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IN THE SUPREME COURT OF FLORIDA

TRAILER RANCH, INC.,
et al.,

Petitioners,

vs.

CASE NO. 68,190

CITY OF POMPANO BEACH,
etc.,

Respondent.

PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

Respondent has restricted its brief to the sole issue set forth by the district court as ground for reversal of the trial court. That issue, as certified by the district court, was whether the respondent condemning authority was entitled, as a matter of law, to introduce in evidence its plans for the already-completed sewer project.

Petitioners will, in turn, so restrict this reply brief. Petitioners respectfully submit that the certified question must be answered in the negative. The trial court properly excluded the plans in question, and the district court erred in holding to the contrary.

ARGUMENT

ISSUE PRESENTED

IS A CONDEMNING AUTHORITY WHICH SEEKS A PERMANENT UNDERGROUND UTILITY EASEMENT, TOGETHER WITH THE NECESSARY ABOVE-GROUND USES TO CONSTRUCT AND MAINTAIN SUCH UTILITIES, ENTITLED TO INTRODUCE INTO EVIDENCE THE PLANS AND SPECIFICATIONS REFLECTING THE DETAILS OF THE UTILITY PROJECT BEFORE THE JURY DETERMINING THE DAMAGES TO WHICH THE PROPERTY OWNER IS ENTITLED?

Respondent continues to take the position, also erroneously adopted by the district court, that as condemning authority it had an absolute legal entitlement to introduce the plans and specifications of its already-completed sewer project. This is not the law of Florida, and the authorities cited by respondent do not so hold.

It is pertinent to recall, briefly, that in this case the Order of Taking defined the legal interest taken from petitioners by respondent. That Order of Taking, entered October 8, 1976, defined the legal interest as follows:

9. That Petitioner is entitled, prior to final judgment herein, upon payment into the Registry of the Court of the sum of Nineteen Thousand Seven Hundred Fifty (\$19,750.00) Dollars, to perpetual underground utility easements and temporary construction easements under, across and over the real property located in Broward County, Florida described hereinabove, for underground sanitary

sewer lines with the right to construct, maintain, operate and repair facilities and appurtenances in, on or under said lands which may be required for the full enjoyment of the rights hereby acquired.

(A 4) (Emphasis supplied.)

Nowhere in the pleadings or Order of Taking was there any further restriction on the easement under, across and over the lands taken by respondent (A 1-5). Nowhere in those determinative documents was there any reservation of rights or use in petitioners, whose lands were taken (A 1-5).

Petitioners have urged throughout these proceedings, and the trial court held, that the legal interest taken by respondent was defined by the above-quoted Order of Taking, and that the interest taken was tantamount to taking of the fee. See Houston Texas Gas & Oil v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961); Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966). Any restriction on the extent of taking would have had to have been set forth in the petition and Order of Taking. Peebles v. Canal Authority, 254 So.2d 232, 233 (Fla. 1st DCA 1971).

The determinative error of the district court was its reliance on Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974); cert. den. 310 So.2d 745 (Fla. 1975). Erroneous reliance on this decision is, likewise, the very heart of respondent's answer brief.

In their initial brief petitioners have discussed and distinguished the Central and Southern case at length. (See initial brief, pp. 10, 11, 12, 13, 14, 15, 16, 22, 23.) As noted in that prior brief, distinctions abound and include (1) the primary disputed documents in that case consisted of, or were based upon, a formal resolution of the condemning authority; (2) the evidence did not purport to restrict the nature or extent of the legal interest taken, but merely dealt with supplementary access to be provided; (3) the evidence dealt with a project that had not yet been constructed; (4) the decision of the court was that the condemnation action should not have been dismissed with prejudice; and (5) the court specifically acknowledged that if the evidence were found improper, the "correct ruling" would have been to strike and exclude it from the record.

Based upon these distinctions, treated more fully in petitioners' initial brief, it is respectfully submitted that the district court's reliance on and citation of Central and Southern Florida Flood Control District v. Wye River Farms, Inc., supra, was misapplication of law, which must be set aside by this Court.

Respondent's other primary authority in support of the district court's decision is Jones v. City of Tallahassee, 304 So.2d 528 (Fla. 1st DCA 1974). This case, also discussed

in petitioners' initial brief (pp. 17; 26-37) presents a situation unlike the instant case, for in Jones, supra, the condemning authority specifically moved to amend the order of taking to restrict the legal interest taken and the trial court, though not formally ruling on the motion, entered its pre-trial order consistent with the proffered amendment and expressly restricted the scope of the order of taking. Properly read, Jones v. City of Tallahassee, supra, is better authority for reversal of the erroneous decision of the district court.

Before departing Jones v. City of Tallahassee, supra, it is informative to note that in that case the landowner was expressly reserved the right to cross, re-cross, cultivate and graze the easement and under certain circumstances even to preclude the condemning authority from travel along the easement. Nevertheless, in that case the condemning authority conceded by its testimony that the rights taken had a value of 75% of the fee.

In the instant case, however, where the easement "under, across and over" the land is otherwise legally unrestricted; where the condemning authority would clearly have authority to take exclusive use of the entire lands at any time for maintenance or repair; where the Order of Taking clearly authorizes condemnor to add above-ground

appurtenances; and where it is conceded that petitioners are perpetually barred from erection of any permanent structures, the respondent proffered testimony to the effect that the rights taken were of a minimum value of 10% to 25% of the fee (see answer brief, p. 10) with absolutely no severance damages (respondent's appendix, p. 102). The contrast between this case and Jones v. City of Tallahassee, supra, demonstrates that respondent's expert misunderstood applicable law.

Respondent has placed great emphasis on the fact that the surface of the easement is currently crossed in some places by vehicular traffic and even parked upon. As the trial court properly recognized, however, the key issue as to what has been legally taken is the legal interest defined by the petition and Order of Taking. See Houston Texas Gas & Oil v. Hoeffner, supra; Smith v. City of Tallahassee, supra; Peebles v. Canal Authority, supra.

What is being allowed now does not define or limit the legal interest taken from petitioners by reason of the Order of Taking, nor does it limit the legal interest now owned by the condemnor City. Respondent's "bundles of sticks" argument overlooks that the largest sticks in the bundle are those which represent uninterrupted right of use, and potential future use. When government takes an interest over, across and under land with the right to exclusively

occupy that land at any future time, and with a permanent prohibition of any future structures by the condemnee, there are no "sticks" left in the landowners' "bundle."

Thus, it is clear that respondent's proffered testimony was based upon a misconception of law. Respondent's continuing argument and allegations regarding "windfall profits" and "miscarriage of justice" are nothing more than rhetoric founded on the same misconception. It has been recognized time and again, however, that a condemnor's expert testimony as to valuation is properly excluded where based upon a misconception of law. Mulkey v. Division of Admin., etc., 448 So.2d 1062, 1067 (Fla. 2d DCA 1984); Stubbs v. State, Department of Transportation, 332 So.2d 155 (Fla. 1st DCA 1976). Rhetoric based on such a misconception of law requires no further reply.

Returning more directly to the central issue of plans and specifications, respondent has cited several cases for the proposition that such plans must be admitted in evidence when offered. As noted earlier, despite respondent's citation and reliance, Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), is so readily distinguished as to provide respondent with no support in the instant case.

Respondent's reliance on Division of Administration v. Decker, 408 So.2d 1056 (Fla. 2d DCA 1982), is equally misplaced, for in that case the propriety of the admission of plans does not appear to have been a contested issue. In Division of Administration, etc. v. Mobile Gas Company, 427 So.2d 1024 (Fla. 1st DCA 1983), the court, in a later action, merely held that the landowner could maintain an inverse condemnation action where after the initial condemnation action the State failed to construct a promised access road.

Respondent's reliance is, however, most sorely misplaced by its citation of In Re Division of Administration v. St. Regis Paper Company, 402 So.2d 1207 (Fla. 1st DCA 1981). In that case the condemnor attempted to offer plans and specifications as to access, which plans and specifications were silent as to intended "turnouts." When the plans and specifications were found deficient, the condemnor offered engineering testimony as to the manner of intended construction.

The trial court excluded the plans as to the access issue, excluded the proffered engineering testimony, and directed a verdict for the landowner based upon the assumption of worst possible damage (i.e., total deprivation of access). The district court affirmed, specifically noting that there was no showing of authority conferred on the designated engineer to make commitments for, or bind, the condemnor.

In Re Division of Administration v. St. Regis Paper Company,
supra.

In the instant case the plans offered by respondent were equally silent as to the surface of the land. The plans showed no appurtenances, though it is clear that the Order of Taking authorized same. Perhaps more importantly, the plans did not purport to depict the right of the condemnor to preempt complete use of the land for purpose of maintenance or repair, or for construction of subsequently required appurtenances. Finally, the plans did not purport to depict the permanent prohibition of construction of structures by petitioner on the land.

In short, in the instant case, as in In Re Division of Administration v. St. Regis Paper Company, supra, the plans were deficient by silence as to the matter at issue, and proffered testimony to cure that deficiency was not binding on the condemnor. Thus, the plans, and testimony, were properly excluded in the instant case. Indeed, in the instant case the basis for exclusion was even stronger, for here the plans and testimony, as drawn and offered, purported to modify and limit the nature and scope of the legal interest taken, as defined by the petition and Order of Taking. Respondent chose the "magic" words, which defined

by petition and Order of Taking the legal interest taken. Respondent must now pay for that interest.

It is worthy of further note that Central and Southern Florida Flood Control District v. Wye River Farms, Inc., supra, and various other decisions cited by respondent for the proposition that plans must be admitted when offered, deal with projects that are not yet constructed or completed. While petitioners submit that even those cases do not mandate admission of any proffered plans as a matter of law, it must also be recognized that such cases are entirely different from the instant situation where the initial construction was complete at time of trial.

Where the project has not been yet constructed, plans and specifications represent an affirmative judicial representation as to what is going to be done. They are the only way to convey to the court and the jury what is going to be done with respect to its impact on adjacent land. It establishes the standard whereby a landowner can be further compensated if the condemnor constructs the project differently and thereby increases the injury. There is, thus, a strong policy ground in favor of admission of plans, for pre-construction proceedings are "blind" and undirected without them.

In a case such as this, however, where the project is complete and available for view, the plans serve no such purpose. Surely respondent does not contend the jury was without knowledge of the underlying pipes when it walked the easement during view. This case, and these proceedings now, do not turn on the underground portion of the easement or the presence of the pipes at the time of trial. Yet that was all the plans would have depicted.

The key to these proceedings was the legal rights taken by respondent with respect to, and above, the surface. As to these legal rights, the plans were not only silent, but affirmatively misleading by a pictorial depiction or suggestion of no surface loss of legal rights whatsoever. The plans were, therefore, properly excluded.

This Court's recent decision in Belvedere Development Corporation v. Department of Trans., 476 So.2d 649 (Fla. 1985), has been cited by respondent. That case, however, cannot be read to hold that plans and specifications of an already-completed project must be admitted where the plans are silent, or misleading, as to the surface legal rights taken. Indeed, this Court's terminology referring to the "project as contemplated by the construction plans" certainly suggests the significance of plans for contemplated, but unperformed, construction.

It is respectfully submitted that the certified question must be answered in the negative. Trial courts are not compelled as a matter of law to admit in evidence plans or specifications of the condemning authority. Even if such a rule were established as to not-yet-constructed projects, it should not apply to completed projects. Certainly such a rule would not apply where, as here, the proffered plans were silent or misleading as to the nature of surface rights taken.

In this case, with months of advance notice that its appraisal testimony would be excluded as based on an erroneous interpretation of law (R 365), and that its plans and engineering testimony would also be excluded (R 405-430), respondent chose to take its chances rather than secure and offer expert testimony in accordance with controlling law. The respondent, to use current terms, chose to "go bare" rather than present evidence in accordance with the correct, pre-trial pronouncements of the trial court. If there were any injury by reason of trial without any expert testimony on respondent's behalf, the injury was self-inflicted.

It is respectfully submitted that the decision of the district court should be reversed, with instructions to reinstate the final judgment. Petitioners are entitled to their just compensation, which has now been deferred

for a full decade since the filing of this action in April,
1976.

CONCLUSION

The certified question should be answered in the negative and the decision of the district court reversed. The sole ground for the decision of the district court setting aside the final judgment, and the sole ground asserted and preserved by respondent in this Court, is exclusion of respondent's proffered plans and specifications for the already-completed project. The authorities discussed above, and in petitioners' initial brief, establish that there was no error in this exclusion. The district court's decision to the contrary is erroneous and must be reversed.

Respondent's brief reflects a continuing determination not to recognize, or pay just compensation for, the full legal interest defined and taken by respondent by petition and order of taking. This Court should end this decade-long delay of compensation by reinstatement of the final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing
Petitioners' Reply Brief has been furnished by U.S. mail
to DONALD C. ROBERGE, ESQ., Post Office Box 2083, Pompano
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