IN THE FLORIDA SUPREME COURT

PALM BEACH COUNTY,

Petitioner,

vs.

Supreme Ct. Case No. 90,750
Fourth District Case No. 96-05215

COVE CLUB INVESTORS, LTD.,

Respondent.
_____/

AMICUS CURIAE BRIEF OF LEE COUNTY

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STATEMENT OF THE CASE AND FACTS

As stated in the opinion of the Fourth District Court of Appeal, Palm Beach County acquired by eminent domain a lot which was subject to a recorded document entitled "Declaration of Conditions, Covenants, Restrictions and Reservations Affecting Property Located in Sandalfoot Cove." Included in this document was a restrictive covenant that required each lot owner pay to Cove Club Investors, Ltd. a monthly recreation fee in exchange for the right to utilize the recreational facilities of the Sandalfoot Cove Country Club which included a golf course and country club. Palm Beach County had not paid the fee since it acquired the lot.

Cove Club filed an inverse condemnation action alleging Palm Beach County took a property right from it without compensation. The trial court ruled Cove Club had a vested property right pursuant to the restrictive covenant to receive the recreation fee income from the lot acquired by Palm Beach County and that this property right was taken without compensation.

On appeal, the Fourth District Court of Appeal distinguished this Court's decision in Board of Public Instruction of Dade County v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955), and affirmed, holding that the restrictive covenant vested Cove Club with a property right to monthly income from each lot owner. The Fourth District Court of Appeal ruled the Declaration ". . . created a covenant running with the land, a property right, and was more than a mere contract right."

The District Court certified the following question to this Court:

> "Whether the right of a private country club to receive a stream of income from a monthly recreation fee assessed against the owner of a residential mobile home lot constitutes a property right compensable upon inverse condemnation by the county for use of that lot in a public road widening project?"

SUMMARY OF ARGUMENT

Restrictive covenants are contract rights, not property rights, and are not compensable under Article X, Section 6 of the Florida Constitution. That the covenant runs with the land or the obligation imposed by the covenant can be assessed a value does not alter the fact that it is a contract, not a property right.

ARGUMENT

WHETHER A RESTRICTIVE COVENANT IS AN INTEREST IN REAL PROPERTY ENTITLED TO PROTECTION AGAINST UNCOMPENSATED TAKINGS OF PROPERTY BY ARTICLE X, SECTION 6 OF THE FLORIDA CONSTITUTION.

Article X, Section 6 of the Florida Constitution, the "full compensation clause", protects against the uncompensated taking of property. The sine qua non of a claim for compensation, whether in eminent domain proceedings or an inverse condemnation action, is the possession of a property interest in the land taken. For the reasons that follow, the decision of the Fourth District Court of Appeal founded upon the premise that a restrictive covenant is a property interest, is erroneous and must be reversed.

A restrictive covenant is an agreement between landowners that traditionally restricted the use of property. Under Florida law, restrictive covenants are ". . . creatures of equity arising out of contract." Homer v. Dadeland Shopping Center, Ltd., 229 So.2d 834 (Fla.1969). Restrictive covenants are subject to the general requirements of a valid contract and will be enforced when established by a contract between the parties. Hevia v. Palm Terrace Fruit Company, 119 So.2d 795 (Fla. 2d DCA 1960). Wahrendorff v. Moore, 93 So.2d 720 (Fla. 1957).

Noting that covenants restricting free use of land are not favored, this Court in Sinclair Refining Co. v. Watson, (Fla. 1953) 65 So.2d 732, stated such covenants will be enforced ". . . to provide fullest liberty of contract . . ."

The contractual nature of covenants was described in Osius v. Barton, 109 Fla. 556, 147 So. 862, 868 (1933):

> The theory adopted in this state is that the contract which embodies the restriction may be enforced against both the promisor and those taking from him with notice, thereby including amongst those who may enforce the obligation not only the promisee, but those who take from him and those in the neighborhood who may be considered as beneficiaries of the contract.

Additionally, this Court went on to state in Osius, supra. at 867 that frustration of contractual object is the basis for not enforcing restrictive covenants when there is a change in the character of the neighborhood.

Restrictive covenants are classified as either "running with the land" or personal. Maule Industries, Inc. v. Sheffield Steel Products, Inc., 105 So.2d 798 (Fla. 3d DCA 1958). A covenant running with the land is an agreement which concerns the property conveyed and the occupation and enjoyment thereof and a personal covenant is not immediately concerned with the property conveyed. Maule, supra. A covenant running with the land passes to the vendee or other assignee of the land the right to take advantage of, or the liability to perform, the obligations of the covenant. Burdine v. Sewell, 92 Fla. 375, 109 So. 648 (1926). One who takes land subject to a restrictive covenant is said to accept the terms of the restrictive covenant, Bessemer v. Gersten, 381 So.2d, 1344, 1348 n.6 (Fla. 1980), and whether a covenant runs with the land is material only on the question of notice. Hagan v. Sabal Palms, Inc., 186 So.2d 302 (Fla.2d DCA 1966).

While restrictive covenants concern property and may run with the land to bind subsequent vendees, restrictive covenants are still contract rights and not property. Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955). Ryan v. Town of Manalapan, 414 So.2d 193 (Fla. 1982).

In Bay Harbor, supra. at issue were restrictive covenants restricting use of land that was acquired to build a public school. This court, in Bay Harbor, supra. at 639 framed, the issue as follows:

> "Whether such restrictions constitute property in those in whose favor such restrictions exist for which compensation must be paid in the event said lands are acquired for public purposes."

Noting that restrictive covenants "do not fall within the category of true easements", which are interests in real property, this court characterized restrictive covenants as "negative easements or equitable servitudes." Bay Harbor, supra., 640.

> "Such so-called easements are basically not easements in the strict sense of the word but are more properly classified as rights arising out of contract" Bay Harbor, supra., 640.

The Bay Harbor Court held that restrictive covenants are not property rights which vest in the beneficiaries of such covenants a right to compensation when land subject to the restrictive covenant is acquired for public use.

Reaffirming the rule of law announced in Bay Harbor, this court in Ryan, supra. at 196 explained:

> "The Court concluded that the better view was that restrictive covenants are not interests in real property, as are easements, but are mere contractual rights, not compensable when destroyed by exercise of the power of eminent domain."

Contrary to the precedent established by this court, the Fourth District held that a restrictive covenant imposing monthly recreation fees constituted a property right. The rationale of the court was that the restrictive covenant was ". . . a covenant running with the land, a property right, and was more than a mere contract right." The Fourth District

justified its departure from the precedent of Bay Harbor by distinguishing the nature of the covenant in Bay Harbor - a restriction on building - and the covenant in this case - a monthly payment obligation, and proclaiming that the covenant in Bay Harbor was not "a property interest on which a monetary value could be assessed." The holding of the Fourth District is contrary to the established law in Florida and its attempt to distinguish Bay Harbor is unfounded.

As noted above, restrictive covenants are contract rights, not property rights. The fact that a restrictive covenant "runs with the land" does not change it into a property right. A covenant running with the land remains a contract right albeit enforceable by and against subsequent vendees and assigns of the land which the covenant concerns. The fact that the covenant runs with the land does not make it a property right. The covenants in Bay Harbor and Ryan were covenants running with the land and properly identified as contract rights. The Fourth District's equating a covenant running with the land with a property right is contrary to the law of Florida. A covenant running with the land is a contract right, not a property right, and not protected by Article X, Section 6 of the Florida Constitution.

The Fourth District's distinction of the covenant requiring payment of recreation fees in this case from the covenants restricting building on the lots in Bay Harbor and Ryan, is illusory. While the covenants in this case and the covenants in Bay Harbor and Ryan may be dissimilar in the obligations imposed, all remain restrictive covenants. It is the nature of the covenant, rather than the obligation imposed, which defines a restrictive covenant as a contract right under the law.

Moreover, a covenant restricting use of land, such as in Bay Harbor and Ryan, is

arguably more closely related to an interest in property than a covenant requiring payment of money. While covenants restricting use can be described as "negative easements" due to their direct restriction on use of land, a covenant running with the land requiring payment of maintenance fees ". . . is more akin to a contractual provision than a restriction placed on the use of land." Balzer v. Indian Lake Maintenance, Inc., 346 So.2d 146, 149 (Fla. 2d DCA 1977). A covenant requiring payment of money is not so concerned with the land as it is with the intangible personal property (cash) of the owner. See Caulk v. Orange County, 661 So.2d 932 (Fla. 5th DCA 1995).

The fact that a monetary value may be placed on the obligation imposed by the restrictive covenant adds nothing to the analysis whether a covenant is a property interest. The notion that because a monetary value may be placed on something it is therefore "property" is novel to Florida law. For example, monetary value may be placed on a license to use land but a license is not property. Lodestar Tower v. Palm Beach Television, 665 So.2d 368 (Fla. 4th DCA 1996). Business damage may be readily valued but business damage implicates no property interest. Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983). As noted in K. E. Morris, supra. at 928, payment of compensation for intangible losses and consequential damages is not required by the constitution. The fact that a monetary value can be placed on a covenant does not make it a property interest. The loss of a future income stream based on a covenant is no different than a business damage - a consequential damage, not a taking of a property interest.

CONCLUSION

This Court should reaffirm the established law in Florida that restrictive covenants are contract rights, not constitutionally protected property rights, and reverse the decision of the Fourth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief has been furnished by U.S. Mail upon DAVID W. WELCH, ESQ., Welch & Finkel, 2401 East Atlantic Boulevard, Great Western Bank Building, Suite 400, Pompano Beach, Florida 33062 and PALM BEACH COUNTY ATTORNEY, ATTN: LEONARD BERGER, ASSISTANT COUNTY ATTORNEY, Post office Box 1989, West Palm Beach, Florida this 18th day of August, 1997.

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