IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

ESTATE OF MARY WINSOR BEYER, Plaintiff-Appellant, v. CITY OF MARATHON, FLORIDA, and the STATE OF FLORIDA, Defendants-Appellees.	)	No. 3D12-777 L. T. Case No. CA-05-313-M

APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant Estate of Mary Winsor Beyer hereby gives notice of filing the following Supplemental Authority to Appellant's Motion for Rehearing and Rehearing En Banc, for purposes of supplementing the argument that the Court's reliance on the special master's estimation of the value of "points" in this case should not have been relied upon by the Court to affirm the lower court's summary judgment, where at a minimum the case should be remanded for purposes of an evidentiary hearing regarding adequate constitutional compensation for the taking in this case. The supplemental authorities that Appellant has attached are:

1. *Palm Beach County v. Tessler*, 538 So. 2d 846, 849 (Fla. 1989) (after the trial makes a finding of inverse condemnation "the question of compensation is then decided as in any other condemnation proceeding");

2. *State Road Dep't v. Lewis*, 190 So. 2d 598 (Fla. 1st DCA 1966) (after a finding of inverse condemnation, the case is transferred to the law side for a determination of compensation); and

3. *Askew v. Gables-By-The-Sea, Inc.*, 333 So. 2d 56 (Fla. 1st DCA 1976), *cert. denied*, 345 So. 2d 420 (Fla. 1977) (after a finding of inverse condemnation in Leon County, the State was commanded to forthwith institute condemnation proceedings in Dade County, Florida pursuant to the applicable statutes).

DATED: August 15, 2016.

Respectfully submitted,

By: /s/ Mark Miller
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CERTIFICATE OF COMPLIANCE

I certify that the font used in this Notice is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: August 15, 2016.

/s/ Mark Miller
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITY has been electronically filed with the Clerk of Court using the e-DCA electronic filing system on this 15th day of August, 2016, which will send a notice of electronic filing to the following:

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ATTACHMENT 1

538 So.2d 846
Supreme Court of Florida.

PALM BEACH COUNTY, Petitioner,
v.
Mildred TESSLER, et al., Respondents.

No. 71962.
|
Feb. 16, 1989.

Owners of commercial property brought inverse condemnation action against county government. The Circuit Court, Palm Beach County, Timothy P. Poulton, J., held for owners, and county appealed. The District Court of Appeal, Letts, J., 518 So.2d 970, affirmed, and question was certified. The Supreme Court, Grimes, J., held that owners of commercial property located on major public roadway were entitled to judgment of inverse condemnation when county government blocked off access to property.

Question answered.

Attorneys and Law Firms

***847** Shirley Jean McEachern, Asst. County Atty., West Palm Beach, for petitioner.

James J. Richardson, Tallahassee, James W. Vance, P.A., West Palm Beach, and Alan E. DeSerio of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, Tampa, for respondents.

Maxine F. Ferguson, Appellate Atty. and Thomas H. Bateman, III, Gen. Counsel, Tallahassee, amicus curiae for State of Fla., Dept. of Transp.

Opinion

GRIMES, Justice.

This case comes to us from the Fourth District Court of Appeal certifying a question of great public importance. The question is:

> ARE THE OWNERS OF COMMERCIAL PROPERTY LOCATED ON A MAJOR PUBLIC ROADWAY ENTITLED TO A JUDGMENT OF INVERSE CONDEMNATION WHEN THE COUNTY GOVERNMENT BLOCKS OFF ANY ACCESS TO THE PROPERTY FROM THE ROADWAY AND LEAVES ACCESS THERETO ONLY THROUGH A CIRCUITOUS ALTERNATIVE ROUTE THROUGH RESIDENTIAL STREETS?

Palm Beach County v. Tessler, 518 So.2d 970, 972 (Fla. 4th DCA 1988). We have jurisdiction pursuant to article V, section 3(b)(4), of the Florida Constitution.

The subject real estate, which is zoned commercial, is located at the intersection of Spanish Trail and the main east-west thoroughfare in Boca Raton, Palmetto Park Road. The respondents own and operate a beauty salon that fronts on Palmetto Park Road. As part of a bridge construction and road-widening project, the county planned to construct a retaining wall directly in front of the respondents' property, which would block all access to and visibility of the respondents' place of business from Palmetto Park Road. While the property will continue to have access to Spanish Trail, that street is intended to pass underneath the newly constructed bridge on Palmetto Park Road. The wall will extend to a point approximately twenty feet east of the property. Consequently, the respondents and their customers will only be able to reach the property from Palmetto Park Road by an indirect winding route of some 600 yards through a primarily residential neighborhood. A sketch of the area which illustrates the effect of the proposed construction is appended to the opinion of the district court of appeal.

There were two issues before the trial court: (1) whether the county's construction of a retaining wall occurred on private property or in the public right of way; and (2) whether the construction of this wall amounted to a taking for purposes of inverse condemnation. The court found that the wall was constructed in the public right of way, and that finding has not been disputed. However, the court determined that a case of inverse condemnation had been proven because the property owners were denied "suitable access" to their property as a result of the

retaining wall. The Fourth District Court of Appeal affirmed.

Where there has been no taking of the land itself, when is a property owner entitled to be compensated for loss of access to the property caused by governmental intervention? The county argues that unless the property owner has been deprived of all access, the law of eminent domain does not recognize that a taking has occurred. Respondents contend that a taking has occurred when any portion of the access has been eliminated and that the suitability of the remaining access may be taken into account in the assessment of compensation. We reject both positions as being extreme.

Without placing emphasis on whether other access was available, several early Florida cases announced the principle that the rights of abutting landowners were subordinate to the needs of government to improve the roads and that any loss of access was *damnum absque injuria.* ***848** *Weir v. Palm Beach County,* 85 So.2d 865 (Fla.1956); *Bowden v. City of Jacksonville,* 52 Fla. 216, 42 So. 394 (1906); *Selden v. City of Jacksonville,* 28 Fla. 558, 10 So. 457 (1891). However, in *Benerofe v. State Road Department,* 217 So.2d 838, 839 (Fla.1969), this Court said:

> [E]ven when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easements of access, light, and air from the street or highway appurtenant to their land, and unreasonable interference therewith may constitute a taking or damaging within constitutional provisions requiring compensation therefor. Such easements may be condemned originally, as in the case of a limited access highway; or they may be acquired later on, if need for their acquisition arises, by the municipal or highway authorities; or compensation may be required therefor in timely and proper cases by the abutting landowners where deprivation thereof actually occurs without prior acquisition.

Accord Department of Transp. v. Jirik, 498 So.2d 1253 (Fla.1986). Thus, under current law, there can be no doubt that where access is entirely cut off, a taking has occurred.

Several other decisions of this Court lend support to the proposition that under some circumstances there may be a taking even though access to property is not entirely cut off. In *Florida State Turnpike Authority v. Anhoco Corp.,* 116 So.2d 8 (Fla.1959), the complaining parties owned property abutting State Road 826 on which two outdoor movie theaters were operated. In the course of converting State Road 826 into a feeder road, the Turnpike Authority dug a ditch along the edge, thereby relegating the owners "to entrance and exit via secondary roads running at right angles to the highway in question which their property fronts." *Id.* at 14. While acknowledging that the rights of abutting owners may be subordinated to the public and thereby regulated, the Court reasoned that rather than being regulated, the right of access in this instance was being destroyed. The Court held that the owners were entitled to be paid for their temporary loss of access to State Road 826.

Likewise, in *Department of Transportation v. Stubbs,* 285 So.2d 1 (Fla.1973), property was being condemned in connection with the construction of Interstate 295. As a consequence, a service road which adjoined the property was eliminated, although the property could still be reached by crossing an overpass from the opposite side of I-295. Relying upon the rationale of *Anhoco,* the Court held that the owner was entitled to compensation for loss of access. The Court noted:

> The rationale for granting compensation, although not always expressed in judicial pronouncements, is that "property" is something more than a physical interest in land; it also includes certain legal rights and privileges constituting appurtenants to the land and its enjoyment. This is part of a gradual process of judicial liberalization of the concept of property so as to include the "taking" of an incorporeal interest such as the acquisition of access rights resulting from condemnation proceedings. See Stoebuck, The

> Property Right of Access Versus the Power of Eminent Domain, 47 Texas L.Rev. 733 (1969).

Id. at 2.

Palm Beach County argues that *Anhoco* and *Stubbs* are not authority for recovery in the instant case because both of those decisions involved takings under section 338.04, Florida Statutes (1973), which mandated that property owners be reimbursed for loss of access incurred in the construction of limited access roads. However, when the *Anhoco* case came back to the Court for enforcement of its earlier mandate, we observed that the rule requiring compensation when the conversion of a land service road into a limited access facility cuts off access to abutting property owners "applies regardless of the specific requirements of a statute." *Anhoco Corp. v. Dade County,* 144 So.2d 793, 797 (Fla.1962). This would seem to follow once it is recognized, as Florida does, that the right of access is a property right which appertains to the ownership of land. We did not ***849** intend that *Division of Administration v. Capital Plaza, Inc.,* 397 So.2d 682 (Fla.1981), be read as limiting the rationale of *Stubbs* to takings under section 338.04. The *Capital Plaza* case involved a reduction in the flow of traffic. In the course of the widening of a road, a median was installed so that northbound drivers could no longer turn across traffic directly into the landowner's service station. We ruled that this did not involve a deprivation of access but rather an impairment of traffic flow for which no recovery was available. *Accord Jahoda v. State Rd. Dep't,* 106 So.2d 870 (Fla. 2d DCA 1958).

In *Pinellas County v. Austin,* 323 So.2d 6 (Fla. 2d DCA 1975), the county had vacated a dirt road leading to the Austins' property. Two alternative modes of access existed. One was an unimproved platted road, while the other required traffic to cross an old wooden bridge which could not support service vehicles such as garbage and fire trucks. The court said:

> On the other hand, not everyone owning property near a street which has been vacated is entitled to be compensated. A landowner must demonstrate that he has suffered special damages which are not common to the general public. 11 E. McQuillin, The Law of Municipal Corporations, § 30.188 (3d ed. 1964). Thus, in *Linning v. Board of County Commissioners of Duval County,* Fla.App. 1st, 1965, 176 So.2d 350, the court held that a person who owned a home about 250 feet away lacked standing to contest the validity of the vacation of a street because he had not shown an injury different in kind and degree from that sustained by other property owners or citizens of the community. *See* 11 E. McQuillin, The Law of Municipal Corporations, §§ 30.192-30.194 (3d ed. 1964). The fact that a person loses his most convenient method of access is not such damage which is different in kind from damages sustained by the community at large where his property has suitable access from another street even though the alternate route is longer. *Bozeman v. City of St. Petersburg,* 1917, 74 Fla. 336, 76 So. 894; *Halpert v. Udall,* S.D.Fla.1964, 231 F.Supp. 574. *Cf. Daugherty v. Latham,* 1937, 128 Fla. 271, 174 So. 417.

Id. at 8-9. The court held the evidence sufficient to support the conclusion that the Austins had suffered a sufficient impairment of their right of access which was to be different in kind from the public at large. The court noted, however, that the existence of the other means of access could have the effect of reducing the amount of the Austins' recovery. *Cf. City of Port St. Lucie v. Parks,* 452 So.2d 1089, 1090-91 (Fla. 4th DCA) ("Diminishment in the quality of access ... means an actual impairment which results in some deprivation to the property, but does not include mere inconvenience."), *review denied,* 459 So.2d 1041 (Fla.1984).

[1] **[2]** **[3]** **[4]** **[5]** **[6]** Several principles emerge from an analysis of these and other cases.[*] There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary

that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. The extent of the access which remains after a taking is properly considered in determining the amount of the compensation. In any event, the damages which are recoverable are limited to the reduction in the value of the property which was caused by the loss of access. Business ***850** damages continue to be controlled by section 73.071, Florida Statutes (1987).

[7] Applying these principles to the instant case, we conclude that the district court of appeal properly permitted the respondents to recover damages for their loss of access to Palmetto Park Road. The respondents lost more than their most convenient means of access. The evidence supports the conclusion that there was a substantial loss of access. As stated by the court below:

> They have shown that the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property. The wall will also block visibility of the commercial storefront from Palmetto Park Road.

518 So.2d at 972.

We note that the district court of appeal held that it was a question of fact as to whether the walling off of the respondents' commercial property and circuitous alternative to reach it amounted to more than inconvenience. Actually, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon the facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

As related to the facts of this case, we answer the certified question in the affirmative. We approve the decision of the district court of appeal.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT and KOGAN, JJ., concur.

All Citations

538 So.2d 846, 14 Fla. L. Weekly 66

Footnotes

* We acknowledge that some of the cases we have considered involved a partial taking of land as well as the destruction of access. However, because Florida recognizes that the destruction of the right of access is compensable even where land is not taken, we believe the reasoning of those cases may be appropriately considered in our analysis.

ATTACHMENT 2

190 So.2d 598
District Court of Appeal of Florida, First District.

STATE ROAD DEPARTMENT of Florida, a State Agency, Appellant,
v.
H. B. LEWIS and D. M. Lewis, Co-partners, d/b/a M G. Lewis & Sons Garage, and Florida Reduction Corporation, a Florida corporation, Appellee.

No. G-525.
|
Sept. 6, 1966.
|
Rehearing Denied Oct. 18, 1966.

Inverse condemnation action to recover compensation for land taken and damaged by state road department in building viaduct and making road improvements. From a judgment of the Circuit Court for Gulf County, W. L. Fitzpatrick, J., in favor of property owners, the state road department appealed. The District Court of Appeal, Rawls, C.J., held, inter jalia, that, though requiring road department to institute eminent domain action might have been better practice, transferring inverse condemnation action to law side of court for jury trial to determine amount of compensation due property owners was ont error of which road department could complain on appeal, where department had participated without objection in such proceedings.

Affirmed.

Attorneys and Law Firms

***599** P. A. Pacyna, Tallahassee, for appellant.

Cecil G. Costin, Jr., Port St. Joe, and Benjamin H. Dickens, Tallahassee, for appellee.

RAWLS, Chief Judge.

The lengthy judicial history preceding this appeal is reported in 79 So.2d 699 (Fla.1955), 95 So.2d 248 (Fla.1957), cert. den. 355 U.S. 907, 78 S.Ct. 334., 2 L.Ed.2d 261, 156 So.2d 862 (1963), and 170 So.2d 817 (1964). Here, it is sufficient to state that the Lewises instituted this inverse condemnation suit in 1960 seeking compensation for damages caused by the State Road Department while building a viaduct and making certain road improvements partly on property belonging to the Lewises and being used by them as a garage for the sale and service of new and used cars. The trial judge decreed that there had been a taking and transferred the cause to the law side of the court for a determination of the amount of the damages and the value of the property taken. This decree was affirmed though modified as to the extent of the taking by both this court (156 So.2d 862) and by the Supreme Court (170 So.2d 817). On remand the cause was transferred to the law side of the court where it advanced through the pretrial stages, a jury trial, and culminated in a judgment for the Lewises. From this judgment the Road Department has again appealed, arguing seven points.

[1] The Road Department in its first point questions the type of proceeding had in this cause. It contends that since the complaint was in the nature of an inverse condemnation action, the chancellor should have mentered a final decree, requiring the Road Department to institute an eminent domain proceeding at law. There is no doubt that such might be the better practice, however, the procedure utilized here-that is the transfer to the law side of the court for a jury trial on the question of damages-does have some foundation in our ***600** case law,[1] did not mislead either party, and was not questioned by the Road Department at any prior stage. On the contrary the record discloses participation in and acceptance by the Road Department in all stages of the trial. The Department apparently elected to defend this action rather than file its petition in eminent domain. Technically, the procedural aspect of this cause may have been subject to challenge at the outset of the trial, but from a practical standpoint the route followed was a most expeditious one fully protecting the rights of the parties.

[2] Next the Department questions the propriety of the allowance of attorney's fees in an inverse condemnation case. We summarily dispose of this contention by observing that the sovereign without due process confiscated property belonging to one of its citizens. Viewing the Department's argument to a logical conclusion, we find its position to be that if it complies with the law of this state by instituting an eminent domain action, it is liable for attorney's fees; but if it unlawfully appropriates a citizen's property without instituting such an action, it thus escapes liability for the attorney's fees incurred by the aggrieved owner. The

absurdity of this argument disposes of this point contra to the Department's contention.

[3] The Road Department argues that interest on the value of the property taken should only be allowed from date of judgment. We concur with the trial court's finding that the Road Department is liable by law for interest from the time of taking, [2] an the time of taking was estabished by the stipulation of the parties as being September 1, 1956.

[4] Finally, the Road Department questions the amount allowed by the trial judge for attorney's fees for appellee's attorneys in this cause. The amount is rather substantial; however, we do not find it excessive considering the many years of extensive litigation required for appellees to judicially establish their rights which were transgressed by the sovereign.

We have carefully considered the other points urged by appellant and find that they are without merit. Therefore, the judgment appealed is

Affirmed.

WIGGINTON and CARROLL, DONALD, K., JJ., concur.

ON PETITION FOR REHEARING

RAWLS, Chief Judge.

By petition for rehearing, Appellee Lewis urges this Court to clarify its opinion filed September 6, 1966, wherein after considering the type proceeding held, we stated, '* * * the route followed was a most expeditious one fully protecting the rights of the parties.' Lewis points out that the trial court in its initial final decree provided in part, 'That this cause is hereby transferred to the law side of the court for eminent domain proceedings'; that the two volumes of testimony in this cause were styled as follows: 'State Road Department of Florida, a State Agency, Petitioner, v. H. B. Lewis and D. M. Lewis, Co-Partners, d/b/a M. G. Lewis & Sons Garage, and Florida Reduction Corporation, a Florida Corporation, Defendants'; and that the court in instructing the jury at the beginning of the trial of the eminent domain case stated:

> 'This is a condemnation case, and for the purpose of clarity, the State Road Department will be-is the Petitioner, and it is alleged that they're taking certain ***601** land of the Defendants, H. B. Lewis and D. M. Lewis, doing business as M. G. Lewis and Sons Garage. The defendants, Lewis, will be referred to simply as 'defendants-wherever that word is used, it means H. B. Lewis and D. M. Lewis, Co-partners, doing business as Lewis and Sons Garage. The State Road Department is actually the Petitioner, will probably be referred to exclusively in this trial as 'The State'-wherever 'The State' is referred to in any way, it means the State Road Department of Florida, the Petitioner in this case.'

Lewis further notes that the record discloses a notice sent by the State Road Department to Lewis State Bank, an intervenor, advising:

> 'You are hereby notified that the following described property situate in Gulf County, Florida, is the subject of an eminent domain proceeding presently pending in the Circuit Court, Fourteenth Judicial Circuit of Florida, in and for Gulf County.'

In short, the petition for rehearing by reference to various excerpts in this cause points out that an eminent domain trial was had in this cause and that same was recognized as such by the State Road Department at all stages of the proceedings.

In our prior opinion we stated, 'The Department apparently elected to defend this action rather than file its petition in eminent domain.' By such statement we did not intend to convey the meaning that the Road Department did not take affirmative action.

What happened in this cause is that Lewis filed its complaint in inverse condemnation. We do not find in the record a formal eminent domain petition filed on behalf of the State Road Department. However, from the

time of the transfer of the case to the law side of the court, the record is replete with references to the Road Department as being the Petitioner an the Lewises as being the Defendants. There is no doubt from a perusal of this record that all of the parties considered the trial of this cause before the jury as a proceeding in eminent domain brought on behalf of the Road Department and defended by the Lewises; and upon completion thereof, the action of the jury was then incorporated in the initial proceedings filed by the Lewises against the Road Department.

As clarified by the foregoing observations, the prior opinion of this Court is adhered to in every respect.

CARROLL, DONALD K., and WIGGINTON, JJ., concur.

All Citations

190 So.2d 598

Footnotes

1 See State Road Department v. Darby, 109 So.2d 591 (Fla.App.1st, 1959), and State Road Department v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941).

2 Section 74.061, Florida Statutes, F.S.A.

ATTACHMENT 3

333 So.2d 56
District Court of Appeal of Florida, First District.

Reubin O'D. ASKEW, Governor of
the State of Florida, et al., Appellants,
v.
GABLES-BY-THE-SEA, INC., a
Florida corporation, Appellee.

No. Z-92.
|
June 3, 1976.

In continuing litigation, plaintiff, corporate owner of submerged lands purchased from state, sought mandatory injunction requiring defendants, state agencies and officials, to institute condemnation proceedings, and damages or compensatory fine against defendants for having joined in effort to procure from corps of engineers denial of plaintiff's dredge and fill permit. The Circuit Court, Leon County, Ben C. Willis, J., granted partial summary judgment in favor of plaintiff, and defendants appealed. The District Court of Appeal held that defendants had permanently denied to plaintiff use of its land and thus plaintiff was entitled to mandatory injunction requiring that defendants institute condemnation proceedings; that plaintiff was not entitled to recover damages; and that right to just compensation through eminent domain proceedings was only relief to which plaintiff was entitled.

Affirmed.

Attorneys and Law Firms

***57** Ross A. McVoy, Dept. of Environmental Regulation, Tallahassee, Robert L. Shevin, Atty. Gen., and Kenneth F. Hoffman, Asst. Atty. Gen., for appellants.

Marion E. Sibley of Sibley, Giblin, Levenson & Ward, Miami Beach, for appellee.

Opinion

PER CURIAM.

This controversy between appellee and the State has suffered an extensive judicial journey. In entering the partial summary judgment in favor of appellee, Gables-By-The-Sea, Inc., the learned trial judge traced the trials and tribulations that appellee has suffered for more than a decade by the actions of the sovereign. We adopt as this court's opinion the trial court's Partial Summary Judgment, viz.

'. . . The Court has examined the pleadings of the parties and the depositions and exhibits attached of Bernard Barnes of the Department of Pollution Control; Harmon W. Shields, Executive Director of the Florida Department of Natural Resources; Joseph W. Lander, Jr., of the Florida Board of Trustees of the Internal Improvement Trust Fund; Dr. O. E. Frye, Jr., Executive Director of the Department of Game and Fresh Water Fish Commission; and Bernard E. Goods, Chief of the Regulatory Branch of the U.S. Corps of Engineers, Jacksonville District. The Court has also considered the final judgment rendered in this cause on the 10th day of September, 1970; the supplemental final judgment rendered in this cause on January 21, 1972; and the opinions and judgments in this cause rendered by the District Court of Appeal of Florida, First District; namely, Kirk, Governor of State of Florida et al. v. Gables By The Sea, Inc., 251 So.2d 880, and Askew, Governor of State of Florida et al. v. Gables By The Sea, Inc., 258 So.2d 822. Based thereon the Court finds that:

'1. In the Judgment of this Court on the 10th day of September, 1970, it was finally adjudicated: (Defendants are appellants here and Plaintiff is appellee.)
'On January 6, 1936, plaintiff acquired by purchase from the Trustees of the Internal Improvement Fund a substantial tract of bottoms in Biscayne Bay and within the City of Coral Gables. This tract extended seaward to the then established bulkhead line.

'Some time after the purchase of these bottoms, the bulkhead line was reestablished some distance seaward from its previous location.

'In 1956 plaintiff began to seek the necessary permits to dredge from the adjacent public bottoms and fill its land. Under date of May 17, 1956, the Trustees agreed to the issuance by the U.S. Corps of Engineers of a permit for this dredging. Everyone concerned seems to have regarded this as, at least, a license to plaintiff to remove the fill from the public bottoms.

'During 1957 plaintiff sought to acquire by purchase from the Trustees a parcel of bottoms consisting of the area between the bulkhead line as it had previously existed and the new builkhead line which had been established somewhat seaward from the old line.

'Plaintiff filed a formal application with the Trustees, accompanied by a map which indicated the bottoms to be acquired, the areas to be filled and areas from ***58** which the proposed fill was to be dredged. This map clearly indicates that the area to be filled embraced the parcel previously acquired and the proposed new acquisition.

'Under date of September 25, 1967, in the light of this background plaintiff purchased and paid for the second parcel of bottoms-that lying between the old and the new bulkhead lines.

'. . . prior to October 18, 1965 the City of Coral Gables approved a fill permit to plaintiff and on November 2, 1965, this permit was formally approved by the Trustees. It is also admitted that this permit was extended until December 31, 1968.

'The extension of the fill permit took the form of an approval by the Trustees of an extension of a permit issued by the Corps of Engineers.

'On May 21, 1968, the Trustees adopted a resolution prohibiting any person from thereafter dredging pursuant to any preexisting permit unless dredging operations had already commenced. Plaintiff respected this resolution and, not having begun dredging, did not thereafter attempt to dredge under its permit.'

In that judgment it was adjudicated:
'1. The right of plaintiff under the circumstances of this case to dredge fill material from public bottoms to fill the submerged land purchased from the Trustees was an incident to the purchase of submerged land and became a vested right.

'2. This right did not extend in perpetuam and would be lost if not exercised within a reasonable time.

'3. A reasonable time does not extend beyond the expiration date of the last extension granted by the Trustees.

'4. The granting of dredge and fill permits by the Trustees served to perpetuate the rights of plaintiff for the life of such permits.

'5. The action of the Trustees in attempting to abrogate an extension of a fill permit previously granted was without lawful authority, and void.

'6. Plaintiff should not be penalized for obeying the demands of the highest officers of the State and respecting the order not to dredge.

'7. Plaintiff is entitled to dredge from the designated areas under the terms and conditions of its permit in effect on May 21, 1968, for a number of days after this judgment becomes final, and the time for appeal expires, equal to the number of days from the adoption of the above-described resolution of the Trustees to December 31, 1968.

'If such filling would injure the aquatic life of the vicinity to such an extent as to adversely affect the public interest, the State has the power of eminent domain to take, for just compensation, the plaintiff's property. But the State cannot, after selling submerged land to private owners, deny such owners the right to use those lands in the only way in which private ownership can be of any value.'

And the Court found:

> 'The plaintiff has the lawful right to dredge material from the areas indicated on the application for a dredge and fill permit and to use such material to fill its privately owned submerged land indicated on such application for a period of time consisting of 223 days beginning on the day this judgment becomes final by the expiration of the time of appeal, or the filing of the mandate of an Appellate Court affirming this judgment, whichever is the later date.'

***59** '2. The permit granted by the U.S. Army Corps of Engineers which permitted the Plaintiff to dredge and fill the land involved was not revoked and remained outstanding and valid until the date of its expiration on December 31, 1968. The Defendants, by the revocation of

the state permit, were the direct cause of the expiration of the federal permit, and thus, prevented the Plaintiff from dredging and filling its property pursuant to said federal permit.

'3. In the supplemental judgment rendered on the 16th day of February, 1972, upon the prior issuance of the Rule Nisi directed to the Board of Air and Water Pollution Control, Department of Air and Water Pollution Control for the State of Florida, it was found that:
'In the last analysis the issues involved are between the plaintiff on the one hand and the State of Florida, acting through its agencies, on the other. Though the Trustees of the Internal Improvement Fund and the Board of Air and Water Pollution Control and the Department of Air and Water Pollution Control are separate and distinct agencies of the State, they are nevertheless mere agencies of the State and the question before this Court is not whether the actions of one may be the actions of another but whether or not the State is bound by the results of litigation involving one of such agencies.'

'4. In an effort to overturn this adjudication the Board of Air and Water Pollution Control of the Department of Air and Water Pollution Control took an appeal to the District Court of Appeal of Florida, First District, and the District Court of Appeal of Florida, First District, held:
'It is the conclusion of this Court that the appeal herein is dilatory in nature, is sought by appellants for the sole purpose of further frustrating and delaying compliance with the mandate of this Court and the final judgment of the trial court, is frivolous, and not taken in good faith. This Court does hereby conclude that the final judgment entered by the trial court is an appropriate order rendered in strict compliance with the mandate of this Court.'

'5. The Plaintiff, through the due course of law, was not able to procure the issuance of a permit from the Defendants until June 19, 1972. This permit granted to the Plaintiff a 223-day period to dredge and fill its land from the date of the issuance of an extension to the U.S. Corps of Engineers' permit, which had expired, as above pointed out.

'6. On May 30, 1972, the Corps of Engineers had advised the Plaintiff: . . .

'Since the Department of the Army permit for this work expired 31 December 1968 no further work should be performed until the permit has been revived and extended.'

Pursuant to this notification the Plaintiff on July 28, 1972, filed its application for a revival and extension of the permit. Attached to the application was the permit issued by the Board of Trustees of the Internal Improvement Trust Fund, and the application filed by the Plaintiff with the Corps of Engineers provided: . . .

> 'Dredging must be completed within a period of 223 days after issuance of final Corps of Engineers permit in accordance with Florida Internal Improvement Fund Permit.'

'7. The Corps of Engineers on August 17, 1972, sent out notice to state agencies and other persons advising of the application made by the plaintiff for the extension of its permit for the said 223-day period, and requested comments for approval or objections to the issuance of the extension. On August 23, 1972, a report was made to the Director of the Board of Trustees of the Internal Improvement Trust Fund received by that Director on August ***60** 28, 1972, from the divisions controlled by the Defendants; namely, the Division of Interior Resources, the Bureau of Beaches and Shores and Survey and Management Section of the Department of Natural Resources in which these divisions make the following comment: . . .
'This is in response to your request for comments relative to the above-captioned Corps of Engineers notice.

'The Division of Interior Resources does object to the issuance of the referenced item. . . .

'The Bureau of Beaches and Shores does not object to the issuance of the referenced item.

'The Survey and Management Section objects to the issuance of the referenced item. . . .'

'8. The Trustees of the Internal Improvement Trust Fund on September 12, 1972, through their Executive Director, advised the Corps that it would be inappropriate for the

Trustees to comment 'inasmuch as we are under a court order to grant a permit.' . . . However, the Trustees attached to their letter a report made to the Trustees on August 30, 1972, from the Department of Natural Resources, above referred to, together with the attached comments of said division of said department, one of which was a letter of August 6, 1969, from the then Florida Board of Conservation, now the Department of Natural Resources, in which the marine biologist from said Board of Conservation makes findings of the damage and injury that will occur to the environment and to the ecology if the dredge and fill permit is granted and in which its Chief of Survey and Management states: . . .
'This massive dredge and fill project will have definite and permanent adverse effects on marine biological resources.'

Also attached to said letter of the Trustees to the Corps was the attached report of the Department of Natural Resources, the Division of Interior Resources, in which that department finds 'that the construction, if permitted, would dredge an area and open that ares (sic) to intrusion by sea-water almost to the saltwater intrusion line.' It also finds that the aquifer will be damaged 'through the misuse of land and resources available.' . . .

'9. The Florida Game and Fresh Water Fish Commission filed a vigorous protest with the Corps to the extension of Plaintiff's permit. In said protest the said commission contended that the extension of the dredge and fill permit would cause serious injury and damage to the ecology and environment and ecosystem.

'10. The Pollution Board did not itself file a protest, however, a member of the Pollution Control Board, James F. Redford, Jr., in the name of the Izaak Walton League, did protest. In this protest he pointed out that the Court had ordered a certification by the Florida Pollution Control Board without affording the department an opportunity to study the project. He further stated: . . .
'If the Corps should deny such a hearing and issue a permit to Gables-By-The-Sea, I can assure you of a lawsuit against the Corps of Engineers by the Izaak Walton League, Tropical Audubon Society, Florida Audubon Society, Sierra Club, and by property owners in the subdivision involved.'

He refers to 'the Strange and Convoluted history of this project.' The Attorney General advised Redford in connection with the application before the Corps of Engineers as follows: . . .

> 'Although I will prepare a more extensive memorandum for the Board's consideration, it is my initial feeling that in view of the past court orders in this case, it would be best for the board not to attempt ***61** to interfere with the certification by a declaratory action in federal court. I think the matter would best be solved by a private plaintiff or by the Corps' own analysis of the project.'

'11. David B. Harris of the Environmental Protection Section of the Florida Game and Fresh Water Fish Commission (See s 20.25(17), F.S.), September 11, 1972, advised the property owners engaged in protesting the issuance of the Corps' permit as follows: . . .
'To bring pressure on the 'Corps' I would recommend that you start a massive letter writing campaign to the District Engineer. This tactic has proved very successful in the past and I believe it would be effective in this case.'

The Corps of Engineers on November 22, 1972, sought permission to deny the application, and, thereafter, on January 18, 1973, denied said application, giving as its reasons that it is not consistent with current public interest, would destroy a biologically productive area, and was opposed by federal agencies, 'the State of Florida Game and Fresh Water Fish Commission and Department of Natural Resources, the Dade County Planning Department, and was the subject of over 500 letters of opposition from the general public.' . . .

'12. The motion for summary judgment presents two issues. First, whether the Plaintiff is entitled to a mandatory injunction requiring the Defendants to institute condemnation proceedings. Second, whether the Court can award damages or a compensatory fine against the Defendants for having joined in the effort to procure from the Corps of Engineers a denial of this permit. Turning first to the question of whether or not the Plaintiff is entitled to a mandatory injunction, this Court has found in the final judgment rendered on the 10th day of September, 1970, the state cannot 'after selling submerged land to private owners deny such owners the right to use

those lands in the only way in which private ownership can be of any value.' The Court has also held that the action of the Trustees in revoking the permit thus denying the Plaintiff the right to use its land in the only way in which private ownership can be of any value rendered the land totally useless so far as the Plaintiff, as a private owner, is concerned. This unlawful revocation of the Plaintiff's permit ultimately resulted in the denial to the Plaintiff of the right to use its land for private purposes. The unlawful action of the Defendants caused the valid permit issued to the Plaintiff by the Corps of Engineers to expire. The long delay due to the Defendant's (sic) determination to deny the Plaintiff the use of its land by utilizing every court process to delay the granting of a permit not only caused the loss by expiration of the Army permit but surely was a contributing factor in the Corps' refusal to grant an extension, for there is no contention that the permit granted by the Corps in 1965, which did not expire until December 31, 1968, would have caused any different, supposed ecological injury than it is now contended would be suffered through the extension of the said permit for 223 days.

' **[1]** The Court concludes that the Defendants have permanently denied to the Plaintiff the use of its land and the Plaintiff is entitled to a judgment requiring the Defendants to institute condemnation proceedings in Dade County, Florida, pursuant to the provisions of law governing such actions.

'The Court finds from the pleadings, depositions, and admissions, all on file, together with the affidavits of the parties, that there is no genuine issue as to any material fact, and the Plaintiff is entitled to a judgment as a matter of law on the issue and prayer for the rendition of a mandatory injunction against the Defendants requiring the Defendants to institute and maintain condemnation proceedings against the property of the Plaintiff shown ***62** and described in the permit granted by the Defendants on June 19, 1972.

' **[2]** 13. Turning to the issues of whether or not damages should be awarded to Plaintiff for costs and expenses to which it has been put due to the actions of the state agencies and officials involved, the Court deems that no such right has been established and, even if it had, the extent of the alleged damages have not been shown. The right to just compensation through eminent domain proceedings is the only relief to which the plaintiffs are entitled.

'It is thereupon,

'CONSIDERED, ORDERED AND ADJUDGED:

'A. A mandatory permanent injunction is hereby granted against the Defendants, the Board of Trustees of the Internal Improvement Trust Fund, enjoining requiring and commanding the said state agency to forthwith institute condemnation proceedings in Dade County, Florida condemning, pursuant to the applicable statutes, the Plaintiff's property involved in this litigation, for which it shall in said condemnation proceedings pay such just compensation as may be awarded together with reasonable attorneys fees as may be allowed to the Plaintiff's attorneys in said condemnation proceedings, as is provided by law.

'B. Summary judgment is denied on the claim for assessment of damages for costs and expenses.

'C. Jurisdiction is reversed to enforce the injunction herein granted. . . .'

AFFIRMED.

RAWLS, Acting C.J., and McCORD and MILLS, JJ., concur.

All Citations

333 So.2d 56