IN THE SUPREME COURT OF FLORIDA

BELVEDERE DEVELOPMENT CORP., et al.,

Petitioners,

vs.

CASE NO. 62,172

DEPARTMENT OF TRANSPORTATION, DIVISION OF ADMINISTRATION, et al.,

Respondents.

RESPONDENT'S ANSWER BRIEF ON THE MERITS DEPARTMENT OF TRANSPORTATION

ALAN E. DeSERIO
Appellate Attorney
JOHN H. BECK
General Counsel
Department of Transportation
Haydon Burns Building
Tallahassee, Florida 32301
904/488-6212

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PRELIMINARY STATEMENT

For the purposes of this brief, the following symbols will be utilized:

"R" refers to the Record on Appeal filed herein.

"A" refers to the Appendix accompanying this brief.

STATEMENT OF CASE AND FACTS

The Respondent, pursuant to Fla.R.App.P. 9.210(c), accepts the Statement of the Case and Statement of the Facts provided in the Initial Brief of the Petitioners, except as supplemented or disputed below.

With regard to the Complaint seeking to acquire Parcel 110 and 111, while the Department sought to acquire the property in fee simple absolute, it did so with an express reservation to the landowners which provided:

> Reserving unto the Defendant the rights to use and enjoy the riparian rights of and pertaining to said lands, including the rights to bulkhead and fill, said lands as provided by law, which are not in conflict with the interests of the Florida Department of Transportation in the construction and maintenance of said public highway. (R: 341-342) (A: 8-9)

None of the answers filed in response to the petition challenged the estate sought to be acquired by the condemnor. (R: 352-356; 357-361; 362-365; 366-369) Likewise, there is nothing in the record brought before this court that indicates an objection to the estate sought to be acquired was made at the hearing on the Order of Taking. When that order was entered it contained the exact reservation that was provided in the Complaint. (R: 376-377) (A: 31-32)

During the trial the Petitioners questioned the Department's appraisal witness in regard to an appraisal made

by another individual, Carl Miller. (R: 115-116) The witness related that he included some of the information in the Miller appraisal in his appraisal. (R: 116) There were no further questions in this regard, and although the appraisal was marked as Defendant's Exhibit A for identification (R: 115) and subsequently denied admission as evidence (R: 203), the document was never proffered into the record. It should also be noted that there was never any motion to strike the testimony of the Department's appraisal witness, Charles D'Agostino. (R: 125)

During the trial, counsel for the landowner sought to proffer the testimony of its appraisal witness based upon what they perceived to be proper legal theory of the case. (R: 260-262) Rather than proceed by way of question and answer, counsel for the Department stipulated to allow the written appraisal report as the proffer. (R: 263) Based upon the stipulation, counsel for the landowner proffered the valuation analysis on Parcel 110 prepared by Roy Smith. He also proffered two documents that were prepared by Samuel Holden. (R: 264) These exhibits were then marked "Exhibit In Support Of Proffer" by the clerk. (R: 265)

Regarding the Petitioners' contention that the trial court issued what was tantamount to an "Allen" charge prior to the jury retiring to consider its verdict, it should be noted that the verdict in this cause was not returned by the jury on the same evening that they began deliberations. The

trial court allowed them to deliberate until 6:00 p.m. He then called the jury in to determine if they were close to reaching a verdict. Upon the jury indicating they were "not close," the matter was recessed for the evening. (R: 318-321) The jury reconvened at 9:00 a.m., and resumed their deliberation. The jury submitted a question which resulted in the rereading portions of the jury instructions given the day before. (R: 322-323; 325-326) After reinstruction, the jury subsequently returned its verdict. The jury was polled at the request of counsel for the landowner and each juror affirmed the verdict given. (R: 327-329) No subsequent motion requesting an interview of the jurors was filed by the Petitioners.

While the jury was deliberating, counsel for the Department moved for a mistrial based upon the fact that he had been informed by the court reporter that Judge Farrington answered a juror's question after the jury had been excused for the evening, and counsel for both parties had left the courtroom. (R: 324) Judge Poulton, who was presiding for purposes of receiving the verdict, indicated that he would contact Judge Farrington regarding a hearing on the motion. (R: 324-325) No motion for mistrial or other objection was made by counsel for the landowner at that time. Likewise, no request for curative instruction was made.

Upon rendition of the verdict, counsel for the Department withdrew his motion for mistrial. (R: 330) At

that time, counsel for the landowner moved for a mistrial. (R: 330) He then withdrew the motion. (R: 332) At the hearing on the Motion for New Trial, Judge Farrington related what "actually took place." This will be elaborated upon in Point Seven of this Reply Brief.

Other references to the factual occurrences below will be made as needed in replying to the individual issues.

ARGUMENT

POINT I

A.

Among the authorities cited by Petitioners in support of their contention that riparian rights are not alienable or severable from the lands to which such rights attach is 78 Am.Jur.2d, Waters Section 275. Had the Petitioners pursued the Am.Jur. title just a little further, they would have found the following:

> It is generally held that riparian rights may be separated from the ownership of the land to which they are appurtenant either by a grant of such rights to another or by a reservation thereof in the conveyance of the land. Accordingly, riparian rights may be conveyed to a nonriparian owner. 78 Am.Jur.2d, Waters Section 278.

Cited in support of that principle are cases from Maryland, Minnesota, New Hampshire, Oregon, and Virginia, Id. at 720, f.n. 93. Additional authority is found in 1A Thompson on Real Property, Sections 262 and 273 (1980 Replacement) and 2 Tiffany, The Law of Real Property, Section 667 (3rd ed. 1939). It is apparent that the decision relied upon by the Petitioners is indeed in the minority.

Florida is among those jurisdictions which hold that riparian rights may be devised separate from the lands to which such rights attach. Thus our jurisprudence is replete with statements to the effect that:

> A conveyance of land to which riparian rights to submerged lands are attached . . . may carry the riparian rights, unless such rights are reserved or a contrary intent appears from the conveyance. (Emphasis supplied). Panama Ice and Fish Company v. Atlanta and St. A. B. Ry., Company, 71 Fla. 419, 71 So. 608, 610 (1916).

See also Lopez v. Smith, 145 So.2d 509, 515 (Fla. 2nd DCA 1962); City of Tarpon Springs v. Smith, 81 Fla. 479, 88 So. 613 (1921); Caples v. Taliaferro, 144 Fla. 1, 197 So. 861 (1940); and Padgett v. Central and Southern Flood Control District, 178 So.2d 900 (Fla. 2nd DCA 1965).

Another line of cases recognize that a dedicator may reserve all riparian rights appurtenant to the land dedicated. Burkhart v. City of Fort Lauderdale, 168 So.2d 65 (Fla. 1964); Cartish v. Soper, 157 So.2d 150 (Fla. 2nd DCA 1963); and Feig v. Graves, 100 So.2d 192 (Fla. 2nd DCA 1958).

Burkhart, supra, is particularly instructive. In Burkhart, the owner of certain property located on a navigable body of water recorded a subdivision plat of land. The plat contained a street dedication but specifically reserved riparian rights to the developer and its successors. Subsequently a dispute arose between the city and certain landowners as to the ownership of riparian rights in respect to land subsequently formed by accretion and lying across the road fronting on their lots. In resolving that issue the Supreme Court stated:

> We conclude that because of the express reservation of riparian rights by the dedicator herein to itself and assigns, contained in the plat herein, these rights did not pass to the public as an incident to the street easement in Ocean View Drive. Id at 70.

Implicit in all of the foregoing cases is the principle that riparian rights are severable from the ownership of the land to which they attach. If this were not so, decisions which resolve how and to whom to allocate riparian rights would not even arise and the qualifying language found in the first series of cases cited is merely a non sequitur.

The Department in this cause followed the recommendations stated by the court in Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1st DCA 1971). There the condemning authority acquired property in fee simple and the taking severed existing access to the Oklawaha River. In acquiring the property, the condemning authority in no way limited the estate they acquired in their petition or Order of Taking. In holding that it was improper for the condemnor's appraiser to assume access to the river after the taking, based upon a policy of allowing such access, the court stated:

> It is established law that privileges in the property taken (in this case, access to a body of water), the enjoyment of which is not compatible with the exercise of the title taken (here, a fee simple absolute) by the condemning authority, cannot be considered in awarding compensation unless they are

> formally established by the condemnation proceeding. Privileges such as a right of access to the pool, which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in reduction of damages. 4 Nichols on Eminent Domain, Section 12.41(2); Smith v. City of Tallahassee, 191 So.2d 446 (Fla.App. 1st, 1966). Any restriction on the extent of the taking should be stipulated in the petition and the Order of Taking, for the condemnor is bound by these instruments. Houston Texas Gas and Oil Corporation v. Hoeffner, 132 So.2d 38 (Fla.App. 2nd, 1961). Id. at 233.

The decision not only recognizes that riparian rights can be reserved to the landowner by the condemnor, but commends the procedures followed by the Department in this cause. Not only did the petition contain the reservation of riparian rights (R: 341-342) (A: 8-9), but the Order of Taking, granting possession of the property, contained the same reservation. (R: 376-377) (A: 31-32)

B.

Any discussion of the applicability of Section 197.228, Florida Statutes, to the separability issue before the court must begin with the statute's unique legislative history.

The language in Section 197.228(1) first appeared in Section 1 of Chapter 28262, Laws of Florida (1953). Chapter 28262 contained five sections. Section 1 defined riparian

rights and declared them appurtenant to and inseparable from riparian land; declared that navigable waters did not extend to certain lakes covering areas previously conveyed to private individuals; and confirmed certain conveyances made more than fifty years earlier. Section 2 of the act dealt with the taxation of submerged bottom land under navigable waters. Section 3 barred the taxation of riparian rights separate from the appurtenant upland and declared void any tax sale certificates describing riparian rights only. Sections 4 and 5 simply repealed conflicting laws and established an effective date.

The statutory revisers in preparing the 1953 revision of the general statutes placed Sections 1 and 2 and the first half of Section 3 in Chapter 192, "Taxation, General Provisions," as Section 192.61. The remainder of Section 3 was placed in Chapter 194, "Tax Sale Certificates and Tax Deeds," as subsections 1 and 2 of Section 194.63. Accordingly, Chapter 28262, including the language at issue here, was first carried as part of the tax law.

In preparing the 1955 edition of the statutes, the revisers reconsidered their placement of the act. The original Section 1 of the act was broken into three subsections. The original Section 2 became a fourth subsection, and the four subsections were moved to Chapter 271, "Grants to Riparian Owners," becoming subsections (1) through (4) of a new Section 271.09. The original Section 3 remained in the tax chapters.

The language at issue here remained in Section 271.09(1) until 1971 when again the revisers elected to transfer the language to a taxation chapter, this time to Chapter 197, "Tax Collections, Tax Sales, Tax Liens," as subsection (3)(a) - (d) of Section 197.315.

Unfortunately, the acts checkered history was jsut beginning.

In 1972, the Legislature enacted Chapter 72-268, Laws of Florida. A Reviser's Bill, Chapter 197 was enacted at the same time.

Chapter 72-268 repealed all sections of Chapter 197, including Section 197.315. A new Section 197.226 was adopted from subsections 1 and 2 of Section 197.315.[1] Subsection 3 of Section 197.315 was not carried forward in any provision of Chapter 72-268. The Reviser's Bill, Chapter 197, notes the shift of Section 197.315 to Section 197.226, but does not in its Sponsor's Notes otherwise discuss Section 197.315. Nevertheless, when the revisers compiled the 1972 Supplement, Section 197.315(3) shows as "T [transferred] to 197.228 by Reviser." (Emphasis supplied). The legislative history for Section 197.228 set forth in the 1972 Supplement and each subsequent revision reflects only Chapter 28262, 1953 and

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[1]The provisions of Section 197.315(1) and (2) were also carried forward in a new Section 197.416 which varied slightly from Section 197.226. However, the 1972 Supplement set forth only Section 197.226.

Chapter 61-119.[2] There is no reference of any kind to Chapter 72-268.

Section 197.228's unique legislative history ends with its resurrection in the 1972 Supplement. It has not been revised or transferred since.

Respondent recognizes the body of law holding that the Legislature's bienial adoption of the Florida Statutes effects the adoption of any substantive changes in the law made by the Statutory Revision Commission. State v. Lee, 22 So.2d 804 (Fla. 1945); Kawasaki of Tampa, Inc. v. Calvin, 348 So.2d 897 (Fla. 1st DCA 1977). Nevertheless, the Statutory Revision Commission's resurrection of a statute expressly repealed by the Legislature was unquestionably arbitrary, contrary to the legislative intent, and beyond the reviser's statutory authority. Cf.: McCulley Ford, Inc. v. Calvin, 308 So.2d 189 (Fla. 1st DCA 1974), cert. denied 314 So.2d 592 (Fla. 1975).

Even assuming the current viability of Section 197.228, Florida Statutes, the statute's legislative history indicates that the provision's placement in a tax chapter is correct. The provision, as originally enacted, addressed and

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[2]To eliminate confusion and to simplify accounting procedures, Chapter 61-119 established the general revenue fund, trust funds, and the working capital fund and consolidated the state agencies' fund, the general inspection fund, the state road fund, and the trust fund into the newly created trust funds. Interestingly, Chapter 61-119 does not specifically revise Section 271.09, the provision then containing the language at issue.

was intended to impact upon the assessment of riparian rights for tax purposes, and not substantive property law. Certainly, the majority of Chapter 28262, Laws of Florida (1953), was directed to the taxation of riparian rights and its original placement in a taxation chapter argues strongly that it was intended as tax law. Additionally, it was characterized as tax law, not property law, by the Supreme Court in McDowell v. Trustees of the Internal Improvement Fund, 90 So.2d 715 (Fla. 1956). In McDowell, a central issue was the navigability of a lake. The defendant relied upon Section 271.09(2), arguing that under the statute, the portion of the lake to which he held a deed was nonnavigable as a matter of law. The court, in resolving that issue, pointed out that the subsection was part of the tax chapter. While recognizing that the provision was later reenacted as part of "Grants to Riparian Owners" in Section 271.09, the court nevertheless noted that:

> In the 1953 Florida Statutes, the subsection was appropriately included in the chapter on taxation, and it was apparently intended by the legislature to provide a guide for the benefit of tax accessors. Id. at 717. (Emphasis supplied)

Since 1971 the language at issue has remained within a taxation chapter and it is now gnerally accepted as a tax provision. Feller v. Eau Gallie Yacht Basin, Inc., 397 So.2d 1155 (Fla. 1st DCA 1981). In Feller, the appellees relied on Section 197.228, Florida Statutes (1979), to support their

claim that land must extend to the ordinary high water mark of navigable water in order for riparian rights to attach. In addressing that contention the court noted:

> Riparian rights exist in Florida as a matter of constitutional rights and property law and are not dependent on the statute cited which merely attempts to define them for tax purposes. However, in this instance, the tax statute definition is accurate . . . . Id. at 1157.

Interestingly, the court's decision suggests that constitutional and property law control riparian rights, and should a conflict occur, established principles of constitutional and property law control, not the statute.

C.

There can be little doubt that the language at issue is inconsistent with generally accepted property doctrines. (See the cases and authorities cited in Point I of Respondent's Answer Brief.) Moreover, the court in Kendry v. State Road Department, 213 So.2d 23 (Fla. 4th DCA 1968), cert. denied 222 So.2d 752 (Fla. 1969), citing to F.S. Section 271.09, 1967, F.S.A., which then contained the language at issue, found that an allegation that land borders a navigable water establishes only a prima facie showing, not a conclusive presumption created by statute, that riparian rights are appurtenant to the land. Implicit in that

finding, is a recognition that the prima facie showing is rebuttable.

Additionally, the construction urged by Petitioners runs afoul of constitutional guarantees. Riparian rights are property rights subject to all constitutional protection afforded by the United States and Florida Constitutions. Feller v. Eau Gallie Yacht Basin, Inc., supra. See particularly Article I, Section 2, Florida Constitution (1968), which provides that all natural persons have the inalienable right of acquiring, possessing, and protecting property. One of the principal elements of property is the right of alienation or disposition. 25 Fla.Jur., Property, Section 6. To construe Section 197.228 to preclude the severability of riparian rights is to afford the statute a construction in direct conflict with constitutional guarantees.

D.

Further, Section 1 of Chapter 28262 contained what is now subsections (1) through (3) of Section 197.228. The fifth sentence of Section 1 of Chapter 28262 states that riparian rights are appurtenant to and inseparable from the riparian land. However, the concluding two sentences of the section [now subsections (2) and (3) respectively of Section 197.228] specifically exclude from navigable waters (and

thereby makes subject to private ownership) lakes, ponds, swamps, or overflow lands and the submerged lands of nonmeadered lakes conveyed more than fifty years ago unless the conveying instrument specifically reserves public rights in and to such waters. Accordingly, the original enactment itself clearly recognized and sanctioned conveyances reserving riparian rights, which is exactly the procedure employed by the Department.

E.

Petitioners rely solely upon Carmazi v. Board of County Commissioners of Dade County, 108 So.2d 318 (Fla. 3rd DCA 1959). However, Carmazi was a suit to adjudicate property rights and recover damages to riparian land as a result of the construction of a proposed dam on a navigable stream. While the decision quotes Section 271.09, the severability of riparian rights was neither at issue nor addressed by the court. Accordingly, the decision is not authority for the position urged by Petitioners.

POINT II

Contrary to the Petitioners' position, there were no promissory representations made in the proceedings below. Rather, the testimony offered explained the construction that was to occur and the use to which the property taken was going to be put. This was totally proper. Division of Administration, State of Florida Department of Transportation v. Decker, 408 So.2d 1056 (Fla. 2nd DCA 1981); Bryant v. Division of Administration, State of Florida Department of Transportation, 355 So.2d 841 (Fla. 1st DCA 1978).

The situation below is analogous to what occurred in Central and Southern Florida Control District v. Wye River Farms, 297 So.2d 323 (Fla. 4th DCA 1974). In Wye River the landowner maintained, as do the Petitioners in this cause, that the evidence offered regarding the construction of access to the remaining lands was merely a statement of "permissive policy which later may be withdrawn." Id. at 328. As in this cause, the evidence was alleged to be in contravention to the rule set out in Houston Texas Gas and Oil Corporation v. Hoeffner, 132 So.2d 38 (Fla. 2nd DCA 1961). In rejecting this argument, the court found that the evidence offered was in "mitigation of damages to the remainder" and did not "alter the quality of title or legal interest of any parcel." Id. at 328. The court went on to state:

> Appellees' argument overlooks the distinction between an attempt at limiting the effect of the title or legal interest acquired as contained in the pleadings on the one hand, and a positive evidentiary statement by the condemnor as to what he intends to construct as part of the project on the other hand. Id. at 328.

This is the exact distinction the Petitioners fail to make in this appeal. Unlike the setting in Houston Texas Gas and Oil, supra, the estate acquired by the Department in this cause contained a specific reservation to the landowner of riparian rights to the extent that they did not conflict with the "construction and maintenance" of the highway. (R: 341-342) Although the Petitioners argued below that the condemnor was attempting to alter the estate acquired and in essence the testimony to be offered was tantamount to giving back the property acquired (R: 31-41), the trial court correctly ruled that the condemnor was entitled to explain to the jury the use to which the property taken was going to be put. (R: 41) The question of the extent to which the right of maintenance interfered with the riparian rights reserved to the landowners was one to be determined by the jury in light of the evidence presented. (R: 264)

In this regard, the Department presented evidence demonstrating that the plans did not reveal that any construction would take place on the parcels acquired. (R: 47-48; 49) Concerning "maintenance," the engineering witness testified that except for the placement of rubble against the

existing bulkhead on Parcel 111 (R: 49-50; 54) there was no further maintenance expected in the future on either of the parcels. (R: 49; 50)

Considering the project constructed and the anticipated maintenance, the witness stated that there was no physical impediment on either parcel that would prohibit the use of the property in the same manner as prior to the taking. (R: 50)

In response, the landowner submitted his own testimony which contended that there existed a potential for substantial interference with the use of the remainder based upon the Department's right to conduct maintenance along the parcels taken. One witness even suggested that, in regard to Parcel 111, the replacement of rip rap (piled rubble) may require the Department to tear down the existing dock. (R: 147)

The appraisal witnesses based their valuation upon the different opinions of potential interference by the Department's future need to maintain. Thus the issue of damages was framed by the estate acquired by the Department along with the plans and explanatory engineering testimony submitted which indicated exactly how the property acquired was to be utilized. Wye River, supra at 328. Given this evidence, the question of damages was properly submitted to the jury and their findings should not be disturbed.

POINT III

In response to the argument on this point, it should merely be noted that the record reveals, and Petitioners concede, that the verdict in this matter was returned the morning after the alleged "Allen" charge was given to the jury.

As noted by the Petitioners:

> "Had a quick verdict been returned as ordered by the lower court, it would have been apparent that little thought was given those issues for both sides were pretty much in agreement on the value of the part taken." (See: Petitioners' Brief, p. 25) (Emphasis supplied).

The fact remains that a quick verdict was not returned by the jury. There was no coercion on the part of the trial court to return a verdict prior to departing on the evening of June 28, 1980. To the contrary, when the judge inquired at 6:00 p.m., and the jury indicated they were "not close" to reaching a verdict, they were dismissed for the evening. (R: 318-321) Upon further deliberation the following morning, along with a re-reading of the jury instructions, the jury then returned its verdict.

The Petitioners' claims in regard to this issue are unfounded to say the least and the showing of prejudicial error is totally lacking.

POINT IV

Regarding the admissibility of the Department's appraisal testimony, there are several preliminary hurdles the Petitioners have failed to clear. The first, and most obvious, is the fact that the Petitioners never objected to or moved to strike the appraiser's testimony on the grounds that the opinion given was based upon that of another expert. In fact, upon the completion of Mr. D'Agostino's testimony, the court inquried if there were any motions to be made out of the jury's presence. Counsel for the landowners responded: "No, your Honor, I don't have any motion I would like to make." (R: 125)

The second hurdle the Petitioners have failed to clear is the fact that although the appraisal report prepared by Carl Miller was marked as Defendant's Exhibit A for Identification (R: 115), and subsequently denied admission as evidence (R: 203), neither the document nor the relevant contents thereof were ever proffered before the trial court. Counsel for the landowner never pursued a line of questioning, proffered or otherwise, which would indicate exactly what material contained in the Carl Miller report was utilized by Mr. D'Agostino. Nor did he pursue a line of questioning that would indicate what portion of Carl Miller's appraisal report constituted an admission against interest.

Without considering the lack of a proffer, the Respondent would seriously question the propriety of

attempting to impeach Mr. D'Agostino's testimony with the report of another appraiser who was not a witness at the trial. If the Petitioners thought that Mr. Miller had done a better job than Mr. D'Agostino, they should have called him as their own witness. It would have been impermissible, however, to refer to the fact that Mr. Miller was previously hired by the Department of Transportation. Sun Charm Ranch, Inc. v. City of Orlando, 407 So.2d 938 (Fla. 5th DCA 1981).

Without proffering the document, or questioning in regard to the document, there is nothing in the record to indicate that the material was relevant or that the Petitioners have suffered any prejudice as a result of the court's ruling denying the admissibility of the report. Stager v. Florida East Coast Railroad Company, 163 So.2d 15, 17 (Fla. 3rd DCA 1964); Ritters Hotel, Inc. v. Sidebotham, 142 Fla. 171, 194 So. 322 (1940); Nicholson v. City of Fort Walton Beach, 293 So.2d 104 (Fla. 1st DCA 1974); Musachia v. Terry, 140 So.2d 605 (Fla. 3rd DCA 1962). The Petitioners have again failed to demonstrate the existence of prejudicial error.

POINT V

In responding to the Petitioners' contention, we would merely point out several things that occurred regarding their proffer that they have failed to mention.

Specifically, upon counsel's indication that he wished to make a proffer of its appraisal testimony based upon what they perceived to be the proper legal theory of the cause (R. 260-263), the following colloquy occurred:

> MR. WEAVER: Myself, the problem in fact, if you have a written appraisal by an appraiser, you wish to incorporate into your proffer the written appraisal as it is given this way I can't. (sic)
>
> MR. COALSON: If you will stipulate to that --
>
> MR. WEAVER: As a proffer I would, yes, sir.
>
> MR. COALSON: Based upon the stipulation I hand the trial clerk valuation analysis prepared by Mr. Roy F. Smith, Jr., on Parcel 110 under the premise that the fee owners in this case have been denied their riparian rights by the interceding three foot strip acquired by the DOT in fee simple, absolute.
>
> And I have also two sheets, one on Parcel 110 and Parcel 111 which is prepared by Mr. Samuel F. Holden under the same evaluation premise, and would respectfully ask it be made a matter of record in the cause.
>
> THE COURT: They will be received for the purpose of setting forth what your proffered testimony would be, and the proffer will be denied. It's not the holding of the court that the Defendants still have riparian rights. The holding of the court is although riparian rights have evolved to the state, the effect of reservation in the, in the order of taking is equivalent to grant by the state of its consent to use its riparian rights to the extent they will not interfere with maintenance and construc-

> tion would impose on the right to exercise those rights of, generally rights of access and use of facilities that cross over the area taken by the state.
>
> MR. COALSON: I understand Your Honor's ruling. I must submit the stubbed toe by not giving grants of easement as opposed to trying to reserve.
>
> THE COURT: State stubbed its toe by taking this particular stand.
>
> It seems like it's a big waste of the public's money. They did. We are here to determine what they should pay for it.
>
> THE CLERK: How should I mark the proffer?
>
> MR. WEAVER: Judge, I agree with you. For the record.
>
> THE CLERK: How shall I mark the Defendant's Exhibit for proffer?
>
> THE COURT: Exhibit in support of proffer will be a satisfactory designation. We will have a short recess before we start argument. (R: 263-265) (A: 51-52)

The Petitioners gave no indication that they had any other materials to be submitted. It is clear from the quotation that the trial judge permitted the Petitioners to proffer all that they desired on the issue and those items were properly identified as proffered exhibits. The trial court then denied the admissibility of that information for purposes of consideration by the jury. This is the exact procedure to be followed when the court denies admission of any proffered evidence.

The proffered exhibits, if included in the record on appeal, are available to this court for examination and

determination of the propriety of excluding the evidence submitted. The Petitioners' contention on this point is unfounded based upon the record established below and again he has failed to demonstrate prejudicial error.

POINT VI

Since the Petitioners have combined several allegations of error in this point, it will be necessary to single out the points of attack and address them individually.

Concentrating on the allegations relating to the special jury instructions, the trial court properly denied the Defendant's Special Instruction No. 1 because it ignored the fact that the estate acquired by the Department contained a specific reservation or easement to the landowners. As noted by the court in the final reitreation of its ruling on this point:

> It's not the holding of the court that the Defendants still have riparian rights. The holding of the court is although riparian rights have evolved to the state, the effect of reservation in the, in the order of taking is equivalent to grant by the state of its consent to use its riparian rights to the extent they will not interefere with maintenance and construction. And that the jury can determine from the evidence what limitation, maintenance and construction would impose on the right to exercise those rights of, generally rights of access and use of the facilities that cross over the area taken by the state. (R: 264-265)

Since the instruction ignored the estate created it was properly denied. A proper instruction directing the jury to "assume the worst possible effect upon the remainder that the full extent of the legal rights acquired would imply" was given by the court. (R: 307)

The Defendant's Special Instruction No. 2 was properly denied for the same reason. Again it ignores the reservation to the landowner.

The Petitioners have made a point of the "inflections in the voice of the trial judge" during the proceedings. We would agree with the Petitioners' statement that they are "impossible to detect" on the bare record. It is also impossible to detect any objection by counsel for the landowner regarding these "inflections," which likewise makes it impossible for this court to detect any reason to consider this allegation any further.

Considering next the Petitioners' allegation regarding the judges initial comments to the jury, two things become apparent. First, the Petitioners made no objection to the comment. (R: 8-9) Second, the judge correctly stated that the burden of proof on the issue of severance damages is on the landowner. City of Ft. Lauderdale v. Casino Realty, Inc., et al., 313 So.2d 649, 652-653 (Fla. 1975).

Turning now to the Petitioners' list of "improper judicial conduct" found on page 34 of Petitioners' Brief, we will go through the comments one by one.

The first comment regarding the "waste of the public's money," was not a reflection on the Petitioners' claim, but rather a chastisement of the condemnor for acquiring property that had little or no planned future use. (R: 265) It should be noted that the comment was not made in the jury's presence.

The second quotation comes from the trial court's initial instructions to the jury. (R: 13-17) This instruction is a near verbatim recitation of that submitted by the Petitioners in their Defendant's Requested Jury Instruction No. 1. (A: 53-56) Note also that there was no objection to this instruction by the Petitioners.

The third statement occurred out of the jury's presence during discussion of the court's ruling concerning the reservation given to the landowner. Review of the entire discussion reveals no improper conduct by the trial court but merely an elaboration of his ruling. (R: 31-41)

The next comment occurred during the trial court's final instructions to the jury. (R: 306) That portion of the instruction quoted is a verbatim statement from the jury instruction submitted by the Petitioners as Defendant's Requested Jury Instruction No. 5. (A: 57)

The final quotes, taken out of context, occurred while the trial judge was explaining the contents of the verdict form to the jury. (R: 310-312) Considering the fact that the court's statements were merely a reiteration of instructions previously given, which were included as part of the Defendant's Requested Instructions, the Department would maintain that the Petitioners' complaint is totally unfounded. Also, if the Petitioners were of the opinion that the trial court unduly emphasized anything during the instructions to the jury, a curative instruction should have

been requested. Failure to do so constituted a waiver of the point.

Moving next to the omissions in the jury instructions, the first one mentioned by the Petitioners needs no discussion. Upon discovery of the omission (R: 314-316), the trial gave the jury the full instruction, and thus any error was cured. (R: 317-318)

The next omission challenged concerns the court's instruction on the issue of severance damages and loss of access. As noted in the record the court gave the following instruction:

> Damage to the remaining property of an owner are known as salvage (sic) damages and may consist of the following: Number one, reduction in value because of the reduced size or shape of the remaining property. Two, reduction in value because of the use to which the Petitioner intends to put the property actually taken. And three, reduction in value of the owner's remaining property because of the loss of access. (R: 306)

The portion omitted was merely surplusage and unneeded to convey to the jury the fact that the loss of access was a compensable item of damage. A party is not entitled to the use of any particular language in a jury instruction. Luster v. Moore, 78 So.2d 87 (Fla. 1955). So long as the instructions given fairly reflect the law on the subject no error has occurred. Southeastern General Corp. v. Gorff, 186 So.2d 273 (Fla. 2nd DCA 1966). The jury was properly instructed to consider the loss of access in determining the

severance damages due to the landowner and thus no error in regard to that jury instruction can be claimed.

The Petitioners alleged error in the omission of the first two paragraphs of Defendant's Requested Instruction No. 9 requires no consideration by this court. First it should be noted that Instruction No. 9 was not omitted. (R: 307) Rather the paragraphs were deleted from Defendant's Requested Jury Instruction No. 13. In their haste to support the accusation of the trial court's "intentional omission" of portions of the jury instruction, the Petitioners have failed to mention that they agreed to the deletion of those two paragraphs which were considered redundant by the trial court. (R: 266) The Petitioners again have waived his right to contest this point.

POINT VII

A brief review is needed of the factual occurrences surrounding the alleged improper comment to a juror in order to understand why the point does not require reversal.

The comment by the trial court apparently occurred after the jury has been discharged for the evening. The record indicates that counsel for both parties became aware of the situation upon being told by the court reporter the morning after. At that time, in moving for a mistrial, counsel for the Department summarized what had been related to him. (R: 324) Counsel for the landowner neither joined in, nor made his own motion for mistrial at that time. There was no request for a curative instruction, and no objection to the subject of the court's comment, regarding the existence of a deed, was made by counsel. In fact he sat mute. (R: 324-325)

Pursuant to a request by the jury, the instructions given the day before were re-read to the jury. (R: 325-326)

Upon further deliberation, the jury then returned its verdict. (R: 327) The jury was polled, at the request of counsel for the landowners (R: 327-329), and thereafter discharged by the trial court. (R: 330)

At that time, counsel for the Department withdrew his motion for mistrial. Counsel for the landowner, for the first time, moved for a mistrial. (R: 330) The motion was then withdrawn with an indication that it would be brought up by way of motion for new trial. (R: 332)

At the hearing on the motion for new trial, the trial judge indicated that he recalled the conversation (R: 488) and then related what occurred as follows:

> What actually took place, as the jury was leaving the box - - I don't recall whether they were going back to the jury room or going out for the day. One of the jurors, I presume it was the foreman, came over to the Clerk and asked for the deed, by which the title had passed to the Department of Transportation. And the Clerk looked at me and I said, "There is no such deed." (R: 493) (A: 59)

The court went on to note that even if the attorneys had been there, the answer would have been the same. As was correctly stated by the court, there was no such deed in evidence. (R: 493)

Given this factual setting the following becomes evident:

- The comments made by the court were in answer to an inquiry made to the clerk.
- The comment was correct in that no such deed existed or was in evidence.
- When counsel for the landowner first became aware of the comment, which was prior to the discharge of the jury, he made no objection or relevant motion to the court.
- Counsel for the landowner made no attempt to determine the extent of the comment prior to the discharge of the jury.
- Although the opportunity existed, since the jury had not yet been discharged, counsel for the landowner made no objection to the judge's response to the question posed by the juror to the clerk. Further, no curative instruction was re-

quested concerning the correctness of the information conveyed by the trial court's response.

- Counsel for the landowner made his only objection to the court's comments after the verdict was rendered and the jury discharged. That objection was then withdrawn.

It is apparent from the foregoing summary that the error alleged has been waived. Uniquely analogous and applicable to the issue presented in this cause is Eastern Airlines, Inc., v. J. A. Jones Construction Company, 223 So.2d 868 (Fla. 1969). In that case, after the jury retired for deliberations and counsel for the parties departed the courtroom, the jury sent a note to the judge asking if a summary of a witness' testimony was in evidence or available for the jury's consideration. The judge responded that "All exhibits admitted in evidence are in the jury room. No other documents are before the jury or available." Id. at 333. Counsel for the parties became aware of the communication, prior to the jury returning its verdict, when they were so advised by the bailiff. No objection was made at that time. Rather, as in this case, the objection was made after the verdict and discharge of the jury. The District Court went on to hold:

> Under these circumstances, we think the rule stated in 89 C.J.S. Trial Section 483, is applicable. It states:
>
> As a general rule, if a party obtains knowledge during the progress of the trial of acts of jurors, or acts affecting them, which he shall wish to

> urge as objections to the verdict, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objection. (Emphasis added)

See also, Alvarez v. Mauney, Fla. App. 1965, 175 So.2d 57.

> Had the Plaintiffs' counsel made a timely objection, the trial court would have been given an opportunity to correct its error, if any in fact had occurred. By waiting until the jury returned its verdict before objecting, we think the Plaintiff waived its right to object to this alleged error. Id. at 333-334.

In the proceeding below, if a timely objection had been made along with a request for a curative instruction, the court would have had an opportunity to correct its error, if any in fact had occurred. However, the Petitioners' untimely objection foreclosed that opportunity and he should be deemed to have waived his right to challenge the alleged error.

CONCLUSION

Based upon the foregoing arguments and authorities cited therein, the Respondent respectfully suggests that the district court opinion should be affirmed.

Respectfully submitted,

ALAN E. DeSERIO

MARGARET-RAY KEMPER
Appellate Attorneys
JOHN H. BECK
General Counsel
Department of Transportation
Haydon Burns Building
Tallahassee, Florida 32301
904/488-6212

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 13th day of July, 1982, to WILLIAM L. COALSON, ESQUIRE, Greene & Greene, P.A., 2600 Gulf Life Tower, Jacksonville, Florida 32207.

Alan E. DeSerio

ALAN E. DeSERIO