O/A 2-7-91

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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. : 75,984
5DCA CASE NO.: 89-00450

PETITIONER'S REPLY BRIEF

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OTHER AUTHORITIES CITED:

By contrast, Home Rule Powers are rooted in the Constitution and are to be liberally construed. [see: Art. VIII, §2(b), Fla. Const. and City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983).] These tenants are argued fully in the Petitioner's Initial Brief beginning at page 12 and, for the sake of brevity, will not be reiterated here.

So then, the court below and the Respondents herein commit the same fundamental error. Both attempt to translate statutory provisions for business damages into the constitutional dignity properly reserved for historical elements of eminent domain. They then balance their fortified concept of business damages against constitutional provisions for Home Rule and find the latter to be wanting. Such is error.

Instead, the correct result is rather easy to divine if the precedents articulated by this Court are followed. That is, strictly construe the statutory provisions for business damages and liberally construe Home Rule Powers in favor of delegation. When these rules of construction are followed, it is clear that Home Rule Powers must prevail.

POINT TWO

COLLATERAL PROVISIONS OF CHAPTER 166 PROVIDE NO SUPPORT FOR THE RESPONDENTS' POSITION.

Respondents contend that because Florida Statutes Section 166.411 (1985), which sets forth the uses and purposes for which municipalities may condemn land, does not contain an authorization for municipalities to condemn more land than is necessary so as to reduce acquisition costs, municipalities must lack this authority.

However, the amount of land authorized to be taken is not a "use or purpose". The enumerated uses and purposes for which land may be taken, as set forth in **5166.411,** are totally unconnected with the amount of land permitted to be taken for any particular use or purpose that is permitted. Therefore, it is not at all surprising that this statute is silent regarding the amount of land to be taken.

Respondents also argue that the placing of the municipal eminent domain provisions in part IV of Chapter 166 must mean that the legislature intended municipalities' eminent domain powers to stand separately from municipalities' general Home Rule powers. This argument is unconvincing, All of Chapter 166 is entitled "Municipal Home Rule Powers Act" and all of Chapter 166 relates to Home Rule powers. Section 166.011, Fla. Stat. **(1985).** If there **is** anything at all significant about placing municipal eminent domain provisions in Chapter 166, it is a reaffirmation of the legislature's intent for Home Rule provisions to apply fully to municipal eminent domain powers.

Respondents next contend that because the legislature passed Laws **1988,** Chapter 88-168, Section 5 authorizing municipalities to exercise map reservation powers granted to the Department of Transportation, and did not specifically authorize municipalities to exercise the Department of Transportation's condemnation powers, the legislature must not have intended municipalities to have the power to condemn entire parcels to save on acquisition costs. However, the fact that municipalities were given specific statutory

authorization to perform a function they already had power to perform under their Home Rule powers does not restrict other municipal Home Rule powers.

Lastly, the Respondents urge the 1990 amendment to §166.401(2), Fla. Stat. (1989) as support for their argument that, prior to the amendment, municipalities did not have the power to condemn entire tracts. As discussed in the Petitioners' Initial Brief beginning at page 17, this amendment is irrelevant to this instant case.

The issue for determination herein is one of constitutional law. At all times relevant to this proceeding, the City either did, as the result of constitutionally guaranteed Home Rule Powers, possess the authority to condemn entire tracts or it did not possess that authority. If the City did not have that power before, the Legislature could do nothing to provide it retrospectively. On the other hand, if the City did have the power previously, legislative confirmation of that fact was a mere redundancy and could not be said to have abrogated authority that had existed before.

The Municipal Home Rule Powers Act provides that the legislature intends to extend to municipalities the exercise of powers for municipal purposes "not expressly prohibited by the constitution, general, or special laws, or county charter, and to remove **any** limitations .... on the exercise of home rule powers other than those expressly prohibited" (emphasis added). §166.021(4) Fla. Stat. (1987); Gidman, supra. at 1279-1280.

Nowhere in the Florida Statutes are municipalities expressly prohibited from condemning entire parcels to obtain lower acquisition costs. Certainly the inferences sought to be drawn by the Respondents from collateral provisions of Chapter 166 do not constitute an express prohibition. Therefore, the power to condemn entire tracts is extended to municipalities as a result of Home Rule power.

POINT THREE

THE CITY WILL ABANDON *ANY* ARGUMENT BASED UPON FUNDING SOURCES FOR THE 14TH STREET PROJECT.

Upon review of the argument contained in Respondents' Brief On The Merits regarding the relevancy of funding sources for the 14th Street project, the City will concede that Respondents' position has merit. Therefore, the City will abandon any argument based upon funding sources.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN AUTHORIZING THE TOTAL TAKING OF PARCEL 23 PURSUANT TO THE PROCEDURE EMPLOYED BY THE CITY OF OCALA.

Respondents contend that the City has not followed the procedural requirements necessary to invoke the provisions of §337.27(3) Fla. Stat. **(1985)**. However, the City has complied with all **such** requirements.

The Respondents rightly observe that the City is required by statute to initiate eminent domain proceedings by the passage of a legal resolution. Obviously, the City does not contest that principle of law. However, the entire concept is irrelevant in these proceedings because the City did initiate the eminent domain

action by passage of legal resolutions, Number 86-10 (R: 25-63) and Number **86-50** (R: **64-71).**

Section **73.021, Fla.** Stat. **(1985)** does require that the petition set forth the authority under which the property is to be acquired. The City's authority for condemning Respondents' property was set forth in paragraph two **(2)** of the Complaint (R: **1).** This paragraph does not specifically recite a reference to §337.27(3) and the City concedes that the better practice would have been to have done so. However, that failure in 1986 is not fatal to the City's current position.

As discussed in detail in POINT ONE of the PETITIONER'S INITIAL BRIEF, Chapter 166 incorporates §337.27(3) by implication and extends the authority contained therein to municipalities. The City's Complaint did make specific reference to Chapter **166.** Therefore, by reference and by implication, §337.27(3) may be relied upon by the City.

Secondly, the requirement for a municipality to set forth the authority by which a taking is to occur is really nothing more or less than a required jurisdictional allegation. This point is recognized by the Respondents at page **20** of their Respondents' Brief on the Merits. By citing authority for the taking, the condemning authority provides the information necessary for the trial court to determine, a3 a threshold matter, whether or not it has jurisdiction to hear the case. As with any jurisdictional issue, the concept of ancillary jurisdiction is applicable to the instant **case.**

The doctrine of ancillary jurisdiction stands for the proposition that once a court acquires jurisdiction of one aspect of a controversy, the court will then determine the entire controversy. See: 21 C.J.S. Courts §88 (1940). The implication for our instant case is obvious. Once the court below acquired jurisdiction of the eminent domain case, it acquired jurisdiction to decide the entire case, including questions of business damages. Therefore, it was not necessary far the City to allege each and every authority by which it could initiate the taking. It is enough that the City allege sufficient authority to allow the lower court to accept jurisdiction. Clearly, this was accomplished in paragraph two (2) of the Complaint. (R: 1).

Thirdly, as discussed below, the issue of whether the City could condemn all of parcel 23 in order to defeat Respondents' business damage claim was tried with the express or implied consent of the parties. (R: 229-233) Therefore, this issue must be treated as if it had been raised in the Complaint. Fla.R.Civ.P. 1.190(b).

At the Quick Taking Hearing held on June 30, 1986, Respondents were represented by attorney C. Ray Greene, Jr. Attorney Greene was fully aware that a total taking of parcel 23 would eliminate any claim Respondents would have to business damages and, hence, argued repeatedly to the trial court that a total taking was not necessary for the construction of the N.E. 14th Street project. (R: 213-218, 226-233) For example, Mr. Greene discussed a diagram of parcel 23 with the trial court, pointed out to the trial court

the area of property not required to be taken, argued to the court that, as lessees, Respondents were owners for the purpose of the business damages statute, and argued that Respondents were therefore entitled to contest the entire taking and present a claim for business damages. (R: 226-233) In response, the City argued that it was authorized to condemn all of parcel 23. (R: 228) The trial court agreed with the City and entered its ORDER OF TAKING condemning the entirety of parcel 23. (R: 85-91)

Furthermore, after the ORDER OF TAKING was entered by the trial court condemning all of parcel 23 (R: 85-91), Respondents filed a MOTION FOR REHEARING regarding whether the City could condemn all of parcel 23 (R: 98), filed memorandums of law in support of their motion (R: 99-125, 138-140), argued the merits of whether the City could condemn all of parcel 23 in order to avoid paying business damages at the hearing on Respondents' motion (R: 258-294), and were initially successful in obtaining an ORDER MODIFYING ORDER OF TAKING. (R: 143-144) This order modified the original ORDER OF TAKING to provide that the condemnation of parcel 23 was a partial taking and that Respondents could present their claim for business damages. (R: 143-144)

Fla.R.Civ.P. 1.190(b) provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. As the above discussion demonstrates, in the present case the parties argued the issue of whether the City could condemn all of parcel 23 in order to defeat Respondents'

business damages claim at both the Quick Taking Hearing and the Rehearing as to the Order of Taking for parcel 23. Therefore, the issue was tried with the consent of the parties and must be treated as if it was raised properly by the pleadings.

The City is aware of Turf Express, Inc. v. Palmer, 209 So.2d 461 (Fla. 3d DCA 1968) which, upon first perusal, would seem to damage the City's argument. However, upon further review, Turf Express is easily distinguishable.

Turf Express holds that a trial court may not grant a summary judgment upon an issue raised by an affidavit in support of the motion rather than by a complaint. Id. at 462. The basis for this holding was a concern for surprise. The court stated:

> This holding appears necessary to us, because a contrary holding would deprive the party defending against the motion for summary judgment of an opportunity to raise defenses to the claim. Id. at 462.

Our instant case contrasts sharply with the situation presented in Turf Express. In the case sub judice both parties were represented by counsel who fully researched and litigated the issue regarding condemnation of the entirety of parcel 23. It is difficult to envision any aspect of a trial within the meaning of Rule 1.190(b) which was not present in the quick taking proceedings. Therefore, Fla.R.Civ.P. 1.190(b) should apply and the City's Complaint should be regarded as having been amended to conform with the evidence. That is, the Complaint should be amended to allege authority by the City to take the entire parcel in order to avoid payment of business damages.

Respondents next contend that the City has never proven that it would save money by taking all of parcel **23,** as must be the case for §337.27(3), Fla. Stat. **(1985)** to apply. However, the dramatic reduction in costs obtained by the entire taking has never been a contested issue, Respondents did not dispute this fact either in their MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING (R: 174-190), nor in their oral argument at the hearing on the City's MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING which resulted in the issuance of the orders presently being appealed. (R: 295-326) If Respondents had contested the lower cost of the project at that time, the City could have presented the valuation testimony.

In failing to raise the acquisition cost issue before the trial court, Respondents have waived their right to contest this issue on appeal. Cosid, Inc. v. Bay Steel Products Co., Inc., 288 So.2d 277 (Fla. 4th DCA 1974). Therefore, the question of whether an evidentiary showing regarding the lower cost of acquisition was required to be made to the trial court is not a question which is before this Court.

POINT FIVE

THE CITY OF OCALA DID NOT WAIVE ITS RIGHT TO CONTEST THE MODIFIED ORDER OF TAKING.

Respondents contend that the City's MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING (R: 162-164) is devoid of factual allegations constituting "surprise" or "excusable neglect". However, the City's Motion states that at the November 24, 1987 hearing, wherein the trial court ruled that parcel 23 was only a

partial taking for which business damages could result, the Second District Court of Appeal in State Department of Transportation v. Fortune Federal Savings and Loan Association, 507 So.2d 1172 (Fla. 2d DCA 1987), had held that §337.27(3), Fla. Stat. (1985) was unconstitutional. (R: 162-163) The Motion then states that on August 19, 1988 the Supreme Court of Florida quashed the opinion of the Second District Court of Appeal and upheld the constitutionality of said statute. Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988.) (R: 163) The Motion concludes by alleging that this dramatic change in the law constitutes "surprise" ox "excusable neglect" so that the trial court had the power to relieve the City from the previous order decided under the prior case law. (R: 163-164)

In the instant case, the City had a right to rely on the prior Fortune case holding that §337.27(3), Fla. Stat. (1985) was unconstitutional. When this Court reversed that decision on August 19, 1988, the City diligently researched and filed its MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING, filing said Motion on October 17, 1988. Therefore, to the extent that any neglect may be said to have taken place, the grounds of "excusable neglect" have also been met.

Respondents contend that the basis for the City's Motion, filed pursuant to Fla.R.Civ.P. 1.540, was a mistaken "view of the law" and therefore was inappropriate. This contention is incorrect. The City's actions were predicted upon what was at the

time the controlling law, not a mistaken view of the law. When the controlling law was changed by the Supreme Court, the City could then argue, under its 1.540 Motion, the newly expounded interpretation of the law. This is because the policy of the law is to encourage decisions on the merits of controversies, not on technicalities. Florida Investment Enterprises, Inc. v. Kentucky Company, Inc, 160 So.2d 733 (Fla. 1st DCA 1964). Greater leniency is granted in cases of setting aside of judgments not decided on the merits. Id.

Furthermore, the decision of Fiber Crete Homes, Inc. v. Department of Transportation, 315 So.2d 492 (Fla. 4th DCA 1975), cited by the Respondents, is distinguishable fromthe instant case. In Fiber Crete Homes the parties had completed the trial of their cause, final judgments had been entered for two parcels involved in the condemnation action, and the plaintiff's motion for new trials on these parcels had been denied by the trial court. Id. at 493. Thereafter the trial court discovered and interpreted an appellate court decision which had been rendered on March 29, 1974, over three months prior to the entry of the trial court's order denying the plaintiff's motions for new trial.

In contrast, to Fiber Crete Homes, in the instant case this Court's Fortune decision was issued over six months after the trial court entered its February 5, 1988 ORDER MODIFYING ORDER OF TAKING, not three months prior to said order as was the case in Fiber Crete Homes. More importantly, no jury trial regarding the amount of business damages suffered by the lessees of the Coffee Kettle

restaurant has been held. Certainly, no final judgment has been entered. Therefore, Fiber Crete Homes has no applicability to this case whatsoever.

POINT SIX

THE TAKING OF THAT PORTION OF PARCEL 23 ACTUALLY NECESSARY FOR THE CONSTRUCTION OF THE PROJECT DOES CONSTITUTE A CONSTRUCTIVE TOTAL TAKING SO AS TO ELIMINATE BUSINESS DAMAGES.

This Court, in approving the Rules Regulating the Florida Bar, has recognized the tenant that, "the law is not always clear and never is static." [see: R. Reg. Fla. Bar, 4-3.1 (comment).] For this reason, it is both proper and desirable for advocates to urge extension and modification of existing law. Id. Surely there can be no more appropriate forum for the advancement of such arguments than this Court of last resort.

So then, the Respondents' attempt to dismiss perfunctorily the City's argument as being without precedential basis cannot succeed. Contrary to the characterization by the Respondents, the City's position is not an "end run" around the business damage statute. Rather, as has been declared from the beginning, the constructive total taking issue is an opportunity for this Court to clarify or extend existing law.

In reviewing the case law which does exist, the Respondents argue that Young v. Hillsborough Co., 215 So.2d 300 (Fla. 1968) overrules Douglas v. Hillsborough Co. 206 So.2d 402 (Fla. 2d DCA 1968). The City disagrees. Most obviously, Young does not mention or refer to Douglas.

Secondly, insufficient facts are set forth in the Young opinion to permit quantitative comparison. By review of the district court's Young opinion we learn that the land owner operated a business on parcel 221 and on land adjoining parcel 221. Young v. Hillsborough Co., 206 So.2d 405, 406 (Fla. 2d DCA 1968). We do not know how much of the business structure was taken nor how much remained. In contrast, the Douglas decision states specifically that 5/8s was taken. Having no knowledge as to the extent of the "partial" taking in Young, there is no way to know whether or not this Court was in 1968 rejecting the doctrine of constructive total taking in general or whether the peculiar facts of Young simply rendered the doctrine irrelevant,

Lastly, the Respondent observes that the City has offered no evidence as to whether or not the remaining strip of land had economic value, They are correct in that assertion. However, what they fail to mention is that the trial court ruled that the City would not be allowed to present any such evidence. (R: 289-290) This ruling was made even though the trial court had previously conceded that, in the abstract, a constructive total taking might be possible. (R: 286)

Therefore, if for any reason this cause is remanded for trial, this Court should hold that the City shall be permitted to introduce evidence that the remainder has no reasonable economic utility. Further, the trial court should be directed to instruct the jury that if it finds no reasonable economic utility a

constructive total taking shall have occurred and no business damages are to be awarded.

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. Foreman, Esq., P.O. Box 159, Ocala, FL 32678, this 7th day of January, 1991.

Respectfully Submitted,

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