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Condemnation Blight Under Florida Law: A Rule of Appropriation or the Scope of the Project Rule in D

by Robert Alfert, Jr.

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The ubiquitous notion of "condemnation blight" appears to have gained a resurgence in eminent domain circles, especially in Florida. Not surprisingly, condemnation blight also continues to be one of the more erratically applied, confused notions in eminent domain jurisprudence. Judicial decisions from the various states apply the concept differently, and differences of opinion can even be found among decisions in the same state. Perhaps the only common denominator is in the meaning of condemnation blight. Condemnation blight generally refers to the detrimental impact on property caused by the threat of condemnation *or* by delays between the time the condemnor announces a proposed acquisition and the time the actual taking occurs.[1] The question then becomes whether courts will recognize condemnation blight as a rule of appropriation (*i.e.*, a de facto taking absent a physical invasion or the imposition of some direct legal restraint) or a rule of evidence applicable to valuation proceedings. This article analyzes the majority and minority views and assesses the status of Florida law on this subject. Although not a paradigm of clarity, the Florida Legislature and Florida courts have at least established certain guideposts for practitioners to follow in this area of the law.

Condemnation Blight as a Rule of Appropriation

The general proposition recognized in the vast majority of jurisdictions is that the mere plotting or planning in anticipation of a public improvement—the generally alleged cause of condemnation blight—does not constitute a taking.[2] A variety of reasons underscore this proposition: Plotting or planning does not deprive the owner of the use or enjoyment of the property; no physical invasion of the property has occurred; the projected improvement may be abandoned; the threat of condemnation is one of the conditions upon which all property is held; and, finally, precondemnation planning assists and promotes flexibility in the growth and expansion of, inter alia, cities, counties, and critical infrastructure.[3]

A distinct minority of jurisdictions, however, have articulated exceptions which may apply in "extraordinary circumstances."[4] A taking may be found where the condemnor engages in extreme activity which evinces an "unequivocal intent" to take the allegedly affected property. Prohibitory actions by the condemnor which interfere with an owner's use and enjoyment of the property may constitute an exception. An increasing number of courts are also holding that actions of a condemnor which tend to severely depreciate the value of property required for a public improvement may rise to the level of a compensable taking.[5]

The most often cited cases in this area reveal that polar results can arise from virtually indistinguishable facts, dependent solely upon whether the presiding court recognizes an exception to the general rule regarding precondemnation activities. For example, the case of *City of Chicago v. Loitz*, 329 N.E.2d 208 (Ill. 1975), involved a proposed realignment of an intersection which would require four separate parcels. To facilitate the project, the commissioner of public works was authorized to engage in negotiations with the property owners to purchase the four parcels. The commissioner specifically entered into negotiations with the condemnee and reached an oral agreement as to price. This agreement was never reduced to an enforceable contract. During these negotiations, the city acquired or condemned the other three separately owned parcels.[6]

The city ultimately never sought to finalize the purchase agreement and, in fact, abandoned the entire project. The condemnee later claimed that the planning activities severely damaged his property which, at that time, was being used for the operation of a gas station. The common knowledge of the project allegedly prompted the gasoline supplier to refuse to supply gasoline for resale and terminated negotiations with the condemnee for additional funds to remodel the gas station. Although the condemnee conceded that planning activities such as open discussions of public improvements, adoption of planned improvements, and publication of the adopted

plans do not rise to the level of a taking, the condemnee argued that the price negotiations and alleged price agreement itself independently constituted a taking. The Illinois Supreme Court, expressly following the majority rule, held that neither the price agreement nor the totality of the city's action could give rise to an inverse claim.[7]

The case of *Macmor Mortgage Corporation v. Exchange Nat'l Bank of Chicago*, 332 N.E.2d 740 (Ill. App. Ct. 1975), which followed and perhaps extended the authority of *Loitz*, involved the distinction of the takings claim being predicated on the effect of the condemnor's acquisition of adjacent property rather than the refusal to acquire the subject property. In *Macmor Mortgage*, the condemning authority announced its plan to develop a new junior college within an eight-block city area. The claimant landowner in this action owned two hotels located within phase III of the planned project. Over the course of four years the condemnor acquired or razed virtually all of the property within phase III with the sole exception of the two hotels.[8]

The inverse condemnation action brought by the landowner alleged that the acquisition and demolition of the buildings surrounding the two hotels "destroyed the residential character of the area, destroyed the attractiveness of the hotels as residential property, and rendered the property unfit for its sole feasible use."[9] The overall alleged impact was the interference with the landowner's use and enjoyment of the property. Relying on the general rule that precondemnation activities do not constitute a taking, the appellate court ruled that even the acquisition and demolition of surrounding properties and resulting decline in the value of the subject property was not sufficient to constitute a taking.[10]

Under virtually identical material facts, decisions from other jurisdictions have ruled otherwise. As an example, in *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1997), the condemnor repeatedly advised a landowner that it would acquire his property as part of a redevelopment zone. Thirteen years after the property was initially included in the zone and thus subject to condemnation, the condemnor ultimately decided to forgo the acquisition. During that period, the vast majority of adjacent properties had been acquired; the landowner had lost its tenants; and the property value had been substantially impaired. The Ninth Circuit held that a de facto taking had indeed occurred:

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. To constitute a taking under the Fifth Amendment, it is not necessary that property be absolutely "taken" in the narrow sense of the word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a direct interference with or disturbance of property rights.[11]

The most recent pronouncement on this subject by a Florida appellate court occurred in *Auerbach v. Department of Transportation*, 545 So. 2d 514 (Fla. 3d DCA 1989). The Third DCA in *Auerbach* affirmed the trial court's dismissal of a second amended complaint which attempted to allege an inverse condemnation claim predicated on the argument that the DOT's "administrative planning actions, preparatory to the institution of possible eminent domain proceedings, rendered the claimant's property economically useless and of no value."[12] Although the *Auerbach* decision is somewhat bereft of any detailed analysis—likely due to the court's belief that its holding was a "self-evident proposition"[13]—it did cite for support the frequently cited *Loitz* decision.[14] As discussed above, the *Loitz* decision expressly refused to follow the exceptions recognized by the minority jurisdictions.

Other Florida decisions have also appeared reluctant to acknowledge condemnation blight as a viable inverse theory. In *Florio v. City of Miami Beach*, 425 So. 2d 1161 (Fla. 3d DCA 1983), the Third DCA affirmed the trial court's denial of an inverse condemnation action predicated on alleged condemnation blight arising from a parcel's inclusion in a dedicated redevelopment area. Additionally, the First DCA in *Department of Transportation v. Donahoo*, 412 So. 2d 400 (Fla. 1st DCA 1982), reversed a trial court's finding that a de facto taking had occurred as a result of the DOT's change in construction plans and alleged failure to condemn certain property after promises to the contrary and after years of negotiations for the purchase of such property. Although framed more as a business damage issue, the Third DCA in *Amerkan v. City of Hialeah*, 534 So. 2d 976 (Fla. 3d DCA 1988), also rejected a condemnation blight type counterclaim seeking redress for lost business damages attributable to a two-year delay between the notice of condemnation and the actual institution of condemnation proceedings.

The only Florida decision following a minority viewpoint is a little known trial court ruling rendered by the circuit court for the 15th Judicial Circuit, Palm Beach County: *James Doyne York Trust, et al. v. South Florida Water Management District,* Case No. CL 95 1804 AG (June 6, 1995). In a self-proclaimed case of first impression in the State of Florida, the circuit court specifically analyzed "whether *oppressive* precondemnation conduct constitutes a cause of action for damages. . . ." The *James Doyne* case arises from the recently enacted Everglades Forever Act which mandated restoration and protection of the Everglades through a comprehensive construction project. The cornerstone of the project involves the construction of over 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) determined that the plaintiffs' properties would be acquired for the construction project on or before July 1, 1988.

After negotiations for the purchase and sale of the plaintiffs' property failed, the plaintiffs filed an action alleging that SFWMD's precom- demnation conduct constituted a de facto taking, and sought an injunction to require the condemning authority to exercise its power of eminent domain. The gist of the allegations was that the condemning authority "ha[d] focused on the subject property far beyond mere planning efforts and engaged in a deliberate pattern of conduct designed to coerce the owners to sell their land at less than fair market value and/or to waive certain constitutional rights of due process of law and full compensation. . . ." Plaintiffs specifically alleged that the following conduct constituted oppressive and actionable precondemnation activity:

(a) SFWMD earmarked Plaintiffs' property for definite acquisition and in various ways advised both the Plaintiffs and the public of this fact;

(b) SFWMD caused the property to be appraised for agricultural use and immediately offered to purchase the property at less than its fair market value for its highest and best use which is residential;

(c) Plaintiffs' appraisals, incurred at their own expense, revealed a much higher property value;

(d) SFWMD rejected Plaintiffs' appraisals and stated that immediate purchase could only be by "voluntary purchase" at its price, or otherwise the acquisition would only take place by condemnation in 1998;

(e) SFWMD would only agree to file immediate eminent domain proceedings if Plaintiffs provided sufficient "incentives." SFWMB then prolonged discussions for seven months to propose incentives such as: (1) waiver of jury trial; (2) waiver of attorneys' fees and costs; (3) a cap on the amount of compensation regardless of a higher award of full compensation; (4) waiver of severance damages; and (5) exaction without compensation of an access easement across the remainder; and

(f) SFWMD demanded immediate right to drill test core borings and run transect surveys throughout the property.

Plaintiffs additionally alleged that SFWMD had the funds to proceed with condemnation of the property and actually acquired four other large tracts of land for the construction project. The alleged effect of these actions is that the property became "suspended from the marketplace, sterilized and depreciated. It cannot be sold and may only be rented for temporary maintenance type uses which are a mere fraction of its highest and best use and fair market value. It is not capable of being financed or developed for its highest and best use."

Ruling on a motion to dismiss, the trial court maintained:

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.

The court essentially fashioned a hybrid ruling which incorporated the various minority positions articulated by the case law of other jurisdictions.

The trial court's anomalous ruling in *James Doyne* was not tested by appeal; the plaintiff voluntarily dismissed the case. The decision also has not been tested or even cited by any published decision. Certainly the holding is questionable. The *James Doyne* case summarily discarded the *Auerbach* ruling and, notwithstanding its lengthy case law analysis,[15] failed to discuss any of the other Florida "condemnation blight" cases or the *Loitz* and *J.W. Clements* decisions which have been cited with favor by Florida appellate courts. The *James Doyne* court also failed to attempt to establish a connection to well-established Florida precedent in noninvasive, regulatory-takings contexts which requires an express finding of a denial of substantially all economically beneficial or productive use of the land.[16] Although such a "connection"[17] would indeed be a stretch, a de facto taking predicated on a noninvasive situation without a correlative finding of the denial of substantially all economically beneficial use runs dramatically afoul of Florida Supreme Court precedent.

Condemnation Blight as a Rule of Evidence

Perhaps the notion of condemnation blight was articulated with the greatest clarity in *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895 (N.Y. 1979), which is the leading condemnation blight case according to *Nichols on Eminent Domain*. The court in that case stated:

There is in fact a marked distinction between those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true value at the time of the taking but as if it had not been subjected to the debilitating effect of the threat of condemnation . . . and those cases which go even further and declare that the acts of the condemnor constitute a de facto taking. . . . One is the product of acts which result, realistically speaking, in no less than an out and out appropriation of property . . . while the other relates more properly to certain affirmative value-depressing acts on the part of the condemning authority, requiring only that evidence be received of value prior to such acts in an effort to arrive at just compensation. Both concepts owe their existence to the law's efforts to secure full compensation; they differ only insofar as one involves essentially the rules of appropriation while the other relates to the rules of evidence.
The distinction has, however, at times been ignored and lower courts have been wont to confuse the concepts often speaking of one in terms of the other. Despite this obvious confusion, it is clear that a de facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. *On the other hand, "condemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a taking in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent de jure proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.*[18]

This distinction noted in *J.W. Clement* between "condemnation blight" operating as a rule of evidence rather than a rule of appropriation comports with Florida law.

As thoroughly discussed in this article, Florida courts have not demonstrated an inclination to recognize condemnation blight as a rule of appropriation. Moreover, the Florida Legislature has essentially adopted as a rule of evidence a notion of condemnation blight similar to *J.W. Clement's* interpretation and application of condemnation blight. The Florida Eminent Domain Code, legislatively overruling *Department of Transportation v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984), has now codified the "scope of the project" rule:

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.

F.S. §73.071(5) (1997).

Florida's scope of the project rule is a narrowly defined version of the rule of evidence notion of condemnation blight as articulated by the *J.W. Clement* case. "Compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a *threatened condemnation.*" 269

N.E.2d at 904 (emphasis added). *See also Dade County v. Still*, 377 So. 2d 689, 690 (Fla. 1979) (stating the identical proposition in *J.W. Clement*). Florida courts have long recognized a variant of condemnation blight arising from the concrete threat of condemnation. Specifically, Florida courts have maintained that property subjected to the threat of condemnation will be valued as if it had not been subjected to such a threat. *See, e.g., Department of Transportation v. Gefen*, 636 So. 2d 1345, 1346 (Fla. 1994); *Dep't of Transp. v. Springs Land Investments, Ltd.*, 695 So. 2d 414, 417 (Fla. 5th DCA 1997). The threat, however, must be an imminent threat arising where land is "definitely marked for condemnation," such as the passage of a resolution authorizing acquisition of certain property.[19] *See, e.g., State Road Dep't v. Chicone*, 158 So. 2d 753, 754–55 (Fla. 1963); *Langston v. City of Miami Beach*, 242 So. 2d 481 (Fla. 3d DCA 1971). Mere negative effects attributable to the anticipation of proposed public improvements will not suffice. *Id.*

Thus, a landowner is not left without a remedy in a de jure proceeding. Courts will take cognizance of "condemnation blight" in the valuation of the real property, assuming, of course, that the landowner establishes the threshold proof of an imminent threat of condemnation.

Conclusion

This notion of condemnation blight as a rule of evidence likely is of little comfort to a landowner whose property has been impacted by the threat of condemnation which, under (fortunately) uncommon circumstances, is never instituted or is abandoned. There are, however, powerful countervailing policy reasons why value-depressing incidents which are a consequence of legitimate planning functions of the appropriating sovereign should never constitute a de facto taking. The U.S. Supreme Court in *Danforth v. U.S.*, 308 U.S. 271, 185 (1939),[20] stated this point quite lucidly: "A reduction . . . in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." As *Nichols on Eminent Domain* has also acknowledged, the judiciary harbors significant concerns about the rather obvious slippery-slope implications of condemnation blight giving rise to a de facto taking.[21] Such a prospect indeed has nightmarish implications; the chilling effect on planning would be debilitating. q

[1] Julius L. Sackman, *Nichols on Eminent Domain* §18.01[1] (3d ed. rev. 1997).

[2] *See, e.g., Danforth v. United States*, 308 U.S. 271, 286 (1939); *City of Chicago v. Loitz*, 329 N.E.2d 208, 210–11 (Ill. 1975)).

[3] *See generally* J.R. Kemper, Annotation, *Plotting or Planning in Anticipation of Improvement as Taking or Damaging or Property Affected*, 37 A.L.R.3d 127, 131 (1971) [hereinafter *Annotation*]; *Nichols on Eminent Domain* §18.04[2][c][iii].

[4] *Annotation*, 37 A.L.R. at 131; *Loitz*, 329 N.E.2d 208.

[5] *Annotation* at 131–32.

[6] *Loitz*, 329 N.E.2d at 210

[7] *Id.* at 211.

[8] *Macmor Mortgage Corporation v. Exchange Nat'l Bank of Chicago,* 332 N.E.2d 740, 741 (Ill. App. Ct. 1975).

[9] *Id.* at 741.

[10] *Id.* at 744. *See also Uvodich v. Arizona Board of Regents*, 453 P.2d 229, 234 (Ariz. App. Ct. 1969) (affirming dismissal of action partly predicated on claim that the condemnor's announcement of development plans and acquisition of neighborhood properties in furtherance thereof diminished value of subject property).

[11] *Richmond Elks Hall Association v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977). Although this case also involved intermittent flooding, it is important to note that the date the court established that a de facto taking had occurred predated the flooding by at least 18 months. The holding is, in fact, based upon condemnation blight. *See also Althaus v. U.S.*, 7 Cl. Ct. 688 (1985) (finding a de facto taking where the condemnor engaged in precondemnation activities for over 10 years and to a point where plaintiff's land was the only private land within a national park).

[12] *Auerbach v. Department of Transportation,* 545 So. 2d 514, 515 (Fla. 3d D.C.A. 1989).

[13] The Third DCA specifically stated that the complained-of administrative planning could not rise to the level of a de facto taking, or else such planning would be precluded. *Auerbach*, 545 So. 2d at 515.

[14] The *Auerbach* court also cited *Danforth v. U.S.*, 308 U.S. 271 (1939); and *City of Buffalo v. J.W. Clement Co.*, 269 N.E. 2d 895 (N.Y. 1979) (discussed *infra*).

[15] *James Doyne*, Case No. CL 95 1804 AG (*Kaiser Development Co. v. Honolulu*, 913 F.2d 573, 574–75 (9th Cir. 1990) (maintaining that precondemnation activities can give rise to takings claims, but such claims require proof that there is "no economically viable use" for the land); *Richmond Elks Hall,* 561 F.2d 1327 (finding a de facto taking where the condemnor withheld instituting condemnation proceedings for over 13 years, continued to advise the plaintiff landowner that his property would be acquired in due time, and then ultimately decided to forgo the acquisition after the majority of the adjacent properties had been acquired and the condemnation substantially interfered with the property and its value); *Althaus*, 7 Cl. Ct. at 693 (finding a de facto taking where the condemnor engaged in precondemnation acquisition activities lasting over 10 years and reaching the point where plaintiffs' properties remained the only piece of commercial land within a national park); *Taper v. City of Long Beach*, 181 Cal. App. 3d 169, 182 (Ca. 4th D.C.A. 1982) (admonishing agencies not to "defer negotiations or condemnation . . . or take any other action coercive in nature, in order to compel an agreement on the price to be paid for . . . property . . . or intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property."); *Missouri Highway & Transportation Commission v. Edelin*, 872 S.W.2d 551, 558 (Mo. App. Ct. 1994) (holding there is no compensable taking for simple decline in value due to threat of condemnation "unless there is evidence of aggravate delay or untoward activity by the condemnor").

[16] *Palm Beach County v. Wright*, 641 So. 2d 50, 53 (Fla. 1994); *Tampa-Hillsborough County Expressway Authority v. A.G. W. S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994).

[17] *See Auerbach*, 545 So. 2d at 515.

[18] *J.W. Clement*, 269 N.E.2d at 902 (emphasis added).

[19] Research revealed no reported Florida decision which permits recovery for any diminution attributable to delays between the time the property becomes "definitely marked for condemnation" and the time the actual taking occurs. The Florida Legislature, as a matter of public policy, arguably has already foreclosed an argument to that effect.

[20] The *Danforth* decision has been cited with approval by Florida courts, specifically *Auerbach v. Department of Transportation*, 545 So. 2d 514 (Fla. 3d D.C.A. 1989), which refused to find a taking arising merely from precondemnation planning activities.

[21] *Nichols on Eminent Domain* §18.04[2][d].

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