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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

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The County incorporates and relies upon the Introduction and Statement of the Case and Facts set forth in its initial brief.

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.

Respondents argue that evidence as to the reasonable probability of a variance being granted is too speculative to be admitted. This argument is without merit. In the first place, the fact that such evidence concerns a "reasonable probability," not just some vague, undefined possibility, demonstrates its reliability. Second, such evidence is no more speculative than is evidence of the reasonable probability of rezoning, which is clearly admissible when a property owner seeks to establish the property's highest and best use in order to determine its value. See 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). Third, it should be remembered that to whatever extent the evidence is speculative, the property owner can eliminate the speculation by simply making a good faith effort to obtain the necessary variance. If such an attempt is unsuccessful, there would no longer exist a reasonable probability of a variance and such evidence would not be admissible. If the attempt succeeds,

however, damages could be calculated accordingly and a just result reached.

Indeed, if a property owner is allowed to refuse to seek a variance and still be able to keep out evidence of the reasonable probability of one being granted, that property owner will be allowed to obtain damages as if there was no chance of a variance and still retain the right to seek the variance and, if successful, to effect a cure that would cost significantly less than the damages received. The result would be the sort of unjustifiable windfall at taxpayers' expense discussed in the County's initial brief.

Respondents also argue that rezoning is a legislative function, while granting a variance is an executive one.

This is a distinction without a difference, insofar as it relates to the present case. The key factor from an evidentiary perspective is whether there exists a reasonable probability that either will be granted. This is true regardless of the nature of the decision making process because the question of who makes the actual determination is immaterial.[1] Thus, the reasonable

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[1]Indeed, suppose a municipality set up a procedure for determining whether to grant variances that involved putting 999 white ping pong balls and one red ping pong ball in a barrel. Applicants are blindfolded and choose one ball. The variance is granted unless the red ball is chosen. Clearly, under such circumstances, the process would hardly be legislative in nature. Just as clearly, however, there would exist an overwhelming probability that any particular request for a variance would be granted. Certainly in that situation the evidence of the reasonable probability of a variance should be admissible. It is thus clear that admissibility relates to the chances of success, not the nature of the process.

probability of a variance being granted should be equally admissible as the reasonable probability of rezoning.[2]

Respondents also argue that evidence of the reasonable probability of a rezoning is admissible because it relates to the market value of the land taken, not the calculation of severance damages to the remainder. This argument is premised upon the fact that the reasonable probability of rezoning is a factor that willing sellers and purchasers, not compelled to sell or purchase, would consider. Respondents offer no reason why such sellers and purchasers would not also consider the reasonable probability of a variance. It is unrealistic to think that such a consideration would not be equally important to such individuals. Moreover, it cannot seriously be disputed that if a cure is implemented under a cost to cure approach, the market value of the property will be enhanced.[3]

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[2]As noted in the County's initial brief, the concepts of rezoning and obtaining a variance have been viewed by the courts as virtually identical in nature insofar as they are relevant here. In Troup v. Bird, 53 So. 2d 717, 720 (Fla. 1951), this court recognized that "broadly speaking, to grant a variance or exception is to rezone." Moreover in the second Board of Commissioners case, the court noted 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).

[3]Amicus curiae notes that if the variance is denied, the property owner may not receive full compensation for the property and asserts that property owners should not have to be subjected to such contingencies. They don't. As discussed previously, they can make a good faith effort to obtain a variance and settle the question prior to trial. The contingencies therefore exist only if the property owners choose to let them exist.

It should also be realized that Respondents' argument in this regard was specifically rejected in In re Old Riverhead Road, 48 Misc. 2d 39, 264 N.Y.S. 2d 162, 167 (Sup. Ct. 1965), in which the court stated, "Just as the reasonable probability of obtaining such a variance is a proper element to consider in determining the market value of land taken . . ., so it may also be considered in fixing the amount of other compensable damages resulting from the taking (citations omitted)."

Respondent Patel argues that one of the County's experts, Donald Sutte, testified that the severance damages to Respondent Patel's property were $270,000. This is incorrect. Sutte testified that the property would lose that value only if Respondent Patel's counsel's assumption that the existing parking spaces would not be usable was accepted (T 737). Sutte did not accept that premise, however (T 790).

Respondent Patel argues extensively that counsel for the County in the trial court was incorrect in maintaining that City of Miami Beach v. Buckley stands for the principle that it is proper to show the reasonable probability of a variance being granted. This argument is puzzling to say the least since the County has not taken this position in the present proceeding. Respondent Patel's argument in this regard is therefore of no significance.

Respondents Picillos contend that the certified question in this case is not of great public importance because there has been no effort in the legislature to override the decision in Williams v. State Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA

1991), the case upon which the district court relied in the present case. Assuming that in fact there have been no such efforts,[4] it is likely that the reason is because, for the reasons argued in the County's initial brief, Williams didn't say what the district court here found it to say. The decision under review here presents far broader implications than did the decision in Williams. The certified question, therefore, clearly has far-reaching implications and is of great public importance.

Respondents Picillos also maintain that the present case is moot because a new zoning ordinance was adopted subsequent to the taking. It is not. This argument ignores the fact that the new ordinance was more restrictive than the old one (T 351, 544) and that there was no change with regard to the parking requirements (T 546). Thus, any variance that would have been granted under the new ordinance would have also been granted under the old one. Further, since an effort to obtain a variance would be an effort to mitigate damages, it would have been appropriate to consider the circumstances that existed that would have allowed or precluded such mitigation, circumstances that would have included the standards set by the new ordinance.

Finally, it should be noted that perhaps more significant than what Respondents say in their briefs is what they do not say. They do not address their duty to mitigate damages, a duty that is plainly inconsistent with their arguments. Despite recognizing

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[4]The record in this case gives no indication one way or the other.

that no previous Florida case has dealt with the issue present here, Respondents fail to discuss the out of jurisdiction cases that have been decided in a manner consistent with the County's position or offer any reason why Florida should depart from this established line of authority. Respondents also ignore this court's statement in Troup v. Bird, cited in n. 2, equating the granting of a variance with rezoning. Respondents' silence as to these matters speaks for itself.

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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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 22nd day of July, 1993.

Anthony C Musto

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ACM:smc
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