CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Attorney Fees

***Barco v. School Board of Pinellas County*,**
975 So. 2d 1116 (Fla. 2008)

Motions to recover costs are timely under Florida Rule of Civil Procedure 1.525 if filed prior to or within thirty days of entry of final judgment.

FACTS AND PROCEDURAL HISTORY

Paul Barco (Barco) owned property that was the subject of an eminent domain proceeding. The School Board of Pinellas County (School Board) needed the property for expansion of an elementary school. The parties resolved the issue of compensation for the property in mediation, and the court retained jurisdiction to resolve attorney's fees and costs. Barco then filed a motion to enforce the settlement and a request for attorneys' fees and costs. At a hearing, the court granted the motion and then entered a final judgment with respect to the entire eminent domain case. Barco then filed a motion to tax costs related to the litigation more than three months after the filing of the judgment. The motion was granted, but the School Board objected to the award on the grounds that the motion was served more than thirty days after the judgment. Barco countered by stating that his original motion for costs was filed and served twenty-three days before the final judgment. The School Board contended that the motion was not timely because it was filed before the judgment rather than within the thirty days after entry of final judgment. The trial court agreed, following Second District precedent that Florida Rule of Civil Procedure 1.525 creates a bright-line rule that the motion for fees and costs must be served within thirty days after the judgment, not before it. Barco appealed to the Second District Court of Appeal which adhered to its rule and certified conflict with all other districts to the Florida Supreme Court.

ANALYSIS

Florida Rule of Civil Procedure 1.525 provides that a party seeking to recover costs must file a motion within thirty days af-

ter the judgment is filed. The Florida Supreme Court had to decide whether the Rule establishes only the latest time at which the motion may be served or whether it establishes a narrow thirty-day window which prohibits motions to recover costs from being filed before entry of judgment. The First, Third, Fourth, and Fifth Districts each have held that motions filed before entry of judgment are timely according to an interpretation of the intent of the rule. However, the Second District had ruled that motions filed before the thirty-day window are not timely. Accordingly, the Florida Supreme Court noted that the dispositive issue was whether the word "within" was intended to exclude motions for costs that precede entries of judgment. The Court concluded that "within" frequently means not beyond or not later than, but it does include any time before. Accordingly, motions for costs filed prior entry of judgment satisfy Rule 1.525's timeliness requirement. Further, the purpose of the Rule was to replace the "reasonable time" language of the Rule. The Court further explained that "there is no indication that the purpose of the Rule was to establish a narrow window to begin only after filing of the judgment." *Barco*, 975 So. 2d at 1123. Therefore, Rule 1.525 requires only that the motion be served no later than thirty days following the judgment and is not intended to prohibit pre-judgment motions to recover costs. Barco's motion was timely, the Second District's ruling was reversed, and the conflict was resolved.

SIGNIFICANCE

Barco clarifies a procedural rule that allows a more flexible approach concerning motions for costs and fees, instead of a narrow interpretation of the rule. The motion can be served before the judgment or after the judgment, but no later than thirty days after the judgment is filed.

RESEARCH REFERENCE

- 12 Fla. Jur. 2d *Costs* §§ 136, 139 (2005 & Supp. 2009).

Matthew Ransdell

Condemnation & Eminent Domain: Attorney Fees

***JEA v. Williams*,**
978 So. 2d 842 (Fla. 1st Dist. App. 2008)

For purposes of computing attorney's fees under Florida Statutes Section 73.015, written communications concerning the acquisition of property between condemning authorities and private landowners are considered pre-suit eminent domain negotiations if the private landowner can reasonably conclude that the communication is more than just an arm's length offer to purchase the property.

FACTS AND PROCEDURAL HISTORY

JEA, a public-utility company, provides electrical and underground-utility services to Duval and surrounding counties. JEA sought to acquire underground-easement rights to property held by Marilyn D. Williams and Linda Trunick, as trustees of the Marilyn D. Williams Trust (Owners), in order to expand its underground-utility service area to southern Duval County and northern St. Johns County. JEA, through an acquisition service acting as its agent, mailed the Owners a letter stating that JEA was planning to acquire easement rights through the Owners' property. The letter contained an offer of $62,000, which was the appraised value of the easement rights. The Owners obtained counsel and negotiations between the parties continued. JEA passed a resolution authorizing the acquisition of the property through condemnation proceedings. JEA then sent a second letter to the Owners notifying them that JEA wished to acquire a fee interest in two parcels of the Owners' property, rather than the previously mentioned easement interest. The second letter contained an offer of $85,000 for the first parcel and $185,000 for the second parcel. Shortly thereafter, JEA sent a third letter that expanded the acreage and increased the offered price to $500,000.

The Owners rejected JEA's offer, and condemnation proceedings ensued. The trial court entered a stipulated final judgment requiring JEA to pay the owners $2,000,000 for both parcels, and granted attorney's fees to the Owners based on the difference between the offer in the first letter and the amount ordered for the property by the court. JEA appealed the calculation of the attor-

ney's fees to the First District Court of Appeal, arguing that the first letter was an arm's length real estate transaction, and that the calculation of attorney's fees should be based on the difference between the third offer and the final judgment. The First District affirmed the trial court's order, holding that the first letter was a binding offer and upholding the award of attorney's fees.

ANALYSIS

The court explained that the constitutional right of full compensation for the taking of property includes the right to receive a reasonable fee for the landowner's counsel. Florida Statutes Section 73.092 provides for an award of attorney's fees in eminent domain cases based on the benefit that the attorney procures for the client. The statute defines a benefit as the difference between the final judgment and the last written offer made to the property owner before counsel was secured. The court explained that ordinary, arm's length offers do not qualify for an award of attorney's fees. The district court looked to the facts to determine whether the Owners could have reasonably concluded that the letter was more than just an ordinary arm's length offer to purchase property. Because the letter clearly stated that JEA was planning to acquire utility rights to the property, and contained a project name and number, "reasonable property owners could conclude that the letter was more than an ordinary arm's length offer to purchase their property, but rather the initiation of a presuit negotiation as contemplated by [S]ection 73.015, Florida Statutes." *JEA*, 978 So. 2d at 845.

Further, the court rejected JEA's argument that the first offer was not a binding offer because it sought to acquire a different interest than the interest that was granted in the final taking. The court explained that the statute was clear and unambiguous—attorney's fees are calculated based on the difference between the final offer before counsel is retained and the final judgment. Finally, the court concluded that the first offer was binding for purposes of attorney's fees because the letter expressed JEA's intent in certain and definite terms under which it would purchase the property.

SIGNIFICANCE

JEA clarifies that a written offer from a public-utility company that contains certain and definite indications of the company's intent to acquire property may reasonably be construed as an initiation of pre-suit negotiations between a condemning authority and a private landowner.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Eminent Domain* §§ 174, 176 (2008 & Supp. 2009).

April Justus

Condemnation & Eminent Domain: Dedication

***Chackal v. Staples*,**
991 So. 2d 949 (Fla. 4th Dist. App. 2008)

Presumed dedication of a road pursuant to Florida Statutes Section 95.361(1), requires a governmental entity to prove that it constructed the road, which requires that the entity to show that it made improvements or repairs to the road, and additionally that it maintained or repaired the road, to the appropriate extent under the circumstances, uninterruptedly and continuously for at least four years. While Section 95.361(1) vests all rights and appurtenances to the road to a governmental entity meeting its requirements, land itself cannot pass as an appurtenance to the road even if the material beneath the land, necessary for the road's support, is an appurtenance to the road.

FACTS AND PROCEDURAL HISTORY

In 1972, all residents of the Carleton subdivision, a residential subdivision surrounding a shell rock road titled Suzanne Circle, executed quitclaim deeds to Palm Beach County (County) for their section of Suzanne Circle. In 2001, Ralph and Judy Chackal and Kenneth and Judith Hecht (Owners), successor property owners to two lots in the subdivision, learned through a title search that their portions of the Suzanne Circle (Disputed Strip), were never included in the original deeds to their property. Consequently, the former owners of these lots never actually con-

veyed the Disputed Strip to the County in 1972; rather, the original developer retained a fee simple interest in the Disputed Strip which it later conveyed to the Owners by a special warranty deed in 2001. Unbeknownst to the County, it had failed to receive title to the Disputed Strip. The County then paved part of the strip, installed a guardrail, and planted sod on the west end of the guardrail (Grassy Portion) in 1984, and at various times throughout 1993 to 2003, it conducted further repairs to the Disputed Strip.

The Owners sought to quiet title to the Disputed Strip against the County and other Carleton residents pursuant to their special warranty deeds obtained from the original grantor. The trial court determined the County had acquired title to the entire Disputed Strip through statutorily presumed dedication under Florida Statutes Section 95.361(1). The Chackals timely appealed to the Fourth District Court of Appeal claiming the trial court misapplied Section 95.361(1). On appeal, the Fourth District affirmed the trial court's finding that the County met its burden of proving presumed dedication under Section 95.361(1) to the area east of the guardrail (Paved Portion) of the Disputed Strip and appurtenances to it, but reversed the trial court's determination that the County met its burden as to the Grassy Portion at the western end of the strip. The court ultimately held that the County acquired title to the Paved Portion of the Disputed Strip and all appurtenances to it, but the Owners retained fee simple ownership of the Grassy Portion of the Disputed Strip.

ANALYSIS

Section 95.361(1) provides for a governmental entity to acquire "all right, title, easement, and appurtenances in and to [a] road" through statutorily presumed dedication when the road was "constructed" by a governmental entity and "has been maintained or repaired continuously and uninterruptedly for four years" by the entity. In examining whether the County met its burden under the presumed dedication statute, the court considered three issues on appeal: (1) whether the Disputed Strip was "constructed" by the County; (2) whether the County continuously and uninterruptedly repaired or maintained the road for at least four years; and (3) whether the Grassy Portion of the Disputed Strip was an appurtenance to the Paved Portion of the Disputed Strip.

In reviewing the trial court's application of Section 95.361(1) de novo and considering its findings of fact pursuant to the competent substantial evidence standard, the court ultimately concluded the County had met its burden under the Statute as to the Paved Portion, but not the Grassy Portion of the Disputed Strip, and further that the Grassy Portion was not an appurtenance to the Paved Portion of the Disputed Strip.

First, the court addressed whether the County "constructed" the Disputed Strip as required under Section 95.361(1). In considering this issue, the court looked to Florida Supreme Court precedent that broadly defined "constructed" in applying an earlier version of Section 95.361. *Pasco Co. v. Johnson*, 67 So. 2d 639, 642 (Fla. 1953). The *Pasco* court determined the County had "constructed" a road when it cleaned up the road so that it was usable, even though the road was on private property and had been previously laid out by the private owners. Similarly, the court here concluded that although the shell rock road had already been laid out by the original developer, the County "constructed" the road when it conducted extensive improvements and repairs to it. The court found the record contained ample and substantial evidence that the County "constructed" the Disputed Strip when it improved the drainage system, installed support against the end wall of the road, paved the road, and installed a guardrail.

Second, the court addressed whether the County proved it had continuously and uninterruptedly repaired or maintained the road for at least four years pursuant to Section 95.361(1). The court noted that while the test for this requirement of the Statute is the appropriateness of the maintenance to the specific circumstances, not the frequency or obviousness of the maintenance, the Statute should still be construed strictly because its effect divests an owner of his or her property in a short time period. The court determined the record was replete with substantial evidence to support the trial court's determination that the County met this requirement under Section 95.361(1). However, the court found no evidence to support the trial court's determination that the County had maintained the Grassy Portion of the Disputed Strip, yet it found substantial evidence and unrefuted testimony that the Owners maintained the Grassy Portion of the Disputed Strip to the appropriate extent under the circumstances.

Finally, the court considered whether the Grassy Portion of the Disputed Strip was an appurtenance to the Paved Portion so as to vest title in this area to the County under Section 95.361(1) which provides that an entity meeting the requirements of the Statute is entitled to the road and all appurtenances to the road. The court noted that appurtenances generally belong to a principal and therefore pass incidentally with the principal. The court ultimately agreed with the trial court's determination that the support material, the subterranean materials providing the road foundation, and the drainage structure were appurtenances to the Paved Portion of the Disputed Strip. However, the court determined the Grassy Portion of the Disputed Strip, which was sodded to prevent erosion of the fill material beneath it that was necessary for subjacent and lateral support of the roadbed, was not an appurtenance. This Grassy Portion was land itself—that does not pass as an appurtenance to other land even if the support material beneath it was deemed an appurtenance to the Paved Portion of the Disputed Strip. Therefore, even though the Grassy Portion prevented erosion to the support material beneath it, which the court deemed an appurtenance, the court held the Grassy Portion was not an appurtenance because it was land itself and consequently concluded the Owners retained fee simple ownership to this portion of the Disputed Strip subject to the easement rights of the County and other subdivision residents.

SIGNIFICANCE

Chackal establishes that Section 95.361(1)'s construction requirement may be satisfied where the governmental entity can prove that it conducted repairs or improvements to a road without having laid out the road. Further, under Section 95.361(1), the governmental entity must prove only that it maintained or repaired the road to the appropriate degree under the specific circumstances continuously and uninterruptedly for at least four years. Finally, this case affirms that land itself cannot pass as an appurtenance to other land, even if the area beneath that land provides support for a road and is an appurtenance to the road.

RESEARCH REFERENCES

- 28A Fla. Jur. 2d *Highways* §§ 32, 33 (2008 & Supp. 2009).
- 19 Fla. Jur. 2d *Deeds* § 158 (2005 & Supp. 2009).

Amy C. Paulke

Condemnation & Eminent Domain: Historical Preservation

***City of Hollywood Community Redevelopment Agency v. 1843, LLC*,**
980 So. 2d 1138 (Fla. 4th Dist. App. 2008)

A community redevelopment agency's decision to take property through an exercise of eminent domain is supported by some evidence of reasonableness sufficient to warrant the taking when alternative plans are considered but deemed unsuitable, the long-term impact of the taking is considered, and the taking would minimize the destruction of a historic landmark.

FACTS AND PROCEDURAL HISTORY

In 1979, the City of Hollywood (City) created a community redevelopment agency (CRA) to improve areas that were deemed deficient because of ineffective traffic flow, platting patterns, ownership diversity, and inappropriately mixed land uses. In 1981, the City adopted a community redevelopment plan for its downtown commercial district, which included a historic three-story hotel. The development plan specified that the hotel be restored if feasible, and that sidewalk cafes and pedestrian access points should be accommodated. The developer and architect for the project presented a plan to the City, but it was determined that this plan would cause traffic-flow problems and would require the hotel to be partially demolished. In response, the plan was modified so as to minimize the traffic impact and preserve the hotel. However, the modifications called for the taking of a one-story privately owned commercial building. The owners of the building filed suit to prevent the CRA from taking their property, arguing that it was not absolutely necessary. The trial court agreed with the property owners, but on appeal, the Fourth District Court of Appeals reversed, holding that "because the CRA

presented some evidence of the reasonable necessity for the taking, the trial court was required to defer to the CRA's determination that the property was necessary for the redevelopment." *City of Hollywood Community Redevelopment Agency*, 980 So. 2d at 1139.

ANALYSIS

The property owners argued that the CRA did not meet its burden of proving reasonable necessity because there were other options available for the downtown revitalization. The CRA argued that it met its burden of showing reasonable necessity because it considered alternate plans; however, the City rejected them due to traffic-flow issues and the potential of harming a historic site. The court agreed with the CRA.

In determining whether the CRA met its burden by proving that there was a reasonable necessity for the taking, the court analyzed the facts to see if the CRA had provided some evidence of reasonable necessity. The court pointed out that a reasonable necessity is not the same thing as an absolute necessity, and it further iterated that takings authorities have been vested with broad discretion in determining what and how much property to take. Such discretion should not be disturbed by the judiciary absent a clear abuse of discretion by the authority.

After examining the surrounding facts, the court found that the CRA presented three separate examples of evidence of reasonable necessity. First, the CRA showed that it seriously considered other development plans not requiring a taking, but for traffic-flow reasons, decided they were not suitable. Second, the CRA pointed out that for long-term downtown development, a one-story building would not structurally fit in with the high rises and other surrounding commercial buildings that were sure to develop. Finally, the CRA showed that the plan that called for the taking was the only available one that would preserve the historic hotel. In finding that historic preservation was sufficient evidence of a reasonable need, the court reasoned that "[i]f a government can take property solely for historical purposes, it follows that it can refuse to consider development alternatives which would destroy historic property, even in part." *Id.* at 1143.

The dissent agreed with the majority that there was sufficient evidence to support the CRA's determination that the taking

was reasonably necessary, but it did not agree with the amount of property to be taken. The dissent pointed out that only seventeen feet of the parcel were necessary for the redevelopment plan, and therefore, only seventeen feet, and not the entire property, should be taken.

SIGNIFICANCE

City of Hollywood Community Redevelopment Agency clarifies that under the Community Redevelopment Act, historic preservation may be an adequate justification for a government to acquire private property for community redevelopment when the taking is reasonably necessary to preserve a historic landmark. Further, the court's holding provides that under the Act, condemning authorities may also be justified in refusing to consider alternatives to development proposals where the alternative would result in the destruction of all or part of a historic property.

RESEARCH REFERENCES

- 12A Fla. Jur. 2d *Counties* § 84 (2008 & Supp. 2009).
- 21 Fla. Jur. 2d *Eminent Domain* § 10 (2008 & Supp. 2009).

April Justus

Condemnation & Eminent Domain: Necessity

***Rawls v. Leon County*,**
974 So. 2d 543 (Fla. 1st Dist. App. 2008)

A condemning authority may establish the necessity of using eminent domain to take a piece of property without considering alternative properties when its finding of reasonable necessity is supported by other evidence.

FACTS AND PROCEDURAL HISTORY

Leon County (County) brought an eminent domain proceeding to acquire a parcel of land owned by Helen Rawls (Landowner). The purpose of the taking was to connect two roadways. One of the roadways ended in a subdivision designated a Development of Regional Impact (DRI), and the alignment to be used in

connecting the two roads was identified in the development agreement associated with the DRI.

At the order of taking hearing before the circuit court, the County introduced into evidence its authorizing resolution, which deemed the taking to be for a valid public purpose and necessary for the extension project's completion. The County also called as a witness the engineer of record and project manager (Project Manager). The Project Manager testified that the proposed alignment would satisfy environmental concerns, safety issues, and cost requirements. The Project Manager also testified that the proposed alignment would meet the needs of the regional transportation agency's long-range plan, but he admitted that no other alignments had been considered in his design of the road extension.

At the hearing, the Landowner essentially conceded that the County's proposed taking was for a public purpose; however, she argued that the County's failure to consider any alternative alignments left it unable to establish the *necessity* of taking her property. The Landowner did suggest one alternative alignment upon request by the court, but the trial judge deemed it to be completely unreasonable.

The circuit court found the taking to be necessary for a valid public purpose, and it entered an order of taking for the County. On appeal, the First District Court of Appeal upheld the order.

ANALYSIS

Under Article X, Section 6(a) of the Florida Constitution, "[n]o private property shall be taken except for a public purpose." In addition to this constitutional requirement, Florida courts have long held that the condemning authority must also show that the particular parcel being sought is necessary for the public use or for the project proposed by the condemning authority. With the issue of public purpose essentially conceded by the Landowner, the primary issue before the First District was whether the County had adequately proved the necessity of taking the Landowner's property.

In the context of eminent domain, the necessity must be reasonable rather than absolute, and it should be based upon considerations such as cost, environmental factors, long-range planning, safety concerns, and alternative routes. The evidentiary burden of establishing such reasonable necessity lies, initially, with the

condemning authority. However, once evidence of reasonable necessity has been shown, the landowner must "concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense." *Rawls*, 974 So. 2d at 547.

In this case, the First District concluded that the County had satisfied its evidentiary burden through the introduction of its authorizing resolution (which deemed the project to be necessary for a public purpose) and the testimony of the Project Manager (which concerned cost, environmental factors, safety, and long-range planning). The court concluded that the combination of the resolution and the Project Manager's testimony was enough to satisfy the County's burden, although it noted that the resolution alone would have been insufficient.

The Landowner, in contrast, failed to establish any bad faith or abuse of discretion on the part of the County. The Landowner's sole argument was that the County could not establish necessity without first considering one or more alternative alignments. The First District flatly rejected this argument, noting that a condemning authority "'is vested with a considerable discretionary power . . . . The landowner cannot object merely because some other location might have been made or some other property obtained which would have been suitable for the purpose.'" *Id.* at 547 (quoting *Wilton v. St. John's Co.*, 123 So. 527, 535 (Fla. 1929)).

SIGNIFICANCE

Rawls rejects the premise that a condemning authority must consider multiple options before selecting a piece of property to be taken through eminent domain. A consideration of alternatives is one possible factor to be considered in determining the reasonable necessity of taking a particular piece of property, but it is not a determinative factor. *Rawls* also suggests in dicta that the condemning authority's legislative resolution stating the necessity of a taking is insufficient, when standing alone, to establish the reasonable necessity of a taking and to shift the burden to the landowner.

RESEARCH REFERENCE

- 21 Fla. Jur. 2d *Eminent Domain* §§ 52, 141 (2008 & Supp. 2009).

Brett B. Pettigrew

Condemnation & Eminent Domain: Ripeness & Preclusion

***Agripost, LLC v. Miami-Dade County*,**
525 F.3d 1049 (11th Cir. 2008)

If a Florida state court dismisses a Takings Clause claim because the plaintiff lacks a compensable property interest and if the state court's resolution of that issue satisfies Florida's four-part test for issue preclusion, then the plaintiff is barred by the Full Faith and Credit Statute from re-litigating that issue in federal court—even when the plaintiff was forced to bring her initial claim in state court and attempted to reserve a federal claim for subsequent adjudication in federal court.

FACTS AND PROCEDURAL HISTORY

Agripost, Inc. (Lessee) subleased a plot of land from Miami-Dade County (County) for the purpose of constructing and operating a waste-treatment plant. The property was zoned for agricultural use, so the sublease required the Lessee to maintain an unusual-use permit for the property. The sublease was also conditioned upon Lessee's continued use of the property for its waste-treatment plant.

Per the terms of the sublease, the Lessee obtained the necessary unusual-use permit from the County. One of the permit conditions required the Lessee to comply with all applicable conditions and requirements of the County's Department of Environmental Resources Management (County Agency).

With the sublease and unusual-use permit in place, the Lessee built the waste-treatment plant and began operating it. However, within the first year the plant began having odor problems. In response, the County Agency declared the plant a public nuisance and revoked its unusual-use permit. Following the Lessee's

unsuccessful appeal of the permit revocation to the County's zoning board and County commission, the sublease was terminated.

The Lessee filed suit in state circuit court to challenge the County Agency's permit revocation. The administrative appeals panel of the circuit court upheld the County Agency's decision, and the Third District Court of Appeal denied review.

The Lessee then filed suit against the County in federal district court, claiming that the permit revocation was a regulatory taking without just compensation that violated the Fifth Amendment of the United States Constitution. The district court dismissed the claim because, under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, a plaintiff seeking compensation under the Just Compensation Clause of the Fifth Amendment does not have a ripe federal claim until he or she has unsuccessfully attempted to obtain compensation through the procedures established by the state. 47 U.S. 172, 195 (1985). The Eleventh Circuit Court of Appeals affirmed.

After the dismissal in federal court, the Lessee returned to state circuit court and filed suit against the County, claiming that the permit revocation constituted inverse condemnation under Florida law because it deprived the Lessee of all economically viable use of the property. The Lessee also sought damages under the United States Constitution's Just Compensation Clause but expressly reserved its right to litigate that federal constitutional claim in federal court at the conclusion of the state court proceedings, as allowed by *Fields v. Sarasota–Manatee Airport Authority*. 953 F.2d 1299, 1306 (11th Cir. 1992). The circuit court granted the County's motion for summary judgment, and the Third District Court of Appeal affirmed, holding that the Lessee's conditional interest in the use of the property was not protected by either the Florida or United States constitutions once the applicable permit conditions had been violated. The Florida Supreme Court denied certiorari review.

Following its unsuccessful pursuit of compensation in the state court system, the Lessee turned once more to the federal district court and re-asserted the Fifth Amendment regulatory takings claim that it had previously attempted to reserve under *Fields*. The County filed a motion for summary judgment arguing that, as a result of the state court's dismissal of the Lessee's claims, the Lessee's federal constitutional claim was now barred

by claim preclusion (res judicata) and issue preclusion (collateral estoppel). The district court agreed and granted the County's motion for summary judgment. On appeal to the Eleventh Circuit Court of Appeals, summary judgment in favor of the County was affirmed.

ANALYSIS

Noting that claim preclusion and issue preclusion have "generate[d] more than their fair share of complexity . . . in takings cases brought in federal court after *Williamson County*," the Eleventh Circuit addressed each doctrine separately. *Agripost, LLC*, 525 F.3d at 1052. Beginning with claim preclusion, the court focused its analysis on the interplay between the ripeness doctrine and the Full Faith and Credit Statute, 28 U.S.C. § 1738.

Under *Williamson County*, a federal Takings Clause claim is not ripe until the plaintiff has unsuccessfully sought compensation through the state court system. But under Section 1738, a federal court is precluded from re-litigating factual and legal issues that have already been resolved in state court. Consequently, a plaintiff forced initially into state court by *Williamson County* might never have the opportunity to litigate his other takings claim in federal court.

In *Fields*, the Eleventh Circuit formalized an exception to Section 1738 that would allow a plaintiff forced into state court by *Williamson County* to reserve his other federal Takings Clause claim for subsequent federal adjudication expressly. This decision was based largely upon dicta from *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976). *Jennings*, in turn, was based upon the Supreme Court's opinion in *England v. Louisiana State Board of Medical Examiners*. 375 U.S. 411, 421–422 (1964). The *Fields* court expressed doubt that *England* actually compelled the result in *Jennings*, but it felt compelled to follow the *Jennings* precedent.

Support for the *Jennings–Fields* claim preclusion exception was further eroded by the Supreme Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*. 545 U.S. 323 (2005). In *San Remo Hotel*, the Court rejected the argument that an *England* exception was appropriate for a plaintiff who was in state court involuntarily. Instead, the Court held that an *England* exception was appropriate only when the "antecedent state issue

requiring abstention was *distinct* from the reserved federal issue." *Id.* at 1055 (quoting *San Remo Hotel*, 545 U.S. at 339).

Having summarized the development of federal case law in this area, the Eleventh Circuit noted that "*San Remo Hotel* seems to undercut much of the support for *Jennings* and *Fields*." *Id.* at 1055. But rather than addressing that conflict, the court distinguished *San Remo Hotel* as an issue preclusion case and declined to rule on the continued validity of the claim preclusion exception under *Jennings* and *Fields*. Instead, the court assumed arguendo that the Lessee had validly reserved its federal claim under *Jennings* and *Fields* and moved on to its discussion of issue preclusion.

Under Florida law, an issue may not be re-litigated if the following four-part test for preclusion is satisfied: (1) the parties are identical; (2) the issue is identical; (3) there was a full and fair opportunity to litigate the issue, and it was actually litigated; and (4) the issue was necessary to the prior adjudication. The court concluded that the first, second, and fourth elements had been satisfied in this case and focused its analysis on the third element—whether there had been full and fair litigation of the issues.

The Lessee argued that it had been denied a full and fair opportunity to litigate its takings claim in state court because the circuit court's summary judgment was based exclusively on the factual record created during the initial permit-revocation litigation in state court. The Lessee argued that the circuit court's failure to allow further discovery during its takings claim prevented a full and fair hearing on those issues.

The Eleventh Circuit disagreed, holding instead that the Lessee had been given an opportunity to argue for the existence of compensable property interest before the state court, had made that argument, and had lost. Once the state court concluded, as a matter of law, that the Lessee's nonconforming property use was not a compensable property interest, the Lessee's takings claim necessarily failed, and it was no longer entitled to discovery. The Eleventh Circuit concluded that "[n]othing in the litigation rendered [the Lessee's] opportunity to make its case insufficiently 'full and fair'" and noted that "[u]nder Florida law, a full and fair opportunity to litigate an issue does not entail a full civil trial and its accouterments." *Id.* at 1056, 1056 n. 8.

SIGNIFICANCE

By resolving *Agripost* as a matter of issue preclusion, the Eleventh Circuit avoided a decision as to whether a plaintiff may reserve a federal takings claim after being forced into state court by *Williamson County*. However, the court clearly suggested that the *Fields–Jennings* exception stands on shaky ground after the United States Supreme Court's recent decision in *San Remo Hotel*.

In the absence of such an exception, the combination of *Williamson County* and the Full Faith and Credit Statute will continue to make it extremely difficult for a plaintiff to litigate a Takings Clause claim in federal court.

RESEARCH REFERENCES

- 16B Am. Jur. 2d *Constitutional Law* § 980 (1998 & Supp. 2008).
- 32A Fla. Jur. 2d *Judgments and Decrees* §§ 110, 112 (2003 & Supp. 2009).

Brett B. Pettigrew

Condemnation & Eminent Domain: Temporary Takings

***Bauknight v. Monroe County*,**
994 So. 2d 362 (Fla. 3d Dist. App. 2008)

A private party seeking damages for inverse condemnation has no cause of action when alternative, non-judicial relief was available but not pursued. Claims for temporary takings do not become ripe until an affected property owner seeks a beneficial-use determination from the appropriate local government entity.

FACTS AND PROCEDURAL HISTORY

Three owners purchased vacant lots in a rural part of Monroe County (County). In 1995 and 1996, the owners applied for permits to build homes on their lots. After receiving preliminary approvals, they were informed by the Monroe County Planning Director that building permits would not be issued due to the inadequate level of service provided by the main highway running

through the area. A County regulation kept the Planning Director from issuing the permit unless the highway met a "C" level of service. At the time the owners applied for their permits, the highway was rated a "D" or lower.

In 2002, the Planning Director recommended that the properties be considered under Monroe County's beneficial-use ordinance. Under this ordinance, if an owner has been denied all beneficial use of his or her property due to land-development regulations, the owner is entitled to either the issuance of the requested permit or just compensation. The Special Master appointed to consider the case found that the owners qualified under the ordinance and recommended that the County issue the requested building permits.

After being issued the permits, the owners sued the County, alleging that there had been a temporary taking during the six-year period during which they could not build. The trial court entered summary judgment in favor of the County, and the property owners then appealed to the Third District Court of Appeal. On appeal, the owners claimed a violation of the Fifth Amendment to the United States Constitution and a violation of Article X, Section 6 of the Florida Constitution.

ANALYSIS

The owners asserted that because they were prevented from building homes on their land through denial of building permits, the highway level of service ordinance resulted in a temporary taking of their property from 1996–2002. The court first considered whether the takings claim was ripe for review. The court explained that challenges to the application of land-use regulations do not become ripe until a final decision has been rendered by the government entity. The plaintiffs satisfied this requirement because a final decision was reached in 2002 when the County issued permits to the plaintiffs.

The court turned to the plaintiff's claim for relief for the period between the initial denial in 1996 and the permit issuance in 2002. The court noted that the relief outlined in the beneficial-use ordinance was available to the owners as soon as their initial permit applications were denied in 1996. The court reasoned that the owners' failure to apply for the remedy available via the beneficial-use ordinance caused the permit issuance delay—not any

action of the County. Therefore, "[a]s the delay in obtaining relief was attributable to the owners themselves, there was no taking and can be no damages for delay." *Bauknight*, 994 So. 2d at 366.

SIGNIFICANCE

Bauknight provides that if there is a remedy available for property owners that would alleviate the effects of a taking, but the owners choose not to pursue that remedy, there has not been a taking sufficient to warrant damages. This outcome requires owners to exhaust all remedies available under beneficial use or other similar ordinances prior to asserting a claim for inverse condemnation.

RESEARCH REFERENCES

- 12A Fla. Jur. 2d *Counties* § 84 (2008).
- 21 Fla. Jur. 2d *Eminent Domain* § 10 (2008).

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