0d7

FILED
SID J. WHITE
AUG 14 1997
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

PALM BEACH COUNTY, a political subdivision of the State of Florida,

Petitioner,

v.

COVE CLUB INVESTORS LTD., d/b/a SANDALFOOT COUNTRY CLUB, a Florida Limited Partnership,

Respondent,

CASE NO. 90,750

District Court of Appeal, 4th District - No. 96-0367

PETITIONER, PALM BEACH COUNTY'S, INITIAL BRIEF

DENISE D. DYTRYCH
County Attorney
Florida Bar No.: 642118
LEONARD BERGER
Assistant County Attorney
Florida Bar No.: 896055
BARRY S. BALMUTH
Assistant County Attorney
Florida Bar No.: 868991
P.O. Box 1989
West Palm Beach, Florida 33402
(561) 355-2225

TABLE OF CONTENTS

TABLE OF CONTENTS i

NOTES ii

TABLE OF AUTHORITIES iii

STATEMENT OF CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT I 4

SUMMARY OF ARGUMENT II 4

ARGUMENT I - **COVENANT IN FAVOR OF COVE CLUB IS NOT A PROPERTY INTEREST COMPENSABLE UPON INVERSE CONDEMNATION** 5

II - **FINDING THIS COVENANT TO BE COMPENSABLE UPON INVERSE CONDEMNATION IS CONTRARY TO PUBLIC POLICY** 13

CONCLUSION 17

NOTES

1. Petitioner, Palm Beach County is herein referred to as COUNTY.

2. Respondent, Cove Club Investors, Ltd., d/b/a Sandalfoot Country Club, is herein referred to as COVE CLUB.

3. Citations to the Record are to Exhibits in the Appendix filed with the Initial Brief in the Fourth District Court of Appeal, as well as the Answer Brief filed by COVE CLUB, and herein referred to as APP-__ with the appropriate letter.

TABLE OF AUTHORITIES

CASE AUTHORITY **PAGES**

Balzer v. Indian Lake Maintenance, Inc.,
346 So.2d 146 (Fla. 2d DCA 1977) 7

Division of Administration v. Ely,
351 So.2d 66 (Fla. 3rd DCA 1977) 9, 10, 11

Home Builders and Contractors Association v. Palm Beach County,
446 So.2d 140 (Fla. 4th DCA 1983), cert. denied,
451 So.2d 848(Fla. 1984), appeal dismissed,
105 S.Ct. 376 (1984) 14

Homer v. Dadeland Shopping Center, Inc.,
229 So.2d 834 (Fla. 1970) 6

North Dade Water Co. v. Florida State Turnpike Authority,
114 So.2d 458 (Fla. 3d DCA 1959), dismissed,
120 So.2d 621(Fla. 1960) 8, 9, 10

Palm Beach County v. Cove Club Investors, Ltd.,
692 So.2d 998 (Fla. 4th DCA 1997) 1, 3, 5, 11, 12

Palm Beach County v. Wright,
641 So.2d 50 (Fla. 1994) 14

Ryan v. Town of Manalapan,
414 So.2d 193 (Fla. 1982) 7, 15

Sackett v. Los Angeles City School District,
118 Cal. App. 254, 5 P.2d 23 (Cal. App. 4th Dist. 1931) 13

Shavers v. Duval County,
73 So.2d 684 (Fla. 1954) 7, 8, 10, 11

Suitum v. Tahoe Regional Planning Council,
_ U.S. __, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) 11, 12

Tampa Hillsborough County Expressway Authority v.
K.E. Morris Alignment Service, Inc.,
444 So.2d 926 (Fla. 1983) 9

PAGES

The Board of Public Instruction of Dade County v. Town of Bay Harbor Islands,
81 So.2d 637 (Fla. 1955) 5, 6, 7, 10, 11, 13, 14, 15, 16

STATUTES

Section 163.3180, Florida Statutes (1995) 14

Section 70.001(10), Florida Statutes (1995) 15

OTHER AUTHORITY

Article X, Section 6, Florida Constitution 12

Fla. R. App. P. 9.130(a)(3)(C)(iv) 1

James A. Kushner, Urban Transportation Planning,
4 Urb.L. & Pol'y 161, 163 (1981) 14

Projection of Fla. Population by County 1996-2020,
30 Fl. Pop. Studies #2, U. of Florida, Bureau of
Econ. and Bus. Res. (Feb. 1997) 14

STATEMENT OF CASE

This matter concerns a claim for inverse condemnation filed by Cove Club Investors, LTD, d/b/a/ Sandalfoot Country Club (COVE CLUB). The trial court conducted a bench trial on December 19, 1996 to determine whether there was a taking of COVE CLUB property (transcript at APP-D). At the trial, the court orally denied COUNTY's motion for judgment on the pleadings (APP-D, page 1 line 10 - page 2, line 4; COUNTY Motion and Memorandum filed in support at APP-E and F, respectively). On January 4, 1997, the court entered its Judgment in Favor of Plaintiff in Claim of Inverse Condemnation, reserving jurisdiction for a valuation trial (APP-A) . COUNTY timely appealed this non-final order to the Fourth District Court of Appeal pursuant to Rule 9.130(a)(3)(C)(iv), Fla. R. App.Pro. The Fourth District affirmed the trial court's judgment (Dell, J., dissenting). Upon motion by the COUNTY, however, all three members of the panel certified the following question to this court as a matter of great public importance:

> 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?

Palm Beach County v. Cove Club Investors, Ltd., 692 So.2d 998, 1000 (Fla. 4th DCA 1997) On June 6, 1997, the COUNTY filed a notice to invoke this court's discretionary jurisdiction. In an order dated June 18, 1997, this court postponed its decision on jurisdiction and ordered the filing of briefs.

STATEMENT OF FACTS

On November 21, 1989, COUNTY purchased and took title to a residential mobile home lot legally described as Lot 1, Block 2, of Sandalfoot Cove Section One, according to the Plat thereof, recorded in Plat Book 28, Page 225 of the Official Records of Palm Beach County (hereinafter the "Real Property"), then owned by Mary B. Herman (APP-B, Stipulation at pages 5-6). The parties stipulated in the Joint Pretrial Stipulation that the COUNTY purchased the Real Property for "right-of-way purposes" through its powers of eminent domain and under threat of condemnation for the improvement of Marina Boulevard in Palm Beach County, Florida (APP-B, Stipulation at page 5).

The Real Property was, prior to purchase by COUNTY, subject to a "Declaration of Conditions, Covenants, Restrictions and Reservations Affecting Property Located in Sandalfoot Cove" dated June 12, 1969 (the "Declaration")(APP-C). The Declaration contained several restrictive covenants including one entitling COVE CLUB to receive monthly recreation fees from the fee simple title owners of the lots in the Sandalfoot Cove community (APP-C, Declaration at paragraph (4)(b)). The term of the covenants was initially for 30 years with automatic successive renewal terms of 25 years each unless sooner terminated by the Grantor (APP-C, Declaration at paragraph (6)). The Declaration was recorded in the public records and the Restrictive Covenant ran with the land (APP-C). Both parties agree that no recreation fees were due on the Real Property as of the date of the acquisition by COUNTY, and that the COUNTY has not paid any recreation fees since the time of the acquisition (APP-B, Stipulation at page 6).

The parties stipulated that the issues for trial were as follows: [1]

1. Whether the actions of PALM BEACH COUNTY, constituted a compensable taking.

2. Whether the rights, if any, of COVE CLUB derived from the Restrictive Covenant may be enforced against as set forth in the COUNTY's second affirmative defense. The COUNTY's second affirmative defense provided that any rights of COVE CLUB are contract rights which may not be enforced against COUNTY.

3. Whether the rights sued upon are contractual and, therefore, are not proper subject matter for a suit in inverse condemnation, as claimed in the Defendant's third affirmative defense. (APP-B, Stipulation at pages 6-7).

As stated by counsel for COVE CLUB in his opening statement "[t]he contest here is primarily a legal one. By and large the facts in this case have been pretty well stipulated to" (APP-D, transcript at page 6). On January 4, 1996, the court entered its Judgment in Favor of Plaintiff in Claim of Inverse Condemnation, reserving jurisdiction for a valuation trial (APP-A).

The Fourth District agreed that the only issue in this case is whether COVE CLUB's asserted right to a stream of payments arising out of a restrictive covenant is a property right compensable upon inverse condemnation. Cove Club, 692 So.2d at 999. The Fourth District affirmed, but granted COUNTY's motion to certify the question.

---

[1] There was, at the time of execution of the Stipulation, an additional defense relating to standing that COUNTY subsequently withdrew.

SUMMARY OF ARGUMENT I

The COUNTY acquired a mobile home lot subject to a restrictive covenant which obligated the owner of the lot to pay a monthly recreation fee to COVE CLUB. COVE CLUB's interest in this restrictive covenant is not a property interest compensable upon inverse condemnation. Florida law makes it clear that restrictive covenants are not enforceable against a government acquiring the property for public purposes. The interest at issue in our case is more akin to a contract, personal to the holder, and not a property right in the constitutional sense. The fact that the restrictive covenant at issue in this case runs with the land or describes mutual obligations does not change the fact that the interest asserted by COVE CLUB is contractual. In determining whether the interest at issue is a compensable property right, the relative ease in determining the value of that interest is not relevant. No authority in Florida supports the notion that a restrictive covenant of the sort at issue in our case gives rise to a compensable property interest.

SUMMARY OF ARGUMENT II

In refusing to recognize that restrictive covenants give rise to compensable property interests, Florida courts are consistent with a policy that balances property rights of the individual against the need of government to serve the public as a whole. Individuals who enter into private agreements to benefit their land do so with the knowledge that land is subject to government's eminent domain authority. Individuals should not contract in a manner which frustrates government's ability to acquire property for public purposes. Requiring government to pay just compensation for such contract rights would result in a windfall to the contracting parties at the expense of the public.

ARGUMENT I

COVENANT IN FAVOR OF COVE CLUB IS NOT A PROPERTY INTEREST COMPENSABLE UPON INVERSE CONDEMNATION.

There is no question that County acquired this mobile home lot subject to a number of restrictive covenants (APP-C), among them the obligation to pay recreation fees. During the search to determine whether this particular covenant describes a compensable property interest, it has been given many titles.[2] The various aliases this obligation has enjoyed, however, cannot hide fact that the restrictive covenant at issue here is in substance a contractual obligation and not a property right in the constitutional sense.

This court, in The Board of Public Instruction of Dade County v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955), ruled that restrictive covenants:

> ...do not fall in the category of true easements, such as the right of passage, use, or rights of light, air and view. See 18 Am.Jur., Eminent Domain, p. 786, Sections 156-158, especially Section 158. Easements such as these fall into a separate category from the easements such as those we are dealing with in this case. These latter easements have been defined, and we think correctly, as negative easements or equitable servitudes. Such so called easements are basically

---

[2]The obligation at issue exists in a document entitled "Declaration of Conditions, Covenants, Restrictions and Reservations Affecting Property Located in Sandalfoot Cove" (APP-C). In the pre-trial stipulation it was referred to as a restrictive covenant (APP-B). The judgment referred to it as a covenant (APP-A). COVE CLUB, introduced for the first time in this litigation an argument in its Answer Brief to the Fourth District, asserting that the obligation to pay recreation fees is a "negative easement" under which the mobile home lots are the "servient estate" and the golf and country club lands are the "dominant estate and that the right of the owners to use the country club is an 'affirmative easement' " (APP-I, Answer Brief at pages 16-18). The District Court of Appeal, Fourth District, in its certified question to this Court, referred to an income stream. 692 So.2d at 1000.

> not easements in the strict sense of the word but are more properly classified as rights arising out of contract.

81 So.2d at 640 (emphasis added); see also, Homer v. Dadeland Shopping Center, Inc., 229 So.2d 834, 837 (Fla. 1970).

The restrictive covenant at issue in Bay Harbor did not involve the obligation to pay money, but rather restricted the use of the property to residential purposes. Nevertheless, the rationale of Bay Harbor applies with equal force. In Bay Harbor the Florida Supreme Court held that such restrictive covenants cannot bar the erection of a school. Bay Harbor holds that restrictive covenants are not enforceable against government bodies because they do not "constitute property" held by "those in whose favor such restrictions exist for which compensation must be made in the event said lands are acquired for public purposes." 81 So.2d at 643. The court held in that case "that such rights were not property rights in a constitutional sense." In reaching this conclusion, the court reasoned:

> '[w]hile the owners [of property] may so contract as to control private business, and thereby increase the values of their estates, they are not entitled so to contract as to control the action of the government or to increase the values of their lands by any expectation or belief that the government will not carry on public works in their vicinity, or that if it does it will compensate them for their loss ....'

81 So.2d at 642 (quoting Anderson v. Lynch, 188 Ga. 154, 3 S.E.2d 85 (Ga. 1939)) (additional citations omitted).

The Court in Bay Harbor reiterated the axiom of Florida law that "'the right to own and acquire property by the individual is subject to the right an power of eminent domain." 81 So.2d at 643. The Bay Harbor Court further emphasized that: " The Constitution and

laws of this State are a part of every contract. Every person is charged with knowledge that any land may be taken by the sovereign for public purposes at any time." 81 So.2d at 642. In Ryan v. Town of Manalapan, 414 So.2d 193 (Fla. 1982), this court extended the Bay Harbor holding to instances where government acquires land subject to restrictive covenants by purchase rather than by eminent domain. According to the Ryan court:

> [W]e see no distinction when the land is acquired by agreement or purchase. In either case the restrictive covenants do not 'constitute property in those in whose favor such restrictions exist for which compensation must be made...'

414 So.2d at 195 (quoting Bay Harbor, 81 So.2d at 639).

In our case, COVE CLUB seeks to make the COUNTY compensate it for a private agreement made between the developer of the property and the purchasers of lots in the property. That this agreement is in the form of a restrictive covenant which runs with the land does not transform it into a compensable property interest. See Balzer v. Indian Lake Maintenance, Inc., 346 So.2d 146, 149 (Fla. 2d DCA 1977)(covenant requiring payment of maintenance fees "is more nearly akin to a contractual provision than a restriction placed on the use of the land").

In Bay Harbor, this court relied in part on its earlier decision in Shavers v. Duval County, 73 So.2d 684 (Fla. 1954). In Shavers, this court determined that the right to receive interest under a long term mortgage was not a property right in the constitutional sense. Therefore, the right to receive this interest was not compensable when lands encumbered by the mortgage were condemned for public use. 73 So.2d at 690. The

Shavers court did not find this stream of interest payments to be property in the constitutional sense. Rather, this court looked to the nature of the asserted interest in the property explaining: "a mortgagee does not have an estate or interest in mortgaged lands, by virtue of his mortgage, but is merely the owner of a chose in action creating a lien on the property." 73 So.2d at 687 (citations omitted).

The Restrictive Covenant at issue in our case provides in Section 4(c) that if this contract establishing an obligation for payment is not complied with, COVE CLUB "shall have a lien against the defaulting owner's lot to secure the payment of delinquent recreation fees, which lien may be foreclosed in the same manner as mortgage liens may be foreclosed in the State of Florida." (APP-C, Declaration at paragraph 4(c)) [e.s.]. As in Shavers above, the right asserted by COVE CLUB in this case is merely a chose in action and not a compensable property right in the constitutional sense.

In North Dade Water Co. v. Florida State Turnpike Authority, 114 So.2d 458 (Fla. 3d DCA 1959), dismissed, 120 So.2d 621 (Fla. 1960), the court ruled that a service and easement agreement in favor of a private company to provide water and sewer service to the owners of land creates no property right which is compensable upon condemnation of the land or the right-of-way on the land to which the agreement relates. This easement by its own terms was a "... reservation and condition running with the land." Id. at 460, n.3. Despite the fact that this agreement was termed an easement, the agreement at issue entitled the company to little more than the right to collect money. As such, the court found this agreement to be an easement in gross, personal to the holder and not, therefore, a compensable property interest. 114 So.2d at 461. The only benefit to the water company

in that case was essentially the right to collect money.

COVE CLUB's interest in our case is also nothing more than a right to collect money. In both cases, this interest could not be considered an easement appurtenant as any benefit to a dominant estate is illusory. For the first time on appeal, COVE CLUB asserted that its interest was in the form of an easement and therefore compensable. (APP-I, Answer Brief at pages 16-18). The fact that such an agreement can be called an easement should not alter the outcome of this case. Under such logic, a company with a long term contract to provide maintenance service to a building could elevate its contract rights to a constitutionally protected property interest in the building by simply labeling the contract an easement. Notwithstanding any labels that may be placed upon the covenant at issue, its only benefit to COVE CLUB is the right to receive money which is nothing more than a contractual right. As stated by the court in North Dade Water Co., "the incidental frustration of the performance of a contract by the public taking of certain other property is not compensable." 114 So.2d at 461; see also, Tampa Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926, 928 (Fla. 1983). (As to business damages, compensation for consequential damages is not required by the Florida Constitution but rather is "granted or withheld simply as a matter of legislative grace.")

Similarly, the court in Division of Administration v. Ely, 351 So.2d 66 (Fla. 3rd DCA 1977), looked beyond the label of the claimed right and focused instead on the substance of the agreement to determine whether it was a compensable property interest. This easement agreement, which was also a covenant running with the land, provided that the gas company would install certain equipment and provide liquefied petroleum gas to

residents of a mobile home park and that these residents would in turn pay various fees to the company in exchange for the service. 351 So.2d at 67-68, n.1. The court in Ely held that this mutual obligation was not a property interest that requires compensation upon condemnation. 351 So.2d at 69. In our case, COVE CLUB is similarly obligated to provided certain recreational amenities while the residents of the mobile home park were obligated to pay for it. As in Ely, the mutual obligation which runs with the land in our case is simply a contract to provide services and receive payment for it, not a compensable property right.

These cases demonstrate that in Florida, an asserted property interest is not a compensable property interest in the constitutional sense merely because that interest is labeled "easement" or "restrictive covenant." Nor can one rightly receive just compensation simply because the agreement at hand involves mutual obligations or entitles a party to stream of payments or to a chose in action. The interest asserted by COVE CLUB here describes nothing more. As such, COVE CLUB has no greater rights than the plaintiffs in Shavers, Ely or North Dade Water Co.. Like these cases, the COVE CLUB's interest is merely a private contract right and therefore not compensable upon inverse condemnation.

The Fourth District Court of Appeal agreed with the trial court that Bay Harbor was distinguishable from our case because:

> "Bay Harbor involved a building restriction only, and not a property interest *on which a monetary value could be assessed*...We agree with this distinction of Bay Harbor. The declaration in this case vested in Cove Club Investors, Ltd., a property right to *a determinable monthly income* from each mobile home lot owner."

Cove Club, 692 So.2d at 999-1000 [e.s.]. The relative ease of measuring the value of an asserted right, however, is not a relevant factor in determining whether the asserted right is a compensable property interest.[3] In Shavers, for example, the mortgagee's right to receive interest payments was not compensable when lands encumbered by the mortgage were condemned for public use. 73 So.2d at 690. Surely this stream of interest payments can be valued as easily as the recreational fees at issue in our case, but the dispositive issue in Shavers turned not on the ease of valuing the interest but rather on substance of the interest itself. Similarly, the value of the interest at stake in Ely was readily calculable, but was not a part of the court's analysis. 351 So.2d at 67-68, n.1.

Finally, the Supreme Court of the United States recently rejected the notion that relative ease of valuation determined whether a takings claim is ripe. Suitum v. Tahoe Regional Planning Council, __ U.S. ___, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). In that case, Suitum was not allowed to develop her land, but was entitled to transferable development rights(TDRs) which could be sold to third parties. The agency argued among other things that Suitum's claim was not ripe because values attributable to Suitum's TDRs were unknown. In rejecting this argument, the Court explained that valuation of various

---

[3] It is apparent that the trial court adopted the contention of COVE CLUB that the restrictive covenants in Bay Harbor are distinguishable from this Restrictive Covenant because the damages from the Bay Harbor restrictive covenants are too speculative or "nebulous" to measure:

> Mr. Welch [counsel for COVE CLUB]: ... So, yes, it's a covenant like the restrictive covenant in the Bay Harbor case. But why is it different? It's different because it has readily calculable value. It's not this nebulous valuation that was a concern of the Florida Supreme Court and focus in [the] Bay Harbor case....

(APP-D, Transcript at page 98, lines 10 - 16).

property interests for which there were few or no related market transactions are routinely determined in judicial proceedings. 117 S.Ct. at 1668 (citations omitted). According to the Court: "While it is true that market value may be hard to calculate without a regular trade in TDRs, if Suitum is ready to proceed in spite of this difficulty, ripeness doctrine does not block her." Id. at 1669.

Suitum deals primarily with the ripeness doctrine, but the Court clearly refused to consider relative ease of valuation of a property interest in determining whether such an interest is compensable in the constitutional sense. Until our case, this reasoning has been entirely consistent with Florida case law. The Fourth District's opinion in our case presents a significant departure from this precedent.

Simply put, a property right protected by Article X, Section 6 of the Florida Constitution is not created merely because the right runs with the land, or because it is labeled "easement" or "restrictive covenant." The relative ease in valuing an asserted right does not determine whether it is a compensable property interest, nor is a compensable property interest created from an agreement setting forth mutual obligations to receive payment in exchange for providing services. Stripped of all artifice, COVE CLUB argues that its right to collect a monthly payment contained in a restrictive covenant is a property right in the constitutional sense. No authority in Florida supports the notion that a restrictive covenant of the sort at issue in our case gives rise to a compensable property right. If allowed to stand, the Fourth District's opinion in Cove Club would present a significant departure from existing precedent and introduce significant cost increases for all condemning authorities.

ARGUMENT II

FINDING THIS COVENANT TO BE COMPENSABLE UPON INVERSE CONDEMNATION IS CONTRARY TO PUBLIC POLICY.

The Bay Harbor Court correctly distinguished constitutionally protected property rights from contractual rights arising out of a restrictive covenant. As explained in Bay Harbor: "We think the conclusion reached by us is not only supported by what we believe to be the best considered cases but also by logic and reason. Were we to recognize a right of compensation in such instances, it would place upon the public an intolerable burden wholly out of proportion to any conceivable benefits to those who might be entitled to compensation." 81 So.2d at 643. In arriving at this conclusion, the court relied in part upon Sackett v. Los Angeles City School District, 118 Cal. App. 254, 5 P.2d 23 (Cal. App. 4th Dist. 1931), and quoted in the following passage:

> It presents the situation of an agency of the state created for the sole purpose of providing adequate educational facilities for the youth of a certain limited area against whom there is sought to be invoked the aid of equity to enforce a restriction created by the provisions of a private contract to which the state was in no wise a party and by which it neither expressly nor by necessary implication consented to be bound. The state may not be thus hampered in carrying out a purpose in which it is so vitally interested.

81 So.2d at 644 (quoting Sackett). Put another way, the Bay Harbor court announced that the public should not be required to bear the cost of private agreements when government acquires property for public purposes.

The passage of time has made this rationale no less persuasive in Florida today. The Bay Harbor court was in fact prophetic in refusing to allow private contractual

arrangements to impair government's eminent domain power. In the years following Bay Harbor, the state has experienced unprecedented growth. Periods of rapid land development activity has in the past and will continue to outpace government's ability to provide adequate infrastructure. By the year 2010, Florida's population is estimated to reach 18 million, a 28.5% increase. Projection of Florida Population by County, 1996-2020, 30 Florida Population Studies No. 2, Bulletin 117, Bureau of Economic and Business Research, University of Florida (Feb. 1997) ; see also Palm Beach County v. Wright, 641 So.2d 50, 53 (Fla. 1994) ("'the infrastructure of many of America's cities demands extensive redevelopment along sewer and transportation networks....") (quoting James A. Kushner, Urban Transportation Planning, 4 Urb.L. & Pol'y 161, 163 (1981)).

In an effort to narrow the gap between development and government's ability to provide infrastructure to serve it, local government employs a variety of land development regulations. Development and implementation of such regulations evidence the state's desire to balance the rights of the individual property owner against the rights of the public as a whole to provide adequate infrastructure. This court, for example, has affirmed local government's ability pursuant to its police powers to impose impact fees requiring new development to pay for infrastructure needs created by the development. See,e.g., Home Builders and Contractors Ass'n v. Palm Beach County, 446 So.2d 140 (Fla. 4th DCA 1983), cert. denied, 451 So.2d 848 (Fla. 1984), appeal dismissed, 105 S.Ct. 376 (1984). The Legislature has enacted laws requiring development to be concurrent with adequate infrastructure available to serve that development. §163.3180, Fla. Stat. (1995). Finally, the state adopted the Burt J. Harris Act to protect individuals from government acts which

inordinately burden private property, but exempted from the Act all government actions which relate to maintenance, expansion or operation of transportation facilities and eminent domain actions relating to transportation. §70.001(10), Fla. Stat. (1995). Thus, even this most recent legislation, designed to protect private property rights, recognizes the government's need to acquire property for the public good.

Allowing private parties to contract in a manner which frustrates government's ability to acquire property for public purposes is contrary to public policy. Bay Harbor, 81 So.2d at 643; Ryan, 414 So.2d at 195-96. Requiring government to pay just compensation for such contract rights would result in a windfall to the contracting parties at the expense of the public. While COVE CLUB may be required to provide recreation facilities under the Restrictive Covenants at issue, it must do so for one less lot owner as a result of the COUNTY's acquisition. If the COUNTY acquired half of the lots in the subject development, COVE CLUB would presumably require just compensation for each of the acquired properties, even though it would be providing services to a far smaller community. In other words, the COUNTY in acquiring property under its powers of eminent domain, would be required to subsidize a private club.

Affirming the Fourth District's decision would open for argument all manner of restrictive covenants that may be subject to just compensation. Maintenance fees, an association's right to assess new fees in the future based upon an as yet unanticipated need, even covenants specifying monetary penalty for failure to adhere to a restrictive covenant, could be new opportunities to elevate a contractual obligation to the status of a property right and subject to just compensation.

Should persons creating private agreements to benefit their property, knowing that the property may be necessary for public purposes, bear the risk of loss of that benefit, or should the taxpayers of this state be insurers of these private arrangements? Until now, Bay Harbor and its progeny provided a clear, and most certainly the best answer. The public policy goals of this state would be best served by answering the Certified Question in the negative.

CONCLUSION

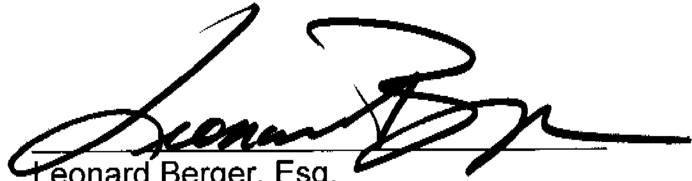
The question certified by the Fourth District Court of Appeal should be answered in the negative and the Fourth District's decision quashed. This matter should remanded to the trial court with instructions to vacate the finding of inverse condemnation and to enter order granting COUNTY's Motion for Judgment on the Pleadings.

Respectfully Submitted,

Leonard Berger, Esq.
Assistant County Attorney
Fla. Bar No. 896055
COUNTY ATTORNEY'S OFFICE
PALM BEACH COUNTY
P.O. Box 1989
West Palm Beach, Florida 33405

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served by U.S. Mail, postage pre-paid, this 12 day of , 1997, to David Welch/Shanell M. Hatton, Esquire, Welch and Finkel, 2401 W. Atlantic Boulevard, Great Western Bank Building, Suite 400, Pompano Beach, FL 33062.



Leonard Berger, Esq.
Assistant County Attorney
Florida Bar No.: 896055
COUNTY ATTORNEY'S OFFICE
PALM BEACH COUNTY
P.O. Box 1989
West Palm Beach, Florida 33402
(561) 355-2225
(561) 355-4398 (Facsimile)

g:\...\landuse\lberger\appeals\coveclub.pet