IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,489

MOONLIT WATERS APARTMENTS, INC.,

Petitioner,

vs.

JOSEPH J. CAULEY, Trustee,

Respondent.
_____/

Fourth District Court
of Appeal
Case No. 93-5050

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent disagrees with Petitioner's statement of the case and facts. Specifically, Respondent asserts that facts material to the appeal have been omitted from Petitioner's statement. Therefore, pursuant to Florida Rule of Appellate Procedure 9.210(c), Respondent's statement of the case and facts is set forth below.

This case involves a residential cooperative which was created in 1965 and is governed by an association known as the MOONLIT WATERS APARTMENTS, INC. ("Petitioner," "MOONLIT WATERS," or "Lessee"). The cooperative is located on property which fronts the east side of the intracoastal waterway in Pompano Beach, Broward County, Florida. Improvements include a four-story building which contains twenty (20) cooperative apartments, a pool, shuffle board court, dock and parking areas for the unit owners. All of the real property upon which the cooperative development was built is currently owned by JOSEPH J. CAULEY, TRUSTEE (Respondent, CAULEY or Lessor) and is subject to a Lease dated November 17, 1964. The Lease has a term of ninety-nine (99) years commencing April 1, 1965 and provides for annual rental payments which are adjusted at ten (10) year intervals based upon increases or decreases in the consumer price index. The Petitioner, MOONLIT WATERS, is the current Lessee of the property. (R-64-72)

The twenty (20) cooperative apartments were initially sold at prices of between $14,000,00 and $18,000.00. At that time, the

annual rental amount for the real property totaled $8,400.00, or approximately $420.00 per apartment. As a result, the initial annual rental amount equaled approximately 2.5% of the unit's initial purchase price ($420.00 divided by $16,000.00). (R-64-72).

At the time this action was commenced, the apartments had assessed values, as determined by the Broward County Property Appraiser's Office, of between approximately $56,000.00 and $65,000.00 per unit. The annual rental amount for the real property totaled $28,610.84, or approximately $1,430.00 per unit. As a result, the annual rental payment for the real property equaled approximately 2.38% of a unit's assessed value for property tax purposes ($1,430.00 divided by $60,000.00). (R-64-72)

The subject Lease does not grant the Lessee an option to purchase the real property. Although the Lease does grant the Lessee a right of first refusal to purchase the real property on terms and conditions offered by the Lessor to any third party, the Lessee is not granted the option to purchase the property against the will and without the consent of the Lessor. (R-64-72)

In December of 1991, MOONLIT WATERS demanded that CAULEY agree to sell the subject property at a price to be determined by subsequent negotiations. When CAULEY responded that a sale at that time would not be in the best interest of the beneficial owners of the property, MOONLIT WATERS commenced an action in the Circuit Court of the Seventeenth Judicial Circuit to compel CAULEY's sale

of the property and to further compel CAULEY to submit to arbitration to determine the sales price. (R-1-21)

On April 29, 1993, the parties submitted memoranda of law together with other supporting documents and a hearing was held before Circuit Judge Mel Grossman on the petition of MOONLIT WATERS. On August 24, 1993, Judge Grossman entered an Order denying MOONLIT WATERS' petition to compel arbitration and on September 15, 1993, entered a Final Judgment in favor of CAULEY. Although the Circuit Court questioned whether Florida Statutes Section 719(1)(f)(1) applied to the subject lease, the Circuit Court based its decision on the conclusion that retroaction application of the statute was an invalid impairment of the obligation of contracts.

MOONLIT WATERS took an appeal from the Order and Final Judgment entered by the Circuit Court. On March 15, 1995, the Fourth District Court of Appeal issued an opinion which affirmed the decision of the trial court. The District Court held that Florida Statute §719.401(1)(f)(1) did not apply to the subject Lease. The Fourth District also certified the following question to the Supreme Court of Florida as one of great public importance:

> WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED

On April 10, 1995, Petitioner filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal affirming the Circuit Court's denial of MOONLIT WATERS' petition to compel CAULEY to sell the subject property and submit to arbitration to determine the sales price should be affirmed for two reasons. First, as the Fourth District held, Florida Statutes §719.401(1)(f)(1) does not apply to the subject Lease. This statutorily required option to purchase is limited to leases **of** recreational and other commonly used facilities. It does not apply to all leases of real property with a residential cooperative association which **include** recreational and other commonly used facilities. The subject Lease encompasses all of the MOONLIT WATERS cooperative development and is beyond the scope of the subject statute.

Second, as the trial court found, the application of §719.401(1)(f)(1) to the subject Lease is an unconstitutional impairment of the obligations of contract. The subject Lease was executed twenty-four years prior to the adoption of §719.401(1)(f)(1). The subject Lease did not grant Lessee an option to purchase and for twenty-nine years, MOONLIT WATERS has made rental payments (of a lesser amount) based on the absence of a purchase option provision. Retroactive application of the statute would significantly and permanently alter the parties' contract to the extent that the contract itself would cease to exist and CAULEY would be stripped of ownership of real property.

This impairment is not vitiated, as Petitioner insists, because §719.401(1)(f)(1) constitutes an exercise of the State's power of eminent domain and provides for just compensation. The State of Florida has no involvement in this private transfer of property and application of the statute does not constitute a taking of property for a public purpose. Indeed, if the statute did constitute an exercise of the State's power of eminent domain, the statute would clearly be unconstitutional as depriving CAULEY of his right to a judicial determination that the taking was for a public purpose, his right to trial by jury to determine the amount of just compensation payable, and his right to recover attorneys' fees and other costs resulting from the forced sale. Nor does §719.401(1)(f)(1) advance a public purpose, as required for a forced taking of private property.

For these reasons, the decision of the Fourth District Court of Appeal should be affirmed and the certified question answered in the negative.

ARGUMENT

I. FLORIDA STATUTES SECTION 719.401(1)(f)(1) DOES NOT APPLY TO THE SUBJECT LAND LEASE

Florida Statutes §719.401(1)(f)(1) (1991) provides:

> A **lease of recreational or other commonly used facilities** entered into by the association or unit owners prior to the time the control of the association is turned over to unit owners other than the developer **shall grant to the Lessee an option to purchase the leased property**, payable in cash on any anniversary date of the beginning of the leased term after the tenth anniversary, at a price then determined by agreement. If there is no agreement as to the price then the price shall be determined by arbitration. **This paragraph shall be applied to contracts entered into on, before or after January 1, 1977, regardless of the duration of the lease.** (emphasis added)

This statutory subsection, with the exception of the last sentence, was initially adopted by the Florida Legislature in 1976. The last sentence was added in 1988. Other than the decision of the Fourth District in the instant case, there are no reported decisions construing the scope of leases subject to this statutory subsection.

The above-quoted statute does not apply to the instant case because the subject Lease does not constitute "a lease of recreational or other commonly used facilities." Instead, the subject Lease constitutes a lease of the entire property upon which the cooperative development is located. The statute does not apply to all leaseholds upon which cooperative developments are located, nor does the statute apply to leases which include recreational or other commonly used facilities. Instead, application of the

statute is limited to leases of recreational or other commonly used facilities. Fla. Stats. §719.401(1)(f)(1) (1991).

The Court's analysis should begin with the actual language of the statute and should be consistent with the plain meaning of statutory language. Transouth Financial Corporation of Florida v. Johnson, 931 F.2d 1505, 1507 (11th Cir. 1991). In construing the statute, the Court should give language its ordinary meaning and common usage. Words, including simple ones, must be given their ordinary and commonly accepted meaning as used in the particular statutory context. Hancock Advertising, Inc. v. Dept. of Transportation, 549 So. 2d 1086, rev. denied, 558 So. 2d 17 (1990) (interpretation of the word "on"). Rules of statutory construction dictate that words used by the legislature are to be given their plain meaning and the statute must be construed to avoid unreasonable consequences. Lloyd Citrus Trucking, Inc. v. State Dept. of Agriculture, 572 So. 2d 977 (Fla. 4th DCA 1990).

The plain meaning of the word "of" demonstrates that the subject statute is limited to "a lease of recreational or other commonly used facilities." The legislature did not provide that the statute applies to all cooperative leaseholds or to a lease which includes recreational facilities or other commonly used facilities. Applying the statute to all cooperative leaseholds which include any recreational or commonly used facilities, would be contrary to the plain meaning of the statute.

This interpretation is dictated by the principle of statutory construction, *expressio univs est exclusio alterium* -- the mention of one thing implies the exclusion of another. See, Devin v. City of Hollywood, 351 So.2d 1022, 1025 (Fla. 4th DCA 1976). Thus, by expressly using the term "recreational or other commonly used facilities" and excluding the specific term "land" or "ground" lease, the legislature intended to omit the type of lease in the instant case from the ambit of §719(1)(f)(1). This conclusion is buttressed by the fact that where the legislature intended to include land leases within certain statutes, it expressly did so. See, Fla. Stat. §§718.4015(1), 719.4015(1). In fact, in these statutes, the legislature expressly distinguished "land leases" from "agreements for recreational facilities, land, or other commonly used facilities." Id.

Inquiry into legislative intent for purposes of interpreting a statute, as urged by Petitioner, only is necessary when the statute is ambiguous on its face. Streeter v. Sullivan, 409 So. 2d 268, 271 (Fla. 1987). The subject statute unambiguously limits its application to leases of particular facilities and clearly does not encompass all cooperative leaseholds which happen to include recreational or commonly used facilities regardless of size. Nevertheless, should the Court determine that further inquiry into legislative intent is necessary for purposes of interpreting the statute, the Court should consider the language of the statute in

connection with the "evil" sought to be corrected by the legislature. See, State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

The history is clear that the legislature has on numerous occasions sought to prohibit escalation clauses in leases of recreational or other commonly used facilities which serve condominiums and cooperative developments. The "evil" sought to be corrected is the rise in cost of the operation of recreational and commonly used facilities caused by the escalation clause which has no relation to the increase in cost of bringing those facilities to the unit owners. The legislature has sought to address the perceived injustice of situations in which a developer sells condominium and cooperative developments but retains ownership of pools, tennis courts, or other recreational facilities which are leased back to the association of unit owners at an ever increasing cost bearing no relationship to the cost of recreational facilities provided. See Preamble, Florida Statute §718.401 (Laws of Florida 1988 c. 88-225) (citing escalation clauses tied to the consumer price indices as providing "windfall profits to owners" which have "no relation to the increase in costs of bringing those lands and facilities to the unit owners.").

The subject Lease does not create the type of "evil" the legislature sought to address with §719.401(1)(f)(1). The record evidence demonstrates that the value of Petitioner's units has increased substantially, so that the current rent charged under the Lease actually represents a lower percentage of the units' assessed

value as compared to the rent initially charged. (R-64-72). Thus, the only "windfall" that the Lease has created benefits Petitioner not Respondent. Therefore, even if the Court were to inquire into the legislative intent, the legislative history demonstrates that the subject Lease is not a cause of the "evil" §719.401(1)(f)(1) was enacted to address.

For these reasons, the Court should affirm the decision of the Fourth District Court of Appeals finding that §719.401(1)(f)(1) does not apply to the subject Lease.

II. RETROACTIVE APPLICATION OF FLORIDA STATUTE SECTION 719.401(1)(f)(1) TO THE SUBJECT LAND LEASE IS INVALID AS IMPAIRING THE OBLIGATION OF CONTRACT UNDER ARTICLE I, SECTION 10 OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

Article I, Section 10 of the Florida Constitution provides in pertinent part that **"no . . . law impairing the obligation of contracts shall be passed."**[1] In Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979), the Florida Supreme Court reviewed in detail the federal and Florida cases which establish the analytical frame work to determine whether a law unconstitutionally impairs the obligation of a contract. In Pomponio, the Florida Supreme Court discussed at length and cited with approval several decisions issued by the United States Supreme Court, including United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234

[1] Article I, Section X of the United States Constitution provides in pertinent part: "no state shall . . . pass any . . . law impairing the obligation of contracts . . . ".

(1978). This Court quoted with approval several rules and standards previously announced by the United States Supreme Court to determine whether a law unconstitutionally impaired the obligation of a private contract. In this regard, the Florida Supreme Court quoted with approval the following:

> As with laws impairing the obligation of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.
> ...
> The extent of impairment is certainly a relevant factor in determining its reasonableness, an enactment cannot be considered necessary if the legislature, without modifying the covenant at all, could have adopted alternative means of achieving their . . . goals.
> ...
>
> In applying these principals . . . the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alterations of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Pomponio, 378 So. 2d at 778-79 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977); Allied Structural Street Co. v. Spannaus, 438 U.S. 234, 244-45)).

Several factors to be considered in this balancing test were identified:

> a. Was the law enacted to deal with a broad, generalized economic or social problem?
>
> b. Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade in an area never before subject to regulation by the state?
>
> c. Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent and immediate change in those relationships--irrevocably and retroactively?

Id. at 779 (citations omitted). The Court in Pomponio concluded that:

> To determine how much impairment is tolerable, we must weigh the degree to which a parties' contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Id. at 780.

Utilizing these standards, this Court has invalidated, on constitutional grounds, several Florida Statutes which sought to eliminate or prevent the enforcement of escalation clauses in condominium and cooperative recreation leases and management contracts. See, Maison Grand Condo. Ass'n, Inc. v. Dorten, 600 So. 2d 463 (Fla. 1992); Condominium Association of Plaza Towers North,

OsceolaInc. v. Plaza Recreation Development Corp., 557 So. 2d 1356 (Fla. 1990); Ass'n of Golden Glades Condo. Club, Inc. v. Security Management Corp., 557 So. 2d 1350 (Fla. 1990); Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So. 2d 354 (Fla. 1983); and Fleeman v. Case, 342 So. 2d 815 (Fla. 1976).

Following Pomponio, it is manifest that application of Florida Statutes §719.401(1)(f)(1) to the subject Lease would constitute an unconstitutional impairment of the private contract between the parties. First, application of the statute would significantly and permanently alter the parties' contract. In effect, §719.401(1)(f)(1) operates to impose a contractual obligation -- a lease purchase option -- for which Petitioner did not negotiate and without which the parties have been performing for years. Imposition of the lease purchase option onto the subject Lease would result in a windfall for the lessees by granting Petitioner the benefit of an option without having to pay for it. In 1964, the parties negotiated the terms of the subject Lease which did not include a lease purchase option.[2] Had the Lease contained the benefit of a lease purchase option, then Respondent would have increased the amount of rent charged to reflect this benefit. Thus, the amount of rent charged by Respondent since 1964 has reflected the fact that the Lease did not include a lease option. To now insert an option into the subject Lease would allow the

[2] Petitioner never has maintained that the lease is unconscionable or a contract of adhesion.

lessees to receive more than the benefit of their bargain. In such an instance, Respondent never would be able to recoup the difference between the amount of rent that has been charged all these years based upon the absence of the lease purchase option and the amount of rent which would have been charged had the option been a term of the original Lease. Application of the statue would significantly and permanently alter the contract in that lease payments would not continue to escalate, the lease itself would cease to exist and the Lessor would involuntarily be stripped of ownership of the real property.

Additionally, §719.401(1)(f)(1) operates in an area which was not subject to any state regulation at the time the parties' contractual obligations were originally undertaken in 1964. Thus, Respondent could never have anticipated at the time of the Lease that sometime in the future it might be subject to a term for which neither party negotiated. Therefore, Respondent had no notice of the potential loss and could not have planned to mitigate possible future costs.

Finally, the subject Lease does not involve the perceived "evil" which the legislature sought to address by adoption of the statute. As stated above, the value of the cooperative apartments, as encumbered by the subject Lease, has increased dramatically since the parties' contractual obligation was originally undertaken. (R-64-72). Indeed, the increase in value has exceeded increases in the annual rent payable under the Lease. If anything,

the statute grants a windfall to Petitioner, not Respondent. See supra. This is completely distinguishable from the type of "evil" -- "windfall profits to owners" -- the legislature sought to address with §719.401(1)(f)(1). See, Preamble, Florida Statute §719.401 (Laws of Florida 1988 c. 88-225).

Additionally, in the absence of a binding contractual agreement to arbitrate, Appellant's attempt to compel arbitration not only impairs the obligation of contracts, it also violates the access to courts provision of the Florida Constitution:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Fla. Const. Art. 1, sec. 21. Under Florida law, parties may not be required to submit to arbitration any question which they have not expressly agreed to arbitrate. G&N Construction Co. v. Kirpatovsky, 181 So. 2d 664 (Fla. 3d DCA 1966). The constitutional right to access to courts only may be denied where (1) a reasonable alternative remedy or commensurate benefit is provided, or (2) there is a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity. Smith v. Dept. of Ins., 507 So. 2d 1080, 1088 (Fla. 1987) (citing Kluger v. White, 281 So. 2d 1 (Fla. 1973)). A statute requiring arbitration which does not meet these criteria is unconstitutional for violating the right of access to courts. See e.g., University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993).

In the instant case, Florida Statute §719.401(1)(f)(1) violates the property owner's constitutional rights not once, but twice. First, the lease does not provide for a purchase option; therefore, the statute operates to impose a forced sale in an instance where the parties never negotiated or agreed to a purchase option. Second, if the parties cannot agree on an amount for which the property will be sold, the statute compels them to arbitrate. This provision denies property owners the right to access to a court to determine the worth of the property they are being forced to sell.

Furthermore, §719.401(1)(f)(1) does not meet either of the criteria set forth in Kluger to constitute an exception to the access to courts provision. First, compulsory arbitration is not a reasonable alternative remedy, as it imposes an arbitration clause where none exists, was bargained for, or agreed to. Second, the legislative history of §719.401(1)(f)(1) does not indicate any "overpowering public necessity" to abolish a property owner's right of access to courts. See supra. Even if there was some public need, there has been no showing that their is no alternative method whereby any need could be met. Moreover, unlike the medical malpractice statute approved by this Court in Echarte, which provided for voluntary arbitration, §719.401(1)(f)(1) unconstitutionally compels arbitration. Accordingly, the arbitration provision of §719.401(1)(f)(1) is an unconstitutional

violation of the property owner's right of access to the courts. See, Smith, Kluger, supra.

For these reasons, retroactive application of §719.401(1)(f)(1) to the subject Lease would be an unconstitutional impairment of contract. Additionally, the statute violates the access to courts provision of the Florida Constitution. Therefore, the decision of the Circuit Court and District Court of Appeals should be affirmed.

III. FLORIDA STATUTE SECTION 719.401(1)(f)(1) DOES NOT CONSTITUTE AN EXERCISE OF THE STATE'S POWER OF EMINENT DOMAIN

Petitioner's entire argument regarding the constitutionality of Florida Statute §719.401(1)(f)(1) is based upon the erroneous premise that the statute constitutes an exercise of the state's power of eminent domain. See, Initial Brief at 23. However, §719.401(1)(f)(1) does not even mention the exercise of any state power -- police power, power of eminent domain, or other power. Rather, the statute only addresses very specific types of leases -- cooperative leases of recreational and commonly used facilities -- and requires such leases to contain an option to purchase. Fla. Stats. 719.401(1)(f)(1). This requirement that the parties include an option to purchase in their private agreement has nothing to do with the state's power of eminent domain.

"Eminent domain" is a fundamental power of the sovereign. Art. X, sec. 6, Fla. Const.; City of Miami Beach v. Cummings, 266 So. 2d 122 (Fla. 3d DCA 1972); see also, Nichols on Eminent Domain

§1.11 (Matthew Bender & Co. rev. 3d ed. 1986). The power of eminent domain is an inherent attribute of sovereignty that is absolute. Daniels v. State Road Dept., 170 So. 2d 846 (Fla. 1964).

"Condemnation" refers to the process by which the state's power of eminent domain is exercised. Nichols, supra. This exercise of eminent domain involves legal issues for a court to determine. City of Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974). Condemnation proceedings are governed by Chapters 73 and 74 of the Florida Statutes.

In order to effect a taking, the sovereign must file an application, stating the authority under which and the use for which the property is to be acquired. Fla. Stat. §73.021(1). After application is made, a circuit court in the judicial district where the property to be taken is situated will hold an order of taking hearing to determine if there is a public purpose. Fla. Stat. §74.041(3). Prior to the hearing the property owner must be notified of all statutory rights under Florida Statute §73.091. Fla. Stat. §73.0511. Because a "taking" is such a drastic proceeding, these procedures are strictly construed and enforced. See, Peavy-Wilson lumber Co. v. Brevard County, 31 So.2d 483 (Fla. 1947).

In the instant case, Petitioner's attempt to characterize §719.401(1)(f)(1) as an exercise of the State's power of eminent domain must fail. A taking does not occur by adoption or operation of a statute, as Petitioner suggests. Rather, a taking involves an

application by the sovereign and a judicial determination, after notice to the property owner and an opportunity to be heard. See supra. Only after the sovereign has adhered to these procedures and an order of taking been entered by a circuit court judge, does the issue of compensation even arise. At that point, the property owner is entitled to have just compensation determined by a twelve member jury. Fla. Stat. §73.071(1). Therefore, §719.401(1)(f)(1), a statute which does not involve the sovereign or the requirements of Chapters 73 and 74, cannot, by its operation, constitute a taking for which just compensation is warranted.

Petitioner's misplaced reliance on Hawaii Housing Authority v. Midkiff, 457 U.S. 229 (1984), to support its "takings" theory is unavailing. Petitioner disregards the critical fact distinguishing Midkiff from the instant case: in Midkiff, the Hawaiian government itself instituted condemnation proceedings. Under the Hawaiian Land Reform Act of 1967 (the "Act"), tenants living in single family residents were entitled to ask the Hawaii Housing Authority ("HHA") to condemn the property in which they live. Id. at 233 (citing Act). After 25 eligible tenants filed the appropriate applications, the Act authorized the HHA to hold a public hearing to determines whether acquisition by the state would effectuate the public purposes of the Act. Id. If the HHA found that these public purposes would be served, it was authorized to acquire, at a price set at a condemnation trial, the fee owner's interest in the land. Id. Only after the taking and compensation had been judicially

determined could the HHA sell the fee simple interests to the tenants who applied. Id. at 234. By condemning the property, the Hawaiian government intended to make the land sales involuntary, thereby making the federal tax consequences less severe. Id. at 233. Based upon these procedures and the involvement of the sovereign, the Hawaiian Act clearly constituted an exercise of the state's power of eminent domain.

However, the Hawaiian Land Reform Act is a far cry from Florida Statute §719.401(1)(f)(1). The Hawaiian Act involved the actual condemnation of property by the sovereign. See supra. In condemning property, the Hawaiian government had to follow many of the procedural requirements found in Chapters 73 and 74 of the Florida Statutes -- notice to the owner, a judicial determination of public purpose, and a trial on the issue of compensation. See supra. Florida Statute §719.401(1)(f)(1) contains none of these procedural safeguards. In fact, §719.401(1)(f) does not even involve the sovereign. Instead, it requires specific leases between private parties to contain a purchase option. Because the power of eminent domain lies exclusively with the sovereign, by definition, §719.401(1)(f)(1) cannot constitute a taking.

Moreover, noncompliance with the requirements of Chapters 73 and 74 raises due process issues. City of Lakeland v. Bunch, 293 So. 2d 66 (Fla. 1974). Thus, even if §719.401(1)(f)(1) could be construed as an exercise of eminent domain, the statute would be unconstitutional for violating a property owner's due process

rights. Furthermore, because there is no taking by the sovereign as there was in Midkiff, a property owner's tax consequences are not ameliorated.

Petitioner's erroneous claim that the statute "clearly provides for constitutionally sufficient notice and opportunity to be heard," ignores the procedural safeguards contained in Chapters 73 and 74. Initial Brief at 24. Such requirements are to protect the property owner's due process rights from the "'naked'" wealth transfers." See, Stone, et al., Constitutional Law, 1447 (Little, Brown & Co. 1986). Without a scintilla of authority, Petitioner postulates that a property owner's due process rights are protected because the owner is permitted to present evidence regarding the value of the property taken. Initial Brief at 18, 20, 24-25. This analysis ignores the preliminary requirement of a judicial determination of public purpose after a proper application has been made by the sovereign and the property owner has received notice of all statutory rights.

Finally, unlike the Hawaiian Land Reform Act or any other example of a state's legitimate exercise of eminent domain, §719.401(1)(f)(1) does not advance a public purpose. The public purpose doctrine is a constitutional limitation of the exercise of eminent domain. See, Fla. Const., Art. X, sec. 6; see also, U.S. Const. Amd. 5.; 2A Nichols on Eminent Domain §7.01[2] (Matthew Bender & Co., rev. 3d ed. 1986)). Public purpose, also called public use, has been defined by this Court:

> A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. . . . The public interest must dominate the private gain.

From this definition, several basic characteristics of a public use have been identified:

> 1. The property that is acquired for a public use or purpose must be available to the public in common.
>
> 2. The public interest in the project must dominate the private gain.
>
> 3. The manner of enjoyment or use of the property acquired must be in the control of the public.

Florida Eminent Domain Practice and Procedure §3.4 (The Florida Bar Continuing Legal Education 4th ed. 1988).

While the first characteristic does not require that the entire community directly participate in the benefits to be derived from the property taken, the use and benefit must be available to the public in common, not to particular individuals or estates. Id. (citing Wilton v. St. Johns County, 123 So. 527 (Fla. 1929)). Nor does the requirement that the public interest must dominate the private gain preclude some incidental private benefit. Id. (citing Hanna v. Sunrise Recreation, 94 So. 2d 597 (Fla. 1957)). However, the private use truly must be incidental, even if the project would be of material benefit to the growth, progress, and development of

a community. State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

Section 719.401(1)(f)(1) does not possess any of the characteristics associated with a public purpose. One, no one but Petitioner would benefit from the forced sale of the land Lease; therefore the property is not being made available to the public in common. Two, because the only benefit conferred by the statute inures to lessees of recreational and commonly used facilities, the private benefit is exclusive, not incidental. Three, the public does not control the manner of enjoyment of private recreational leases or private leases of commonly used facilities. Accordingly, §719.401(1)(f)(1) clearly does not advance a public purpose.

This Court specifically has found that no public purpose existed where the projects were only to benefit particular individuals. State v. Suwannee County Development Authority of Suwannee County, 122 So. 2d 190 (Fla. 1960) (purchase of real estate for construction of private building was not a public purpose); City of West Palm Beach v. State, 113 So. 2d 374 (Fla. 1959) (lease of entire civic center to a private corporation was not a public purpose); Osceola County v. Triple E Development Co., 90 So. 2d 600 (Fla. 1956) (right of way in nonnavigable private lakes was not public purpose). In contrast, where a project has the overriding goal of benefitting a large segment of the population, this Court has found a public purpose. See e.g., State v. City of Tallahassee, 195 So. 402 (Fla. 1940) (construction of

state office building was public purpose); Demeter Land CO. v. Fla. Public Service Co., 128 So. 402 (Fla 1930) (installation of power lines was public purpose).

Clearly, the Hawaiian Land Reform Act at issue in Midkiff falls into the latter category. As the Supreme Court explained, the Act was necessary to regulate a land oligopoly. 467 U.S. at 242. By definition, an "oligopoly" is the concentration of a limited resource in the hands of a few. Therefore, by regulating the oligopoly which benefited the few, the Act clearly advanced a public purpose. See id.

Unlike the Act in Midkiff or the relevant decisions of this Court, §719.401(1)(f)(1) does not benefit the public in general, as would a building or power lines. Rather, it the statute requires a purchase option in certain lease between private parties. This requirement will only benefit few select private citizens -- the lessees -- and therefore is most like the cases in which this Court has refused to find a public purpose. See supra. Consequently, based upon this Court's own precedent, §719.410(1)(f)(1) does not advance a public purpose.

On conclusion, Florida Statute §719.401(1)(f)(1) does not, by its mere existence, constitute a taking of property for a public purpose. First, it does not involve the condemnation of land by the sovereign State of Florida, the essence of a taking. Second, the statute does not contain any of the procedural requirements of Chapters 73 and 74, which govern takings in the State of Florida.

Third, even if the §719.401(1)(f)(1) could somehow be construed as a taking, it would be constitutionally violative of the property owner's due process rights. Finally, the statute contains only a private benefit and therefore does not advance a public purpose.

For these reasons, Petitioner's arguments based upon the premise that §719.401(1)(f)(1) constitutes a exercise of the State's power of eminent domain must be rejected.

CONCLUSION

The Fourth District Court of Appeal was correct in affirming Circuit Court's denial of MOONLIT WATERS' petition to compel CAULEY's sale of the subject property and submission to arbitration to determine the sales price. The Fourth District's decision should be affirmed in its entirety and the certified question answered in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **HARVEY K. MATTEL, ESQUIRE**, 633 South Federal Highway, 8th Floor, P.O. Box 02-9010, Ft. Lauderdale, FL 33302-9010, this 5th day of July, 1995.

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