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IN THE SUPREME COURT OF FLORIDA

CITY OF ST. PETERSBURG, FLORIDA, Petitioner,	
vs.	CASE NO. 62,821
BARRY L. WALL and GEORGE D. CRANTON, Respondents.	

PETITIONER, CITY OF ST. PETERSBURG'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

For the purposes of this brief the following symbols will be utilized:

"A" - shall refer to the Appendix accompanying the Petitioner's brief. "R" - shall refer to the record on appeal. Copies of the District Court Opinion, as well as the main cases cited as conflicting, are included in the Appendix. Also included is the lower Court's opinion in City of Lauderdale Lakes v. Corn.

STATEMENT OF THE CASE AND FACTS

This case arose when the Petitioner, City of St. Petersburg, initiated formal condemnation proceedings for a parcel of land owned by the Respondents. After an evidentiary hearing was held in that case the trial court ruled that necessity for the taking was not shown by the condemning authority and therefore denied the City's right to take. The City filed a timely appeal from that ruling on January 20, 1978. On April 24, 1978, the Respondents made application to the Court for the imposition of a supersedeas bond to be posted by the City. The Court denied Respondents' request for said bond, copy of said Order is attached and made a part of the appendix herein (A-1). On November 1, 1978, the Second District Court of Appeal affirmed per curiam the ruling of the trial court below. The City thereafter took a timely appeal from this Court's Order of affirmance to the Supreme Court of Florida. The Florida Supreme Court denied certiorari on September 17, 1979.

The case below was then filed against the City, claiming damages as a result of the delay caused by the trial and Appellate process. Trial of this case resulted in a jury verdict and judgment against the City in the amount of $128,340.76. Appeal was taken to the District Court of Appeal, Second District, from that judgment. The District Court of Appeal affirmed in part and reversed in part in an

opinion entered on September 29, 1982, in which the District Court held that damages for delay during trial were not recoverable.

This proceeding was begun by the filing of a Notice pursuant to Rule 9.120(b), Fla.R.App. on October 29, 1982, invoking the jurisdiction of the Supreme Court under Rule 9.030 (a)(2)(A)(iv). This Court accepted jurisdiction of this case by an Order dated March 25, 1983.

POINTS ON APPEAL

POINT ONE

THE FINAL JUDGMENT FROM WHICH THE CITY APPEALED CONCERNED LEGISLATIVE OR "PLANNING-LEVEL" GOVERNMENTAL FUNCTIONS FOR REVIEW OF WHICH THE APPELLATE COURT HAD NO AUTHORITY TO REQUIRE A SUPERSEDEAS BOND AND FOR WHICH THE CITY COULD NOT BE HELD LIABLE IN DAMAGES.

POINT TWO

THE ORDER OF THE DISTRICT COURT OF APPEAL DENYING RESPONDENTS' REQUEST FOR A SUPERSEDEAS BOND WITHOUT PREJUDICE TO A SUBSEQUENT CLAIM FOR DAMAGES DID NOT AND COULD NOT CREATE A CAUSE OF ACTION AGAINST THE PETITIONER, CITY FOR TAKING AN APPEAL.

POINT THREE

THE TRIAL COURT, AS A MATTER OF LAW, ABUSED ITS DISCRETION IN AWARDING DAMAGES ON AN "INVERSE CONDEMNATION" CLAIM GROUNDED IN THE PROCEDURAL EFFECTS OF THE CITY'S RIGHT TO APPELLATE REVIEW OF AN ADVERSE EMINENT DOMAIN JUDGMENT.

POINT ONE

THE FINAL JUDGMENT FROM WHICH THE CITY APPEALED CONCERNED LEGISLATIVE OR "PLANNING-LEVEL" GOVERNMENTAL FUNCTIONS FOR REVIEW OF WHICH THE APPELLATE COURT HAD NO AUTHORITY TO REQUIRE A SUPERSEDEAS BOND AND FOR WHICH THE CITY COULD NOT BE HELD LIABLE IN DAMAGES.

It has long been established that the right to exercise the power of eminent domain is a legislative function and the legislature of a state may delegate that power to the legislative body of a municipality within carefully prescribed limits. Joslin Mfg. Co. v. Providence, 262 U.S. 688, L.Ed 1167 (1922). Such power has been delegated to Petitioner, the CITY OF ST. PETERSBURG, in the Municipal Home Rule Powers Act, Chapter 166, Part IV, Florida Statutes (1981).

In the instant case, the City exercised its power of eminent domain when its City Council "found it to be necessary and in the public interest to acquire" the respondents property, as set forth in the City's Resolution No. 77-456 adopted on May 5, 1977. The City issued a Notice of Lis Pendens as part of the eminent domain proceedings. The trial court ruled that the City "failed to carry its burden of proof on the issue of necessity." The City, accustomed to the deference of the Court to the legislative body in terms of wisdom and policy, appealed to the Second District Court of Appeal. The District Court of Appeal per curiam

affirmed. Following that decision the instant action was filed seeking damages from the City for the alleged inability of Respondents to use their property during the eminent domain action at the trial and appellate level. A judgment of $128,304.76 was entered against the City which was upheld on appeal (although reduced to $121,826.95) by the judgment of the District Court of Appeal in the case sub judice. The District Court thus ultimately held the City liable for money damages for actions taken in its attempt to validate the legislative intent expressed in its resolution. The Second District Court's holding directly conflicts with this Court's holding in City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982).

In Lauderdale Lakes, supra, p. 1272 this Court held:

> [1] While we agree that the court may require a bond of a public body under many circumstances, we cannot agree that supersedeas bond is proper for appellate review of legislative planning-level determinations. Requiring a bond in this situation would clearly chill the right of a governmental body to appeal an adverse trial court decision declaring invalid a legislative act. We distinguished between "operational-level" and "planning-level" governmental functions in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). We find that the distinction also applies in supersedeas bond proceedings under Rule of Appellate Procedure 9.310(b)(2). To rule otherwise would make cities liable for damages resulting from legislative planning-level decisions.

> This is clearly contrary to existing law. We, thus, construe rule 9.310(b)(2) as allowing trial and appellate courts the discretion to require governmental entities to post supersedeas bonds in suits where the judgment concerns operational-level functions but find that no authority exists to lawfully require such bonds in planning-level governmental functions.

In Lauderdale Lakes, supra, this Court followed Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979):

> So we, too, hold that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain "discretionary" governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subject to scrutiny by judge or jury as to the wisdom of their performance. Commercial Carrier Corp., supra, p. 1022.

Respondents', in their jurisdictional brief at page seven state:

> Admittedly, the City's determination to exercise its power of eminent domain to acquire Respondents' property was a planning level decision. Respondents, however, were not harmed by the City Council's legislative act. The damage was initiated when the City implemented its planning level decision by the filing of the condemnation suit and the Lis Pendens.

Respondents' position is that the legislative "planning-level" act ends with the adoption of the resolution by the City Council. This position is contrary to the procedures of Chapter 73, Florida Statutes. "Those having the right to

exercise the power of eminent domain may file a petition therefor. . ." §73.021, Fla. Stat. (1981). The City Council's resolution is attached to the petition and simply commences the exercise of the sovereign right of eminent domain.

This Court emphasized in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) at p. 1075 in the words of Justice Overton that:

> The reason most frequently assigned [sic. for immunity] is that in any organized society *there must be room for basic governmental policy decision and the implementation thereof,* unhampered by the threat or fear of sovereign tort liability, or, as stated by one writer.

In Commercial Carrier Corp., supra, this Court commended the use of a four-pronged test to determine whether an act enjoys "planning level" immunity. That test is:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective?
> (2) Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program or objective?
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Questions one (1) and four (4) can be answered in the affirmative because eminent domain can only be exercised for public purpose and in accord with statutory authority. See Sections 166.401 and 166.411, F.S.A. The filing of a petition and all the steps flowing there from are not only "essential to the realization" of the policy or program, but they are required by law. Thus when the governmental unit follows that statute and the rules of this Court, question two (2) can only be answered in the affirmative. "The exercise of basic policy evaluation" is only completed by the City Council when its decision to exercise the power of eminent domain is carried to fruition by entry of an Order of Taking. Question three (3) must be answered in the affirmative because in each case the decision to take property by eminent domain and the determination of necessity is unique. The decision as to necessity is in no way comparable to a ministerial act, such as maintenance of a traffic signal, as Respondents allege.

The trial court in the subsequent action to determine damages arising during the judicial proceedings did not make any distinction between the trial delay and the delay caused by the appeal. However, the Second District Court of Appeal, sub judice after disregarding the City's reliance on this Court's decision in Lauderdale Lakes v. Corn, supra,

did make just such a distinction when it reversed the award for damages during the progress of the trial proceedings. The District Court conditioned this partial reversal stating:

> Where, as here, there has been no showing of bad faith, a city should not be held liable for litigating a case which it subsequently loses. All property is owned subject to the power of eminent domain. Where that power is exercised in good faith, damages will not be assessed against the unsuccessful exercise of that legal right . . .

City of St. Petersburg v. Wall, 419 So.2d 1167, 1169 (Fla. 2d DCA 1982). The trial court, *sub judice*, dismissed all allegations of bad faith. It is respectfully submitted that damages should not be assessed against the exercise of a legal right at the appellate level any more than at the trial level. To do so has precisely the chilling effect which this Court sought to avoid in *City of Lauderdale Lakes*, *supra*.

POINT TWO

THE ORDER OF THE DISTRICT COURT OF APPEAL DENYING RESPONDENTS' REQUEST FOR A SUPERSEDEAS BOND WITHOUT PREJUDICE TO A SUBSEQUENT CLAIM FOR DAMAGES DID NOT AND COULD NOT CREATE A CAUSE OF ACTION AGAINST THE PETITIONER, CITY FOR TAKING AN APPEAL.

Respondents list the order of the Second District Court of Appeal as if it judicially created a cause of action arising from Rule 9.310, Florida Rules of Appellate Procedure, or Rule 5.12, Florida Appellate Rules. Rule 5.12, which granted an automatic stay simply upon the filing of a notice of appeal by a governmental agency, is essentially the same as Rule 9.310, and is procedural law, not substantive law, _Wait v. Florida Power & Light Co._, 372 So.2d 420 (Fla. 1979). This Court in _Wait, supra._, cited its earlier decision in _Benyard v. Wainwright_, 322 So.2d 473, 476 (Fla. 1975), stating:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.

Procedural rules are only the "means and method" to enforce some other substantive duty. The City owed the

Respondents no duty to voluntarily set aside the automatic stay prescribed by the appellate rule. The substantive law is as set forth in Point One, herein. According to the rule of law in City of Lauderdale Lakes v. Corn, supra, the District Court of Appeal had no lawful authority to require a supersedeas bond for review of legislative actions.

When the District Court denied Respondent's motion for a supersedeas bond, it stated that the denial was "without prejudice to Appellee's seeking recovery of damages and costs resulting from any stay pending appeal pursuant to Rule 9.310 (b)(2), Florida Rules of Appellate Procedure." (A. 2) This did not create a cause of action where none had existed. It merely insured Respondents' rights to seek damages if they could find a cause of action to pursue. The Order did not require the City to become a self-insurer if the stay were to remain in effect. The Respondents were certainly free to appeal that Order of the District Court in an effort to obtain a bond so that some recovery would be possible.

In Lauderdale Lakes, supra, the Court stated that requiring a government entity to pay for judicial review of legislative actions would "prove catastrophic for small

municipalities and counties." (P.1272) This fact is certainly evident in the instant case. To hold the City of St. Petersburg liable for any damages incurred by Respondents due to the appeal would serve only to penalize the City for exercising their constitutional right to appeal a case. The City has pursued this appeal in good faith and requiring the City to pay for any damages for judicial review can not be justified.

A supersedeas bond limits an appellee's right to damages for a delay incurred due to an on-going appeal. From the City of St. Petersburg's standpoint, such a bond would have the effect of limiting the City's liability for money damages allegedly caused by delay as a result of the City's appeal. The case of City of Jacksonville v. Brentwood Golf Course, Inc., 338 So.2d 1105 (Fla. 1st DCA, 1976) clearly stated that rule.

In that case, the City of Jacksonville was unsuccessful in appealing a trial court decision to invalidate a deed restriction. After the appeal terminated in favor of the landowner, damages were sought by the landowner for the delay caused by the appeal. In denying those damages the First District Court of Appeal said:

> So, also, the obligation of an appellant, as principal, is founded wholly on the bond itself. He signs the bond, not as a redundant confirmation of some independent obligation imposed as an incident of the appeal, but to bind himself and his heirs and assigns to pay according to its terms, and thereby to obtain supersedeas. When as here a bond was not required for supersedeas,

> there is consequently no obligation. For the appeal itself the law exacts no price or penalty. Statutory interest is of course incurred on unsatisfied money judgments regardless of whether execution is stayed. Sec. 55.03, F.S. 1975. Id at 1106.

This premise was confirmed in the case of City of Coral Gables v. Geary, 398 So.2d 479 (Fla. 3d DCA, 1981). In Geary a property owner was granted certain building variances and the City appealed. The Third District Court of Appeal reversed the trial court's order declining to require a supersedeas bond and also directed the trial court to fix the amount and conditions of the bond. A problem arose when the property owner was awarded attorney's fees and the City appealed. The Court stated that the City's liability was co-existent with the conditions of the bond and since no provision was contained in the bond for attorney's fees, no liability existed against the City under the bond. In stating this rule the Court cited the case of City of Lauderdale Lakes v. Corn, 371 So.2d 1111, (Fla. 4th DCA 1979).

These two cases clearly point out that a City's liability for any damages during a delay are completely controlled by a supersedeas bond and in fact are "co-existent" with the conditions of that bond. When the notice of appeal was filed by the City in the instant case, the judgment of the trial court was automatically stayed under Rule 5.12(1), Florida Appellate Rules, 1962 Revision. Respondents asked

the Appellate Court to vacate the stay of at least require the posting of a supersedeas bond. The District Court denied Respondent's motion. Since no supersedeas bond was required and the City's liability, if any, depends on that bond and is "co-existent" with the bond, no liability in the instant case existed on the part of the City of St. Petersburg and there can be no recovery.

POINT THREE

THE TRIAL COURT, AS A MATTER OF LAW, ABUSED ITS DISCRETION IN AWARDING DAMAGES ON AN "INVERSE CONDEMNATION" CLAIM GROUNDED IN THE PROCEDURAL EFFECTS OF THE CITY'S RIGHT TO APPELLATE REVIEW OF AN ADVERSE EMINENT DOMAIN JUDGMENT.

The second "legal theory" alleged by Respondents was inverse condemnation. The United States Supreme Court, in two recent decisions, distinguished between inverse condemnation and eminent domain:

> Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. United States v. Clarke, 445 U.S. 253, 255-258, 63 L.Ed.2d 171, 100 S.Ct. 895 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted" Id., at 257, 63 L.Ed.2d 171, 100 S.Ct. 895.

Agins v. City of Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980). The appellants in Agins v. City of Tiburon, supra, also alleged an inverse condmenation claim based upon the City's unsuccessful prosecution of an eminent domain claim:

> The (California) State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants'

> enjoyment of their property as to constitute
> a taking . . . . Even if the appellants'
> ability to sell their property was limited
> during the pendency of the condemnation
> proceeding, the appellants were free to sell
> or develop their property when the proceedings
> ended.

(citations omitted and emphasis added) 447 U.S. at 263. The condemnation proceedings in which the City of St. Petersburg received an adverse judgment did not end until the Second District Court of Appeal per curiam affirmed without opinion. City of St. Petersburg v. Wall, 364 So.2d 896 (Fla. 2d DCA 1978), cert. denied, 376 So.2d 69 (Fla. 1979).

The Circuit Court of Pinellas County entertained a claim of inverse condemnation even though, as a matter of law, inverse condemnation can only arise when there has been a taking "when condemnation proceedings have not been instituted." Therefore inverse condemnation cannot be conceived from a procedural right during the pendency of a review of the City's adverse eminent domain judgment. Eminent domain is a legal proceeding; inverse condemnation results from the [illegible] thereof. The respondents, in their inverse condemnation theory, failed to state a claim upon which relief could be granted, and the trial court's failure to grant the City's Motion To Dismiss was an abuse of discretion.

Inverse condemnation has been defined in Florida as a cause of action against a governmental body having the power of eminent domain to recover the value of the property that has been [illegible]

when no formal exercise of the power of eminent domain has been attempted. Florida Power & Light Co., v. Radar, 306 So.2d 565 (Fla. 4th DCA 1975); Jacksonville v. Schuman, 167 So.2d 95 (Fla. 1st DCA 1964), cert denied, 172 So.2d 597 (Fla. 1965).

Respondents were not denied all reasonable use of their property by the lis pendens during the appeal period. The property remained in their control. The City had absolutely no use of the property and had made no appropriation of it during that period. It may be that the lis pendens caused some consequential damage by inhibiting the ability to sell or develop the property, however, consequential damage sounds in tort not in inverse condemnation. See State Dept. of Transportation v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982) and Kendry v. Div. of Admin., State Dept. of Transportation, 366 So.2d 391 (Fla. 1978) in which this Court opined at page 393:

> Where there is no taking, however, there will be no recovery. Although an abutting landowner may suffer consequential damage due to the use of public land made by public authority, such damage is not recoverable. Division of Administration, State of Florida Department of Transportation v. Hillsboro Assoc., Inc., 286 So.2d 578 (Fla. 4th DCA 1973).

See also Leeds v. City of Homestead, 407 So.2d 920 (Fla. 3rd DCA 1981).

During the trial of this case the property owner responded in cross examination as follows:

> "Q. Do you know of any reason why that property could not have been rented to anyone else, say, between September of 1977 and September of 1979?
>
> A. I guess that thought never entered my mind.
>
> Mr. Cranton and myself bought the land to put a building on it. That was the purpose for which we purchased it. We didn't give consideration for short-term storage on the property for a building or starting anything like that. It never came to my mind." (R.258-259)

In the instant case the damage, if any, caused by the appeal was at most a temporary damage or impairment and not permanent deprivation or taking as required for the inverse condemnation. See Department of Transportation v. Burnette, 384 So.2d 916 (Fla. 1st DCA 1980).

Perhaps the key decision in this area is this Court's decision in Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979) in which this Court held that diversion of water from the acquifer was not a taking. The Court said at p. 669:

> Article X, section 6, of the Florida Constitution forbids the "taking" of private property except for a public purpose and with full compensation. Unlike the constitutions of several other states, the Florida Constitution does not expressly forbid "damage" to property without just compensation. Arundel Corp. et al. v. Griffin, et al., 89 Fla. 128, 103 So. 422 (1925).

> [6] When the governmental action is such that it does not encroach on private property but merely impairs its use by the owner, the action does not constitute a "taking" but is merely consequential damage and the owner is not entitled to compensation. Selden, et al v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891).

The District Court of Appeal, Second District, interestingly, recently decided the case of Pinellas County v. Brown, 420 So.2d 308 (Fla. 2d DCA 1982) which was argued the same day as the case sub judice. In Brown the Court held that by refusing a building permit the Court did not take the property because there was no complete deprivation of all beneficial use. The Court opined at page 310:

> [5] In order to establish a taking, appellees must show that the county's actions have substantially deprived them of all beneficial uses of the property, as compared with merely impairing its use. State Department of Transportation v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982); Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla.), cert. denied, 442 U.S. 965, 100 S.Ct. 453, 62 L.Ed.2d 377 (1979).
>
> Assuming that appellees were entitled to a permit since existing zoning allowed it, and further assuming that the conflict between the ordinance and the comprehensive plan did not constitute a pending change as contemplated by Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980), cert. dismissed, 403 So.2d 407 (Fla. 1981), we do not think that the county's denial constituted a taking of appellees' land. First, appellees were not completely deprived of all beneficial uses of their property; they were only deprived of their particular

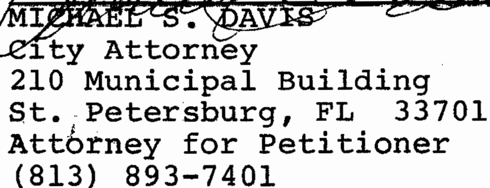
> requested use. Appellees did not seek to use their property for commercial uses which presumably would have been approved. Second, appellees were only deprived temporarily as the county stipulated that it would issue the permit even before a judicial determination was reached.

The _Brown_ decision clearly indicates that the District Court in the case _sub judice_ grounded its decision in tort not inverse condemnation.

CONCLUSION

In conclusion the Petitioner, CITY OF ST. PETERSBURG, requests this Court to reverse the decision of the District Court of Appeal herein and mandate entry of judgment in favor of Petitioner so that the confusion and inconsistency created by that decision may be set to rest and the law in this important area may be uniform and clear. Governmental entities need to know that this Court's decision in City of Lauderdale Lakes v. Corn is the law in the Second District of Florida as well as the entire state.

Respectfully submitted,



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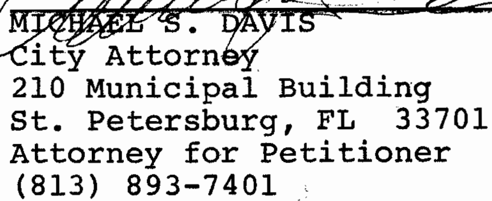
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of foregoing of the Petitioner City of St. Petersburg's Initial Brief on the Merits has been furnished to H. REX OWEN, ESQUIRE, 157 Central Avenue, P.O. Drawer "O", St. Petersburg, FL 33731, by mail, this 13th day of April, 1983.



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