hazy outlines of ethical commands and serve notice on the profession that unethical or illegal conduct is punished. The supreme court discipline cases, however, can only go part of the way toward fostering ethical behavior. Ultimately, an ethical bar should arise, not from a strong enforcement mechanism, but from an attorney's sense of duty to the public,[72] to the profession, and to the laws and constitutions he swears to uphold.[73]

Eliot S. Jubelirer

VIII

PROPERTY

A. Filing of Municipality's General Plan as a Taking by Inverse Condemnation

Selby Realty Company v. City of San Buenaventura.[1] California's land development experience has amply demonstrated the need for rational land use planning. The legacy of haphazard land development has been the loss of open space and farmland to urban and suburban sprawl. Recognizing the need for a more rational approach, the California Legislature has provided that each city and county must create a planning agency responsible for preparing a long-term general plan for development.[2] General plans must address issues of land use, traffic circulation, conservation, and open space.[3] Detailed planning

72. *See* CAL. BUS. & PROF. CODE § 6068 (West 1964) (duties of attorney); Rules of Professional Conduct, *supra* note 27, CAL. BUS. & PROF. CODE foll. § 6076 (West Supp. 1974); ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970); *Proposed Rules of Professional Conduct*, 48 CAL. ST. B.J. 328-43 (1973).

73. *See* CAL. BUS. & PROF. CODE § 6067 (West 1964) (oath).

1. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973) (Mosk, J.) (6-0 decision, Clark, J., not participating).

2. CAL. GOV'T CODE § 65100 (West Supp. 1973) (requiring creation of an agency); *id.* § 65300 (West 1966) (requiring that each planning agency prepare and each city or county adopt a general plan). The legislature's attempt to improve the planning process is not limited to the encouragement of general plans. Statutes have been enacted which provide for the adoption of specific plans, CAL. GOV'T CODE §§ 65450 *et seq.* (West 1966); regional plans, *id.* §§ 65060 *et seq.* (West 1966); transportation plans, *id.* §§ 65080 *et seq.* (West Supp. 1973); and plans directed towards the special needs of particular areas, *e.g., id.* §§ 66650 *et seq.* (West Supp. 1973) (providing for San Francisco Bay Conservation and Development Commission), and *id.* §§ 66800 *et seq.* (West Supp. 1973) (Tahoe Regional Planning Compact).

3. CAL. GOV'T CODE § 65302 (West Supp. 1973). A plan must also include housing, seismic safety, noise, and scenic highway elements. *Id.*

of these elements is necessary if a general plan is to have significant value as a tool for rationalizing land use. Specific proposals for future limitations on land use may, however, have an immediate impact on the value and use of property. Particularly where public use of property is foreseen or where a plan provides for severely restricted use of property, a detailed plan might exceed the permissible range of governmental regulation and give rise to a landowner's claim for inverse condemnation.

In *Selby Realty*, the California Supreme Court partially insulated the planning activities of governmental entities by holding that adoption of a general plan does not create a cause of action for inverse condemnation for landowners whose property may be affected by implementation of the plan. Further, the court held that such landowners generally will not be allowed to bring declaratory actions to determine the effect of the plan.

In 1968 the City of San Buenaventura and the County of Ventura jointly adopted a general plan.[4] As required by statute,[5] the plan included a circulation element which described the location of both existing and proposed streets. Three of the streets proposed in the circulation element were scheduled to pass through properties owned by the plaintiff, Selby Realty Company.[6]

Selby Realty owned two adjacent parcels of land located in the City and a contiguous parcel located in an unincorporated area of Ventura County. Apartment buildings had been constructed on one of the city parcels but the other city parcel, while zoned for multiple dwellings, was unimproved. The county land was zoned and used partly as industrial and partly as farm land.[7]

In November, 1970, Selby Realty submitted plans for the construction of a 54-unit apartment complex on the unimproved city property and applied for a building permit. Selby Realty's plans indicated that the apartments were to be built on property which the circulation element of the general plan had designated for a proposed extension of Cedar Street.[8]

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4. The facts presented in this Note were taken from plaintiff's allegations. Since the supreme court heard this case on appeal from judgment entered after defendants' demurrers were sustained, the facts pleaded were treated as true.

5. CAL. GOV'T CODE § 65302(b) (West Supp. 1973).

6. 10 Cal. 3d at 115, 514 P.2d at 114, 109 Cal. Rptr. at 802.

7. Brief for Plaintiff at 3, Selby Realty Co. v. City of San Buenaventura, 104 Cal. Rptr. 866 (2d Dist. 1972), *vacated*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

8. 10 Cal. 3d at 115-16, 514 P.2d at 114, 109 Cal. Rptr. at 802.

Although the City Planning Commission was empowered to disapprove building plans only if it found that the proposed structures would be so at variance with buildings in the immediate neighborhood as to cause substantial depreciation of property values,[9] the Commission's staff recommended disapproval of Selby's plans because no provision was made for the extension of Cedar Street.[10] After a hearing at which no other objection to the development was made, the Planning Commission disapproved the plans, stating only that the project did not meet the requirements of the city ordinance.[11]

Selby Realty appealed to the City Council, which sustained the Planning Commission's disapproval of the plans. The City Council's resolution upholding the Commission's action was extremely vague, stating only that "the proposed use of this parcel would be detrimental to the public interest, safety, health, morals or general welfare or injurious to the property or improvements in the same vicinity and zone in which the property is located."[12]

Seeking clarification of the City's reasons for disapproval of the plans, Selby addressed a letter to the City requesting the requirements for issuance of a building permit. The City replied that as a condition to the issuance of a building permit, Selby Realty must promise to construct and dedicate the proposed extension of Cedar Street shown on the general plan.[13] Claiming that by this required dedication the City had taken its land, Selby Realty filed a claim with the City for compensation. When the claim was refused, Selby Realty brought this suit against both the City and County.

The complaint alleged six causes of action[14] and requested a dec-

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9. The municipal code provided that plans shall be disapproved

> [I]f the City Planning Commission finds that the plot plans, exterior architectural appeal and functional plans of such proposed buildings, structures or signs will be so at variance or in conflict or disharmony with those of other buildings or structures in the immediate neighborhood as to cause substantial depreciation in property values [t]hereof.

SAN BUENAVENTURA, CAL., CODE § 8129A.2 (repealed 1970).

10. 10 Cal. 3d at 121-22, 514 P.2d at 118, 109 Cal. Rptr. at 806.
11. *Id.*
12. *Id.* at 124 n.9, 514 P.2d at 120 n.9, 109 Cal. Rptr. at 808 n.9.
13. *Id.* at 122, 514 P.2d at 119, 109 Cal. Rptr. at 807.
14. The causes of action asserted in plaintiff's complaint were:

(1) First Cause of Action: alleged the adoption of the general plan and the City's refusal to issue a building permit and requested declaratory relief against the City and County and named officers thereof.
(2) Second Cause of Action: alleged that resolutions purportedly adopted by the City Planning Commission and City Council were not in fact presented in that form.
(3) Third Cause of Action: alleged damages arising from the City's refusal to issue the building permit.
(4) Fourth Cause of Action: alleged a "scheme" by the City and County to take Selby's land without payment.

laration prescribing the manner in which the general plan affected plaintiff's rights in both its city and county properties, a writ of mandate to compel issuance of the building permit, and damages from the City for inverse condemnation. The trial court sustained the County's demurrer. The City's demurrer was also sustained, but Selby Realty was given the opportunity to amend the portion of its complaint asking review of the building permit denial. On failure to amend, the action was dismissed.[15]

On appeal, the Court of Appeal for the Second District reversed, holding that Selby Realty had stated causes of action for declaratory relief, for mandamus, and for inverse condemnation.[16] In its discussion of inverse condemnation, the court of appeal suggested that such a claim could be founded solely on publication of a general plan calling for public acquisition of specified properties within five to ten years.[17]

The court of appeal's opinion caused a virtual paralysis of many local governmental agencies' planning activities.[18] Trapped between the legislative mandate that general plans be prepared and promulgated for public discussion, and the risk of liability for inverse condemnation, city and county planning departments faced a serious dilemma. To resolve this situation which threatened the legislature's attempt to improve the planning process, the California Supreme Court granted a hearing.

In a decision highly protective of the planning function of municipalities, the supreme court held that Selby Realty was not entitled to declaratory relief and had failed to state a cause of action for inverse condemnation. The first two sections of this Note analyze the court's reasons for these holdings, and explore the effect *Selby* will have on the availability of these actions to landowners whose property is affected by inclusion in a general plan. The court did not foreclose Selby Realty from all relief, however, for it held that mandamus was available to review the building permit denial. Decision of this issue was complicated by a change in the governing city ordinances effected after the permit was denied. The final section of this Note focuses upon the effect a court reviewing a permit denial should give to such a change of law.[19]

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(5) Fifth Cause of Action: alleged unauthorized denial of the building permit and sought the remedy of mandamus.

(6) Sixth Cause of Action: sought inverse condemnation against the City. Brief for Plaintiff, *supra* note 7, at 8-39.

15. 10 Cal. 3d at 122, 514 P.2d at 119, 109 Cal. Rptr. at 807.

16. Selby Realty Co. v. City of San Buenaventura, 104 Cal. Rptr. 866 (2d Dist. 1972), *vacated*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

17. *Id.* at 874.

18. *See*, Los Angeles Times, December 13, 1972, § 1, at 3, col. 1.

19. Only Selby's first, fourth and sixth causes of action (requesting declaratory

I. DECLARATORY RELIEF

a. The county

The court began its opinion by considering Selby Realty's claim for declaratory relief against the County. An action for declaratory relief may be brought pursuant to Code of Civil Procedure section 1060 which provides that in cases of "actual controversy" an action may be brought for a declaration of rights or duties with respect to another party.[20] Focusing on the requirement of an "actual controversy", the court found that there was no concrete dispute between the plaintiff and the County justifying judicial relief.[21] The court said that a general plan was "by its nature merely tentative and subject to change,"[22] and therefore promulgation was not sufficient to create a dispute with the County concerning use of plaintiff's land.

The court's conclusory reference to the transient nature of a general plan does not provide a satisfactory basis for denial of declaratory relief. Government Code section 65860 requires county and city zoning ordinances to conform to the general plan and provides that a private party may bring an action to compel conformity.[23] This provision suggests a perspective incompatible with a view of general plans

relief, mandamus, and damages in inverse condemnation respectively) are treated in the text of this Note. The second and fourth causes of action were rapidly disposed of by the supreme court and are of little interest or complexity. Selby's second cause of action was found to be based on no legal theory and had incorporated no request for relief. 10 Cal. 3d at 127, 514 P.2d at 122, 109 Cal. Rptr. at 810. The fourth cause of action alleged a "scheme" to take Selby Realty's land and was interpreted by the supreme court to be an attempt to state a cause of action for civil conspiracy. The court noted that to state an action for civil conspiracy a tortious act in furtherance of the conspiracy must be alleged. The court held that the denial of a building permit by a governmental body authorized to do so could not be considered a tort. *Id.*

Selby Realty's third cause of action sought damages against the city for the cost of preparing its building plans and for the rental value of the proposed apartment complex. The court held that section 818.4 of the Government Code was a bar to the damage action. *Id.* Section 818.4 provides that where a public entity is authorized by law to determine whether or not a permit should be issued, it is not liable for injuries caused by refusal to issue the permit. CAL. GOV'T CODE § 818.4 (West 1966). This section is clearly a bar to any damage action based on the city's negligence in refusing the permit.

20. CAL. CODE CIV. PRO. § 1060 (West 1972).

21. 10 Cal. 3d at 117-18, 514 P.2d at 115-16, 109 Cal. Rptr. at 803-04.

22. *Id.* at 118, 514 P.2d at 115-16, 109 Cal. Rptr. at 803-04. The court may have relied too heavily on the transient quality of general plans in its denial of declaratory relief. As the court noted elsewhere, Government Code section 65860(a) requires county and city zoning ordinances to conform to the general plan by January 1, 1974. CAL. GOV'T CODE § 65860(a) (West Supp. 1974). Further, a private party may bring an action to compel consistency. CAL. GOV'T CODE § 65860(b) (West Supp. 1974). These provisions suggest a view of general plans as other than "merely tentative," and make it likely that they will have considerable impact on the marketability of property. The uncertainties in a plan for future development seem to be shaky grounds on which to rest a refusal of declaratory relief.

23. CAL. GOV'T CODE § 65860(a), (b) (West Supp. 1974).

as "merely tentative," and also makes it likely that a general plan will have a considerable effect on the marketability of property. Unless the owner of property affected by a plan has no present intention to sell or develop his land, the mere possibility that a general plan might be changed in the future seems insufficient to support denial of declaratory relief.

The petition for declaratory relief was rejected for the additional reason that the adoption of a general plan is a legislative act. The court asserted that only defects in the proceedings leading to a plan's enactment may be challenged by declaratory relief, and that a "landowner may not maintain an action in declaratory relief to probe the merits of the plan."[24] Of course, the court correctly stated that the wisdom of a plan is a matter generally of legislative and not judicial competence, but in the context of *Selby* the court's argument seems to be inapplicable: Selby Realty did not seek to challenge the wisdom of the plan, rather it desired a declaration of the plan's effect on development of its property.[25] A judicial declaration of the effect of a general plan would not seem to invade the legislative sphere unless the plan was so vague as to require the court to, in a sense, develop its own plan.

Yet the court's refusal to allow declaratory relief, at least as against the County, seems appropriate. Selby Realty did not allege an intention immediately to develop its county lands nor the form any such development might take.[26] By the time Selby Realty decides to develop, the general plan may have been changed. Further, as dedication of property for roads or recreational use may in many circumstances properly be made a condition of development,[27] it would have been premature for the court to consider the validity of the general plan as applied to plaintiff's county land until a particular type of de-

24. 10 Cal. 3d at 118, 514 P.2d at 116, 109 Cal. Rptr. at 804.

25. *Cf.* Mills v. San Francisco Bay Area Rapid Transit Dist., 261 Cal. App. 2d 666, 68 Cal. Rptr. 317 (1st Dist. 1968). In *Mills*, taxpayers brought an action for declaratory and injunctive relief to compel the transit district to locate a station at the site announced before the bond election instead of at a new unacceptable location. The County was joined as a defendant because it had adopted a traffic circulation plan premised on the station's new location. The court of appeals found that the taxpayers had stated no cause of action against the County since their attack went to the merits of the county traffic plan.

26. Selby Realty also did not allege any present intention to sell its property. For the relevance this factor may have to a decision to allow declaratory relief, see text accompanying notes 35 and 36 *infra*.

27. *See, e.g.*, Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (municipality may require dedication of land for park or recreational purposes as a condition of approving subdivision maps); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (dedication to widen street required as a condition of subdivision approval); Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (2d Dist. 1967) (dedication to widen street required as condition for permit to enlarge gas station).

velopment was proposed. Consequently there was no concrete dispute between Selby and the County admitting of immediate judicial resolution, for the court was presented with a purely hypothetical issue.

While the court properly found that Selby Realty's complaint did not present a case for declaratory relief against the County,[28] it may be argued that an action should be permitted when an owner's plans for development reach a point where a court would be faced with an issue susceptible of conclusive resolution. Such a case was presented by Selby Realty's claim against the City.

b. The city

Selby Realty's claim for declaratory relief against the City presented the court with a narrow, well-defined inquiry. The company alleged adoption of the general plan and denial of a building permit on the sole ground that the proposed apartment complex was inconsistent with the general plan in failing to provide for the Cedar Street extension.[29] Plaintiff characterized the City's denial of the permit as an improper implementation of the general plan and requested declaratory relief as to the effect of the plan.[30]

The supreme court upheld the trial court's determination that Selby Realty's allegations failed to state a cause of action for declaratory relief.[31] But the discussion of this point was quite limited and did not treat the allegations as a coherent whole. Instead, the court separately considered the allegations dealing with the building permit denial and stated that declaratory relief was an inappropriate means for review of an administrative decision.[32] So disposing of this portion of the allegations, the court turned to the allegations concerning adoption of the general plan. After cursorily alluding to the reasons developed for denying declaratory relief against the County, the court held that the City's adoption of a general plan, for like reasons, would not support an action for declaratory relief.[33]

28. The court's refusal to allow a declaratory action against the County with respect to the plaintiff's city property is clearly appropriate. The County's only action regarding this property was its adoption of the portion of the joint plan which pertains to the City to allow synchronization of city and county planning efforts. Such coordination of planning efforts between governmental entities in the same region has been facilitated by statute. *See,* CAL. GOV'T CODE §§ 65305-06 (West Supp. 1973); *id.* §§ 65650-51 (West 1966). The County had no power to implement the City plan so as to affect Selby Realty's property. Nor did Selby Realty need to obtain permission from the County to build on this property. Hence, any judgment declaring the rights and obligations of Selby Realty against the County would be of dubious value.

29. 10 Cal. 3d at 126-27, 514 P.2d at 122, 109 Cal. Rptr. at 810.

30. Brief for Plaintiff, *supra* note 7, at 6.

31. 10 Cal. 3d at 126-27, 514 P.2d at 122, 109 Cal. Rptr. at 810.

32. *See, e.g.,* Floresta, Inc. v. City Council, 190 Cal. App. 2d 599, 612, 12 Cal. Rptr. 182, 190 (1st Dist. 1961).

33. 10 Cal. 3d at 127, 514 P.2d at 122, 109 Cal. Rptr. at 810.

The court's disposition of Selby Realty's claim against the City is not, however, supported by its discussion of the claim for relief against the County. The City's action in denying the building permit undermines the argument that the plan is merely tentative. The plan's specificity and immediacy was evidenced by application of its requirements to Selby Realty's proposal. Also there was no danger that the court might invade the legislative sphere. The planned extension of Cedar Street was unambiguous, and granting declaratory relief would not involve the court in a planning decision. Finally, Selby Realty presented a specific plan for development, and so narrowed the controversy which the court was requested to resolve.

The court's denial of declaratory relief might be better viewed as resting on the availability of an alternative remedy. As will be discussed in Part III of this Note, Selby Realty may obtain review of the permit denial by mandamus. As mandamus offers an efficient method for resolving the dispute between Selby Realty and the City, there simply was no need for the court to grant declaratory relief.

Viewed from this perspective, it appears that *Selby* leaves little scope for declaratory actions with respect to a general plan, for alternative remedies are available in many situations other than permit denials. For example, where a general plan has been implemented by specific zoning restrictions, a declaratory action regarding the implementing ordinances is available[34] and presents a court with a sharply focused inquiry. In such a case, the court properly may refuse to allow declaratory actions directed towards the general plan but permit the action as to the implementing ordinances.

However, an alternative remedy is not always available. For example, if a municipality enacts a general plan and does not implement it by more specific ordinances, a landowner who wishes to sell his land may have no way to test the constitutionality of the general plan's proposed restrictions unless a declaratory relief action is allowed.[35] Yet, the plan's provisions may destroy the land's marketability. If the general plan is sufficiently clear so that a court does not have to make a planning decision and the landowner intends an immediate sale, declaratory relief might be allowed. As the landowner would only be able to present hypothetical development plans, relief might be restricted to situations where application of the provisions of the general

34. *See*, McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953).

35. It is conceivable that a landowner could force a municipality to adopt zoning ordinances consistent with the general plan (CAL. GOV'T CODE § 65860(b) (West Supp. 1973); see note 22 *supra*) and then test the constitutionality of the ordinances. However, in many situations no analogue to this procedure exists.

plan would destroy all economically feasible use of the property.[36] In such instances the landowner should have access to declaratory relief.

II. INVERSE CONDEMNATION

a. *The* Klopping *approach*

By far the most disruptive aspect of the court of appeal's decision in *Selby* was its holding that a cause of action for inverse condemnation was stated by allegations of adoption and publication of a general plan. Although no prior California case had indicated that liability could be founded solely on general planning activities,[37] the court of appeal believed its result was a logical extension of a recent California Supreme Court case, *Klopping v. City of Whittier*.[38]

In *Klopping*, the City of Whittier adopted a resolution to condemn plaintiffs' properties for a parking facility. Condemnation proceedings were initiated but were abandoned when a landowner sued to enjoin assessments by the parking district. Along with the resolution abandoning the condemnation activities, Whittier simultaneously declared its intention to resume condemnation proceedings when the funding problems were resolved. Plaintiffs brought an inverse condemnation action.[39]

The California Supreme Court carefully distinguished plaintiffs' claim of inverse condemnation from inverse condemnation based on a de facto taking.[40] The court limited application of the de facto taking concept to those occasions where the defendant physically invades property or imposes harsh use restrictions. In such cases, the defendant, in effect, acquires an interest in the property and so bears the risk of economic loss from the date of the taking. The plaintiffs in *Klopping*, however, requested damages only for the economic effect of precondemnation publicity. The court believed that this claim was sufficiently distinct from a de facto taking to be separately treated, and held that where a city unreasonably delays its condemnation action after initial publicity, or otherwise acts oppressively, it will be liable for damages.[41]

The court of appeal in *Selby* reasoned that publication of a general plan calling for future acquisitions has the same economic effect

36. For example, if all of a landowner's property were scheduled to be used for a freeway extension.

37. *Cf.* Peacock v. County of Sacramento, 271 Cal. App. 845, 77 Cal. Rptr. 391 (3rd Dist. 1969) (awarding damages in inverse condemnation action but distinguishing an action based solely on the adoption of a plan for airport development).

38. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), *noted in* 61 CALIF. L. REV. 587 (1973).

39. *Id.* at 42, 500 P.2d at 1348, 104 Cal. Rptr. at 4.

40. *Id.* at 46-47, 500 P.2d at 1351, 104 Cal. Rptr. at 7.

41. *Id.* at 51-52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

on property values as a resolution to condemn.[42] It therefore held that Selby Realty had stated a cause of action for inverse condemnation. The supreme court rejected this analogy to *Klopping*, stating that the "adoption of a general plan is several leagues short of firm declaration of an intention to condemn property."[43]

Insofar as this distinction rests on the transience of a general plan, it does not adequately dispose of the economic effect analysis made by the court of appeal. Announcement of a general plan may not have as severe and immediate an economic effect as a resolution to condemn. Yet, if severity of economic consequences is the critical factor differentiating the two situations, the plaintiff should be allowed to show the effect that publication of the general plan has had on his property.

In fact, the court's decision not to extend *Klopping's* rationale to *Selby* did not rest on the difference in economic effect between publishing a general plan and announcing an intention to condemn. Instead, the crux of the court's decision was the conclusion that if governmental planning activities were to result in anything more than the publication of "vacuous generalizations", planning agencies must be insulated from inverse condemnation actions based on the publication of general plans.[44]

The court in *Kopping* held that unreasonable delay in condemnation activities would allow a recovery for the effects of precondemnation publicity. However, recognizing the importance of public input into condemnation decisions, the court acknowledged that the landowner might have to bear the loss occasioned by precondemnation announcements made a reasonable time before acquisition.[45] The court's decision in *Selby* is consistent with this aspect of *Klopping*.[46] Meaningful public input to the planning process would be precluded if publication of a general plan alone could give rise to an action for inverse condemnation.

b. De facto taking

The court also held that no de facto taking was alleged by Selby Realty's complaint. California courts have required physical invasion or harsh use restrictions for an inverse condemnation action based on a de facto taking.[47] The court endorsed this restrictive approach by stat-

42. 104 Cal. Rptr. at 874.

43. 10 Cal. 3d at 119, 514 P.2d at 117, 109 Cal. Rptr. at 805.

44. *Id.* at 120-21, 514 P.2d at 117-18, 109 Cal. Rptr. at 805-06.

45. 8 Cal. 3d at 51-52, 500 P.2d at 1354-55, 104 Cal. Rptr. at 10-11.

46. In *Klopping* the court noted that overbroad application of its approach might have deleterious effects on the planning process. *See, id.* at 45 n.1, 500 P.2d at 1350 n.1, 104 Cal. Rptr. at 6 n.1.

47. *See, e.g.*, Hilltop Properties v. State, 233 Cal. App. 2d 349, 355-56, 43 Cal. Rptr. 605, 609 (1st Dist. 1965).

ing that a plaintiff must show an "invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury."[48] In the court's view, the adoption of a general plan did not by itself create any restrictions on land use. Rather, since implementing legislation was required if the plan was to be given any effect, the court reasoned no restraint is imposed by adoption of a general plan. Because the County had not passed legislation implementing the general plan, no cause of action for inverse condemnation could be stated against it.

Selby Realty's inverse condemnation claim against the City, however, was not based solely on the adoption of the general plan but was also founded on the City's refusal to grant a building permit. Selby Realty argued that the totality of the City's actions constituted a taking of the land to be used for the Cedar Street extension. The court abruptly dismissed this claim. Treating each element of the claim separately, the court stated that mere adoption of the plan did not constitute a taking, and that denial of a building permit would not support an action for inverse condemnation. Perhaps unsatisfied with this approach, the court also commented that the "gravamen" of Selby Realty's complaint was the City's refusal to issue the permit unless the plaintiff complied with an assertedly invalid condition. The court indicated that the appropriate method for considering the claim, so characterized, was a proceeding in mandamus.[49]

The court's treatment of Selby Realty's claim may presage the demise of inverse condemnation actions for de facto takings by harsh use restrictions. The key to the court's attitude may be found in its comment that the proper avenue for consideration of Selby Realty's claim is by way of mandamus. If mandamus is available to review a city's action and free the landowner from any unconstitutional conditions, it appears unneccessary to allow the landowner the option of bringing an action in inverse condemnation. At least where the landowner brings his action promptly, he will lose little by being limited to mandamus. Further, inverse condemnation is a drastic remedy to impose on a city, which may in some circumstances be forced to acquire property for which it has no need.

These considerations apply equally, however, to inverse condemnation actions based on any use restrictions. In such cases, either mandamus or declaratory action is available to test the constitutionality of a restriction alleged to be the basis of the inverse condemnation action.[50] The availability of these avenues for relief may lead the

48. 10 Cal. 3d at 119-20, 514 P.2d at 117, 109 Cal. Rptr. at 805.

49. *Id.* at 128, 514 P.2d at 122-23, 109 Cal. Rptr. at 810-11.

50. *See, e.g.*, McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d

court to conclude, as it has in *Selby*, that landowners should not have the additional remedy of inverse condemnation.

The threat of an inverse condemnation action may, however, serve as a useful restraint on governmental invasions of property rights.[51] If the only sanctions available are subsequent judicial orders to remove or eliminate a restriction, it is possible that localities will more readily risk treating landowners abusively. This possibility may be outweighed by the advantages of freeing localities from the threat of inverse condemnation actions which may restrain the use of innovative zoning approaches. However, even if the need to limit abuse is given great weight, a de facto taking approach to inverse condemnation seems unneccessary. Instead, by analogy to *Klopping*, the court might properly restrict relief to invalidation of the restriction and recovery of damages caused by the imposition of the unconstitutional restraint. This would provide a sanction for abusive conduct by the governmental agency, without requiring it to purchase unwanted property.[52]

Of course, a different situation is presented when the defendant would prefer to institute condemnation proceedings rather than allow the restriction to fall.[53] In such cases, a court might stay enforcement of a judgment for the plaintiff to allow the defendant to initiate condemnation proceedings. An alternative approach would be to allow full recovery for inverse condemnation rather than force the defendant to institute a condemnation action.

III. MANDAMUS: THE EFFECT OF INTERVENING CHANGES OF LAW

The court followed previous California decisions by holding that

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932 (1953); Floresta, Inc. v. City Council, 190 Cal. App. 2d 599, 12 Cal. Rptr. 182 (1st Dist. 1961).

51. For a particularly oppressive history of use restriction which led a court to uphold a claim of inverse condemnation, see Peacock v. County of Sacramento, 271 Cal. App. 2d 854, 77 Cal. Rptr. 391 (3d Dist. 1969). After announcing its intention to use plaintiff's land as an approach to a proposed airport, the County, over a period of years, rejected all of plaintiff's plans for development of the property. At one point plaintiffs even were informed by a county representative that they could not construct a golf course as the "flags" would not be permitted to extend above the putting greens.

52. *Compare* Peacock v. County of Sacramento, *supra* note 51 (County was held liable for entire value of the plaintiff's property even though it had abandoned airport project and no longer had any need for the property).

53. *See* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (4th Dist. 1963) (height limitation imposed by County to clear a flight path to county airport, set at four feet on the part of landowner's property adjoining runway, held a taking of an air easement); Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959) (resort owners having a way of necessity through airspace over Superior National Forests in Minnesota were entitled to compensation for a taking of their land when an Executive Order banned travel by air below 4,000 feet over forest land surrounding their property). Both present situations where the defendant would prefer to pay compensation instead of having the restriction invalidated.

administrative mandamus was the proper means for challenging the city's denial of a building permit.[54] Selby Realty's allegations that it had complied with all valid requirements for issuance of the permit and that the permit was denied solely on the basis of its refusal to dedicate property for the street extension were considered sufficient to state a cause of action in administrative mandamus.[55] By so holding, the court suggested that a municipality may enforce the provisions of its general plan only if enforcement is pursuant to a validly enacted ordinance.[56]

An additional complication was present in this case. Subsequent to the denial of Selby's building permit, the City passed an ordinance enabling the city manager to condition approval of a permit on dedication of a right of way if he found that the proposed construction would lead to an increase in traffic volume.[57] The city argued that judicial notice should be taken of the new ordinance, which it claimed authorized refusal of the permit. The supreme court responded by stating that since the ordinance had not been in effect at the time the permit was denied, the trial court erred in sustaining the demurrer to plaintiff's mandamus action.[58] Realizing, however, that the issue

54. *See, e.g.*, Gong v. City of Fremont, 250 Cal. App. 568, 58 Cal. Rptr. 664 (1st Dist. 1967). Administrative mandamus is available to review abuse of discretion when the decision sought to be reviewed is the result of a hearing required by law at which evidence is required to be taken, and where an administrative agency is required to make a factual determination. CAL. CODE CIV. PRO. § 1094.5 (West Supp. 1972). *Compare* CAL. CODE CIV. PRO. § 1085 (West 1966) ("traditional mandamus," which is only available for enforcement of purely ministerial duties).

55. The City argued that while the facts alleged in the complaint might support an action in administrative mandamus, Selby Realty's failure properly to plead the action after it was given an opportunity to amend supported the trial court's decision to dismiss the action. The supreme court rejected this argument and construed Selby Realty's complaint with great liberality, holding that a cause of action for administrative mandamus was pleaded. 10 Cal. 3d at 123-25, 514 P.2d at 119-21, 109 Cal. Rptr. at 807-09.

56. The court, however, apparently viewed the City's decision to deny the permit on the basis of Selby Realty's failure to dedicate and improve the land as unsupported by any city ordinance or other statute, and hence an abuse of discretion. *See*, 10 Cal. 3d at 124-25, 514 P.2d at 120, 109 Cal. Rptr. at 808. Perhaps the City explicitly must grant the power to deny permits on the basis of inconsistency with the general plan. But *cf.* Russian Hill Improvement Assn. v. Board of Permit Appeals, 66 Cal. 2d 34, 37 n.5, 423 P.2d 824, 827 n.5, 56 Cal. Rptr. 672, 675 n.5, (1967) (building permit might be denied because pending ordinance would soon prohibit the planned structure). It is conceivable that by this rationale, a court might allow denial of a building permit on the basis of inconsistency with a general plan. *Cf.* GOV'T CODE § 65567 (building permit may not be granted unless the proposed development is consistent with the local open space plan).

57. SAN BUENAVENTURA, CAL., CODE § 8323 (1973) (amending a prior version which required dedication only for widening existing streets); 10 Cal. 3d at 124-25, 514 P.2d at 120, 109 Cal. Rptr. at 808.

58. 10 Cal. 3d at 125, 514 P.2d at 120-21, 109 Cal. Rptr. at 808-09.

would arise on remand, the court considered the effect of an intervening change of law on an appeal from the denial of a building permit.

Several California court of appeal cases have held that an applicant who complies with all requirements for a building permit at the time application is made is entitled to the permit even when there has been an intervening change of law which would forbid the issuance of the permit.[59] This line of authority was distinguished in *Selby* as applicable only when the intervening change of law "stemmed from an attempt to frustrate a particular developer's plans."[60] The court held that where no improper motivation is alleged for an intervening change of law prohibiting the proposed project, the issuance of a building permit should not be compelled.[61] The rule is necessary, the court said, to "prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions."[62]

While the court's decision enabled the City to apply its newly enacted ordinance, the ordinance itself called for the exercise of the city manager's discretion. Hence, the ordinance did not necessarily prohibit the development sought by the plaintiff, but required the city manager to determine if the project created a need for the right of way. The court found it unnecessary to decide whether the city manager could properly condition permit approval on a dedication by Selby Realty as the city manager had not yet made the requisite determination.[63]

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59. *See* Sunset View Cemetary Assn. v. Kraintz, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1st Dist. 1961); McCombs v. Larson, 176 Cal. App. 2d 105, 1 Cal. Rptr. 140 (4th Dist. 1959); Munns v. Stenman, 152 Cal. App. 2d 543, 314 P.2d 67 (2d Dist. 1957).

60. 10 Cal. 3d at 126 n.11, 514 P.2d at 121 n.11, 109 Cal. Rptr. at 809 n.11. This analysis was first set forth by the supreme court in Russian Hill Improvement Assn. v. Board of Permit Appeals, 66 Cal. 2d 34, 37 n.5, 423 P.2d 824, 827 n.5, 56 Cal. Rptr. 672, 675 n.5 (1967).

61. 10 Cal. 3d at 125, 514 P.2d at 121, 109 Cal. Rptr. at 809.

62. *Id.* This might be more precisely described as a statement of the effect of this rule rather than its purpose.

63. In the circumstances of this case, the propriety of allowing the city manager to decide whether the development proposed by Selby Realty would create a need for a right of way is open to question. The City, through its actions, seems to have committed itself to the view that Selby Realty must dedicate and improve the Cedar Street extension. It is difficult to believe that the city manager could exercise his discretion uninfluenced by the prior proceedings. Abuse of discretion by the city manager in making this determination would be difficult for a court to review.

The court did not directly consider the possibility that an intervening change of law which called for the exercise of discretion might be treated differently than a change of law which of its own force would support denial of a permit. Ordinarily an intervening change of law which does not call for the use of discretion will embrace a class of activities. This generality provides some safeguards against abuse. If, how-

Selby makes clear the use that landowners may make of mandamus to review permit denials. An owner may challenge permit denial on the ground that his development proposal complies with a general plan's implementing ordinances. Additionally, where a change of law prohibiting the contemplated development occurs subsequent to denial, the owner may seek review by alleging that the change was improperly motivated and that his plans were in compliance with existing ordinances when application for the permit was made.

CONCLUSION

In *Selby* the California Supreme Court attempted to shield the planning activities of governmental entities from actions by landowners who believe that they are being unreasonably treated. There can be little doubt that by refusing to allow a claim for inverse condemnation based on adoption of a general plan, the court averted an immediate crisis. However, if general plans are to have any effect they must ultimately be given force by implementing legislation, and such legislation will be open to judicial review. Thus much of the *Selby* opinion might be viewed as a delaying action.

While *Selby* does not directly define the scope of relief to be afforded landowners who are affected by implementations of a general plan exceeding constitutional limitations, there are indications in the opinion that inverse condemnation will not be available at the plaintiff's option. Limitation of the aggrieved landowner's action to the remedies of mandamus and declaratory relief may be the lasting import of the *Selby* opinion.

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ever, the change is framed narrowly to reach only a single project, it will be easier for a court to find an attempt to subvert that developer's plans, and thus refuse to apply the intervening change of law.

On the other hand, an intervening change of law which calls for the exercise of discretion may be framed in general terms, but applied to subvert a particular developer's plans. Establishing discriminatory treatment would seem to be a most difficult burden, particularly where the ordinance is first applied against the developer whose plans are being frustrated.

Yet a city should be able to require the dedication and improvement if the developer's activities create the need for an additional right of way. A solution which balances these factors might be to change the standard of review for discretionary decisions made pursuant to an intervening change of law. Requiring the city to prove that its determination is reasonable would provide a safeguard against abuse, but would not injure the city's legitimate interests. (Compare the supreme court's holding in Strumsky v. San Diego County Employee's Retirement Ass'n, 11 Cal. 3d 28, 519 P.2d 1405, 112 Cal. Rptr. 805 (1974), decided as this Note was going to print, that a court may independently review rulings of local administrative agencies to determine if a ruling affecting a "fundamental vested right" is supported by the weight of the evidence.

B. *Building Restriction as Compensable Interest in Eminent Domain Proceedings*

Southern California Edison Co. v. Bourgerie.[1] Reversing a long-standing California rule, the supreme court held that article I, section 14, of the California Constitution[2] requires that when a condemnor takes *A*'s property, which is burdened by a building restriction for the benefit of *B*, the condemnor must compensate *B* for the damage suffered from the taking of *A*'s property for use inconsistent with the restriction. The decision explicitly overruled *Friesen v. City of Glendale*,[3] a unanimous supreme court decision of 1930 which held that a building restriction is not a compensable interest when taken in eminent domain proceedings.[4]

In 1964, Bourgerie and Glenn bought a tract of land in Santa Barbara from the Bank of America. The deed contained various restrictions on uses to which the land could be put, one of these providing that the land could not be used for an electric transmission station. Adjacent land retained by the bank was made subject to identical restrictions. In 1969 Southern California Edison Co. filed an action in eminent domain, seeking to take part of the bank's remaining property for construction of an electric substation.[5] The action joined Bourgerie and Glenn as defendants in addition to the bank. The trial court ruled that the restrictions forbidding construction of an electric transmission station on the bank's land did not create a compensable property interest in Bourgerie and Glenn.

On appeal, the supreme court reversed. The majority based its holding that a building restriction is a compensable property interest on two propositions. First, as a theoretical matter, the court decided that building restrictions constitute property within the meaning of article I, section 14. In support of this proposition, the majority argued that building restrictions are recognized as property interests for many purposes[6] and are indistinguishable from other property interests, par-

1. 9 Cal. 3d 169, 507 P.2d 964, 107 Cal. Rptr. 76 (1973) (Mosk, J.) (5-2 decision).

2. "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . . ." CAL. CONST. art. I, § 14.

3. 209 Cal. 527, 288 P. 1080 (1930).

4. 9 Cal. 3d at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80.

5. The right of eminent domain may be exercised for specified public uses, including electric power lines and plants and buildings necessary for the generation, transmission, or distribution of electricity. CAL. CODE CIV. PRO. § 1238 (West 1973). Any person may acquire through eminent domain private property for any of the uses specified in section 1238. CAL. CIV. CODE § 1001 (West 1954).

6. That building restrictions constitute property rights for some purposes is indisputable, but it is difficult to ascertain the relevance of this statement to the issue

ticularly easements, which are clearly compensable.[7] Second, the court found that public policy arguments supporting the distinction between building restrictions and other compensable property interests were unpersuasive.[8] It considered and rejected three such arguments: that the increased costs of condemnation will substantially burden the exercise of eminent domain power, that the ability of private parties to create compensable building restrictions will encourage substantial abuses when condemnation proceedings are "on the horizon," and that the procedural difficulties associated with the condemnation of building restrictions will discourage public acquisition of essential property.[9]

Part I of this Note critically examines the court's reliance on the analogy between building restrictions and easements. Part II considers the propriety of the court's use of public policy to justify its resolution of the constitutional question presented in *Bourgerie*. Part III probes the scope and severity of the procedural difficulties which the court noted but did not address in detail.

I. THE ANALOGY BETWEEN BUILDING RESTRICTIONS AND EASEMENTS

As the dissent pointed out, the crux of the majority's position appears to be the contention that building restrictions and easements should be treated similarly in eminent domain actions.[10] One short answer to this contention is that, historically, California and a minority of other jurisdictions have differentiated "mere contract rights" relating to property and "property interests," placing building restrictions in

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of whether compensation should be paid for the taking of a building restriction in eminent domain. The opinion does not elucidate the relevance; the court contents itself with citing one California case, Mock v. Shulman, 226 Cal. App. 2d 263, 38 Cal. Rptr. 39 (2d Dist. 1964), and a section from Professor Powell's treatise, 5 R. POWELL, POWELL ON REAL PROPERTY § 671 at 147 (1971). Both authorities deal with the enforceability of restrictions between private parties.

7. 9 Cal. 3d at 172-73, 507 P.2d at 966-68, 107 Cal. Rptr. at 78-80.

8. The court may have been influenced by the fact that a majority of jurisdictions which have considered the issue favor compensation in this situation. The rule adopted in *Bourgerie* is referred to by the court as the "majority rule" and the discarded *Friesen* rule of noncompensability as the "minority view." *Id.* at 173-74, 507 P.2d at 967, 107 Cal. Rptr. at 79. Although not an argument in itself, the fact that most jurisdictions favor compensation may support the court's second major proposition, that public policy arguments distinguishing building restrictions from easements are unpersuasive. *Id.*

9. *Id.* at 174, 507 P.2d at 967, 107 Cal. Rptr. at 79.

10. Two justices dissented. Justice Burke, joined by Justice McComb, wrote:

> Today's majority opinion is founded upon the tenuous proposition that a building restriction is substantially equivalent to an easement. Since an easement is a compensable property interest, and since both easements and building restrictions bear some similar characteristics, the majority concludes that a violation of a building restriction in a condemnation action is a taking of a property interest, and is likewise compensable.

Id. at 176, 507 P.2d at 969, 107 Cal. Rptr. at 81.

the former category and easements in the latter for purposes of eminent domain.[11] The majority characterized this distinction as "inequitable and rationally indefensible,"[12] bolstering its argument with the assertion that "the violation of a building restriction could cause far greater damage in monetary terms than the appropriation of a mere right of way."[13]

Conceding that the distinction between contract rights and property interests represents a somewhat arbitrary criterion for determining compensability, the court's reliance on arguments involving equity and the amount of loss is slightly disingenuous. The amount of loss suffered by a property owner as a result of public improvements has never been thought to control the issue of his entitlement to compensation for that loss. For example, if a freeway is built near a homeowner's property but none of his property is taken, he is normally not entitled to compensation no matter how great the monetary loss.[14] To take an example closer to the present case, if the deed to Bourgerie and Glenn had not contained a building restriction, they presumably would suffer a similar amount of damage from construction of the electric transmission station on the adjoining property, yet there would be no suggestion of compensation. The amount of monetary loss, therefore, cannot determine whether liability exists.

Similarly, the equity arguments are not dispositive of the compensation issue. Admittedly, when a property owner possesses a building restriction that is taken in eminent domain, it seems fair in a fundamental sense that he be reimbursed for the diminution in the value of his property caused by construction of the public improvement in his neighborhood. The property owner should not have to bear a disproportionate share of the public improvement cost because it happens to be built next door.[15] The same sense of fundamental fairness, however, also dictates that the property owner who suffers a diminution in property value but does not own a building restriction should

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11. See note 8 *supra.*

12. 9 Cal. 3d at 173, 507 P.2d at 967, 107 Cal. Rptr. at 79.

13. *Id.* at 173, 507 P.2d at 966, 107 Cal. Rptr. at 78.

14. As recently as 1971, a California court reiterated this proposition:

> It is also obvious that adjacent property is damaged to the same degree by the detrimental factors of a freeway, whether a mere strip is taken, or whether a substantial portion of the property is taken for the improvement. Until such time as provision is made for compensation of those who are merely adjacent, they presumably may not recover proximity damages.

People v. Volunteers of America, 21 Cal. App. 3d 111, 127-28, 98 Cal. Rptr. 423, 435 (1st Dist. 1971).

15. "The moral imperative behind the constitutional mandate of just compensation [is] the ideal of equitable loss distribution . . . ." VanAlstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California,* 16 U.C.L.A.L. REV. 491, 508 (1969).

be compensated if he is not to pay a disproportionate share.[16] If fairness is the criterion, the issue of whether compensation will be paid should not depend on something as fortuitous as the existence of a building restriction in a deed. In an imperfect world, fairness at some point must be sacrificed for practicality. The issue is where to draw the line that grants recovery to some and denies it to others. As the majority opinion explicitly recognized, ultimately the line can be drawn only by reference to public policy.[17]

Although the court did not find them persuasive, several of the policy factors it identified[18] arguably support the distinction between easements and building restrictions. First, there are practical differences between the two interests which might make a condemnation proceeding substantially more expensive for the condemnor than similar proceedings involving easements. These differences center around the effect each interest has on the value of the burdened property.

A typical right-of-way easement will usually result in some diminution in value of the servient property. If *B* has the right to walk or drive across *A*'s property, the value of *A*'s property will probably be reduced. (Of course, the reduction in the value of *A*'s property will not necessarily correspond to the increase in the value of *B*'s property arising from the right of way.) If a condemnor takes *A*'s property, it will have to compensate *B* for the loss of his easement, but the amount it must pay *A* will reflect the diminution in market value resulting from the existence of the easement. In contrast, a building restriction prohibiting the use of *A*'s property for, say, streets or rapid transit may not reduce the market value of *A*'s property at all.[19] But, under the decision in *Bourgerie*, the condemnor will have to pay *B* for the loss of the building restriction, in addition to compensating *A* for the value of his property undiminished by the existence of the restriction.

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16. For the suggestion that the tort doctrine of maximum risk distribution be used in the area of eminent domain to allow the recovery of consequential damages, so that the costs of public projects would not fall too heavily on the few whose property is directly affected, see Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA. L. REV. 437 (1962).

17. 9 Cal. 3d at 173, 507 P.2d at 967, 107 Cal. Rptr. at 79.

18. The discussion in this section focuses on the first and second public policy arguments mentioned in the text accompanying note 9 *supra*. For a discussion of the third public policy argument, relating to procedural problems, see text accompanying notes 25-34 *infra*.

19. The essential difference between an easement and a building restriction in this respect is that an easement (right of way) will diminish the desirability of the property to a prospective purchaser regardless of the use to which he intends to put that property, whereas a building restriction will only diminish the desirability of the property to a prospective purchaser who intends, or foresees an intention, to put the property to the use proscribed by the restriction.

Moreover, if not only *B* but also *C*, *D*, *E*, *F*, and every other property owner in the neighborhood have the right to cross *A*'s property, its value will probably be further reduced. However, no reduction in the value of *A*'s property will normally be occasioned by a building restriction which runs to all property owners in the neighborhood. Thus the increased condemnation costs resulting from the recognition of building restrictions as compensable property interests may be substantially greater than the costs attributable to similar recognition of easements. (Of course, the other property owners are entitled to be compensated only for the loss of value they actually suffer.) Although the court rejected increased cost as a ground for denying compensation,[20] it did not deal with the argument that an easement will usually reduce the value of the servient property while reduction will not typically occur in the case of a building restriction.

Secondly, differences in the way easements and building restrictions typically arise lend some credence to the argument that the *Bourgerie* rule will encourage the giving of building restrictions whose major purpose would be to ensure compensation in future condemnation proceedings. To take a typical example, a developer may restrict his entire subdivision to residential purposes. The purchasers, who after all are seeking homes, are unlikely to object to this restriction and may even approve of it. On the other hand, if the developer provided an easement through every backyard for the benefit of every other property owner in the subdivision, he might encounter a great deal of difficulty in marketing his houses. As a result, the developer will only provide for easements if they serve some function apart from ensuring compensation upon condemnation of a neighbor's property. In contrast, the prudent residential developer after *Bourgerie* will burden his lots with reciprocal building restrictions against typical public projects such as electrical substations and rapid transit lines. Because a homeowner in a residential development is extremely unlikely to construct an electrical substation or a rapid transit line, these restrictions will be significant only in the event that a public project touches the development and necessitates condemnation of a portion of it.

To counter this threat of "plucking valuable causes of action from the air,"[21] the court relied on its ability to spot "unduly acquisitive landowners" and "sharp practices."[22] It would be highly unfair, however, to characterize as a sharp practice the inclusion of building restrictions which would spell the difference between compensation and no compensation for the undeniable loss resulting from the con-

20. 9 Cal. 3d at 174-75, 507 P.2d at 967-68, 107 Cal. Rptr. at 79-80.
21. *Id.* at 174, 507 P.2d at 967, 107 Cal. Rptr. at 79.
22. *Id.* at 175, 507 P.2d at 968, 107 Cal. Rptr. at 80.

struction of a public project in the vicinity of one's home. Moreover, the court's answer to this problem seems wholly inapposite to building restrictions which have existed for a long period but which were lightly given and not reasonably necessary.

In conclusion, then, the court's reliance on the analogy between easements and building restrictions is entirely too facile. It ignores significant differences between the two types of interests in terms of the policy considerations which the court itself identified and it fails, on the level of fundamental fairness, to eliminate arbitrariness in the awarding of recovery for losses resulting from condemnation.

II. THE JUDICIAL ROLE

In *Bourgerie* as in *Friesen*, the court was faced with determining the applicability of the constitutional provision "Private property shall not be taken or damaged for public use without just compensation . . ."[23] to a building restriction. Confronting this task in *Bourgerie*, the court candidly assessed its role:

> An objective analysis reveals the real basis for the decisions which deny compensation for the violation of building restrictions by a condemnor relates to pragmatic considerations of public policy rather than abstract doctrines of property law, and it is upon these issues of policy that jurisdictions choose between the minority and majority views.[24]

Granting the court's responsibility to interpret or reinterpret the state constitution, judicial resolution of important public policy questions as a basis for constitutional interpretation remains open to question. To the extent that the question of the applicability of the just compensation provision to building restrictions turned on matters within the special competence of the judiciary (namely, familiarity with abstract doctrines of property law), the court should have decided the case in accordance with its best judicial judgment. To the extent, however, that resolution of the question depended on matters within the special competence of the legislature (namely, formulating public policy), the court should have resolved the case in a way which makes legislative input possible.

Unfortunately, the California Supreme Court effectively foreclosed any legislative input by its decision in *Bourgerie*. Even if this were a case of first impression, the *Friesen* result is preferable from this standpoint because it leaves room for the legislature to overturn the public policy announced by the court. Specifically, if the legislature had been dissatisfied with *Friesen*, it could have enacted legisla-

23. CAL. CONST. art. 1, § 14.
24. 9 Cal. 3d at 173, 507 P.2d at 967, 107 Cal. Rptr. at 79.

tion requiring compensation for the taking of a building restriction, without regard to the just compensation provision of the constitution. After forty years of apparent legislative satisfaction with the *Friesen* rule—or, at the very least, insufficient dissatisfaction to motivate change—judicial usurpation of the legislative task seems particularly inappropriate.

Furthermore, although property owners probably are not organized to lobby for the protection of their rights in condemnation actions, it is hard to believe that they are members of the type of powerless, disenfranchised group which courts have traditionally protected against legislative abuse. Certainly, condemnors as a group are more likely to make themselves heard in legislative chambers, since for them condemnation is not a once-in-a-lifetime occurrence but an ongoing part of their activities. This imbalance, however, does not seem sufficiently severe to warrant judicial intervention in the essentially legislative task of resolving the public policy dispute between these two groups.

Finally, it is important to remember that the *Bourgerie* decision rested on changed public policy and not some concept of basic fairness which might have been within the competence of the judiciary. Were the court faced with deciding whether compensation must be paid for all diminution of market value caused by public improvements—and it may be doubted that the court would take upon itself the making of a change of such magnitude—an issue of basic fairness would be presented. Absent the court's willingness to address this basic fairness issue, *Bourgerie*'s new and no less arbitrary line between compensation and no compensation, drawn on the court's own notions of public policy, does not commend itself for support.

III. PROCEDURAL DIFFICULTIES

Leaving aside the wisdom of the court's resolution of the constitutional issue in *Bourgerie*, substantial procedural difficulties will accompany implementation of the decision. The court suggested without deciding that the condemnor might choose which of those benefitted by a building restriction to be condemned need be joined in the condemnation action:

> As to the procedural difficulties, while they are not here involved and we need not decide the issue, it has been posited by some authorities that a condemnor need only selectively join in the action landowners whose property is most likely to be damaged by the violation of the building restriction; there are other remedies for excluded owners who anticipate the improvement will result in damage to their property.[25]

25. *Id.* at 174-75, 507 P.2d at 968, 107 Cal. Rptr. at 80.

This suggestion, unfortunately, appears to ignore the specific requirements of section 1244 of the Code of Civil Procedure on the elements of a complaint in an eminent domain action:

> The complaint must contain:
>
> . . . .
>
> (2) The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;
>
> . . . .[26]

Thus, despite the court's hint to the contrary, the condemnor would evidently be required to join each property owner benefitted by a building restriction in order to comply with the express statutory requirements. Of course, each defendant must be served with a summons.[27] The expense and complexity of joining and serving all property owners in, for example, a 100-home tract restricted to residential purposes may well be imagined, not to mention the confusion and anxiety which homeowners might experience when served with a summons notifying them to appear and defend an eminent domain action involving condemnation of a house two blocks away.[28]

How, then, should a condemnor respond to the court's invitation to join selectively only "landowners whose property is most likely to be damaged by the building restriction"?[29] The answer is probably to ignore it. Apart from a possible reluctance to ignore explicit statutory requirements, the prudent condemnor may be reluctant to expose itself to subsequent inverse condemnation actions by parties whom it failed to join and who did not voluntarily appear in the original eminent domain action.[30] Provided that the plaintiff in the later in-

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26. CAL. CODE CIV. PRO. § 1244 (West 1973).

27. CAL. CODE CIV. PRO. § 412.20 (West 1973).

28. The dissent forecast the difficulties likely to be engendered by the decision:

> Additionally, damage awards in future eminent domain actions may present complex procedural entanglements. If each parcel in a residential subdivision is mutually benefitted and burdened by a building restriction, then upon violation of the restriction by condemnation proceedings and inconsistent use, the problem is raised as to which persons have compensable property interests requiring joinder in the action. The owner of every benefitted parcel should be joined if, as the majority concludes, each has suffered a taking of 'property.' Also, since lienholders and mortgagees maintain a present proprietary interest in the benefitted property, they too may possess a right to have that interest considered and protected. These are substantial procedural hurdles which, because of the majority's refusal to consider [them], may return to haunt us in the near future.

9 Cal. 3d at 177-78, 507 P.2d at 970, 107 Cal. Rptr. at 82 (footnotes omitted).

29. *Id.* at 174, 507 P.2d at 968, 107 Cal. Rptr. at 80.

30. As the majority opinion suggested, the property owner whom the condemnor fails to join is not without remedy. *Id.* A property owner benefitted by a building restriction may appear and defend even though he was not named originally as a defendant. Section 1246 of the Code of Civil Procedure provides, in part:

> All persons in occupation of, or having or claiming an interest in any of the

verse condemnation action prevails and recovers some compensation, he is entitled to costs and expenses, including reasonable attorney fees.[31] In contrast, defendants in actions in eminent domain are not entitled to attorney fees.[32] When the condemnor is a public agency, the plaintiff must file a claim with that agency prior to initiating an action in inverse condemnation,[33] so an agency could avoid an inverse condemnation action by settling the claim. However, just as waiting for numerous plaintiffs to bring numerous inverse condemnation actions (or possibly a single class action) is probably unacceptable from the condemnor's point of view, paying all but the most excessive or frivolous claim does not appear to be a satisfactory solution. Under present law, the least unsatisfactory solution for the condemnor may well be to join all possible defendants, that is, all property owners to whom the benefit of the building restriction runs.

The solution of these procedural problems lies with the legislature. It should enact a statute providing for notice of the condemnation proceeding to all those benefitted by the building restriction and providing for a period within which they could file claims for compensation.[34] Claims not filed within this period would be waived. In

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property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

CAL. CODE CIV. PRO. § 1246 (West 1973).

31. CAL. CODE CIV. PRO. § 1246.3 (West 1973).

32. *See* CONDEMNATION PRACTICE IN CALIFORNIA § 1.9 (M. Hunter ed., Continuing Education of the Bar Series) (1973).

33. Dorow v. Santa Clara County Flood Control Dist., 4 Cal. App. 3d 389, 391, 84 Cal. Rptr. 518, 520 (1st Dist. 1970), CAL. GOV'T CODE § 945.4 (West 1966).

34. The legislature could accomplish this goal by adding to Title 7 of Part 3 of the Code of Civil Procedure a new section along these lines:

> Notwithstanding section 1246 of the Code of Civil Procedure, a person having or claiming an interest in real property solely on account of having or claiming the benefit of a building or use restriction, limiting or restricting the allowable uses of property which is the subject of an action in eminent domain, need not be joined as a defendant in the action in eminent domain. Upon or before filing the action in eminent domain, the plaintiff in eminent domain shall publish in a newspaper of general circulation in the county in which the property is situated (or in one of the counties if the property is situated in more than one county) and send by certified mail to each person known to have or claim the benefit of such building or use restriction a notice stating
>
> (a) that the building or use restriction will be the subject of a condemnation proceeding,
>
> (b) that any person who will be damaged by condemnation of the restriction shall have 60 days from the date of publication or mailing (whichever is later) to present his claim to the condemnor, and
>
> (c) that claims not filed within 60 days are waived.
>
> The condemnor shall join as a party to the action in eminent domain any person whose claim is not paid or settled within 30 days of its receipt.

For a similar suggestion, see Brickman, *The Compensability of Restrictive Covenants in Eminent Domain*, 13 U. FLA. L. REV. 147, 171-72 (1960).