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Eminent domain -- Full compensation -- Condemnation blight -- Motion to prevent defendants in eminent domain proceeding from presenting evidence of condemnation blight that has allegedly lowered value of taken property is denied -- Although "scope of the project rule" of section 73.071(5) is not applicable where value of property has allegedly been decreased by repeated intervention by multiple governmental entities over span of decades prior to announcement of resolution condemning property, constitutional requirement of full compensation requires that defendants' experts be allowed to testify regarding evidence of blight and how it has affected value of property

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, Petitioner, v. GEORGE P. BAUER, et al., Defendants. Circuit Court, 20th Judicial Circuit in and for Collier County, Civil Action. Case No. 112016CA0006850001XX. Tract No. 100-116. October 20, 2017, Nunc Pro Tunc October 5, 2017. James Shenko, Judge. Counsel: Joseph A. Spejenkowski, Office of Attorney General, and Judith Levine, South Florida Water Management District, for Petitioner. Jackson H. Bowman IV and Ryan C. Reese, Moore, Bowman & Rix, P.A., for Defendant Myers.

ORDER ON PETITIONER'S MOTION

IN LIMINE *NUNC PRO TUNC*

THIS CAUSE came to be heard upon Petitioner, SOUTH FLORIDA WATER MANAGEMENT DISTRICT's 'Motion in Limine on Condemnation Blight,' filed on September 21, 2017. The Court, having reviewed the file, including Defendants' Response in opposition, having heard arguments of counsel on October 5, 2017, and being otherwise fully advised in the premises, hereby finds as follows:

Background

1. This is an eminent domain proceeding pursuant to Chapters 73 and 74, Florida Statutes (2017). Petitioner, the SOUTH FLORIDA WATER MANAGEMENT DISTRICT (hereinafter "District") has condemned the five-acre homestead of the Defendants, CATHY MYERS, DONNIE MYERS, DONNA GONZALES a/k/a DONNA MYERS, and DEVIN MYERS. The property is located in the unincorporated part of Collier County known as South Belle Meade.

2. Trial is set for October 10-13, 2017, where a jury of twelve persons will be asked to determine the 'full compensation' due to the Defendants for this involuntary acquisition. In advance of trial, the District seeks to exclude Defendants from presenting testimony and documentary evidence on the issue of "blight."

3. Defendants' theory of the case is predicated on the fact that the subject area has been targeted for governmental acquisition for decades, under a well-documented and publicly expressed desire to restore the area's ecology to "natural" environmental conditions. Defendants assert that this endeavor has been ongoing since at least the mid-1980's. Defendants' evidence is supported by many exhibits, some of which were referenced and included in its memorandum in response the District's Motion. Additional exhibits supporting Defendants' theory are referenced in their Exhibit List, filed on September 29, 2017. In their Response, Defendants present an extensive canvass of governmental actions and policy decisions that they believe have worked to "blight" the subject area, and accordingly, their appraiser has valued the subject property under the hypothetical condition that such blight did not exist.

4. In the introduction to Petitioner's Motion, the District contends that evidence of "condemnation blight" may only be presented if it falls within the auspices of Fla. Stat. § 73.071(5). This provision, commonly referred to as the "Scope of the Project Rule," states particularly:

> (5) Any increase or decrease in the value of any property to be acquired which occurs after the scope of the project for which the property is being acquired is known in the market, and which is solely a result of the knowledge of the project location, shall not be considered in arriving at the value of the property acquired. For the purpose of this section, the scope of the project for which the property is being acquired shall be presumed to be known in the market on or after the condemnor executes a resolution which depicts the location of the project.

In essence, the District's principle contention is that, for evidence of blight to be admissible, the decrease in the value of the subject property: (a) must occur *after* the governmental project and its precise location are known; and (b) must be solely attributable to that project and its location. Accordingly, the District asserts that governmental action that depresses a subject property's value, which occurs *prior to* the official condemnation announcement, is entirely irrelevant and thus non-compensable.

Findings

5. The Court notes at the onset Florida's Constitutional standard to be applied when government forcibly takes private property for a public purpose: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Fla. Const. Art. X, § 6(a). "The whole purpose of and reason for the constitutional provisions, both state and federal, relating to compensation for property condemned is to insure that the property owner will be adequately and fairly compensated in money for that property which is taken from him. These provisions and the statutes implementing them are designed to protect the owner against confiscation of his property." *State Road Dep't v. Chicone,* 158 So. 2d 753, 758 (Fla. 1963). Importantly, landowner compensation "is to be determined by equitable principles and that its measure varies with the facts." *Id.* Equally significant here is the Florida Supreme Court's directive in *Daniels v. State Road Dep't.,* where it determined full compensation to be a

"judicial function that cannot be performed by the Legislature either directly or by any method of indirection." 170 So. 2d 846, 852 (Fla. 1964).

6. The "Scope of the Project Rule," advanced by Petitioner, covers two opposing concepts: (1) enhancement, which deals with increases in value due to anticipation of a project; and (2) depreciation, which deals with decreases in value due to anticipation of a project. *United States v. Reynolds,* 397 U.S. 14, 16 (1970). These concepts have been codified and narrowed by § 73.071(5). The statute serves to limit the rule's application to scenarios when the threat of condemnation is publicly apparent, and the increase or decrease is "solely a result of the project location."

7. The District reads § 73.071(5), as requiring the exclusion of evidence that falls *outside* the conditions set forth therein. According to it, should a decrease in value occur *before* rather than "*after* the scope of the project for which the property is being acquired is known in the market," that decrease should be considered irrelevant in valuing the acquired property. However, this is too broad a reading, and would otherwise serve to inhibit the constitutional requirement of "full compensation." Notably, the plain text of the § 73.071(5) does not address decreases in value *before* a given project; rather it addresses valuation differences *after* a project is announced. To extend the statute's reach beyond what is clearly stated is contrary to well-established rules of statutory interpretation. *See e.g. Holly v. Auld,* 450 So.2d 217, 219 (Fla. 1984) (statute must be given its plain and obvious meaning).

8. As set forth in their Response, Defendants' allegations of blight are broader in scope than a negative influence created *solely* from the District's project. Their argument is premised upon repeated governmental intervention into the subject area by *multiple* actors,[1] through *several* environmental initiatives, over a span of decades. This activity, they allege, created a devaluation of the market area generally, and Defendants' property specifically, ***well before*** the District's project was announced via its resolution adopted on August 13, 2015. Thus, Fla. Stat. § 73.071(5) has no applicability herein. Instead, the Court must turn to the equitable principles of eminent domain jurisprudence, as they relate to the issue of "full compensation."

Relevant Caselaw

9. As a threshold matter, the Court finds *Savage v. Palm Beach County,* 912 So. 2d 48 (Ha. 4th DCA 2005) [30 Fla. L. Weekly D2054a], most aligned with the facts alleged in this matter. *Savage* involved an area in Palm Beach County known as 'Unit 11' that was prone to flooding. *Id.* at 49. There, the District (Petitioner herein), the United States Army Corps of Engineers, and Florida Department of Environmental Protection, (coincidently all entities involved in the instant matter) declined to permit drainage improvements that would have helped resolve the flooding impacts. *Id.* Four years before the County passed its resolution authorizing condemnation, the County began to purchase parcels from "willing sellers."[2] *Id.* at 49-50. The owner's expert appraiser in *Savage,* Dr. Barry Diskin, assumed that but for the governmental interference, values would have been similar to property values outside of the 'Unit 11' area that were unimpacted by the governmental interference. *Id.* at 50. Dr. Diskin based his opinion on engineers' reports that concluded "the very agencies that they needed to get the permit [from] wanted it to be used as a wildlife corridor' and had therefore intentionally not issued the permits." *Id.* Palm Beach County filed a motion in limine to limit this testimony. The trial court granted the County's motion:

> Accordingly, appraisers, Dr. Barry Diskin and Steven Matonis, cannot offer an opinion that the highest and best use of the parcels at issue in this case is for use as single family home sites similar to such sites in The Acreage, and cannot offer an opinion as to the value of the subject parcels under this speculative highest and best use, where this use is dependent upon the permitting and construction of the various, speculative drainage and infrastructure improvements in Unit 11, that did not exist at the time of the taking, do not exist now, and are not likely to exist in the reasonably foreseeable future.

Id. at 51.[3]

10. The Fourth District, however, overturned the trial court, relying upon *State Road Dep't v. Chicone,* 158 So. 2d 753, 758 (Fla. 1963) and *Dep't of Transp. v. Gefen,* 636 So. 2d 1345, 1346 (Fla. 1994). The court held:

> Here, the property owners were deprived of the opportunity to prove the fair value of their property. **Moreover, our supreme court held that a condemning authority cannot benefit from a depression in property value caused by a prior announcement of the intent to condemn**.
>
> Here, the jury was prevented from hearing relevant testimony concerning the lost potential value of property in Unit 11, **how it occurred, and when** . . .
>
> This error was exacerbated when it undermined the foundation for the property owners' appraisal experts and led to the exclusion of their testimony. Once the property owners' experts were prohibited from relying upon the opinions of the engineers, their appraisals were effectively gutted.

Savage, 912 So.2d at 52 (emphasis added).

11. *Gefen* is also instructive. Its holding reaffirms that equity is the backdrop to the Court's rulings in eminent domain. It is also analogous insofar as the Court recognized a fictional condition needed to be assumed in order to ensure full compensation was provided. *Gefen* was brought because ingress and egress ramps to I-95 were closed allegedly resulting in a taking without compensation. *Id.* at 1346. The Florida Supreme Court briefly reviewed Florida's access law and ruled that no inverse condemnation had occurred as the ramp closure was a traffic flow issue and thus a non-compensable loss. *Id.* The Court went further, however:

> While we find no taking in the instant case, the record reflects that the DOT has preliminary plans to ultimately condemn at least a portion of Gefen's property. While compensation must await the actual taking of the property, *City of Miami v. Romer,* 73 So. 2d 285, 287 (Fla. 1954), we have held that a condemning authority cannot benefit from a depression in property value caused by a prior announcement of intent to condemn. *State Road Dep't v. Chicone,* 158 So. 2d 753 (Fla. 1963). In *Dade County v. Still,* 377 So. 2d 689 (Fla. 1979), the county adopted a right-of-way plan which set minimum widths for certain roads planned as arterial streets for the purpose of giving notice of potential future road expansion. When the county later condemned some of the property within the minimum width designation in order to widen a street, this Court held that **compensation must be based on the value that the property had at the time of the taking had it not been subject to the depreciating threat of condemnation. We find Gefen's property to be in an analogous position. Therefore, if the DOT later condemns some or all of her property, compensation will have to be based on the value that the property would have had if the access ramps had not been closed**."

Id. at 1346 (emphasis added).

12. Several points germane to the instant matter can be gleaned from the quoted passage. When the inverse case was decided, DOT's plans to condemn were "preliminary." No mention is made of the requirement for a pending resolution to condemn. Nonetheless, the Court leaves no doubt that it was extending the holdings of *Chicone* and *Still*. The *Gefen* Court uses the phrase "to be in an analogous position" to describe the situation concerning Gefen' s property in relation to the cited cases. The facts underlying *Gefen,* however, are not the same as those at issue in *Chicone,* and *Still*. Yet, the case resolutions maintain a constant equitable theme. The courts in these cases endeavored to make certain that true "full compensation" was achieved.

13. In *Chicone,* the government based its valuation testimony on the fact that the owner's property was predominantly vacant, which was a direct result of the threat of condemnation. *Id.* at 755. Also important to the issue is the characterization of the public notice: "In 1957, the Department publicly announced the route through Orlando of Interstate Highway No. 4. . . These parcels, all in one block, had improvements thereon all of which were leased when the route of the proposed highway was announced." *Id.* Again, no mention is made of a condemnation resolution. Even though some parcels were condemned in 1958, it was not until 1960 that suit was filed on the *Chicone* parcels. *Id.*

14. Both of FDOT's witnesses testified that in arriving at their value opinions they "discounted the value of the properties because of the prospect of taking by the Department." *Id.* Consistent with the equitable principles of full compensation, the Court held:

> In the case now before us **we do not think the result contended for by the Department would be just, fair or equitable**.
>
> The rule advocated by the Department and followed in the trial in the instant case, **would permit a condemnor to depreciate property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value**.
>
> **This would amount to a confiscation of the owner's property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.**

Id. at 757 (emphasis added).

15. In *Still*, all three courts, trial, Third District Court of Appeal and the Florida Supreme Court, held the same. The facts from *Still* are set forth generally above in the block quotation from *Gefen.* One additional fact that supports Defendants' interpretation is that the ordinance that established minimum widths needed for arterial rights-of-way was adopted in 1938, ***thirty-nine years*** before the eminent domain petition was filed in 1977. *Still*, 377 So.2d at 689. The trial court directed the appraisers to disregard the right-of-way ordinances in determining the appropriate compensation. *Id.* at 690. The appellate court affirmed, curing the potential inequity attempted by Dade County in offering valuation testimony that considered the diminishing effect of the ordinances on the subject property. *Still* at 690. Significantly, in *Still*, it was not the threat of condemnation that adversely impacted the owner, but rather the County's attempt to use an ordinance that depressed value **as part of the condemnation process** that was found unacceptable.

16. In sum, *Savage, Gefen, Chicone* and *Still* all endorse Defendants' position that the constitutional requirement of full compensation must consider the property as if not depreciated by the alleged collaborative efforts of various governmental entities. *See also Florida Dep't of Envtl. Protection v. West,* 21 So. 3d 96, 99 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D2185a] ("in compensating the landowners the jury had to disregard the effect of the State's pre-condemnation action on the property value.").

The District's Enhancement Cases

17. Other than *Chicone,* the scope of the project cases the District cites are *enhancement* cases that do not remotely address "blight." Enhancement is not at issue herein, and these cases are thus immaterial to the instant facts. Although incorrectly characterized by the District as a "condemnation blight" instruction, the jury instruction given in *325 W. Adams St., Ltd. v. City of Jacksonville,* 863 So. 2d 380 (Fla. 1st DCA 2003) [28 Fla. L. Weekly D2864d] was an enhancement instruction: "Fair market value, which you may use to determine the award to the owners, may reflect an ***increase in value*** due to the anticipation of the new downtown county courthouse project. . ." *Id* at 381. The court found the instruction inconsistent with section 73.071(5) because the project location of the downtown county courthouse was known in the market. Accordingly, *325 W. Adams St.* has no applicability here.

18. *Dames v. 926 Co.,* 925 So. 2d 1078 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D785a] suffers the same fate. *Dames* does not stand for the proposition that **decreases** in value that occur prior to the announcement of the project's precise location should be *disregarded;* rather it speaks of *increases* only. Thus, *Dames* is distinguishable and of no support.

Conclusion

19. Defendants assert that their experts have concluded that "blight" adversely affects the subject property's value, and was caused by a collaboration of government action spanning years. This Court refuses to follow the same path that resulted in the *Savage* trial court being overturned. Defendants' experts may testify regarding blight in order to provide context to their opinions. The Court will allow Defendants' experts to testify consistent with the arguments raised by Defendants in their Response, and this factual issue shall be submitted to the jury.

20. Equally important to the Court's decision is the fact that Defendants' evidence, whether in the form of documentary evidence or witness testimony, will be subject to cross-examination. *See Savage,* 912 So.2d at 52 (quoting *Florida Dep't of Transp. v. Armadillo Partners, Inc.*, 849 So. 2d 279, 287-88 (Fla. 2003) [28 Fla. L. Weekly S349a]: "[A]n appraiser's opinion may be subject to impeachment or to having its weight reduced because of its failure to properly consider one of the many factors that may influence an opinion as to value, but that failure should not prevent the opinion's admission, nor cause its complete exclusion from the jury's consideration."). Additionally, and as requested by the District's Counsel at hearing, the District will be allowed to present rebuttal testimony to refute the Defendants experts' assertions. Accordingly, the jury will be permitted to hear both sides of the story and assign the appropriate weight to any "blight" evidence. The Court further notes that the District filed its Witness List on August 25, 2017. Its Witness List includes experts David Weeks and Michael Fernandez, AICP, RA, as rebuttal witnesses. The District's Exhibit List was filed on the day of this hearing, October 5, 2017. The List appears to contain exhibits that will be used to counter Defendants' "blight" argument.

21. Finally, this Court's ruling recognizes the truly unique facts inherent in this matter. Equity, justice and fairness are the principles echoed in the cases cited by Defendants. These principles must be the guide when one's property has been taken for the greater public good.

It is hereby **ORDERED** and **ADJUDGED** that Defendants' experts may testify at trial regarding evidence of "blight," and how it may have affected the value of the subject property. The Court determines that this evidence is both relevant and legally permissible under the constitutional mandate of "full compensation," the caselaw discussed above, and is necessary to allow the Defendants' experts to fully explain the underlying bases for their opinions. Petitioner may cross-examine and rebut the evidence and testimony as it sees fit.

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[1]As a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights, as government decisions are not produced in a vacuum. *Lost Tree Village Corporation v. City of Vero Beach,* 838 So.2d 561 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D2454a] (citing Charles E. Harris, *Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action,* 25 U. Fla. L. Rev. 635, 683 (1973); *see also Anhoco Corporation v. Dade County,* 144 So.2d 793 (Fla. 1962) (multiple governmental units engaged in a cooperative effort to obtain property can all be liable for the taking of property). While this case does not involve inverse condemnation, the case is analogous to these cited authorities.

[2]Again, this fact is similar to the "willing seller" programs in the instant case.

[3]This preclusion of evidence is virtually identical to what the District is advocating for here. Also similar is the fact that Dr. Diskin is the instant Defendants' expert appraiser.

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