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VLX Props., Inc. v. S. States Utils., Inc., No. 5D99-3314, 2000 Fla. App. LEXIS 9251 (Fla. Dist. Ct. App. July 21, 2000)

Tiffany Turner

The 1994 Everglades Forever Act ("Act") authorized the South Florida Water Management District ("District") to levy a tax on property owners within the district for pollution abatement purposes. Non-polluter property owners within the taxation district claimed they could not be taxed under the Act because Amendment 5, adopted in 1996, prohibited this taxation. Amendment 5 made property owners within the district who caused pollution primarily responsible for paying the abatement cost of their pollution. Thus, non-polluter property owners argued they could not be taxed under the Act because Amendment 5 superceded the general provisions of the Act. The non-polluter property owners unsuccessfully challenged the District's statutory basis to tax under the Act in the Circuit Court for Orange County and appealed to the Court of Appeals of Florida, Fifth District.

In affirming the circuit court, the appellate court based its holding on a Supreme Court of Florida advisory opinion that stated Amendment 5 was not a self-executing amendment. This advisory opinion elaborated by stating the Act was not the enabling legislation for Amendment 5. Because the Act was not Amendment 5's enabling legislation and Amendment 5 had no enabling legislation, the Act would be effective until the legislature expressly repealed it.

The appellate court held it could not tell the legislature when to enact legislation nor dictate the substance of legislation. As a result, the appellate court lacked the power to override the will of the people who adopted Amendment 5, which required supplemental legislation prior to enactment. Thus, the appellate court affirmed the circuit court by holding Amendment 5 lacked enabling legislation, the Act was still good law, and property owners within the district could be taxed under the Act regardless of whether they were polluters or non-polluters.

Kirstin E. McMillan

VLX Props., Inc. v. S. States Utils., Inc., No. 5D99-3314, 2000 Fla. App. LEXIS 9251 (Fla. Dist. Ct. App. July 21, 2000) (holding that, in the case of flooding due to release of treated wastewater from a wastewater treatment plant with the power of eminent domain, the legal standard for inverse condemnation is the standard of physical invasion and not the deprivation of all reasonable use of the property).

VLX Properties, Inc. ("VLX") owned part of James Pond ("Pond") which was inadvertently included in an agreement between a golf course owner and a wastewater facility ("SSU") for disposal of treated wastewater. VLX planned to use the area around the Pond to develop homes. However, flooding from the Pond due to the release of the wastewater made those plans impossible. VLX filed a petition for inverse condemnation. The trial court ruled VLX did not meet the

inverse condemnation "taking by flooding" requirement of deprivation of all VLX's reasonable use of the property.

VLX appealed and the court of appeals reversed. The appellate court ruled the correct legal standard involved the question of whether a continuing physical invasion of the property existed. The court stated it was not the flooding that caused the taking, but the taking that caused the flooding. In considering the water flow a continuing physical invasion, the court concluded VLX proved the three elements needed to constitute inverse condemnation under the physical invasion standard. First, SSU entered upon private property with the water for more than a momentary period. Second, SSU entered under color of legal authority because SSU was a utility with eminent domain powers. Third, SSU devoted the property to public use by releasing the treated wastewater. Under the physical invasion standard, VLX need not show deprivation of all reasonable use of the property. Thus, VLX recovered in inverse condemnation, not because there was a taking by flooding, but because there was a taking by physical invasion.

Tiffany Turner

IDAHO

Dupont v. Idaho State Bd. of Land Comm'rs, 7 P.3d 1095 (Idaho 2000) (affirming state land board's decision revoking a dock permit granted in a designated swimming area).

Dupont filed an application with the Idaho Department of Lands ("Department") seeking permission to construct a private dock in the waters abutting his property. The Department communicated with the City of Coeur d'Alene ("City") several times regarding the application of city ordinances to Dupont's proposed dock. In 1992, the State Board of Land Commissioners ("Board") issued the dock permit when no timely objections were filed. Subsequently, the Department filed a notice of appeal regarding Dupont's permit. Likewise, the City notified the Department of its objection to the permit and requested the Board to reconsider. The Department scheduled an informal hearing and concluded the Board validly issued the permit. However, in 1993, after a hearing officer's recommendation from *de novo* contested case hearing, the Board issued a decision revoking Dupont's permit due to "unusual circumstances." The Board concluded the proposed dock violated City boating ordinances preventing the operation of a boat within a designated swimming area.

Dupont appealed to the district court. The district court concluded the Board's order revoking the permit was erroneous. The district court determined no procedure existed by which the Board