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IN THE SUPREME COURT OF FLORIDA

BROWARD COUNTY, a political subdivision of the State of Florida, Petitioner, vs. BHARAT PATEL, et al., Respondents.	CASE NO.: 81,416 ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner was the plaintiff in the trial court and Respondents were the defendants. Petitioner will be referred to in this brief as "the County" and Respondents will be referred to as "Respondents" or by name. The symbol "R" will constitute a reference to the record on appeal. The symbol "T" will constitute a reference to the trial transcript.

STATEMENT OF THE CASE AND FACTS

Respondent Bharat Patel owned a 30 unit motel on State Road A-1-A in Pompano Beach. Respondents Warren and Selina Picillo owned a 13 unit adjoining motel. As part of a project to widen the roadway, Broward County instituted an eminent domain action to acquire a four to eight foot strip of each property's frontage.

Patel's property included a paved parking area of 17 to 18 spaces (T 702, 706, 760). After the taking, the paved lot had 18 (T 702, 786, 791) or 19 (T 760) spaces. Because of a site plan on file with the City of Pompano Beach, the owner of this property was lawfully authorized to utilize just 13 parking spaces (T 413, 561, 784-785, 786, 791, 794).

The Picillos' property included nine parking spaces along A-1-A. The County presented expert testimony to the effect that these spaces were still usable after the taking (T 651, 653, 656, 690).

At trial, the County presented the testimony of expert witnesses with regard to alterations that could be done to each of the properties to reconstruct any lost parking facilities.[1]

As to each property, the suggested alterations would have required the granting of zoning variances by the City of Pompano

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[1] The County's witnesses took the position that no alterations were needed in light of the fact that Patel had as many or more parking spaces after the taking as he did before, and the fact that the Picillos' parking spaces were still usable. Nonetheless, the County alternatively presented site plans for the purpose of showing the cost to cure any damages that might be said to have occurred. With regard to Patel, the cost of the site plan was $31,775.50 (T 568). With regard to the Picillos, the cost was $26,117.25 (T 500).

Beach (T 473-474, 564-566). The County therefore also presented expert testimony as to the likelihood of the necessary variances being granted.

The testimony included that of Sheila Rose, the Director of Planning with Keith and Schnars, P.A., an engineering firm with seven offices that undertakes development and redevelopment projects throughout the state (T 463). In that capacity, Ms. Rose supervises a staff of approximately 18 landscape architects, project planners and comprehensive planners (T 462). Ms. Rose testified as to her extensive experience with zoning matters (T 463-466). This experience included dealing with variances on an everyday basis since she joined Keith and Schnars (T 464-465) in 1985 (T 463). Ms. Rose stated that Keith and Schnars had provided a considerable amount of services in Pompano Beach, including seeking a variance on behalf of the city and working as the community redevelopment planner and engineer for the city (T 466-467). Ms. Rose prepared proposed site plans to cure the severance damages on Respondents' properties (T 467, 562-563).

Based on her experience, the fact that she had obtained a written indication from city officials that one of her proposed plans was one that they could support and approve (T 363-364) and investigative research into the history of which types of variances

have been granted in the past by the city (T-475),[2] Ms. Rose gave her opinion that there existed a reasonable probability that if requested the variances would be granted (T 502, 573).

The County also presented the testimony of Regan Yarbrough, the Director of Zoning for the City of Pompano Beach (T 338) and the advisor to the city's Zoning Board of Appeals (T 340), which decides whether to grant variances (T 339). In this capacity, Mr. Yarbrough prepared a seven page report on requests for variances which explore the code provisions, discuss the effect of the variance on adjacent properties and give a recommendation as to whether the applicant has demonstrated a hardship sufficient to warrant a variance (T 342). Mr. Yarbrough reviewed Ms. Rose's proposals regarding the Picillos' property and found that the city could support and approve one of them (T 363-364). Mr. Yarbrough also testified that the Balkan House, a motel of less than 25 units (T 374) located about 8 blocks from the properties with which the present case is concerned (T 373), received variances similar to those needed here when it was affected by the road widening project on A-1-A (T 373-375). Mr. Yarbrough also stated that the Zoning Board of Appeals is "more than generous" and that it grants more variances than the staff recommends (T 397).

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[2] Ms. Rose reviewed the 200-300 requests for variances submitted from 1987 through approximately October of 1990 to identify those requests that concerned matters with which her plan dealt (T 493). She located 27 such applications and determined that 24 had been granted (T 494), including three that were resubmitted after an initial denial (T 578).

Also testifying on behalf of the County was Donald T. Sutte, a professional real estate appraiser and consultant (T 606), who reviewed the plan submitted by Ms. Rose. Most of Mr. Sutte's work was in the field of eminent domain or condemnation or in consulting activities related to that field (T 607). Based on his experience, his visits to the motel both before and after the road construction (T 609), his study of all the sites and motels along the affected portion of A-1-A (T 621-625) and his correspondence and conversation with city officials, Mr. Sutte testified that there was a reasonable probability that the necessary variance would be granted (T 628).

Respondents presented evidence that conflicted with much of the evidence presented by the County. Since this case is before this court on a certified question relating to the admissibility of the County's evidence regarding alterations that require the granting of a variance, the evidence presented by Respondents is not relevant to the present proceeding. It therefore will not be detailed here.

The jury awarded Patel $18,760.00 for the property taken and $9,360.00 in severance damages.[3] The jury awarded the Picillos $9,100.00 for the property taken and $26,117.25, the amount suggested by the County's experts, in severance damages.[4]

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[3] The jury also awarded Patel $3,300.00 for a second parcel of property unrelated to the issues in the present proceeding.

[4] The jury also awarded the Picillos $700.00 for a second parcel of property unrelated to the issues in the present proceeding.

Respondents appealed to the Fourth District Court of Appeal which reversed and remanded for a new trial. Patel v. Broward County, ____So. 2d ____, 18 Fla. L. Weekly D463 (Fla. 4th DCA Feb. 10, 1993), stating:

> We reverse and remand for a new trial on the authority of 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). These cases stand for the proposition that the government, when attempting to prove cost-to-cure severance damages, cannot present evidence of proposed alterations to a condemnee's property when those alterations are predicated upon the grant of a variance from the controlling zoning authority. Here, virtually the government's entire case on cost-to-cure was predicated upon speculation that such variances would be granted to permit the appellants to relocate and reconstruct parking facilities lost by virtue of the taking. In addition, the government's experts failed to consider any loss to the condemnees by virtue of the appropriation of other areas of their property for parking. See Williams, 579 So. 2d at 229.
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> Id., at D463 (footnote omitted).

The Fourth District went on to certify the following question to this Court as an issue of great public importance.

> 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?
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> Id., at D463.

This proceeding follows.

SUMMARY OF ARGUMENT

It is clear that the reasonable probability of rezoning is a factor that the trier of fact may consider when determining the value of condemned land. Given this fact, it is logical that the reasonable probability of the granting of a variance to a zoning ordinance should also be a proper factor for the trier of fact to consider. This is particularly true in light of the fact that this court has held that to grant a variance or exception is to rezone.

To conclude otherwise is to say that a condemnee has no duty to mitigate damages resulting from a taking when such mitigation can be accomplished by obtaining a variance. Such a condemnee would be able to ignore a simple method of avoiding the consequences of the taking and to collect damages for those consequences. Moreover, after accepting payment for the damages, the condemnee could then obtain the variance, correct the avoidable consequences and pocket the often substantial difference between the cost-to-cure and the payment received. Such a windfall at taxpayers' expense would fly in the face of well settled principles relating to the duty to mitigate damages.

The general rule is that one seeking damages cannot recover for damages that could have been avoided by the exercise of reasonable care. This concept applies to virtually every case in which recovery of a money judgment or award is authorized, including condemnation proceedings.

Cases from other jurisdictions have endorsed the position argued by the County, while the Florida case upon which the

appellate court here relied did not deal with the question of whether it is proper for a party to introduce evidence of a reasonable probability of a variance being granted.

The decision of the appellate court must therefore be reversed.

ARGUMENT

THE GOVERNMENT MAY 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.

In condemnation proceedings, severance damages are generally measured by the "before and after" rule, which measures the reduction in the value of the property after the taking. Canney v. City of St. Petersburg, 466 So. 2d 1193 (Fla. 2d DCA 1985). When the injury to the remaining property can be cured at a cost less than the damages calculated by the reduction in value, the "cost-to-cure" is the appropriate measure of damages. Hill v. Marion County, 238 So. 2d 163 (Fla. 4th DCA 1970).

In the present case, the County sought to prove cost-to-cure severance damages by presenting evidence of proposed alterations that would have been required for granting of a variance as to each property, along with testimony that there existed a reasonable probability that applications for the variances would be granted. This evidence was proper.

It is clear that the reasonable probability of rezoning is a factor that the trier of fact may consider when determining the value of condemned land. City of Miami Beach v. Buckley, 363 So. 2d 360 (Fla. 3d DCA 1978), cert. dismissed, 374 So. 2d 98 (Fla. 1979); Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, 108 So. 2d 74 (Fla. 1st DCA 1958), cert. quashed, 116 So. 2d 762 (Fla. 1959); Board of Commissioners of

State Institutions v. Tallahassee Bank and Trust Company, 100 So. 2d 67 (Fla. 1st DCA 1958). See also 4 Nichols on Eminent Domain (1993) §12C.03 [2], p. 12C-74--12C-83 and cases cited therein; Annotation, 9 ALR 3d § 6 [a], p. 309-311 and cases cited therein.

Given this fact, it is logical that the reasonable probability of a variance to a zoning ordinance should also be a proper factor for the trier of fact to consider. Indeed, this court in Troup v. Bird, 53 So. 2d 717, 720 (Fla. 1951), recognized that, "broadly speaking, to grant a variance or exception is to rezone." Moreover, in the second Board of Commissioners case, the court demonstrated its agreement with the County's position in this regard by noting that it is proper to consider the fact that there is "a reasonable probability that the ordinance may be changed or an exception made in the foreseeable future." 108 So. 2d at 83 (emphasis added).

To conclude that the evidence presented here was not appropriate is to say that a condemnee has no duty to mitigate damages when such mitigation can be accomplished by obtaining a variance. Such a condemnee would be able to ignore a simple method of avoiding the consequences of the taking and to collect damages for those consequences. Moreover, after accepting payment for the damages, the condemnee could then obtain the variance, correct the avoidable consequences and pocket the often substantial difference between the cost-to-cure and the payment received. Such a windfall at taxpayers' expense would fly in the face of well settled principles relating to the duty to mitigate damages.

The general rule is that one seeking relief cannot recover for damages that could have been avoided by the exercise of reasonable care. Hodges v. Fries, 34 Fla. 38, 15 So. 681, 686 (1894); Jenkins v. Graham, 237 So. 2d 330 (Fla. 4th DCA 1972). This principle applies in "virtually every type of case in which the recovery of a money judgment or award is authorized." State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So. 2d 707 (1943). Thus, in condemnation proceedings, "a condemnee has a duty to mitigate his losses." Mulkey v. Division of Administration, State of Florida, 448 So. 2d 1062, 1067 (Fla. 2d DCA 1984). See also 4 Nichols on Eminent Domain (1993) §14A.04 [1], p. 14A-100; 14.04 [2][a], p. 14A-101--14A-102.

Application of these principles here therefore compels the conclusion that the evidence presented by the government was properly admitted.

Cases from other jurisdictions have endorsed the position argued by the County.

In In re Old Riverhead Road, 48 Misc. 2d 39, 264 N.Y.S.2d 162 (Sup. Ct. 1965), the court dealt with a taking that reduced the claimant's side yard width to less than that required by a municipal zoning ordinance. In addressing the issue of damages, 264 N.Y.S.2d at 167, the court stated:

> A general rule of damages, however, requires a claimant to minimize his damages. (4 Nichols on Eminent Domain [3d Ed.], 520, §14.22). This suggests that our claimant should seek by other means to legalize the present use. The most obvious and least costly medium would be an application for an area variance. Under the special circumstances of the instant case it is rather unlikely that the Village would deny such an

> application. . . . Just as the reasonable probability of obtaining a variance is a proper element to consider in determining the market value of land taken (cf. School District #13 of Town of Huntington v. Wicks, Sup. 227 N.Y.S.2d 768; Cook v. Pieper, 34 Misc.2d 532, 228 N.Y.S.2d 601), so it may also be considered in fixing the amount of other compensable damages resulting from the taking.

In Harwood v. State, 112 A.D.2d 741, 492 N.Y.S.2d 236 (1985), it was found that the trial court erred in considering the effect of a zoning restriction in placing a value on a piece of property without allowing the state to present testimony as to whether a special permit or variance could have been obtained.

In Sorenson Transportation Company, Inc. v. State, 3 Conn. App. 329, 488 A.2d 458 (1985), it was asserted on appeal that the referee erred in valuing certain property on the basis of an access road that could not be built unless a zoning variance and an environmental permit could be obtained. The appellate court rejected the claim relying on the evidence presented before the referee that the required variances and permits would have been granted.

Despite recognizing two of these three out of jurisdiction cases and expressing concern over the County's claim in this regard, the appellate court found the introduction of the evidence in the present case to be error. The court relied primarily upon the decision in Williams v. State Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991), for "the proposition that the government, when attempting to prove cost-to-cure severance damages, cannot present evidence of proposed alterations to a condemnee's property when those alterations are predicated upon the

grant of a variance from the controlling zoning authority. Patel v. Broward County, __ So. 2d __ at __, 18 Fla. L. Weekly D463 at D463 (Fla. 4th DCA Feb. 10, 1993) (footnote omitted).[5]

In Williams, the Department of Transportation presented an expert witness who testified that each of four cost-to-cure site plan proposals he prepared complied with all applicable codes, ordinances and laws. The condemnees adduced evidence that the proposed cures did not meet certain requirements of the city and county zoning codes and moved to strike the testimony of the department's expert. In overruling this motion, the trial court volunteered that the strict requirements of the ordinances and codes would be subject to variance and that the parties could argue to the jury the applicability of the ordinances and the probabilities of a variance being granted.

Thus, the question of whether it was proper for a party to introduce evidence of a reasonable probability of a variance being granted was not at issue in Williams. No such evidence was even offered in that case.

Rather, the decision in Williams merely stands for the proposition that the question of whether a proposed cure complies

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[5] The appellate court also relied on State Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971) for this proposition. That case, however, did not deal with a variance or even with a zoning ordinance. Rather it stands for the proposition that a condemnee suffers severance damage when parking spaces lost by virtue of a taking are relocated on the remaining portion of the property. The County does not dispute the principle of law set forth in Byrd, but does submit that it has no relevance to the question of whether the government may properly introduce evidence of the reasonable probability of a variance being granted.

with a zoning ordinance is a question of law, not one for the trier of fact. Any language in Williams relating to the likelihood of a variance is therefore nothing more than dicta that cannot withstand the logic of the authorities set forth previously in the brief. [6]

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[6] Although not specifically indicating whether it considered it to be a basis for reversal, the appellate court also relied on Williams in concluding that the County's experts failed to consider any loss to the condemnees by virtue of the appropriation of other areas of their property for parking. This conclusion is also erroneous.

In this regard, it should initially be noted that the appellate court incorrectly dealt with this matter as one pertaining to both Respondents. In fact, the site plan for Patel's property involved only the remodeling of the existing parking lot and not the relocation of any parking spaces onto other parts of the property (T 562-568). This factor is therefore of no relevance to consideration of the damages suffered by Patel.

With regard to the Picillos, the County's expert testified that the nine spaces that existed before the taking were still usable afterwards (T 628-629, 651, 656, 691-692). Therefore, no other area of the property needed to be appropriated in a manner that would call for severance damages. Moreover, under the site plan presented to cure any loss of parking that might have been said to exist, the area in which the parking spaces were relocated was an unpaved area already being used for parking (T 652). Thus, no portion of the property was to be converted to parking from some other use.

CONCLUSION

Based upon the foregoing, the County respectfully submits that the decision of the appellate court should be reversed and the cause remanded with directions to reinstate the judgments in this cause.

Respectfully submitted,

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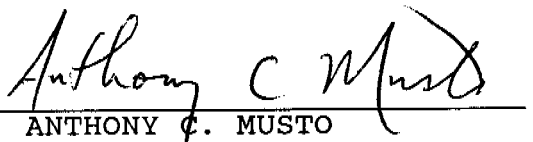
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail to ROBERT A. WARE, ESQUIRE, English, McCaughan & O'Bryan, Post Office Box 14098, Fort Lauderdale, Florida 33302-4098, and DAVID D. WELCH, ESQUIRE, Welch & Finkel, 2401 East Atlantic Boulevard, Great Western Bank Bldg., Suite 400, Pompano Beach, Florida 33062, on this 10th day of May, 1993.

Anthony C Musto

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ACM:smc
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patel.brf