O/a 8-30-83

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IN THE SUPREME COURT OF FLORIDA

CITY OF ST. PETERSBURG, FLORIDA,

Petitioner,

vs.

BARRY L. WALL and GEORGE D. CRANTON,

Respondents.

CASE NO. 62,821

PETITIONER, CITY OF ST. PETERSBURG'S REPLY BRIEF

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TOPICAL INDEX

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The Respondents, WALL and CRANTON, shall be referred to herein as "Respondents" and the Petitioner shall be referred to as "Petitioner" or "City". "A" shall refer to the Appendix accompanying Petitioner's initial brief on the merits. "R" shall refer to the record.

STATEMENT OF THE CASE

The Petitioner will rely upon its Statement Of The Case in its Initial Brief On The Merits. There are, however, several statements made in Respondents' Answer Brief On The Merits which are incorrect and need to be set straight.

The most important inaccuracy in Respondents' Statement Of The Case is the assertion that the instant case went to trial on the theory that there was an implied contract created by the Order of the District Court of Appeal. (Respondent's Brief p. 2). The pleadings demonstrate that that is not true. The case was not tried on a contract theory (R. 1-5). Respondents also assert that they proved that drainage water would flow backwards. That is a characterization of the evidence by Respondents. The transcript simply reflects that the City had not yet done all of the necessary field calculations to demonstrate (precisely) how the drainage system would be designed. (R. 157).

STATEMENT OF THE FACTS

Petitioner will rely upon its Statement Of The Facts in its Initial Brief On The Merits.

POINTS ON APPEAL

POINT I

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE 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).

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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.

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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.

POINT V

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

ARGUMENT

POINT I

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE 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).

For purposes of response to Respondents' brief, the City will state the points and respond to them as they are stated and argued in Respondents' brief. In Point I, Respondents concede that the City's exercise of its power of eminent domain is a legislative or planning level governmental funtion for which the City remains immune from liability. However, the Respondents then attempt to divest eminent domain of its legislative character by confusing the substantive law of eminent domain with the procedural steps mandated by the state legislature. By characterizing eminent domain as a judicial function, Respondents attempt to remove this controversy from the controlling rule of law set forth in City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982).

Respondents' argument relies solely on a narrow reading of this Court's opinion in City of Lakeland v. Bunch, 293 So.2d 66 (Fla. 1974), wherein the opinion delineates the Court's role in reviewing a legislative finding of necessity. In Bunch, the trial court incorrectly characterized the

nature of the City Commission's function as administrative. In the instant case, Respondents incorrectly characterize the legislative function of the City as becoming "judicial" in nature just because the means to the end to fulfill the City's public purpose is a judicial forum.

This Court, in Bunch, correctly described the role of the City, citing Bragg v. Weaver, 251 U.S. 57 (1919):

> Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, . . . (emphasis supplied in Bunch at p. 70)

Although the Court is performing a judicial function in reviewing the sufficiency of the City's findings, the City's role as Plaintiff in eminent domain proceedings is nevertheless legislative in character.

More recently the United States Supreme Court has described "the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one", Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27, 37 (1954).

Respondents admit, on page nine of their brief that the City's determination to condemn is legislative; that the City had a right to take Respondents' property; and that Respondents did not question the necessity of the drainage

system. Though these statements of fact by Respondents are not pertinent to the issue of a supersedeas bond in this case, they nevertheless underscore the applicability of the rule of law in City of Lauderdale Lakes v. Corn, supra. When the trial court ruled adversely to the City, the City appealed in good faith, properly exercising its delegated legislative authority.

The rule of law stated in Corn re-affirms the public policy of this state that certain discretionary governmental functions remain immune from liability. Accordingly, the capacity in which governmental functions are performed determine the extent, if any, of a municipality's liability. Regardless of the forum, be it judicial, quasi judicial, or administrative, a governmental body exercising eminent domain powers, delegated by the legislature, is acting in a legislative capacity throughout the statutory procedure.

POINT 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.

The doctrine of Collateral Estoppel raised by Respondents has no application to the City's efforts to seek appellate review. On the contrary, the doctrine lends support to the City's third point on appeal. The Respondents' interpretation of the Second District Court of Appeals language in denying Respondents' Motion For Supersedeas loses sight of the effects of the denial. When the District Court denied Respondents' Motion For A Supersedeas Bond, the extent of the City's liability was established and was consistent with the rule of law in City of Lauderdale Lakes v. Corn, supra:

> It is paramount for governmental bodies to have unrestricted appellate court review of their authority to act in a legislative capacity. Requiring payment of damages for such review is not justified. . . (p. 1272).

Respondents were aware of the rule of law for supersedeas bonds as stated in City of Jacksonville v. Brentwood Golf Course, Inc., 338 So.2d 1105 (Fla. 1st DCA, 1976). Yet, Respondents failed to appeal the denial of the motion or otherwise seek to vacate the same. Regardless of any error or ambiguity in the District Court's order denying the

motion for supersedeas bond, the issue of the City's liability was raised and became res judicata, City of Miami v. Osborne, 55 So.2d 120 (Fla. 1951). Just as the issue of necessity was presented, so too the issue of the City's liability for damages for delay during the pendency of the appeal was squarely presented in the motion for supersedeas and became res judicata when the Second District Court of Appeal per curiam affirmed. The condemnation suit was res judicata and a complete bar to the instant suit.

Respondents, in their brief, and throughout the instant case for delay damages, place great weight in the ambiguous language of the District Court's Order while ignoring the denial. The phrase "without prejudice to Appellees (Respondents)" did not impose any duty upon the City, but simply left open to Respondents the opportunity to raise the issue of bad faith. See City of Lauderdale Lakes v. Corn, 415 So.2d 1270 (Fla. 1982) at p.1272. In the instant case the District Court found that there was no showing of bad faith. (A-4).

The review of collateral estoppel and res judicata by the Respondents do no more than remind this Court that it was Respondents' Motion for Bond that was denied and that Respondents chose not to appeal said Order. Under the foregoing principles of law as set forth in Brentwood and Corn supra, the decree became conclusive and binding between the parties hereto and is not now subject to collateral attack.

POINT 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.

Respondents continue to place great weight on the words, "without prejudice" while ignoring the res judicata effects of the order denying the supersedeas bond. When the District Court attached those words to the denial of Respondents motion, it had the same affect as a trial court dismissing a Plaintiff's case, "without prejudice". Respondents are free to bring a cause of action if they have one. No other rights are vested in the moving party and no liability is imposed on the opponent. Denial of a bond does not create a "de facto bond" in the same stroke. In making such an absurd allegation, Respondents are acknowledging the necessity of a bond as a requisite before liability may be imposed upon the City.

Respondents attempt to distinguish (Respondents Brief p. 20) the instant case from Brentwood, supra, relying on the fact that appellees in Brentwood failed to file a motion requesting that a supersedeas bond be posted. The rule stated in Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953) dispels this notion:

> In accordance with the rules governing the application of the doctrine of res judicata to judgments generally with regard to matters

> concluded thereby, . . . 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, in the condemnation proceedings. (p. 901).

It does not matter whether a bond is requested or not. Liability is possible only when a bond is required (unless bad faith can be demonstrated).

POINT 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 doctrine of estoppel is not applied against the state or a political subdivision as freely as against individuals, Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956). The limitation upon the use of estoppel stated by Respondents (Respondents' Brief p. 23) and in Claughton, supra is:

> provided that the restraint placed upon such governmental body to accomplish such purpose does not interfere with the exercise of governmental power.

The City's right to appeal an adverse eminent domain ruling fits squarely within this limitation and is consistent with the public policy for immunity stated in Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982) (City's Main Brief p. 7) and with the rule of law as stated in City of Lauderdale Lakes v. Corn, supra. See also City of St. Petersburg v. Vinoy Park Hotel Co., 352 So.2d 149 (Fla. 2nd DCA 1977).

Respondents have forgotten that the Second District Court of Appeal denied their request for a supersedeas bond during the pendency of the eminent domain appeal. On page 25 of Respondents' brief they now allege that "the Second

District Court of Appeal accordingly granted Respondents' request". The denial of the bond by the District Court was consistent with the rule of law stated in Corn. Respondents have, abandoning logic, interpreted the denial of their motion as a grant of the same.

The first two of four allegations of Respondents contained in the last paragraph on page 25 of their brief are not pertinent to the issues on appeal and were raised or could have been raised in the eminent domain case which is now conclusive. The order denying Respondents' Motion For Supersedeas Bond was adverse to Respondents and favorable to the City because any liability was co-existent with a bond. Therefore, no liability existed on the part of the City. The City had no duty to be a volunteer.

POINT V

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

In San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), Justice Brennan, in his dissenting opinion, did not express the majority view of the United States Supreme Court. Justice Brennan, addressing "temporary takings" in his dissenting opinion, proposed a new constitutional rule:

> requiring the government to pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

C-Y Development Company v. City of Redlands, 703 F.2d 375 (9th Cir. March 8, 1983). Justice Brennan's proposal would be breaking new ground in the area of regulatory powers and obligations but is inappropriate in condemnation proceedings. As a general rule, the taking does not occur in straight condemnation proceedings until the governmental authority is committed to pay the amount required for just compensation. Danforth v. United States, 308 U.S. 271, 284-85 (1939). When the cost of acquiring the subject property is determined, the condemnor still has the opportunity to discontinue the

condemnation if the governmental body decides that at the cost determined the proposed project is then not worth the cost to the taxpayers. To apply Justice Brennan's proposal to condemnation proceedings would place an undue burden on every governmental body that ultimately decides in good faith that the taking is not worth the cost.

Respondents allege (p. 27) that in the absence of a Lis Pendens that there would be no cloud on the title and construction financing would not be hampered. Lis Pendens is merely a means of putting the world on notice that litigation affecting the property is pending. Even without a Lis Pendens, the Respondents would be required, in good faith, to report pending litigation in any loan application. It is the pending litigation not the notice that may constitute a cloud on the title to affected property. Even if the stay is vacated in the condemnation case, the potential for loss would still be present: as illustrated in State v. Falls Chase Special Taxing District, 424 So.2d 787 (Fla. 1st DCA 1982).

In Falls Chase, Chief Judge Robert Smith, in a lengthy dissenting opinion, indicated on page 805, fn. 10 that interest was accruing on sewer bonds at $1,450 per day for over three years during the pendency of Florida Department of Environmental Regulations appeal of an injunction against the Department's attempt to regulate dredging and filling a lakebed. The Appellees, Falls Chase Special Taxing District,

applied to the Circuit Court to vacate the stay, and the court did so, Falls Chase, supra, p. 813. Even then, with the automatic stay vacated the financial burdens were not relieved. Attorneys for the several appellee parties wrote the court urging them to reach a decision to remove the cloud over the use of their property.

The Respondents in the instant case had a cloud over their title during the course of the original condemnation trial. Yet, the Second District Court of Appeal correctly reversed the award of damages for this period. The trial court was not authorized to change the law and award damages contrary to the rule in Corn. This Court held, in Aldrich v. Aldrich 163 So.2d 276, at 280 (Fla. 1964) that despite the argument for "social justice" that:

> we were not authorized 'to change the law simply because the law seems to use to be inadequate in some particular case'.

CONCLUSION

Petitioner, City of St. Petersburg, requests this Court to reverse the decision of the District Court of Appeal and mandate entry of judgment in favor of Petitioner. In circumstances where a trial court or appellate court may lawfully require a supersedeas bond, a municipality's liability should be limited thereby. When, a governmental body is acting in a wholly legislative capacity, the rule of law set forth in City of Lauderdale Lakes v. Corn, supra, should control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner City of St. Petersburg's Reply Brief has been furnished to H. REX OWEN, ESQUIRE, 157 Central Avenue, P.O. Drawer "O", St. Petersburg, FL 33731, by mail, this 23rd day of May, 1983.

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