

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND
FOR PALM BEACH COUNTY

CASE NO. CL 95 1804 AG

JAMES DOYNE YORK TRUST,
et al,

Plaintiff(s),

vs.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT, et al.,

Defendant(s).

ORDER

On May 5, 1994, the Florida Legislature enacted the Everglades Forever Act, §373.4592 Fla.Stat., mandating Everglades restoration and protection through the implementation of the Everglades Construction Project. The cornerstone of the Project is construction of more than 40,000 acres of six flow-through marshes, Stormwater Treatment Areas (STAs), designed to remove phosphorous from agricultural stormwater runoff. The South Florida Water Management District (SFWMD) has determined Plaintiffs' property will be acquired on or before July 1, 1998, as part of the Everglades Forever Construction Project, Stormwater Treatment Area One-East (STA 1-E), pursuant to §373.4592.

After an attempt at negotiation, Plaintiffs filed a three-count complaint against SFWMD alleging SFWMD's oppressive precondemnation conduct constituted a taking under Florida and Federal law. Plaintiffs seek an injunction to require SFWMD exercise its power of eminent domain as a means of making restitution to Plaintiffs for the taking of private property for public use. On the other hand, SFWMD contends the mere declaration of intention to take, or even a threat to take, does not constitute a taking.

~~_____~~ _____

The issue of whether oppressive precondemnation conduct constitutes a cause of action for damages is an issue of first impression for Florida courts. Although Florida courts have held mere planning for future condemnation does not constitute a taking, See, Auerbach v. DOT, 545 So.2d 514 (Fla. 3d DCA 1989) and Div. of Admin. v. Franchman, 476 So.2d 224 (Fla. 4th DCA 1985); Florida courts have not addressed whether deliberate delays in condemnation which allegedly deny the property owner economically viable use of his or her land constitute a taking.

In order to rule on SFWMD's motion to dismiss, this court must first determine whether, under Florida law, a cause of action exists for oppressive precondemnation conduct: In Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the United States Supreme Court recognized a radical curtailment of a landowner's freedom to make use of, or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property. Thus, the Court acknowledged a taking would be effected by a zoning ordinance that deprived "an owner of economically viable use of his land" or a land-use regulation that severely interfered with an owner's "distinct investment-backed expectations", Id. at 2196.

Further, Federal courts recognize a cause of action for oppressive precondemnation conduct holding a condemning authority liable where, as here, it allegedly abuses its authority to acquire real property for public purposes by engaging in oppressive precondemnation activity or delays the filing of eminent domain proceedings in bad faith to coerce an agreement on price subsequent to its determination that the property must be acquired. See, Kaiser Development Co. v. City and County of Honolulu, 913 F.2d 573 (Cir. 9th, 1990) (this court recognizes that in some limited circumstances, a city's precondemnation activities can give rise to a taking claim in favor of a property owner).

In Richmond Elks Hall Assn v. Richmond Redevelopment, 551 F.2d 1327 (Cir. 9th, 1977), a landowner brought inverse condemnation action, under Fifth and Fourteenth Amendment against the city redevelopment agency for just compensation for a de facto taking. The district court found because of the agency's actions, the subject property became unsaleable in the open market and its use for its intended purpose because severely limited. The district court held the natural consequence of the agency actions was the taking of Elk's property by inverse condemnation in contravention of the Fifth and Fourteenth Amendments. Subsequently, the United States Court of Appeal affirmed the District Court decision holding when a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid.

Similarly, in Althaus v. United States, 7 Cl.Ct. 688 (1985), the owners of private lands within a national park brought action against the government alleging their property had been taken in violation of their Fifth Amendment rights. The claim was based on a progressive accumulation of events and governmental action resulting in an alleged de facto exercise of the power of eminent domain consequent to the congressional creation of the park. Specifically, Plaintiff alleged defendant embarked on a course of conduct, the logical, inevitable, and foreseeable, if not intentional, consequence of which was to deprive them of any market for their property and the right to use it other than as the general public could use the surrounding parkland. As a result of the government's actions, plaintiffs lacked the ability to sell their property to anyone other than the government and the government threatened to delay condemnation proceedings for a couple of years forcing plaintiff to either sell the property for less than market value or litigate the price. Thus, the United States Claims Court held the

government's action over the period of ten years constituted a taking of property of the owners' undeveloped land within the park.

In addition, some state courts have recognized a cause of action for oppressive precondemnation activity. In Taper v. City of Long Beach, 129 Cal.App.3d 590 (Ca. 4th DCA 1982), the California Appellate court held the City of Long Beach liable for engaging in unreasonable delays in filing eminent domain proceedings and other oppressive precondemnation conduct. The facts indicated, the city having expressed its intention to acquire the property and having raised the funds necessary to do so, unreasonably dragged out the negotiations and unreasonably delayed in commencing eminent domain proceedings. As a result, the Taper property became unmarketable, unsaleable and unusable. The Taper court concluded the city's conduct went well beyond the general land planning and negotiation stage indicating an intent to condemn which entitled the plaintiffs to damages for the oppressive precondemnation conduct. See also, Cambria Spring Co. v. City of Pico Rivera, 171 Cal. App. 3d 1080 (Ca. 2d DCA 1985). Similarly, in State ex rel. Highway Com'n v. Edelen, 872 S.W.2d 551 (Mo. App.E.D. 1994), the Missouri Court of Appeals stated a landowner may be compensated for decline in value of property if there is evidence of aggravated delay or untoward activity by the condemnor.

After review of both federal and states holding, the court concludes Florida courts should recognize a cause of action for oppressive precondemnation conduct where the conduct goes beyond the mere planning and negotiation stages and indicates an intent to condemn on the part of the government agency. When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation should be paid. Further, if the public entity abuses its authority to acquire real property for public purposes by engaging in oppressive precondemnation conduct or delay tactics to coerce the owner to sell the property at below

market value, the public entity should be liable for damages. To hold otherwise would compromise the intent of both the Florida and Federal Constitution which provide private property shall not be taken for public use, without just compensation. See, Art. X, §6 Fla. Const. and Fifth Amendment, U.S. Const.

In order to rule on Defendant's motion to dismiss, this court must examine the complaint to determine if plaintiffs sufficiently allege conduct going beyond the mere planning stages of condemnation. The pertinent facts alleged by plaintiffs giving rise to this cause of action are as follows: (a) SFWMD has determined it will acquire the property for its Everglades Improvement Project (Complaint ¶ 5); (b) SFWMD has the funds available to acquire the property (¶ 9); (c) SFWMD, by virtue of its conduct and public announcements, has proceeded past the planning stages of the project: by acquiring other property within the project boundaries (¶ 9), by marking the property for acquisition in its project design documents and advising the owners and the public of the pending acquisition (¶ 6a), by appraising the property and offering to purchase the property at below market value (¶ 6b), and by demanding access to the property to conduct tests necessary for the project (¶ 6f); (d) SFWMD has rendered the property unmarketable and incapable of development to its highest value (¶ 7); (e) SFWMD has delayed filing of eminent domain proceedings in order to coerce an agreement on price or to coerce plaintiffs to waive constitutional guarantees (¶ 6e); and (f) SFWMD advised plaintiffs it would file timely condemnation proceedings only if: plaintiffs waive their right to a jury trial on valuation, waive their right to reimbursement of litigation expenses and attorneys' fees, waive their right to severance damages, convey without consideration an access easement for an adjoining property to SFWMD and agree to an arbitrary cap on compensation for the property (¶ 6e).

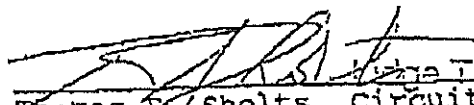
Florida courts should recognize a cause of action for oppressive precondemnation conduct when a condemning authority abuses its authority to acquire real property for public purpose by

engaging in oppressive precondemnation conduct or delay tactics to coerce the property owner to sell his property at below market value. To state a cause of action for oppressive precondemnation conduct, plaintiff must allege conduct going beyond mere planning or negotiation. In our case, Plaintiffs alleged oppressive conduct going beyond mere planning. In addition, Plaintiffs alleged facts indicating an intent by SFWMD to condemn the property and to coerce Plaintiffs to sell their property at below market value. In viewing the allegation in the light most favorable to the nonmoving party, this court concludes Plaintiffs have sufficiently alleged a cause of action for oppressive precondemnation conduct.

Based upon the above, the Motion to Dismiss filed by Defendant South Florida Water Management District is denied. Deendant shall file its answer within fifteen (15) days of the date of this order.

ORDERED at West Palm Beach, Florida,

SIGNED & DATED
JUN - 6 1995
JUN 8 1995


Thomas P. Sholts, Circuit Judge

Copy furnished:
Toby Prince Brigham, Esquire, Brigham, Moore, Gaylord, Schuster & Merlin, 203 S. W. 13th Street, Miami, Fl 33130
Ruth P. Clements, Esquire, 3301 Gun Club Road, West Palm Beach, Florida 33406

RECORDED
INDEXED
JUN 10 1995