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ABANDONMENT OF A PUBLIC WORKS PROJECT – LANDOWNERS' REMEDIES

The Cross-Florida Barge Canal has been one of the most heated environmental controversies politicians have faced in recent years.[1] Public opposition rose to a crescendo until a Presidential order to halt the canal was issued on January 19, 1971.[2] The disposition of the thousands of acres of land condemned for the project across the Florida Peninsula is one of the most significant problems that must be resolved as a result of the canal project cessation. This commentary will suggest various alternative remedies that may be available to landowners seeking to have their property returned.

The affected land may be divided into three classes: (1) land taken under a temporary or perpetual easement; (2) land taken in fee simple with a right of access to the canal given to the prior owner in the condemnation proceedings; and (3) land either condemned by or conveyed to the Canal Authority in fee simple absolute.[3]

EASEMENTS

The abandonment doctrine appears to be the best method of extinguishing the easements taken for the canal, although other methods exist.[4] Termination of easements by abandonment is composed of two elements: act and

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1. St. Petersburg (Fla.) Times, Sept. 5, 1971, §B at 1, col. 1. *See also* Cornwell, *From Whence Cometh Our Help? Conservationists Search for a Judicial Forum for Environmental Relief*, 23 U. FLA. L. REV. 451 (1971); Little, *New Attitudes About Legal Protection for the Remains of Florida's Natural Environment*, 23 U. FLA. L. REV. 459 (1971).

2. 29 CONG. Q. 199 (1971). President Nixon's press release ordered a cessation of all federal funds that had been earmarked by Congress for the canal. The constitutionality of the President's act has been questioned. *See* Canal Authority v. Resor, Civil No. 71-92 (M.D. Fla., filed Feb. 12, 1971). *See also* Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 U. FLA. L. REV. 221 (1972).

3. The Canal Authority is a state agency governed by FLA. STAT. §374 (1969). The breakdown of the 62,164 acres acquired for the canal is:

Perpetual Easements	9,660 acres
Temporary Easements	1,185 acres
Fee Simple with Right of Access	10,529 acres
Fee Simple	30,011 acres
U.S. Forest Service	7,579 acres
Back Waters (Inglis Reservoir)	3,200 acres
TOTAL	62,164 acres

Interview with Col. Giles Evans, Director, Canal Authority, in Jacksonville, Fla., June 25, 1971. Approximately one-third of the canal has been constructed, including the clearing of ground and the filling of the Rodman Reservoir, the construction of several locks and other canal structures, and the excavation of certain portions of the canal itself. Environmental Defense Fund, Inc. v. Corps of Engineers, Civil No. 2655-69 (D.D.C. filed Jan. 27, 1971).

4. For a discussion of such methods *see* R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §23.06 (1969).

intention.[5] Proof of an intent to abandon is the more troublesome.[6] The quantum of proof necessary to sustain evidence of intent to abandon would probably be decisively satisfied in the present situation if the President's order to halt construction of the canal is upheld in the courts.[7] Moreover, the Canal Authority itself has stated that if the canal is abandoned the easements would be extinguished.[8] The easements would not be extinguished, however, if a simple non-use of the property were found,[9] rather than abandonment. A permanent injunction against continuance of the canal project, however, would probably vitiate such an argument.[10]

Termination of the easement by abandonment raises the additional problem of return of compensation.[11] A dearth of Florida law exists on this subject. The Supreme Court of Indiana, however, in interpreting a statute that required forfeiture of an easement if it were not used within five years by the condemnor, indicated that where less than a fee simple is condemned, the word "forfeit" carries no suggestion of reimbursement to the condemnor of the price paid.[12] Although the present situation is distinguishable from the Indiana case, in both situations abandonment has deprived the injured condemnee of the use of his land for a considerable period. Therefore, retention of the compensation should not necessarily imply unjust enrichment.

The easement may terminate automatically upon abandonment or the condemnee may have to resort to judicial process to have the easement extinguished.[13] Pragmatically, the landowner should file suit to quiet title and allow the court to remove the cloud imposed by the easement.

Fee Simple with a Right of Access to the Canal

In north central Florida 10,529 acres were taken in fee for the barge canal, but the condemnee was given a right of access to the waterways.[14] The "right of access" provision provides these condemnees with a viable argument

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5. Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 P. 1112 (1908). *See also* R. Boyer, *supra* note 4, §23.07 (2).

6. *See generally* Canal Authority v. Resor, Civil No. 71-92 (M.D. Fla., filed Feb. 12, 1971).

7. *See* note 2 *supra. See, e.g.,* Maryland & P. R.R. v. Mercantile-Safe Deposit Trust Co., 233 Md. 615, 166 A.2d 247 (1960) in which the court stated that: "[T]here can be an abandonment of an easement is clearly recognized in this jurisdiction, where the acts of abandonment were of a decisive character and clearly indicate an intention to abandon." *See also In re* Harlem River Drive, 307 N.Y. 447, 121 N.E.2d 414 (1954).

8. Canal Authority v. Resor, Civil No. 71-92 (M.D. Fla., filed Feb. 12, 1971).

9. *See* Albury v. Central & So. Fla. Flood Control Dist., 99 So. 2d 248 (3d D.C.A. Fla. 1957).

10. *See generally* Environmental Defense Fund, Inc. v. Corps of Engineers, Civil No. 2655-69 (D.D.C. filed Jan. 27, 1971).

11. Unjust enrichment may obligate the condemnee to return the award made by the condemning authority. *Cf.* State v. Pellitt, 220 Ind. 593, 45 N.E.2d 480 (1942).

12. *Id.* at 595, 45 N.E.2d at 483.

13. *See, e.g.,* Genet v. Florida E. Coast Ry., 150 So. 2d 272 (3d D.C.A. Fla. 1965).

14. *See* note 3 *supra.*

for return of the land. A court could find that a "right of access to the waterway" connotes a condition subsequent to the fee simple.[15] A condition subsequent need not necessarily be expressed in formal words, but is to be gathered from all the facts and circumstances surrounding a conveyance, whether such conveyance is a deed or a judgment in condemnation.[16] Thus, if the provision providing a right of access were a conditional limitation on the deed given,[17] the condemnee could obtain a fee simple absolute by exercising his right of reentry.

If the right of access provision is determined to be an independent rather than a dependent condition, however, a landowner's claim for rescission or reversion would be unsuccessful.[18] In *Zambetti v. Commodores Land Co.*,[19] the Florida supreme court held that intention of the parties controls in determining whether covenants are dependent or independent. *Zambetti* involved a contract to sell land, which contained a promise to pave a road in front of the land within a specified period.[20] When the condition was not met, the vendee was granted damages but denied rescission. *Zambetti* is, however, distinguishable from the instant situation in that the condition for paving the road could easily have been met, only at a later date. In the canal situation, the condition may never be satisfied.

Fee Simple Absolute

The landowner whose property was condemned in fee simple absolute has only one legally plausible basis for rescission of the deed, an attack on the necessity of the original taking.[21] A necessity argument was unsuccessfully

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15. *Cf.* Owenby v. City of Quincy, 95 So. 2d 426 (Fla. 1957). A fee simple on a condition subsequent is a type of defeasible fee, a term that would also apply to a qualified fee. There is a technical difference between a qualified fee and a fee simple on a condition subsequent in the methods used for recovery. *See* L. Simes, Future Interests 28-32 (2d ed. 1966). However, the courts have not chosen to use the distinction and term them both defeasible fees. *See, e.g.*, Seadade Indus., Inc. v. Florida Power & Light Co., 245 So. 2d 209, 216 (Fla. 1971) (Erwin, J., specially concurring).

16. In State v. Columbia Ry. Gas & Elec. Co., 112 S.C. 528, 100 S.E. 355 (1919), South Carolina had conveyed property to a private corporation for the purpose of building a canal within a specified time. The canal was not completed and the court found this to be a condition upon which the deed was given. The court then stated: "The purpose of construction [of the deed given] is to find out the intention, however it may be expressed. . . . No particular phraseology and no technical words are necessary to create a condition subsequent . . . and, when such condition is created, provision for reverter or re-entry for breach thereof is not indispensable . . . ." *Id.* at 538, 100 S.E. at 358.

17. *See, e.g.*, Villafranca v. Cotitia, 147 Fla. 715, 3 So. 2d 397 (1941).

18. Sun City Holding Co. v. Schoenfeld, 97 Fla. 777, 122 So. 252 (1929).

19. 102 Fla. 586, 136 So. 644 (1931).

20. *Id.*

21. The basis of this approach assumes that the doctrine of res judicata is not applicable to attacking a final judgment in condemnation where an unlawful use will be made of the property. Poe v. State Road Dep't, 127 So. 2d 898 (1st D.C.A. Fla. 1961). Using the property for recreational purposes could be interpreted as an unlawful use—one for which the land could not have been condemned originally. Staplin v. Canal Authority, 208 So. 2d

raised in *Carlor Co. v. City of Miami*[22] where land, condemned for an airport, was never used for that purpose. The Florida supreme court upheld a trial court's pronouncement that once fee simple absolute title is taken, the land will never revert to the condemnee even where the necessity for taking has been extinguished.[23]

In *City of Atlanta v. Fulton Co.*,[24] owners of a lake and a contiguous parcel of property contested the sale of the property, after abandonment by the condemnor waterworks utility. The court, in finding for the condemnee, held:[25]

> [I]n construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is necessary to satisfy the language and object of the act; and where as in this case, the land was condemned by the Board of Water Commissioners "for waterworks purposes," fee-simple title "for all purposes" was not necessary to satisfy the object of the act. The words "in fee simple" as used in this provision of the charter must be construed in connection with the words which immediately follow "of such property so required" *for waterworks purposes,* and as thus construed must be held to be only descriptive of the extent of the duration of the enjoyment of the easement thus acquired.

The *City of Atlanta* case dealt with a constitutional prohibition against taking property for public purposes and using it for private purposes.[26] The Georgia court implied that when the condemnor ceases the use for the specified public purpose for which it was taken, the property must revert or the constitution is violated. Since Florida now has a somewhat similar constitutional provision,[27] the same rule could be applicable in the instant situation where property is condemned for the special purpose of building the Cross-Florida Barge Canal. To use the property in any other manner would seem to violate the constitutional mandate.

Other cases involving abandonment of canals have followed the rule that no reversionary right exists in the landowner once fee simple absolute title has been taken.[28] Most of the prior cases, however, dealt with abandonment

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853 (Fla. 1968). There are two classes of landowners here—those whose land was taken by the power of eminent domain and those who "voluntarily" conveyed the property to the Canal Authority under the threat of condemnation. This latter class will not be dealt with in this analysis; however, their remedy would seem to be a suit for rescission on much the same basis as those where land was condemned. Furthermore, if the problem is unresolvable in a court, the legislature should consider passing a remedial statute. *See* suggested statute in APPENDIX *infra*.

22. 62 So. 2d 297 (Fla. 1953).

23. *Id.* at 300.

24. 210 Ga. 784, 82 S.E.2d 850 (1954).

25. *Id.* at 785, 82 S.E.2d at 853.

26. *Id.* at 785, 82 S.E.2d at 852.

27. *See* FLA. CONST. art. X, §6(a): "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."

28. Graf v. City of Newark, 124 N.J.L. 312, 11 A.2d 764 (Sup. Ct. 1940); Whitey v. State, 96 N.Y. (51 Sick.) 240 (1884).

after several years of operation, whereas the barge canal land was abandoned before construction.

In *Whitey v. State*[29] a canal was abandoned after construction and use, and the state converted it to a public road. The landowner sued for damages arising from the abandonment, or alternatively, for the state to maintain the canal. The court stated:[30]

> So far as relates to the position that the land has been converted to another and a different use, it may be observed that if the state acquired an absolute title to the fee, then it had a right to dispose of it as it deemed best.

In *Graf v. City of Newark*[31] the court also refused to recognize a conditional limitation and reversion where a canal was built and thereafter abandoned. Addressing itself to the issue of whether the land could be used for the purpose of a roadway, the court construed the canal as being a water highway and stated: "[I]t was a public transportation use and as such not inconsistent with the second use made of the property."[32]

Other cases, however, have held that abandonment of a canal leads to a reversion. In *People v. White*[33] lands taken for the Erie Canal and thereafter abandoned were held to have reverted to the original owner or his successors. The statutory authorization under which the lands were taken declared that "the fee simple of such premises so appropriated shall be vested in the people of this state."[34] The court construed the act as intending a fee determinable by the cessation of the use for which the land was taken:[35]

> The state has no right to take what is not necessary for the improvement. I see no reason why this restriction does not apply as well to the duration of the estate as to the extent of actual occupation. When the canal is abandoned, the land taken can no longer be said to be "necessary to the prosecution of the improvement"; and it is only to the extent

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29. 96 N.Y. (51 Sick.) 240 (1884).

30. *Id.* at 247. The landowners in *Whitey*, however, were not asking for the return of their land, but only incidental damages where the land was converted to a different use.

31. 124 N.J.L. 312, 11 A.2d 764 (Sup. Ct. 1940).

32. *Id.* at 314, 11 A.2d at 766. If a Florida court would construe the Cross-Florida Barge Canal as a water highway, a logically analogous situation, the applicable sections of the Highway Code would apply and the landowners would be entitled to recover their land. FLA. STAT. §336.12 (1969) provides: "The act of any commissioners inclosing or abandoning any such road, or in renouncing or disclaiming any rights in any land delineated on any recorded map as a road, shall abrogate the easement theretofore owned, held, claimed or used by or on behalf of the public and the title of fee owners shall be freed and released therefrom; and if the fee of road space has been vested in the county, same will be thereby surrendered and will vest in the abutting fee owners to the extent and in the same manner as in case of termination of an easement for road purposes."

33. 11 Barb. 26 (N.Y. 1851).

34. *Id.* at 27.

35. *Id.* at 28. The court noted: "A qualified, base, or determinable fee, is an interest which may continue for ever [*sic*], but is liable to be determined by some act or event circumscribing its continuance or extent." *Id.*

> of the land "so appropriated" which is taken, appraised and paid for according to the previous provisions of the section, that the title is declared to vest in the state.

In another case involving a canal, *Vought* et ux. *v. Columbus H.V. & A.R. Co.*,[36] a state statute authorized abandonment and lease of property to a railroad company.[37] On a suit to recover possession by the landowners, the court observed:[38]

> When appropriated, they are to take a complete title to the premises to the extent and for the purposes set forth in and contemplated by the act. The purpose contemplated by the act is the use of the land for canal purposes so long as the canal is maintained; so that, when the use ends, the title they were permitted to take ends, for it is not a title in fee simple they are permitted to take, but a complete one for the uses and purposes of the canal. The company could not then, when the use ends, sell them to others; on the contrary, the lands must revert to the owner of the freehold.

Railroads as quasi-public utilities have eminent domain powers.[39] In the great majority of cases involving railroad condemnation, abandonment has resulted in reversion to the landowner-condemnee.[40] Although fee simple absolutes were given, the courts in these cases had reasoned that the statutory power to acquire lands expressly refers to railroad purposes. The courts have then reduced the interest taken to a qualified fee — an implied condition subsequent — and where the condition is not met, that is, continuing the use, the land reverts to the condemnee.[41] Since the Florida Legislature has given both the Canal Authority and railroads the same privilege with respect to land ownership,[42] the same principles should be persuasive for reversion upon abandonment. Like the railroad, the Canal Authority's statutory power is clearly limited — a right to acquire land to build the Cross-Florida Barge Canal.[43]

Another potential argument for a reversion might be found in *Seadade Industries, Inc. v. Florida Power & Light Co.*,[44] where the Florida supreme court held that the protection of environmental resources is a constitutional

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36. 58 Ohio St. 123, 50 N.E. 442 (1898).

37. *Id.* at 130-33, 50 N.E. at 444.

38. *Id.* at 139, 50 N.E. at 450.

39. FLA. STAT. §360.01 (4) (1969).

40. *See, e.g.*, Abercrombi v. Simmons, 71 Kan. 538, 81 P. 208 (1905); Annot., 155 A.L.R. 380 (1945); Annot., 132 A.L.R. 142 (1941).

41. *See* note 35 *supra.*

42. FLA. STAT. §360.03 (Supp. 1970) provides: "Whenever the land or water privileges mentioned in the preceding section shall belong to the State of Florida, the use thereof for the aforesaid purposes shall vest in said railroad or canal company upon the occupancy of both or either . . . for such purposes. . . ."

43. FLA. STAT. §374.05 (1) (a) (1969).

44. 245 So. 2d 209 (Fla. 1971). *See* Comment, *Eminent Domain: Public Purpose and Conservation of Natural Resources*, 24 U. FLA. L. REV. 392 (1972).

mandate.[45] Justice Ervin, in a concurring opinion, stated that where environmental factors are to be considered in the determination of an eminent domain proceeding, and where a fee simple absolute is given "the fee simple is a defeasible fee . . . . [T]he condemned unexcavated canal land and other lands taken would then return to the condemnee if the condemning body were unable to obtain the necessary authorization . . . from pollution control agencies. In the event this were to occur, the condemnee should be required to return all the condemnation money awarded . . . within a short period of time . . . otherwise, title absolute in the condemned land would vest in the condemnor."[46]

This concurring opinion is likely to be of some value in effecting disposition of the lands. In both, abandonment for environmental purposes, as in the instant situation, and denial of a permit, the condemned land can no longer be used for the project purposes.

CONCLUSION

The courts and legislature of this state will soon have the burden of remedying the prior landowners' precarious situation. The legislature and courts can, also, begin to provide this state with an environmentally sound future, not for us as much as for our children and grandchildren.

The Corps of Engineers, the Canal Authority, and other such groups should consider the constitutional mandate for a clean environment set forth in *Seadade*. Only then can we be assured that the "Sunshine State" will remain bright and clean for future generations. The public purpose inherent in progress must be balanced against the environment, without any presumption that progress is our most important product.

ROBERT A. MANDELL

45. 245 So. 2d 209, 214 (Fla. 1971). The opinion may be relevant in determining the necessity of the original taking, as the Canal Authority would not have met the dictates of the National Environmental Policy Act. 42 U.S.C. §§4321-47 (1970). *See* Comment, *supra* note 44.

46. 245 So. 2d 209, 216 (Fla. 1971) (concurring opinion).

APPENDIX

The Florida Legislature could simplify the problems of the landowners by enacting a statute that might read:

> If the Cross-Florida Barge Canal ever ceases existence, either by legislative, executive, or court decree, all easements will be automatically extinguished whether they be of a perpetual or temporary nature. And, furthermore, where the land upon which no structures have been erected to which title was taken by the Canal Authority in fee simple absolute, the landowner, his heirs or assigns, from whom it was originally purchased shall have first refusal on the property, after reimbursement of purchase price and interest. If, in the estimation of the Outdoor Recreation Developmental Board, there is land that could be used for a public purpose as a park or lake, title will be transferred to the appropriate agency, assuming little or no environmental damage. This act will be construed liberally to best effectuate the legislative intent.