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FILED
SID J. WHITE
JUL 19 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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JOSEPH WEISENFELD, TRUSTEE,

Petitioner,

vs.

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO: 81,653

District Court of Appeal
5th District - No: 91-2234

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REPLY BRIEF OF PETITIONER, JOSEPH WEISENFELD, TRUSTEE

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TABLE OF CITATIONS

When this Court struck as unconstitutional Section 337.241(2)(b), Florida Statutes, which authorized the filing of a map of reservation, it did so because it found the statute "invalid as a violation of the fifth amendment to the United States Constitution and article X section 6(a) of the Florida Constitution." Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622, 623 (Fla. 1990). It did so because the statute authorized the taking of property without providing for compensation. In its opinion, this Court made clear that: "Rather than supporting a single 'regulatory' characterization, the circumstances under which the statute was enacted exposed the statutory scheme as a thinly veiled attempt to 'acquire' land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74." Id. at 625. All arguments raised by Respondent, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION ("DOT"), must, therefore, be rejected and Petitioner, JOSEPH WEISENFELD, TRUSTEE, must be fully compensated for the taking of his property rights.

In enacting Section 337.241(2)(b), Florida Statutes, the Florida legislature was not attempting to regulate anything under its police power. It was not attempting to prevent the development of property in an area that was subject to flooding or other hazards in order to protect the lives and property of those who might build in such an area, or the state resources that might have to be expended if such a risk should prove a reality. It was not requiring a contribution of property as a

means of off-setting the impact of a proposed development upon a community as a whole. It was not attempting to assure aesthetic uniformity. Instead, the Legislature was simply recognizing that planned road improvements would probably require the taking of certain properties sometime in the future and that it would be desirable to reduce the future costs of such projects by preventing the property owners from developing their property prior to the time of taking. For the Legislature, maps of reservation represented a convenient device by which to achieve that public purpose.

The reality of filing maps of reservation is that for the time they remained in effect, the Legislature's purpose in taking property owners' development rights was achieved. In every case where the DOT implemented the reservation provisions, by filing a map over private property, it engaged in the acquisition or "use" of private property for public purposes in order to permit or facilitate a uniquely public function. Such activities constitute an exercise of the power of eminent domain; once that power has been exercised, the owner cannot be denied the opportunity to claim compensation. To characterize the filing of a map of reservation as a "mere attempt," as the District Court of Appeal, Fifth District, did is to ignore reality.

During the time maps of reservation remained in effect, property owners affected by those maps were denied the basic right to develop their property. In the instant case, Weisenfeld was not able to develop his property as planned. All land

encompassed by the map of reservation had to be left in the state it was in at the time the map was filed. At the time the map was withdrawn, the DOT could, therefore, presumably have purchased Weisenfeld's property for a lower price than if development had proceeded as planned. The public thus attained a benefit. Because a taking occurred in the process, however, Weisenfeld is now entitled to be compensated for all damages caused by that taking.

It is important to note that the trial judge entered summary judgment only as to liability. In that respect, given the circumstances of this case, the only relevant facts are as follows:

1. The DOT filed a map of reservation pursuant to Section 337.241(2)(b), Florida Statutes, on September 29, 1988.
2. The map of reservation encompassed a portion of property owned and held by Weisenfeld.[1]

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[1] There can be no question but that Weisenfeld owns property affected by the map of reservation. The Master Concept Plan attached to the Complaint as exhibit "B" shows the various tracts owned by Weisenfeld, including tract J and tract K on the western side of the property. See Appendix to DOT's Initial Brief, Record on Appeal, p. 64. The ownership to these tracts is set forth in the special warranty deed by which Weisenfeld took title to the property, a copy of which is attached to the Complaint as Exhibit "A", the authenticity of which was never questioned by DOT and which document is a matter of public record. Id. 59-64.

As can be seen from the map of reservation attached to the Complaint as Exhibit "D", the map filed on September 29, 1988 encompassed approximately one-third of parcel K and virtually all of parcel J. Id. 68. At no time by way of affirmative defenses did the DOT challenge Weisenfeld's ownership to the property. The only time DOT raised that issue was by way of an affidavit of Bryon D. Rudd, served on August 16, 1991, just prior to the hearing on Weisenfeld's Motion for Summary Judgment. Id. 113-

3. This Court declared Section 337.241(2)(b), Florida Statutes, unconstitutional, in that it permitted the State to take private property in violation of the fifth amendment to the United States Constitution and article X, section 6(a) of the Florida Constitution.

4. Though amended, the map of reservation was not removed until June 1, 1990.

Those facts are not in dispute. Any questions involving ownership, if DOT persists in contesting Weisenfeld's ownership of any portion of the property for which damages are sought, will be properly determined at trial. The evidence DOT would have Weisenfeld introduce as to the degree the map of reservation interfered with his property or the amount of his property affected by the map, is irrelevant, as the map of reservation

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115. In that affidavit Rudd stated that it "appears" Plaintiff does not own the area reserved by the map of reservation depicted in orange on exhibit "1". Id. 115. Rudd did not include parcel J in the exhibit "1" attached to his affidavit. Id. 115A. Rudd did, however, show and never questioned Weisenfeld's ownership of the portion of parcel K affected by the map of reservation. Id. If there is any legitimate issue as to the ownership of parcel J, that matter will be resolved at trial, as proof of ownership is a condition to the award of damages. Id. 141.

It should also be noted that the property that was dedicated to Seminole County in 1985, which DOT, for some reason, persists in presenting as an issue (Answer Brief, 23), is not property for which Weisenfeld seeks compensation, and the property reserved by Weisenfeld for future right of way west of Eaton Park Road is property for which Weisenfeld may be entitled to little or no compensation. As set forth in the Complaint, Weisenfeld seeks compensation for the taking of substantial portions of parcels J and K encompassed by the map of reservation, the Orange County property, which DOT has forced to become the subject of separate litigation, and the reconfiguration of a portion of the Seminole County remainder property necessitated by the taking of the Orange County property. Id. 52-58.

represented a taking for which compensation is required, not a regulation that might have gone so far as to constitute a taking.[2] Weisenfeld will, however, have to prove damages, pursuant to the provisions of Chapter 73, before he is entitled to compensation. Thus, no inquiry into the extent of economic loss is needed at this time to declare that a taking has occurred.

The fact that this Court found Section 337.241(2)(b) unconstitutional because it permitted a taking outside the "procedural and substantive protection of chapters 73 and 74," eliminated the likelihood of continued constitutional abuse. It did nothing, however, to compensate Weisenfeld for losses he suffered while the taking remained a reality.

For the time it chose to act without providing eminent domain protections the DOT must now be recognized as having inversely condemned Weisenfeld's property. It has been recognized that when governmental action:

> deprives the owner of land of an essential element in his relationship to that land, the results should be the same whether the... [governmental entity itself] brings the

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[2] When Weisenfeld previously referred to the filing of a map of reservation as a "regulatory" taking, he, like others before him, was using the term in the broad sense that the taking grew out of a statute rather than a physical invasion. At no time has Weisenfeld characterized the effect of filing a map as "regulatory" in nature. By seeking to more accurately characterize Section 337.241(2)(b) as authorizing a statutory exercise of eminent domain without compensation, Weisenfeld in no way "changes boats midstream," as the DOT has asserted in its Answer Brief, and, of course, he is in no way altering his basic claim in inverse condemnation.

> action to "condemn" the right to so interfere with the land, or the landowner is forced to be the moving party.

City of Jacksonville v. Schumann, 167 So.2d 95 (citing Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964). In this case Weisenfeld was deprived for a period of 20 months of the right to develop his property as planned. Having been deprived of that right, he is now entitled to compensation.

Notwithstanding DOT's arguments to the contrary, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) "The U. S. Supreme Count **ended** the longstanding practice... of limiting relief for temporary takings to invalidation of the unconstitutional governmental acts." Herrington v. County of Sonoma, 790 F. Supp. 909, 914 (N.D. Cal. 1991) (emphasis added). Nevertheless, lower courts, like the District Court of Appeal, Fifth District in the instant case, have often failed to recognize the directives of the United States Supreme Court in First English. In Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. Unit B 1985), cert. denied 456 U.S. 973 (1982) ("Wheeler I"); 746 F.2d 1437 (11th Cir. 1984) ("Wheeler II"); 833 F.2d 267 (11th Cir. 1987), ("Wheeler III"); 896 F.2d 1137 (11th Cir. 1990) ("Wheeler IV"), for example, the trial court four times denied a demand for compensation very similar to that made by Weisenfeld, before the Eleventh Circuit, following First English, made clear that merely striking an ordinance that permits an unconstitutional taking is not sufficient to compensate property owners affected by the ordinance.

In Wheeler, the City of Pleasant Grove enacted an ordinance that prohibited certain property owners from constructing apartment complexes on their property. Sixteen months later a court found that the ordinance had been "enacted and implemented arbitrarily and capriciously, was confiscatory in nature, and bore no substantial relationship to any legitimate police power interest." Wheeler II, 833 F.2d at 268. Accordingly, the court permanently enjoined the city from enforcing the ordinance against the property owners but refused to grant damages.

When the case was first appealed, the Eleventh Circuit held that the city had engaged in a taking when it unconstitutionally applied an ordinance against the plaintiffs. On a second appeal it "held that a necessary implication of the Wheeler I holding was that the plaintiffs were entitled to compensation for the injury they sustained as a result of the temporary taking." Wheeler II, 835 F.2d at 270. On a third appeal Wheeler III, 833 F.2d at 271, it held that even though the "unconstitutional taking... was not a denial of all use of... property.... The city confiscated appellant's right to construct an apartment complex previously authorized by the city," which constituted a taking. Wheeler IV, 896 F.2d at 1351.

The district court then refused to award damages because the unconstitutional ordinance had not destroyed the highest and best uses of the property or permanently diminished the fair market value of the property. Id. at 1350. The Eleventh Circuit,

however, again reversed the trial court reiterating its holding in Wheeler III that:

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate of return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction.

Id. at 351 (citing Wheeler III), 833 F.2d at 271. Rather than risking yet another appeal, the Eleventh Circuit itself proceeded to determine that an award of $59,841.23 represented just compensation for the 14 months and 3 days during which the taking remained in effect. Thus, the Eleventh Circuit has recognized the necessity not only for striking a statute that permits an unconstitutional act but also for awarding damages to any land owner whose property rights were affected by the unconstitutional act during the time it remained in effect.

In the instant case the trial court did nothing more than determine that under Joint Ventures and First English the filing of a map of reservation against Weisenfeld's property constituted a taking. It is now fully appropriate for the jury, acting under the provisions of chapter 73, Florida Statutes, to determine the full compensation to which Weisenfeld is entitled for the temporary taking of that property.

CONCLUSION

The era of the map of reservation seemingly has passed away. However, the state, having acted outside constitutional requirements, does not now wish to compensate the limited group of private property owners that were victimized by the map provisions in order to provide a benefit to the public as a whole. Contrary to the ruling by the majority below, that is exactly what the compensation clauses of the Florida and United constitutions were "designed" to do. The government, for nearly two years, has gained the benefit of using Weisenfeld's property in furtherance of its uniquely public function. It is now obligated to pay for that "use." To rule otherwise would be tantamount to deleting the compensation clause from the constitution. Therefore, the decision of the District Court of Appeal, Fifth District, must be reversed and the Trial Court's Order granting partial summary judgment as to liability reaffirmed.

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 this 15th day of July, 1993 to: Thomas F. Capshew, Esquire, Assistant General Counsel, and Thornton J. Williams, Esquire, General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458.

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