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, REPLY BRIEF

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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.

4. Citations to Appendix filed with Respondent's Answer Brief are herein referred to as Respondent APP-__ with the appropriate letter.

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ARGUMENT I

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

COVE CLUB's interest in this restrictive covenant is not a property interest compensable upon inverse condemnation. The restrictive covenant at issue here is in substance a contractual obligation and not a property right in the constitutional sense. See The Board of Public Instruction of Dade County v. Town of Bay Harbor, 81 So.2d 637 (Fla. 1955). COVE CLUB takes exception to the characterization of this asserted interest as a restrictive covenant, see Answer Brief, at p. 20, but agreed without protest to use this label in the pre-trial stipulation. For example, according to the concise statement of facts set forth in the Stipulation: "The Plaintiff claims that the Restrictive Covenants entitling the Plaintiff to recreation fees arise out of a recorded instrument entitled 'Declaration of Conditions, Covenants, Restrictions and Reservations affecting property in Sandalfoot Cove...'" APP-B at p. 2. The Stipulation provided the following as an issue to be determined at non-jury trial: "Whether the rights, if any, of the Plaintiff derived from the restrictive covenant described herein may be enforced against the Defendant, PALM BEACH COUNTY, as set forth in Defendant's second affirmative defense." APP-B at p. 6.

COVE CLUB's argument that this interest is an easement appeared for the first time in its answer brief to the Fourth District Court of Appeal. This change of position on appeal is one that should not even be recognized on appeal. See United First Bank of Pinellas v. Farmers Bank of Malone, 511 So.2d 1078, 1080 (Fla. 1st DCA

1987)(Appellee cannot alter its theory of its stated cause of action at the appellate stage); Abuznaid v. Sirhal, 638 So.2d 188 (Fla. 4th DCA 1994).

As to the Declaration itself, see APP-C, there is no meaningful distinction between subparagraphs 4(b) and 4(d). The introductory language to paragraph 4 does not recognize the distinction urged by COVE CLUB. See Answer Brief at pp. 16-19. It provides: "The following provisions with respect to lot maintenance and the recreation facilities shall prevail as to each residential lot owner and are hereby imposed as to each residential lot:" APP-C at p. 4 [e.s.]. Subparagraph 4(b) requires only that each lot owner pay a recreational fee, subject to future adjustment. Subparagraph 4(c) provides that in the event of failure to pay the fee, GRANTOR shall have a lien against the defaulting owner's lot. Subparagraph 4(d) provides that GRANTOR shall provide maintenance, and each lot owner agrees to accept such services and pay a fee for it. As with the recreation fees, Subparagraph 4(e) provides that failure to pay maintenance fees also results in a lien against the subject property.[1]

As set forth in the Declaration, any obligation of GRANTOR appears limited to the maintenance responsibilities. Any notion of reciprocal obligations is limited to the court approved settlement in the unrelated case, Motz v. Sandalfoot Cove Country Club. See Respondent APP-4, pp. 3-6. Paragraph f. of this Final Judgment simply

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[1]COVE CLUB also attempts to distinguish the recreation fee from the maintenance fee by explaining that subparagraph 4(h) allows for the assignability of the latter, but that rights to the former may inure only to owners or successor owners of the golf course property. Subparagraph 4(h) allows in fact for sale or lease of any recreational facilities. This does not alter the fact that the interest asserted by COVE CLUB is the right to receive money in exchange for maintaining recreation facilities.

provides that in exchange for the payment of recreational fees, lot owners will be entitled to certain rights associated with the recreational facilities and goes on to provide that the defendants, or their successors or assigns, will maintain these facilities. In other words, this Judgment describes an agreement to provide services in exchange for money. That these obligations run with the land is no more dispositive of the issue than it was 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). In that case, the easement by its own terms was a "... reservation and condition running with the land." Id. at 460, n.3. Despite the fact that the obligation was termed an easement, it entitled the company to little more than the right to collect money and as such, did not represent a compensable property interest. As with COVE CLUB here, the only benefit to the water company in that case was essentially the right to collect money. Accord Division of Administration v. Ely, 351 So.2d 66 (Fla. 3rd DCA 1977).

As with Ely and North Dade Water Company cited above, the asserted interest in our case is not an easement appurtenant as any benefit to a dominant estate is illusory. The only benefit accruing to COVE CLUB here is the right to receive money; the only burden imposed upon COVE CLUB is the obligation to maintain recreational facilities. COVE CLUB argues that its burden to maintain these facilities continues even though the residential lot in question no longer exists.[2] Answer Brief at p. 26. While this may

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[2]Only a portion of the lot in question was used for right of way purposes. The remaining portion is apparently large enough to accommodate another mobile home. APP-D at p. 59-61. Should this parcel be sold and used for residential purposes, it would be subject to the monthly recreational fee, according to the Declaration of Conditions, Covenants, Restrictions and Reservations. APP -C. Compensation by the County for this "lost" stream of income would be a windfall to COVE CLUB.

be true, COVE CLUB's claim in this case concerns only its purported right to a stream of payments from a single lot. But COVE CLUB is no longer obligated to provide recreational amenities for the benefit of that lot. As with Ely, the destruction of COVE CLUB's contract right to receive money brings with it the corresponding elimination of an obligation to provide services. 351 So.2d at 67(condemnation of parcel in mobile home park eliminated twelve trailer sites).

COVE CLUB argues in addition that Bay Harbor is distinguishable because the value of the property interest involved was too difficult to measure and goes on to quote from the Trial Court Judgment which in turn relies upon Nichols as follows: "[p]roperty in the constitutional sense, includes any interest in real or personal property that may be the subject of ownership and upon which it is practicable to place a money value." Judgment in Favor of Plaintiff on Claim of Inverse Condemnation. Respondent APP - A at p. 4 (citing 2 Julius Sackman, Nichols, The Law of Eminent Domain, §5.01[2] (rev. 3d Ed. 1990)). More specifically, however, Nichols provides: "[p]roperty has been held to include every . . . interest . . . upon which it is practicable to place a money value." The passage goes on to explain: "The mere fact that a specific right or interest has value does not, in and of itself, give it the status of 'property,' within the meaning of the constitutional inhibition upon the taking of property without compensation." Nichols, at §5.01[5][c].

As noted in the Initial Brief, Shavers v. Duval County, 73 So.2d 684 (Fla. 1954), provides an example of a case where interest payments due a mortgagee was readily calculable but still not compensable. This stream of interest payments can be valued as easily as the recreational fees at issue in our case, but the dispositive issue is not

the ease of valuing the asserted right but rather the substance of that right. 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. It is doubtful, therefore, that Bay Harbor would have been decided differently had the covenant in question been given a specific value. Were the opposite true, parties could transform mere restrictive covenants into compensable property rights by simply assigning a value to them. Surely this was not what the Bay Harbor court intended. That case would not have been decided differently had the covenant in question provided that failure to comply would result in specific monetary penalty. According to the Bar Harbor court, if such an interest were compensable, "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.

Finally, the COUNTY did not argue in its appeal before the Fourth District Court of Appeal that the interest at stake does not merit compensation due to its relatively small amount. The issue has been and remains whether the interest at stake in this case is compensable at all.

ARGUMENT II

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

The COUNTY agrees that Florida Constitution, Article X, Section 6 requires payment of full compensation for property acquired by eminent domain. The question is whether the interest at issue in this case rises to the level of a compensable property interest in the constitutional sense. In explaining that a restrictive covenant does not represent a compensable property interest, the court in Bay Harbor explained: "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.

The logic remains sound today. Private parties have every right to enter into agreements for services and compensation, and to make these benefits and obligations run with the land. But contractual agreements of this sort must be made with knowledge of and subject to government's power of eminent domain. Requiring full compensation in the constitutional sense in amounts that could easily far exceed the value of the property itself creates a disproportionate burden on the public as guarantors for such private agreements.

Allowing private parties to contract in a manner which frustrates government's ability to acquire property for public purposes is contrary to public policy. This is not a

specious argument, as urged by COVE CLUB on page 31 of its Brief. COVE CLUB, in fact, illustrates quite clearly why this argument is valid. By taking the COUNTY's hypothetical to its logical conclusion, COVE CLUB submits that it would bear a disproportionate burden to that borne by the public should COUNTY condemn 169 of the 170 lots. Answer Brief at p. 32-33. It is the converse, however, which presents the unacceptable: Should the public be required to pay over a million dollars a year so that one lot owner can be the only member of a private golf and country club? On the contrary, the Supreme Court of Florida in Bay Harbor explained:

> '[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). COVE CLUB's scenario presents a very real example of agreements between private parties which frustrate government's ability to acquire, and pay for, private property for a public purpose. See also Sinclair Refining Co. v. Watson, 65 So.2d 732 (Fla. 1953)(law favors liberty of contract but generally disfavors restricting use of land in manner contrary to public policy).

Finally, case law cited by COVE CLUB in its second point on appeal recounts a variety of instances in which certain interests are deemed compensable property rights, but there exists a similar range of opinions finding that such rights do not exist. For example, while Moore v. State Road Department, 171 So.2d 25 (Fla. 1st DCA 1978), found a taking in a loss of riparian access, it is equally true that riparian access is a

right subject to the superior rights of the public regarding navigation. Ferry Pass Inspectors' and Shippers' Association v. White's River Inspectors' and Shippers' Association, 57 Fla. 399, 402-03, 48 So. 643, 644-45 (Fla. 1909); see also Krieter v. Chiles, 595 So.2d 111, 112 (Fla. 3d DCA 1992)("although the riparian right of ingress and egress is an appurtenance to the ownership of private property . . . it is a qualified right which must give way to the rights of the state's people" (citations omitted)). While substantial loss of road access may be compensable, see Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989), it is equally true that loss of the most convenient access is not compensable when other suitable access is available. Rubano v. Dept. of Transportation, 656 So.2d 1264 (Fla. 1995). While City of Jacksonville v. Shaffer, 144 So. 888 (Fla. 1932), requires compensation for loss of exclusive rights to lay public utility works, North Dade Water Company, 114 So. 2d 458, requires no compensation for loss of the exclusive right to maintain public works on a tract of land. Accord Ely, 351 So.2d at 68-69. Finally, COVE CLUB's reference to access easement cases illustrates precisely why the interest at issue here is not property in the constitutional sense. The burdens and benefits associated with access easements are tied inextricably to the servient and dominant estates. In contrast, COVE CLUB's right to receive payments in our case does not benefit the land, it benefits Cove Club Investors, Ltd.

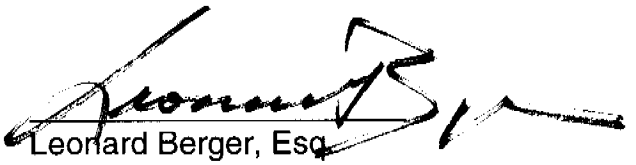
The State of Florida unquestionably requires government to provide full compensation when it acquires private property, but COVE CLUB cites no Florida authority which supports the notion that a restrictive covenant of the sort at issue in our case gives rise to a compensable property interest. COVE CLUB seeks to require the

COUNTY to compensate it for the loss of a stream of income by dubbing the right to receive this income property in the constitutional sense. That such contractual obligations run with the land should not, however, transform such obligations into compensable property rights. Requiring the COUNTY to compensate COVE CLUB for the loss of this contract right is to place the public in the position of guarantor for such private, contractual agreements. Extending the boundaries of compensable property interests to this extreme does not square with public policy goals of this State.

CONCLUSION

For the reasons set forth in this Brief and the Initial Brief, 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,



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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 November, 1997, to David Welch/Shanell M. Hatton, Esquire, Welch and Finkel, 2401 E. Atlantic Boulevard, Great Western Bank Building, Suite 400, Pompano Beach, FL 33062.

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