O/a 8-30-83

IN THE SUPREME COURT OF FLORIDA

FILED

APR 29 1983

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

CITY OF ST. PETERSBURG, FLORIDA,

Petitioner,

vs.

BARRY L. WALL and GEORGE D. CRANTON,

Respondents.

CASE NO. 62,821

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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II. WHETHER THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES THE CITY FROM CONTESTING THE CONDITIONS IMPOSED BY THE SECOND DISTRICT COURT OF APPEAL UPON THE CITY'S AUTOMATIC STAY.

III. WHETHER THE CONDITIONS IMPOSED BY THE SECOND DISTRICT COURT OF APPEAL UPON THE CITY'S STAY OF THE FINAL JUDGMENT MAY CONSTITUTE A BASIS UPON WHICH DAMAGES MAY BE PREDICATED.

IV. WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES THE CITY FROM CONTESTING ITS LIABILITY FOR DAMAGES INCURRED BY THE RESPONDENTS DURING THE CITY'S APPEAL OF THE FINAL JUDGMENT DISMISSING ITS EMINENT DOMAIN ACTION.

V. WHETHER THE TRIAL COURT ERRED IN CONSIDERING RESPONDENTS' ALTERNATIVE CLAIM FOR INVERSE CONDEMNATION.

PRELIMINARY STATEMENT

The Petitioner, City of St. Petersburg, Florida, shall be referred to herein solely as "City", and the Respondents, Barry L. Wall and George D. Cranton, shall be referred to as "Respondents".

The following symbols shall be utilized herein:

"A" shall refer to the Appendix accompanying City's Brief.

"AA" shall refer to the Appendix accompanying this Brief.

"B" shall refer to the City's Brief.

"R" shall refer to the Record on Appeal.

Although the Respondents do not disagree with the City's description of the Statement of the Case and Facts as set forth in its Initial Brief on the Merits, Respondents believe that a more detailed account of the course of the proceedings and underlying facts is necessary for a proper disposition of the issues on appeal. Accordingly, Respondents submit the following Statement of the Case and Statement of the Facts for this Court's consideration.

STATEMENT OF THE CASE

In the case sub judice the City requests this Court to reverse the decision of the District Court of Appeal, Second District, affirming a jury verdict which assessed against the City damages incurred by Respondents during the City's appeal of an adverse judgment in a prior eminent domain action. The City had sought to condemn a parcel of real property owned by Respondents for incorporation in a proposed storm water drainage system. See City of St. Petersburg, Florida v. Wall, et al, Circuit Court, Sixth Judicial Circuit in and for Pinellas County, Florida, Case No. 78-151. At the hearing on the City's Motion for an Order of Taking, Respondents established by cross-examination alone that the City's engineers had not made the necessary calculations or analysis to properly design the desired drainage system and that according to the system's plans as presented, drainage water would actually flow backwards and flood northwest areas of Pinellas County. (R-157). Accordingly, since the system would not work, the trial court ruled that the City failed to carry its burden of proof and entered a judgment denying the City's right to

acquire title to Respondents' property and dissolving the Lis Pendens filed of record. (AA-10).

Subsequently, the City timely appealed the aforesaid Final Judgment to the District Court of Appeal, Second District. Respondents then filed a Motion for Supersedeas Bond requesting that the City's automatic stay provided by Rule 5.12(1), Florida Appellate Rules, be conditioned upon the posting of a bond to secure payment of all damages incurred by Respondents by virtue of the delay during the appellate proceedings. (AA-12). In the alternative, Respondents requested that the automatic stay be vacated to enable Respondents to utilize their property. (AA-13). Since jurisdiction had vested in the District Court of Appeal, Second District, Respondents sought an order to authorize the trial court to hear and determine their Motion for Supersedeas Bond. (AA-14). On May 31, 1978, the Second District Court of Appeal denied Respondents' Motion but provided in its Order that the denial was "WITHOUT PREJUDICE TO APPELLEES SEEKING RECOVERY OF DAMAGES AND COSTS RESULTING FROM ANY STAY PENDING APPEAL PURSUANT TO RULE 9.130(B)(2), FLORIDA RULES OF APPELLATE PROCEDURE." (AA-16). The City did not seek review of the aforesaid Order. On November 1, 1978, the Second District Court of Appeal affirmed the aforementioned Final Judgment per curiam. (AA-21). This Court denied the City's subsequent Petition for Writ of Certiorari on September 17, 1979.

Thereafter, Respondents instituted the instant action and proceeded to trial asserting that the City was liable for damages on two legal theories: (1) the implied contract created by the Order of the Second District Court of Appeal, and (2) inverse condemnation. The jury returned a verdict in favor of

the Respondents and assessed damages against the City in the amount of $128,304.76. (AA-17). Final Judgment was entered August 10, 1981, and the City timely filed its Notice of Appeal. (AA-18). Subsequently, the Second District Court of Appeal affirmed the award of damages during the appeal period but reversed the award for losses incurred during the litigation in the trial court. (A-1-5). On October 29, 1982, the City filed its Notice pursuant to Rule 9.120(b), Florida Rules of Appellate Procedure, invoking the jurisdiction of this Court under Rule 9.030(a)(2)(A)(iv). (AA-19). This Court accepted jurisdiction of this case by Order dated March 25, 1983. (AA-20).

STATEMENT OF THE FACTS

The factual basis of the case sub judice originated from the City's actions in a prior eminent domain suit instituted by the City on September 9, 1977. See City of St. Petersburg, Florida v. Wall, et al, Case No. 78-151. The City had attempted to condemn a parcel of real property owned by the Respondents for incorporation in a proposed storm water drainage system. Prior to the City Council's execution of the Resolution authorizing the aforesaid eminent domain action, Respondents appeared before the City Council to voice their objection to the condemnation of their property. (AA-1-9). Respondents specifically advised the Council that the subject property had been recently purchased by Respondents in order to construct a medical equipment manufacturing plant to replace the facilities which had recently been condemned by the City. Council was informed that City officials had assisted Respondents in selecting the site and that Respondents' decision to purchase was based upon assurances that the City had no need or desire to use the same for public purposes. Respondents complained that their property had been condemned on four prior occasions by governmental agencies in recent years and that the subject property was the last remaining parcel of undeveloped land zoned "Light Manufacturing" available within the City of St. Petersburg. Council members voiced their concern over the necessity of acquiring Respondents' property and specifically questioned the designing engineer as to the possibility of eliminating the subject parcel from the storm water drainage system. The City's engineer responded that the project would be abandoned unless the

Respondents' property was acquired. Subsequently, the Council voted to approve the condemnation of Respondents' land and the City's Petition in Eminent Domain was filed subsequent thereto. (AA-1-9).

At the hearing on the City's Motion for an Order of Taking the Respondents established, through cross-examination alone, that the City's engineers had not made the necessary calculations or analysis to properly design the contemplated storm water drainage system and that, according to the plans as presented, storm water would actually flow backwards and flood northwest areas of Pinellas County. (R-157). At the close of the City's presentation of testimony, the trial court granted Respondents' Motion for Directed Verdict, ruled that the City had failed to meet its burden of proof establishing reasonable necessity and entered Final Judgment denying the City's right to acquire title to Respondents' property and dissolving the Lis Pendens filed of record. (AA-10).

After the City filed its Notice of Appeal, the Respondents filed a Motion for Supersedeas Bond with the trial court, requesting that the City's automatic stay provided by Rule 5.12(1), Florida Appellate Rules, be conditioned upon the posting of a bond to secure payment of damages incurred by Respondents by virtue of the delay during the appellate proceedings. (AA-12). Respondents specifically noted that the pendency of the condemnation action and the Lis Pendens which remained of record effectively precluded Respondents from making use of their property for which it was purchased, i.e., to construct a complex to house their manufacturing operations. Respondents advised the Court that throughout the appellate period they would incur further damages in that they must continue to pay property taxes, mortgage payments, insurance premiums,

and continue renting temporary buildings to operate their businesses until they could proceed with their developmental plans. The irreparable damage that Respondents would suffer by virtue of spiralling construction and financing costs was also particularly set forth. (AA-12,13).

In further support of their request for a supersedeas bond, Respondents cited the then-recent First District Court of Appeal's decision in City of Jacksonville v. Brentwood Golf Course, Inc., 338 So.2d 1105 (Fla. 1st DCA 1976) which held that the recovery of damages caused by appellate delay is precluded when no supersedeas bond is requested or required. In the alternative, Respondents requested that the automatic stay provided by the Rules of Appellate Procedure be vacated to enable the Respondents to utilize their property. (AA-12,13).

On April 27, 1978, the Respondents filed with the Second District Court of Appeal a Motion for Order Authorizing the Lower Court to Hear and Determine the Motion for Supersedeas Bond pursuant to Rule 3.8, Florida Appellate Rules, again specifically citing City of Jacksonville v. Brentwood Golf Course, Inc., supra, in support of their Motion for Supersedeas Bond. (AA-14,15).

On May 31, 1978, the Second District Court of Appeal denied Respondents' aforesaid Motion but conditioned the City's retention of the automatic stay as described in the Statement of the Case. The City did not seek review of the aforesaid Order. The Lis Pendens and the eminent domain action remained of record throughout the City's appeal until this Court denied City's Petition for Writ of Certiorari on September 17, 1979.

On October 29, 1979, Respondents commenced this action and proceeded to trial on two theories of liability: (1) the implied contract created

by the condition imposed by the Second District Court of Appeal on the City's stay and (2) inverse condemnation. During the trial Respondents introduced into evidence the transcripts of the City Council hearing and the Order of Taking hearing described previously herein, together with testimony and evidence of their inability to make economic use of their property and the substantial damages incurred by Respondents as a result of the City's actions, none of which was controverted by the City. (R-156, 157, 165-167, 169-199, 205-212, 213-220). The jury assessed damages accordingly and the City pursued its appellate remedies as set forth in the Statement of the Case herein. (AA-17).

POINT AT ISSUE

I

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN CITY OF ST. PETERSBURG, FLORIDA V. WALL, ET AL, CASE NO. 81-1823, SEPTEMBER 29, 1982, DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN CITY OF LAUDERDALE LAKES V. CORN, 415 SO.2D 1270 (FLA. 1982).

The City's assertion in its first point on appeal that the Final Judgment from which it appealed in the prior eminent domain action concerned a legislative or planning level governmental function is patently erroneous. The City's inability to properly construe the import of said Final Judgment permeates its Initial Brief on the Merits and distorts the plain meaning of the Opinion of the Second District Court of Appeal presently on review by this Court. Respondents have never disputed the principle that the City's determination to exercise its power of eminent domain to acquire the Respondents' property was a planning level governmental function for which the City remains immune from liability. However, the final determination of the necessity of a taking is not a legislative act but rather a judicial function. See City of Lakeland v. Bunch, 293 So.2d 66 (Fla. 1974). In Bunch, supra, the landowners asserted that the Florida Statutes governing eminent domain actions were unconstitutional as violative of due process rights. The trial court so ruled, declaring that since the City Council in an eminent domain action is acting as an administrative body, minimal elements of administrative due process are required before

the filing of a suit. On appeal, this Court reversed and held that adequate and meaningful safeguards were provided within the subject statutes since notice and opportunity to be heard were provided prior to the entry of the order of taking. In reaching such conclusion, this Court held that the necessity for the exercise of eminent domain power, although initially determined by the City Council, is ultimately a judicial question for the Courts.

As is clearly indicated in the Statement of the Facts and Statement of the Case herein, the Final Judgment that was reviewed in the prior appeal was not of a legislative nature but rather a judicial determination. At the Order of Taking hearing in said case, the Respondents did not question the City's legislative determination to condemn their property for incorporation into the proposed drainage system. They did not contest the City's right to take their property for the benefit of the public nor did they argue that a drainage system was not necessary. Rather, the Respondents simply proved that the contemplated drainage system would not work. In fact, Respondents proved, based on plans presented, that the storm water would actually flow backwards and flood northwest areas of Pinellas County. In light of such evidence, the trial court ruled as a matter of law that the City had failed to carry its burden of proof on the issue of the necessity of taking. (AA-14). The trial court did not invalidate a legislative act. Nor did it attempt to scrutinize the wisdom of the City Council in the performance of its function as a coordinate branch of the municipal government. No discretionary policy-making decision was controverted. The trial judge simply ruled that since the drainage system would not work as designed

the City had failed to prove that it was necessary. This distinction must be emphasized for it clearly delineates the inapplicability of the rule of law set forth in City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982).

In Corn, supra, a land developer successfully instituted an action which invalidated a municipal zoning ordinance. The attack in that case was specifically directed at a legislative planning level governmental function, i.e., zoning. The City in Corn, supra, appealed the judgment and the landowners requested the trial court to condition a stay of the final judgment upon the City's posting a bond. The trial court granted the landowners' request and the City immediately sought review of said order. The Fourth District Court of Appeal denied the City's motion for review and certified the question as to the propriety of said bond to the Florida Supreme Court. This Court subsequently reversed said decision and declared that no authority existed that lawfully required the posting of bonds on an appeal stemming from a judgment involving planning level governmental functions. In the case at bar, since the trial court's decision that was previously appealed by the City did not declare invalid a legislative act, the holding set forth in Corn, supra, and the City's discussion of the four-pronged test set forth in Commercial Carrier, Inc. v. Indian River County, 371 So.2d 1010 (Fla. 1979) are not relevant to the disposition of this appeal. The Second District Court of Appeal clearly recognized this important distinction when it stated in a footnote to its Opinion:

> "We note the City's supplemental reliance on City of Lauderdale Lakes v. Corn, No. 57,247 (Fla., June 17, 1982) but we regard the case as inapposite because it concerns matters of legislative planning."

Based on the foregoing, it is apparent that no conflict exists between the Opinion sought to be reviewed herein and the cases cited by the City. Respondents respectfully submit that no confusion or discord will arise in the decisional law of this state as a result of the statements of law set forth by the Second District Court of Appeal.

POINT AT ISSUE

II

WHETHER THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES THE CITY FROM CONTESTING THE CONDITIONS IMPOSED BY THE SECOND DISTRICT COURT OF APPEAL UPON THE CITY'S AUTOMATIC STAY.

As described more particularly in the Statement of the Case and Statement of the Facts herein, after the City filed an appeal on January 20, 1978 of the Final Judgment dismissing its Petition for Condemnation and dissolving the Lis Pendens filed of record in City of St. Petersburg, Florida v. Wall, et al, Circuit Court, Sixth Judicial Circuit in and for Pinellas County, Florida, Case No. 78-151, Respondents filed a Motion for Supersedeas Bond requesting that the City's automatic stay provided by Rule 5.12(1), Florida Appellate Rules, be conditioned upon the posting of a bond to secure payment of all damages to be incurred by Respondents by virtue of their inability to utilize their property during the appellate proceedings. (AA-12). Since jurisdiction had vested in the Second District Court of Appeal, Respondents sought an order authorizing the trial court to hear and determine the aforesaid Motion for Supersedeas Bond. (AA-14). The Second District Court of Appeal concluded that there was no necessity to require the City to post a bond and denied Respondents' Motion "without prejudice to Appellees [Respondents] seeking recovery for damages and costs resulting from any stay pending appeal pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure." (A-2; AA- 16).

The Second District Court of Appeal clearly defined the meaning of the above-quoted language in the Opinion appealed herein when it stated:

> "Here the City was on notice that we recognized its potential liability even though we excused it from the expense of posting a bond. There is little reason to request a solvent municipality to post a bond when its potential liability for obtaining a stay is made a matter of record." (A-3, 4).

The City did not seek review of the propriety of said Order. It did, however, accept the benefits of the stay and retained the Lis Pendens of record until this Court denied the City's Petition for Writ of Certiorari on September 17, 1979.

Throughout this action the City has maintained that the Second District Court of Appeal's Order conditioning the City's stay of Final Judgment in the prior eminent domain suit cannot constitute a basis upon which damages can be predicated. Such argument ignores the prohibition against collateral attacks upon decisions by Courts of competent jurisdiction that has been consistently enforced in Florida. Eastern Shores Sales Company v. City of North Miami Beach, 363 So.2d 321 (Fla. 1978); Aldrich v. Aldrich, 163 So.2d 276 (Fla. 1964); City of Miami v. Osborne, 55 So.2d 120 (Fla. 1951); Tervin v. State, 116 Fla. 633, 156 So. 627, (1934); Lucy v. Deas, 59 Fla. 552, 52 So. 515 (1910); Einstein v. Davidson, 35 Fla. 342, 17 So. 563 (1895). This Court ruled accordingly in Eastern Shores Sales Company, supra, and applied the doctrine of collateral estoppel in a suit to contest the assessment of property taxes in alleged violation of a 1956 annexation agreement with a muncipality. The agreement provided that the City would not levy taxes against the annexed land until buildings had been constructed or revenue-producing improvements

had been placed on the land. The City filed suit seeking a declaratory decree approving the annexation and ratifying the agreement which was rendered by the Circuit Court in 1957. No appeal was taken from this decree. Subsequently, the City, in accordance with the agreement, annexed the land. In 1973, Eastern Shores' land was placed on the City's tax roll and city taxes were assessed retroactively. Eastern Shores was permitted to intervene in the original 1957 lawsuit and alleged that the conditions precedent to taxation had not occurred. In response, the City sought to be relieved from that portion of the 1957 decree that prohibited the taxing of undeveloped land. The trial court held the City in contempt for violating the Court's earlier decree. On appeal, the Third District Court of Appeal reversed, holding that the City was not estopped to assert the invalidity of the 1957 judgment. This Court granted certiorari and quashed the Third District Court of Appeal's decision stating that although the trial court was wrong when it allowed the City in 1957 to contract away its taxing power, that was not sufficient reason now to void that portion of the final decree. At page 323, this Court stated:

> "In the present case the trial court had 'subject matter' jurisdiction; therefore, the final decree, although erroneous, became binding upon the parties when no appeal was taken. Once the authority to decide has been shown, it cannot be divested by being incorrectly employed."

This Court held that since the 1957 decree unequivocally upheld the validity of the agreement between the City and the plaintiff's predecessors, that judgment became conclusive and estopped the parties from relitigating that issue. It was also noted that the fact that the trial court retained

jurisdiction for the purpose of enforcing its decree did not make the judgment any less final or more subject to collateral attack.

Of similar import is this Court's decision in Aldrich, supra, wherein a final decree entered in a Florida action for dissolution of marriage awarded the petitioner $250.00 per month as permanent alimony and provided that such monthly sums should be a charge against the husband's estate during her lifetime in the event the husband predeceased her. No reference was made in the decree as to an agreement between the parties settling their property rights or stipulating to the payment of alimony from the estate of the husband after his death. The decree was not appealed. Upon the death of the husband, the petitioner filed an action in West Virginia to recover the amount of unpaid alimony accrued since the date of the death of the husband. The trial court held that the provisions of the divorce decree purporting to bind the estate of the husband for the payment of alimony accruing after his death were invalid and unenforceable and entered summary judgment for the defendant. Said decision was affirmed on appeal to the Supreme Court of Appeals of West Virginia and the petitioner applied to the Supreme Court of the United States for a review on certiorari. Subsequently, certain questions of law arising out of the controversy were certified to this Court. Upon consideration, this Court noted that the trial court had had subject matter jurisdiction of the divorce action but that in exercising such jurisdiction its decision as to alimony after the death of the husband was erroneous. Nevertheless, this Court acknowledged the estate's liability for such alimony when it stated at page 284:

> "It is our further view, however, that when the husband failed to take an appeal and give a reviewing court an opportunity to correct the error the decree of the Circuit Court on such question passed into verity, became final, and is not now subject to collateral attack."

The doctrine of collateral estoppel was also applied by this Court in Carlor Co., Inc. v. City of Miami, 62 So.2d 897 (Fla. 1953) to prevent a collateral attack upon a decree rendered in an eminent domain action. In Carlor Co., Inc., supra, the plaintiff filed suit to set aside a final judgment of condemnation which had not been appealed and alleged that the condemnor's resolution was defective, that interested parties were not joined and that fraud permeated the proceedings. This Court affirmed the trial court's dismissal of the complaint and held that the allegations of fraud were insufficient to open the judgment to collateral attack. This Court ruled that the remaining assertions of error could not be collaterally attacked by this action instituted seven years after the final judgment was entered and stated at page 900:

> "It is well established that the rules governing the application of the doctrine of res judicata are applicable to condemnation judgments and that the parties are concluded as to all matters which were put in issue or might have been put in issue or were necessarily implied in the decision of the trial court such as the right to condemn and the legality of the proceedings. It is immaterial that the point adjudicated may have been erroneously decided. If it was, the owner should have corrected the error by appeal and cannot now do so by a collateral attack upon the final judgment."

As noted previously, the Second District Court of Appeal conditioned the City's automatic stay of the Final Judgment dismissing the eminent domain action and dissolving the Lis Pendens with the responsibility for the damages resulting therefrom. The City chose not to appeal said Order.

It also chose to accept the stay. Under the foregoing principles of law the decree became conclusive and binding between the parties hereto. Even if it is assumed as alleged by the City that the Second District Court of Appeal had no authority to require a supersedeas bond or impose a condition creating liability pursuant to an implied contract, the subject Order passed into verity, became final and is not now subject to collateral attack. Having failed to seek review of the aforesaid Order, the City is prohibited by the doctrine of collateral estoppel from denying in this action its liability to Respondents for the damages incurred during the City's appeal of the prior adverse judgment.

POINT AT ISSUE

III

WHETHER THE CONDITIONS IMPOSED BY THE SECOND DISTRICT COURT OF APPEAL UPON THE CITY'S STAY OF THE FINAL JUDGMENT MAY CONSTITUTE A BASIS UPON WHICH DAMAGES MAY BE PREDICATED.

By the promulgation of Rule 5.12, Florida Appellate Rules, and Rule 9.310, Florida Rules of Appellate Procedure, the Florida Supreme Court has provided public bodies and public officers the privilege of receiving an automatic stay of a final judgment upon the timely filing of a notice of appeal. While the stay granted is automatic, it is not a matter of absolute right since this Court provided procedures whereby conditions, including the requirement of posting bond, may be imposed upon such stays. Rule 9.310(a), Florida Rules of Appellate Procedure; Rule 5.12, Florida Appellate Rules. In response to Respondents' Motion for Supersedeas Bond to secure payment of all damages incurred as a result of the City's appeal of the dismissal of the eminent domain action in City of St. Petersburg, Florida v. Wall, et al, Circuit Court, Sixth Judicial Circuit in and for Pinellas County, Florida, Case No. 78-151, the Second District Court of Appeal concluded that there was no necessity to require the City to expend funds from the public treasury for the payment of an appeal bond premium, yet conditioned the City's stay by specifically stating that the denial of the motion was without prejudice to the appellees seeking recovery of damages and costs resulting from any stay pending the appeal period. (AA-16). Said condition did not automatically

hold the City legally responsible for the damages incurred by Respondents during the delay but merely tempered the City's right to a stay of execution of the Final Judgment with the responsibility for the consequences of such stay. The City, upon receipt of said Order, had three alternatives: it could have accepted the conditions set forth in the Order and received the stay, it could have proceeded with its appeal without the stay, or it could have immediately sought review of said Order. If it followed the first route, it risked liability for the damages incurred during the appellate process in the event that the Judgment was affirmed. If it selected the second course, the pending lawsuit would have been dismissed, the Lis Pendens dissolved, and Respondents could have proceeded with the construction of the desired manufacturing plant, subject, of course, to the risks of subsequent reversal of the Final Judgment. If it had immediately appealed said Order, then the parties' respective rights and obligations would have been resolved and these proceedings would not be necessary. As noted previously, the City elected to accept the stay and proceed with its appeal to the Second District Court of Appeal and subsequently to this Court. The City's choice was freely and voluntarily made with knowledge in advance of the risks involved.

The City's interpretation of the subject Order as insuring Respondents' right to seek damages if they could find a cause of action to pursue distorts and ignores the plain wording thereof. The Second District Court of Appeal's explanation of its Order as set forth in the Opinion appealed herein is clear and precise, to wit:

> "Here the city was on notice that we recognized its potential liability even though we excused it from the expense of posting a bond. There is little reason to request a solvent municipality to post a bond when its potential liability for obtaining a stay is made a matter of record. A stay is not a

> matter of absolute right. It may be conditioned, and both Rule 5.12, 1962 revision, and Rule 9.310(b)(2), 1977 revision, give courts broad authority over stays. Our order reflected that the stay permitted appellees to seek damages resulting from it. The city had the option of pursuing the appeal without the stay. Having chosen to accept the stay, the city became responsible for damages resulting therefrom."

The City cannot in good faith contend that after having been specifically apprised of the import of the Brentwood Golf Course, Inc., supra, decision cited in Respondents' Motions to the trial court and to the District Court that the appellate court would deny the bond request with full knowledge that no other cause of action existed for the Respondents to recover delay damages. If the Second District Court of Appeal did not intend to impose a condition upon the City's stay that provided security for the damages to be incurred by the Respondents, then it would have simply denied the motion. There would have been no need to add the language that the City now attempts to construe in a manner different from the author's own interpretation. The Second District Court merely provided in its Order an alternative method of obtaining the relief sought in the supersedeas bond; or, in other words, it created a de facto bond.

Contrary to the City's contentions, the Second District Court of Appeal's Opinion herein is not inconsistent with the principles espoused in Brentwood Golf Course, Inc., supra, and City of Coral Gables v. Geary, 398 So.2d 479 (Fla. 3d DCA 1981). The absence of an essential element in Brentwood Golf Course, Inc., supra, distinguishes the holding therein and the statement of law quoted by the City in its Brief from controlling the issues in these proceedings, for the appellees in Brentwood failed to file a motion requesting that a supersedeas bond be posted. Had the Respondents not extended the efforts in the trial court and in the appellate court to

obtain security for the delay damages as indicated more particularly in the Statement of the Facts and the Statement of the Case herein, such principles of law might be more persuasive.

The City has continuously throughout the lower court proceedings inaccurately characterized the basis of its liability to the Respondents and has, on this appeal, once again improperly argued that the City is being held liable for damages incurred by the Respondents due to the City's appeal of the Final Judgment in the eminent domain action. In particular, the City contends on page 12 of its Brief that to require the City to pay damages for judicial review serves only to penalize the City for exercising its constitutional right to appeal a case. The City apparently still does not understand that its liability for damages is predicated upon the stay which it elected to remain in effect during the appellate process and not the appeal itself. Respondents do not contend herein, nor have they ever contended, that the City's right to appeal the trial court's Final Judgment be conditioned by the posting of a supersedeas bond. Rather, Respondents contend and have always contended that the City's right to stay the execution of the Final Judgment dismissing the City's condemnation action and dissolving the Lis Pendens be conditioned upon Respondents' receipt of the correlative right to recover damages incurred by such stay as ordered by the Second District Court of Appeal. It was the stay that caused the Respondents to be unable to obtain financing for developing their property, to obtain building permits or otherwise make any economic beneficial use of their property. The condition imposed by the Second District Court of Appeal on the City's stay had absolutely no impact whatsoever on the City's constitutional

right to appeal. When the City elected to retain the stay it in effect created an implied contract with the Respondents pursuant to the District Court's Order. It now seeks to distort the plain language of said Order in an attempt to correct its previous error in judgment. The City should not be permitted to evade the Second District Court of Appeal's prior mandate and deny the Respondents compensation for the damages proximately caused by its course of conduct.

POINT AT ISSUE

IV

WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES THE CITY FROM CONTESTING ITS LIABILITY FOR DAMAGES INCURRED BY THE RESPONDENTS DURING THE CITY'S APPEAL OF THE FINAL JUDGMENT DISMISSING ITS EMINENT DOMAIN ACTION.

The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals. Daniell v. Sherill, 48 So.2d 736 (Fla. 1950); Texas Company v. Town of Miami Springs, 44 So.2d 808 (Fla. 1950); Trustees of Internal Improvement Fund v. Bass, 67 So.2d 433 (Fla. 1953); Salkolsky v. City of Coral Gables, 151 So.2d 433 (Fla. 1963); Hollywood Beach Hotel Company v. City of Hollywood Beach, 329 So.2d 10 (Fla. 1976). The doctrine of estoppel may be invoked against the exercise of governmental power where it is necessary to prevent manifest injustice and wrongs to private individuals; provided that the restraint placed upon such governmental body to accomplish such purpose does not interfere with the exercise of governmental power. Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956).

The testimony and evidence presented by Respondents in the trial court unequivocally established that the City knew that the Respondents had recently purchased the subject property to construct a new medical equipment manufacturing plant to replace the facilities recently condemned by the City. (R-156;AA-4-7) In fact, it was established that the City's own agents assisted the Respondents in selecting the site. (AA-4;R-156). The evidence also showed that the subject parcel was the only remaining

parcel of undeveloped property zoned "Light Manufacturing" remaining within the City and that the Respondents' decision to purchase the same was predicated upon assurances by the City that it had no intentions to utilize the same for public purposes. (AA-5;R-156). It also cannot be questioned that the City knew that the Respondents would incur substantial damages during the City's appeal of the adverse eminent domain judgment if they were precluded from utilizing their property since the Respondents delineated the elements of foreseeable damage in the Motion for Supersedeas Bond. The City was presented with the option by the Second District Court of Appeal to proceed with its appeal without the stay or accepting the stay and risking liability for Respondents' damages. The City elected to follow the latter course with full knowledge and awareness of the Respondents' claim for substantial damages. It now seeks to avoid the obligation it assumed when it retained the stay in the prior action. However, justice does not permit a party to a cause to approbate a decree, and by so doing, admit that it is just and valid, and then subsequently, upon finding that for some reason he cannot perform it, reprobate it, for no other purpose than to be relieved of his obligations under it. Palm Beach Estates v. Croker, 111 Fla. 671, 152 So. 416 (1933). As this Court so aptly stated in Daniell, supra, at page 739:

> "Men must turn square corners when they deal with the government, it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens."

Respondents in the case at bar took every possible action to notify the City that they would seek damages for the losses incurred during the City's appeal of the eminent domain judgment in the event that they

were unable to utilize their property. The Respondents apprised both the trial court and the Second District Court of Appeal that they were requesting a supersedeas bond under the principles of law set forth in City of Jacksonville v. Brentwood Golf Course, Inc., 338 So.2d 1105 (Fla. 1st DCA 1979) in order to protect their interests. The Second District Court of Appeal accordingly granted Respondents' request by conditioning the City's acceptance of the stay with the responsibility for the payment of Respondents' damages yet, at the same time, saved the City the expense of a bond premium. The City sought no review of said Order. It accepted the stay and the benefits accruing thereunder. Having voluntarily elected to so proceed, the City should not now be allowed to renege on the obligation assumed. The City must be required to turn square corners.

It would be manifestly unjust to impose upon the Respondents the financial burden created by the City's actions. Respondents respectfully submit that the past conduct of the City (1) in assisting the Respondents in purchasing the subject property to replace the facilities previously condemned by the City, (2) in representing that the same would not be utilized in the future for public purposes, (3) in failing to appeal the Order of the Second District Court of Appeal which imposed conditions upon the City's retention of the automatic stay, and (4) in retaining said stay thereby denying Respondents the use of their land and causing the damages assessed by the jury, mandate the conclusion that the doctrine of equitable estoppel precludes the City from denying liability herein.

POINT AT ISSUE

V

WHETHER THE TRIAL COURT ERRED IN CONSIDERING RESPONDENTS' ALTERNATIVE CLAIM FOR INVERSE CONDEMNATION.

The City's third point on appeal herein asserting that the trial court abused its discretion in regards to Respondents' alternative claim sounding in inverse condemnation is now moot since a cursory review of the subject Opinion indicates that the Second District Court of Appeal affirmed the City's liability under the implied contract created by the conditions imposed on the City's stay and reversed the remaining damages awarded. Nevertheless, Respondents feel compelled to address two points raised by the City in its discussion of inverse condemnation. As to the City's argument that damages cannot be assessed against it since the "taking" herein was not permanent but at most temporary, Respondents respectfully submit that this Court can take judicial notice of the fact that the various agencies of the State of Florida along with municipal and county governments condemn temporary takings such as construction easements on a regular basis. Accordingly, there can be no legally justifiable denial of an inverse condemnation action simply because the deprivation is not perpetual. Supreme Court Justice Brennan stated in his Opinion in San Diego Gas & Electric Company v. City of San Diego, 101 S.Ct. 1287 (1981) at page 1306:

> "Nothing in the just compensation clause suggests that takings must be permanent or irrevocable, nor does the temporary reversible quality of a

> regulatory taking render compensation for the time of the taking any less obligatory."

Although said Opinion is a dissenting opinion, it reflects the majority view of the United States Supreme Court on said principles of law as noted in Justice Rhenquist's concurring Opinion in said case.

Secondly, Respondents must refute City's allegation that they were not substantially deprived of the beneficial use of their property when the City elected to retain the stay during the appellate process. The testimony and evidence submitted in the trial court unequivocally established that local financial institutions refused to loan the Respondents construction money necessary to proceed with their developmental project by virtue of the City's pending eminent domain action and the Lis Pendens. (R-165-167,203) It was specifically noted that one financial institution even refused to accept an application for a loan for construction purposes. (R-203,206). A vice president of a local bank testified that the pending litigation was considered as a cloud on the title to the Respondents' property and acknowledged that but for said clouded title, the bank would have granted the Respondents the desired construction loan. (R-165-167). Also, an expert witness in the area of real estate law testified that the existence of the pending condemnation action and the Lis Pendens rendered any attempt to obtain a building permit from the City impracticable and futile while the City was pursuing appellate remedies in an attempt to proceed with the condemnation of the subject property. (R-217,218). Said witness declared that as an attorney, he would not advise the Respondents to take any action in an attempt to develop or construct a building on their property. (R-221).

The City presented no evidence at the trial of the cause to refute any of the foregoing evidence or the fact that as a result thereof the Respondents suffered substantial economic losses. In fact, the City's own expert economist acknowledged that the increase in the cost of mortgage financing that occurred during the period that the eminent domain action was on appeal would cause the Respondents to pay additional interest in the amount of $380,000.00. (R-282).

Based on the foregoing, it is apparent that the Respondents clearly established in the trial court that the City's decision to retain the stay during the appeal period substantially deprived them of the beneficial use of their property and that such actions were accomplished by the City with full knowledge and awareness of such consequences. Thus, even though the City's liability to Respondents is now predicated solely upon its own course of action selected after the Second District Court of Appeal conditioned the City's stay during appellate review, the trial court was presented with a sufficient factual basis to consider Respondents' alternative claim for inverse condemnation.

CONCLUSION

No conflict or inconsistency exists between the Opinion reviewed herein and the principles of law set forth in Corn, supra. The unique facts involved in the case at bar distinguish it from the Corn decision in two important respects. First, unlike Corn, no legislative planning level governmental function was involved in the Judgment appealed by the City in the prior action, but rather a judicial determination that the City had failed to prove necessity since the project, as designed, would not work. This distinction was clearly noted by the Second District Court in a footnote to its Opinion. Second, the City herein failed to seek review of the Order which conditioned its stay with the responsibility for the payment of damages and costs incurred by Respondents. Instead of filing an appeal as the municipality did in Corn, the City elected to retain the stay and thus voluntarily subjected itself to the liability accruing thereunder. The doctrine of collateral estoppel prohibits the City from asserting otherwise in this action. The City accepted the benefits of the stay with full knowledge in advance of the risks involved. The Opinion appealed herein properly enforced the terms of the District Court's prior Order and required the City to pay for the consequences of its actions. The Second District Court's application of law was proper and must be affirmed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to MICHAEL S. DAVIS, ESQUIRE, City Attorney, City of St. Petersburg, 210 Municipal Building, St. Petersburg, FL 33701 this 27 day of April, 1982.

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