No.

In the Supreme Court of the United States

MARINER'S COVE TOWNHOMES ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Amendment to the United States Constitution provides that no private property shall be taken for public use without just compensation. U.S. Const. amend. V. In the present case, the United States condemned 14 of 58 properties comprising Mariner's Cove Townhomes Association, Inc. All 58 properties were bound by a covenant running with the land to contribute assessment fees to support activities of the association. The Fifth Circuit recognized that the association's right to collect assessments was a property right under controlling state law but nevertheless held that the government need not pay any compensation for taking it. The question presented is:

Whether, as the Seventh, Ninth, and Tenth Circuits and numerous state supreme courts have held, "the right to collect assessments, or real covenants generally," App., *infra,* 18a, constitute *compensable* property under the Takings Clause or whether, as the Fifth and D.C. Circuits and a smaller group of state supreme courts have held, they constitute *noncompensable* property.

RULE 29.6 STATEMENT

Mariner's Cove Townhomes Association, Inc., does not have a parent corporation, and no publicly held company owns 10 % or more of the company's stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 705 F.3d 540. The order of the district court (App., *infra*, 28a-41a) is available at 2011 WL 5419725.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2013. Petitioners timely filed a petition for panel rehearing and rehearing en banc, which was denied on March 26, 2013. App., *infra*, 42a-46a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation."

STATEMENT

A. Introduction

The Takings Clause of the Fifth Amendment serves as a bulwark "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). "Though the meaning of 'property' * * * in

the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *United States* v. *Powelson*, 319 U.S. 266, 279 (1943).

The decision below implicates a recognized conflict concerning whether the Takings Clause requires the government, when exercising its power of eminent domain, to compensate private parties for the lost value of real covenants associated with the condemned land. Most jurisdictions hold that real covenants, defined as covenants that are "intimately and inherently involved with the land and therefore binding [upon] subsequent owners," App., *infra*, 16a n.4 (citing *Black's Law Dictionary* 421 (9th ed. 2009), create compensable property interests for purposes of the Takings Clause, *Adaman Mut. Water Co.* v. *United States*, 278 F.2d 842, 849 (9th Cir. 1960), see pp. 12-18, *infra*. In contrast, the court of appeals below joined a minority of jurisdictions in holding that rights created by such covenants, though considered real property under applicable state law, are nevertheless not compensable under the Takings Clause. See generally App., *infra*, 13a-27a, pp. 10-12, *infra*.

The decision below conflicts with bedrock principles of takings law. The government is obligated to provide just compensation any time "the interest for which compensation is sought is a property interest or right, and that interest has actually been taken." App., *infra*, 12a-13a. The court of appeals below determined that petitioner's covenant was unquestionably real property under Louisiana law, *id.* at 13a-16a, but nevertheless held that real covenants are not compensable because of "public policy concerns," *id.* at 20a; see generally *id.*

at 16a-23a. That holding subverts the Fifth Amendment's fundamental promise that private property not be taken without just compensation and threatens the stability of all real covenants, which are critical to structuring commercial and residential developments and conservation districts. This Court's review is warranted.

B. The Taking

This case arises out of the exercise of eminent domain against 14 of the 58 townhouses in Mariner's Cove, a residential development located near Lake Pontchartrain in Louisiana. App., *infra*, 28a-29a. After Hurricane Katrina destroyed a levee adjacent to the development, the United States Army Corps of Engineers sought to acquire these properties to facilitate access to the construction site for an improved pumping station. App., *infra,* 6a. Before condemnation, these 14 townhouses were subject to a variety of covenants, servitudes, and other obligations enumerated in the "Declaration of Servitudes, Conditions and Restrictions of Mariner's Cove Townhomes Association, Inc." App., *infra*, 5a. One such covenant granted Mariner's Cove Townhomes Association ("MCTA") the right to levy periodic assessments on the townhouses in the Mariner's Cove development to cover various expenses associated with the "maintenance, repair, replacement, administration and operation" of the development. App., *infra*, 52a. The owner of each townhouse was required to pay "a proportionate 1/58 share" of these expenses, *ibid.*, which resulted from, *inter alia*, "maintenance of all streets and pedestrian walkways within the project, lawn maintenance and landscaping, [and] maintenance of water and sewer

service," *id.* at 47a-48a, as well as maintenance of various insurance policies, *id.* at 57a-58a. In the event of nonpayment, MCTA could enforce a lien against the delinquent owner's property. *Id*. at 55a.

C. The District Court Proceedings

In June 2009, the government filed condemnation actions against 14 of these townhouses in the Eastern District of Louisiana, naming MCTA as an owner. App., *infra*, 6a. In response, MCTA filed an Answer and Declaration of Interest seeking just compensation under the Takings Clause of the Fifth Amendment for the loss of its right to collect assessments on these properties. *Id.* at 29a. The United States then moved for judgment on the pleadings, contending that MCTA's right to collect assessments, though property under Louisiana law, was not compensable under the Takings Clause. Mot. J. Pleadings at 14.

The district court granted the government's motion. App., *infra*, 41a. The court rested its analysis almost completely on distinguishing one of MCTA's principal authorities, *Adaman Mut. Water Co.* v. *United States*, 278 F.2d 842 (9th Cir. 1960), which held that the Takings Clause entitled a water company to compensation for the diminution of its assessment base. App., *infra*, 36a-40a. The court recognized that "[l]ike the water company in *Adaman*, MCTA is a non-profit business that collect[s] assessments from landowners in exchange for services pursuant to an agreement that state[s] that it r[u]n[s] with the land." *Id.* at 38a. Although MCTA's assessments were used to maintain the roads that gave residents access to the development and to maintain their water supply, *id*. at 36a-37a,

and were enforceable by liens on the subject properties, *id*. at 55a, the district court held that MCTA's assessment rights were not compensable under the Taking Clause. Unlike the assessment rights in *Adaman*, it held, MCTA's rights were not "directly connected with the physical substance of the land." *Id*. at 40a.

D. The Court of Appeals Decision

The court of appeals affirmed, holding that MCTA's rights under the real covenant, although unquestionably property under state law, were not compensable under the Takings Clause. App., *infra*, 13a-27a. In doing so, the court acknowledged that it was adopting the minority position in an "interjurisdictional conflict," recognized by "[v]arious texts," *id.* at 19a (citing 2 Nichols On Eminent Domain § 5.07[4][b], p. 5-366-72 (3d ed. 2012)), and noted that "decisions in other [jurisdictions] addressing this question are legion and conflicting," *ibid.*

The Fifth Circuit recognized that under Takings Clause principles, "the government is required to provide just compensation if the interest for which compensation is sought is a property interest or right, and that interest has actually been taken." App., *infra*, 12a-13a. The Fifth Circuit acknowledged that MCTA's assessment right was property under Louisiana law and observed that neither the district court nor the government disagreed. *Id.* at 13a, 16a. It also did not dispute that MCTA's interest had "actually been taken." *Id.* at 13a. The Fifth Circuit nonetheless held that MCTA's covenantal right was not compensable. *Id.* at 16a.

The court reasoned that providing compensation for the taking of real covenant rights implicated several "public policy concerns." App., *infra*, 20a. First, the court wrote that requiring compensation for the taking of "private covenants might unduly burden the government's ability to exercise its power of eminent domain," *id.* at 21a, especially when the covenants "do not stem from the physical substance of the land," *id.* at 22a. The court also concluded that "real covenants are akin to contracts; that no contract of private persons can make acts done in the proper exercise of government powers, and not directly encroaching upon private property, a taking; and that 'contracts purporting to do this are void, as against public policy.'" *Id.* at 21a (quoting *United States* v. *Certain Lands,* 112 F. 622 (C.C.D.R.I. 1899)).[1]

The court also stated that, in its view, MCTA's covenant was "functionally contractual" because "[b]ut for its inclusion in the Declarations, the * * * covenant * * * would amount to nothing more than a service contract." *Id.* at 22a.

The court concluded that because of the "contractual" nature of MCTA's covenant, compensation was barred by the "consequential loss rule." App., *infra,* 27a. The court acknowledged that this body of law distinguishes between "compensable losses of property" and "noncompensable losses of interests *other than* property," *id.* at 17a (emphasis

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[1] The court also noted the argument that "since the state has the power to condemn the fee before the imposition of a restrictive covenant, the placing of the additional burden on the land does not create a new compensable interest." App., *infra*, 20a n.8. However, the court did not expressly adopt this argument.

added), and recognized that the authorities the government relied on "d[id] not concern losses of property" but rather "business losses and frustration of contracts." *Id.* at 18a. "Nevertheless," the court concluded, "the consequential loss rule applies because MCTA's right to collect assessments is a real covenant that functions like a contract and * * * is not 'directly connected with the physical substance of the land.'" *Ibid.* (quoting *Adaman,* 278 F.2d at 845).

The Fifth Circuit maintained that its holding did not conflict with the Ninth Circuit's decision in *Adaman*, which likewise involved the compensability of a non-profit corporation's assessment rights on condemned property. The assessments in *Adaman* were paid by farm owners in exchange for the extraction and distribution of water from beneath their land. 278 F.2d at 844. As in the current case, those assessment rights were created by real covenants that ran with the land. *Id*. at 843-844. The Ninth Circuit in *Adaman* awarded compensation and explained that "any right or duty, benefit or burden, which moves or is transferred as one with * * * the land * * * must be deemed an interest in that land and compensable upon condemnation of the fee" because these rights and duties established a "direct connection with the land." *Id.* at 849.

The Fifth Circuit held that MCTA's case "differ[ed] from *Adaman* in two important respects." App., *infra*, 25a-26a. First, unlike MCTA's assessments, the water company's "not only were used to provide a service * * * but also enabled the landowners in the agricultural project to exercise the rights to the water underlying the project lands." *Id.* at 26a. "This direct connection between water rights

and the right to collect assessments differentiates *Adaman* from the instant case," the court held, "because [MCTA'a] assessments do not allow the landowners in Mariner's Cove to enjoy a tangible right arising from the land." *Ibid.* Second, the court concluded that MCTA's assessments lacked this "direct connection" for another, related reason. They were not charged "in exchange for a natural resource that was directly connected to the physical substance of the land." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

There is a deep, acknowledged conflict among the federal courts of appeals and state supreme courts over "whether the right to collect assessments, or real covenants generally, are compensable under the Takings Clause." App., *infra*, 18a. The issue has important implications for the hundreds of thousands of association-governed communities that collect $40 billion in assessment fees each year, Cmty. Ass'ns Inst., Industry Data, http://www.caionline.org/info/research/Pages/default.aspx (last visited June 6, 2013), to fund common services and amenities, including private roads, street lights, utilities, swimming pools, landscaping, security, and schools. In 2012, such associations governed 25.9 million American housing units in which 63.4 million people lived. *Ibid.* Whether such associations must be compensated under federal law for lost assessment fees when some of their individual properties are condemned now depends on the happenstance of geography. Since the conflict is deep and growing, this Court should not delay review.

I. There Is A Deep, Acknowledged, And Growing Conflict Among The Courts Of Appeals And State Supreme Courts Over Whether The Right To Collect Assessment Fees And Covenantal Rights More Generally Are Compensable Under The Fifth Amendment

In reaching its decision below, the Fifth Circuit recognized that an "interjurisdictional conflict," App., *infra*, 19a, exists over "whether the right to collect assessments, or real covenants generally, are compensable under the [federal] Takings Clause," *id.* at 18a. Answers to this "question," it noted, "are legion and conflicting." *Id.* at 19a. Both the leading treatise on eminent domain and the Restatement acknowledge the conflict. 2 Nichols On Eminent Domain § 5.07[4][a]-[b] (collecting cases and discussing the "majority" and "minority" views in the "dispute whether a person in whose favor such a restriction exists has a compensable interest in a condemnation proceeding"); Restatement (Third) of Property: Servitudes § 7.8, reporter's note (2000) (same). Indeed, the law is so unsettled that the United States itself takes both positions, demanding compensation when it loses the right to collect assessment fees under real covenants taken by state and local governments, see, *e.g.*, *California* v. *25.09 Acres of Land*, 329 F. Supp. 230, 232 (S.D. Cal. 1971), and, as here, refusing to pay compensation for such lost fees when it takes property subject to real covenants from private parties, App, *infra*, 6a-7a. Because "[t]he federal rule is uncertain," *Adaman*, 278 F.2d at 847, and "state decisions * * * are numerous [and] in hopeless conflict," *id.* at 849, only this Court's review can bring uniformity to the law

and settle this pressing and practically important issue.

A. Two Federal Circuits And Five State Supreme Courts Have Expressly Or Implicitly Held That The Right To Collect Assessment Fees Or Covenantal Rights More Generally Do Not Constitute Compensable Property Interests Under The Fifth Amendment's Takings Clause

The Fifth and D.C. Circuits have held that "the right to collect assessments, or real covenants generally, are [not] compensable under the [federal] Takings Clause." App., *infra*, 18a; see *Moses* v. *Hazen*, 69 F.2d 842, 844 (D.C. Cir. 1934) ("[A]s against the sovereign in discharge of a governmental function, [covenants] are not enforceable to restrict or burden the exercise of eminent domain."). In addition, Alabama has held that such interests are not compensable, *Burma Hills Dev. Co.* v. *Marr*, 229 So. 2d 776, 782 (Ala. 1969), without specifying whether its ruling rests on the federal or state takings clause. Since its supreme court has held that the federal and state provisions are coextensive, however, see *Rudder* v. *Limestone Cnty.*, 125 So. 670, 672 (Ala. 1929), its holding reaches the Fifth Amendment. Arkansas, Colorado, Georgia, and West Virginia have also held that such property interests are not compensable, see *Ark. State Highway Comm'n* v. *McNeill*, 381 S.W.2d 425, 427 (Ark. 1964); *Smith* v. *Clifton Sanitation Dist.*, 300 P.2d 548, 550 (Colo. 1956); *Anderson* v. *Lynch*, 3 S.E.2d 85, 89 (Ga. 1939), *State* v. *City of Dunbar*, 95 S.E.2d 457, 461 (W. Va. 1956), without making clear whether their rulings rest on federal or state takings law. Since it is

inconceivable that any state supreme court would fashion a state takings rule that violated that court's understanding of the federal constitution, these holdings must be presumed to rest implicitly on what federal law requires. As one state supreme court expressed the rule, if a state's constitutional protection "is more restrictive (less protective) * * * than the interpretation of that right by the United States Supreme Court, which, of course, is deemed the minimum permissible, then this court is *constitutionally obligated* to apply the * * * more protective[] federal interpretation." *Dworkin* v. *L.F.P., Inc.*, 839 P.2d 903, 913 (Wyo. 1992) (emphasis added).

As one state supreme court taking this minority approach candidly admitted, these courts "have had some difficulty in finding a sound basis for refusing an award" but have usually held covenantal rights noncompensable for one of two reasons. *Ark. State Highway Comm'n*, 381 S.W.2d at 426-427. First, some jurisdictions have held that *for takings purposes* covenantal rights are not property at all, but rather contract rights that require no compensation in eminent domain. See, *e.g.*, App., *infra*, 22a ("[I]f we were to recognize MCTA's right as compensable, we would give special status under the Takings Clause to what essentially is a contract."); *Moses*, 69 F.2d at 844; *Burma Hills Dev. Co.*, 229 So. 2d at 781-782; *Anderson*, 3 S.E.2d at 87. These jurisdictions admit, however, that for purposes other than takings law covenants constitute property interests enforceable between private parties. See App., *infra*, 16a; *Burma Hills Dev. Co.*, 229 So. 2d at 778; *Moses*, 69 F.2d at 844; *Anderson*, 3 S.E.2d at 89.

Second, some jurisdictions have held that requiring compensation would unduly burden the State's use of eminent domain. See, *e.g.*, App., *infra*, 22a; *Moses*, 69 F.2d at 844; *Anderson*, 3 S.E.2d at 89; *City of Dunbar*, 95 S.E.2d at 461.

Finally, one jurisdiction has held that while covenants undoubtedly protect property rights, taking such a right is not compensable because the damage results from the government's undesirable use of the land and not the loss of the right itself. *Ark. State Highway Comm'n*, 381 S.W.2d at 427. In this view, the taking of covenantal rights does not itself cause any injury.

B. Three Federal Circuits And Seventeen State Supreme Courts Have Held Expressly Or Implicitly That The Right To Collect Assessment Fees Under A Real Covenant Or Covenantal Rights More Generally Represent Compensable Property Interests Under The Fifth Amendment's Takings Clause

The Ninth, Seventh, and Tenth Circuits have held that covenants imposing duties that run with condemned land create compensable property interests under the Fifth Amendment's Takings Clause. In *United States* v. *129.4 Acres of Land*, 572 F.2d 1385 (9th Cir. 1978), for example, the Ninth Circuit adopted in full a district court opinion that had held compensation necessary whenever "a diminution of an entity's assessment base [is] caused by condemnation of property by the Government," provided that the remaining landowners "would be bound to pay increased assessments" and that "the obligations and benefits flowing from the operation of

the [covenant] are appurtenant to the land [taken]," *United States* v. *129.4 Acres of Land,* 446 F. Supp. 1, 5 (D. Ariz. 1976). In *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 459 (7th Cir. 2002), the Seventh Circuit joined the Ninth Circuit in adopting this position, holding that because the owners had lost the right to enforce the covenant, "they have demonstrated a property right that has been taken by state action." It noted that a "covenant constitutes a constitutionally protected property interest" because it "runs with the land and 'creates a property right in each grantee and subsequent grantee of a lot in the plat.'" *Ibid.* (quoting *Pulos* v. *James*, 302 N.E.2d 768, 771 (Ind. 1973)). Likewise, the Tenth Circuit has held that, so long as there is "a nexus between the alleged interest and the property actually taken," the government must pay compensation. *United States* v. *677.50 Acres of Land*, 420 F.2d 1136, 1140 (10th Cir. 1970). In discussing the original Ninth Circuit case, *Adaman*, 278 F.2d 842, upon which it relied, the Tenth Circuit expressly recognized that "this indispensable link," 420 F.2d at 1140, was present when the government took the right to collect assessment fees because a "covenant imposing a duty which runs with the land * * * constitutes a compensable interest in that land," *id.* at 1139 (quoting *Adaman*, 278 F.2d at 849).

In addition to these three circuits, three state supreme courts have held that covenants create compensable property interests under the federal Takings Clause. See *Pulos*, 302 N.E.2d at 774 ("The[] right to [enforce a covenant] is a property right and may not be taken * * * without just compensation. Thus, * * * we * * * run afoul of * * * the due process clause of the Fourteenth Amendment."); *Peters* v.

Buckner, 232 S.W. 1024, 1027 (Mo. 1921) (holding that "rights [granted by real covenants] are property rights, and under the * * * Fifth Amendment * * * such property cannot be taken or damaged without just compensation"); *Meredith* v. *Washoe Cnty. Sch. Dist.*, 435 P.2d 750, 752 (Nev. 1968) (holding that under both the Fifth Amendment and Nevada constitution a "covenant [is] an interest in property, or a property right accorded legal recognition and protection in all cases, and therefore, must be justly compensated for its taking or extinguishment").

Six other state supreme courts take this position under their state Takings Clauses, which they have held are coextensive with the federal Takings Clause. High courts in Florida, see *Palm Beach Cnty.* v. *Cove Club Investors Ltd.*, 734 So. 2d 379, 380 (Fla. 1999) (holding that "a covenant running with the land and requiring individual lot owners * * * to pay monthly recreation fees * * * constitutes a compensable property right"), Maryland, see *Mercantile-Safe Deposit & Trust Co.* v. *Mayor of Baltimore*, 521 A.2d 734, 741 (Md. 1987) (holding "that a covenant running with the land ordinarily is a compensable property interest in the condemnation context"), Massachusetts, see *Ladd* v. *City of Boston*, 24 N.E. 858, 859 (Mass. 1890) (similar), Michigan, see *Allen* v. *City of Detroit*, 133 N.W. 317, 320 (Mich. 1911) (similar), Nebraska, see *Horst* v. *Hous. Auth.*, 166 N.W.2d 119, 121 (Neb. 1969) (similar), and South Carolina, see *Sch. Dist. No. 3* v. *Country Club of Charleston*, 127 S.E.2d 625, 627 (S.C. 1962) (similar), have all held that the right to collect assessments or real covenants generally are compensable under their state takings clauses. These States have interpreted their state takings clauses in this respect

coextensively with the Fifth Amendment. See *St. Johns River Water Mgmt. Dist.* v. *Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011); *Mercantile-Safe Deposit & Trust Co.*, 521 A.2d at 740 n.3; *Commonwealth* v. *Blair*, 805 N.E.2d 1011, 1016-1017 (Mass. App. Ct. 2004); *Ypsilanti*, *Fire Marshal* v. *Kircher*, 730 N.W.2d 481, 516 n.22 (Mich. Ct. App. 2007); *Strom* v. *City of Oakland*, 583 N.W.2d 311, 316 (Neb. 1998); *Byrd* v. *City of Hartsville*, 620 S.E.2d 76, 79 n.6 (S.C. 2005).

In addition, eight other state supreme courts have adopted this position in implicit reliance on the Fifth Amendment. See *Town of Stamford* v. *Vuono*, 143 A. 245, 249 (Conn. 1928) ("When, therefore, property subject to a restrictive easement [in the form of a covenant] is taken for a public use, it has been held that the owner of the property for whose benefit the restriction is imposed is entitled to compensation."); *Ashland-Boyd Cnty. City-Cnty. Health Dept.* v. *Riggs*, 252 S.W.2d 922, 924-925 (Ky. 1952) (same); *Flynn* v. *New York, W. & B. Ry. Co.*, 112 N.E. 913, 914 (N.Y. 1916) (same); *City of Raleigh* v. *Edwards*, 71 S.E.2d 396, 402 (N.C. 1952) (same); *Hughes* v. *City of Cincinnati*, 195 N.E.2d 552, 555-556 (Ohio 1964) (same); *City of Shelbyville* v. *Kilpatrick*, 322 S.W.2d 203, 205 (Tenn. 1959) (same); *Meagher* v. *Appalachian Elec. Power Co.*, 77 S.E.2d 461, 465-466 (Va. 1953) (same); *State* v. *Human Relations Research Found.*, 391 P.2d 513, 516 (Wash. 1964) (same).

Although these courts did not make clear the extent to which their decisions rested on federal constitutional commands, their holdings implicate the Fifth Amendment. In cases involving the interpretation of both the federal Takings Clause and a substantially similar state counterpart, this Court

has assumed that state constitutional analysis mirrors the federal. See *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 236-237 (1984) (holding that Hawaii takings provision presented "no uncertain question of state law," even though it was theoretically possible that the state's courts would interpret the clause differently from the federal constitution); see also Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409, 1427 (1999) (noting this Court's presumption that parallel "state constitutional provisions merely follow federal doctrine"). All these holdings depend at least in part, moreover, on understandings of what the federal Takings Clause requires. All either rest directly on federal law or at the least were decided in the shadow of what federal law requires. As the leading commentator has noted, "[a] United States Supreme Court decision on the [federal] issue [w]ould be decisive [in ending the conflict.]" See William B. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L. Rev. 293, 303 (1970).

Courts following the majority view have set forth several reasons for holding that covenantal rights are compensable. Many courts explain that because covenantal rights are a form of ordinary property the government must compensate those from whom they are taken. See, *e.g.*, *Johnstone* v. *Detroit, G.H. & M. Ry. Co.*, 222 N.W. 325, 329 (Mich. 1928); *Meredith,* 435 P.2d at 752; *Kilpatrick*, 322 S.W.2d at 205-206.

Many of these courts also reason that extinguishing covenantal rights imposes direct injuries on the covenant holder as opposed to noncompensable consequential losses, see *United*

States v. *Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (holding consequential losses not compensable). Whenever a covenant "runs with the land," these courts hold, "a direct connection with the physical substance condemned is established, and the pitfalls of the consequential loss doctrine are avoided." *Adaman*, 278 F.2d at 846, 849; see also *Flynn*, 112 N.E. at 914 ("These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and noncompensational.").

Many of these courts also specifically address and reject the argument that compensation for covenantal rights unduly burdens the government's power of eminent domain and undermines the state's police power. See, *e.g.*, *Vuono*, 143 A. at 249; *Meredith*, 435 P.2d at 752-753 ("We cannot see how compensation, required by constitutional commands, can be said to interfere with any governmental taking."); *Kilpatrick*, 322 S.W.2d at 205; *Meagher*, 77 S.E.2d at 465-466. Unlike a private party, the government may violate or extinguish a covenant through eminent domain, provided it "merely pay[s] for it." *Cove Club Investors Ltd.*, 734 So. 2d at 387 (citing William B. Stoebuck, Nontrespassory Takings in Eminent Domain 134 (1977)). After all, these courts note, eminent domain is already a "complicated and expensive * * * last resort when other efforts to secure needed private property for public use [have] fail[ed]," and even where covenants benefit numerous parties in a subdivision little additional difficulty would result. *Allen*, 133 N.W. at 321; see also *Leigh* v. *Vill. of Los Lunas*, 108 P.3d 525, 530-531 (N.M. Ct. App. 2004). Still other courts argue that providing compensation for covenantal rights will not substantially burden

the government's use of eminent domain because the injuries will be small and must be proved by every holder of the covenant asserting a loss. See *Meredith,* 435 P.2d at 752-753.

Finally, many courts reason that covenantal rights should be compensable because they are in no relevant way different from traditional easements, which all jurisdictions agree are compensable. As the Ninth Circuit explained, "[b]oth [covenants and easements] 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." *Adaman*, 278 F.2d at 849; see also *Vuono*, 143 A. at 249; *Edwards*, 71 S.E.2d at 402; *Leigh*, 108 P.3d at 530-531.

* * *

Whether the right to collect assessment fees or covenantal rights more generally are compensable depends largely on geography. The result can also turn, however, on which level of government is taking the property. When the federal government takes property in Colorado, for example, it must pay compensation for such rights, see *677.50 Acres of Land*, 420 F.2d at 1140, but when the state government takes the same property it need not, see *Clifton Sanitation Dist.*, 300 P.2d at 550. As the Fifth Circuit acknowledged, the decisions addressing the compensability of covenantal rights are "legion and conflicting." App., *infra*, 19a. And by breaking with the Seventh, Ninth, and Tenth Circuits and joining the minority of jurisdictions that hold that covenantal rights are not compensable, the Fifth Circuit's decision has deepened this pervasive uncertainty. This Court's review is necessary to

resolve this stark, entrenched, and well-recognized conflict.

II. The Fifth Circuit's Arbitrary and Restrictive Rule Is Wrong

The Fifth Circuit recognized that petitioner's right to collect assessments on the condemned lots constituted "a property interest" under state law. App., *infra*, 16a. Following the minority rule, however, it held that takings of such interests require no compensation because the covenants are "akin to contracts" and requiring compensation would place "undue burdens" on the government's exercise of eminent domain. *Id.* at 21a. That conclusion violates the plain terms of the Takings Clause and this Court's precedents.

The Fifth Amendment admits of no category of noncompensable property. This Court has long held, consistent with the Fifth Amendment's unqualified terms, that when the government exercises its power of eminent domain it must "pay just compensation for *any* property taken." *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (emphasis added). The obligation to pay just compensation extends to property interests that fall far short of full ownership, see, *e.g.*, *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 194-195 (1910) (holding government must pay just compensation for taking an easement), even to intrusions "no matter how minute," see *Lucas* v. *S. C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984); *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 76 (1982). And the government must pay just compensation even when it itself

derives no benefit from the particular property right taken. It is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *Gen. Motors Corp.*, 323 U.S. at 378.

Like other jurisdictions adopting the minority position, the Fifth Circuit evinced "some difficulty in finding a sound basis for refusing an award." *Ark. State Highway Comm'n*, 381 S.W.2d at 426-427. Its principal ground was that "MCTA's right to collect assessments is a real covenant that *functions like a contract* and * * * is not directly connected with the physical substance of the [land.]" App., *infra*, 18a (emphasis added). Taking such a right, it held, amounted to no more than imposing a "consequential loss" for which no just compensation was necessary. *Ibid.* That logic is exceedingly strange.

First, as the decision below recognized, the consequential loss rule does not create a category of noncompensable property. It instead draws a line between "compensable losses of property * * * [and] noncompensable losses of *interests other than property*." *Id.* at 17a (emphasis added). As this Court has held, consequential losses, which include "future loss of profits[and] the expense of moving removable fixtures and personal property from the premises," *Gen. Motors Corp.*, 323 U.S. at 379, do not require just compensation under the Fifth Amendment because they are not property, *id.* at 379-382. The consequential loss rule does not purport to identify some subset of *property interests* that are not compensable. Indeed, the Fifth Circuit itself recognized as much. When the government attempted to proffer some case law in support of its

proposed rule, the Fifth Circuit recognized the cases as inapposite because they "d[id] not concern losses of property [but] business losses and frustration of contracts." *Id.* 18a.

Second, although real covenants have some features of contract, they are no less property for that. This Court has long recognized that forms of property "akin to contracts," App., *infra*, 21a, are compensable. Although it is blackletter law that leases may be characterized either as contracts or interests in land, see, *e.g.,* Alvin L. Arnold & Jeanne O'Neill, Real Estate Leasing Practice Manual § 31.1 (2013), for example, this Court has repeatedly held that leaseholds are property compensable under the Takings Clause, see, *e.g.*, *Gen. Motors Corp.*, 323 U.S. at 382, and courts generally hold covenants to the real property version, not the standard contracts version, of the Statute of Frauds, Stoebuck, 56 Iowa. L. Rev. at 305.

The particular covenant here, moreover, has much less in common with "service contract[s]," App., *infra*, 22a, than the Fifth Circuit casually assumed. Although certain of petitioner's expenses may have decreased as the development decreased in size, others are inelastic and must be incurred whether there are 44 or 58 properties. (Indeed, under the rule below, even the government's seizure of *44* properties in a 58-unit development, which would surely deal an even more crippling blow to the project's assessment base, would not trigger compensation).[2]

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[2] Even if the court below had determined, rather than assumed, that petitioner's expenses declined in precise proportion to the number of properties condemned, that

Third, MCTA's right to collect assessments, like real covenants generally, "is * * * directly connected with the physical substance of the [land.]" App., *infra*, 18a. Real covenants, unlike contracts, which impose only personal obligations, see, *e.g.*, *Runyon* v. *Paley*, 416 S.E.2d 177, 182-183 (N.C. 1992), run with the land, "binding subsequent owners and successor grantees indefinitely," App., *infra*, 15a (citing *Black's Law Dictionary* 421 (9th ed. 2009)). Moreover, if a townhouse owner does not pay the assessments required under the covenant, MCTA can obtain a lien on the property itself, see *id.* at 55a; Restatement (Third) of Property: Servitudes § 8.3 (2000), reflecting the covenant's "connect[ion] with the physical substance of the [land,]" App., *infra*, 18a. Indeed, as the Fifth Circuit itself recognized, the only reason why a real covenant can bind subsequent owners is that it is "*intimately and inherently involved with the land*." App., *infra*, 16a n.4 (emphasis added).

The Fifth Circuit followed several other minority jurisdictions in offering an additional reason why taking covenantal rights should not require compensation. It argued that requiring compensation for this type of property right would "unduly burden the government's ability to exercise its power of eminent domain." App., *infra*, 21a. But this rationale suffers from many legal and logical defects. For starters, the Fifth Amendment's text provides no such limitation. It offers no authority for denying compensation to those whose property is taken in order to allow the government to take more property

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would bear not on compensability, but rather on the *amount* of compensation due. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 237 (2003).

more easily. It requires "*just* compensation," not whatever amount best facilitates eminent domain—an amount that would necessarily always and everywhere be zero.

As a leading commentator has explained, moreover, if (counterfactually) the constitutional obligation to provide "just compensation" *did* contemplate some sort of balancing between individual fairness and protection of the public fisc, there would be no reason to limit that "principle" to this particular subset of property interests. Stoebuck, 56 Iowa L. Rev. at 307. And, if that principle were applied "consistently[,] then the constitutional guarantees of compensation would be destroyed in every case." *Ibid.*

Indeed, the assumption that courts should construe the Takings Clause to make condemnations as inexpensive as possible rests on a basic error. Although the eminent domain *power* exists to ensure that the government's "perform[ance of] its functions" is not "defeated" by the opportunism or parochial interests of private property owners, *Kohl* v. *United States*, 91 U.S. 367, 373 (1875), the Fifth Amendment's *protection* exists to ensure that owners do not "bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong*, 364 U.S. at 49, "no matter how weighty the public purpose," *Lucas*, 505 U.S. at 1015. Just as in other settings, requiring just compensation does not aim to "limit the governmental interference with property rights *per se,* but rather * * * secure[s] *compensation* in the event of otherwise proper interference." *First English Evangelical Lutheran*

Church of Glendale v. *Los Angeles Cnty.,* 482 U.S. 304, 315 (1987).

The Fifth Circuit's underlying premise—that applying the Takings Clause to the right to collect assessments in the same way it applies to similar interests like easements would add to the government's "burden"—is unsound. More than a century ago, this Court recognized that just compensation is necessarily *reduced* when the property condemned is encumbered by easements or other servitudes. See, *e.g.*, *Boston Chamber of Commerce*, 217 U.S. at 195 (stating that the Constitution "does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole"). As in that case, *some* of "what [was] lost," *ibid.*, by condemnation here belonged to the townhouse owners—the value of property, *as burdened by the perpetual assessment obligation*—but some belonged to petitioners by operation of the covenants. Thus, the minority rule does not spare the government an inequitable "burden" so much as provide a windfall—relieving the government of the obligation to take full account of and responsibility for the private burdens, as well as the public benefits, of compulsory land acquisitions.

In any event, there is no indication here—nor any evidence from jurisdictions that have, for decades, rejected the Fifth Circuit's arbitrary rule—that requiring the government to pay just compensation for taking the kinds of property interests at stake here has hamstrung eminent domain. See *S. Cal. Edison Co.* v. *Bourgerie*, 507 P.2d 964, 967-968 (Cal. 1973) ("Conceding the possibility that the cost of condemning property might be increased somewhat

by awarding compensation for the violation of building restrictions, we cannot conclude that such increases will significantly burden exercise of the power of eminent domain.").

Neither the Fifth Circuit nor other courts taking the minority position have, moreover, offered any reason for why covenantal rights and easements, which "indisputabl[y]" are property—and compensable—within the meaning of the Fifth Amendment, see *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961), should be treated differently. As court decisions and commentators have long noted, covenantal rights and easements are functionally and legally indistinguishable. See, *e.g.*, *Vuono*, 143 A. at 248; *Ladd*, 24 N.E. at 859 (Holmes, J.,) (describing deed restriction requiring "land unbuilt upon for the benefit of the light, air, etc., of neighboring land" as "an easement, [for which] the city must pay."); *Allen*, 133 N.W. at 320 ("Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and a property right of value, which cannot be taken for the public use without due process of law and compensation therefor."). Indeed, this Court has explicitly analogized real covenants to easements in holding that (for other purposes) a covenant is "an interest in lands." See *Chapman* v. *Sheridan-Wyo. Coal Co.,* 338 U.S. 621, 626-627 (1950). And as the Supreme Court of California explained in overruling its prior decision adopting the minority rule, treating easements and covenants differently is "rationally indefensible," *Bourgerie*, 507 P.2d at 967, especially because "the violation of a building restriction [can] cause far *greater* damage * * * than the appropriation of a mere right of way," *id.* at 966 (emphasis added)

(overruling *Friesen* v. *City of Glendale*, 288 P. 1080 (Cal. 1930)).

Finally, the minority rule disregards the considerations of fairness and certainty that this Court has long recognized underlie the Takings Clause. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness * * * as it does from technical concepts of property law." *United States* v. *Fuller*, 409 U.S. 488, 490 (1973). Neither the court below nor the government offered any explanation how "fairness and justice" would support having the MCTA (or the owners of the 44 properties that remain), rather than the "public as a whole," shoulder the burden of providing the government more convenient access to its repair project, *Armstrong*, 364 at 49. The minority rule also disregards the important "investment backed expectations," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), real covenants protect. Developers would not undertake ambitious projects like Mariners Cove unless the development could enforce assessments, keyed to necessary expenses, and other covenantal obligations for the life of the project. See pp. 28-31, *infra*. Covenantal rights, like other property rights, ultimately protect the individual's ability to plan for the future and make meaningful decisions. See *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.,* 130 S. Ct. 2592, 2613 (2010) (Kennedy, J., concurring in judgment) ("The right to own and hold property" "without the fact or even the threat of * * * expropriation" is "necessary to the exercise and preservation of freedom").

Indeed, the United States itself recognizes the necessity of protecting such interests. As noted above, p. 9, *supra*, it has advanced the opposite position from what it argued below when *it* was the beneficiary of assessments tied to lands condemned by a state. In *California* v. *25.09 Acres of Land*, 329 F. Supp. 230, 231 (S.D. Cal. 1971), for example, the government persuaded the court that the Constitution required compensation because the acquisition would "remove a portion of the assessment base, thereby depriving the UNITED STATES of a beneficial interest * * * and increasing the annual * * * charges assessed against [it and other] remaining owners." *Ibid.* This is right and "the validity of a doctrine [should] not depend on whose ox it gores." *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

* * *

The court below recognized, correctly, that MCTA's right to collect assessments was a property interest. That is all that is needed to require just compensation under the Fifth Amendment. The contrary holding by the Fifth Circuit creates needless uncertainty and unjustified complexity in Fifth Amendment jurisprudence and should be reversed.

III. This Recurring Issue Is One Of National Importance

Respect for property rights is deeply rooted in our Constitution and our legal tradition. Indeed, the Founding generation understood "acquiring and possessing property, and having it protected, [as] one of the natural, inherent, and unalienable rights of man." *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.)

304, 309 (C.C.D. Pa. 1795). The Takings Clause embodies these values and "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 at 49. The decision below violates this cardinal principle in a way that jeopardizes the property rights of millions of citizens.

The "covenant running with the land[] is effectively a constitution establishing a regime to govern property held and enjoyed in common." Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 Emory L.J. 977, 990 (1975). In particular, it establishes and governs neighborhood associations, which represent "the most important property right development in the United States since the creation of the modern business association." Robert H. Nelson, Private Neighborhoods and the Transformation of Local Government xiv (Urban Inst. Press 2005). Because of their importance in securing private regulation of property, covenants are ubiquitous in modern property law. As of 2012, 63.4 million Americans (more than 20% of the population) lived in association-governed communities that depend on covenants. Cmty. Ass'ns Inst., Industry Data: National Statistics, http://www.caionline.org/info/research/Pages/default.aspx (last visited on June 6, 2013). In 2005, there were more than 250,000 neighborhood associations in the United States, about ten times the number of general-purpose municipalities, Nelson, *supra*, at 15, and the value of housing governed by them "exceed[ed] $1.8 trillion, which [wa]s more than 15 percent of the value of all residential real estate (and 9 percent of the value of real estate of all

kinds)," *id.* at 73, and "about one-third of the total value of all the shareholdings in U.S. business corporations," *ibid.* The question presented thus affects not only the single most important asset many Americans own—the home—but also a major segment of the American economy. That fact alone demonstrates why the decision below warrants review.

Covenants are often, moreover, a significant component of real property's total value. One report recently concluded that covenants increased the overall value of property in community associations and condominium developments by six percent. Amanda Agan & Alexander Tabarrok, *Do Homeowners Associations Raise Property Values? What Are Private Governments Worth?*, 28 Regulation 17 (2005), *available at* http://www.cato.org/sites/cato.org/files/serials/files/regulation/2005/9/v28n3-2.pdf (last visited June 6, 2013). This is no recent phenomenon. Covenants have long been recognized as "among the very elements that may contribute to the value of the lots affected thereby." *Dixon* v. *Van Sweringen Co.*, 166 N.E. 887, 889 (Ohio 1929).

Why have covenants become so widespread? Precisely because they provide developers with the necessary tools to plan large-scale community developments and pursue important objectives. Covenants allow developers to plan streets, preserve open space between buildings, designate and develop community land, and enforce fundamental private preferences in the residential context. Marc A. Weiss, The Rise of the Community Builders 70 (1987). Likewise, covenants are generally the primary, or even the *only*, source of planning and governance in commercial resort development. In

such contexts, covenants provide developers with necessary flexibility in organizing and regulating the community. James J. Scavo, *How to Draft Mixed-Use Community Restrictive Covenants*, Prac. Real Est. Law. 27 (2002). Covenants likewise form the basis for modern shopping malls, allowing landlords to manage competition, govern and maintain common shopping areas, and regulate rogue tenants. Benjamin Weinstock & Ronald D. Sernau, *High-End Retail Leasing*, 28 Prac. Real Est. Law. 29-34 (2012).

Covenants are also an important tool for environmental conservation. Thomas J. Coyne, *How to Draft Conservation Easement Agreements*, 19 Prac. Real Est. Law. 47, 48 (2003). The National Conservation Easement Database has so far registered over 95,000 conservation easements—which, despite their name, are actually covenants, see William B. Stoebuck & Dale A. Whitman, The Law of Real Property § 8.13, at 470 (3rd ed. 2000)—encumbering over 18 million acres. See National Conservation Easement Database, http://nced.conservationregistry.org (last visited June 5, 2013). It estimates, however, that there are now actually 40 million acres encumbered by such covenants in the U.S. *Ibid.* That is more than 18 times the size of Yellowstone National Park (which consists of 2,221,766 acres). See National Park Service, Yellowstone Fact Sheet, http://www.nps.gov/yell/planyourvisit/factsheet.htm (last visited June 5, 2013). If allowed to stand, the decision below would severely undercut the effectiveness of this conservation tool. See Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897, 1905 (2008) ("Denying conservation easements status as

compensable property for eminent domain purposes * * * would have significant adverse consequences for conservation easements as a land protection tool.").

The decision below puts the reliability of all such covenants in jeopardy. The predictable consequence of allowing government actors to seize or destroy covenants without fear of owing just compensation is that the government will condemn more of them and undermine property owners' expectations of their value. That, in turn, will decrease reliance on covenants in the residential, commercial, and conservation contexts. Property owners will come to understand that their private property arrangements are protected only as a matter of governmental grace.

Indeed, governments routinely take covenantal rights. State and local governments, for example, often take real property for purposes the controlling covenants would not allow, including for building highways,[3] schools,[4] and water facilities[5] and so

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[3] See, *e.g., California* v. *25.09 Acres of Land*, 329 F. Supp. 230 (S.D. Cal. 1971); *Burma Hills Dev. Co.* v. *Marr*, 229 So. 2d 776 (Ala. 1969); *Rudder* v. *Limestone Cnty.*, 125 So. 670 (Ala. 1929); *Ark. State Highway Comm'n* v. *McNeill*, 381 S.W.2d 425 (Ark. 1964); *Anderson* v. *Lynch*, 3 S.E.2d 85 (Ga. 1939); *State* v. *Human Relations Research Found.*, 391 P.2d 513 (Wash. 1964).

[4] See, *e.g.*, *Town of Stamford* v. *Vuono*, 143 A. 245 (Conn. 1928); *Peters* v. *Buckner*, 232 S.W. 1024 (Mo. 1921); *Meredith* v. *Washoe Cnty. Sch. Dist.*, 435 P.2d 750 (Nev. 1968); *Sch. Dist. No. 3* v. *Country Club of Charleston*, 127 S.E.2d 625 (S.C. 1962).

[5] See, *e.g.*, *City of Raleigh* v. *Edwards*, 71 S.E.2d 396 (N.C. 1952); *City of Shelbyville* v. *Kilpatrick*, 322 S.W.2d 203 (Tenn. 1959); *Harris Cnty. Flood Control Dist.* v. *Glenbrook Patiohome Owners Ass'n*, 933 S.W.2d 570 (Tex. App. 1996).

disrupt the structures of residential subdivisions. No one questions governments' basic authority to do these things; nor should anyone question that the Constitution requires the government to pay for the property rights that it destroys in the process. The situation in this case is quite common and, if the lower court's ruling and those like it are allowed to stand, government regulation risks disrupting and undermining the reliability of a critical property right.

Precisely because covenants are so widely used and increasingly likely to run headlong into government regulation, uniformity in their protection against government intrusion is essential. This Court has long emphasized uniformity in decisions regarding just compensation. See, *e.g.*, *Kelo* v. *City of New London*, 545 U.S. 469, 488-490 (2005); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 Cato Sup. Ct. Rev. 39, 63. As explained above, lower courts are confused and have applied several different standards in determining the compensability of covenants. Only a clear, uniform rule can protect established reliance interests in their use.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-31167

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.073 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.071 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.139 acres of land, more or less, situate in Parish of Orleans, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

0.134 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.135 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.072 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.153 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

[**January 28, 2013**]

Before STEWART, Chief Judge, and KING and OWEN, Circuit Judges.

PER CURIAM:

In this eminent domain case, Appellant Mariner's Cove Townhomes Association appeals the district court's grant of judgment on the pleadings for the United States. The district court held that the Association was not entitled to just compensation for the diminution of its assessment base resulting from the government's condemnation of fourteen properties in the Mariner's Cove Development. The question before us is whether the loss of the Association's right to collect assessments on those properties requires just compensation under the Takings Clause of the Fifth Amendment. For the following reasons, we hold that this right was not compensable, and AFFIRM the district court's judgment.

I. FACTS AND PROCEDURAL HISTORY

Mariner's Cove Development ("Mariner's Cove") is a residential community consisting of fifty-eight townhomes located near Lake Pontchartrain and the 17th Street Canal. The Mariner's Cove Townhomes Association ("MCTA") is a homeowner's association and non-profit corporation that provides residential services to the townhouses in Mariner's Cove. In exchange for the services provided, MCTA periodically collects assessments from each of the fifty-eight property owners pursuant to the "Declaration of Servitudes, Conditions and Restrictions of Mariner's Cove Townhomes Association, Inc." ("Declarations"), which was recorded on July 28, 1977, and created servitudes and covenants, as well as other conditions and obligations that run with the land. The Declarations provide that

each owner of a lot in Mariner's Cove pays a proportionate 1/58 share of the expense of maintenance, repair, replacement, administration, and operation of the properties in Mariner's Cove.

Mariner's Cove suffered substantial damage from Hurricane Katrina. After Katrina, the United States Army Corps of Engineers ("Corps") began to repair and rehabilitate the levee adjacent to Mariner's Cove, and began to construct an improved pumping station at the 17th Street Canal. The Corps later determined that it needed to acquire fourteen of the fifty-eight units in Mariner's Cove to facilitate its access to the pumping station.

While the government was negotiating the acquisition of those properties with their owners, MCTA claimed that it had an interest in those properties based upon the rights and obligations conferred by the Declarations. Specifically, MCTA claimed that it was entitled to just compensation for the loss of its right to collect assessments on the properties, as set forth in the Declarations. The government reached agreements with each of the landowners for the purchase of the fourteen properties, but did not resolve MCTA's claim.

In June 2009, the government filed condemnation actions against each of the fourteen properties. The government named MCTA as a purported owner in each proceeding based on MCTA's claimed interest. The district court issued an order in each proceeding granting the United States possession of the fourteen

properties. It later consolidated the condemnation actions.

After the government took possession of the properties, MCTA filed an answer to the government's complaints in condemnation.[1] MCTA claimed that the government was obligated to pay the yearly assessments arising from the Declarations since the Corps's occupation in September 2005, and for the reasonable lifetime of a townhomes association such as Mariner's Cove, as compensation for the diminution of its assessment base. In the alternative, MCTA claimed that it is entitled to a lump sum payment which, if invested conservatively and adjusted for inflation, is a principal amount capable of generating annual interest sufficient to make up the shortfall in funds owed.

In response to the MCTA's answer, the government filed a motion for judgment on the pleadings, arguing that MCTA had no continuing right to levy assessments on the condemned properties because the United States acquired perfect title to them under eminent domain. The government also argued that the losses MCTA claimed were not compensable under the Fifth Amendment because the losses were merely incidental to the taking, as MCTA had no ownership interest in the fourteen properties themselves. MCTA opposed and moved for partial summary judgment, requesting that the district court recognize MCTA's property rights and the obligation

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[1] MCTA answered as an interested party under Federal Rule of Civil Procedure 71.1.

of the government to provide just compensation for the taking of these rights.

The district court granted the government's motion, and consequently it dismissed MCTA's motion as moot. The district court found that "once the declaration of taking and the deposit for just compensation are filed, the property vests in the United States under the Declarations of Takings Act," and all existing possessory and ownership interests not specifically excepted are extinguished. Because the interests alleged by MCTA were not excepted, the district court found that MCTA had no present possessory interest in the condemned properties. The district court then turned to the question whether MCTA's interest in the assessments prior to the governmental taking was compensable under the Takings Clause.

Observing that this circuit has not ruled whether the diminution of an assessment base is a compensable loss under the Takings Clause, the district court considered the case upon which MCTA chiefly relies: *Adaman Mutual Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960). The district court ruled that MCTA failed to show that its interest was compensable because *Adaman* was inapposite, and because MCTA did not cite any case adopting the *Adaman* holding other than one factually similar to *Adaman*. Finally, the district court gave two reasons why Louisiana state law does not disturb the court's ruling that MCTA's interest was not compensable: (1) Louisiana courts have not "addressed whether building restrictions that require affirmative action,

or building restrictions in general, are a compensable property interest," and (2) "federal law controls on the issue of compensability."

The district court entered its judgment on November 18, 2011, and MCTA timely filed a notice of appeal.

II. STANDARD OF REVIEW

We review de novo a grant of judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *United States v. Renda Marine, Inc.*, 667 F.3d 651, 654 (5th Cir. 2012). We look only to the pleadings and accept all allegations contained therein as true. *Id.* The nonmovant, "must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Pleadings should be construed liberally, and judgment on the pleadings is appropriate only if there are no disputed issues of material fact and only questions of law remain." *Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899, 904 (5th Cir. 2002). "The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Id.* (quoting *Hughes v. The Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001)).

III. DISCUSSION

This case presents a question of first impression in this circuit: whether the federal government must provide just compensation under the Takings Clause of the Fifth Amendment when it condemns property burdened by a plaintiff's right to collect assessments and thereby diminishes the plaintiff's assessment base. In granting the government's motion for judgment on the pleadings, the district court held that MCTA was not entitled to just compensation for the loss of its assessment base that resulted from the government's condemnation of properties in Mariner's Cove. We hold that MCTA's right to collect assessments is not a compensable property interest under the Constitution, and affirm the district court's judgment.

A. Takings Clause Principles

The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation. "The critical terms are 'property,' 'taken' and 'just compensation.'" *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

Discussing the Constitution's use of the term "property," the *General Motors* Court stated:

> When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that

> thing, which we denominate ownership. In other words, it deals with what lawyers term the individual's "interest" in the thing in question. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

Id. at 378 (footnote omitted). "Though the meaning of 'property' . . . in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *United States v. Powelson*, 319 U.S. 266, 279 (1943); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("[W]e are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" (second and third alterations in original) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (internal quotation marks and citation omitted))). Thus, Louisiana law governs whether MCTA's right to collect assessments is a property interest. *See United States v. 131.68 Acres of Land*, 695 F.2d 872, 875 (5th Cir. 1983).

The *General Motors* Court also expounded on the meaning of the term "taken" as it appears in the Takings Clause:

> In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the

> construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

323 U.S. at 378. Contrary to the government's assertion at oral argument, we understand takings analysis to be centered on the deprivation of a former owner's property interest, and not on the accretion of that interest to the government. The Supreme Court in *General Motors* emphasized that a constitutional taking only occurs with respect to property, and not with collateral, non-property interests:

> whether the sovereign substitutes itself as occupant in place of the former owner, or destroys all his existing rights in the subject matter, the Fifth Amendment concerns itself solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incident to his ownership.

Id. In short, the government is required to provide just compensation if the interest for which compensation is sought is a property interest or right,

and that interest has actually been taken.[2] *Id.* at 377-78.

B. MCTA's Right To Collect Assessments

This case turns on whether MCTA's right to collect assessments is a compensable property right under the Takings Clause. This question has two parts: whether the right to collect assessments is a property right, and if so, whether it is compensable under the Takings Clause.

1. Intangible Property

We begin by addressing whether MCTA's right to collect assessments is property. The district court, in its ruling, did not find that this right was not property, and the government has not argued to the contrary. Indeed, there is good reason to find that MCTA's right to collect assessments is property.

Louisiana law suggests that this right is called a building restriction. First, it is necessary to explain what "building restriction" means in the language of Louisiana's civil law system. Under Louisiana law, building restrictions are "incorporeal immovables." La. Civ. Code art. 777. "[I]ncorporeal immovables" are "[r]ights and actions that apply to immovable

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[2] The *General Motors* Court understood "just compensation" in ordinary cases to be the fair market value of the interest taken. 323 U.S. at 379 ("In the ordinary case, for want of a better standard, market value, so-called, is the criterion of that value.").

things"). La. Civ. Code art 470. "Immovables" simply means property that is not a "movable." La. Civ. Code art. 448 ("Things are divided into . . . movables and immovables."). And "movables" are what the name suggests: "things . . . that normally move or can be moved from one place to another." La. Civ. Code art. 471. Thus, "immovables" refers to a broad category of immovable property that includes tracts of land and their component parts. La. Civ. Code art. 462. The modifier "incorporeal" simply means "intangible." *See S. Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1244 (La. 1994) ("[T]he civilian concept of corporeal movable encompasses all things that make up the physical world; conversely, incorporeals, i.e., intangibles, encompass the non-physical world of legal rights."); *see also* La. Civ. Code art. 461 ("Incorporeals are things that have no body, but are comprehended by the understanding such as . . . servitudes [and] obligations . . . ."). By logical inference from the definitions at hand, an intangible right that applies to a tract of land is an incorporeal immovable.

In *Tri-State Sand & Gravel, L.L.C. v. Cox*, a Louisiana appeals court confirmed that under Louisiana law, one duty that building restrictions may impose on owners of real property is the affirmative duty to pay assessments. 871 So. 2d 1253, 1256 (La. Ct. App. 2004). Louisiana statutory law supports recognition of the affirmative duty to pay assessments as a building restriction. *See* La. Civ. Code art. 778 ("Building restrictions may impose on owners of immovables affirmative duties that are reasonable and necessary for the maintenance of the

general plan."); *Oakbrook Civic Ass'n, Inc. v. Sonnier*, 481 So.2d 1008, 1010 (La.1986) (same); *see also* 4 La. Civ. L. Treatise, Predial Servitudes § 195 (3d ed.) ("Provisions that each purchaser of a lot in a subdivision shall automatically become a member of a corporation formed to provide maintenance of the common grounds, and that each member shall be subject to an annual assessment, have been enforced as reasonable and necessary."). Thus, the right to collect assessments is a building restriction under Louisiana law, and by extension, an intangible (incorporeal) right.

In common law terminology, building restrictions are real covenants.[3] Louisiana caselaw recognizes prohibitive building restrictions as restrictive covenants. *Nepveaux v. Linwood Realty Co.*, 435 So.2d 589, 593 (La. Ct. App. 1983), *writ denied* 441 So.2d 750 (La. 1983) (describing building restriction that restricted property usage to residential purposes only as a "restrictive covenant"). Restrictive covenants, by definition, are a type of real covenant.[4]

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[3] The record indicates that MCTA's right to collect assessments was made appurtenant to the properties in Mariner's Cove through the Declarations. Thus, like real covenants generally, MCTA's right to collect assessments runs with the land. *See, e.g.*, 20 Am. Jur. 2d Covenants, Etc. § 18 (2012) ("A real covenant runs with the land, while a personal covenant usually does not run with the land." (footnotes omitted)).

[4] *Compare Black's Law Dictionary* 421 (9th ed. 2009) (defining "restrictive covenant" as "[a] private agreement, [usually] in a deed or lease, that restricts the use or

Because MCTA's right to collect assessments is an affirmative building restriction, it seems inappropriate to cast it into the negative mold of a restrictive covenant. Rather, it follows that if negative building restrictions are restrictive covenants, then affirmative restrictions are affirmative covenants. Moreover, Louisiana caselaw recognizes the right to collect assessment fees as a covenant that runs with the land. *Town S. Estates Homes Assoc., Inc. v. Walker*, 332 So.2d 889 (La. Ct. App..1976). Thus, we find that MCTA's right is best understood as a building restriction, but more generally may be viewed—in terms of its common law analogue—as a real covenant.

2. Compensability

Having found that MCTA's right to collect assessments is a property interest, we now turn to the question whether it is compensable. One of the government's main arguments on appeal is that the loss of MCTA's assessment base was incidental to the condemnation, and thus barred by the consequential loss rule. We agree, and affirm the district court's judgment on this basis.

a. The Consequential Loss Rule

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occupancy of real property"), *with id.* (defining "real covenant" or "covenant running with the land" as "[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely").

In *General Motors*, the Supreme Court explained the consequential loss rule as follows:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. . . . [T]he courts have generally held that [such losses] are not to be reckoned as part of the compensation for the fee taken by the Government. . . . Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

323 U.S. at 379-80 (footnote omitted). The *General Motors* Court contrasted compensable losses of property ("rights of ownership") with noncompensable losses of interests other than property. In *Adaman*, the Ninth Circuit briefly described this rule as requiring that "the Government . . . pay for all tangible interests actually condemned and for intangible interests directly connected with the

physical substance of the thing taken." *Adaman*, 278 F.2d at 845.

We recognize that the cases the government cites in support of its argument do not concern losses of property. They concern business losses and frustration of contracts. *See Mitchell v. United States*, 267 U.S. 341, 343 (1925) (destruction of a business growing and canning a variety of corn that grew on condemned land was not a compensable loss); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923) (impairment of a commercial steel contract was not compensable); *Bothwell v. United States*, 254 U.S. 231, 232 (1920) (loss resulting from a sale of cattle below fair market value after the construction of a government dam flooded farmland was not compensable); *Hooten v. United States*, 405 F.2d 1167, 1168 (5th Cir. 1969) (per curiam) (frustration of rent collection contracts resulting from condemnation of tenement properties was not compensable). Nevertheless, we find that the consequential loss rule applies because MCTA's right to collect assessments is a real covenant that functions like a contract and, in the words of the *Adaman* court, is not "directly connected with the physical substance of the [land]." 278 F.2d at 845.

Neither this court nor Louisiana courts have ruled whether the right to collect assessments, or real covenants generally, are compensable under the Takings Clause.[5] Nor is there relevant statutory law.

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[5] Louisiana courts have addressed whether use restrictions—a type of restrictive covenant—are

Moreover, the decisions in other states addressing this question are legion and conflicting.[6] Various texts recognize the interjurisdictional conflict on this issue, the most useful being Nichols on Eminent Domain. 2 Nichols on Eminent Domain § 5.07[4], p. 5–366-72 (3d ed. 2012). "The majority view holds that a restrictive covenant or equitable servitude constitutes property in the constitutional sense and must be compensated for if taken."[7] *Id.* § 5.07[4][a], p.

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compensable interests, finding that they are not. *See Gremillion v. Rapides Parish Sch. Bd.*, 134 So. 2d 700, 703 (La. Ct. App. 1961), *rev'd on other grounds*, 140 So. 2d 377 (La. 1962); *Hosp. Serv. Dist. No. 2 v. Dean*, 345 So. 2d 234, 237 (La. Ct. App. 1977) ("We now reaffirm the reasoning of Gremillion and conclude that the appellants are not entitled to compensation for the loss of their right to enforce the restrictive covenants."). The reasoning in both cases is twofold: (1) "any restriction that property cannot be used for governmental purposes . . . is unenforceable ab initio," and may be "void as against public policy"; (2) "[t]he state's right to acquire such land for [public] purposes cannot be restricted by a private contract between private parties, to which the state is not a party; nor can such a private contract impose upon the state liability beyond that allowed in the absence of the contract." *Dean*, 345 So. 2d at 236-37 (quoting *Gremillion*, 134 So. 2d at 702).

[6] *See* 2 Nichols on Eminent Domain § 5.07[4], p. 5–366-72 (3d ed. 2012) (listing cases reaching conflicting holdings on the issue of compensability of restrictive covenants).

[7] We recognize that our discussion of Nichols concerns restrictive covenants, and that we have defined MCTA's right as a real covenant. We previously highlighted the

5–367-69. However, there is a strong minority view that these interests are not compensable. *Id.* § 5.07[4][b], p. 5–370-72. Several theories grounded in public policy concerns support the minority view.[8]

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distinction between these terms for precision's sake, as restrictive covenants are merely a species of real covenants. *See* Black's Law Dictionary 421 (9th ed. 2009) (defining these terms). However, because these forms of property are so closely related, the reasons for denying compensation for restrictive covenants extends to the type of real covenant at issue in this case.

[8] Nichols summarizes these theories as follows:

> Some argue that restrictive covenants are not property interests and may be taken without payment of compensation. The basis of this claim is that private covenant restrictions were not intended to apply against public improvements and that the rights of the condemnor are impliedly excepted from operation of the restrictive covenant.
>
> Other courts have held that restrictive covenants cannot be property because they would limit the power of a legislature; any such limitations would be void as against public policy since they constitute an attempt to prohibit the exercise of the sovereign power of eminent domain.
>
> Another argument against viewing these covenants as property is that since the state has the power to condemn the fee before the imposition of a restrictive covenant, the placing of the additional burden on the land does not create a new compensable interest.

One such theory is rooted in the concern that private covenants might unduly burden the government's ability to exercise its power of eminent domain. *See id.* § 5.07[4][b], p. 5–370-71. Another theory is that real covenants are akin to contracts; that no contract of private persons can make acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, a taking; and that "contracts purporting to do this are void, as against public policy." *United States v. Certain Lands (In re Newlin)*, 112 F. 622, *aff'd*, 153 F. 876 (C.C.R.I. 1907); *see also* 2 Nichols on Eminent Domain § 5.07[4][b], p. 5–371 ("Denial of compensation has also been justified on the ground that these restrictions do not constitute property at all, but are merely contract rights that need not be compensated for in eminent domain." (citations omitted)). We share these concerns, and view the right to collect assessments, and similar real covenants, as fundamentally different in the takings context from other compensable intangible property, such as easements.[9]

MCTA's right to collect assessments is an affirmative real covenant: the Declarations provide that landowners in Mariner's Cove must pay

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2 Nichols on Eminent Domain § 5.07[4][b], p.5–370-71.

[9] The general rule is that "[w]hen one parcel of land is subject to an easement in favor of another, and the servient tenement is taken for, or devoted to, a public use that destroys or impairs enjoyment of the easement, the owner of the dominant tenement is entitled to compensation." 2 Nichols on Eminent Domain § 5.07[2][b], p. 5–347.

assessment fees, which MCTA is entitled to collect. These assessments enable MCTA to maintain Mariner's Cove. But MCTA's right is unlike recognized forms of compensable intangible property, such as easements, in that it is not directly connected with the physical substance of the properties on which the assessments are made. The nature of the covenant between MCTA and the landowners in Mariner's Cove is functionally contractual. But for its inclusion in the Declarations, the real covenant for which MCTA seeks compensation would amount to nothing more than a service contract between the landowners in Mariner's Cove and MCTA, with periodic assessments paid in exchange for the maintenance of communal property. Viewed in this way, this case mirrors the situations in the consequential loss cases cited by the government.

We believe that recognizing MCTA's right as compensable under the Takings Clause would allow parties to recover from the government for condemnations that eliminate interests that do not stem from the physical substance of the land. This would unjustifiably burden the government's eminent domain power. In addition, if we were to recognize MCTA's right as compensable, we would give special status under the Takings Clause to what essentially is a contract, merely because it appears in a title document. Such a formality alone cannot justify requiring the government to compensate MCTA for the loss of its ability to collect assessments on the condemned properties. In the absence of apposite federal and state law, these concerns guide our decision. Thus, we hold that MCTA's right to collect

assessments is not a compensable interest under the Takings Clause, and that MCTA was not entitled to compensation for the loss of its assessment base.

b. *Adaman*

Having set forth our view as to why MCTA's right is not compensable, we address MCTA's main argument: that *Adaman* is analogous to this case and thus we should apply the *Adaman* court's holding that the right to collect assessments is compensable. We believe these two cases are sufficiently similar that the *Adaman* court's reasoning informs our approach to this case. But as applied to the facts of the instant case, we find that the rationale in *Adaman* compels us to reach the opposite conclusion, namely, that MCTA's right to collect assessments is not compensable under the Takings Clause.

i. Background

Adaman involved an agricultural project established in Arizona on dry land where surface water for irrigation was unobtainable. 278 F.2d at 843. Underground water from beneath the project lands "had to be pumped and distributed, and to provide this service to the small farms envisioned in the Project, at minimum cost, [Adaman], a mutual, non-profit corporation, was organized." *Id.* The owners of the land were entitled to one share of stock in Adaman for each acre of land owned. *Id.* at 843-44. Each share of stock entitled its owner to a prorata share of water. *Id.* at 844. Both water rights and

stock were made appurtenant to the land upon which the water was to be used. *Id.* Further, under the plan:

> the stock and the land to which it [was] appurtenant [were] subject to prorata assessments to be made from time to time by [Adaman] to pay both for the capital investment in the irrigation facilities and for the operation and maintenance of the irrigation system. The assessments, once made, [became] a lien on the land and on the stock and water rights appurtenant thereto.

Id. No assessment could be made until the land was first cultivated. *Id.*

The United States brought condemnation proceedings against 8.3 percent of the land area within the project. *Id.* Adaman sued for compensation for its interest in the assessments, lost in district court, and appealed. *Id.* at 850. The Ninth Circuit determined that the only question raised on appeal was "whether or not [Adaman was] entitled to be compensated for the loss of a portion of Project land since the remaining area will be subject to increased assessments in the future to pay for the maintenance, replacement and operation of the communal irrigation system." *Id.* at 844. "In other words," the court wrote, "does the diminution of [Adaman's] assessment base constitute the taking of a compensable interest under the Fifth Amendment?" *Id.*

The Ninth Circuit found that the lower court was wrong to conclude that Adaman had lost no compensable interest in the form of its reduced assessment base. *Id.* at 850. The *Adaman* court was careful to note that its opinion rested on "the assumption that the land condemned and taken by the Government had corporate stock appurtenant to it and had also been brought under cultivation," which the court deemed important because "the stock subscription agreement itself created the equitable servitude in favor of other stockholding landowners, and the duty to pay assessments would not arise until the land to which it attached had actually been brought under cultivation." *Id.* Accordingly, the Ninth Circuit vacated the district court's judgment and remanded for "specific findings of fact on these crucial points." *Id.* The crux of *Adaman*'s holding was that "under the Fifth Amendment a restrictive covenant imposing a duty which runs with the land constitutes a compensable interest." *Id.* at 849.

ii. Application

We believe that the *Adaman* court correctly determined that the "pitfalls of the consequential loss doctrine are avoided" where "a direct connection with the physical substance [of the land] condemned" is established. *Id.* at 846. Because the subject matter in this case—the right to collect assessments—is analogous to that in *Adaman*, we find this rule to be applicable to the instant case, and therefore we apply it. However, we reach the opposite result of the *Adaman* court, and find that the consequential loss rule applies, because this case differs from *Adaman*

in two important respects, both of which evince the absence of a direct connection between MCTA's right to collect assessments and the physical substance of the condemned properties.

First, in *Adaman*, the water company's right to collect assessments was directly connected to a tangible property right—the right to a prorata share of water—enjoyed by landowners in the agricultural project. MCTA's right to collect assessments does not correspond to a tangible property right of the landowners in Mariner's Cove. It is inaccurate to view both cases as merely involving an exchange of assessment fees for communal services. Whereas the assessment fees that MCTA collected were used to maintain communal structures (e.g., streets), the assessments collected by the water company not only were used to provide a service (irrigation at the lowest possible cost), *id.* at 847, but also enabled the landowners in the agricultural project to exercise the rights to the water underlying the project lands.[10] This direct connection between water rights and the right to collect assessments differentiates *Adaman* from the instant case because the assessments collected by MCTA do not allow the landowners in Mariner's Cove to enjoy a tangible right arising from the land.

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[10] "The benefit derived from this servitude . . . is encompassed by the water rights appurtenant to each parcel and runs with the land to the same extent as does the burden to pay assessments." *Adaman*, 278 F.2d at 847.

Second, whereas MCTA collects assessments in order to collect trash, maintain community streets, and provide similar services, the water company in *Adaman* collected assessments in exchange for water that it extracted from underneath the properties burdened by the obligation to pay the assessments. *Id.* As the *Adaman* court noted, "the warranty deed and the agreement of sale used by the [original landowner] reserved to it the rights in whatever water lay underneath Project land." *Id.* The assessments in *Adaman* were made in exchange for a natural resource that was directly connected to the physical substance of the land in that it physically inhered in the land itself. MCTA points to nothing that would establish such a direct connection to the land. Because no direct connection existed in the instant case, we find that the consequential loss rule applies to MCTA's loss.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CIVIL ACTION**
VERSUS	
0.073 ACRES of LAND, MORE OR LESS, SITUATE in PARISHES of ORLEANS and JEFFERSON, STATE of LOUISIANA, and PETER B. ANDERSON, *et ux.* et al.	**NO: 09–3770 c/w: 09–3771, 09–3772, 09–3773, 09–3774, 09–3775, 09–3776, 09–3777, 09–3778, 09–3779, 09–3781, 09–3782, 09–4241**
	SECTION: "C" (2)

ORDER & REASONS

Before the Court is Motion for Judgment on the Pleadings filed by Plaintiff the United States and Motion for Partial Summary Judgment filed by Defendant Mariner's Cove Townhomes Association ("MCTA"). (Rec. Doc. 51, 59). Having reviewed the record, memoranda of counsel, and the law, the United States' Motion is GRANTED and MCTA's Motion is DISMISSED AS MOOT for the following reasons.

I. BACKGROUND

On June 5, 2009, the United States filed this

eminent domain proceeding against 0.73 acres of land comprising fourteen of the 58 townhomes in Mariner's Cove Development ("Development"), a residential community located near Lake Pontchartrain and the 17th Street Canal, to facilitate the United States Corps of Engineers' ("Corps") access to the pumping station on the canal. (Rec. Doc. 1). MCTA is a non-profit corporation that provides residential services to the individually-owned townhouses in the Development in exchange for periodic assessments pursuant to the "Declarations of Servitudes, Conditions and Restrictions of Mariner's Cove Townhomes Association, Inc." ("Declarations), recorded on July 28, 1977. (Rec. Doc. 20 at 2). MCTA filed an Answer and Declaration of Interest ("Answer") under Federal Rules of Civil Procedure 71.1 and 13, seeking a ruling that "the Corps is obligated to pay the yearly assessments arising from the Declarations encumbering the properties since its occupation in 2005, and for the reasonable lifetime of a townhomes association such as Mariner's Cove." *Id.* at 5. Alternatively, MCTA seeks a "lump sum payment which, if invested conservatively and adjusted for inflation, is a principal amount capable of generating annual interest sufficient to make up the shortfall in the funds owed." *Id.*

The United States' 12(c) Motion argues that this Court should dismiss MCTA's claims on the ground that (1) MCTA has no continuing right to levy assessments on the taken property because when the United States condemns property, it takes perfect, unencumbered title; and (2) the loss of MCTA's right to assess the taken property is not compensable

under federal or Louisiana state law. (Rec. Doc. 51 at 2). MCTA's Motion for Partial Summary Judgment urges this Court to rule that the United States must compensate MCTA for the diminution of its assessment base resulting from condemnation because such a loss is compensable under federal and Louisiana state law. (Rec. Doc. 59 at 8–14). The parties agree that federal procedural and substantive law controls in condemnation proceedings, and that courts may look to state law to determine whether a property interest is compensable under the United States Fifth Amendment Takings Clause. (Rec. Doc. 51–1 at 7, Rec. Doc. 52 at 10, 13).

II. LAW & ANALYSIS

After the pleadings are closed, but within such time as not to delay trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings under Rule 12(c) is subject to the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Doe v. MySpace, Inc.,* 528 F.3d 413, 418 (5th Cir.2008); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.,* 313 F.3d 305, 313 (5th Cir.2002). In determining whether dismissal is appropriate, the court must decide whether the facts alleged in the pleadings, if true, would entitle the plaintiff to a legal remedy. *Ramming v. U.S.,* 281 F .3d 158, 162 (5th Cir.2001); *Cinel v. Connick,* 15 F.3d 1338, 1341 (5th Cir.1994). When considering a Rule 12(c) motion, the court must construe the allegations in the complaint in the light most favorable to the non-moving party, but conclusory allegations and unwarranted

deductions of fact are not accepted as true. *Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994). Judgment on the pleadings is appropriate only if there are no disputed issues of material fact and only questions of law remain. *Voest–Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 891 (5th Cir.1998).

MCTA asks that the United States' Rule 12(c) Motion be converted into a motion for summary judgment pursuant to Rule 12(d), which would allow the Court to consider matter outside the four corners of the pleadings, on grounds that pleadings "rarely provide a sufficient factual basis for a determination on the merits" and "the great majority of Rule 12(c) motions are converted into summary judgments." (Rec. Doc. 52 at 9). MCTA provides no argument as to how this principle applies in this case, stating only that a judgment on the pleadings would deprive MCTA of the opportunity to explain or refute facts before the Court and "would abrogate the rule that all facts pleaded by the nonmover are taken as true." *Id.* This Court is unpersuaded. First, MCTA has preserved its opportunity to refute facts, as shown in its Opposition to the United States' Motion. *Id.* Second, as demonstrated below, this Court adheres to, and does not abrogate, the 12(c) principle that facts are viewed in the light most favorable to the nonmover. Accordingly, the Court shall address the United States' Motion as filed, without converting it into a motion for summary judgment. In granting the United States' Motion, this Court disposes of the case and thus declines to address the merits of MCTA's Motion.

A. Disputed issues of material fact

MCTA argues that seven issues of material fact remain, such that judgment on the pleadings under 12(c) is inappropriate. This Court disagrees. First, MCTA argues that "the government ignores the fact that the ancestors in title of the Mariner's Cove properties filed [the Declarations] which, under Louisiana law, establish real rights in immovable property that apply to all successive owners [...]." (Rec. Doc. 52 at 8). The United States expressly acknowledges that MCTA filed and recorded the Declarations, citing to MCTA's Answer and the Declarations themselves. (Rec. Doc. 51–1 at 3). The United States objects only to the second part of MCTA's argument, which addresses the issue of law whether a real covenant running with the land can burden property that the United States acquired through a condemnation proceeding.

Second, MCTA urges that the United States "ignores the similarity of the facts in [*Adaman Mut. Water Co. v. United States,* 278 F.2d 842 (9th Cir.1960)] to the facts at bar." (Rec. Doc. 52 at 8). Any objection by the United States on this point is plainly tied to legal analysis, not to a dispute about the factual events at the heart of this case. Third, MCTA states that the United States "ignores that the MCTA owns no property in common with the owners of the Mariner's Cove properties." *Id.* at 8. Yet the United States explicitly agrees, stating that "MCTA adamantly states that it has no property interest in the Mariner's Cove development." (Rec. Doc. 51–1 at

13). Fourth, MCTA argues that the United States disagrees that "MCTA has been damaged by the government's abrogation of the obligations it has as owner of encumbered properties." *Id.* at 9. However, the United States specifically acknowledges that MCTA "may be damaged by the instant takings [...]." (Rec. Doc. 51–1 at 11). Its objection pertains not to a factual issue but to whether those damages are compensable under the law. *Id.*

As required by Rule 12(c), the Court takes as true the allegations in MCTA's Answer for purposes of this Motion, including the remaining issues that MCTA characterizes as issues of fact in its Opposition which are referencing allegations in MCTA's Answer. (Rec. Docs. 52, 20). Specifically, the Court finds that "MCTA is a nonprofit corporation whose sole existence is to fulfill the obligations it has to the property owners it was created to serve [...]"; "there are no contracts between the MCTA and any specific owners"; and "the Declarations do not contain a statement that the properties are governed under a condominium regime," as required by the Louisiana Condominium Act, LSA–R.S. 9:1123.101 *et seq.* (Rec. Doc. 52 at 8–9). None of these allegations save MCTA's claims from judgment on the pleadings.

B. Present interest in the land

In its Opposition, MCTA repeatedly states or implies that it has a present interest in the land at issue. *See, e.g.,* Rec. Doc. 52 at 8 ("[Declarations] establish real rights [...] that apply to all successive owners [including the United States]."); *Id.* at 9

("MCTA has been damaged by the government's abrogation of the obligations it has as owner of encumbered properties [...].") (emphasis added). However, it provides no argument supporting that conclusion. In one portion of their Opposition, MCTA dispute that the United States takes perfect title to properties acquired through condemnation:

> [T]he United States proposes the novel concept that, when the government takes title to a property through condemnation, it takes the property free and clear, and therefore, any rights attached to the land that the government chose not to reserve in favor of the holder of the right would then vanish into thin air because of the "perfect title" it acquired. This confounding position misses the mark entirely, and brought to its logical conclusion, would erase the concept of just compensation.

(Rec. Doc. 52 at 3). Yet at another point, MCTA agrees with the Government that condemnation grants perfect title to the United States: "MCTA [...] agrees that the government takes 'perfect title' to any properties taken through condemnation." *Id.* at 10. Taken together, these seemingly contradictory statements demonstrate that the MCTA's quarrel with the United States is not over whether it has a present interest in the land but whether its interest in the land prior to the United States' taking is compensable.

Regardless of MCTA's exact position on its present interest, the law is clear that the United States has

perfect, unencumbered title of the land at issue in this case, and MCTA has no present interest in the same. According to the Fifth Circuit, "the default in eminent domain is that a taking in fee simple establishes a new title and extinguishes all existing possessory and ownership interests not specifically excepted." *United States v. 194.08 Acres of Land,* 135 F.3d 1025, 1029 (5th Cir.1998) (citing *A.W. Duckett & Co. v. United States,* 266 U.S. 149, 151 (1924). Once the declaration of taking and the deposit for just compensation are filed, the property vests in the United States under the Declaration of Takings Act. 40 U.S.C. § 3114; *see, e.g., Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1, 4 (1984); *United States v. 162.20 Acres of Land,* 639 F.2d 299, 303 (5th Cir. 1981).

In this case, the United States filed its complaint in condemnation and declarations of taking of the land at issue on June 5, 2009. (Rec. Docs. 1, 2). The interest MCTA claims in the land— the assessments— were not included as an exception in the declarations of taking. (Rec. Doc. 2 at 6). Thus, any interest MCTA had in the land prior to the taking was extinguished that day. Accordingly, the only issue left for the Court to consider is whether the MCTA's alleged interest prior to the United States' taking is compensable under the Fifth Amendment.

C. Compensability of MCTA's interest prior to the United States' taking

1. Federal law

MCTA's argument relies principally on *Adaman Mut. Water Co. v. United States,* 278 F.2d 842 (9th Cir.1960). There, the Ninth Circuit held that a non-profit water company's loss of assessments derived from a service that was "directly connected with the physical substance" of condemned land was compensable under the Takings Clause. *Id.* The Fifth Circuit has not addressed the issue whether assessments in connection with condemned land are compensable under the Takings Clause. MCTA points to no other cases adopting the *Adaman* holding besides one case with a similar factual scenario to *Adaman. United States v. 129.4 Acres of Land,* 446 F.Supp. 1, 2, 5 (D. Ariz. 1976), *aff'd* 572 F.2d 1385 (9th Cir.1978).

In *Adaman,* a corporation developed farm land in Arizona and divided it up in family-sized farms as part of a "Reclamation Project" ("Project") to encourage farming in the area. Because the surface area was dry, a water company was organized to collect and distribute underground water to the farms. *Adaman,* 278 F.2d at 844. Distribution to an individual farm occurred pursuant to a stock subscription agreement between the owner of a given parcel of the Project ("landowner") and the water company. Each share entitled the holder to a prorata share of water in exchange for assessments, which paid for the capital investment and operation and

maintenance of the irrigation facilities. The Landowners had the option to subscribe to the number of shares equal to the number of acres he or she owned. Non-landowners were ineligible for subscription. The agreement made any stock and the prorata share(s) of water and the accompanying obligation to pay assessments "forever inseparable from the land," even upon transfer and even if the transfer made no mention of the stock or shares of water, but the burden attached only once cultivation of the land had begun. *Id.* at 844, 847. Later, the United States condemned a portion of the land in the Project. *Adaman,* 278 F.2d at 844.

In holding that the water company was entitled to compensation for the diminution of its assessment base under the Fifth Amendment, the Court emphasized the physical element relating the water company to the taken land: "the loss is compensable, for the Government has destroyed an intangible right directly connected with the physical substance of the land condemned." *Id.* at 846. Specifically, the Court reasoned that the water company's physical presence defined the landowners' property rights: "[o]wners by deed held their segment subject to any liabilities or obligations imposed upon the land by reason of its inclusion within the boundaries of [Adaman]." *Id.* Furthermore, a precondition for the subscription agreement to apply, and thus for the stock, water share(s) and assessments to become appurtenant to a particular plot of land, was that cultivation of that land had to begin. *Id.* at 844 ("No assessment can be made, however, upon stock appurtenant to the land that has never been cultivated, that is, until

cultivation begins."). The Court was particularly swayed by this argument, supporting its holding by stating that "[a]s an integral facet of the overall plan, the duty to pay assessments attached to all land to which stock was appurtenant and *upon which cultivation had commenced*." *Id.* at 847 (emphasis added).

Like the water company in *Adaman*, MCTA is a non-profit business that collected assessments from landowners in exchange for services pursuant to an agreement that stated that it ran with the land. The Declarations clearly state that any "covenants, servitudes, conditions, restrictions, uses and obligations [...] shall be deemed to run with the land." (Rec. Doc. 20 at 3, Exhibit 2 at 2). They further state that MCTA is entitled to "levy and collect [...] assessments from owners" and required "to provide maintenance, management, insurance, and such other expenses as are enumerated in these Declarations." (Rec. Doc. 20 at 3, Exhibit 2 at 8). These tasks include "maintenance of all streets and pedestrian walkways within the project, lawn maintenance and landscaping, and maintenance of water and sewer service." (Rec. Doc. 20, Exhibit 2 at 2). An "owner" is the "record Owner [...] of any lot in the within project, together with improvements thereon." *Id.*

However, the similarities between the water company in *Adaman* and MCTA end there, and they do not warrant application of *Adamant's* holding to this case. First, in *Adaman,* the assessments were directly connected with the physical substance of the

land — the water underneath the land which it served. In contrast, MCTA's assessments were not in exchange for extracting, using or distributing a physical element of Mariner's Cove; instead, they were in exchange for residential building and landscape upkeep. Further, unlike in *Adaman,* where the purpose of the project was "to create an integrated, agricultural development," Mariner's Cove was a residential development, not tied to cultivating or making productive use of the land. *Id.* at 846. Lost assessments were held compensable in *United States v. 129.4 Acres of Land,* but the assessments there were derived from prorata benefits of water delivery services, including operation and maintenance of water delivery facilities, in an agricultural development. 446 F.Supp. at 2, 5. Again, in contrast, MCTA's assessments were collected not in exchange for the provision of a natural element physically extracted from the land at issue, but rather for residential building, street, and lawn upkeep.

Second, unlike in *Adaman,* where the water company's physical presence on the land limited landowners' property rights, MCTA did not encroach on Mariner's Cove owners' property rights. Indeed, MCTA states that it had no property interest whatsoever in the Mariner's Cove development and nowhere indicates that it physically defined the owners' rights. *See* Rec. Doc. 20 at 4 (stating that MCTA adopts its pleadings filed in Civil Action 08–3198 under Rule 10(c)); Rec. Doc. 1 at 6). Third, the subscription agreement swayed the *Adaman* Court not because it stated that assessments ran with the

land, but because the contract conditioned assessment on the landowner's physical cultivation of the land. *Adaman*, 278 F.2d at 847. In contrast, the Declarations do not create any precondition for assessments to run with the land other than the owner's record ownership of the land. MCTA has not shown how this relationship is analogous to that in *Adaman,* warranting the holding that MCTA's loss of assessments is compensable because those assessments were "directly connected with the physical substance of the land."

2. Louisiana State Law

Although federal substantive and procedural law are binding in condemnation proceedings, courts may consider state law to determine whether a property interest is compensable. *See United States v. 131.68 Acres of Land,* 695 F.2d 872, 875 (5th Cir.1983). Under Louisiana law, provisions of building restrictions that restrict use to residential purposes only are not compensable. *See Gremillion v. Rapides Parish Sch. Board,* 134 So.2d 700 (La.App. 3 Cir. 1961); *rev'd on other grounds,* 140 So. 2d 377 (La. 1962) (holding that school board's use of property for school purposes, in violation of otherwise binding covenant restricting such property to residential use, was not compensable); *Hospital Service Dist. No. 2 of St. Landry Parish v. Dean,* 345 So.2d 234 (La.App. 3 Cir. 1977) (holding that district's construction of hospital on land restricted under restrictive covenant to residential use was not compensable). However, as MCTA states in its Opposition, Louisiana courts have not specifically addressed whether building

restrictions that require affirmative action, or building restrictions in general, are a compensable property interest. (Rec. Doc. 52 at 14). Given this silence, and given that federal law controls on the issue of compensability, Louisiana state law does not disturb this Court's finding MCTA's claimed interest is not compensable. Construing the allegations in MCTA's Answer in the light most favorable to MCTA, the Court finds that MCTA's interest in the fourteen townhomes is not compensable.

Accordingly,

IT IS ORDERED that the United States' Motion for Judgment on the Pleadings is GRANTED. (Rec. Doc. 51).

IT IS FURTHER ORDERED that Mariner's Cove Townhomes Association, Inc.'s Motion for Partial Summary Judgment is DISMISSED AS MOOT.

New Orleans, Louisiana, this 9th day of November, 2011.

/s/
HELEN G. BERRIGAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-31167

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

0.073 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

0.071 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.139 acres of land, more or less, situate in Parish of Orleans, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

0.134 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.135 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.072 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

0.153 acres of land, more or less, situate in Parishes of Orleans and Jefferson, State of Louisiana, et al.,

Defendants

MARINER'S COVE TOWNHOMES ASSOCIATION, INCORPORATED,

Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC
(Opinion_____, 5 Cir., _____, _____, F.3d_____)

[March 26, 2013]

Before STEWART, Chief Judge, and KING and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

DECLARATION OF SERVITUDES, CONDITIONS AND RESTRICTIONS OF MARINERS COVE TOWNHOMES ASSOCIATION, INC.

* * *

Appearers hereby state that the property described above shall be held, sold and conveyed subject to the following covenants, servitudes, conditions, restrictions, uses and obligations, all of which are declared and agreed to be for the protection of the value of the property and for the benefit of any person having any right, title or interest in the described property, and which shall be deemed to run with the land, and shall be a burden and benefit to any persons acquiring such interests, their grantees, successors, heirs, legal representatives and assigns.

ARTICLE I

DEFINITIONS

1. "Association" shall mean and refer to Mariners Cove Townhomes Association, Inc., and its individuals members.

* * *

4. "Expenses of Maintenance" shall mean the Owners' pro rata (1/58 interest) share of the general common expenses including but not limited to, maintenance of all streets and pedestrian walkways

within the project, lawn maintenance and landscaping, maintenance of water and sewer service, management costs, reserves for capital improvements, assessments and all other charges which the Association may levy upon the Owners in accordance with these Declarations or the By-Laws.

* * *

6. "Declarations" shall mean this document of Declarations of Servitudes, Conditions and Restrictions of Mariners Cove Townhomes, Inc. as may be amended from time to time.

7. "Lots" shall mean and refer to any lot of land as shown upon any recorded subdivision map of the Properties, more specifically, on the survey of J. J. Krebs and Sons, Inc. dated July 28, 1977, attached hereto.

8. "Manager" shall mean any duly authorized property manager or managerial company employed or appointed by the Association to implement the duties and responsibilities incumbent upon the Association.

9. "Owner" shall mean and refer to the record Owner, whether one or more persons or entities, of any lot in the within project, together with improvements thereon.

* * *

12. "Properties" shall mean and refer to the lots described and all improvements thereon and thereto which constitute or shall constitute the entire project herein created, known as Mariners Cover Townhomes.

* * *

ARTICLE II

SCOPE OF DECLARATIONS

1. PROPERTY SUBJECT TO DECLARATION

Appearers, as Owners of the Properties, expressly intend to an, by recording these Declarations, do hereby subject the Properties to the provisions of these Declarations. Nothing in these Declarations shall be construed to obligate Appearers to subject these Declarations as Properties any portion of the development area other than those portions described herein and presently subject to these Declarations.

2. CONVEYANCES SUBJECT TO DECLARATION

All servitudes, restrictions, conditions, covenants, reservations, liens, charges, rights, benefits, and privileges which are granted, created, reserved or declared by these Declarations shall be deemed to be covenants appurtenant, running with the land, and shall at all times inure to the benefit of and be binding on any person having at any time any

interest in the Properties, and their respective heirs, successors, representatives, lessees or assigns. Reference in any act of conveyance, lease, mortgage, other evidence of obligation, or other instrument to the provisions of these Declarations shall be sufficient to create and reserve all of the servitudes, restrictions, conditions, covenants, reservations, liens, charges, rights, benefits or privileges which are granted, created, reserved or declared by these Declarations, as fully and completely as though they were set forth in their entirety in any such document. If reference should be omitted, nevertheless any purchaser or lessee shall be bound by all provisions of these Declarations as provided in Section 5 of Article III hereof.

* * *

ARTICLE IV

USE AND OTHER RESTRICTIONS

1. USE

All of the Properties shall be used for residential purposes only and the maintenance and administration of such. All buildings or structures erected upon said Properties shall be of new construction and no buildings or structures shall be moved from other locations onto the Properties. No structures of a temporary character, trailer, tent, shack, garage, barn or other outbuildings shall be placed on any portion of said Properties. No swimming pools of a permanent or temporary nature

shall be placed on the Properties. No additions or deletions to any Townhouse shall be allowed.

* * *

ARTICLE VII

ASSESSMENTS

1. ASSESSMENTS

Each Owner, upon transfer of title, agrees to pay the Association (1) assessments or charges, and (2) special assessments to be fixed, established and collected from time to time as herein provided. Such assessments, together with interest, attorney fees, and the cost of collection in the event of delinquency in payment shall be the personal obligation of the person who was the Owner, or the persons jointly and severally who were the Owners, at the time when the assessment was made. Payment of the assessments shall be made by the Owners to the Association on an annual or other periodic basis. Assessments shall be due and payable on the first day of January each year and shall become delinquent on March 31 of that year or as provided by Article VIII of the By-Laws.

2. PURPOSE OF ASSESSMENTS

The assessments levied by the Association shall be exclusively for the management and maintenance of the Properties, for the performance of the duties and obligations incurred by the Association pursuant to these Declarations, for repairs,

replacement, maintenance and insurance of walkways and streets within the Properties, caring for the grounds, mowing grass, landscaping, garbage pick-up, administration expenses, working capital, the hiring of personnel necessary for implementation, rental and acquisition of real or personal property, and in connection with other duties to be performed under these Declarations, or that the Association, in its opinion, shall determine to be necessary and desirable including the establishments and maintenance of a cash reserve for such repairs, maintenance and other expenses to be incurred as herein specified. In the event repairs are required resulting from negligent acts of the Owners, the Owner's family, guests, employees, invitees or lessees, the Association shall be reimbursed forthwith by such Owner thereof.

3. BASIS OF ASSESSMENTS

(a) **Maintenance Expenses.** Each Owner shall pay a proportionate 1/58 share of the expense of maintenance, repair, replacement, administration and operation of the Properties, including water and sewer service to the individual Townhouses, unless water service is separately metered to each Townhouse and the * * * Townhouse owner shall be responsible for payment of his own water and sewer charges.

(b) **Individual Assessments.** The Association shall have the right to add

to any Owner's assessment as provided in this Article those amounts expended by the Association for the benefit of any individual Townhouse and the Owner or Owners thereof, including, but not limited to Townhouse insurance as provided hereinafter; repairs and replacements caused by the negligent or willful acts of any owner, his family, guests, employees, licensees, lessees, or invitees, and all other expenditures provided by these Declarations or the By-Laws.

(c) **Levy of Assessments.** The Board shall, during the last month of each calendar year, determine the estimated annual assessment to be paid by each Owner and payable periodically during the following year; provided, however, that said assessment may be adjusted if deemed necessary by the Board but no more than twice in any one year.

(d) **Non-Exemption.** No Owner shall be exempt or relieved from payment of any assessment or charge by the abandonment or leaving of a Townhouse.

4. SPECIAL ASSESSMENTS

In addition to the assessments authorized above for maintenance and repairs, the Board may

levy special assessments for the purpose of defraying in whole or in part the cost of any construction or reconstruction, unexpected structural repairs or replacement or capital improvements, including the necessary fixtures and personal property related thereto. If any such assessment exceeds $5,000.00 the same shall have assent of not less than a majority of the Owners voting in person or by proxy at a meeting duly called for such purposes or at the annual meeting, at which time not less than twenty-five percent (25%) of the Owners shall be represented in person or by proxy. Written notice shall be sent to all Owners of record not less than fifteen (15) days not more than thirty (30) days in advance of the meeting setting forth the purpose of the meeting.

5. NON-PAYMENT OF ASSESSMENTS

(a) Assessments and fees shall be due and payable on the first day of each year and shall become delinquent on March 31 of that year, or as provided by Article VIII of the By-Laws. All unpaid assessments and fees shall be subject to a late charge for non-payment as may be determined from time to time by the Board. If such fees or assessments are not paid by March 31, they shall bear interest from the date of delinquency at the rate of one and one-half (1-1/2%) percent per month or other reasonable rate that may be fixed by the Board and uniformly applied. In the event it shall become necessary for the Board to collect any

delinquent assessments or fees, whether by filing of a lien hereinafter created or otherwise, the delinquent Owner shall pay in addition to the assessment and late charge and interest herein provided, all costs of collection, including a reasonable attorney's fee and costs incurred by the Board in enforcing payment.

(b) The Association shall have an immediate lien against the property of any owner who is delinquent in the payment of his assessments and is hereby granted the right to enforce collection of these monthly or periodic assessments by any legal means including the reduction of said lien to writing and causing it to be filed of record against the property involved. Said lien is to be duly executed and recorded in accordance with the laws of the State of Louisiana. Such lien shall be subject and subordinate to and shall not affect the right of a holder of any prior recorded mortgage, lien or privilege on the lot against which the lien is filed.

(c) In the event an Owner is in default on any obligation secured by an encumbrance on his Townhouse, the Board may at its option pay the amount due on said obligation and file a lien

against the Townhouse in the manner as is provided for herein for unpaid assessments or fees.

(d) Sale or transfer of any interest by an Owner shall not affect or release any lien granted the Association herein.

(e) In the case of the conveyance of a Townhouse pursuant to foreclosure proceedings or by deed in lieu of foreclosure, such transfer of title shall extinguish the lien for all unpaid assessments made by the Association becoming due before the date of transfer of title or date of first possession, whichever comes first. The amount remaining unpaid with respect to which the lien is extinguished shall be deemed to be a Maintenance Expense collectible from all the Owners as such, without prejudice to the right of the Association to recover such amount from the transferor Owner.

6. SUBORDINATION OF THE LIEN TO ENCUMBRANCES

The lien provided herein shall be subordinate only to any prior recorded lien or mortgage now existing placed against the property or interest of the Owner.

ARTICLE VIII

MAINTENANCE

1. MAINTENANCE

The Association shall provide for the care, operation and management of the Properties. Without limiting the generality of the foregoing and by way of illustration, said obligations shall include the repair, maintenance, and insurance of all pedestrian walkways and streets within the Properties, caring for the grounds, mowing grass, landscaping and garbage pickup, maintenance of sewer, water and drainage lines which serve more than one Townhouse.

* * *

ARTICLE IX

* * *

5. ASSOCIATION INSURANCE

The Association shall be required and is hereby empowered to obtain and maintain the following insurance:

(a) Comprehensive public liability insurance in a minimum amount of $1,000,000.00 per single occurrence.

(b) Worker's Compensation coverage upon employees.

(c) Fidelity bond to protect against dishonest acts on the part of the Association officers, directors, trustees and employees, and all others who handle or are responsible for handling Association funds.

(d) Such other insurance as the Board may deem desirable for the benefit of the Owners.

(e) Such other insurance as may be required to insure Townhouses under Section 3 of this Article.

ARTICLE X

DURATION

1. TERMS

These covenants to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten (10) years. Appearers may change or amend, in whole or in part, any restriction or covenant herein until such time as he sells 75% of the lots herein or until July 1, 1980 which occurs first. Thereafter these restrictions may

be amended as provided for in the By-Laws of the Mariners Cove Townhomes Association, Inc.

ARTICLE XI

GENERAL PROVISIONS

1. ENFORCEMENT

The Association shall have the right to enforce all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of these Declarations.

* * *