Florida State University Law Review

Volume 10 | Issue 4 Article 7

Winter 1983

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

Thomas Conrad

Follow this and additional works at: http://ir.law.fsu.edu/lr

Part of the Constitutional Law Commons, and the Property Law and Real Estate Commons

Recommended Citation

Thomas Conrad, *Ryan v. Town of Manalapan, 414 So. 2d 193 (Fla. 1982)*, 10 Fla. St. U. L. Rev. 667 (2017) .
http://ir.law.fsu.edu/lr/vol10/iss4/7

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

CASE NOTES

Constitutional Law/Property—RESTRICTIVE COVENANTS: DO THEY APPLY TO PUBLIC BODIES?—*Ryan v. Town of Manalapan*, 414 So. 2d 193 (Fla. 1982)

> *"Do Restrictive Covenants Affecting The Usage of Land Apply to a Public Body Which Acquires The Land by Purchase as Opposed to Acquisition by Eminent Domain?"*[1]

In *Ryan v. Town of Manalapan*,[2] the Florida Supreme Court answered "no," reminding the Fourth District Court of Appeal, which had certified the question as one of great public importance, that it had answered the question twenty-seven years before in *Board of Public Instruction v. Town of Bay Harbor Islands*.[3] In *Bay Harbor*, the supreme court decided for the first time how restrictive covenants were to be treated under Florida law when land burdened by those covenants is acquired for public purposes. The court held that while the covenants are enforceable "between the parties thereto and their successors with notice," they are unenforceable against a public body which acquires the burdened land. Furthermore, the court held that the rights created by the covenants did not constitute property for which compensation had to be paid in the event the land burdened by the restrictive covenants was acquired for a public use inconsistent with the restrictions.[4]

Although *Bay Harbor* involved the purchase of land, the district court in *Ryan* mistakenly viewed that case as involving acquisition by eminent domain.[5] The mistake was understandable since the the supreme court also found it necessary to include a lengthy discussion of eminent domain in its opinion.[6] In fact, the district court never distinguished voluntary acquisitions from acquisitions by eminent domain.[7] Consequently, while the certified question has been answered, it has not been squarely addressed.

This note will discuss Florida's treatment of restrictive cove-

---

1. Ryan v. Town of Manalapan, 393 So. 2d 633, 635 (Fla. 4th DCA 1981).
2. 414 So. 2d 193 (Fla. 1982).
3. 81 So. 2d 637 (Fla. 1955). *See infra*, notes 42-56 and accompanying text.
4. *Id.* at 642.
5. 393 So. 2d at 635.
6. 81 So. 2d at 640-44.
7. *Id.*

nants when land burdened by those covenants is acquired by either voluntary or involuntary means. It will be suggested that Florida's undifferentiated treatment of restrictive covenants when land has been acquired by a public body for uses inconsistent with the covenants constitutes an unconstitutional taking of property without just compensation. In addition, it will be made clear that the supreme court's recent endorsement of governmental manipulation of the desires of landowners who wish to avoid their covenant obligations, will result in favorable property transactions for the government at the expense of the intended beneficiaries of the covenants.

I. RYAN AND ITS EFFECT

Petitioner Ryan in a declaratory judgment action sought to have his rights and the rights and obligations of the respondents—the Town of Manalapan (Town), Palm Beach County (County), and another landowner, Talmo—determined.[8] Ryan and Talmo were contiguous landowners whose deeds contained identical restrictions on the use of their land.[9] The Town had a comprehensive zoning plan which contained virtually the same restrictions.[10] The controversy arose when Talmo, the Town, and the County negotiated a plan whereby the County was to release its "dedicatory rights" to a portion of Talmo's property in exchange for $70,000, paid in equal shares by Talmo and the Town. Talmo also was to convey a strip of his property to be used as a pedestrian easement.[11] In addition, Talmo was to convey another portion of his land to the Town to be used as a site for a town hall or other municipal use in exchange for the Town's rezoning of the land retained by Talmo to allow for multi-family housing and to permit construction of a single-unit dwelling with only 70 feet of ocean frontage.[12] All of the uses planned by the Town, the County and Talmo violated the terms of the restrictive covenants contained in the deed to Talmo's land.[13]

At trial, the court granted motions to dismiss in favor of the

---

8. 414 So. 2d at 194.

9. *Id.* The restrictive covenants limited construction to single family dwellings on lots with a minimum of 150 feet of ocean frontage. *Id.* It should be noted that Talmo had questioned whether the restrictive convenants applied to his land. The supreme court, however, for purposes of their review, assumed the applicability of the restrictions to Talmo's land. *Id.*

10. *Id.* at 194.

11. *Id.*

12. *Id.*

13. *Id.* at 194-95.

Town and County on the "ground that restrictive covenants are not enforceable against governmental bodies that acquire land for public purposes."[14] Talmo's motion to dismiss as to the remainder of his land was denied.[15] Ryan appealed the dismissal orders.[16]

On appeal, the district court held that it could "see no distinction between when the land is acquired by agreement or purchase" as opposed to when it is acquired by condemnation.[17] The court observed: "In either case the restrictive covenants do not 'constitute property in those in whose favor such restrictions exist for which compensation must be made. . . .' and thus the covenants are not enforceable against the public body."[18] Nevertheless, the court considered the acquisitions by eminent domain and acquisitions by agreement or purchase important enough to certify the question to the supreme court.[19]

The supreme court approved the decision of the district court,[20] holding:

> With an accurate understanding of the *Bay Harbor Island* case, it can be seen that the district court's certified question was answered twenty-seven years ago: restrictive covenants are no more enforceable against a governmental body when it acquires land for public purposes by purchase than they are when it does so by eminent domain.[21]

After briefly reiterating the reasons for the *Bay Harbor* holding, the court discussed and then rejected Ryan's claim, based on *Thompson v. Squibb*,[22] that *Bay Harbor* did not apply.[23]

The *Squibb* case was one of two cases involving restrictive covenants and the "acquisition" of burdened land for public purposes to reach the appellate courts within the twenty-seven year span between *Bay Harbor* and *Ryan*.[24] In *Squibb*, the defendant, an

---

14. *Id.* at 195.
15. 393 So. 2d at 634.
16. 414 So. 2d at 195.
17. 393 So. 2d at 635.
18. *Id.* (quoting Board of Public Instruction v. Town of Bay Harbor Islands, 81 So. 2d at 639).
19. *Id.* The Florida Constitution provides that the supreme court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." FLA. CONST. art. V, § 3(b)(4).
20. 414 So. 2d at 194.
21. *Id.* at 196.
22. 183 So. 2d 30 (Fla. 2d DCA 1966).
23. 414 So. 2d at 196-97.
24. The other case was Kosanke v. City of St. Petersburg Beach, 256 So. 2d 395 (Fla. 2d

owner of a subdivision, attempted to use a lot she owned in an adjoining subdivision as a connecting street. All lots in the adjoining subdivision were restricted by covenant to residential purposes. The Squibbs brought the action to enjoin the defendant from using her lot in a manner inconsistent with the restrictive covenants.[25] The defendant invoked the principle of *Bay Harbor* as a defense, contending that since burdened land may be acquired for public purposes in disregard of restrictive covenants, "then the owner of such restricted land may make a voluntary conveyance or dedication of the land for a public use . . . without liability for breach of the covenants." [26]

The court refused to adopt this reasoning. It reiterated the holding in *Bay Harbor* that private persons contract with knowledge that "any land may be taken by the sovereign for public purposes at any time"[27] and thus impliedly except the sovereign from the operation of restrictive covenants. However, the court held: "[I]t [does] not necessarily follow that a landowner may voluntarily and without at least some substantial prospect that some public authority will exercise the power of eminent domain convey or dedicate his property for a use . . . which would violate his covenants."[28] Unlike *Bay Harbor,* the Squibb court said, "[T]his is a controversy wholly between private parties" and the court was not going to "eliminate or weaken the obligations of . . . covenants as between private parties."[29]

While *Squibb* seemed to provide an opportunity for limiting the *Bay Harbor* principle to situations where the public authority is planning to use its eminent domain power, the *Ryan* decision makes it clear that *Squibb* means little in terms of protecting the beneficiaries of restrictive covenants. The *Ryan* court limits *Squibb* to its facts, that is, to situations where there is "no governmental participation whatsoever," and holds that regardless of how the transaction is classified, "there is by virtue of the agreement an acquisition of property by a local government for public pur-

---

DCA 1972). *Konsanke* involved the City's proposed recreational development of property that had been dedicated for park purposes. A portion of the property was restricted to church site and villa site purposes. The court held that the restrictions were not enforceable against the City in accordance with *Bay Harbor.*

25. 183 So. 2d at 31-32.
26. *Id.* at 33.
27. *Id.*
28. *Id.*
29. *Id.*

poses."[30] Furthermore, the court holds that it is irrelevant whether the public use proposal originates from a private owner's plan of development or from a public body's plan.

The supreme court does not explain why it considers the means by which burdened land is acquired irrelevant. In *Bay Harbor*, upon which the *Ryan* decision is based, the supreme court did not concern itself with the fact that the burdened land was to be purchased as opposed to being condemned, but discussed both voluntary and involuntary means of acquisition as though they constituted "takings."[31] Nevertheless, the supreme court's lumping together of voluntary and involuntary means of acquisition can be justified in this context since, from the point of view of a beneficiary of restrictive covenants, it would appear to be irrelevant which means is employed to acquire the burdened land. Whichever means is employed, the beneficiary of the covenants has had his rights destroyed when the public body acquires the land and he would be entitled to compensation *if* those rights are deemed "property."

While the means used to acquire the burdened land may be irrelevant to beneficiaries of restrictive covenants, the fact that private landowners can initiate the transaction that results in the public acquisition is relevant since it increases the likelihood that their rights will be destroyed. The effect of the *Ryan* decision is to allow a landowner in the position of the defendant in *Squibb* to circumvent the restrictions on her land if she obtains a governmental body's participation in her plans before an owner of the restrictive covenant rights brings an action to enjoin her.[32] As long as the burdened landowner's planned use of the land is consistent with a governmental body's power to acquire land for the public benefit, the burdened landowner may be able to accomplish indirectly what she could not do directly, that is, have the land put to a use inconsistent with the terms of the restrictive covenants by "coaxing" a

30. 414 So. 2d at 197.

31. Acquisitions of property by voluntary means, e.g., by purchase agreement, are not "takings" in either the common sense or the constitutional sense. To be considered a "taking" the property must be seized or destroyed against the will of the owner. *See* 2 NICHOLS, EMINENT DOMAIN § 6.1 (3d ed. 1981).

32. According to the *Ryan* court, if Mrs. Thompson (the defendant in *Squibb*) had kept her plans to herself until she could coax a governmental body into participating in them, that case would have been decided the other way. This leaves the lot owners who are benefited by restrictions defenseless against the individual who buys a lot as part of a plan of development. The fate of their rights will be involuntarily and unknowingly placed at the mercy of governmental bodies which have the power to acquire the lots.

governmental body to go along with her plans. Whether a governmental body becomes interested in a landowner's plan may depend as much on the political influence of the landowner as the practical benefits conferred on the governmental entity through the transaction. Because burdened landowners may be willing to give up much in order to accomplish their development plans, governmental bodies are likely to be confronted with offers they can't refuse.[33] Governments can in turn use the existence of the covenants as leverage in order to create favorable deals for themselves at the expense of the beneficiaries of the covenants who can do nothing to prevent their rights from being destroyed and the value of their property from being diminished. The *Ryan* case is a perfect example of this type of leverage and it shows how far a burdened landowner may go to free his land of encumbrances. Of course, this case involved dedicatory rights and zoning restrictions as well as restrictive covenants.[34]

The purpose of the *Ryan* agreement, as far as Talmo was concerned, was to enable him to use most of the beach front portion of his land for multi-family housing—a purpose that was in violation of the terms of the restrictive covenants.[35] Talmo gave up nearly half of his property and $35,000 to do so.[36] Nevertheless, regardless of whether the County released its dedicatory rights and whether the Town rezoned the retained portion of his land, the retained portion remains burdened by the covenants. It does so because it was not acquired for public purposes and because "the zoning or rezoning of real property cannot in any way abolish, abrogate or enlarge lawful contractual covenants and restrictions pertaining thereto."[37] The anomalous result is that the Town and County now own portions of Talmo's land and may do with it as they please, while Talmo has less land and it is still restricted by the covenants.[38] Meanwhile, Ryan has lost the benefit of the covenants to

33. Indeed, the defendant in *Squibb* was willing to donate the lot in the adjoining subdivision to the public in order to accomplish her plans.

34. 414 So. 2d at 194.

35. *Id.*

36. *Id.*

37. Staninger v. Jacksonville Expressway Auth., 182 So. 2d 483, 485 (Fla. 1st DCA 1966). *See also* Tolar v. Meyer, 96 So. 2d 554 (Fla. 3d DCA 1957).

38. Technically, Talmo received compensation from the Town and County to support the agreement. While the rezoning of the retained portion of Talmo's land could not remove the restrictions, since restrictive covenants are subject to discharge by release or agreement, he is a step closer to freeing his land of encumbrances. *Restatement of Property* § 557 (1944).

the extent they applied to that portion of Talmo's land now owned by the Town and County.

II. Bay Harbor and the Minority View

A. *Introduction*

It has been observed that: "Since the exercise of the power of eminent domain is one of the most harsh proceedings known to the law, both the United States and the Florida constitutions contain provisions to safeguard the rights of the individual."[39] In addition to the requirement of due process,[40] the Florida Constitution provides that "No private *property* shall be taken except for a public purpose and with full compensation therefore paid to each owner."[41]

The controversy regarding restrictive covenants has centered on the issue of whether such covenants, or more properly, the rights they create, are to be considered "property". In *Bay Harbor,* the Florida Supreme Court faced this issue for the first time.

B. *Bay Harbor*

The Town of Bay Harbor Islands brought suit to enjoin the Board of Public Instruction of Dade County, which had contracted to purchase land within the town's corporate limits, from building and operating a public school on such land in contravention of restrictions in the town's subdivision plan.[42] The Board appealed the decree of the circuit court enjoining it from proceeding with the construction and operation of the school.[43] On appeal, the supreme court adopted the "minority" view or what it called the "better view, if it is not actually the majority view," holding that restrictions in covenants are not "property" for which compensation must be made in the event land burdened by the restrictions is acquired for public purposes.[44]

While the *Bay Harbor* court characterized the minority view as

---

39. The Florida Bar, Florida Eminent Domain Practice and Procedure § 2.2 (3d ed. 1977).

40. Fla. Const. art. I, § 9 provides in part: "No person shall be deprived of life, liberty or *property* without due process of law." (emphasis added).

41. Fla. Const. art. X, § 6 (emphasis added).

42. 81 So. 2d at 638-39.

43. *Id.*

44. *Id.* at 642.

the "recent trend,"[45] that characterization appears to have been erroneous. The most recent case the court could cite in support of the minority view was *Anderson v. Lynch*,[46] one of first impression in the Georgia Supreme Court and some sixteen years old at the time it was cited in *Bay Harbor*. If the court had looked a little farther north, it would have found that in 1952, just three years prior to its decision, the North Carolina Supreme Court had recognized restrictive covenant rights as property.[47] Moreover, the other cases decided in the interval between *Anderson* and *Bay Harbor* cited as supporting a state's position on the issue, all support the majority view.[48] The Florida Supreme Court, nevertheless, relied heavily on the Georgia case.

Bay Harbor, Anderson and "the [other] cases that may be cited as opposed to compensation all rest . . . largely on one case . . . in which the doctrine expressed was *dictum*."[49] The case, *United States v. Certain Lands*,[50] is quoted extensively by the *Bay Harbor* court. *Certain Lands* involved the condemnation of land for the purpose of erecting fortifications for coastal defense.[51] The deeds to the condemned land contained restrictive provisions listing a number of uses that were to be prohibited.[52] The court gave two factually-based reasons why the restrictions did not apply to the government. The first reason was that "the right acquired by the

---

45. *Id.*

46. 3 S.E.2d 85 (Ga. 1939).

47. City of Raleigh v. Edwards, 71 S.E.2d 396 (N.C. 1952). The court stated:

> [T]he decided weight of authority in other jurisdictions supports the proposition that such a restriction, being in the nature of an equitable servitude, is an interest in land and must be paid for when taken. The theory is that these restrictions impose negative easements on the land restricted in favor of and appendant to the rest of the land in the restricted area, and when a particular parcel thereof is appropriated for a public use that will violate the restrictions, such appropriation amounts in a constitutional sense to a taking or damaging of property of the other landowners for whose benefit the restrictions are imposed.

Id. at 401.

48. Ashland-Boyd County City-County Health Dep't. v. Riggs, 252 S.W.2d 922 (Ky. 1952); Burger v. City of St. Paul, 64 N.W.2d 73 (Minn. 1954); Crayden v. Seidman, 87 Pa. D. & C. 118 (1952); Meagher v. Appalachian Elec. Power Co., 77 S.E.2d 461 (Va. 1953).

49. Aigler, *Measure of Compensation for Extinguishment of Easements by Condemnation*, 1945 WIS. L. REV. 5, 31.

50. 112 F. 622 (C.C.D.R.I. 1899), *aff'd sub nom*, Wharton v. United States, 153 F. 876 (1st Cir. 1907).

51. *Id.* at 624.

52. *Id.* at 624-25. The provision provided, in part: "But this deed is on condition that no slaughterhouse, smith shop, steam engine, furnace, forge, bone-boiling establishment . . . [nor] other noxious, dangerous, or offensive trade or business whatever shall ever be done . . . upon said land. . . ."

government [did] not appear to be in any substantial particular inconsistent with the provisions. . . ."[53] The second reason was based on a finding that the limitation of remedy clause contained in the provisions did not provide for remedies that could be applied against the government.[54] Sandwiched between was dicta in which the court said that, as a matter of public policy, even if the government's use was inconsistent with the provisions, the beneficiaries of the restrictions could not enforce them against the government and would not be entitled to compensation for any depreciation in the value of their property due to the public use.[55] The court's primary concern was that if restrictive covenant rights were recognized as being compensable, then private parties could through "a mere device of conveyancing . . . defeat entirely the rule that depreciation of property incidental to a public use does not constitute a 'taking.' "[56]

While this doctrine was followed by at least one early federal decision,[57] it is clear that rights created by restrictive covenants are now recognized as property under existing federal law.[58]

The *Bay Harbor* court also had relied on the fact that California courts had "long since adopted the rule which the Georgia Court . . . concluded to be the better rule."[59] It is interesting to note that in 1973 the California Supreme Court abandoned the minority view, rejecting each of its major justifications.[60] These are the same justifications advanced by the *Bay Harbor* court.

C. *The Minority View Rationales*

Basically, there are five justifications advanced by the courts subscribing to the minority view. The first two are nothing more than conclusions and the last three are based upon public policy.

The first justification is based upon labeling. The supreme court,

---

53. *Id.* at 627.
54. *Id.* at 630.
55. *Id.* at 627-30.
56. *Id.* at 629.
57. Moses v. Hazen, 69 F.2d 842 (D.C. Cir. 1934). However, in this case, as in *Certain Lands*, the court first found that the contemplated use was not inconsistent with the restrictions.
58. Adaman Mutual Water Co. v. United States, 278 F.2d 842 (9th Cir. 1960); United States v. 0.01 Acre of Land, 310 F. Supp. 1379 (D. Md. 1970); United States v. Certain Land in City of Augusta, Maine, 220 F. Supp. 696 (S.D. Me. 1963); United States v. 11.06 Acres of Land, 89 F. Supp. 852 (E.D. Mo. 1950).
59. 81 So. 2d at 643.
60. Southern California Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973).

in *Bay Harbor*, states that "restrictions . . . do not fall within the category of true easements, such as the right of passage, use, or rights of light, air and view" but are more correctly defined as "negative easements or equitable servitudes."[61] The court continues:

> 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. It may well be that the failure of some of the courts to recognize this *real difference* has led to the confusion and the 'irreconcilable conflict' in the decisions.[62]

The court does not support its conclusion that restrictive covenant rights are rights arising out of contract and does not discuss just what significance this "real difference" in their classification has on the resolution of the conflict.

The court states that restrictions are not "true easements" but are "negative easements or equitable servitudes" and implies this distinction is significant. However, this statement is misleading for two reasons: (1) the so-called true easements of light, air and view are themselves negative easements,[63] and (2) these easements are not always recognized as compensable property interests.[64]

The interests that have been recognized as "true" negative easements are basically limited to those of light, air and view. The recognition of these interests stems from the common law doctrine of ancient lights.[65] Under this doctrine, a landowner could prevent his neighbor from obstructing his access to light, air or view if he had enjoyed their unobstructed passage for a period of time, typically twenty years. This doctrine has, however, been uniformly rejected in the United States.[66] Thus, unlike affirmative easements, these negative easements cannot be created by prescription. Furthermore, implied negative easements have been held in Florida to be noncompensable in the event they are destroyed by a public use.[67]

---

61. 81 So. 2d at 640.
62. *Id.* (footnote omitted) (emphasis added).
63. Easements may be classified as being either negative or affirmative (positive). Negative easements are those that allow one person to restrict another from using his land in certain ways. Affirmative easements allow a person to use the land of another in a limited manner. *See* 3 R. POWELL, REAL PROPERTY § 405 (1949).
64. *Id.*
65. *Id.* at § 414(8).
66. *Id.*
67. Seldon v. City of Jacksonville, 10 So. 457 (Fla. 1891); Bowden v. City of Jacksonville, 42 So. 394 (Fla. 1906); (both cases involved the erection of a viaduct by a municipal govern-

In *Weir v. Palm Beach County,*[68] the supreme court held, *inter alia,* that an individual's right to view is "subordinate to the public good and any alleged damage suffered is damnum absque injuria."[69] However, while there is a lack of case law on point, the general consensus is that these negative easements may be created by express grant and, if so created, would be held compensable in the event they were destroyed by a public taking.[70] This last point is important since the courts following the majority view base their decisions on the idea that restrictive covenant rights are indistinguishable from negative easements. Restrictions and negative easements share a major characteristic—both have the effect of preventing a landowner from using his land in otherwise permissible ways.

The *Bay Harbor* court, as with other courts subscribing to the minority view, is content, however, with labeling restrictions not as "true easements" but rather "rights arising out of contract" without discussing why that is significant. The attempt to establish a substantive distinction based merely upon the labels applied is both "inequitable and rationally indefensible."[71]

The second justification for the *Bay Harbor* rule is as weak as the first. It holds that, since "[t]he Constitution and laws of [the] State are a part of every contract," and because "[e]very person is charged with knowledge that any land may be taken by the sovereign . . . at any time,"[72] then it somehow follows that public bodies are impliedly excepted from the operation of restrictive covenants.[73] Of course, this "reasoning" is merely circular. It is exactly this issue—whether the covenants apply to public bodies—that must be decided in order to determine what the law is which forms a part of every contract. Furthermore, this reasoning could apply to any improvements to property made pursuant to a contract. For example, in the case of a lot owner who had contracted to have a

---

ment thereby destroying an abutting lot owner's implied rights to light and air and his rights of ingress and egress).

68. 85 So. 2d 865 (Fla. 1956).

69. *Id.* at 869. Damages that are damnum absque injuria are those that do not give rise to an action in damages against persons who cause them. BLACK'S LAW DICTIONARY 354 (rev. 5th ed. 1979).

70. *See* 3 R. POWELL, *supra* note 63 at § 414 [8]. The fact that the supreme court in *Bay Harbor* makes the distinction between these "true" negative easements and restrictions evidences that it considers them compensable in some situations. By the process of elimination, the compensable situations must be those created by express grant.

71. 507 P.2d at 966-67.

72. 81 So. 2d at 643.

73. *Id.* at 641 (quoting 2 NICHOLS, EMINENT DOMAIN § 5.73 (3d ed. 1950)).

residence built upon his lot, it could be argued that a public body which acquires the lot need not compensate him for the value of the residence since the lot owner knew at the time he entered the contract that his lot could be "taken by the sovereign at any time."

The third justification is based upon the notion that it is somehow incongruous to allow private parties to create compensable rights out of the "thin air,"[74] imposing a new burden on the public, when the state has the power to condemn the land prior to the creation of those rights. Standing alone, the fact that a new burden would be imposed could not possibly justify the nonrecognition of restrictive covenant rights.[75] Private parties can and do create new compensable rights through grants of easements and there is no reason why these rights should be compensable, and restrictive covenant rights not, when "upon condemnation in both situations the financial burden of the condemner [would be] increased solely by virtue of agreements made between private parties."[76] If this "new burden" rationale is taken seriously, the state could avoid compensating landowners for any improvements made upon their land as well.

The fourth justification for non-compensation is related to the third. The concern is that not only would a new burden be created by recognizing covenant rights as property, but recognition would entail the payment of damages that have heretofore been considered noncompensable.[77] These so-called consequential damages represent the depreciation in the value of property caused when nearby property is put to a public use, and are generally considered noncompensable.[78] The consequential damage rule would appear to be out of place in this context, however, because the covenants create a legally recognizable interest in the land taken and "make direct . . . the damages which otherwise would be consequential."[79]

---

74. Arkansas State Highway Comm'n v. McNeill, 381 S.W.2d 425, 427 (Ark. 1964).

75. Although the Florida Supreme Court does not explicitly voice this concern, some minority view courts have expressed a fear that landowners would impose a new burden in bad faith. However, this concern was answered by the California Supreme Court in *Southern California Edison Co.* when it stated that "the speculative possibility that some unduly acquisitive landowners might in bad faith enter into restrictive covenants . . . would not justify the denial of compensation to all property owners. . . ." Furthermore, as the court points out, courts have the power to deny compensation upon a finding of bad faith. 507 P.2d at 968.

76. *Id.* at 966 (footnotes omitted).

77. 81 So. 2d at 642 (quoting United States v. Certain Lands, 112 F. 622, 629).

78. *See* 2A NICHOLS, EMINENT DOMAIN § 6.4432(1) (3d ed. 1981).

79. Flynn v. New York, W. & B. Ry., 112 N.E. 913, 914 (N.Y. 1916). *See also* Brickman,

In the absence of restrictions a landowner cannot prevent his neighbor from using his land in ways that may depreciate the value of his property, except when those uses constitute nuisances.[80] Through restrictive covenants, a landowner can protect the value of his property by prohibiting his neighbor from using his land in otherwise permissible ways. Moreover, he may, with the benefit of such covenants, enjoin his neighbor without having to prove actual depreciation in the market value of his property.[81] It is this right—the right to enjoin a neighbor from using his land in otherwise permissible ways—that is taken when the sovereign acquires the burdened land and it is for this "taking" that the beneficiaries of covenants seek compensation. When the burdened land is acquired for public purposes, the rights are destroyed. There is nothing indirect about this damage.

The fifth justification expressed by the court in *Bay Harbor* is that if the courts were "to recognize a right of compensation in [these] 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."[82] Assuming that compensation will approximate value taken, the court's inference that the owners of restrictive covenant rights are benefited insignificantly by existence of the rights would, if true, simply defeat any argument that the substantive burden would be "intolerable." However, it is often the case that covenant rights are extremely valuable. Furthermore, it is difficult to see how the substantive burden would be *out of proportion* to the benefits received from covenant rights when compensation would be determined by a relatively objective measure—the difference in the fair market value of the benefited tenements before and after the burdened land is acquired.[83]

The real concern of the courts is that, in their view, the substantive and procedural burdens would, in many instances, be so great that as a practical matter governmental bodies would be prevented from exercising their eminent domain powers.[84] In situations where

---

The Compensability of Restrictive Covenants in Eminent Domain, 13 U. FLA. L. REV. 147, 169 (1960).

80. Reaver v. Martin Theatres, 52 So. 2d 682 (Fla. 1951); Preston v. Schrenk, 295 P.2d 272 (Idaho 1956).

81. 5 R. Powell, Real Property § 676 (1949).

82. 81 So. 2d at 643 (footnotes ommited).

83. *See* 2 NICHOLS, EMINENT DOMAIN § 5.73(1) (3d ed. 1981).

84. 81 So. 2d at 643.

there are only a few benefited tenements, this concern would seem unwarranted for even if the covenant rights were quite valuable to their individual owners, the aggregate amount to be compensated could not reach a prohibitive figure. With few potential litigants, the additional procedural burdens are also likely to be small. The additional burden in these situations would simply be another cost for the public body to consider in choosing the particular lot to be acquired. In this manner land is put to its optimum use.

It is only in situations where there are many covenant beneficiaries that the "intolerable burden" argument appears warranted. As expressed in *Bay Harbor:*

> In the event of the construction of a public building in a large subdivision containing many separate ownerships, a determination of the varying degrees of damage, if any, which might be claimed by the individual lot owners would present obstacles of an unwarranted nature in the exercise of the sovereign power.[85]

While the concern expressed above was with procedural burdens, courts have also been concerned with the substantive burdens which arise where there are a large number of potential claimants.[86] However, in such a situation, it is unlikely that all lots would be harmed by a public use acquisition. In fact, the owners of lots not in the immediate vicinity of the acquired land may actually be benefited. For example, in the case of a fire station, "it can well be said that little difficulty would be experienced with those whose lots are not in close proximity to the proposed site."[87] Even if a large number of lot owners suffer a technical loss, as a practical matter, the number of claimants is not likely to be overwhelming since: (1) "As the distance of the claimant's lot from the invaded tract increased, the amount of compensation would rapidly diminish, soon to the vanishing point,"[88] and (2) those who hold small claims are likely to find that it would not, as a practical matter, be worth pressing their claims or, in any event, they may be expected to settle out of court for nominal amounts.[89]

---

85. 81 So. 2d at 643-44.
86. City of Houston v. Wynne, 279 S.W. 916, 920 (Tex. Civ. App. 1925).
87. Allen v. City of Detroit, 133 N.W. 317, 321 (Mich. 1911).
88. Aigler, *supra* note 49, at 32.
89. As far as costs of condemnation proceedings, including reasonable attorney's fees, are concerned, Florida law presently requires they be paid by the condemning authority. FLA. STAT. § 73.091 (1981). One commentator has suggested that this statute be modified in the case of restrictive covenants. *Brickman, supra* note 79, at 168.

Specifically regarding the procedural burdens, a number of approaches may be taken to limit the burden that would befall the public. One suggestion that has been made is that the requirement of serving notice could be met through publication.[90] A Florida statute presently allows for notice by publication in eminent domain proceedings where the property owner is not a resident of the state or if personal service cannot be had "for any other reason."[91] Where personal service can be had, notice by publication may be insufficient to satisfy due process requirements.[92] Nevertheless, in the typical subdivision situation, providing notice directly to benefited lot owners would appear to be a simple and inexpensive thing to accomplish. Interested lot owners can be ascertained from public records and delivery of notice could be accomplished easily because the lot owners would all be living together in what is usually a well-defined neighborhood. Another suggestion is that a portion of the costs of condemnation proceedings could be assessed to claimants whose claims are deemed frivolous.[93] As far as the determination of damages is concerned, a special master could be appointed to provide courts with recommendations. Also, the burden of proving damages could be placed upon the condemnees.

While heavy burdens, both substantive and procedural, may arise in certain instances, one commentator nevertheless noted that "the constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy."[94] Certainly, in terms of fairness, it would be more fair to spread the costs over the public, for whose benefit the burdened land has been acquired, than to place them all upon the shoulders of a small group of private property owners.

III. The Majority View: The Nature of Restrictions

The courts subscribing to the majority view take a more logical approach to this issue. Instead of simply labeling restrictive cove-

---

90. *Id.* at 166.

91. Fla. Stat. § 73.031 (1981).

92. *See, e.g.*, Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); In *Walker*, a portion of the appellant's land was condemned. Although the appellant's name was known to the city and was contained in official records, the only notice given was by publication in a city newspaper. The court held that under such circumstances, notice by publication was insufficient to meet due process requirements. 352 U.S. at 116.

93. Brickman, *supra* note 79, at 168.

94. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L. Rev. 293, 307 (1970).

nant rights, they look instead at their nature. These courts resolve the issue as follows:

> Why should a party receive compensation for an easement right which enhances the value of his property and yet be denied compensation for a right obtained by a restrictive covenant which similarly adds to the value of his holdings? Both interests are directly connected to the land and we are unable to find a distinction between them which will justify dissimilar treatment at the hands of a condemning authority.[95]

The rule followed by all American jurisdictions is that legally recognizable easements are property rights that must be compensated for when taken by a public authority.[96] Thus, if there are no significant distinctions between restrictive covenant rights and these other easements, logic would dictate that they be treated as property rights. In fact, even the courts subscribing to the minority view seem to concede that the rights created by restrictive covenants are, in effect, negative easements.[97] The only distinction these courts allude to is that restrictive covenant rights rest upon contract law, while easements have their roots imbedded in the common law of property.[98] The Florida Supreme Court and the other minority view courts rely on this technical distinction not so much as a rationalization, for the courts do not explain just what significance this distinction has, but as a convenient excuse for denying compensation based upon public policy concerns.[99]

IV. Conclusion

While an examination of the nature of restrictive covenants would seem to be the most important step in determining whether the rights they create are, in fact, "property," the Florida Supreme Court, like the other courts subscribing to the minority view, does not take this approach. Instead its contention, put in simple terms, is that it would cost too much to recognize these rights as property.

---

95. Adaman Mutual Water Co. v. United States, 278 F.2d 842, 849 (9th Cir. 1960).

96. 2 Nichols, *supra* note 83, at § 5.72. Fla. Const. art. X, § 6(b) provides: "Provision may be made by law for the taking of easements . . ." *See also* Glessner v. Duval County, 203 So. 2d 330 (Fla. 1st DCA 1967); City of Miami Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d DCA 1965).

97. One court has conceded that restrictions were, in fact, "property" even though it held them noncompensable. Arkansas State Highway Comm'w v. McNeill, 381 So. 2d at 427.

98. 2 American Law of Property § 9.40 (1952).

99. *See supra* text accompanying notes 60 and 61.

This assessment has been based not on actual fact patterns presented to the courts but on hypothetical situations that are not likely to occur with any substantial frequency.[100] The fact that many jurisdictions have long subscribed to the majority position, allowing compensation where restrictive rights are destroyed, evidences that such situations happen infrequently or when they do occur, do not present the difficulties advanced by the minority view.[101] Meanwhile, in frequently occurring situations, the beneficiaries of restrictive covenants are having what can only be deemed property rights destroyed without the compensation constitutionally guaranteed them.

In *Ryan v. Town of Manalapan*, the supreme court had the opportunity to reexamine its minority view position and, at the very least, could have limited the scope of its *Bay Harbor* holding to those situations where public bodies initiate the plan whereby land burdened by restrictive covenants is acquired. The court did neither, and as a result, beneficiaries of restrictive covenants find their rights not only vulnerable to public plans of development, but to private plans as well. Furthermore, judging from the infrequency with which these cases are reviewed by the supreme court, it is unlikely that that court will be reexamining its stance in the foreseeable future.

THOMAS CONRAD

---

100. In a frequently cited passage, a Texas court advanced a 10,000 lot hypothetical. City of Houston v. Wynne, 279 S.W. 916, 920 (Tex. Civ. App. 1925).

101. For example, Michigan has subscribed to the majority view for over 70 years. Allen v. City of Detroit, 133 N.W. 317 (Mich. 1911).