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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE 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.

RICHARDSON LAW OFFICES, P.A.'S AMICUS CURIAE BRIEF IN SUPPORT OF BHARAT PATEL AND WARREN AND SELINA PICILLO'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statement of the Case and Facts as presented in Respondents, Patel and Picillo's, Answer Briefs.

SUMMARY OF ARGUMENT

The "Texas Rule" is a rule of evidence in condemnation which allows a jury to award an increment of value for land taken above that for which it is currently zoned if the evidence shows that a reasonable probability of rezoning exists. An extension of the "Texas Rule" to circumstances in which a cost to cure is offered in mitigation of severance damages requiring a variance from existing land use regulations is improper because the "Texas Rule" is based on market factors an extension of the rule to variances required for cost to cures is not. The extension of the rule to these circumstances makes full compensation contingent upon the granting of the variance as well as speculative.

The cost to cure offered in this case fails to restore the utiity of the remainder and fails to address elements of compensation necessary to the validity of the cost to cure approach. It ignores the reduction in size of the parent tract and the effects that the construction of the cure will have on the remainder.

Wherefore, this Court should answer the certified question in the negative and affirm the District Court.

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 Fourth District, by certifying the question stated above, is essentially asking this Court to decide whether or not to extend the "Texas Rule" to situations where a "cost to cure," offered in mitigation of severance damages, violates the existing land use law. The Fourth District bases its question on three Florida cases: Bd. of Comm'r of State Institutions v. Tallahassee Bank & Trust Co., 100 So. 2d 67 (Fla. 1st DCA 1958); Bd. of Comm'r of State Institutions v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (Fla. 1st DCA 1958) cert.quashed, 116 So. 2d 762 (Fla. 1959); and City of Miami Beach v. Buckley, 363 So. 2d 360 (Fla. 3d DCA 1978) cert.dismissed, 374 So. 2d 98 (Fla. 1979) and draws an analogy between a reasonable probability of rezoning and a reasonably probability that a variance may be granted to language in Florida law holding that "to grant a variance or exception is to rezone." Troup v. Bird, 53 So. 2d 717, 720 (Fla. 1951). The Fourth District correctly held that the "Texas Rule" should not be extended.

A. The extension of the "Texas Rule" to circumstances where a cost to cure in mitigation of severance damages depends on the grant of a variance from existing zoning makes "full compensation" contingent and lacks the market basis upon which the "Texas Rule" relies.

Though, the "Texas Rule" may be appropriate in cases involving the value of the land taken, it is inappropriate to a "cost to

cure." The "Texas Rule" allows the appraisal of real property at a highest and best use for which it is not currently zoned if there is a reasonable probability of rezoning shown by the evidence. Tallahassee Bank & Trust Co., at 69. Tallahassee Bank quoted the following language:

> When however a particular use of property is prohibited or restricted by law, but there is a reasonable probability that the prohibition or restriction will be modified or removed in the near future, the effect of such probability upon the value of the property may be taken into consideration.

Tallahassee Bank, at 69, (quoting Nichols on Eminent Domain, 2d Ed., Vol. I, p. 166, Sec. 219).

From the above-quoted language, it is apparent that the statement of law in Nichols emphasizes not the reasonable probability of rezoning per se, but the effect of such a probability on the market value of the property. As stated in the current edition of Nichols:

> Phrased differently, it is not considered as a present measure of value, but is considered to the extent that prospective demand for such use *would have affected the price* a willing buyer would have offered for the property just prior to the taking.

IV Nichols, The Law of Eminent Domain, Sec. 12C.03(2) p. 12C--75-83, (3rd Ed. 1993). (Emphasis added). The same section goes on to state:

> An important *caveat* [emphasis in the original] to remember in applying the foregoing rule is that the property must not be evaluated as though the rezoning were already an accomplished fact. It must be evaluated under the restrictions of the existing, zoning *with consideration given to the impact upon market value* [emphasis added] of the likelihood of a change in zoning. Although most cases speak of determining value on the basis of the existing zoning, with allowance for an

> incremental factor due [to] the existence of the probability of rezoning, it has been held that an award may be made on the basis of an impending zoning (as an accomplished fact), minus a discount fact[or] to allow for the uncertainty.

IV Nichols, The Law of Eminent Domain, Sec. 12C.03(2) p. 12C--88-89, (3rd Ed. 1993). It is clear that Tallahassee Bank does not contemplate the application of the "Texas Rule" to variances sought to accomplish a cost to cure in mitigation of severance damages. The emphasis of the "Texas Rule" is not upon whether or not rezoning may be accomplished, but whether or not *the market* reflects that expectation, but not certainty, of rezoning and values the property incrementally more as a result.

When a cost to cure approach is offered in mitigation of severance damages, different circumstances prevail. Because a cost to cure mitigates acknowledged severance damages (otherwise no cost to cure would be offered), the variance must be granted or the cure cannot, under law, be accomplished. If the variance is denied, "full compensation" is denied.

When a jury awards compensation based on a cost to cure approach offered by the condemnor, contingent on a variance, the landowner is made whole and the requirement of full compensation met *only* if the variance is granted. If the variance, for whatever reason, is denied, the cure cannot be implemented and the owner is denied full compensation. This is entirely different from the "Texas Rule" which allows a jury to award an increment of value if a reasonable probability of rezoning translates to *additional value in the market*. In the market for real estate, sellers rarely sell

parking off the front of their buildings. Therefore, no market basis exists for an extension of the "Texas Rule" and the analogy to the classic "Texas Rule" case fails.

As is admitted by the County, the landowner must apply for the variance and incur the necessary engineering, legal, and application fees. Although the County included an amount they deemed sufficient to compensate the landowner for these fees, applications for variances of any type in today's land use climate are uncertain. The condemning authority offers the cost to cure and assures the court and the jury that a variance will be granted; however, the landowner, not the condemning authority must apply for the variance. After final judgment, the condemnor walks away and the landowner stands naked before the Board of Adjustment and Appeals.

The "Texas Rule" assumes a market in which the buyer and seller freely allocate the risk of rezoning and set a price based on that allocation of risk *as reflected in that market*. As stated in Nichol's, the property must not be appraised as if the rezoning were an accomplished fact, but incrementally, between its value under the current zoning and its value as rezoned. The condemnor's approach here does not allocate risk but imposes it; does not mitigate severance damage incrementally, but totally. The award of "full compensation" depends on the discretion of an agency not a party to the condemnation. The condemnor seeks to mitigate all severance damage caused by the taking but expects the landowner to bear the consequences.

Condemnors should not be allowed to impose such contingencies on landowners whose only crime is owning property needed by the condemnor. Therefore, this Court should answer the certified question, No.

B. THE CURE FAILS TO RESTORE THE FULL UTILITY OF THE REMAINDER AND THEREFORE FAILS TO AWARD FULL COMPENSATION.

The Fourth District held that the cases of Williams v. State Dep't of Transp., 579 So. 2d 226 (Fla. 1st DCA 1991) and State Dep't of Transp. v. Byrd,, 254 So. 2d 836 (Fla. 1st DCA 1971) compel their decision not to extend the "Texas Rule" to cures contingent on the granting of a variance. The Fourth District is perfectly correct.

First, the right to control land use is a valuable property right. E.g., Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622 (Fla. 1990). The taking of a portion of any landowner's property, especially if it is small, affects the uses to which the remainder can be put. Before a cure can be offered in full mitigation of severance damages, it must be shown that the cure fully restores the remaining property to its pro-rata value before the taking. This rationale underlies both Williams and Byrd.

Severance damages are typically evaluated using the before and after approach. IV Nichols on Eminent Domain, Sec. 14.02(1)(b), p. 14-30, (3rd Ed. 1993). The rule is applied as follows: The entire property is appraised and the value of the part taken is subtracted from the total value. This difference is the value of the remainder as a pro-rata part of the whole. The remainder is then appraised to determine its value after the taking as a separate piece of property. The difference between the pro-rata value of the remainder as part of the whole and the remainder as a separate piece of property yields severance damage to the remainder.

Nichols, at p. 14--30-31. Among the factors considered in the evaluation of the remainder are:

1. The reduced size or altered shape of the remainder;
2. Changes in access or grade;
3. The use to which the property taken is put; and
4. The destruction of improvements in the part taken.

Florida Eminent Domain Practice and Procedure, Sec. 9.23, p. 205-208, 4th Ed. (1988). IV Nichols, The Law of Eminent Domain, Sec. 14A.03, pp. 14A--40-62, (3rd Ed. 1993).

Here, the taking reduced the size of the property. The proposed cures replace the improvements taken by using other property owned by the landowner, but offer no compensation for the reduction in the size of the parent tracts or for the use of the other property. The vacant land upon which the cures are to be constructed has value in and of itself and in relation to the improvements presently on the parent tract. For instance, in the Picillo case, the vacant area proposed for the cure, was not only being used for parking, but could have been used for expansion, construction of amenities such as shuffleboard courts, tennis courts, a patio, a garden, or for landscaping. This is exactly why both Byrd and Williams speak so strongly against a cure which ignores "the reduction in value of a motel with smaller grounds for its guests to enjoy, . . . [or] . . . lesser area for expansion." Williams, at 229.

In Williams, the Department of Transportation's real estate appraiser testified to a cure replacing the parking taken from the

front of the Williams' building on grassed areas on side and rear. As stated by the Williams' court:

> Presley's opinion ignores the fact that the new parking area would not provide as much space for parking as Williams had before the taking, ignores the fact that the new parking area would intrude into Williams' service area, ignores the impact that the rear parking for customers might have on the value of the property as a business site, and ignores the fact that the new parking area would prevent future expansion of the business on that site. All of these items were appropriate for consideration as severance damages under the Byrd decision and should have been considered in the formulation of Presley's opinion.

Williams, at 229. The Byrd decision states the rule more succinctly. "The state appraiser's estimate of damages sustained by appellees is impermissibly based on a premise which would require destruction by the property owners of property which is outside the area of taking as a means of theoretical mitigation of damages." Byrd, at 837.

The reasons for the Byrd and Williams decisions are sound. When a cure is implemented on the remainder in mitigation of severance damages to that same remainder, the implementation of the cure affects the remainder. The implementation of the cure forces the landowner to use property being used as parking, landscaping, a buffer, or being held for future improvements or use, to correct a problem caused by the condemnor. First, the County takes the parking from the front, then replaces the parking on the side and occupies land which, though still owned by the landowner, must be put to a use dictated by the County. The construction of new parking on the remainder has exactly the effects which Williams and Byrd require the condemnor to evaluate and compensate. Therefore,

a cure which ignores the effects of the cure on the remainder fails the test of full compensation and should be excluded from evidence.

CONCLUSION

Extension of the "Texas Rule" to variances necessary for a "cost to cure" lacks the market foundation of the "Texas Rule" and would make an award of full compensation contingent on factors beyond the control of the courts. Furthermore, no cost to cure approach may ignore the effects of the cure on the remainder. This Court should therefore answer the question in the negative and refuse to extend the scope of the "Texas Rule" to variances necessary to a cost to cure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on this 2nd day of June, 1993, to Thomas F. Capshew, Esq., General Counsel, Department of Transportation, Haydon Burns Bldg., MS 58, 605 Suwannee St., Tallahassee, FL 32399-0458; Robert A. Ware, Esq., P. O. Box 14098, Ft. Lauderdale, FL 33302-4098; David D. Welch, Esq., P. O. Drawer 1838, Pompano Beach, FL 33061; and Anthony Musto, Esq., Governmental Center, Suite 423, 115 S. Andrews Ave., Ft. Lauderdale, FL 33301.

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