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SUPREME COURT OF FLORIDA

BROWARD COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs. CASE NO.: 81,416

BHARAT PATEL, et al.,

Respondents.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION'S AMICUS CURIAE BRIEF IN SUPPORT OF BROWARD COUNTY'S INITIAL BRIEF

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PRELIMINARY STATEMENT

For the purposes of this brief, Petitioner BROWARD COUNTY shall be referred to as "BROWARD COUNTY". Respondent, BHARAT PATEL shall be referred to collectively as "PATEL." Respondents WARREN PICILLO and SELINA PICILLO shall be referred to collectively as "PICILLO." Amicus Curiae STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION shall be referred to as "DEPARTMENT." References to the Record on Appeal will be indicated parenthetically as "R" with the appropriate page number(s).

STATEMENT OF CASE AND FACTS

The DEPARTMENT as Amicus Curiae accepts the Statement of the Case and Facts contained in BROWARD COUNTY's Initial Brief.

SUMMARY OF ARGUMENT

The burden of proving severance damages is on the property owner. In eminent domain proceedings, a property owner is allowed to introduce evidence of a probability of rezoning and the issue becomes a jury question. Condemning authorities are allowed to present evidence of a "cost to cure" value when it is less than severance damages. Allowing evidence of the reasonable probability of obtaining a variance in a "cost to cure" approach serves the same purpose as evidence of reasonable probability of rezoning: it reflects the reality of fair market value.

Allowing evidence of reasonable probability of a variance will also avoid the award of speculative damages and promote the property owner's duty to mitigate damages. If there is a strong likelihood that a variance will be granted, awarding a property owner full severance damages will overcompensate the property owner. Allowing evidence of reasonable probability of a variance to be presented to the jury will encourage the property owner to apply for a variance prior to trial to reduce the projected costs to actual costs. The Fourth District Court of Appeal's certified question should be answered in the affirmative and the decision quashed.

ARGUMENT

MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING ZONING JURISDICTION OVER THE PROPERTY?

The Florida Constitution requires that full compensation be paid to the property owner for the "taking" of private property:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

Art. X, §6, Fla. Const. The issue in this case relates to the valuation not of the private property taken by BROWARD COUNTY for the widening of State Road A1A, but the valuation of the damages to the private property remaining after the taking. These damages are commonly called "severance damages" and are considered special damages. See The Florida Bar, Florida Eminent Domain Practice and Procedure, §9.23 (4th Ed. 1988). "As a practical matter, the most frequent and the most substantial differences of opinion with regard to value in eminent domain cases relate to the amount of severance damages." Id.,

This Court, construing a similar provision in the Constitution of 1885, has noted that the requirement of "just compensation" includes not only the value of the land actually appropriated but also severance damages. Daniels v. State Road Dept., 170 So. 2d

846, 851 (Fla. 1964).

As noted by this Court, the burden of proof to establish the value of the land actually taken is upon the condemning authority. Behm v. Div. of Admin., 336 So. 2d 579, 581-582 (Fla. 1976). The burden of proof to establish the amount of any other damages, including severance damages, is on the property owner. Id.; Kendry v. Div. of Admin., 366 So. 2d 391, 394 (Fla. 1978); City of Tampa v. Texas Company, 107 So. 2d 216, 227 (2nd DCA 1958), cert. denied, 109 So. 2d 169 (Fla. 1959). See also City of Ft. Lauderdale v. Casino Realty, Inc., 313 So. 2d 649, 652 (Fla. 1975)[Overton, J., concurring].

The calculation of severance damages is generally based on a calculation of the difference between the value of the property before the "taking" and the value of the property after the "taking." Canney v. City of St. Petersburg, 466 So. 2d 1193, 1195 (Fla. 2nd DCA 1985). However, the courts of Florida recognize an alternative calculation labeled the "cost to cure" approach. Under the "cost to cure" approach, the amount of money it would take to "cure" the severance damages to the remainder can be introduced as evidence to replace the amount the jury would otherwise award as severance damages. Id. See also Mulkey v. Div. of Admin., 448 So. 2d 1062, 1065 (Fla. 2nd DCA 1984); Div. of Admin. v. Frenchman, Inc., 476 So. 2d 224, 227 (Fla. 4th DCA 1985), review dism. 495 So. 2d 750 (Fla. 1986).

The "cost to cure" approach frequently arises where the "taking" has caused a loss of parking spaces to serve an existing business. See e.g. Mulkey; Williams v. State, Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991); and, State, Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971). The courts have developed at least two constraints on the use of the "cost to cure" approach. One constraint is simply that the proposed cure cannot entail the use of property in which the property owner does not have a legally recognized interest. Mulkey, 448 So. 2d at 1066. Stated simply, severance damages cannot be cured "off site."

The second restriction arises out of the First District Court of Appeal's decision in Byrd, 254 So. 2d at 836. At a minimum, Byrd stands for the proposition that a cure of severance damages cannot include destruction of existing improvements on site. The decision in Byrd also contains some language which has been construed by property owners' attorneys and at least one district court of appeal judge to hold that a cure of severance damages cannot be made on an area of the property that could be used for future expansion. See Byrd, 254 So. 2d at 837; Williams, 579 So. 2d at 229. The logical extension of an argument that a cure on site cannot cover area that could be used for future expansion would lead to an obliteration of the "cost to cure" rule by the exception. The rule says the cure must be on site. The exception advanced by property owners is that the cure cannot reduce area for

future expansion. In reality, every single on site cure will reduce the area available to the property owner for future expansion.

For example, if a property owner owns 100 acres of property and has established a use of only 5 acres of that property, the owner has 95 acres left for future expansion. If a condemning authority condemned one half of the area currently being used by the property owner and attempted to propose a cure of severance damages by replacing the functions within the area taken on another 2.5 acres of the 100 acre tract, the cure would not be permissible under the property owner's interpretation of Byrd because such cure would be on property owned by the property owner, and would reduce the area for future expansion from 95 acres to 92.5 acres. A reasonable interpretation of the reduction of area for future expansion exception would require the property owner to come forward with bona fide plans for expansion in the foreseeable future, thereby taking future expansion out of the speculative realm. If the property owner can prove a reasonable probability of future expansion in the foreseeable future, the cure would not be able to encroach on the area so designated for expansion.

Another way of insuring that the property owner is made whole when a "cost of cure" analysis is proposed is to pay the property owner for the fair market value as of the date of the "taking" for the property actually consumed in the cure. If the condemning

authority includes in its "cost to cure" the fair market value for the land on which the cure is placed, the condemning authority has put the property owner in as good of a position as he was in prior to the "taking" because the property owner retains ownership of the land where the cure is affected and is given the current fair market value of that land to allow the property owner to replace the land consumed by the cure with additional land, if available. For example, the condemning authority in Williams included in its "cost to cure" value $6.00 a square foot for the usage of the land consumed by the cure. Williams, 579 So. 2d at 228. Even though the condemning authority's appraiser in Williams testified that he had taken into consideration "all effects" on the remainder of the property, the court of appeal articulated several factors that it believed the appraiser ignored. Id., at 228-229.

One of the overriding concerns in eminent domain actions is that the condemning authority should not have to pay for speculative losses. In an oft-quoted statement, this Court has said:

> It is not proper to speculate on what could be done to the land or what might be done to it to make it more valuable and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date. To permit such evidence would open a flood-gate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest.

Yoder v. Sarasota County, 81 So. 2d 219, 221 (Fla. 1955). The First District Court of Appeal recently cautioned the parties to

avoid the introduction of evidence of speculative future uses at some unannounced future date in a retrial of an eminent domain case. Jacksonville Transportation Authority v. ASC Associates, 559 So. 2d 330, 334 (1st DCA), review denied 574 So. 2d 139 (Fla. 1990).

Yoder stands for the proposition that the value of the land is to be determined as of the date of the lawful appropriation. Yoder 81 So. 2d at 221. An exception to the rule that valuation is determined by the current lawful use of property at the time of the "taking" was germinated in this Court's decision in Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 116 So. 2d 762 (Fla. 1959). While this Court in Tallahassee Bank determined it did not have conflict jurisdiction to hear the case and quashed the writ of certiorari, the Court "deem[ed] it appropriate to observe" that it found no fault with the First District Court of Appeal's adoption of the "Texas rule:"

> That even though an existing municipal zoning ordinance may prohibit the use of property for stated purposes at the time of condemnation, nevertheless, if there is a reasonable probability that the ordinance may be changed or an exception made in the foreseeable future, then the value for such use as may be included in the amendment or exception may be considered.

Id., at 766 fn. 7 [emphasis in original]. When such evidence is introduced, the highest and best use of the property becomes a jury question. Id., at 766. The seed germinated by this Court's statement in Tallahassee Bank has grown into a mature and full-

blossomed rule law used extensively by property owners with approval from the District Courts of Appeal. See e.g. City of Miami Beach v. Buckley, 363 So. 2d 360 (3rd DCA 1978), cert. dism. 374 So. 2d 98 (Fla. 1979); Stack v. State Road Dept., 237 So. 2d 240 (Fla. 1st DCA 1970); Swift & Company v. Housing Authority of Plant City, 106 So. 2d 616 (Fla. 2nd DCA 1958). The importance of this exception is evident from a review of its treatment in the Florida Bar's Continuing Legal Education Manual which discusses the exception extensively, suggests items of proof to present as reasonable probability of rezoning, and articulates a proposed jury instruction concerning the issue. The Florida Bar, Florida Eminent Domain Practice and Procedure, §§9.33, 11.13 (4th Ed. 1988).

The purpose of this brief is not to criticize the probability of rezoning rule but to argue that the adoption of a similar rule for probability of variances is workable and provides a level playing field.

If the Fourth District Court of Appeal's decision in this case is allowed to stand, it will provide awards based on speculative damages and will also remove any incentive for a property owner to mitigate his severance damages. The Fourth District Court of Appeal in this case ruled that a cure which contemplates obtaining a variance is inadmissible at trial even with evidence of the reasonable probability of a variance. Patel v. Broward County, 613 So. 2d 582 (Fla. 4th DCA 1993). There is no question in this case

that BROWARD COUNTY presented extensive evidence concerning the probability of variance. At trial, BROWARD COUNTY called an expert land planner who did extensive research into the probability of a variance (Witness Rose) and had two city officials testify as to what a successful variance application normally includes (witnesses Kleingartner and Yarbrough).

Property owners left with remainder property rarely attempt to obtain variances prior to a valuation trial. The DEPARTMENT as been involved in cases where the property owner objects to any application for a variance prior to the valuation trial and impedes any attempts to apply for a variance. Even so, the courts of this state have attempted to impose upon the property owner a duty to mitigate their damages. See Mulkey, 448 So. 2d at 1067. Just as a property owner is allowed to introduce evidence of a higher value of his property based upon a highest and best use not available at the time of the "taking" if he introduces a reasonable probability of rezoning in the near or immediate future, condemning authorities should have the opportunity to introduce the "cost to cure" value based upon a variance when there is sufficient evidence of a reasonable probability that the variance will be granted in the near or immediate future.

Rezoning of property can be as site specific as the granting of a variance from the zoning code for property. "Indeed, broadly speaking, to grant a variance or exception is to rezone." Troup v.

Byrd, 53 So. 2d 717, 720 (Fla. 1951). Allowing the condemning authority the opportunity to introduce reasonable probability of a variance and the "cost to cure" based on such a variance will avoid the award of speculative damages as the following example illustrates. For example, assume a cure of a property owner's severance damages is available which complies with all of the provisions of the zoning code except for one insignificant factor, an example would be curing the loss of parking on the remainder, except that the replacement parking encroaches on a side set back in a commercial area by six inches. Research is done in the governmental entity's files indicating that every single previous application for a variance based upon a similar six inch violation of a side set back has been granted by the governmental entity.

Under the rule adopted by the Fourth District Court of Appeal in this case, the condemning authority would not be able to introduce such evidence at trial and would be required to compensate the property owner for severance damages even though the property owner is virtually assured of getting a variance after the valuation trial that costs a fraction of the amount awarded by the jury for severance damages. Under by the rule advanced by BROWARD COUNTY and the DEPARTMENT in this brief, the governmental entity would be able to present to the jury the evidence concerning the "cost to cure" and the probability of obtaining a variance and the jury would weigh the evidence and decide the issue of fact just as it does in cases where the property owner introduces evidence of

reasonable probability of rezoning. The property owner would be made whole without being over compensated.

Secondly, establishing a rule of law allowing for evidence of reasonable probability of variance and including the variance in the "cost of cure" would also promote the property owner's duty to mitigate his damages. Such a rule would provide an incentive for the property owner to immediately develop a plan to cure the severance damages and apply for a variance prior to the valuation trial. If the application for a variance is rejected, the property owner has additional evidence to present to the jury to weigh against the probability of obtaining a similar variance in the condemning authority's cure. However, if the application for variance is granted, the actual costs of applying for such a variance and the cost to cure are admissible at the valuation trial to determine full compensation for the "taking." Florida courts have held that actual costs are admissible when available. Malone v. Div. of Admin., 438 So. 2d 857, 861 (3rd DCA 1983), pet. rev. denied 450 So. 2d 487 (Fla. 1984); Mulkey, 448 So. 2d at 1067. See also Lee County v. T & H Associates, Ltd., 395 So. 2d 557, 561 (Fla. 2nd DCA 1981) ["court disputes should be decided upon the most reliable evidence available"]

Finally, including a variance in a "cost to cure" approach and allowing the jury to consider the reasonable probability of a variance reflects fair market value as does the reasonable

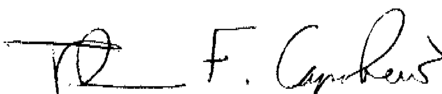
probability of rezoning. A willing buyer and a willing seller would not substantially reduce the price paid for property because of a zoning code problem with that property if, in fact, there was a likelihood that such a problem could be remedied inexpensively through a variance. The cost of fixing the problem and the cost of obtaining the variance would be factored in together with the risk of the application being unsuccessful and the price would be adjusted accordingly. Evidentiary rules should reflect reality as much as is practical and condemning authorities should be allowed to present to the jury a cure contemplating a variance when such evidence is coupled with evidence of the reasonable probability of obtaining such a variance. Such a rule would not reduce a property owner's recovery of full compensation: it would reduce the condemning authority's risk of providing over compensation.

This rule should only apply when other governmental entities are the decisionmakers in the variance procedure. Where the condemning authority is the same entity that has the authority to grant the variance, the entity should be required to bind itself to the proposal at trial in order to allow a cure based upon the variance to be admissible. Such a rule would be consistent with this Court's pronouncement concerning the binding effect of the project's plans. Trailer Ranch, Inc. v. City of Pompano Beach, 500 So. 2d 503, 505 (Fla. 1986).

CONCLUSION

The certified question should be answered in the affirmative and the Fourth District Court of Appeal's decision in this case should be quashed. This Court should adopt a rule of law that allows a condemning authority to present a cure to the jury that includes a variance if such evidence is coupled with evidence of the reasonable probability of the variance being granted.

Respectfully Submitted,



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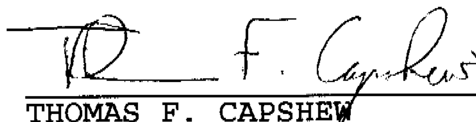
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail on this 10th day of May, 1993 to ROBERT A. WARE, ESQUIRE, Post Office Box 14098, Ft. Lauderdale, Florida 33302-4098; DAVID D. WELCH, ESQUIRE, Great Western Bank - Suite 400, 2401 E. Atlantic Blvd., Post Office Drawer 1838, Pompano Beach, Florida 33061; ANTHONY MUSTO, ESQUIRE, Governmental Center, Suite 423, 115 South Andrews Avenue, Ft. Lauderdale, Florida 33301.



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