IN THE SUPREME COURT OF FLORIDA

CITY OF OCALA, a Municipal Corporation under the laws of the State of Florida,

Petitioner,

vs.

O. J. NYE AND CAROLYN NYE,

Respondents.

SUPREME COURT CASE NO. 75984
5DCA CASE NO. 89-00450

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PAGE NUMBER

TABLE OF CITATIONS

CASES CITED: **PAGE NUMBER**

CONSTITUTIONAL PROVISIONS CITED:

STATUTES CITED:

OTHER AUTHORITIES CITED:

STATEMENT OF THE CASE AND FACTS

This is a Petition to invoke the discretionary jurisdiction of the Supreme Court to review a decision of the Fifth District Court of Appeal rendered April 5, 1990. The City of Ocala filed its Notice requesting that this Court invoke its discretionary jurisdiction to review this decision on May 4, 1990.

The issue before the Fifth District Court of Appeal was whether a municipality exercising its power of eminent domain may condemn more property than is actually necessary for a public purpose, if by doing so, the total acquisition cost will be equal to or less than the cost of acquiring only a portion of the property. App. 1. The Fifth District Court of Appeal held that a municipality does not have this power. App. 4.

SUMMARY OF ARGUMENT

The opinion below expressly construes Art. VIII, §2(b) and Art. X, §6, Fla. Const. and expressly and directly conflicts with Douglass v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968), on the same question of law. Therefore, this Court is vested with discretionary jurisdiction to review this case. The Supreme Court should exercise its jurisidiction to accept this case because the issues involved will substantially affect eminent domain proceedings by municipalities throughout the State.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA HAS DISCRETIONARY JURISDICTION TO REVIEW THIS CAUSE IN THAT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUES A PROVISION OF THE FLORIDA CONSTITUTION.

In its decision the Fifth District Court of Appeal phrased the issue in this case as follows:

> When a municipality exercises the power of eminent domain and all of a tract of land is not needed for municipal purposes, but the cost to acquire the entire tract would be equal to, or less than, the cost of acquiring only a portion of the tract, can the municipality condemn the entire tract? App. 1.

The Fifth District Court of Appeal's opinion further stated that the City of Ocala contended as follows:

> The municipality contended that under its home rule powers, Art. VIII, section 2(b), Fla. Const., and section **166.021,** Florida Statutes, **it** may exercise any power for municipal purposes except when expressly prohibited by law. "Municipal purposes" is defined as "any activity or power which may be exercised by the State or its political subdivisions", §166.021(2), Fla. Stat., and since the State, Department of Transportation (DOT) as well as counties are expressly permitted by statute to condemn more property than is necessary where they would save money be doing so, **§§337.27(2),** 127.01(1)(b), **Fla.** Stat,, the municipality contends it may likewise do so and thus avoid the business damage claim. App. 2.

In holding that municipalities do not have the power of eminent domain to acquire an entire tract to avoid a business damage claim, the Fifth District Court of Appeal expressly construed Art. VIII, §2(b) of the Florida Constitution as not permitting such an acquisition.

The basis for the Fifth District Court of Appeal's opinion also involved an express construction of a second provision of

the Florida Constitution. The Appellate Court cited Peavey-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947); and Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975) for the proposition that powers of eminent domain given to municipalities are limited under Art. X, 56, Fla. Const., and must be strictly construed. App. 3. Therefore, the Fifth District Court of Appeal reasoned, until the legislature explicity authorizes municipalities to have the eminent domain power given to the State and counties to acquire entire tracts, municipalities do not have this power. App. 4.

Because the Fifth District Court of Appeal construed Art. VIII, §2, Fla. Const. and also construed Art. X, §6, Fla. Const. in setting forth the reasons for its decision, the Supreme Court of Florida has discretionary jurisdiction to review the appellate decision. Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii); Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So.2d 153, 154-155 (Fla. 1982); Estate of Hampton v. Fairchild-Florida Construction Company, 341 So.2d 759, 760-761 (Fla. 1976); City of Casselberry v. Orange County Police Benevolent Association, 482 So.2d 336, 337 (Fla. 1986). This discretionary jurisdiction is demonstrated by the case of Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964). Daniels concerned, inter-alia, an appeal from a judgment entered in eminent domain proceedings regarding the applicability of Section 29 of Article XVI, Fla.

Const. (1885) to condemnation proceedings instituted by a State agency or political subdivision to acquire property for a public purpose. Id. at 847. In that *case* the owners of property condemned by the State Road Department and Sarasota County contended that Section 29 of Article XVI was applicable to the condemnation proceedings involving the owners' property, and that said Section 29 permitted the landowner to receive remainder damages without diminution from the benefit of any improvement proposed. Id. at 848. The State Road Department and Sarasota County maintained that, although some of the opinions of the Florida Supreme Court appeared to support the landowners' contention, the issue had never been squarely presented to the Florida Supreme Court. Id. The State and county argued that the legislative history of Section 29 of Article XVI revealed that the section was not intended to apply to condemnation proceedings. Id. Under these facts the Supreme Court of Florida ruled that it had jurisdiction and ruled that Section 29 did not apply to condemnation proceedings. Id. at 847, 848-851.

Similar to Daniels, supra, in the present case the City of Ocala requests that the Supreme Court of Florida exercise its discretionary jurisdiction to determine how an Article of the Florida Constitution should be construed: i.e., whether it should be construed to permit municipalities to exercise the powers given to the State of Florida by virtue of §337.27(3), Fla. Stat. (1985). The Fifth District Court of Appeal opinion expressly construes Art. VIII, §2(b), Fla.

Const. as not permitting municipalities to exercise said powers. It arrives at this conclusion by expressly construing another provision of the Florida Constitution: Art. X, $6, as limiting municipal eminent domain powers to those specifically given to municipalities by the Florida legislature. Therefore, because the Fifth District Court of Appeal opinion expressly construes two provisions of the Florida Constitution, the Supreme Court of Florida should accept jurisdiction in this case.

II. THE SUPREME COURT OF FLORIDA HAS DISCRETIONARY JURISDICTION TO REVIEW THIS CAUSE IN THAT THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH ANOTHER DISTRICT COURT OF APPEAL OPINION ON THE SAME QUESTION OF LAW.

The Supreme Court of Florida also has discretionary jurisdiction in this case because the Fifth District Court of Appeal opinion expressly and directly conflicts with another District Court of Appeal opinion on the same question of law. As the Fifth District Court of Appeal's decision sets forth, in this case the City of Ocala sought to condemn property to widen N.E. 14th Street and was required to condemn parcel 23. App. 1. This parcel fronted 200 feet along N.E. 14th Street and was 60 feet in depth. Id. The City needed to condemn 200 feet by 50 feet of parcel 23 (83.33% of the total parcel) to construct its street improvements, leaving a strip 10 feet wide by 200 feet long (16.67% of the parcel) which was not necessary to construct the improvements. Id. On this strip, was located the remaining portion of the "Coffee Kettle" business structure: an area approximately 7 feet wide by 70

feet long. [See: Exhibit "A" on page 9 of Appellants' (Respondents') Initial Brief].

In its cross appeal the City maintained that this 83.33% taking constituted a constructive total taking so that no business damages would be owed to the "Coffee Kettle" lessees. The City cited Douglass v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968) in support of its position, and also discussed the possibly conflicting authority of Young v. Hillsborough County, 215 So.2d 300 (Fla. 1968). Both of these cases were cited by the Fifth District Court of Appeal in its decision rendered in this cause. App. 1.

In Douglass, Hillsborough County condemned and destroyed 5/8's of a coin-operated laundry business structure, leaving 3/8's of the structure remaining upon the adjoining land not taken. Id. at 403. The Second District Court of Appeal treated this 5/8's taking as a constructive total taking. It stated that under the aforesaid facts the sublessee/business owners had failed to bring themselves within the purview of Florida Statutes 573.071. Id. at 405. This was because the effect of the condemnation was to destroy the business by reason of an entire taking of both the business and the land. Id. at 404-405. The rationale of the Second District Court of Appeal was that, because the sublessee's coin-operated laundry business would require relocation, it was effectively entirely taken. Id. at 405.

The Fifth District Court of Appeal's decision in the present case addresses only the issue of whether a

municipality may condemn an entire tract instead of a portion of a tract if by doing so the municipality may avoid incurring business damages. The appellate court's decision thereby presumes that the taking in this cause was a partial taking. The decision therefore expressly and directly conflicts with Douglass, supra, which held that a 5/8's taking which effectively destroyed a business constituted an entire taking such that no business damages were owed.

The fact that the Supreme Court of Florida has discretionary jurisdiction because of the express and direct conflict with Douglass, supra is demonstrated by State Road Department v. White, 161 So.2d 828 (Fla. 1964). In White the Florida Supreme Court granted certiorari based on a Petition for Certiorari which alleged conflict between the Second District Court of Appeal White decision reported at 148 So.2d 32 and the Third District Court of Appeal opinion of Gross v. Ruskin, 133 So.2d 759 (Fla. 3d DCA 1961). 161 So.2d at 829. The Florida Supreme Court determined that it had discretionary jurisdiction and held that the Second District Court of Appeal in White had correctly ruled that a lessee is an "owner" for purposes of the business damages statute. Id. In arriving at its decision the Second District Court of Appeal had noted the Gross case but had ruled that Gross did not conflict with its decision in White because the precise question of whether a lessee was an "owner" entitled to receive business damages was not involved in the Gross decision. 148 So.2d at 35. Despite the fact that

there was no specific reference to conflicting case law in the White and Gross appellate decisions, the Florida Supreme Court held that a statement made in the Gross case that business damages were not recoverable by a lessee was at odds with the language of the Second District Court of Appeal in White. 161 So.2d at 829. Therefore, the Supreme Court held that conflict jurisdiction existed. Id.

In the case sub judice, following White, conflicting language exists between the Douglass case which held that a 5/8's taking was a constructive total taking, and the present case, which holds that an 83.33% taking is a partial taking. Therefore, the Supreme Court of Florida has discretionary jurisdiction to review the present case.

111. THE SUPREME COURT OF FLORIDA SHOULD EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION OF THIS CASE BECAUSE THE FIFTH DISTRICT COURT OF APPEAL'S DECISION HAS SUBSTANTIAL RAMIFICATIONS FOR MUNICIPAL CONDEMNATIONS THROUGHOUT THE STATE.

As discussed, supra, there are two separate and distinct bases upon which this Court can accept jurisdiction. However, the question remains whether or not this Court should exercise its discretion in that manner. The City of Ocala respectfully suggests that it is most important for the Supreme Court to consider this matter on the merits because the question presented has substantial ramifications for municipal eminent domain proceedings throughout the State.

Reduced to it most basic elements, the central issue presented by this case is whether or not municipalities will be permitted to acquire an entire tract of land in order to

avoid a business damage claim. Clearly, both the Florida Department of Transportation and each county in the State have this power. [See: §§337.27(2) and 127.01, Fla. Stat. (1989)].

In presenting its rationale for granting this power to the Department of Transportation, the legislature stated:

> This subsection shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the State of property acquisitions is a public purpose and that, without this limitation, the viability of many public projects will be threatened. §337.27(2), Fla. Stat. (1989).

These same financial constraints affect the municipalities in the same manner as they effect the Department of Transportation and the counties. Therefore, the ". . . viability of many public projects . . ." initiated by municipalities across our State will be imperiled unless the Court elects to exercise its discretion to review this case on the merits.

As a result of the Local Government Comprehensive Planning and Land Development Regulation Act, §163.3161(1), Fla. Stat. (1989), (hereinafter the "Act"), the peril for municipalities becomes even greater. The Act provides for certain mandatory elements that must be addressed by each municipality in the State. Among these mandatory elements are the capital improvements element and the traffic circulation element. [See: §163.3177(3) and (6)(b)].

As this Court is aware, the "concurrency doctrine" will require that municipalities attain the levels of service

established in their comprehensive plan or cease to issue development orders. [See: Fla. Admin. Code Rule 9J-5.016(4)(b)]. Therefore, the effective result of these requirements is that municipalities will be faced with the decision to construct road and street projects, regardless of the costs, or face a moritorium on development. For this reason, every municipality in the State has a direct and substantial interest in having this Court address on the merits this issue which substantially affects land acquisition costs,

CONCLUSION

The Court has discretionary jurisdiction to review this cause based upon both an express construction of the Florida Constitution and a direct conflict with the decision of another district court of appeal opinion on the same question of law. Furthermore, it is essential that this Court exercise its discretion and accept jurisdiction because the decision below has susbstantial ramifications for municipal condemnation actions throughout the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles R. Forman, Esq., P.O. Box 159, Ocala, FL 32678, this 11 day of May, 1990.

William H. Phelan, Jr.

APPENDIX TO PLAINTIFF/PETITIONER'S BRIEF ON JURISIDICTION

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1990

O. J. NYE, et al.,

Appellants/Cross-Appellees,

v. CASE NO. 89-450

CITY OF OCALA, etc., et al.,

Appellees/Cross-Appellants.

Opinion filed April 5, 1990

Appeal from the Circuit Court for Marion County, Wallace E. Sturgis, Jr., Judge.

Charles R. Forman and Michael G. Takac of Atkins, Krehl & Forman, Ocala, for Appellants/Cross-Appellees.

William H. Phelan, Jr., and Rollin E. Tomberlin of Bond, Arnett & Phelan, P.A., Ocala, for Appellees/Cross-Appellants.

COWART, J.

The issue in this case is: when a municipality exercises the power of eminent domain and all of a tract of land is not needed for municipal purposes, but the coat to acquire the *entire* tract would be equal to, or less than, the cast of acquiring only a portion of the tract,' can the municipality condemn the entire tract?

Appellee, a municipality, sought to condemn property to widen N.E. 14th Street. The property which is the subject of this appeal, parcel 23, fronts 200 feet along the street and is 60 feet in depth. The municipality actually needs only 50 feet of the 60 foot depth for the street widening. This parcel

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[1] This anomaly exists because section 73.071(3)(b), Florida Statutea, which authorizes special damages for a taking which damages or destroys an established business, is only applicable when less than the entire business premises is sought to be appropriated. See Young v. Hillsborough County, 215 So.2d 300 (Fla. 1968); State Road Department v. Bramlett, 189 So.2d 481 (Fla. 1966); Douglass v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968); and Palm Beach County v. Awadallah, 538 So.2d 142 (Fla. 4th DCA 1989), rev. denied, 548 So.2d 662 (1989).

contains a building leased to a tenant who has operated a business thereupon for more than five years. The tenant asserted a claim for special damages to its business under section 73.071(3)(b), Florida Statutes, which statute is applicable when less than an entire tract is to be condemned. The municipality amended its eminent domain petition to take the additional 10 foot width of the tract so as to eliminate the business damage claim. The tenant contended that the municipality has only the authority to take land by eminent domain for the municipal purpose and therefore has no authority to take the 10 foot remainder. The municipality contended that under its home rule powers, Art. VIII, section 2(b), Fla. Const., and section 166.021, Florida Statutes, it may exercise any power for municipal purposes except when expressly prohibited by law. "Municipal purpose" is defined as "any activity or power which may be exercised by the State or its political subdivisions", § 166.021(2), Fla. Stat., and since the State, Department of Transportation (DOT) as well as counties are expressly permitted by statute to condemn more property than is necessary where they would save money by doing so, §§ 337.27(2),[2] 127.01(1)(b), Fla. Stat., the municipality contends it may likewise do so and thus avoid the business damage claim.

Because section 73.071(3)(b), Florida Statutes, authorizes damages for a taking which damages or destroys an established business only when less than the entire property is sought to be taken, it is often less costly to the condemning authority to acquire an entire tract and thus eliminate business damages than to acquire only a portion of a tract and pay business damages. See e.g., Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988). The problem however is that a condemning authority traditionally has had only the authority to take private property which is necessary for the public purpose, Wilton v. St. Johns

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[2] Previously section 337.27(3), Florida Statutes.

County, 98 Fla. 26, 123 So. 527 (1929); Knappen v. Division of Administration, 352 So.2d 885 (Fla. 2d DCA 1977), cert. denied, 364 So.2d 883 (1978). However, the legislature has made a specific exception as to DOT in section 337.27(2), Florida Statutes, which essentially provides that when the cost to acquire an entire parcel is equal to or less than the cost of acquiring a portion of the tract, DOT is authorized to acquire the entire tract.[3] By section 127.01(1)(b), Florida Statutes, the legislature has expressly given counties this special eminent domain power granted DOT to take all of a tract of land when only a part is needed. The legislature has not seen fit to amend the statutes empowering municipalities to exercise the power of eminent domain (§§ 166.401, 166.411, Fla. Stat.) to authorize municipalities, in the exercise of their eminent domain powers, to take all of a tract when only a portion is needed for the public purpose.

According to our supreme court:

> The power of eminent damain is an attribute of the sovereign. It is not a vesture of the state conferred by constitution or statute. It is circumscribed by the constitution [4] and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings knawn to the law, coneequently when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power.

Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947). See also Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975).

Because powers of eminent domain are *to* be strictly construed and because the legislature has expressly given DOT and counties the authority to take an entire tract when only a portion is needed but has not extended that authcrity to

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[3] The constitutionality of this subsection (then § 337.27(3)) was upheld in Department of Transportation v. Fortune Federal.

[4] Art. X, § 6, Fla. Const.

municipalities,[5] we resolve the issue in this case by holding that a municipality in Florida today does not have the power of eminent domain to acquire an entire tract when only a portion of the tract is needed for a municipal purpose merely because the cost to acquire a portion of the tract is more than the cost of acquiring the entire tract. If it is the desire of the legislature to give municipalities this more expansive power of eminent domain, it can easily do so in the same manner it has empowered DOT and counties.

Accordingly, the court's order of January 30, 1989, denying appellants' business damage claim by permitting the total taking of parcel 23 is reversed and the cause remanded for proceedings not inconsistent with this opinion.[6]

REVERSED and REMANDED.

DANIEL, CJ., and GOSHORN, J., concur.

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[5] Indeed, we note the legislature amended section 166,401, Florida Statutes, in 1988 to explicitly authorize municipalities to exercise eminent domain powers granted to DOT in section 337.27(1) but did not include in this authorization the power granted to DOT by section 337.27(2). See Ch. 88-168, Laws of Florida.

[6] We intentionally do not address the effect, if any, of the lease provision relating to the rights of the parties to the lease in the event the leased premieres are taken by eminent domain.