

SUPREME COURT OF FLORIDA

CASE NO. SC00-1764
Lower Tribunal No.: 3D99-2230

CITY NATIONAL BANK OF FLORIDA,
Formerly known as CITY NATIONAL
BANK OF MIAMI, as Trustee under
Certain Trust Agreement dated November 21,
1985, and known as Trust Number 5005110,
et al.,

Petitioner,

vs.

MIAMI-DADE COUNTY, formerly known
As DADE COUNTY, a political subdivision
of the State of Florida,

Respondent.
.....

RESPONDENT-S ANSWER BRIEF
.....

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent, Miami-Dade County, certifies that the following persons and entities have or may have an interest in the outcome of this case.

City National Bank

Miami-Dade County

Ruden, McCloskey, Smith, Schuster and Russell, P.A.

Thomas R. Bolf, Esq.

Thomas Goldstein, Esq.

Joan Webb

Dr. Lloyd Moriber

Charles Putman

John Hagan

Ronald Baker

Donald Moore

John R. Moreland

James A. Horland, Esq.

PREFACE

The term ACounty@ refers to Respondent/Appellant Miami-Dade County f/k/a Dade County.

The term AProperty Owners@ refers to the Petitioners/Appellees, City National Bank of Florida, as Trustee, and the beneficiaries of the Trust, Dr. Lloyd Moriber and Mrs. Joan Webb.

The term ASubject Property@ refers to the property subject to the condemnation herein, approximately a ten (10) acres tract at the southwest corner of N.W. 27th Avenue and N.W. 207th Street, near Pro Player Stadium, f/k/a Joe Robbie Stadium.

The transcript from the July 7, 1999 hearing on the Defendants= Motion to Tax Attorneys= Fees, Costs, and Experts= Fees (Volume V, Record on Appeal), will be cited to as AT@ with pagination.

The Record below will be referred to by AR@ with pagination.

STATEMENT OF THE CASE AND FACTS

Most of the facts are set forth in the opinion of this Court in *City National Bank of Florida v. Dade County*, 715 So. 2d 350, 351-352 (Fla. 3d DCA 1998), *rev. den.*, 727 So. 2d 904 (Fla. 1998) (copy of opinion attached as Appendix 1) and are repeated herein:

In 1987, the owner prepared a conceptual site plan which called for a hotel, a retail strip shopping center, and four outparcels along 27th Avenue. The outparcels were designed for such uses as a convenience store, fast food restaurant, and a small commercial building.

The County rezoned the property consistent with the conceptual site plan. The southern 3.3 acres were zoned for hotel use and the northern 6.5 acres were zoned for commercial development. However, the owner desired to retain maximum flexibility in developing the property, and did not request approval of the site plan. Consequently, there was no approved site plan for the property.¹

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¹

Although the owner contends otherwise, it is abundantly clear that the body with the power to approve the site plan, the county commission, never did so. The county commission resolution rezoned the property but did not approve the site plan.

=====

After rezoning, economic conditions were not suitable for immediate development of the property. Eventually the owner decided to try to sell the entire ten-acre tract for sale in bulk, leaving the question of

development for a successor owner. In the meantime, the land remains entirely undeveloped and is used as overflow parking for Pro Player Stadium.

In 1992, the County decided to improve the intersection of Northwest 27th Avenue and Northwest 207th Street. In order to accomplish the improvement, the County condemned a triangular segment of land located at the northeast corner of the owner's property. If the property is visualized as a page of a book, Dade County clipped off a segment of the upper right-hand corner. This was about two percent of the total acreage.

As part of its damage claim, the owner sought severance damages. The owner theorized that, had there been no condemnation order, development of the tract would have proceeded in accordance with the conceptual site plan. Under that plan, there were 610 feet of commercial frontage on Northwest 27th Avenue. Under the conceptual site plan, the 610 feet on 27th Avenue were divided into four approximately 150-foot outparcels. The site plan suggested a convenience store, commercial building, fast food restaurant, and conventional restaurant as likely uses for the four outparcels.

After the taking, the commercial frontage on 27th Avenue was reduced by 116 feet, leaving 494 feet available for development. The expanded roadway ran diagonally across the northeast corner of the property, eliminating much of the proposed 150-foot outparcel which the conceptual plan had placed at the northeast corner of the property.

The owner argued that after the taking, development could no longer proceed in accordance with the conceptual site plan. This meant that the owner would either have to create three oversize outparcels, or else four undersize outparcels, on 27th Avenue. Because the conceptual site plan could not be implemented as drawn, the owner c

ontended that it was entitled to severance damages.

* * *

Furthermore, even if the owner had sought approval for this particular site plan, it is also speculative whether the County ever would have agreed to it in its proposed form. In this particular case, Northwest 207th Street was misaligned where it crossed Northwest 27th Avenue. This created an awkward traffic flow and a traffic signal problem. Given the increased traffic which would result from development, the County may well have required road access to be regularized before development could proceed. Whether for that or other reasons, there can be no assurance that the conceptual site plan ever would have been approved in its original form. In short, the owner's intentions and the County's possible actions both fall into the realm of speculation, and the conceptual site plan was properly excluded from evidence.

There was not only one conceptual site plan; rather, there were multiple conceptual drawings/site plans. During 1985-1987, architect Avellino Leonicio produced numerous conceptual drawings/site plans for the subject property, including conceptual plans that did not contemplate any subdivision at all of the subject property. R.354-358; Appendix 2. Eventually, the conceptual plans contemplated a Proposed Parcel Subdivision Plan of the subject property; however, this subdivision plan was never platted, officially subdivided or recorded in accordance with law. Chapter 28, Subdivision Code, Code of Metropolitan Dade County. R.357; Appendix 3 and Hagan Deposition at 27. Several different conceptual drawings/site plans were prepared depicting this fictitious subdivision. R./361-364; Appendix 4. The resulting site plan (R.375; Appendix 5)

did not comply with Section 33-251.5, Plan Review Standards, Code of Metropolitan Dade County; therefore, it was not reviewable by the County's building and zoning department. R.688.

The Property Owners and their attorney, Tom Bolf, chose to seek severance damages from the County by superimposing the area of the taking over this conceptual site plan and then determining how the taking affected the Owners' ability to implement their conceptual plan. R.283; Appendix 6. In addition to the above, all of the experts retained in this case assumed that a gas station would have been built on the fictitious corner outparcel. T.93, 102-103, R.344; Appendix 7. In this rendition of the conceptual site plan, however, the dimensions of the corner parcel were inexplicably downsized from the other three outparcels when the conceptual layout of a gas station was now depicted on that corner. Appendix 7.

The land planner, Charles Putman, then determined that the taking would wipe out the established gas station use. R.345; Appendix 8. Therefore, in order to save the valuable gas station corner outparcel, Mr. Putman reconfigured the fictitious subdivision into three alternative fictitious subdivisions depicting three reconfigurations of the fictitious, non-existent gas station. R.316-318, 346-348; Appendix 9. Mr. Ron Baker of MDM Services specializes in the design and construction of gas stations. T.126. Mr. Baker, at the request of Mr. Bolf, prepared a half-d

ozen layouts of gas stations on the corner parcel in both the before condition and in the after condition on the reconfigured outparcels. R.285, 289-291B, T.126, 128; Appendix 10. A gas station marketing expert, John R. Moreland, was also retained. T.123, 125.

Don Moore of Zook, Moore & Assoc. from West Palm Beach performed a traffic engineering and transportation safety and site development analysis with regard to the various conceptual plans produced by MD M Services, the gas station designer. T.114-115. Mr. Moore analyzed traffic patterns and flow in both the before and after situations. T.119-120; R.292-294.

Prior to filing its eminent domain petition, the County had offered the owner \$95,000 and thereafter deposited that amount as its good faith estimate in 1993 in accordance with its Order of Taking. T.151. The County's good faith deposit was based on an appraisal that arrived at a value of \$10 per square foot for the entire tract of land. Gallaher's Appraisal at 31. The Property Owner's appraiser, John Hagan, arrived at the same \$10 per square foot value of the entire tract. Both appraisers determined that the highest and best use based on its commercial zoning was for commercial development including the possibility of subdividing the property into outparcels. Hagan's Appraisal at 8 and Gallaher's Appraisal at 19.

Hagan, however, did not stop there. Based on the unplatted, fictitious and unrecorded subdivision appearing on the unapproved site plan, Hagan allocated specific values to each of the outparcels. Hagan's Appr

aisal at 11. Hagan allocated a \$20 per square foot value to the corner o
utparcel assuming it was a gas station site, \$12 per square foot to the ot
her three outparcels based on their use as fast food or sit-down restaura
nt sites, and, by simple mathematical calculations arrived at a value of
\$6.12 per square foot for the remaining land which he designated as the
West commercial parcel. Hagan Appraisal at 11.

In order to prove severance damages to the remainder of the entire
tract, Hagan determined:

After the taking, the present site plan will not be
suitable for a service station development. The
area acquired would render the corner site infeasible for service station use given its configuration.

With the assistance of the firm of Charles Put
man & Associates, Inc. and Zook Moore Associat
es, Inc. the appraiser has analyzed an alternate si
te plan which will provide for full service station
use conforming to the taking. With the newly ali
gned intersection, the curvature of the northeast
corner of the site requires the service station site
layout to extend for 160' from the point of tange
ncy with the curve. This is the same amount of l
inear frontage possessed before the taking. The r
emaining outparcels fronting on NW 27 Avenue c
ontain a total of 89,448 sf. A third parcel is crea
ted adjacent to the service station parcel to the
west. This parcel will contain 33,807 sf, and be c
onsidered a side parcel lying between the service
station and the rear commercial area.

Hagan's Appraisal at 15. Based on the redesign of the non-existent gas
station on a reconfigured, unplatted, unrecorded fictitious subdivision, H
agan assigned values to each of the Anew@ parcels: \$20 per square foot to
the corner service station outparcel, but based on less total square foot

age than the before condition; \$12 per square foot to each of the other two outparcels, but based on a larger total square footage than before; \$8 per square foot for a newly created Aside parcel; and \$6.12 per square foot to the remaining West Commercial Parcel, but based on a larger total square footage.

When Hagan adds the total values of all the parcels, he arrives at a value to the remaining tract of land of \$9.59 per square foot or a loss to the entire remaining tract of 414 per square foot. Hagan then reallocates the amount of square footage for the service station site to equal the size of the service station site before the taking, and the total loss to the entire tract is reduced to 284 per square foot. Hagan then reconciled these two after approaches to arrive at a loss to the entire tract of 354 per square foot resulting in a total severance damage for the entire tract of land at \$97,000.00. Thus, Hagan spent the vast majority of his time determining this severance damage based on how the property was conceptually to be developed with a gas station. T.139-140, 147.

Hagan's total bill was \$17,922.50, while the County's appraiser was paid \$1,800.00 for his initial good faith estimate of value of \$95,000.00. T.149. Mr. Putman, the land planner, billed \$37,741.48. T.90. Mr. Moore, the traffic engineer, billed a total of \$38,004.16. T.120. Mr. Baker, gas station design specialist, billed a total of \$7,513.57, while Mr. Moreland,

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He was paid an additional \$9,150.00 for acting as a consultant to counsel and for trial preparation.

the gas station marketing expert, billed \$500.00. T.123, 126. The County did not retain any experts other than its appraiser.

At the conclusion of the litigation six years later, the Property Owners were awarded \$95,000.00, the exact amount offered to them in 1992 prior to filing suit. The Property Owners appealed to the Third District Court of Appeal which affirmed the trial court's ruling granting the County's Motion in Limine to exclude the proffered testimony of the conceptual site plans as the basis to determine severance damages as speculative and conjectural. *City National Bank of Florida v. Dade County*, 715 So. 2d 350 (Fla. 3d DCA 1998), *rev. den.*, 727 So. 2d 904 (Fla. 1998) (Appendix 1). The Supreme Court denied conflict review.

A different trial judge conducted a hearing on the Property Owner's motion to tax attorney's fees and costs totaling over \$217,000 including expert witness fees. The trial court issued its Findings of Fact, Conclusions of Law and Final Judgment Awarding Attorneys' Fees, Expert Fees and Costs on July 28, 1999. (copy attached as Appendix 11). The trial court determined that it was reasonable and justified under the circumstances of this case for Tom Bolf, the Property Owner's attorney, to pursue the severance damage claim. The Court awarded Bolf \$75,000 of the \$100,759 fee that he sought. The court then awarded \$17,922.50 to the appraiser Hagan representing 100% of his billing. T.135. Without explanation, the Court awarded \$50,000 of the \$89,991.21 that was billed

by the remainder of the experts and co-counsel Horland for them to split up as they saw fit. The total attorneys' fees and expert witness fees awarded by the trial court was \$140,739.26. Dade County appealed the trial court's ruling. The Third District Court of Appeal reversed the trial court's ruling finding that the trial court had erred by including expert witness fees incurred in proving a severance damage claim based solely on the Aconceptual site plan theory[@] that was speculative and conjectural. *Miami-Dade County v. City National Bank of Florida*, 761 So. 2d 368 (Fla. 3d DCA 2000) (Appendix 12). The Third District reduced expert witness fees from \$65,739.26 to \$1,500.00, which amount reflected a reasonable fee that would be paid for an appraiser to verify or challenge the amount of compensation determined by the County's appraiser. *Id.*, 761 So. 2d at 370. In addition, the Third District remanded the award of attorneys' fees to the circuit court to significantly reduce the \$75,000.00 award to reflect counsel's time spent on matters other than time spent on proving severance damages based on the Aconceptual site plan theory. [@] *Id.*, 761 So. 2d at 370. Motions for rehearing, rehearing en banc, certification of conflict, and certification of question of great public importance were denied. R.681.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly held that the trial court erred in awarding attorneys= fees and expert witness fees incurred in preparing for the recovery of severance damages based on the Aconceptual site plan theory.@ The trial court abused its discretion in awarding such attorneys= fees and expert witness fees because all such fees and costs were incurred in preparing a case for severance damages that was based on conceptual site plans which were inadmissible as a matter of law as speculative and conjectural. The trial court did not even consider whether severance damages based on speculative and conjectural site plans were predictably not recoverable.

The trial court in awarding an attorney=s fee also failed to apply the correct standards that would give the greatest weight to the fact there was no monetary benefit resulting to the client from the services rendered. The trial court also failed to consider what the Property Owners would ordinarily expect to pay as an attorney fee if the County were not responsible for paying such fees.

ARGUMENT

in an eminent domain proceeding attorneys= fees incurred in proving a severance damage claim that is inadmissible as a matter of law and RESULTED IN no benefit for the property owner are not recoverable from the condemning authority.

The standard of review for appellate courts reviewing both the award of attorney fees and expert witness fees is one of abuse of discretion by the trial court. *Department of Transportation v. Springs Land Investments, Ltd.*, 695 So. 2d 414, 415 (Fla. 5th DCA 1997), and *Div. of Admin., State Dept. of Transportation v. Denmark*, 354 So. 2d 100, 102-103 (Fla. 4th DCA 1972). In assessing such fees, this Court must be guided by the eminent domain fee statutes in effect at the time of the filing of the suit in 1993. *DOT v. Robbins and Robbins, Inc.*, 700 So. 2d 782 (Fla. 5th DCA 1997), *rev. disp.*, 716 So. 2d 769 (Fla. 1998).

² ' 73.092 provides in pertinent part:

73.092 Attorney=s fees.--

(1)

In assessing attorney=s fees in eminent domain proceedings, the court shall give **greatest weight** to the benefits resulting to the client from the services rendered. (emphasis added)

* * *

(2)

In assessing attorney=s fees in eminent domain proceedings, the court shall give secondary consideration to:

(a)

The novelty, difficulty, and importance of the questions involved.

(b)

The skill employed by the attorney in conducting the cause.

(c)

The amount of money involved.

(d)

The responsibility incurred and f

In eminent domain cases, the appellate courts will closely scrutinize an attorney fee award to ensure that they are reasonable under the circumstances. *Seminole County v. Clayton*, 665 So. 2d 363, 364 (Fla. 5th DCA 1995). As stated in *Brevard County v. Canaveral Properties, Inc.*, 696 So. 2d 1244, 1246 (Fla. 5th DCA 1997):

There is no basis for an excessive appellate attorney's award in eminent domain cases. It is not legally justifiable nor in the public interest. The taxpayers of this state ultimately have to pay any excessive awards made, with no corresponding benefit to the public's interest or welfare.

Furthermore, since the condemning authority is required to pay any reasonable attorney fee incurred in an eminent domain case, the condemnee property owner has no interest in the amount of that fee. *DOT v. Robbins and Robbins, inc., supra*, 700 So. 2d at 785. (Since the condemnee has no interest in the attorney fee, the condemning authority does not have to pay any costs incurred in proving the amount.)

The trial court in this case clearly abused its discretion in its award of attorneys' fees and expert witness fees; and the Third District Court of Appeal in its review of the trial court's order correctly determined the trial court abused its discretion when it clearly determined that the trial court erred by including in its calculations those fees and costs related to Property Owners' failed severance damages claim. @ *Miami-Dade County v. City National Bank of Florida, supra*, 761 So. 2d at 370 (Appendix 12).

Tom Bolf, counsel for Property Owners, is an experienced eminent domain trial attorney with fifteen (15) years of legal experience and is an AV rated attorney. Any lawyer practicing in the field of eminent domain, however, must have and certainly should be charged with knowledge of the holding in *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955). *Yoder* holds that speculative and conjectural testimony is inadmissible as a matter of law:

ulfilled by the attorney.

(e)

The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

The attorney fee statute was amended in 1995 to provide for an award of an attorney fee based solely on a percentage of the benefit obtained for the client. Since there was no benefit achieved by the attorney in this case, under the 1995 amendment, the attorney would not be entitled to any fee at all.

We have consistently ruled that the amount of compensation to be awarded to a property owner when his property is sought to be taken in an eminent domain proceeding is the value of the land taken at the time of the lawful appropriation. It is appropriate to show the uses to which the property was or might reasonably be applied and the damages, if any, to adjacent lands. Nevertheless, the value must be established in the light of these elements as of the time of the lawful appropriation. It is not proper to speculate on what would be done to the land or what might be done to it to make it more valuable and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date. To permit such evidence would open a floodgate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest. (emphasis in the text, citations omitted). 81 So. 2d at 20-221.

See also, Coral Glade Co. v. Board of Public Instruction of Dade County, 122 So. 2d 587 (Fla. 3d DCA 1960) and *Jacksonville Transportation Authority v. ASC Associates*, 559 So. 2d 330, 334 (Fla. 1st DCA 1990), *rev. d en.*, 574 So. 2d 139 (Fla. 1990). It is also axiomatic in eminent domain law that A[T]he owner's actual plans or hopes for the future are completely irrelevant. Such matters are regarded as too remote and speculative to merit consideration. @ 4 *Nichols On Eminent Domain* & 12B.12 (1998).

Mr. Bolf, however, points to *Partyka v. Florida Dept. of Transportation*, 606 So. 2d 495 (Fla. 4th DCA 1992), as authority for the admissibility of the site plans to justify pursuing his theory for proving severance damages using a site plan. However, in *Partyka* there is no indication whether the site plan put into evidence was an officially approved site plan; whether the property was a parcel either not available for subdivision or used as a single parcel; whether the property was actually platted or subdivided and if so whether it was an approved subdivision; and whether there actually were any steps taken towards development or construction and if so, what those steps were. Even assuming the Property Owners in this case did have an approved site plan, Mr. Bolf should have known that under Florida law it was still subject to county permitting requirements and could not have been relied upon as a guarantee that the County would have issued a building permit. *See, Circle K General, Inc. v. Hillsborough*, 524 So. 2d 1143 (Fla. 2d DCA 1988).

The issue in the case *sub judice* was not whether a site plan was *per se* admissible as a matter of law; rather, the issue was whether these conceptual site plans and development scheme upon which Bolf was relying to prove his case for severance damages were speculative and conjectural, and therefore, inadmissible in evidence as a matter of law. Mr. Bolf was on notice from the inception of this case that the site plan was Aconceptual@ (a letter from Property Owners= architect in 1987 to attorney Robert Traurig referring to the site plan as Aconceptual@ R-Exh. 15) and, according to his own appraiser, Mr. Hagan, Apreliminary@ or Ainformal site plans@ (Hagan Deposition at 12 and R-603). Mr. Bolf also knew that the conceptual site plan was not legally binding on his clients, could have been changed at any time to accommodate any subdivision or no subdivision at all, and could have accommodated any development on the vacant land for any use legally permitted by the zoning.

Yet, in spite of all the foregoing, Mr. Bolf chose to pursue preparing his severance damage claim based on the conceptual site plans depicting the owner=s fictitious, unplatted, intended subdivision and development scheme, as if it were an accomplished fact. He retained experts to both concoct and then quantify the severance damages to the remainder of the entire unsubdivided tract by reconfiguring the fictitious conceptual subdivision to accommodate a specific, but nonexistent, gas station use. Thus, all the evidence sought to be introduced at trial was clearly speculative and conjectural and went far beyond valuing the property in the condition it existed on the date of taking (and still exists today)--that is, a vacant tract of unsubdivided land.

Mr. Bolf knew that the burden of proof of severance damages was on the property owner, not on the County (the condemning authority). *City of Ft. Lauderdale v. Casino Realty, Inc.* 313 So. 2d 649, 652 (Fla. 1975). Yet, Bolf continues to persist in arguing that the County's Appraiser used the methodology that the County now asserts was plainly inappropriate as the basis for the reasonableness of his Aconceptual site plan theory@ for proving severance damages. Petitioner's Initial Brief, P. 21. First, the Third District Court of Appeal in *City National Bank of Florida v. Dade County, supra*, 715 So. 2d at 353, found that no matter what the County's appraiser did with regard to the owner's site plan, that the County's Appraiser granted the conceptual site plan greater dignity than it deserved. @ Second, in light of *Casino Realty, supra*, the County was not required to present any evidence with regard to severance damages; it is the property owner who must allege and go forward with the evidence of such special damages. Third, the County appraiser's testimony clearly shows his purpose in looking at the possible plan of development from the owner's point of view was to **prove use not value**, and that there could be an infinite number of configurations on this vacant tract of land depending on the end users, including the potential to have a single end user for the entire tract. Gallaher's deposition at 20-23, and 25.

The trial court's ruling has the practical effect of reversing this burden of proof and placing the consequences of the property owner's failure to sustain that burden (to the extent that attorneys' fees and expert witness fees incurred in pursuing that claim must be paid) onto the condemning authority.

The trial court had all of the foregoing information in front of it, including the Third District's opinion upholding the trial court's decision that there was no approved site plan, no development had occurred, and it was entirely speculative whether development would ever take place in accordance with the conceptual site plan. @ *City National Bank of Florida v. Dade County*, *supra*, 715 So. 2d at 353. The trial court abused its discretion in failing to apply the findings of the trial judge and the Third District in determining the award of attorneys' fees. The trial court only adjusted the attorney's fee down from \$106,991.50 to \$75,000 based on the trial court's perception that Mr. Bolf presented a Rolls Royce conceptual plan when Chevrolet should have accomplished the purpose. @ Appendix 11, p. 4. In other words, the trial court was approving the use of a Chevrolet conceptual plan while ignoring the fact that both the trial judge and the Third District Court of Appeal had ruled that such conceptual plans were inadmissible as a matter of law.

Even though the Third District had previously ruled that it was proper to assess an attorney fee even where there was zero compensation awarded, that court noted that the right of a landowner to an award of an attorney fee and costs was **neither objected to nor questioned by the condemning authority** in the trial court. *City of Miami Beach v. Liflans Corp.*, 259 So. 2d 515, 516 (Fla. 3d DCA 1972). The County in this case, however, has both objected to and questioned the award of any attorney fee or expert witness fee for work performed formulating, preparing and presenting any unsuccessful, legally inadmissible severance damage claim based on the conceptual site plan theory.

The case relied upon by Property Owners' counsel for awarding fees and costs where there is zero compensation awarded is *Hodges v. Division of Administration, State Dept. of Transportation*, 323 So. 2d 275 (Fla. 2d DCA 1975). *Hodges*, which deals with fees and costs awarded in a failed business damage claim, cites *Liflans* as its authority for paying such fees and costs. However, the Second District Court of Appeal has receded *sub silentio* from the *Hodges* opinion. In *County of Sarasota v. Burdette*, 524 So. 2d 1064 (Fla. 2d DCA 1988), the Second District Court of Appeal refused to award an accountant's fee where the owners on the second day of trial abandoned their claim for business damages. In so ruling, the Second District stated:

We have carefully analyzed the question of whether the Youngs are entitled to reimbursement for Payne's fee and *we are unable to find an acceptable basis for its allowance.* (Emphasis added.)

524 So. 2d at 1067.

The trial court further abused its discretion by not applying the correct methodology in determining the attorney fee lodestar figure. The Court in *State Dept. of Transp. v. Skidmore*, 720 So. 2d 1125 (Fla. 4th DCA 1998), after noting that the 1993 statute provides no formula or methodology for calculating the attorney fee, ruled:

Rather, we have consistently followed, as did the court below, Byrne's method of calculating the fee award by looking at the benefits obtained by the attorneys for the client, determining the appropriate lodestar using the factors listed in ' 73.092(2), and then deciding whether to adjust that figure based on the total benefits obtained (citations omitted). *Id.* at 1129.

See also, DOT v. Robbins and Robbins, Inc., supra (the Court ruled the correct procedure was to consider all of the factors set forth in *Rowe* except that the benefits obtained should be weighed more heavily³ in determining the lodestar and then adjust the lodestar up or down based on the benefit obtained.).

Thus, both *Skidmore* and *Robbins* requires the trial court to consider the benefits achieved for the client twice in arriving at a reasonable fee. First, in accordance with ' 73.092(2)(e), the court must determine the reasonable number of hours expended and the hourly fee for those hours **in light of the benefit achieved**. Then, in accordance with section 73.092(1) that requires the court to give the greatest weight to the benefits resulting to the client from the services rendered,⁴ the court should have adjusted that figure down based on the zero benefits achieved for the client. It is totally unclear the method of adjustment employed by the Court in this case to arrive at the \$75,000 award of an attorney's fee. The legislature obviously recognized that the hours spent on an eminent domain case must have **some** relationship to the results obtained. Certainly, the trial court should have started with the fact that counsel for the condemnee achieved no benefit for his client over six years of litigation and then applied the statutory criteria in section 73.092(2), Fla. Stats. (1993) in light of the zero benefit to arrive at a proper lodestar. The novelty, difficulty and importance of the questions involved should have also been analyzed in light of the result obtained. However, in this case, the novelty, difficulty and importance of the questions were all creations of defense counsel, and he should not be rewarded for predictable failure in his attempt to circumvent the law on speculative evidence, even if he did succeed initially in misleading the trial judge as to the admissibility of such evidence. He took a chance and was ultimately unsuccessful, but the citizens of Miami-Dade County should not have to pay for counsel's calculated attempt to circumvent the law.

³ Section 73.092(2)(e)

The attorney's time and labor reasonably required adequately to represent the client **in relation to t**

Counsel is obviously a skilled and experienced eminent domain lawyer, but as such he should have had a better understanding of what was wrong with his case, especially when the County refused to hire its own experts to contradict experts retained by him. The amount of attorney time expended and expert witness costs incurred exceeds by two-fold the maximum benefit that could have been achieved even had counsel achieved total success--such an expenditure of public funds is impossible to justify. Eminent domain is not synonymous with free reign and irresponsible litigation. The attorney took his responsibility to an extreme, gambled and lost.

Now, counsel for the Property Owners argues that in eminent domain the lawyer always gets paid. However, in normal litigation a lawyer owes his client a duty of full disclosure, including informing the client of the client's potential responsibility to pay for all attorney's fees and expert witness fees that would be incurred if the client lost, so the client could make an informed decision whether to proceed or not. Had the Property Owners in this case been informed that they could incur over \$200,000 in attorney's fees and expert witness fees to pursue a \$100,000 severance damage claim, it seems obvious to conclude that they would opt not to pursue such a claim. Why doesn't an eminent domain lawyer, especially in light of the cautionary statutory language that "the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner were not responsible for the payment of fees and costs" (§ 73.092(4), F.S.), have to disclose to the client that attorney's fees and expert witness fees may not be paid by the Petitioner if the case is lost. *See, Skidmore, supra*, 720 So. 2d at 1129-1130.

he benefits resulting to the client. (emphasis added).

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The Florida legislature has now amended section 73.092(1) requiring that an attorney fee be awarded solely on the basis of benefits achieved for the client (F.S. 1994), which, if applied in this case, would result in an award of zero attorney's fees.

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Counsel is not unmindful, however, that in eminent domain cases t

In light of the result, it is glaringly obvious that all of the attorney's time and labor was ultimately unproductive and wasted in the pursuit of a legally inadmissible Aconceptual site plan theory@ of proving severance damages. When one adds the statutory mandate that

(4)

In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner were not responsible for the payment of fees and costs. ' 73.092(4), Fla. Stats. (1993).

then the attorney fee becomes even more glaringly unreasonable. What property owner would pay more than \$217,000 in attorney fees, expert witness fees and costs to receive an additional \$100,000 in compensation. As stated by the Court in *Skidmore* it was Aunreasonable to expect that Skidmore would pay \$900,000 to receive only about 25% more in benefits." *Supra* at 1129-1130. Applying the *Skidmore* rationale to the case *sub judice* it would seem even more unreasonable to expect to pay any fee whatsoever. *See also, Florida Inland Navigation District v. Humphrey*, 616 So. 2d 494, 497 (Fla. 5th DCA 1993) (a court award of attorney's fee as a percentage of benefits without regard to an hourly rate was acceptable as long as the trial court showed it relied on Sec. 73.092 and **accorded primary consideration to the benefits achieved.**).

The trial court clearly abused its discretion in not following a proper method of determining the lodestar figure. The error was compounded by the court's failure to explain how it adjusted the lodestar figure down to arrive at the \$75,000 fee award, especially in light of its comment that time was spent on a Amisconceived counterclaim@ and developing and attempting to present a ARolls Royce@ conceptual plan when a Chevrolet could have accomplished the purpose. Certainly, the trial court appears to have awarded a Rolls Royce attorney's fee.

he practice is for attorneys and expert witnesses to accept whatever the courts award as fees.

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The Florida legislature made it clear in its 1995 amendment that in awarding attorneys fees in eminent domain its intent was to look **exclusively** at the benefit achieved for the client.

in an eminent domain proceeding expert witness fees and costs incurred in a severance damage claim that is inadmissible as a matter of law are not recoverable from the condemning authority.

The standard of review for appellate courts reviewing an award of an expert witness fee is one of abuse of discretion by the trial court. *Department of Transportation v. Springs Land Investments, Ltd.*, *supra*, 695 So. 2d at 415. The trial court clearly abused its discretion in awarding expert fees incurred in this case to prove a conceptual site plan theory of severance damages that has been ruled inadmissible as a matter of law. Since in eminent domain law both attorney fee awards and expert witness fee awards share much the same law on appellate review, we adopt and incorporate herein the arguments presented under Issue I.

In this case, just as in the case of *Leeds v. City of Homestead*, 407 So. 2d 920 (Fla. 3d DCA 1982), it was the condemnee who initiated the hiring of experts other than appraisers; and the City, believing that damages sought to be proved by the condemnee were not recoverable, steadfastly refused to hire such experts. The *Leeds* court explained its rationale in footnote 2:

Leeds' contention that he was compelled to hire his expert to combat contrary testimony of the City's experts is totally without merit. The City's position throughout the proceedings below was that the damages sought to be proved by Leeds through his expert were not recoverable. While the City was prepared to show that the lift station operated properly and did no damage to Leeds' property, that was a fall back position for the City, not one it was required to prove and Leeds required to rebut.

Leeds' alternative contention that his need for an expert was occasioned by the trial court's initial ruling that it would hear the testimony offered is equally without merit. Leeds did not obtain the expert in reliance on this ruling, and the trial court's willingness to hear him out, over the City's continued objection, did not make the expert's testimony necessary to any real issue and cannot enhance Leeds' right to recover the cost of the expert. *Id.* at 921.

The *Leeds* court went on to say that the expenditure for expert witnesses must be reasonably and necessarily incurred in relation to a proper issue in the case.® (emphasis added). *Id.* at 921. The *Leeds* court found no abuse by the trial court for refusing to award expert witness fees in that case since the expert's testimony related to damages **predictably not recoverable** in the eminent domain proceedings. . . .® (emphasis added). *Id.* at 922. *See also, Dept. of Transportation v. Spring Land Investments, Ltd.*, 695 So. 2d 414 (Fla. 5th DCA 1997) (ruling that an owner does not have carte blanche to incur unnecessary fees).

As in *Leeds*, the County never hired a land planner, a traffic engineer or a gas station consultant or designer to counter the expert witnesses hired by Property Owners' counsel. The County was not about to engage in a speculative battle of the visionaries® as to what should or will be developed on that property. Although the trial court implies in its order that even though the County did not hire independent® engineers and land planners, that the record reflected that the County's internal land planners and engineers gave deposition testimony. A review of the record clearly

shows that any such personnel from the County were testifying in response to notices of taking depositions by counsel for the Property Owners but **only** with regard to whether the site plan was conceptual or approved or whether the development could proceed to approval and permitting without first creating a single-phased traffic signalization on that N.W. corner of the property.

Under these circumstances, the trial court abused its discretion by taxing costs of the expert witnesses against the County. Severance damages based on speculative conceptual site plans were predictably not recoverable. What belies counsel for the Property Owners' assertion that his belief that the site plans were admissible was reasonable was his insistence on proving throughout the litigation that it was an approved site plan and not just a speculative conceptual drawing.

Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950) is the seminal case establishing that expert witness fees are recoverable costs in eminent

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The Third District Court of Appeal in its opinion in this case stated in the body:

Consequently, there was no approved site plan for the property.¹

The footnote states:

Although the owner contends otherwise, it is abundantly clear that the body with the power to approve the site plan, the county commission, never did so. The county commission resolution rezoned the property but did not approve the site plan.

City National Bank of Fla. v. Dade County, supra, 715 So. 2d at 351.

domain cases and are awardable within the sound discretion of the trial court. Adopting the language of the trial judge, the Supreme Court in *Bri gham* based its ruling on the following:

The courts should not be blind to the realities of the condemnation process. Any excuse which the Court might have for disclaiming knowledge of just what goes on, is entirely removed by the fact that the Court itself views the trial and proceedings and has personal knowledge of all such matters. The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings, prepared by expert draftsmen.

The court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifications, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like services of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for the same out of his own pocket.

Can the County contend that such high priced evidentiary items are not a part of the Acosts of the proceedings@ when they themselves by presentation of the same in their case, make them a part of the proceedings in their behalf?

* * *

It does not follow that all expenses to which the defendant elects to put himself in connection with the defense of such a case may be collected on a costs judgment. (emphasis added).

Id. at 604.

The Initial Brief for Property Owners makes it more abundantly clear today's realities of the condemnation process: it is the condemnees, the property owners' attorneys, who have taken complete control of the condemnation process by hiring a myriad of experts on every condemnation case whether really needed or not, because the hiring of such experts is entirely at the expense of the condemning authority. It has opened up the ability of the condemnees bar to demand two or more times the amount of compensation offered to the property owner or face the prospect of paying those same additional amounts in a run up of expert witness fees and costs.

One need look no further than the trial court's ruling on fees and costs in this case to see the truth of this assertion. The trial court stated that "[F]rom early in the case it should have been obvious to all that, from an economic standpoint, there was no way Dade County could win the case; a condemnation case cannot be prepared and tried, with experts and attorneys on both sides, for \$100,000." Appendix 11, p. 5.

The trial court went on to find that "the County's current predicament in facing these enormous claims [for attorneys' fees and costs] is of its own making, for it was unreasonable and intransigent in offering only \$20,000 to resolve the landowner's \$100,000 claim, even if it wins the case." Appendix 11, p. 5. Such a finding by the trial court is itself an abuse of discretion, an invitation to the condemnees bar that they have carte blanche to incur any expense--there are no consequences to guessing wrong, A

taking a shot, @ Ashooting the moon@ or at least threatening such action to effectuate an otherwise unjustified settlement.

That is now the reality of the unfettered discretion exercised by the condemnees= bar, to either hire or threaten to hire a gaggle of experts no matter the size or significance of the taking to provide opinions on every aspect of a property--not only appraisers, but real estate brokers, real estate consultants, marketing specialists, land planners, engineers (traffic, design and/or structural), contractors, architects, surveyors, topographers, hydrologists, seismologists, and geologists as well as any other specialty that can arguably be linked to that property or project. If the condemnees= bar did not publicly acknowledge

wielding this sword of Damocles before, certainly now, with the trial court's ruling in this case, it becomes an indisputable reality to which this Court cannot be blind.

The trial court's ruling has the effect of requiring the condemning authority to either pay the property owner a substantial amount or all of his claim early on or pay the costs of any failed effort to prove either entitlement to or additional compensation for the taking. Either way, the condemning authority loses. Under the circumstances of this case and as determined by the Third District Court of Appeal, neither the land planner, Charles Putman & Assocs., the traffic engineer, Zook, Moore, the gas station designer, MDM Services, Inc., nor the gas station consultant, John Moreland, should be taxed as recoverable costs against the County. The appraiser, John Hagan, should be awarded a reasonable appraisal fee based only on the work he performed in verifying or challenging the amount of compensation that the appraiser for the County, Robert Gallaher, found for the taking, for which a sum of \$1,800 was paid to Gallaher. A reasonable fee for Hagan was determined by the Third District Court of Appeal to be \$1,500.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the holding in the Third District which clearly recognizes the reality of eminent domain practice today.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day of March, 2001, to: Thomas R. Bolf, Esquire, RUDEN, McCLOSKEY, SMITH, SCHUSTER & RUSSELL, P.A., 200 East Broward Boulevard, 15th Floor, P.O. Box 1900, Fort Lauderdale, Florida 33302.

.....
Assistant County Attorney

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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