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MEMORANDUM

Confidential and Privileged Attorney Work-Product

TO: R. N. Koblegard, III

FROM: Timothy P. Atkinson

SUBJ: FPUA Reverter Clause Issues

DATE: April 28, 2015

You have sent for review three deeds (1946, 1956 and 1975), an agreement (1956) and a map. While the deeds contain property descriptions, there is no map or site plan that shows the precise aerial extent of the properties conveyed by deed. The map that was included does not appear to correspond to the deeds.

You previously indicated that there may exist a desire to relocate the existing FPUA water treatment facilities located on the parcels described by the deeds to another property located inland. The resulting vacant land, being situated in an advantageous location along the waterway, would then be sold or leased and developed, possibly in a partnership between the county, the city and private developers, for hotels, restaurants, condominiums and/or other commercial development.

The three deeds all contain a public purpose clause, that the land is to be used for public purposes only. However, only the 1956 and 1975 deeds contain a reverter clause. The 1946 deed does not contain a reverter clause. Even though the land conveyed in the 1946 deed contained a public purpose clause, when no provisions for a reverter are made, it appears that a violation of the public purpose clause would not cause the property to revert, although a violation of the public purpose clause could subject the landowner to a declaratory judgment or mandamus action by the State to attempt to enforce the public purpose clause, which might include tearing down any structures constructed in violation of the public purpose clause.

The Courts of the State of Florida have generally approved of the concept of reverter clauses, and reverter clauses have appeared in Florida statutes[1]. Although such clauses are strictly construed "most strongly against the grantor," the guiding principle is the intent of the parties. *Loveland v. CSX Transportation, Inc.*, 622 So. 2d 1120, 1121 (Fla. 3rd DCA 1993). Should a portion of a property subject to a reverter clause be sold thereby violating the restriction, if it could be equitably separated from the main tract, the reversion clause would be triggered but only as to those portions of the property that were sold. *Loveland*, 622 So. 2d at 1123. The party seeking to quiet title via a reverter clause will bear the burden of demonstrating the violation of the reverter restriction. *Meigs Properties, LTD. v. Board of County Commissioners of Okaloosa County*, 107 So. 3d 1171 (Fla. 1st DCA 2013).

Deeds and Agreement

1) In a deed dated August 10, 1946 (Deed No. 19178), the Internal Improvement Fund deeded property (approximately 3.94 acres) to the Fort Pierce Inlet District. The deed does not contain a reverter clause, it does contain a public purpose clause: "The above described land is to be used for public purposes only."

2) In a deed dated April 20, 1956 (Deed No. 21183), the Trustees of the Internal Improvement Trust Fund deeded property (approximately 13.0 acres) to the City of Fort Pierce, Florida. This deed contains a very specific public purpose clause that the land shall never be sold or leased to ". . . any private person, firm or corporation for any private use or purpose, it being the intention of this restriction that the said land shall be used solely for public purposes." The deed also contains a reverter clause: "It is covenanted and agreed that the above conditions subsequent shall run with the land and any violation thereof shall render this deed null and void and the above described lands, shall in such event, revert to the Grantors or their successors."

   Shortly before the 1956 deed was given, on April 2, 1956, the City of Fort Pierce and the Fort Pierce Port Authority entered into an agreement, in pertinent part:

   - The City has undertaken installation of a sanitary sewer system and disposal plant and requires submerged lands.
   - References an application to the Internal Improvement Board for the conveyance by the Board of submerged lands to the City indicated on a sketch dated April 11, 1955 (missing). This sketch apparently references a Parcel A (to be conveyed from the City to the Port) and a Parcel B (to be retained by the City and filled in for the plant).
   - The City and Port agreed that the conveyance by the Board to the City would permit a conveyance by the City to the Port of fee simple unencumbered tile to the submerged lands (Parcel A).

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[1] For example, in Section 253.111(5) and (6), Florida Statutes (1967), the Florida legislature passed legislation related to transactions on offshore tidal lands held by the Board of Trustees. The Board of County Commissioners were given a first option to purchase any lands vested in the Trustees, except submerged lands riparian to an upland owner. However, lands purchased pursuant to this statute must have been utilized for outdoor recreational purposes; they were subject to a reverter to the Trustees if they were not so used.

3) In a deed dated March 21, 1975, from the Fort Pierce Port and Airport Authority to the City of Fort Pierce (no acreage specified), the deed contains both a public purpose and reverter clause: "TO HAVE AND TO HOLD, the same in fee simple forever; provided, however, that said land shall be used for public purposes only, and in the event that said land should ever cease to be used for public purposes, title thereto shall revert to the grantor."

There is nothing in the wording of the public use or reverter clauses in the three deeds which suggests that the restrictions would be found to against public policy or otherwise found invalid. The 1956 agreement merely demonstrates the need for the conveyances, and provides evidence of intent in the form of public sanitary sewer and disposal plant uses, but otherwise does not bear on the question of the validity of the reverter clauses.

Butler Act of 1921

In 1921, the Florida Legislature passed an act "Granting and Confirming Riparian Rights n Submerged and Filled-in Lands." This act, known as the Butler Act, followed the Riparian Rights Act of 1856, but the two acts were consistent and the Butler Act did not repeal the earlier act. Under the Butler Act, in order to foster commerce and to improve the state, the legislature intended to vest title in the riparian owner to the submerged lands upon the bulkheading, filling in, or otherwise permanently improving submerged lands. The Bulkhead Act (Chapter 57-362, Laws of Florida (1957), repealed the Butler Act and was codified in Section 253.129 (1957): "The title to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each such owner."

In this case, additional information is required to ascertain whether any property was bulkheaded, filled or otherwise improved such as to qualify for a transfer of title to have taken place under the Butler Act. Specifically, was any sovereign submerged lands, not otherwise subject to a reverter clause in a deed, bulkheaded, filled in, or otherwise permanently improved prior to 1957?

It would be most helpful (for several reasons, not just this Butler Act analysis) to obtain a drawing by a registered surveyor detailing the areas that 1) were filled or improved prior to the repeal of the Butler Act in 1957, 2) were granted under the 1946 deed, 3) were granted under the 1956 deed, and 4) were granted under the 1975 deed. In order to understand what areas might fall within category 1, the drawings of the deeded areas along with an aerial photographic history of the property may be needed. Historic photographs are available through various sources, such as the Florida Department of Environmental Protection and the Florida Department of Transportation, and elsewhere.

Waiver of Public Purpose and Reverter Clauses

Upon application to the Board of Trustees of the Internal Improvement Fund, potentially for consideration, the public purpose and reverter clauses could be waived, especially where it could be shown to the Trustees that the action would be for a public purpose and an environmental benefit.

Relocating the FPUA water treatment facilities to a property located inland would have several public benefits. First, the aging facilities at the current location would be replaced with newer facilities utilizing modern technology and equipment. There might also be less of a chance of an environmental hazard caused by severe storms or by rising sea levels. The new inland facility and transfer / conveyance structures to the new facility would likely be expensive (you indicated in the $100M ballpark) and would likely be paid for by public funds. Some part of the cost of the new facility would be paid for by the sale or lease of the existing lands to private developers or other private interests. Every dollar of the public treasury saved through such private investment would therefore be in the public interest. Also, while purely an esthetic consideration, the treatment facility would no longer be an eyesore for the area and attractive new development could take its place, thereby encouraging other growth and modernization within the area.

The resulting vacant land, being situated in an advantageous location along the waterway, would then be developed, possibly in a partnership between the county, the city and private developers or other private interests, for hotels, restaurants, condominiums, and/or other desirable commercial development. The development would bring short-term and long term job growth. It would be very important to highlight for the Trustees job creation estimates from a credible expert in the field.

It is unknown what consideration, if any, the Trustees would require for the waiver of the public purpose and reverter clauses. A recent waiver item before the Trustees in May of 2013 however, indicates that the Trustees exacted 15% of rental payments as consideration for waiving a reverter for a proposed state-of-the-art public and private commercial mega yacht marina and mixed-use development on Watson Island in Miami-Dade County on Biscayne Bay. Attached are copies of the agenda and portions of the transcript.

The waiver process is political, and while the Trustees rely upon the staff (FDEP) for guidance, the Trustees have the ultimate decision. Objectors from the local area might attempt to influence the Trustees in order to make the cost prohibitively high or to deny the request. This can be seen in the attached agenda where objectors from the Sierra Club and residents groups spoke against the agenda item. It is our experience that careful planning, and continued, well-prepared, documented and unified communication with the FDEP, and the Trustees and their aides is essential to achieving a good outcome.

Further research could be done with FDEP, as the Board of Trustees staff, to ascertain whether and to what extent the Trustees previously waived public purpose and/or reverter clauses. Such information might serve to support an application by showing precedent for such actions.

Conclusion

It appears that the public use and reverter clauses would probably be found to be valid deed restrictions. The intent of the parties will be the key question in any dispute in court. If a portion of the overall parcel subject to a reverter restriction is sold or leased in contravention of the reverter clause, ownership of such portion would probably revert to the Trustees.

It is possible that a grant of tile under the Butler Act of 1921 was made subsequent to the filling in of submerged lands (and done prior to the Bulkhead Act in 1957). Additional information on the aerial extent and dates of fill would be needed, however, to complete the analysis.

The following information or documents are needed:

- A drawing by a surveyor detailing the areas that:
  1) were filled or improved prior to the repeal of the Butler Act in 1957, along with the dates of fill or improvement;
  2) were granted under the 1946 deed;
  3) were granted under the 1956 deed; and
  4) were granted under the 1975 deed.
- A composite drawing showing the areas granted under all three (3) deeds.
- Aerial photographic history of the property.

Clayton Lindstrom

From: Florinda Mazzarella
Sent: Wednesday, June 03, 2015 4:20 PM
To: Clayton Lindstrom
Subject: FW: Memorandum - reverter clause issues
Attachments: Flagstone Transcript exerpts.pdf; May 13 2014 Flagstone Agenda Item.pdf; FPUA Reverter Clause Memo.pdf

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From: The Koblegard Law Firm [mailto:koblegardlaw@aol.com]
Sent: Wednesday, June 03, 2015 4:08 PM
To: Florinda Mazzarella
Subject: Fwd: Memorandum - reverter clause issues

Florinda,

Please see attached Tim Atkinson's opinion. We received the information requested at the end from Shane this morning and will be forwarding that along for further review.

Thanks,
Rosalie

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-----Original Message-----
From: Tim Atkinson <TAtkinson@ohfc.com>
To: koblegardlaw <koblegardlaw@aol.com>; koblegardlaw2 <koblegardlaw2@aol.com>
Cc: Tim Atkinson <TAtkinson@ohfc.com>
Sent: Tue, Apr 28, 2015 6:24 pm
Subject: Memorandum - reverter clause issues

Dear Koby,

As you requested, please find attached my memorandum on the reverter clause issues.

I also attached some additional information discussed in the memorandum.

Please let me know if you have any questions. Please feel free to call me to discuss.

Best regards,

Tim

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From: Tim Atkinson
Sent: Monday, December 8, 2014 3:50 PM
To: 'koblegardlaw@aol.com'; 'koblegardlaw2@aol.com'
Subject: reverter clause issues

Hi Rupert,

It was a pleasure to speak with you this afternoon about the reverter clause issues for the FPUA water treatment facility.

In addition to the reverter clause issues we discussed, it would be a good idea to look at the Butler Act. If the property were filled prior to 1951, the State may have lost its interest in the property. It would be important to know when the property was obtained, when the submerged lands were filled, if there was a permit issued for the fill, and the sequence of these events, etc. I have attached a copy of the Anderson Columbia Co., Inc. v. Board of Trustees of the Internal Improvement Trust Fund case from 1999 that Ken Oertel and I litigated (Ken previously served as general counsel to the Board of Trustees by the way). The 1DCA in Anderson Columbia confirmed and discussed the operation of the Butler Act to confirm title in upland owners who fill in or bulkhead submerged lands adjacent to uplands.

It would also be important to research the exact wording of the reverter clause in the deeds. Depending on the wording, the reverter clause might violate the rule against perpetuities (Section 689.225, F.S.) or could be an unreasonable restraint on alienation, and therefore void.

If it appears the reverter is valid, the State (probably the Board of Trustees of the Internal Improvement Trust Fund) could extinguish it, particularly if it would be for a public purpose, and also an environmental benefit. Those matters are decided by the Governor and Cabinet.

Please let us know if you have any questions or if we may be of further assistance. I look forward to hearing from you.

Best regards,

Tim

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