CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Injunctive Relief

DiChristopher v. Board of County Commissioners,
908 So. 2d 492 (Fla. 5th Dist. App. 2005)

Injunctive relief is not available to a plaintiff who has a cognizable inverse condemnation claim. The fact that prevailing on the claim is difficult or improbable is irrelevant. As long as there is a possibility of prevailing and there is an adequate remedy at law available, injunctive relief is not appropriate.

FACTS AND PROCEDURAL HISTORY

Michael DiChristopher owned two parcels of land in Brevard County. The parcels were part of 1,200 acres that the Brevard County Mosquito Control District had been flooding each year since 1958 to help control mosquitoes. Although he initially consented to the flooding, DiChristopher withdrew that consent after his attempts to sell the property to the County did not materialize.

Concluding that he could neither sell his property to the County, nor sell or develop it privately while it was subject to annual flooding, DiChristopher filed a three-count petition against the County. In count one, he sought temporary and permanent injunctions against further flooding. In counts two and three, he sought damages for inverse condemnation and devaluation of the property, respectively. At the hearing before the trial court, the County argued that DiChristopher's inclusion of the inverse condemnation and devaluation claims demonstrated that DiChristopher had an adequate remedy at law, and therefore, injunctive relief was unavailable. DiChristopher argued that he was entitled to plead in the alternative and that doing so should not foreclose his ability to seek an injunction. The trial court agreed with the County and dismissed the first count of the petition. DiChristopher appealed.

ANALYSIS

When seeking injunctive relief, a party

> must establish that: (1) irreparable injury will result if the injunction is not granted; (2) there is no adequate remedy at law; (3) the party has a clear legal right to the requested relief; and (4) public interest will be served by the . . . injunction.

Provident Mgt. Corp. v. City of Treasure Island, 796 So. 2d 481, 485 n. 9 (Fla. 2001). The County argued that injunctive relief was not appropriate because the inverse condemnation claim provided an adequate remedy at law. DiChristopher countered that he was entitled to plead alternative causes of action even if the causes of action were mutually exclusive and that the remedy at law was not adequate because it would be difficult for him to prevail on the inverse condemnation and devaluation claims.

Citing cases from the Fourth District Court of Appeal, as well as from several other states and the United States Supreme Court, the Fifth District Court of Appeal concluded that the inverse condemnation claim provided a possible legal remedy. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *see City of Dania Beach v. Konschnik*, 763 So. 2d 555, 556 (Fla. 4th Dist. App. 2000). Moreover, DiChristopher effectively admitted that possibility when he included that claim in his petition. Because he had a possible remedy at law, injunctive relief was inappropriate. The Fifth District found that it was possible that DiChristopher might succeed on these claims and the mere possibility of prevailing on these claims was sufficient to consider that there was a remedy at law. Improbability or difficulty is not enough to make a legal remedy inadequate. *Hiles v. Auto Bahn Fedn., Inc.*, 498 So. 2d 997, 999 (Fla. 4th. Dist. App. 1986). Therefore, the trial court had not abused its discretion by dismissing his claim for a temporary injunction.

SIGNIFICANCE

Injunctive relief, either temporary or permanent, is an extraordinary remedy. Practitioners seeking injunctions must be careful to allege and prove facts sufficient to meet all four required elements: irreparable harm, the lack of adequate legal remedies, a clear right to an injunction, and that public interest favors granting the injunction. Courts will likely view alternative claims of inverse condemnation as evidence that a legal remedy is available or that harm is not irreparable. Accordingly, practitio-

ners must determine early whether an inverse condemnation claim is possible. If so, even if prevailing on the claim would be extremely difficult, injunctive relief will not likely be available.

RESEARCH REFERENCES

- 42 Am. Jur. 2d *Injunctions* § 24 (2000).
- 29A C.J.S. *Eminent Domain* § 387 (1992 & Supp. 2005).
- 29 Fla. Jur. 2d *Injunctions* § 22 (1998 & Supp. 2006).

William G. Giltinan

Condemnation & Eminent Domain: Inverse Condemnation

Black v. Orange County,
888 So. 2d 156 (Fla. 5th Dist. App. 2004)

When construing the dedication language on a subdivision plat, summary judgment should not be granted when there is a disputable issue of material fact as to the original intent of the language.

FACTS AND PROCEDURAL HISTORY

George Black, along with other landowners in the Blue Ridge Acres Subdivision, owned property abutting Hiawassee Road in Orange County. The subdivision plat, approved in 1977, contained a notation for a "60 FT EASEMENT RESERVED FOR FUTURE ROADWAY WITH 110 SETBACK." *Black*, 888 So. 2d at 156. The plat also contained a dedication block providing that the streets and easements shown on the plat were dedicated to "the perpetual use of the public." *Id.* at 157. In January 2001, the County widened Hiawassee Road and in the process, utilized sixty feet of Black's lot.

Black, along with other landowners, filed suit for inverse condemnation, claiming that the County owed them compensation for taking the sixty feet. The County contended that the sixty-foot area had been reserved as an easement and dedicated to the public via the subdivision plat. Both parties filed motions for summary judgment. The trial court granted the County's motion, finding that the sixty-foot area had been dedicated to the public through the subdivision plat.

ANALYSIS

Summary judgment is appropriate only if there is no genuine issue of material fact. *Volusia County v. Aberdeen*, 760 So. 2d 126, 130 (Fla. 2000). In reversing the trial court, the Fifth District Court of Appeal concluded that a disputable issue of fact existed as to whether the term "reserved" in the plat was intended to create a reversion subject to Chapter 59-1658, Laws of Florida, Section 7(2)(g). The court also found ambiguities in the phrase "reserved for future roadway" and in the relationship between the language that created the easement and the statements included in the dedication clause. Because there were disputable issues of fact as to whether the land is question had been reserved, as opposed to dedicated, to the public, the court held that summary judgment was improper and reversed and remanded the case.

Judge Thompson, in his dissenting opinion, stated that he saw no ambiguities in the language of the plat dedicating the easement. He cited references to the sixty-foot reservation in title insurance documents and boundary surveys as indications that the County already owned the property in question. Because *Aberdeen* requires courts to give effect to the plain meaning of the terms of a document, Judge Thompson opined that the majority should have found that the easement existed and that compensation was not required. *Aberdeen*, 760 So. 2d at 130.

SIGNIFICANCE

This case reaffirms the long-standing rule regarding when summary judgment is proper. Summary judgment should not be granted when a genuine issue of material fact exists. When construing the language included in a dedication block on a plat, a genuine issue of material fact will exist if the intent of the original language is unclear.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Eminent Domain* § 201 (Westlaw database updated Jan. 2006).

Courtney Fish

Condemnation & Eminent Domain: Inverse Condemnation

Osceola County v. Best Diversified, Inc.,
2005 WL 1787438 (Fla. 5th Dist. App. July 29, 2005)

A regulatory taking may occur when a local government denies a property owner all economically feasible use of his land by imposing conditions for which it has no legal authority.

FACTS AND PROCEDURAL HISTORY

In 1992, Best Diversified, Inc., acquired property that had been used as a landfill since the 1960s. The acquisition included the original Florida Department of Environmental Protection (FDEP) permit that authorized use of the property as a construction and demolition debris landfill. The permit was subject to an Osceola County conditional use permit renewal in 1996. Before the renewal date, residents of a nearby subdivision complained of odors allegedly emanating from the landfill. Best Diversified tried unsuccessfully to eliminate the odors. When Best Diversified attempted to renew its county and FDEP permits in 1996, the FDEP found that the operation of the facility constituted a public nuisance and denied Best Diversified's permit request. In 1997, the Osceola County Board of County Commissioners also denied Best Diversified's request for a conditional use permit, rendering the landfill inoperable. The Board then rejected a subsequent application in 1998, after which Best Diversified attempted to dump additional construction debris so that it could grade and slope the property to prepare the landfill for closure. The County considered the activity to be a continued operation of the landfill and refused to allow Best Diversified to proceed. Best Diversified then sought permission from the County to grade and slope the property using clean fill. The County authorized Best Diversified to do so, provided the FDEP approved the proposed closure plan. The FDEP, however, could not approve the closure plan because it did not have the authority to regulate clean fill. Best Diversified then brought suit against the FDEP and the County, claiming damages under the theory of inverse condemnation and under the Bert J. Harris, Jr. Private Property Rights Protection Act. Fla. Stat. § 70.001 (2005).

At trial, the County objected to the plaintiff's introduction of evidence regarding the propriety of the permit rejections because in 1999, Best Diversified filed a "Notice of Acceptance of Agency Action," waiving its right to further challenge the denials through the administrative process, while reserving the right to maintain the pending cause of action. The trial court overruled the objection and allowed Best Diversified to present evidence indicating that the County and FDEP reacted to political pressure to shut the facility down, and that the landfill was never determined to be the cause of the odors. The trial court ruled in favor of Best Diversified, holding that a taking had occurred because the County made it impossible for Best Diversified to make use of the land. A jury awarded Best Diversified $1,415,000 on the inverse condemnation claim.

ANALYSIS

On appeal, the Fifth District Court of Appeal determined that it was error for the trial court to review the propriety of the permit denials because Best Diversified failed to seek appropriate administrative or judicial review. In addition, Best Diversified explicitly accepted the County's and FDEP's determinations by filing a notice of acceptance and was thereby foreclosed from challenging their decisions. The Fifth District then held that Best Diversified was not due compensation based on the denial of the permits because the landfill was the cause of the odors and thus constituted a public nuisance. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 873 (Fla. 2001). But the court ultimately affirmed the ruling in favor of Best Diversified against the County (but not the FDEP) on the question of whether a taking had occurred through the denial of the proposed closure plan.

The court reasoned that Best Diversified was placed in a "catch-22" situation because the County required the landfill be closed pursuant to an FDEP approved plan, but the FDEP could not grant such approval. Thus, the court determined that Best Diversified could neither operate the landfill nor close it lawfully, depriving Best Diversified of the opportunity to put the land to another use and precluding all reasonable economic use of its land. A regulatory taking occurs when local government regulations deny a landowner all economically viable use of his or her

land. *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d Dist. App. 1995). The court held that a taking had occurred because the County's actions precluded Best Diversified from closing the landfill by requiring an FDEP approval that was impossible to receive.

In an opinion concurring in part and dissenting in part, Judge Griffin rejected Best Diversified's contention that it tried to close the landfill lawfully, finding instead that the evidence showed that efforts were merely a thinly veiled attempt to continue to operate. Judge Griffin maintained that the FDEP would not have had to participate in the regulation of clean fill in order to approve a closure plan.

SIGNIFICANCE

This case alerts local governments that, in order to avoid a regulatory taking, its mandates cannot deny landowners all economically feasible use of their property through the imposition of conditions that cannot be met and for which there is no legal basis.

RESEARCH REFERENCE

- Fla. Stat. § 70.001 (2005).

Jay Daigneault

Condemnation & Eminent Domain: Valuation

Blankenship v. Department of Transportation,
890 So. 2d 1130 (Fla. 5th Dist. App. 2005)

In an eminent domain action, all factors impacting the value of the parent parcel should be considered in assessing damages. The potential for flooding on the remainder of the parent parcel, as an incident of taking, is a properly considered consequential damage, even if temporary or speculative in nature.

FACTS AND PROCEDURAL HISTORY

The Florida Department of Transportation (FDOT) acquired a perpetual easement over a portion of Chuck Blankenship's property for the purpose of building a storm water pipeline.

Blankenship contended that construction of the pipeline would periodically cause flooding on the remaining portion of his property. He sought to recover damages for these future injuries, as well as other consequential and severance damages in an eminent domain valuation proceeding.

Prior to trial, FDOT filed a motion in limine regarding Blankenship's speculative flooding claim. FDOT argued that any evidence regarding the potential flooding was speculative and should be excluded from the trial, as it was not ripe for adjudication. FDOT further argued that Blankenship could later bring a claim for inverse condemnation, if and only if, flooding occurred.

The trial court granted FDOT's motion, concluding that compensation stemming from the speculation of future flooding was not recoverable in an eminent domain damages trial. Blankenship argued that the language of the trial court's final judgment would bar him from recovering damages for any future flooding if it ultimately did occur. The court denied Blankenship's motion for rehearing, and this appeal followed.

ANALYSIS

Florida's Constitution requires "full compensation" to a land owner when his property is taken for public use. Fla. Const. art. X, § 6. In determining what constitutes "full compensation," courts must review the individual circumstances surrounding the taking, as there is no single definitive test for assessing full compensation. *Fla. Power & Light Co. v. Jennings*, 518 So. 2d 895, 897 n. 2 (Fla. 1987). FDOT contended that Blankenship could not recover damages for the potential flooding of his land because the issue was speculative and not ripe for adjudication. The Fifth District Court of Appeal rejected this argument, holding that all facts and circumstances that had an impact on Blankenship's property were to be taken into account.

In reversing and remanding the case, the court relied on *Poe v. State Road Department*, noting that historically it has been recognized that damages stemming from the "obstructing, diverting, or increasing the flow of surface waters, but which do not amount to permanent deprivation" of use of the property are consequential damages of the taking and are appropriately recovered in the eminent domain proceeding. 127 So. 2d 898, 901 (Fla. 1st Dist. App. 1961). As a result, Blankenship's "full compensation" would

include damages for potential flooding of his land that was a direct consequence of the taking of the land for public use.

Furthermore, the Fifth District rejected FDOT's argument that Blankenship's damages for potential flooding were more appropriately recovered in an inverse condemnation proceeding rather than an eminent domain valuation proceeding. The court noted that inverse condemnation may have been appropriate if this case had not involved a physical taking.

SIGNIFICANCE

Blankenship is significant because it clarifies that the definition of "full compensation" includes *all* damages to the parent parcel stemming from the taking, and is not limited to damages that have already occurred.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 55 (2004).
- Fla. Const. art. X, § 6.

Phillip J. Harris

Condemnation & Eminent Domain: Valuation

Savage v. Palm Beach County,
912 So. 2d 48 (Fla. 4th Dist. App. 2005)

In a condemnation case, the jury should be able to hear testimony from the property owner's appraisers and engineering experts regarding "condemnation blight" and its impact on the value of the property. The court may limit expert testimony to the extent that it is inappropriate, but should not exclude the testimony altogether. It is ultimately the jury's responsibility to assign the appropriate weight to the expert testimony.

FACTS AND PROCEDURAL HISTORY

Marvin Savage owned property in the Indian Trails Improvement District in Palm Beach County. The property was located on a 1,760 acre tract of land, known as Zone 11, that was subdivided in the early 1970s. The area was vulnerable to periodic flooding, which prevented residential development of the

property. In 1996, the County instituted a buy-back program to acquire lots in Zone 11 from willing sellers in anticipation of a canal construction project. From 1996 through 2003, the County acquired approximately 100 parcels under this program at a cost of $4,000 to $6,000 per acre. During this same time-frame, a private developer purchased property in the area for mitigation purposes at a significantly higher price.

In 2000, the County authorized the use of eminent domain to acquire the remainder of the land in Zone 11. The County began condemnation proceedings against Savage and other property owners in the area two years later. Savage and the other owners hired two engineers and two appraisers to analyze the value of their properties. The engineers were prepared to testify that the actions of the County, as well as other state and federal agencies, created conditions adverse to development. One engineer proffered testimony that "the very agencies needed to get the permit [from] wanted it to be used as a wildlife corridor," and therefore, those same agencies refused to issue permits for development. *Savage*, 912 So. 2d at 50. The engineers concluded that the coordinated efforts of the local, state, and federal agencies resulted in "condemnation blight," thereby reducing property values in the area. The appraisers were prepared to testify as to the value of the land if it were developed and put to its highest and best use.

At trial, the court excluded the testimony of the property owners' engineers. The trial court reasoned that admitting the engineers' opinions would force the County to defend permitting decisions of other state and federal agencies. Because the engineers' testimony was excluded, the property owners' appraisers could not base their valuations on the assumptions in the engineers' opinions. Ultimately, the jury determined the value of the property in the area to be $6,000 per acre, consistent with the testimony of the County's expert, and significantly lower than the $41,500 per acre that Savage's experts had assigned to the property. The property owners appealed.

ANALYSIS

On appeal, the property owners argued that the trial court erred in excluding the engineers' expert opinions and essentially negating the appraisers' opinions. The County argued that the engineers' allegations of collusion among the local, state, and fed-

eral agencies amounted to nothing more than a conspiracy theory, and therefore, the appraisers' valuations were flawed.

The Fourth District Court of Appeal agreed that allegations of government conspiracies were misplaced, but concluded that the trial court could have limited the experts' opinion without excluding them altogether. The court recognized that the threat of condemnation alone could prevent a property owner from attaining the highest and best use for his or her property. *St. Rd. Dept. v. Chicone*, 158 So. 2d 753, 756 (Fla. 1963). It would not be fair to compensate an owner based on the limited use of his or her property resulting from the threat of condemnation. *Id.* Further, however, the government should not benefit from depressed property values that it had a hand in creating. *Dept. of Transp. v. Gefen*, 636 So. 2d 1345, 1346 (Fla. 1994). The Fourth District reasoned that the engineers could testify as to the possible causes and effects of this "condemnation blight" without referring to collusion and conspiracy.

With regard to the appraisers' opinions, the court relied on the holding in *Florida Department of Transportation v. Armadillo Partners, Inc.*, 849 So. 2d 279 (Fla. 2003). In condemnation cases, an appraiser may be impeached or have the weight of his opinion reduced for failing to consider all relevant factors. *Armadillo Partners*, 849 So. 2d at 287–288. Failure to consider all relevant factors, however, should not cause the appraiser's opinion to be completely excluded. *Id.* The Fourth District held that the jury should have been able to hear the appraisers' expert opinions and assign them the appropriate weight, reasoning that if the underlying assumptions in the appraisers' valuations were weak, the jury was free to consider such weakness when calculating an appropriate award for the property owners.

SIGNIFICANCE

Savage extends the holding from *Armadillo Partners* to include not only an appraiser's expert opinion, but also the engineer's opinion on which the appraiser's valuation was based.

RESEARCH REFERENCES

- 24A Fla. Jur. 2d *Evidence and Witnesses* § 1130 (2005).

- Justin Smith, Student Author, *Expert Testimony in Eminent Domain Proceedings: Oh* Frye, *Where Art Thou?* 56 Fla. L. Rev. 831 (2004).

Shannon A. Treadway

Condemnation & Eminent Domain: Valuation

State of Florida, Department of Transportation v. Tire Centers, LLC,
895 So. 2d 1110 (Fla. 4th Dist. App. 2005)

The duty to mitigate business damages in an eminent domain case does not extend beyond the remainder of the parent tract.

FACTS AND PROCEDURAL HISTORY

Through its power of eminent domain, the Florida Department of Transportation (FDOT) executed a partial taking of property owned by Tire Centers, LLC in Palm Beach County. The Tire Centers building was demolished as a result of the taking, and Tire Centers relocated to a nearby tract. Although FDOT and Tire Centers agreed on what the appropriate damages would have been had the property been taken as a whole, they disagreed as to the amount of the business damages. FDOT's position was that because Tire Centers had relocated so closely to its original business, part of Tire Center's business damages were mitigated. Tire Centers moved to exclude evidence of mitigation of its business damages. The trial court ruled in favor of Tire Centers and FDOT appealed.

ANALYSIS

Business damages are specifically addressed in the statute governing eminent domain and are intended to compensate business owners for the intangible value that is lost when a property is taken. Fla. Stat. § 73.071(3)(b) (2003).

In adopting Florida Statutes Section 73.071(3)(b), the Legislature acknowledged that a business location is an asset that may not be fully captured in the constitutionally required full compensation for eminent domain takings. And, while business damages

are permitted, business owners are required to reasonably mitigate business damages.

FDOT contended that because Tire Centers was able to relocate just a short distance from its original location, any loss of the goodwill it had established at the taken property had been mitigated by the close proximity of its new site. Tire Centers argued that in assessing business damages, the court could not look outside the "parent tract" for the application of mitigating factors. The Fourth District Court of Appeal looked to a Second District Court of Appeal decision, *Mulkey v. Division of Administration, State of Florida, Department of Transportation*, 448 So. 2d 1062 (Fla. 2d Dist. App. 1984). In *Mulkey*, a convenience store lost five of its eight parking spaces in a condemnation proceeding. *Id.* at 1064. The *Mulkey* court refused to allow FDOT to consider moving the store's parking to an adjacent vacant lot as mitigation of damages. *Id.* at 1067. Because the law of eminent domain is concerned with the property that has been taken, the assessment of business damages should involve the property taken and not unrelated parcels. *Id.* In *Tire Centers*, the Fourth District noted that if the Legislature had wanted to include off-site mitigation as a factor in determining business damages, it could have included such language in the statute. Finding that the trial court was correct in excluding off-site mitigation in the assessment of business damages, the Fourth District affirmed the trial court's decision.

SIGNIFICANCE

This case confirms that governments will have to compensate business owners for the intangible value of their property in eminent domain proceedings, including the location of the property taken. Business owners are required to reasonably mitigate their damages, but that duty does not extend to areas outside of the property taken.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* §§ 101, 106 (2005).
- Paul D. Bain, *1999 Amendments to Florida's Eminent Domain Statutes*, 73 Fla. B.J. 68 (Nov. 1999).

Sandy Phillips
Nicole Guillet