O/A 11-6-84

IN THE SUPREME COURT
STATE OF FLORIDA

JOYCE G. MAINER, etc.
et.al.,

Petitioners,

vs.

CASE NOS. 64,689
through 64,697

CANAL AUTHORITY OF THE STATE OF FLORIDA, a body corporate under the laws of the State of Florida, etc.,

Respondent.

FILED
SID J. White
OCT 15 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

TO REVIEW DECISION OF
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
DOCKET NOS. 82-817, 82-818, 82-819, 82-821
82-823, 82-824, 82-825, 82-826 and 82-827

REPLY BRIEF OF PETITIONERS ON THE MERITS

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PRELIMINARY STATEMENT

The respondent, Canal Authority of the State of Florida, was the defendant in the trial court and is referred to in this brief as the "Canal Authority". The petitioners were plaintiffs in the trial court and may be referred to individually by the last names of the plaintiffs or by the corporate names of the plaintiffs, e.g., Mainer, Hodges, Ocala Manufacturing, Astor West.

The following reference symbols are used:

(R)	Refers to the record.
(TR)	Refers to the transcript of the trial held on December 17 and 18, 1981.
(Pl.Ex.)	Refers to an exhibit of the plaintiffs.
(Def.Ex.)	Refers to an exhibit of the defendant.
(A)	Refers to petitioners' Appendix.
(BR)	Refers to the answer brief of the respondent.

TABLE OF CITATIONS

ARGUMENT

POINT I

(WHETHER) THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TITLE TO LAND TAKEN IN FEE SIMPLE DOES NOT REVERT IN THE EVENT OF ABANDONMENT.

The factual circumstances of the petitioners' cases are unlike any case previously decided by this court. They are unique in the State of Florida. Because of this, petitioners' cases are entitled to be considered on their individual merits and should not be resolved through the improper extension of general principles developed in routine condemnation cases. When reviewed in this light, the overriding equitable considerations mandate a reversal of the decision of the District Court of Appeal and a reinstatement of the Final Judgments rendered by the trial court. Furthermore, the affirmance, when limited to the peculiar facts of the Cross Florida Barge Canal Project, will not result in "Chaos ... in the law of eminent domain ..." (BR 42).

The Canal Authority urges the members of this Court to ignore the people and counties involved, to leave your common sense at home and to render an affirmance of the District Court of Appeal from a machine like application of principles developed in unrelated situations. Its primary argument is based on an overstatement of the general rule found in Carlor Co., Inc. v. City of Miami, 62 So. 2d 897 (Fla. 1953). This overstatement is found at page 15 of the answer brief:

> "... where the condemning authority has acquired property in fee simple it may wholly abandon the purpose for which the property was acquired and devote that property to another use, or no use, as it chooses."

As stated, the rule would apply to any taking, whether partial or total, by any condemning authority, without regard to whether or not consideration for the taking would be impaired by the changed use. Additionally, the application of the rule as stated would not be affected by reservations or limitations engrafted on the title taken. Petitioners urge this court to refrain from extending the Carlor decision and its progeny to the point desired by the Canal Authority.

There is only one Cross Florida Barge Canal! No other comparable project exists in Florida. The Canal Authority is a unique corporate entity created pursuant to "special" legislation now codified as Chapter 374, Florida Statutes. Its very limited purpose was agreed to in the PRETRIAL STIPULATIONS of the parties:

> 2. The Canal Authority was created in 1933 to act as local sponsor for the federal governments project to construct a canal across the peninsula of Florida ... (Mainer R-25; Berman R-18; Gay -37; Hodges R-25; Hasty Greene R-31; Silver Springs R-159; couse R-27; Astor West R-33; Griffitts R-34).

The Canal Authority is not a soverign entity. It has no fundamental common-law right to exercise the power of eminent domain for any public purpose. The only purposes for which the Canal Authority could take petitioners' lands through eminent domain are set forth in §374.071 Fla.Stat. (1969).[1] A succinct statement of the law is contained in Staplin v. Canal Authority, 208 So. 2d 853 (Fla. 1st D.C.A. 1968):

> The statute creating the Authority and setting forth its powers restricts its right to acquire lands to the single purpose of construction, operating, repairing, and improving a cross-state canal and canal system.
>
> Id, at 855.

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[1] The Canal Authority's assertions to the contrary are misleading and incorrect (BR 20).

The instant actions all involve partial takings for canal rights-of-way purposes. It was admitted by counsel for the Canal Authority that significant benefits were to have accrued to petitioners' remaining lands upon completion of the Canal Project, and that these benefits were promised in the original condemnation proceedings (TR 273-276, A 1-4). The promise of these benefits was relied on by the judges, juries and parties to these cases and their reliance was justified. Common sense dictates that creating waterfront property is beneficial. In addition, it was a matter of common knowledge that petitioners' remaining lands would become much more valuable upon completion of the Canal Project (TR 274, A 2). Finally, the lands could only be used for this purpose due to the statutory limitations in place at that time. §374.071 Fla.Stat. (1969).

Unfortunately, the Canal Project is abandoned. The Canal Authority has no alternate authorized use for petitioners' lands. It could not legally have taken them for their current and projected uses. §374.071 Fla.Stat. (1969). Because of the representations it made to the petitioners, the Canal Authority has paid less than full value for lands it does not need and will never use, while petitioners have not received and will not receive the benefit of their promised bargain.

These were not the facts in Carlor Co., Inc. v. City of Miami, supra. A cursory review of this Court's Carlor file reveals that the City of Miami took all of Carlor Co., Inc.'s land in fee simple absolute. It was not a partial rights-of-way taking as in the instant cases. No reservations or limitations were expressly engrafted on the City of Miami taking as was done in the Gay and Mainer cases herein. Finally, the City of Miami had every right to condemn the Carlor parcel

for any "municipal use" and, concurrently, had the power to convert it to a different municipal use. Carlor is simply not on all fours with the petitioners' cases. The additional cases cited by the Canal Authority in support of its position suffer from the same weakness.

Langston v. City of Miami Beach, 242 So. 2d 481 (Fla. 3d D.C.A. 1971), sheds no light on the extension of the Carlor doctrine to petitioners' cases. Langston involved a direct appeal from a total taking by a municipality with a general power of eminent domain. The City of Miami Beach "... took from the property owners exactly what they had received in their original conveyances. Upon a completion of the condemnation, the condemning authority occupied the same status as a bonafide purchaser for value." Id, at 483. Petitioners accept this statement of the general rule as it applies to total takings. It has nothing to do, however, with petitioners' arguments, infra.

City of Miami v. Coconut Grove Marine Properties, Inc., 358 So. 2d 1151 (3d DCA 1978), does not control the instant cases. The holding of the Coconut Grove case was that absent a showing of extrinsic fraud, former landowners cannot sue a general condemning authority for subsequently converting property to an alternate authorized use where there has been a total taking followed by entry of a consent final judgment awarding "... full compensation for the property taken and for all other damages of any nature which have resulted or may result from the condemnation ..." Id, at 1154. This case is consistant with the Carlor decision in that both are grounded on the proposition that absent extrinsic fraud, total takings, by definition, result in full compensation for all of the affected property owners' interests.

If Carlor is extended to deny petitioners' rights of reaquisition, then Coconut Grove could similarly be extended to deny claims brought by petitioners for additional compensation. This obvious conclusion points out the logical inconsistency inherent in the Canal Authority's assertion that petitioners' remedy is limited to money damages. (BR 24). If the facts in a given case give rise to equitable jurisdiction, then it exists for all purposes and the question of the appropriate remedy rests in the sound discretion of the trial court. Winn and Lovett Grocery Co. v. Saffold Bros. Produce, 121 Fla. 833, 164 So. 681 (Fla. 1936).

Florida courts have recognized the propriety of exercising jurisdiction to award additional damages in partial taking cases where projects were not constructed in accordance with plans and specifications received in evidence at the original trial. Central & S. Fla. Fl. Con. Dist. v. Wye River Farms, Inc., 297 So. 2d 323 (Fla 4th D.C.A. 1974), at 329. No such equity exists in the case of a total taking as there is no continuing consideration to fail and no remaining property interest to be damaged. City of Miami v. Coconut Grove Marine Properties, Inc., supra. Similarly, the logical extension of Carlor's reasoning does not block the remedy of reacqusition in appropriate partial taking cases. In these cases the individual facts will have to be considered to determine whether or not equitable jurisdiction exists. The Canal Authority has shown no abuse of discretion by the trial judge in the fair manner in which he fashioned the equitable remedies in the instant cases. This Court should affirm his decisions by reversing the decision of the District Court of Appeal.

The Canal Authority next relies on the related decision of the Fifth District Court of Appeal in Canal Authority v. Harbond, Inc., 433

So. 2d 1345 (Fla. 5th D.C.A.) Harbond is not factually distinguishable from the present cases. The same court decided it, however, and the decision is wrong for the same reasons that are present in petitioners' cases. As a result, it should also be rejected by this court.

The Texas, Alabama and New York cases cited by the Canal Authority are not authority for extension of the Carlor doctrine to the cases before this court. Gilbert v. Franklin County Water District, 520 S. W. 2d 503 (Tex. App. 1975); Nearhos v. City of Mobile, 57 So. 2d 819 (Ala. 1952); Bottillo v. State, 386 N.Y.S. 2d 475 (App. Div. 1976). All involve unconditional, total takings in fee simple absolute. None address the issues raised by petitioners' suits. In particular, none discuss the obvious differences between condemnees whose lands are totally taken and those who must continue to adjoin the venture of the condemning agency. For the same reasons, the Federal cases cited by the Canal Authority are inapplicable. Reicheldorfer v. Quinn, 287 U. S. 315, 77 L.Ed 331 53 S. Ct. 177 (1944); United States v. Three Parcels of Land, 224 E. Supp. 873 (D. Alaska 1963); United States v. 10.47 Acres of Land, etc. 218 E.Supp. 730 (D. New Hampshire 1962); Higginson v. United States, 384 F.2d 504 (6th Cir. 1967); O'Hara v. District of Columbia, 147 F.2d (D. C. Cir. 1944); Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958).

Another reason for distinguishing the federal cases is that the condemnor was a sovereign having inherent common law powers of eminent domain. The United States may take property for any predominately public purpose and may subsequently convert its use to another. In such cases there can be no justificable reliance by the judge, jury and parties to a condemnation proceeding that an intended use for a parcel

of property will have to be effectuated.

In direct contrast with the Canal Authority's cases, petitioners have cited this Court the case of The People v. Hugh White, 11 Barb. 26 (N. Y. App. 1851), supra. It has been cited for two primary reasons. First, it is factually on all fours with petitioners' cases. Secondly, it is the only case cited discussing the application of pre-statutory common law principles of eminent domain.

The Canal Authority attempts to distinguish White factually on the basis that "... neither the project's land, nor any works, nor the canal purpose have been abandoned." (BR 28). That is not what the trial court ruled. That is not what the district court of appeal ruled. Summarizing from the record, the following facts are clear:

1. There are no present plans to complete the Canal Project (Pl.Ex. 6A-6J; composite deposition at p. 10).

2. No work has been done to complete the Canal Project since President Nixon's stop order took effect in 1971 (Pl. Ex. 6A-6J; composite deposition at pp. 6-8).

3. Since 1971, we have been through three different presidential administrations and no funds have been appropriated by Congress to complete the Canal Project (Pl.Ex. 6A-6J; composite deposition at p. 10); (TR 213-216).

4. The Cross-Florida Barge Canal Restudy Report, Final Summary (Pl.Ex. 1-A), completed and published February, 1977, at a taxpayer cost of 3.5 million dollars (TR 215), called for scrapping the project (TR 136, 217). As Congressman Chappell testified, the monstrous report concluded the Canal Project was unsound environmentally and unsound economically (TR 217, 218).

5. In 1977, Governor Askew forwarded a letter of transmittal to President Carter signed by himself and all of the cabinet members of the State of Florida recommending that the Canal Project be terminated and the lands restored (Pl.Ex. 8, TR 149-150, TR 220).

6. Funds have been appropriated and spent to dismantle the Dunnellon railroad bridge and to restore the lands to their original state (TR 129).

7. The Canal Authority has repudiated its contract with the United States government by refusing to pay the final $800,000.00 portion of a judgment for damages awarded against the United States incident to the construction of the canal (TR 132). The refusal to pay was precipitated by President Nixon's "mishandling" of the Canal Authority in terminating the construction (TR 132-133).

8. Although the Canal Authority had the power to build the canal, Section 374.051, Florida Statutes (1981), the Authority has never had funds to complete the project. (TR 233-234).

9. The two witnesses working at the heart of the project, Giles Evans and Congressman Chappell, both testified that the "Upland Alignment" was the selected completion alternative, thereby completely eliminating the project's need for the properties of those petitioners fronting on the Eureka Pool. (TR 167, 217-218).

10. It is undisputed that there is absolutely no canal related use for the lands sought to be reacquired in Gay, Mainer, Berman, Hodges and Silver Springs Shores.

The decision below that the Canal Project has been abandoned is supported by competent substantial evidence and should be affirmed. Jacksonville Conch Co. v. Early, 78 So.2d 369 (Fla. 1955). As a result, there is no significant factual distinction between the facts in the White case and those at bar.

The Canal Authority next urges this Court to ignore the relevant common law principles enunciated in The People v. Hugh White, supra, for the reason that petitioners were fully compensated for the takings and retain no rights or interest whatsoever. (BR 29). It is this reasoning that is "simplistic", not that of petitioners.

Assuming the Canal Project and Eureka Pool were now built, petitioners' lands would be unique and more valuable. (Pl.Ex. 3C, 3D and 3K; TR 46, 207-210). Gay and Mainer could exercise or sell their rights of ingress and egress to the beautiful lake known as the Eureka Pool. (Def.Ex. 7D, 7P; TR 227-228). The White case would not apply.

Unfortunately, however, the real facts are markedly different. The Canal Project is abandoned. The government now wishes to convert the use of these properties and, by so doing, undercut the judges, juries and parties who tried these cases on the justifiable belief that the Canal Project would be built, that it had to be built as planned and that the specific statutory powers granted the Canal Authority would forever prohibit these properties from being converted to unauthorized alternate uses. If the government is permitted to act as it now intends, these petitioners will have lost their bargained for benefits. Because of this, the trial judge was not willing to apply the Carlor decision. See, dialogue TR 273-276, set out in full, Appendix 1-4.[2] Instead, he properly applied the common law rules set out in White to the unique facts of the instant cases where the compensation paid petitioners was entirely interdependent with the benefits that were supposed to result from the construction of the Canal Project. See, The People v. Hugh White, supra, at 32; cited approvingly 13 Am.Jur.2d 478 (Canals §11). This Court should affirm the application of these principles to the instant cases by reversing the decision of the District Court of Appeal.

The Canal Authority next argues against the application of White to the facts of the instant actions because of the existence of a law that may never become effective, Chapter 79-167, Laws of Florida. If

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[2] Present counsel for the Canal Authority is incorrect in his assertion dehors the record that "...not one petitioner pleaded that his remaining lands had suffered severance damages for which he had not been compensated." (BR 23). The truth is that they did claim severance damages in their Answers. In reliance on the overwhelming assurances of the project's construction, however, these claims were abandoned at trial.

correct, the Canal Authority's reasoning would render our judiciary impotent to act wherever a governmental entity was concerned.

The issue of abandonment, vel non, is an issue for our judiciary to decide. Chapter 374, Florida Statutes, grants the Canal Authority the right to construct the Canal Project. It has not done so. The project is abandoned. Chapter 79-167, Laws of Florida, cannot undo that which has not been done! This finding of the trial court must be affirmed.

POINT II

(WHETHER) IN THE EVENT OF RECISSION OF THE CANAL AUTHORITY'S FEE SIMPLE ACQUISITIONS, THE CANAL AUTHORITY IS ENTITLED TO THE PRESENT FAIR MARKET VALUE OF ITS LANDS.

The Canal Authority argues that it is entitled to the current fair market value of these lands due to the "... unparalleled appreciation in value of much of the property in question." (BR-40). This is incredible! The Canal Authority did not purchase these properties from willing sellers. It took them ! It has had the unfettered use of these properties at their appreciated values, tax free, and now wants a windfall profit awarded as a result of its failure to follow through on its promise to construct the Canal Project. Furthermore, the Canal Authority will merely repay the tax monies provided to it for these acquisitions. What would it do with its remaining profits?

A good example of the inequity is the Berman case. In that case Berman's predecessors in interest were paid $828.00 for the property sought to be reacquired. Testimony as to its fair market value at the time of trial ranged from $8,600.00 (TR 123) to $43,600.00 (TR 243).The primary reason for the great increase in value is Berman's development of an industrial park on his remaining lands. (TR 243). The Canal

Authority's position is that for not having completed that which it promised to do, it should be rewarded with a 5,266 % profit! There is no equity in this proposal.

Alternatively, the Canal Authority seeks interest on the compensation paid. It does not suggest, however, that it should have to repay the landowners the fair market rental value for the period it has possessed their properties! This argument should be rejected. The landowners have had the use of the condemnation proceeds. The Canal Authority has had the use of the land. The trial court, which had equitable jurisdiction to resolve all issues before it, properly offset the two. Winn & Lovett Grocery v. Saffold Bros. Produce, supra. Other solutions are fraught with difficulty and will result in non uniform and often inequitable results. The Final Judgments of the trial court should be affirmed.

POINT III

RESPONSE TO AMICUS CURIAE BRIEF OF FLORIDA DEFENDERS OF THE ENVIRONMENT, INC.

I. (WHETHER) PETITIONERS' CLAIM OF AN EQUITABLE RIGHT TO REPURCHASE LANDS CONVEYED TO THE CANAL AUTHORITY IN FEE SIMPLE ABSOLUTE BY EMINENT DOMAIN OR PURCHASE IS UNSOUND.

The initial argument advanced by Amicus on this point is that Carlor Co. v. City of Miami, supra, and Langston v. City of Miami Beach, supra, are controlling. This is a restatement of the Canal Authority's argument which has been rebutted, supra, POINT I.

Amicus' second and third arguments are attempts to inject new issues involving the rule against perpetuities and illegal restraints on the free alienability of property. It is improper to consider these new defenses that were not argued and preserved by the Canal Authority for

consideration by this Court. Action v. Ft. Lauderdale Hospital, 418 S. 2d 1099 (Fla. 1st D.C.A. 1982); Keating, etc. v. State of Florida ex rel. Ausebel, 157 So. 2d 567 (Fla. 1st D.C.A. 1963).

The final argument presented in support of this point is that Canal Authority v. Ocala Mfg. Co., 365 So. 2d 1060 (Fla. 1st D.C.A. 1979), should be condemned. This argument merely restates the ultimate issue. That case is factually indistinguishable from petitioners' or, for that matter, the case of Canal Authority v. Harbond, Inc., supra. Their prospective application as precedent depends extirely upon this Court's resolution of the conflict between the decisions of the First and Fifth Districts.

II. (WHETHER) IF, arguendo, PETITIONERS POSSESS A RIGHT TO REPURCHASE, THE REPURCHASE PRICE WOULD NOT BE THE ORIGINAL CONSIDERATION.

In its second point, Amicus repeats the Canal Authority's position which has been rebutted, supra, POINT II. This argument lacks equity, because it ignores the differences between a taking and a market place transaction. Secondly, it ignores the fact that petitioners' equitable rights of reacquisition were generated by the failure of the Canal Authority to do that which it promised. Finally, it assumes the fact that these petitioners were paid full fair market value for fee simple absolute interests in the original condemnation trials. This conclusion is contrary to the determination of the trial court. If the findings of fact of the trial judge are affirmed by this Court, then the Final Judgments should be also.

CONCLUSION

Where a corporation created by our Legislature is granted the power of eminent domain for a strictly limited purpose and exercises that power to take only a part of contiguous lands owned by a citizen, and the consideration paid for the partial taking is directly dependent upon the promised completion of the project which is ultimately abandoned thereby terminating the possibility of the citizen's receiving the promised benefits, and there exists no valid basis for retention of the part taken, then, in that event, the citizen's remaining rights include the right to reacquire the part taken on an equitable basis. This was the ruling of the trial court. It is equitable and requires the government to treat its citizens with the same degree of fairness it demands from them. The decision of the trial court should be affirmed as the law of this State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to LOUIS F. HUBENER, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301; LEWIS F. MURPHY, ESQUIRE, 4000 Southeast Financial Center, Miami, Florida 33131-2398; and JOSEPH W. LITTLE, 3731 N.W. 13th Place, Gainesville, Florida 32605, on this 12th day of October, 1984.

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