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Florida East Coast Railway v. City of Miami, 321 So. 2d 545 (Fla. 1975)

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but also the appearance of evil."[107] Thus, where an attorney requests permission to withdraw from an appointment in an effort toward self-regulation of his conduct according to ethical standards, a court should never force him into an untenable position by requiring that he represent adverse interests. By appointing separate attorneys for individual defendants where there is alleged conflict, the courts uphold not only the individual's constitutional rights and protections, but also the integrity of the entire criminal justice system.

MELANIE HINES ALFORD

Eminent Domain—PRIOR PUBLIC USE DOCTRINE: NEW JUDICIAL CRITERIA—*Florida East Coast Railway v. City of Miami*, 321 So. 2d 545 (Fla. 1975).

The City of Miami brought condemnation proceedings to acquire, for use as a public park, land owned by the Florida East Coast Railway Company (hereinafter FEC).[1] The railroad asserted, as an affirmative defense, that the prior public use doctrine precluded the city's condemnation of the land. This doctrine provides that property presently being used for a public purpose by an entity having the power of condemnation cannot be condemned by another entity that has the same general power of condemnation.[2] The prior public use doctrine

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107. R. WISE, LEGAL ETHICS 2 (1966).

1. FLA. STAT. § 166.401 (1975) grants the power of eminent domain to municipalities:

> All municipalities in the state may exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property, for the uses or purposes authorized pursuant to this part. The absolute fee simple title to all property so taken and acquired shall vest in such municipal corporation unless the municipality seeks to condemn a particular right or estate in such property.

FLA. STAT. § 166.411 (1975) gives the condemnation power to cities for the purpose of establishing public parks:

> Municipalities are authorized to exercise the power of eminent domain for the following uses or purposes:
>
> . . . .
>
> (4) For public parks, squares, and grounds . . . .

For a background discussion of the theory of eminent domain, see Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

2. Property that has been acquired by the power of eminent domain and is presently being put to an important public use cannot be reappropriated for another use unless the second appropriation is expressly granted by the legislature or arises as a necessary implication. This rule was stated in Adirondack Ry. v. New York, 176 U.S. 335, 349 (1900): "It is true that the State may delegate the power [of eminent domain], and where it has done so to a railroad corporation and by its exercise lands have been

prevents the perpetuation of condemnation proceedings. If property used for a public purpose could be acquired from an entity having a power of condemnation, then logically that entity could reacquire the same property.[3] This doctrine places a limit on the process of condemnation, absent other statutory and judicially-created exceptions.[4]

The Circuit Court for Dade County held that the City of Miami could not acquire those portions of the property used for public purposes by the railroad or its lessees,[5] although it could acquire those portions leased to private commercial users.[6] The Third District Court of Appeal affirmed that part of the circuit court's order which permitted the city to take the portions of the property used for private commercial purposes.[7] These portions were clearly outside the scope of the prior public use doctrine and had not been contested on appeal by FEC. But the district court of appeal reversed that part of the circuit court's order which had denied the city the right to take the

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subjected to a public use, they cannot be applied to another public use without specific authority . . . ." *See* Village of Blue Ash v. City of Cincinnati, 182 N.E.2d 557 (Ohio 1962); Village of Richmond Heights v. Board of County Comm'rs, 166 N.E.2d 143 (Ohio Ct. App. 1960); Oklahoma City v. Local Fed. Sav. & Loan Ass'n, 134 P.2d 565 (Okla. 1943); Vermont Hydro-Elect. Corp. v. Dunn, 112 A. 223 (Vt. 1921); 1 SACKMAN, NICHOLS ON EMINENT DOMAIN § 2.2 (3d ed. 1976).

The courts have frequently had great difficulty in determining what constitutes a public use. *See, e.g.*, Demeter Land Co. v. Florida Pub. Serv. Co., 128 So. 402 (Fla. 1930). But as this comment will show, for purposes of interposing the defense of prior public use, the meaning of public use is limited at least to those uses for which the power of eminent domain has been granted. Thus, the legislative grant giving a railroad the condemnation power limits that power to appropriation of land for the purpose of constructing terminal facilities. FLA. STAT. § 360.02 (1975). As a result of the case at hand, the prior public use immunity is limited to land presently being used for terminal facilities. See note 17 *infra* for text of statute.

3. City of Miami v. Florida E. Coast Ry., 286 So. 2d 247 (Fla. 3d Dist. Ct. App. 1973); Township of Weehawken v. Erie R.R., 120 A.2d 593 (N.J. 1956).

4. Statutory grants which penetrate the shield of the prior public use doctrine are numerous and usually of a very specific nature. For example, FLA. STAT. § 373.086 (1975) grants flood control districts the right to condemn land for crossing of highways and railroads. For further examples, see 12 FLA. JUR. *Eminent Domain* § 53 (1957). Judicially created exceptions are carved out on a case-by-case basis, and their validity turns on the particular circumstances of facts before the court. *See* discussion of the compatible use exception, text accompanying notes 23-26 *infra.*

5. 321 So. 2d at 547. This included: land used by the railroad's truck line subsidiary, the Florida East Coast Highway Dispatch Company, as a port facility; land leased to TMT Trailer Ferry, Inc.; and portions of the bay bottom that were not needed by the railroads as an ingress or egress.

6. *Id.* at 546. The parcel designated in the trial court as the defendant railroad's parcel #1, located in the southwest corner of the property, was leased to Standard Oil Co. Parcel #3, located in the center of the property, was leased to Holiday Inns of America, Inc., while parcel #4, located near the north end of the property, was leased to American Oil Co.

7. *Id.*

portions of the property not necessary to the railroad for its business as a railroad.[8] The trial court had allowed the railroad to retain all land being used for public purposes, including that leased by private parties. At the center of the controversy was a portion leased to a trucking company;[9] although this portion was being used for a public purpose, the trucking company had not been independently granted the power of eminent domain. Also at stake was land that the railroad was not putting to a present public use; FEC proposed to fill portions of the bay bottom and use this land for terminal facilities.

On conflict certiorari, the Florida Supreme Court affirmed the district court of appeal's order.[10] The supreme court approved the limitation of the scope of the protection from condemnation afforded by the prior public use doctrine to all areas "necessary for the successful operation of the [rail]road,"[11] construing this to mean that only property used by the railroad for railroad business was excluded from condemnation.[12] The court went on to clarify the terms "necessary" and "successful."[13] It defined "the term 'necessary' . . . to mean utilitarian in furtherance of the public use for which a public franchise or certificate of public convenience and necessity has been granted. It does not mean 'indispensable' to the railroad['s] operation."[14] The term "successful" was defined "to mean a use correlative with the railroad's public use, as opposed to a financially successful use."[15]

The supreme court's new criteria would limit the scope of the prior public use doctrine so as to protect only property that was both necessary to and actually being used for the purpose for which a public franchise and the general power of condemnation had been granted. The courts of Florida will no longer countenance a blanket

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8. City of Miami v. Florida E. Coast Ry., 286 So. 2d 247, 252 (Fla. 3d Dist. Ct. App. 1973). Descriptions of the relevant portions are found in note 5 *supra*.

9. Florida East Coast Highway Dispatch Company. *See* note 5 *supra*.

10. 321 So. 2d 545 (Fla. 1975).

11. 286 So. 2d at 252. The district court of appeal expressly took this criterion from 26 AM. JUR. 2d *Eminent Domain* § 99 (1966), which states the doctrine as follows:

> The use by a railroad company which protects its lands from condemnation under general authority, except for crossings, is not restricted to the operation of its main line, but extends to all the ground occupied by appliances necessary for the successful operation of the [rail]road, such as its freight yard, sidetracks, and spur tracks.

12. 321 So. 2d at 548.

13. Other jurisdictions have used similar terminology when attempting to define the contours of the prior public use doctrine. *See, e.g.*, City of Goldsboro v. Atlantic Coast Line R.R., 97 S.E.2d 486, 491 (N.C. 1957) (prior public use doctrine does not apply "where the property is not in actual public use and [is] not necessary or vital to the operation of the business").

14. 321 So. 2d at 548-49.

15. *Id.* at 549.

immunity from condemnation for a public franchise entity and its lessees.

After the decision in the district court of appeal, but before the case was decided by the supreme court,[16] an amendment affecting the railroad's power of condemnation was passed by the Florida Legislature.[17] This amendment subordinated the railroad company's power of condemnation to that vested in governmental entities within which the property is located.[18] The railroad argued that the amendment had no application to the facts of this case, on the theory that it applies only when a municipality and a railroad or canal company are simultaneously seeking to condemn the same parcel of land.[19] The City of Miami, on the other hand, argued that the amendment applies when a municipality seeks to condemn land owned by a railroad or canal company, regardless of whether the land is presently being put to public use.[20] The supreme court refused, on the basis of a procedural

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16. *Id.*

17. Act of May 17, 1974, ch. 74-47, § 1, 1974 Fla. Laws 49. FLA. STAT. § 360.02 (1975) (amended portion in italics) now reads as follows:

> Any railroad or canal company, which is a public carrier or intended to be, in the construction of its railroad or canal, or in the extension of the same, for the purpose of securing terminal facilities therefor on any of the waters of any river, lake, bay, gulf or ocean, shall have and they are hereby given the right to condemn for the use of such railroad or canal company, a sufficient area of land therefor and included in which shall be space on shore for depots, yards, switches, turntables, shops and storehouses, and such area in and over the waters to the limit of the channel, natural or artificial, of rivers, lakes, bays, gulf, or oceans sufficient for ample room for docks, wharves, elevators, berths for ships, warehouses and storehouses, tracks, switches, and all required facilities for the reception, retention, transfer and forwarding of commerce. *However, such right shall be subordinate to the right of the governmental entity wherein the property is located to condemn said property through the exercise of its powers of eminent domain for a public purpose.*

The dispute in this case between the City of Miami and Florida East Coast Railway was apparently the cause of the amendment:

> We have sitting in the middle of the City of Miami a piece of land owned by the FEC [Florida East Coast Railway Company] that was originally acquired for terminal facilities. The City of Miami wishes to acquire that piece of land so it can put its entire park on the bay together.

Oral statement concerning H.R. 1716, by Rep. Marshall Harris, bill sponsor, at a Senate Transportation Committee meeting relating to H.R. 1716, held on April 22, 1974. Further examination of the legislative intent behind the amendment reveals that it was to apply to the facts of this case. According to Rep. Harris, "[t]his bill [the amendment to § 360.02] would subordinate the railroads [*sic*] condemning authority for terminal facilities to that of any governmental entity, irrespective of whether or not the land is being used for public purposes." Written statement by Rep. Harris, on file in Senate Transportation Committee Records, Florida Legislative Library.

18. See note 17 *supra* for full text of the amendment.

19. 321 So. 2d at 549.

20. *Id.*

rule of review,[21] to decide whether the amendment applied to the particular facts and remanded the case to the trial court to determine the applicability of the amended statute.[22]

Prior to *Florida East Coast Railway*, the only recognized exception to the prior public use doctrine in Florida allowed condemnation when the present owner's use was not materially impaired or destroyed. This is known as the compatible use exception to the prior public use doctrine.[23] In order to show a compatible use it is only necessary to show that the proposed subsequent use will not materially injure or destroy the prior use; it is not necessary to show that the subsequent use will be in any way beneficial to the prior use. For example, it is not necessary to show that the consolidation of two systems of drainage will improve the functioning of the initial drainage system.[24] The public policy justification of the prior public use doctrine, that an important public use should be protected, is also furthered by the compatible use exception, since the proposed use of the condemnor must be compatible with the present use of the condemnee, thus preserving the existing use. The distinction is that the prior public use doctrine is a shield which prevents condemnation, while the compatible use exception allows condemnation but requires preservation of the already-existing use. In *City of Dania v. Central & Southern Florida Flood Control District*,[25] for instance, the Flood Control District sought to condemn land owned by the city of Dania. The Second District Court of Appeal held initially that the Flood Control District had no authority to condemn the city's land because the land was presently being used for a public purpose (refuse disposal). On rehearing, however, the court of appeal, while affirming the application of the prior public use doctrine, stated that if, on remand, the Flood Control District could show that its proposed use of the property was compatible with the city's prior use or would not seriously injure or destroy the prior use, the trial court should allow the appropriation.[26]

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21. This is a non-codified rule of procedure limiting the scope of review of the appellate courts. "This is a justiciable issue that must first be considered at the trial level. We adhere to the rule that we will not consider an issue initially raised in this Court." 321 So. 2d at 549-50.

22. On remand the railroad raised jurisdictional issues, and as of August, 1977, FEC was still contesting the City's condemnation proceedings.

23. *See generally* 1 SACKMAN, *supra* note 2.

24. This exception would not apply to the present case since use of the land as a public park is incompatible with its use as a railroad terminal.

25. 134 So. 2d 848 (Fla. 2d Dist. Ct. App. 1961).

26. *Id.* at 856. Judge Sandler, in a separate concurrence, wanted to include the additional factor of whether the proposed subsequent use is "superior" to the prior use as a dispositive criterion to determine if the appropriation should be allowed. *Id.*

In *Georgia Southern & Florida Railway v. State Road Department*,[27] the First District Court of Appeal allowed the Florida State Road Department to appropriate the railroad's land on the basis of the compatible use exception to the prior public use doctrine.[28] The court found that the Department's proposal to widen the state road and to condemn the railroad's property for a drainage easement would not interfere with the railroad's existing drainage ditches, and that it would in fact be beneficial to the railroad in those places where the two ditches were consolidated.[29]

Before *Florida East Coast Railway*, a situation had not arisen in which the intended condemnee was using the property for a public use different from that for which it was granted the power of condemnation. In a refinement of the district court of appeal's holding, the Florida Supreme Court distinguished between property used by the railroad in furtherance of its public purpose as a railroad and property used by the railroad in furtherance of other public uses irrelevant to its power of condemnation.[30] This distinction is important because it eliminates the unfair immunity previously afforded to common carriers owned by companies that have been granted powers of condemnation for certain purposes but which are actually using the property for other public purposes. In the instant case, FEC's property being used by its subsidiary trucking company for a common carrier terminal was subject to condemnation for the purpose of establishing a public park.[31] This interpretation of the prior public use doctrine puts the subsidiary trucking company on an equal footing with other trucking companies, or public use businesses of any sort, that do not have the power of condemnation.

Thus, in order to successfully assert the prior public use doctrine, absent other statutory and common law exceptions,[32] the condemnee

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27. 176 So. 2d 111 (Fla. 1st Dist. Ct. App. 1965).

28. The district court of appeal stated that "property devoted to a public use cannot be taken and appropriated to another and different public use," but then went on to say that an exception to this rule exists "when the taking will not materially impair or interfere with or is not inconsistent with the use already existing . . . ." *Id.* at 112.

29. *Id.* at 113.

30. The supreme court stated:

> The doctrine of prior public use should operate as a complete bar to condemnation if the subject property is used in furtherance of the railroad's public purposes. However, if the use is principally for common carriage other than a railroad, *i.e.*, a truck terminal *unrelated* to rail carriage, it does not qualify since condemnation by the railroad for a truck terminal purpose is not authorized.

321 So. 2d at 549. In this case Florida East Coast Railway Co. owned the trucking company.

31. *Id.*

32. *See* 1 SACKMAN, *supra* note 2.

would have to possess the general power of condemnation and fulfill the following criteria. First, the property would have to be in use for the purpose for which the power of condemnation had been granted.[33] Land used for purposes other than those for which the holder was granted the power of condemnation, even though the use be public, is subject to condemnation by another entity having the power of eminent domain.[34] The prior public use doctrine does not require, however, that the land for which the immunity from condemnation is claimed be acquired originally through condemnation. Such a requirement would irrationally distinguish between land acquired by condemnation and land acquired in a voluntary sale. Second, the use must be essential to the success of that aspect of condemnee's operation for which it had been granted the power of eminent domain.[35] These two criteria assure the viability of the prior public use doctrine yet limit the scope of its application. They provide predictability in condemnation cases involving two entities, each having a power of eminent domain. If a condemnee wishes to assert the prior public use defense and retain its land, it must prove not only that the land is in actual use, but also that the land is being used for the purpose for which the condemnee was granted the condemnation power.

As noted above, an amendment subordinating the railroad's power of eminent domain to that of the local municipality was passed before this case reached the Florida Supreme Court. Regardless of the future application of the amended statute, the supreme court's new criteria will be useful in calculating the scope of the prior public use doctrine. Even if the amendment completely obliterates the railroad's use of the doctrine as a shield against local municipalities, the doctrine retains validity in a variety of condemnation circumstances. The power of condemnation has been delegated to numerous public agencies and political subdivisions,[36] and the doctrine will be crucial in resolving legal disputes between any two such entities.

The public policy justification supporting the prior public use

33. 321 So. 2d at 549.

34. The reader should note that this criterion also effectively eliminates for the court the difficult task of judicially determining which uses are public and which are private. If the current use is not that for which the legislature has granted the condemnation power, then whether the use is public or private is irrelevant, and, barring other exceptions, the court must allow the condemnation.

35. 321 So. 2d at 549.

36. For example, FLA. STAT. § 127.01(1) (1975) grants the power of eminent domain to all the counties in the State of Florida; § 166.401 (1975) gives the power to all municipalities; § 337.27 (1975) gives the power to the Department of Transportation; and § 235.05 (1975) gives the power to school boards in the state. For a more complete listing of the various public agencies and political subdivisions that have been granted the power of eminent domain, see 12 FLA. JUR. *Eminent Domain* § 12 (1957).

doctrine, that land being put to a public use for which the present owner has been granted the power of eminent domain should not be usurped by another condemning authority, is furthered by the supreme court's new criteria; however, the criteria also serve the important function of limiting the doctrine's shield to those lands that are in actual use and necessary to the success of the public purpose for which the legislature granted the power of eminent domain.

CRAIG B. WILLIS

Environmental Law—NEPA—REGIONAL IMPACT STATEMENT IS NOT REQUIRED IN THE ABSENCE OF FORMAL PROPOSAL FOR REGIONAL ACTIVITY—*Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Kleppe v. Sierra Club[1] concerned the applicability of the National Environmental Policy Act (NEPA)[2] to cumulative federal action in an area encompassing portions of four states: Wyoming, Montana, North Dakota, and South Dakota. Identified in the original complaint as the Northern Great Plains Region, the area contains an extremely rich basin of low sulfur coal.[3] The coal is easily accessible through strip mining. Recent energy demands make development of coal reserves a matter of vital public concern, but development of the Region's coal would have an extensive environmental impact.[4]

NEPA establishes a federal policy to maintain and restore the environment through all practicable means.[5] The act requires that environmental impact be a major factor in all federal agency decisionmaking; each agency report or recommendation on a proposed major federal action must include an environmental impact statement detailing the proposed action's impact, its effect on long-term productivity, and the extent to which resources will be irreversibly committed. The impact statement must also describe any unavoidable adverse effects and possible alternatives to the proposed action.[6]

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1. 427 U.S. 390 (1976), *rev'g* Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
2. 42 U.S.C. §§ 4331-4347 (1970).
3. The Northern Great Plains Region holds more than 48% of the nation's total coal reserve. Sierra Club v. Morton, 514 F.2d 856, 861 (D.C. Cir. 1975), *rev'd*, Kleppe v. Sierra Club, 427 U.S. 390 (1976).
4. 514 F.2d at 862.
5. National Environmental Policy Act (NEPA) § 101, 42 U.S.C. § 4331 (1970) states:

   [I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

6. NEPA § 102(2)(C)(v), 42 U.S.C. § 4332(2)(C)(v) (1970).