SUPREME COURT OF FLORIDA

CASE NO. SC00-1764
Lower Tribunal No.: 3D99-2230

CITY NATIONAL BANK OF FLORIDA, formerly known as CITY NATIONAL BANK OF MIAMI, as Trustee under certain Trust Agreement dated November 21, 1985, and known as Trust Number 5005110, et al,	:
Petitioner,	:
vs.	:
MIAMI-DADE COUNTY, formerly known as DADE COUNTY, a political subdivision of the State of Florida,	:
Respondent.	:

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

To clarify certain statements in the County's Answer Brief, the Property Owners reply thereto. At page 4, the County references plans by an architect that do not show a subdivision of the property. These were the preliminary drawings that ultimately evolved into the site plan that was presented to the County, and as the Third District noted, "[t]he County rezoned the property consistent with the conceptual site plan." *City National I,* 715 So.2d at 351. The Property Owners are not seeking any reimbursement for the architect's services.

The County pejoratively refers to the site plans as "fictional", etc. The site plans were quite real, and were developed over a number of years at great expense to the Property Owners. The County states that the corner parcel was "inexplicably downsized". Ans. Br. At 5. To the contrary, the revised site plan simply superimposed a typical gas station footprint, which was slightly less deep than the corner outparcel.

The County states that "[b]oth appraisers determined the highest and best use … was for commercial development including the possibility of subdividing the property into outparcels." Ans. Br. At 6-7. This understates the County's appraiser's conclusion, which was that "at the time the site is developed for commercial purposes, it is likely that it would be developed in a manner similar to that indicated by the owners, that is, retail strip stores across the rear of the site and three or four outparcels

along the 27th Avenue frontage." (Findings, ¶4(d), p. 3) This conclusion is then supported by five (5) separate reasons in the County's appraisal (*See* Addendum hereto, pp. 19-20 of County's appraisal).

The County's Answer Brief then states that the Property Owners' analysis "did not stop there" (Ans. Br. At 7), implying that the County's own appraiser did stop there, and that the County's appraiser did not then analyze the impact of the taking on the ability to develop the four outparcels along 27th Avenue. In fact, the County's appraiser undertook the very same analysis that the Property Owners' experts did; he concluded that before the condemnation, the site "was divisible into four useable sites, each with at least 150 feet of street frontage." (Addendum at p. 27). The County's appraiser further stated that "[a]ccording to brokers and developers that we have talked with, 150 feet is a typical site for such" outparcels. (*Id*.) He concluded that the frontage for one of the outparcels would be reduced to well below 150' wide, and he then stated the issue as follows: "If this last site is too small to be developed with a restaurant or convenience type retail use, then the remainder site would have been damaged by the taking." (*Id.*; emphasis supplied) To "analyze" whether the "thin" outparcel would sell, the County's appraiser searched Dade County, and came up with seven (7) parcels in Dade County that had less than 150 feet of frontage. (*Id*.) Based on this finding, he concluded that the "thin" outparcel on the subject could be sold.

The County's appraisal does not analyze the value of the seven (7) "thin" parcels, compared to the value of normal outparcels, nor does it analyze how having a "deficient" outparcel may impact on the balance of a larger development. (*Id*.)

The County trivializes the expected use of the corner parcel for a gas station. However, the County's appraiser concurred that a gas station was part of the Highest and Best Use of the property (addendum, p. 20, 27), and used sales of gas station sites to value the subject property (addendum, p. 22-23).

SUMMARY OF ARGUMENT

The County's Summary of Argument simply asserts that the trial court failed to consider certain facts and statutory factors in assessing attorneys' fees and experts' fees in condemnation cases. In contrast, the transcript below and the trial court's Findings specifically reference and address the items allegedly not considered by the trial court.

The County does not assert that the trial court's Findings are not supported by substantial competent evidence.

The County argues that the Property Owners' claim in the condemnation action was obviously improper from the start, and that "any lawyer" would know that. In contrast, at least six lawyers disagree (the trial court judge herein, the three appellate court judges that decided *Partyka*, the Property Owners' counsel, and the attorney's fee expert at the below fee hearing). In addition, all five of the lay experts that testified

at the fee hearing herein, each of whom had over twenty years of experience in condemnation cases, testified that the manner in which this case was handled was the typical manner in which these type of cases are handled, both by Property Owners' counsel, and the government's counsel. This testimony was unrebutted. Lastly, even the County's own appraiser undertook the same analysis, and used the same site plan, which the County now chastises the Property Owners for using.

If the Property Owners' approach herein was so patently improper, then Dade County should have been able to find at least one witness to so testify; it did not. If the Property Owners' approach herein was so patently improper, then Dade County should have excluded this approach at the beginning of the case, instead of waiting until the trial to attempt to exclude it (and then losing its motion at that time).

Dade County, and all other condemnors, have a ready remedy to combat perceived abuses by property owners: an Offer of Judgment, which was specifically created for condemnation cases in 1990 (Fla. Stat. § 73.032).

ARGUMENT

(Due to the substantial overlap between the two issues on appeal, the Property Owners combine their response in this section)

[1]The Third District Court of Appeal cites no supporting precedent for its

[1] "Bolf", (as counsel is referenced by the County, Ans. Br. at 10, 17 and 18) would be doing himself a disservice if he did not respectfully object to the in personam nature of the County's brief. "Bolf" also respectfully submits that statements such as counsel was "misleading the trial judge" and made a "calculated attempt to circumvent the law" (Ans. Br. at 23) to name a few, are of no service to this Court, and have no place in a brief. Perhaps a reference to Shakespeare's "doth protest too much" explains the County's strident verse.

opinion herein. At least five cases recognize that even when a condemnation case is unsuccessful, the condemnor is responsible for the fees and costs. *Department of*

Transportation v. Jack's Quick Cash, Inc., 748 So.2d 1049, 1052 (Fla. 5th DCA 1999); *Leeds v. City of Homestead*, 407 So.2d 920 (Fla. 3d DCA 1981); *Division of Administration, Department of Transportation, v. Grant Motor Co.*, 345 So.2d 843, 846 (Fla. 2d DCA 1977); *Hodges v. Division of Administration, State Department of Transportation*, 323 So.2d 275 (Fla. 2d DCA 1975); *City of Miami Beach v. Liflans Corporation*, 259 So. 2d 515 (Fla. 3d DCA 1972), cert. denied, 267 So.2d 83 (Fla. 1972).

The fee statute itself recognizes that condemnors are responsible for experts fees incurred for unsuccessful claims involving constitutional claims, as opposed to business damage claims. *See, e.g., Jack's Quick Cash*, 748 So.2d at 1054. Florida Statute Section 73.091 was amended in 1987 to add the requirement that "business damages [be] compensable," before an accountant's fee must be paid by the condemnor. No similar restriction exists regarding experts' fees for prosecuting land claims. Under the statutory construction guideline of *inclusio unius est exclusio alterius*, the specific restriction of government's responsibility for accountants' fees only if the claim is successful, but not imposing a similar requirement for the payment of expert's fees for land claims, is a clear statement that even when unsuccessful, the condemnor is responsible for expert's fees incurred to prosecute land valuation issues. The constitutional basis for land compensation, versus the statutory basis for business damages, explains this dichotomy. *Id*. at 1052-1054.

Instead, the only potential restriction to the County's responsibility for the fees and costs herein involve situations where the claim was "predictably not recoverable," akin to the Florida Statute Section 57.105 standard. *Leeds v. City of Homestead*, 407 So.2d 920 (Fla. 3d DCA 1981). It cannot be overemphasized that the County's position is therefore premised on the alleged "fact" that the Property Owners should have known that their approach to the case was improper. If this "fact" fails, so does the County's argument. However, the County does not cite any evidence to support this "fact".

The County's premise requires this court to ignore the fact that the County's own expert undertook the same analysis, and did so not in response to a position taken by the Property Owners' experts, as his appraisal occurred long before any of the professionals were even employed by the Property Owners. If the Property Owners' approach herein was patently inappropriate, then the County should have been able to present testimony supporting that contention. Not one witness testified that the approach herein was improper. In contrast, each witness testified that the approach taken herein was the typical approach to handle this type of case. The expert witnesses also testified that when the government employs them in these cases, they handle the case the same way it was handled herein. The trial court had six witnesses, all with at least 15 years of experience in condemnation cases (and the experts each had over 20 years of experience), all confirming that the subject case was

handled the same way these type of cases are typically handled. The County presented ***no*** evidence to the contrary, and the County nowhere suggests that the trial court's Findings of Fact are unsupported by substantial competence evidence. The trial court also referenced the decision of *Partyka v. Florida Department of Transportation*, 606 So.2d 495 (Fla. 4th DCA 1992), which specifically endorsed the Property Owners' approach herein. The trial court's factual conclusion that the approach taken herein was appropriate and reasonable is supported by substantial competent evidence, and must be sustained.[2] That factual conclusion eviscerates the County's argument.

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[2] Let us examine the Property Owners' premise to the underlying case, which the County contends "was plainly inappropriate". (Ans. Br. At 19) The Property Owners were stating that on a major thoroughfare, the Highest and Best Use of commercial property is for outparcels along the road, and strip retail stores across the back of the property. This is not speculative and conjectural. One need not be an expert to drive down the road, and see great quantities of examples of this type of development. Regardless of any site plan that was or was not in existence, an intelligent developer, interested in maximizing the value of this property, would conclude the Highest and Best Use was as suggested by the Property Owners herein. At minimum, it would be a question of fact and persuasion for the jury to determine if the Property Owners' suggestion was reasonable. Because the County's appraiser and the Property Owners' appraiser agreed on this Highest and Best Use, one would presume the jury would so conclude. We know that outparcels are typically 150 feet wide in Dade County, again a fact with which each appraiser agreed. Therefore, the Property Owners 610 feet of frontage can accommodate four outparcels, a simple mathematical fact. We then are confronted with a reduction in the frontage by 116 feet, down to 494 feet. To assess the issue of whether the resulting outparcels are too small, the County's appraiser concluded that there is a market for outparcels which are thinner than 150 feet (conspicuously omitting any statement as to whether such outparcels sell for the same amount as "normal" sized outparcels). Long after the County completed its analysis, the Property Owners were unwillingly thrust into a condemnation action, and they employed experts who reviewed the County appraiser's conclusion that thin outparcels are just as good as regular sized outparcels. These experts disagreed with the County appraiser. Plainly, that issue is one of fact and opinion, and not one of law. To illustrate their point, the Property Owners used the same site plan that the County appraiser used, and attempted to mitigate the County's taking by rearranging the outparcels. Perhaps instead of trying to "fix" the problem presented by the taking, the Property Owners should simply have calculated the value of one outparcel (approaching $500,000 for a non-gas station site, and approximately $1.0 million for a gas station site, *see* Addendum, County's Appraisal at 22). However, moving an outparcel to the side road was seen as a means of mitigating the damages caused by the taking.

That is it. That is the sum and substance of the "speculative and conjectural" approach taken herein. Perhaps a jury ultimately would not have been persuaded, but that does not mean it was unreasonable to present this testimony. At the fee hearing, the trial court specifically rejected the County's position that it was unreasonable to pursue this claim of severance damages, and the court's factual conclusion is fully supported by the record. Indeed, the record is devoid of evidence to the contrary.

Dade County states that "any lawyer" would have figured out that *Yoder v. Sarasota County*, 81 So.2d 219 (Fla. 1955) precluded the Property Owners' attempted use of site plans. (Ans. Br. at 15). First, as referenced above, this factual allegation is unsupported in the record, and in contrast, the evidence against this factual allegation was strong and unrebutted. Second, *Yoder* nowhere makes even a veiled reference to site plans. Instead, *Yoder* involved physical changes to property, and rejected the attempt to value property under water as if the property was dry land. *Id*. at 220. This is the proverbial sale of swamp land (albeit on the beach). In contrast, and in support of the Property Owners' position herein, *Yoder* stated: "It is appropriate to show the uses to which the property was or might reasonably be applied, and the damages, if any, to adjacent lands." Id. at 221 (emphasis supplied). The most logical and understandable evidence of how the subject property "might reasonably be" used would be a picture (i.e. a site plan) depicting that use. *Partyka*. To suggest that *Yoder* plainly prohibits the Property Owners' use of site plans, when *Yoder* makes no reference to site plans, and involves far different facts, is without merit.

Indeed, the case closest on point, and which had been decided less than six months before the filing of the instant lawsuit, specifically cited *Yoder* in reversing a trial court for excluding site plans. In *Partyka v. Florida Department of Transportation*, 606 So.2d 495, 496 (Fla. 4th DCA 1992), the court held that "[t]he excluded site plans were

perhaps the clearest form of evidence available to demonstrate the remaining property's utility before and after the taking." The *Partyka* court specifically cited *Yoder* as authority for using the site plans. *Id*. In contrast to Dade County's assertion that "any lawyer" would know that *Yoder* precluded the use of site plans herein, at least the three appellate judges in *Partyka* were as equally mistaken as the Property Owners herein as to the use of site plans to show problems created by takings, and were equally mistaken in their belief that *Yoder* actually supported the use of site plans. When an appellate decision less than six months old had reversed a trial court for excluding the use of site plans, and had cited *Yoder* as its authority, for the County to suggest that *Yoder* plainly prohibits the Property Owners' use of site plans is meritless. *See also Boynton v. Canal Authority*, 265 So.2d 722 (Fla. 1st DCA 1972) (Approves "development approach" to appraising property in condemnation and distinguishes *Yoder*.)

Dade County makes much noise about the Property Owners' site plan being "preliminary" or "conceptual" (Ans. Br. at 17-18). First, every site plan is "preliminary" or "conceptual". Until the buildings are built, the site plan can change (and sometimes, even after that). Even if the site plans are approved by the government, nothing prohibits the property owner from revising the site plan; this happens all the time. At least one of the site plans improperly excluded in *Partyka* was

"conceptual" or "preliminary", as there were multiple site plans referenced, but only one could have been actually used for construction of the improvements.[3]

Second, by definition, property being condemned is to be appraised based on its Highest and Best Use. Consistent with *Yoder*, one of the elements of determining Highest and Best Use is the potential uses of the land. This necessarily requires the appraiser to formulate a concept of what development can theoretically be placed on the land. Indeed, both appraisers herein did precisely that. The market uses the same approach. A developer does not buy land based upon what is on it presently. Instead, the developer determines what can be placed on the land, and makes a determination of the land's value based on that "preliminary" or "conceptual" use. That concept may be, and frequently is, refined after the property is purchased, but to value property, a basic concept of what can be done with it must be developed. Again, common experience demonstrates that the development concept adopted by both appraisers herein is not fanciful, as there are a great many examples of intelligent land buyers investing millions of dollars into developing outparcels along a busy road, with a shopping center behind the outparcels. This is not speculation; this is reality.

The County asserts that *Hodges v. Division of Administration, State Department of Transportation*, 323 So.2d 275 (Fla. 2d DCA 1975) has been receded

[3] The statement footnoted hereby is simply one of logic, and does not reference the facts contained in the *Partyka* record. This Court's broad powers authorize it to review the record of other cases, if it so chooses.

sub silentio by *County of Sarasota v. Burdette*, 524 So.2d 1064 (Fla. 2d DCA 1988). This "receding" was so silent that the County did not make such a claim, or even mention *Burdette*, previously in this litigation. Indeed, *Hodges* continues to be cited as good law on the very point that "[i]n a proper case, the landowner may secure a fee for expert witnesses, even though the jury returns a zero verdict." *Department of Transportation v. Jack's Quick Cash, Inc.*, 748 So.2d 1049, 1052 (Fla. 5th DCA 1999). In point of fact, *Burdette* involved a party voluntarily abandoning a business damage claim, and then not being compensated for the expert that helped develop that claim. No such abandonment occurred herein. *See Owens v. Orange County*, 747 So.2d 467 (Fla. 5th DCA 1999).

In its Summary of the Argument, Dade County's premise is that the trial court did not consider certain issues or statutory factors. However, the record demonstrates that the trial court did indeed consider these items, and in fact these specific items are all specifically discussed in the trial courts Findings. Dade County argues that the trial court did not consider what the Property Owners would ordinarily expect to pay for attorneys' fees if the County were not responsible (Fla. Stat. Sec. 73.092(4)) and also that the trial court failed to give due weight to the benefits achieved for the client. [Dade County omits any mention of the benefits achieved for the client, as specifically found by the trial court (access to the property from 207th Street, and avoidance of the Offer of Judgment).]

In response, the Property Owners simply point to the subject Findings, and presume the trial judge was being truthful when he stated:

> The sum of $96,945 is a reasonable approximation for a *Rowe-Quanstrom* lodestar fee. By statute, Fla. Stat. Sec. 73.092 (1993), "the trial court shall give the greatest weight to the benefits resulting to the client from the services rendered." The court has considered the benefits and all of the other statutory factors. …Based upon all of these considerations, in accordance with *Lee County v. Tohari*, 582 So.2d 104 (Fla. 2d DCA 1991), it is appropriate to reduce the lodestar fee by $21,945 for a final reasonable fee award in accordance with section 73.092 of $75,000.

Findings, p. 8, par. 1 (emphasis supplied).

Absent an allegation that the trial court was not being forthright, it is impossible to credibly contend that the trial court did not consider "the benefits and all of the other statutory factors."

Dade County also asserts that "the trial court did not even consider whether severance damages based on speculative and conjectural site plans were predictably not recoverable." (Ans. Br. at 12) This assertion cannot be reconciled with the record of the fee hearing below (Tr. at 11), in which Dade County made this argument, or with the Findings of Fact, in which the trial court discussed at length this argument by Dade County. (Findings, ¶¶4 and 5) Simply put, the trial court rejected the County's position that prosecuting these claims was unreasonable, and specifically found that "Defendant's counsel had a reasonable basis for believing that the evidence would be

admissible… .” (Findings, ¶4(c), p. 3) This factual conclusion is supported by substantial competent evidence.

The County claims that it is defenseless against the unscrupulous condemnee bar, and their incursion of unreasonable expenses. This is simply inaccurate, and is of no relevance to this case. If Dade County believes the Florida Constitution and the condemnation statutes unreasonably impose a burden upon government when they take property away from private citizens, then it should lobby the legislature for a change, and seek a change to the constitution. All the statutes do now is make Dade County responsible for the reasonable fees incurred by property owners in defending themselves against unwanted litigation, in which their property is being forcibly taken away from them by the government. If Dade County thinks this is unreasonable, its remedy lies with the legislature, and not this Court. There is nothing unconstitutional about this requirement.

In point of fact, the legislature has already addressed Dade County’s concerns. In 1990, Florida Statutes Section 73.032 was enacted, giving Dade County (and all other condemnors) the ability to use Offers of Judgment in condemnation cases. An offer of judgment shifts the burden of the fees and costs to the property owners, if their claims are rejected. This ready remedy is conspicuously omitted from the County’s brief. If a condemnor believes a property owner is exercising "carte blanche to incur any expense" (Ans. Br. at 32), then it should issue an Offer of Judgment.

The other ready remedy for Dade County is to present evidence to the court at the fee hearing that the fees and costs incurred on behalf of the Property Owners were unreasonable. However, when Dade County appears for a special set hearing set for a half day, and shows up with no witnesses to support its position, and states it is not contesting the number of hours or the hourly rates of the professionals, it has no one but itself to blame if the court is not persuaded by its rhetoric.

Ruden, McClosky, Smith, Schuster and Russell, P.A. represents four counties in their condemnation cases, and thus is aware of the costs which government incurs in taking property. However, there are only two entities that can bear the cost of condemnation litigation: the government, and the property owner. As between the two, it is respectfully submitted that it is the party that is instituting the dispute, that successfully forces a sale against an unwilling seller, and which has the ability to pay the costs, that should bear the expense. It would be incredibly unfair for the government to use its almost unlimited powers to forcibly take someone's property away from them, and then after the person loses their property, send a substantial bill to that person for the costs of the litigation which they had no desire to be involved in.

Another premise of Dade County's argument is that judges are apparently incapable of ably discharging their duties. Dade County appears to presume that a judge will inevitably rule in favor of the Property Owner on cost motions, regardless of the law

or the facts. This is an extreme disservice to the bench, and moreover, simply is not true. Perhaps Dade County's experience is occasioned by its practice of not presenting evidence at cost hearings to support its position.

Dade County does not allege any basis for the Third District Court of Appeal's determination of the appraiser's fee award of $1,500. Indeed, Dade County acknowledges that the $1,500 figure "was determined by the Third District Court of Appeal". (Ans. Br. At 33). The record is devoid of any evidence to support such an arbitrary decision, and the $1,500 award is plainly without basis. The appellate court herein was not in position to make such a determination.

CONCLUSION

The trial court's Findings herein are supported by substantial competent evidence, and the trial court's decision was not arbitrary or fanciful. The trial court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas Goldstein, Esq, Assistant County Attorney, Attorney for Appellant, Miami-Dade County, Suite 2810, Metro Dade Center, 111 N.W. First Street, Miami, Florida 33128-1993, this ____ day of April, 2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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