O/a 9-9-86

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 67,934

FRENCHMAN, INC.,

Petitioner,

vs.

DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF

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PREFACE

Petitioner, FRENCHMAN, INC., was the Defendant at the trial court and appellee at the Fouth District Court of Appeal and is referred to herein as "Frenchman".

Respondent, DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, was the Plaintiff at the trial court and appellant at the Fourth District Court of Appeal and is referred to herein as "DOT".

References to the record on appeal refer to the record as delivered to the Fourth District, and are indicated by the letter "R" followed by the page of the record as prepared by the Clerk of the Circuit Court.

ISSUES PRESENTED FOR REVIEW

I. IS A LANDOWNER ENTITLED IN AN EMINENT DOMAIN PROCEEDING TO RECEIVE FULL COMPENSATION FOR DAMAGES TO ITS REMAINDER PROPERTY BY EMPLOYING A COST TO CURE METHOD IN MEASURING THOSE DAMAGES WITHOUT THE NECESSITY OF FIRST PRESENTING EVIDENCE SHOWING THE REDUCTION IN VALUE OF THE REMAINDER PROPERTY THROUGH COMPARISON OF THE BEFORE AND AFTER TAKING FAIR MARKET VALUE OF THE PROPERTY: A) WHEN THE EVIDENCE DEMONSTRATES THAT THE TAKING OF THE PROPERTY INVOLVED WAS UNIQUE, B) WHEN THE EVIDENCE FURTHER SHOWS THAT THE REMAINDER PROPERTY HAS BEEN DAMAGED BY THE TAKING, AND C) WHEN THE AWARD OF SUCH COST TO CURE DAMAGES DOES NOT ENHANCE THE VALUE OF THE REMAINDER PROPERTY SUBSEQUENT TO THE TAKING?

II. WAS FRENCHMAN ENTITLED TO RECOVER DAMAGES TO ITS REMAINDER PROPERTY FOR LOSS OF VIEW, PRIVACY, SECLUSION AND AESTHETICS CAUSED BY THE TAKING?

III. IS A LAND OWNER ENTITLED TO BE COMPENSATED FOR DRAINAGE DAMAGES WHICH ARE CAUSED BY A TAKING AND THE USE TO WHICH A CONDEMNING AUTHORITY INTENDS TO PUT THE PROPERTY?

IV. WHETHER THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES FOR SERVICES RENDERED IN THE TRIAL COURT ON BEHALF OF FRENCHMAN SHOULD BE REINSTATED?

STATEMENT OF THE CASE AND OF THE FACTS

On October 19, 1981, DOT filed a petition in eminent domain seeking to acquire 11.756 acres of land owned by Frenchman. (R. 853-864). This strip of land was approximately 95 feet in width and 1 mile long, which was taken by DOT in fee simple for road right-of-way for Alternate A-1-A roadway expansion. (R. 1276-1284). In addition to the land taken in fee simple, DOT also sought and acquired a temporary construction easement on the east side of the land taken which varied in width from 10 to 15 feet. (R. 1276-1284). At the time of the taking, the land acquired was being used as a buffer from the roadway for three holes of the Frenchman's Creek golf courses. (R. 122, 207).

On January 28, 1982, the lower court entered its Order of Taking permitting the DOT to acquire the property. (R. 894-897). Subsequent to the taking, DOT removed all trees and vegetation from the strip of land acquired from Frenchman.

In the trial court, the parties stipulated as to the money to be paid to Frenchman for value of the land taken by the DOT and as to the value of the temporary construction easement. (R. 1276-1284). The total amount awarded to Frenchman, exclusive of interest, for the land taken and the temporary construction easement was $394,913. (R. 1276-1284). The

parties were unable to agree, however, as to the amount of money to be paid for damages to the remainder property, and the case went to trial before the jury on that issue. Frenchman contended at trial that as a result of the removal of the trees and dense vegetation which had acted as a buffer for the golf courses from Alternate A-1-A, it was necessary to build a substitute buffer on a portion of Frenchman's remainder property at certain points along the three holes and to make various modifications to the golf courses. Frenchman also claimed that the drainage for the golf courses had been damaged as a result of the taking and the use to which the DOT intended to put the land taken.

During its case, Frenchman presented testimony from Robert Cupp, a golf course architect, and Howard Searcy, a drainage engineer, concerning damages to the golf courses caused by the taking and modifications necessary to correct those damages. (R. 199-306; 306-344). Frenchman also presented the testimony of Samuel Holden, a real estate appraiser, who testified regarding the damages to the remainder property. (R. 117-193). DOT presented evidence at trial from Bill Watts, a golf course architect; John Adair, a drainage engineer; and Roy Rood, a landscape architect and nurseryman, concerning the DOT's position about damages sustained by the golf courses due to the taking and the modifications necessary to cure those damages. (R. 446-528, 560-614, 619-643, 644-692). John Hagan, a real estate appraiser, also testified on behalf of DOT. (R. 534-560). The jury, after hearing and reviewing the evidence

and viewing the property, returned an award for damages to the remainder property in favor of Frenchman in the amount of $190,000. (R. 846).

Subsequent to the jury award, on February 8, 1984, the lower court entered a Final Judgment in favor of Frenchman based upon the jury verdict. (R. 1368-1373). The lower court also assessed, by separate Order, attorneys' fees in favor of Frenchman for services rendered by Frenchman's attorneys in the trial court. (R. 1535-1536).

DOT appealed the Final Judgment and the Attorneys' Fee Judgment to the Fourth District Court of Appeal. The Fourth District reversed the Final Judgment and the Attorneys' Fee Judgment.

The grounds for the Fourth District Court of Appeal's reversal of the Final Judgment (each of which are discussed in detail below) were that: Frenchman had employed an improper method of valuation in assessing damages to the remainder property; the damages claimed by Frenchman for loss of view, privacy, seclusion and aesthetics were in this case, noncompensable and Frenchman was not entitled to compensation for its claim for drainage damages. The Attorneys' Fee Judgment was reversed because it had been predicated, in part, on the jury award to Frenchman.

This Court accepted jurisdiction, under Art. V, §3(b)3, Fla. Const. based upon Frenchman's Notice to Invoke Discretionary Jurisdiction.

An Appendix consisting of the decision of the Fourth

District Court of Appeal and of smaller-sized copies of photographs of the golf courses prior to the taking introduced into evidence at trial is attached hereto. The Appendix is cited: (A. ___).

SUMMARY OF ARGUMENT

I. The Constitutional guarantee of full compensation under Art. X, §6(a) Fla. Const. does not require that a before and after valuation approach measuring the reduction in fair market value caused by the taking be used before a landowner is allowed to collect damages to his remainder property. Rather, as this Court has previously stated, all valuation methods are merely tools to assist in determining what is full or just compensation. The proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case. In the circumstances of the case at bar, where the evidence adduced at trial by both parties demonstrated that Frenchman's remaining property had been damaged by the taking, that the taking was unique, and that the cost to cure those damages awarded by the jury would not enhance the value of the remainder property after the taking, Frenchman was entitled to receive those damages as part of the Constitutional guarantee of full compensation.

Full compensation for the taking of property must be determined by equitable principles and its measure varies with the facts. Under the facts of the instant case, it is clear that Frenchman's remainder property which was being used as

golf course property had been damaged by the removal of the buffer and alteration of the drainage which existed prior to the DOT's taking of the property. Accordingly, under both the theory and spirit of the full compensation clause itself, as well as this Court's decisions, Frenchman should be allowed to receive the compensation awarded by the jury for the cost of providing a substitute buffer after the DOT had taken and destroyed its excellent existing buffer. In this regard, it is important to note that the testimony was uncontroverted that the award of those damages for a new substitute buffer would in no way enchance the value of the golf courses after the taking.

II. Frenchman should be allowed to collect the damages awarded by the jury which were based upon loss of view, privacy, seclusion, aesthetics, strategic value, maintenance and safety. The Fourth District Court of Appeal improperly reevaluated and reassessed the jury's determination with regard to the damages caused by the taking in finding that Frenchman's property was not secluded prior to the taking. To the contrary, the undisputed evidence adduced at trial demonstrated both the privacy and aesthetic qualities possessed by the property prior to the taking and removal of the buffer by DOT and further showed that the strategic value, maintenance and safety factors had been adversely affected by the taking.

III. Frenchman should be entitled to collect the damages to cure the drainage problem caused by the taking. Contrary to the Fourth District's decision, Frenchman was not attempting to collect drainage damages resulting from the negligence or

misconduct of DOT in performing the construction which was the object of the taking. Rather, Frenchman's testimony demonstrated that, as a result of the taking and the use to which the property taken was being put by DOT, it was necessary to make drainage modifications to the golf courses in order to alleviate the drainage problems caused by the taking. (R. 314-315).

Both the Final Judgment entered by the trial court, and the Attorneys' Fee Judgment, should be reinstated by this Court.

ARGUMENT

I.

A LANDOWNER IS ENTITLED IN AN EMINENT DOMAIN PROCEEDING TO RECEIVE FULL COMPENSATION FOR DAMAGES TO ITS REMAINDER PROPERTY BY EMPLOYING A COST TO CURE METHOD IN MEASURING THOSE DAMAGES WITHOUT THE NECESSITY OF FIRST PRESENTING EVIDENCE SHOWING THE REDUCTION IN VALUE OF THE REMAINDER PROPERTY THROUGH COMPARISON OF THE BEFORE AND AFTER TAKING FAIR MARKET VALUE OF THE PROPERTY: A) WHEN THE EVIDENCE DEMONSTRATES THAT THE TAKING OF THE PROPERTY INVOLVED WAS UNIQUE, B) WHEN THE EVIDENCE FURTHER SHOWS THAT THE REMAINDER PROPERTY HAS BEEN DAMAGED BY THE TAKING, AND C) WHEN THE AWARD OF SUCH COST TO CURE DAMAGES DOES NOT ENHANCE THE VALUE OF THE REMAINDER PROPERTY SUBSEQUENT TO THE TAKING.

In the case sub judice, the Fourth District reversed the jury verdict and Final Judgment which had been entered in favor of Frenchman for damages to Frenchman's remaining property due to the Court's reasoning that Frenchman's appraiser had not employed a proper valuation method in assessing damages to the remainder property. In its decision, the Fourth District

stated that because Frenchman did not first present evidence that it sustained severance damages, it was error to admit testimony on the cost to cure the damages to the golf courses by building a substitute buffer on a portion of the remaining land of Frenchman. (A. 4). The basis for the Court's holding was that the conventional manner of measuring severance damages to the remainder property is by determining the reduction in value of the remainder property caused by the taking, which, in turn is calculated by comparing the pre-condemnation and post-condemnation fair market values of the property. (A. 3). The Fourth District reasoned that because Mr. Holden, Frenchman's appraiser, did not state what the reduction in fair market value of the property was, that it was impermissible for Mr. Holden to testify as to the costs involved to cure the taking.

In analyzing the correctness of the Fourth District's holding that the valuation method used by Mr. Holden was improper, Frenchman respectfully submits to the Court that it is extremely important to consider the following testimony of Mr. Holden which was presented at trial:

1. He has been a real estate appraiser for 44 years. (R. 117-118);

2. He had performed at least a dozen prior appraisals on golf courses. (R. 120);

3. The strip of land taken by the DOT contained many hundreds of trees and dense shrubs which acted as a buffer to the golf courses. (R. 122-123);

4. That he had reviewed whether or not the remaining golf course property immediately adjacent to the taking would be damaged as a result of the condemnation action and determined that there would be damages due to the loss of the trees and shrubs acting as a buffer and that drainage problems would be caused by the taking. (R. 126-127);

5. That in order to determine the extent of the damages to the golf courses he had consulted with a golf course architect and drainage engineer. (R. 133);

6. That he had attempted to determine the amount of severance damages by conducting sale searches of comparable golf courses but found no comparable sales. (R. 133-135). That is, he found no golf courses that had lost a buffer shielding a golf course from a roadway so as to enable him to perform a comparable sales analysis. (On page 4 of its Opinion, the Fourth District agrees that the "market" or comparable sales approach was not available in this case because the property was unique) (A. 4).

7. That he was not able to appraise damages to the remainder property by the income method because the property was unique in the sense of being a golf course and the effect would not be known from an income approach for several years after the taking, and furthermore, a sales search did not reveal any golf courses which were similarly damaged to see how it effected their income record. (R. 134-135, 192-193); (On page 4 of its Opinion, the Fourth District agrees that the income approach is also inapplicable to this situation.) (A. 4).

8. That he had spoken to a potential purchaser of the Frenchman property who had advised him that his company would not buy the property until the damages to the golf courses had been cured. (R. 167);

9. That in this case the only method to utilize to calculate the damages was by employment of the cost to cure method and that he had spoken with other real estate appraisers who confirmed that the cost to cure method would be the only appropriate way to appraise the damages in this case. (R. 136);

10. That the proposal made on behalf of Frenchman for a substitute buffer and drainage modifications made by the golf course architect and drainage engineer would not make the golf courses as good as they were before the taking, rather, the golf courses would be lesser golf courses than before the taking and loss of the original buffer. (R. 163, 192);

In addition to Mr. Holden's appraisal testimony concerning damages to the golf courses, Robert Cupp, a golf course architect, testified as to how the golf courses would be damaged by removal of the buffer, and Howard Searcy, a drainage engineer, testified as to how the courses would be damaged due to the flow and ponding of surface water caused by the taking, and the intended use of the DOT as demonstrated by the project plans which the DOT offered in evidence. (DOT's Exhibits #3 and #4 separately packaged by the Clerk of the trial court in a brown roll.) Both witnesses also testified to the costs involved to cure those damages. Mr. Cupp opined that the buffer that had been taken by the DOT was important to the

courses and that the courses had been substantially damaged as a result of the elimination of the buffer. (R. 207). Mr. Cupp testified in detail as to his proposed modifications of the golf courses and that he was attempting to put important aspects of sight, seclusion and containment which had been lost because of the taking back into the courses. (R. 215). Mr. Searcy who had examined the DOT construction plans to determine the precise intended use of the property taken testified that the DOT construction of an elevated bike path on part of the acquired right-of-way above the remaining golf courses changed the flow of water and was the cause of drainage damages to the golf courses, and Searcy opined that in order to cure the drainage problem it was necessary to make drainage modifications to the courses. (R. 313-315). Mr. Searcy unquestionably testified that it would have been unnecessary to undertake any of those modifications which he proposed if the taking and proposed use and change of the flow of surface water on the remaining golf courses had not occurred. (R. 706).

In addition to Frenchman's own witnesses, the DOT golf course architect, Bill Watts, and the DOT drainage engineer, John Adair, also testified as to costs to restore the property to the condition it was in prior to the taking. In this regard, Watts testified that the golf courses had been damaged because after the taking they were closer to the roadway and there was no longer anything to block the view of the traffic on Alternate A-I-A. (R. 456-458). Mr. Watts' recommendation was that hedges, trees and a cypress fence be used to cure the

problem. (R. 460-461, 483-484). Mr. Watts also testified to the necessity and costs for moving the green for hole 4 north and a canal to the east and for moving a golf cart path. (R. 480-481, 491-492), as well as to the costs of his other proposals to restore the buffer taken. (R. 479-484). During the course of his testimony, Mr. Adair testified as to drainage costs due to the taking. (R. 591-592). Additionally, the DOT offered at trial the testimony of Roy Rood, a registered landscape architect, contractor and nurseryman, who had done substantial work on golf courses. (R. 645-647). Mr. Rood testified that the buffer which was taken contained several hundreds and perhaps even a thousand trees, and that the buffer taken was a "great buffer". (R. 669-670). Mr. Rood further testified there was now a real problem in the sense of not having that strip of buffer anymore. (R. 670). Additionally, Mr. Rood, the DOT's own witness, confirmed that the berming method proposed by Robert Cupp as a substitute buffer was a better method than the oleander hedge proposed by Mr. Watts. (R. 678-679). Mr. Rood was also asked whether or not Mr. Cupp's proposal would completely replace the loss of the 100-foot strip of buffer with the plantings on it, and he replied that only some part of the buffer would be replaced and that the buffer would not be replaced in the same way as before. (R. 658-661).

In addition to the foregoing testimony, DOT also called to testify at trial Mr. John Hagan, a real estate appraiser. Mr. Hagan stated that the trees lying within the right-of-way

served as a buffer between the roadway and the golf courses. (R. 551). Mr. Hagan further acknowledged that he had never made an appraisal before regarding damages to a golf course as a result of trees being taken and that this was a unique case from the standpoint of this property. (R. 551-552). It was additionally admitted by Mr. Hagan that he had contacted Bill Watts to see whether or not there might be some cost to cure damages to the golf courses which needed to be mitigated and that in response to his request he received a letter dated April 14, 1981, containing Watts's estimate with regard to costs to cure the golf courses. (R. 552). At trial, Watts testified to those cost to cure estimates. (R. 480-484). Mr. Hagan additionally admitted during the course of his testimony that he did not do an appraisal of severance damages to the golf course improvements to the land because that was not within the scope of his assignment by the DOT. (R. 546). Therefore, based upon the undisputed facts in the record before the Court, it is clear that Mr. Hagan did not even attempt to make an appraisal of severance damages as to the golf course improvements, but nonetheless, requested and received from Mr. Watts cost to cure estimates for damages to the golf courses, which estimates were testified to at trial by Mr. Watts. Accordingly, Mr. Holden's testimony, as cited in detail above was undisputed in terms of the appraisal methodology employed by Mr. Holden to arrive at the damages to the remainder property.

Based upon the testimony adduced at trial by the DOT as well as Frenchman, the undisputed evidence showed that the golf courses had been damaged as a result of the taking in this case. Furthermore, the undisputed evidence was that the proposals to cure the damage, both by Frenchman and the DOT, would not enhance the value of the property, nor could those proposals completely restore the property to the condition it was in prior to the taking. In fact, in his opening statement to the jury, counsel for the DOT acknowledged what a fine golf course Frenchman's Creek was and stated to the jury that there was nothing that could be built that would totally eliminate the problem which was caused by the taking. (R. 79-80). Counsel for the DOT argued to the jury that what was proposed by DOT was at least as adequate as what was proposed by Frenchman and was satisfactory and in character with the golf courses. (R. 79-80). Based upon the foregoing evidence, the jury returned its verdict in favor of Frenchman for $190,000.

Despite the foregoing, the Fourth District overturned the jury award by reversing the Final Judgment on the basis that an improper valuation approach had been used because Frenchman did not first present evidence that it had sustained severance damages by showing the reduction in value of the remainder property through comparison of the before and after taking fair market value of the property.

Frenchman respectfully submits that the Fourth District's ruling as to the necessity of first showing severance damages by demonstrating the reduction in value of the remainder

property through comparison of the pre-condemnation and post-condemnation fair market value of the property before cost to cure damages would be allowed clearly conflicts with the prior decisions of this Court dealing with a property owner's entitlement to full compensation. In that regard, this Court has held in the landmark case of Jacksonville Expressway Authority v. Henry G. DuPree Company, 108 So. 2d 289 (Fla. 1958), that full compensation includes compensation for damages to remaining lands. Id. at 292. This Court also ruled that although fair market value is an important element in the compensation formula, it is not an exclusive standard in Florida, but rather, is merely a tool to assist in determining what is full or just compensation. Id. at 291. This Court went on to state that full compensation is guaranteed by the Constitution to those whose property is divested from them by eminent domain, the theory and purpose of that guarantee being that the owner shall be made whole so far as possible and practicable. Id. at 292. In the context of the DuPree case, the Court, in allowing a claim for moving expenses caused by a taking, noted that the weight of authority in the United States would be against the award of such expenses because such costs have no bearing on the fair market value of the property. Id. at 291-292. However, in refusing to follow such a view, the Court stated that under the full compensation guarantee of the Florida Constitution, a landowner was entitled to collect such expenses because the theory and spirit of such a guarantee requires a practical attempt to make the owner whole.

In addition to the DuPree decision, in Dade County v. General Waterworks Corporation, 267 So. 2d 633 (Fla. 1972), this Court held that the proper valuation method or methods for any given condemnation case are inextricably bound up with the particular circumstances of the case. Id. at 639. The Court further stated that whatever valuation method is chosen, the litigants and the trial court should bear in mind that the objective is full compensation to the property owners and that all valuation methods are only tools to this end. Id. at 641. The Court again noted, as it did in the DuPree case, that fair market value has been rejected on those occasions when it has not led to an accurate determination of full compensation. Id. at 641. In further commenting upon the requirements of full compensation, this Court stated in Meyers v. City of Daytona Beach, 30 So. 2d 354 (Fla. 1947) that full compensation means nothing less than payment for that of which the property owner is being deprived. Id. at 355. The same sentiment was echoed by this Court in State Road Department v. Chicone, 158 So. 2d 753 (Fla. 1963) when this Court noted that just compensation for the taking of property must be determined by equitable principles and that its measure varies with the facts. Id. at 757.

Upon analyzing the decisions of this Court dealing with a property owner's entitlement to full compensation, it is clear that the trial court was correct in allowing the jury to determine the amount of damages to Frenchman's remainder property caused by the taking. In that regard, the undisputed

evidence at trial showed that Frenchman had been deprived of the buffer which existed prior to the taking and that as a result of the taking of that buffer, the golf courses had been damaged. The evidence further showed that what Frenchman was attempting to do, as best it could, was to restore the golf courses to the condition they were in prior to the taking by building a substitute buffer at certain points along the golf courses, by making physical modifications to the golf courses where necessary and by making drainage modifications to the golf courses to correct the problems caused by the taking and the use to which the DOT intended to put the land taken, including an extra two lanes of traffic and an elevated bike path. The evidence was undisputed that those golf course modifications would not cause any enhancement to the golf courses after the taking.

Frenchman would respectfully point out to this Court that the fact that the golf courses, even with the proposed substitute buffer would not be as good as before the taking and therefore not enhanced in value is crucial to the entire philosophical underpinning of the Frenchman argument. If it can be established that a landowner will not reap a windfall benefit at the expense of the State but rather will have effected a reasonable cure to damage created by the taking, then to hold the landowner to an impossible or unrealistic appraisal methodology is improper and deprives the landowner of compensation to which he is entitled under the Florida Constitution and Florida Statutes.

Further support for Frenchman's entitlement to receive compensation for damages to the remainder property is found in §73.071(3)(b), Fla. Stat. (1983) which provides that:

> (3) The jury shall determine solely the amount of compensation to be paid, which compensation shall include:
>
> (a) The value of the property sought to be appropriated;
>
> (b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, ...

(emphasis supplied).

As can be seen by review of §73.071(3)(b) there is no limitation contained within the express words of the statute whereby a property owner can only recover damages representing the cost of restoring the property to the condition existing before the taking if evidence is first presented that those costs do not exceed the reduction in the fair market value of the property caused by the taking. To the contrary, §73.071(3)(b) specifically states that the compensation shall include any damages to the remainder.

Nevertheless, the District Court concludes that the cost approach could have and should have been used in this case to first establish severance damage as a predicate to putting on testimony of cost to cure damage.

The District Court states on page 4 of its Opinion, "the object of the [cost] approach is to determine the cost of producing a substitute property with the same utility as the property being valuated." (A. 4). (emphasis supplied). It is

respectfully submitted that it is self-evident that it is impossible to take and destroy 100 feet of dense and lush vegetative buffer which is contiguous to the playing area of a golf course and have a substitute property with the same utility without creating another 100-foot wide vegetative buffer on the remaining golf course which would require the complete redesign of the existing golf courses. The only reasonable and appropriate method of determining damage to the remainder golf courses was by determining how much it would cost to put in a substitute buffer that did not require moving the golf courses (fairways, tees, greens) 100 feet to the east. Any concern that the District Court or the DOT might have that the remainder of the golf course might be enhanced by use of the cost to cure method of assessing damages has been dealt with by the numerous references to the record which show that both the DOT and the landowner agreed that a substitute buffer would not make the remaining golf course better or even as good as it was before the original buffer was taken and destroyed. In short, it was shown at trial that the landowner would not be the beneficiary of a windfall by use of the cost to cure method of determining damages.

In addition to the foregoing reasons which clearly support Frenchman's position, it is also respectfully submitted to the Court that common sense and fair play require that the DOT be responsible for paying the damages assessed by the jury. In that regard, the evidence produced at trial by both parties, as set forth in detail above, clearly demonstrated that the buffer

to the golf courses had been removed and that it would be necessary to incur costs to provide a substitute buffer to cure the damage to the golf courses. The DOT should not now be allowed to maintain a position contrary to that proposition by urging that Frenchman did not employ a correct valuation method when, due to the uniqueness of the taking itself, Frenchman employed the only reasonable valuation method under the circumstances.

In the case at bar, it was uncontroverted that Frenchman had been deprived of the buffer which protected the golf courses and provided it with aesthetic value, serenity and functional attributes. Even counsel for DOT, in his opening statement, told the jury that there was nothing that could be built to replace the buffer that would totally eliminate the problem caused by the taking. (R. 80). The Fourth District's decision, in light of the record before it, clearly contravenes this Court's requirement that a property owner be awarded payment for that of which he has been deprived, particularly because the testimony was uncontradicted that the substitute buffer would in no way enhance the value of the golf courses.

II.

FRENCHMAN WAS ENTITLED TO RECOVER DAMAGES TO ITS REMAINDER PROPERTY FOR LOSS OF VIEW, PRIVACY, SECLUSION AND AESTHETICS CAUSED BY THE TAKING.

At trial, Frenchman based its claim for damages to the golf courses primarily upon a loss of view, privacy, seclusion aesthetics and drainage impairment as a result of the taking. Frenchman also based its claim for damages upon its golf course

architect's testimony that the strategic value and maintenance aspects of the golf courses had been adversely affected by the taking and upon its appraiser's testimony that building of a substitute buffer was necessary for safety reasons in order to keep golf balls from going off the course onto either the bicycle path being built by DOT or upon the roadway being widened. (R. 207, 268-273, 170). The Fourth District completely ignored Frenchman's testimony relating to the adverse affects of the taking upon the safety, strategic value and maintenance aspects of the golf courses but instead focused upon Frenchman's entitlement to collect damages for loss of view, privacy, seclusion, aesthetics and for drainage compensation.

In the body of its Opinion, the Fourth District appears to rely upon three grounds for its holding that Frenchman was not entitled to collect damages for loss of view, privacy, seclusion and aesthetics. The Court first bases its Opinion on the fact that because the remainder property was being used as a recreational facility, damages to the remainder property were noncompensable. In that regard, the Court states on page 6 of its Opinion, that "a taking of part of a property that brings heavy traffic to the very walls of a church or school located on the remainder of the same property may constitute a taking of the remainder or a portion thereof; a similar taking where a recreational facility occupies the property does not have the same legal effect." (A. 6).

The effect of the Fourth District's ruling is to deny the full compensation awarded by the jury to Frenchman because a golf course facility occupied the property as opposed to a church or school. In articulating such a dichotomy the Court transgressed the requirements of Art. X, §6(a), Fla. Const. which states that:

> 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.

(emphasis supplied).

Based upon the Fourth District's construction of the Constitutional requirement of full compensation, property owners are now treated differently, according to the use made of the remainder property. Stated another way, the State is obliged to pay if you pray but not if you play. Stated still another way, the State is obliged to respect the privacy and tranquility of persons who attend church more than the privacy and tranquility of persons who want to play golf. Once it has been established, as it unquestionably has been in the record in this case that privacy, tranquility, seclusion and aesthetics are important and integral aspects of value in a golf course property, it is inappropriate to attempt to discriminate among land uses and inevitably landowners because one might feel a school or church should be entitled to a higher degree of seclusion, privacy or tranquility than a golf course. To the extent that a golf course or other recreational facility may be entitled to less seclusion, privacy or

aesthetic surroundings than a school or church, that issue can and should be dealt with as a matter of fact at trial. That is what happened at trial in this case. Frenchman put on evidence of cost to cure by virtue of a substitute buffer and so did the DOT. The jury decided how much seclusion and privacy should be built back into the damaged remainder golf course when it rendered its verdict for less than Frenchman thought was necessary and more than the DOT thought was necessary. Once, however, the landowner's property is shown to have been damaged as a result of less seclusion, privacy and aesthetics, it is unconstitutional to discriminate against a landowner whose property has lost some of those attributes as a result of an actual taking. The Fourth District's ruling should be struck down by this Court on the basis that under the clear terms of the Florida Constitution's guarantee to full compensation, each property owner is entitled to recover damages to their remainder property.

The second basis for the Fourth District's Opinion that Frenchman was not entitled to collect damages for loss of view, privacy, seclusion and aesthetics is grounded upon that Court's determination that the seclusion of the Frenchman's Creek golf courses was limited prior to the highway's widening. In so ruling, the Court relies upon the decision in Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th DCA 1977). A comparison of the facts involved in the Garden Club decision demonstrates that the case is clearly distinguishable

from the case at bar. By relying upon Garden Club and by holding that the seclusion of the golf courses was limited prior to the taking, the Fourth District has reassessed and reevaluated the evidence which was presented to the jury, as well as the view of the property by the jury, both of which served as the basis for the jury's award to Frenchman. Under Florida law it is clear that such reevaluation and reassessment of the evidence is impermissible. See e.g. Marshall v. Johnson, 392 So. 2d 249 (Fla. 1980); Delgotto v. Strong, 360 So. 2d 73 (Fla. 1978); Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976); and Westerman v. Shell's City, Inc., 265 So. 2d 43 (Fla. 1972).

With regard to the Fourth District's reevaluation and reassessment of the evidence, the Court's Opinion references that there had been an unbuffered widened highway along another segment of the golf course perimeter and a railway just beyond the highway involved. (A. 6). In that regard, the Record on Appeal contains copies (located in the yellow box sent from the Circuit court Clerk) of both aerial and ground photographs taken of the surrounding areas prior to the taking, which were introduced into evidence at trial. Included in the Appendix to Frenchman's Initial Brief are smaller-sized copies of the photographs admitted into evidence. Frenchman respectfully requests the Court to carefully examine those photographs because those photographs alone, independent of the uncontroverted evidence testified to at trial by the witnesses for both parties as to the seclusion and aesthetics provided by the buffer taken by DOT, establish that the railway located

west of the property was secluded from the property due to the buffer existing immediately adjacent to the railway and the buffer which was taken from Frenchman as a result of the DOT's eminent domain action. Additionally, the testimony of Robert Cupp, Frenchman's golf course architect at trial, was uncontradicted that Donald Ross Road, which bordered one hole of the golf courses, was a smaller, less traveled road, that the playing area of the hole was further from the road than the holes along A-1-A and that there was foliage which, in fact, provided buffering for the golf course hole from Donald Ross Road. (R. 281). Frenchman respectfully submits that all such evidence was relied upon by the judge and jury below, and the Fourth District impermissibly reevaluated and reassessed that evidence.

Frenchman would note the importance that the "jury view" plays in eminent domain cases where a determination is to be made about whether a particular parcel of land is entitled to damage alleged to be caused by the taking resulting in loss of privacy, seclusion, tranquility and aesthetics to the remainder property. The landowner here is constrained to ask who is in the best position to make such a determination--the jury that walks upon and views the property or the appellate panel that has the cold record before it. Beauty is in the eye of the beholder and in this case a 12-person jury viewed the property and awarded the damages. Whether this property meets the threshold test that permits these elements to be considered by the jury is the appropriate subject of appellate review. In

that regard Frenchman would note that said threshold determination was made by the trial judge and came to the Fourth District with a strong presumption of correctness, and the record amply supports such a threshold conclusion both through testimony and photographs.

The Fourth District's reevaluation and reassessment of the evidence is further manifested when it is considered that the jury was presented with testimony not only from Frenchman but also from DOT's witnesses that the buffer which was removed by the DOT provided seclusion, privacy and aesthetics to the golf courses. (R. 456-458, 669-670). In fact, the DOT's own expert witness, Roy Rood, testified as to the buffer taken being a great buffer and opined that a real problem now existed as a result of the removal of the buffer. (R. 669-670).

Based upon the evidence adduced at trial, it is clear that the Frenchman property possessed prior to the taking the attributes of a view which was necessary and desirable for the golf courses, privacy, seclusion and aesthetics, all of which had been seriously damaged or destroyed as a result of the taking. In addition to those aspects, Mr. Cupp also opined that the strategic value and maintenance aspects of the golf courses had been adversely effected due to the taking. (R. 207, 268-273), and, as noted above, Mr. Holden opined as to the safety factors being affected.

Consideration of the foregoing evidence clearly reveals the nonapplicability of Garden Club, supra, which was relied upon by the Fourth District. In the case at bar the very buffer

taken by the DOT caused the loss of seclusion, view, privacy, aesthetics, strategic value, maintenance, and safety of the golf courses, unlike the property in Garden Club, which had no preexisting buffer to shield it from the numerous major arterial roads surrounding it, the Florida Power & Light substation adjacent to it, and the screaming jet glide path above it. Furthermore, in addition to the Garden Club property not possessing the serene and aesthetic qualities enjoyed by the Frenchman golf courses, the claim by the Garden Club owner did not focus upon a loss of view, privacy or aesthetics. Rather the Garden Club owner was concerned with attempting to reduce the noise level caused by the taking, a claim which the Fourth District did not allow due to the fact that the Garden Club property was not secluded and shielded from noise prior to the taking of the property.

In its Opinion, the Fourth District stated that the holding of Dennison v. State, 265 N.Y.S.2d 671, 48 Misc.2d 778 (N.Y. Ct. Cl. 1965), aff'd 22 N.Y.2d 409; 239 N.E.2d 708 (N.Y. Ct. App. 1968) which allowed damages to a property owner for loss of view, privacy, seclusion and aesthetics was inapplicable due to the Fourth District's finding that the seclusion of the Frenchman's golf courses was already limited prior to the highway's widening. As noted above, the Court's ruling was clearly an impermissible reevaluation and reassessment of the evidence, and Frenchman respectfully submits that the Dennison rationale, holding that damages for loss of view, privacy, seclusion and aesthetics to be compensable is fully applicable

to the facts and circumstances of this case. In addition to Dennison, the California Court of Appeals has also held compensable items of damage to consist of impairment of light and air, impairment of view, and invasion of privacy. See Pierpoint Inn, Inc. v. State, 68 Cal. Reptr. 235 (Cal. Ct. App. 1968). See also, City of Yonkers v. State, 40 N.Y. 2d 408, 353 N.E. 2d 829 (N.Y. Ct. App. 1976) (wherein the court upheld an award of damages for loss of aesthetic qualities such as privacy and view).

Frenchman respectfully submits to the Court that it is important to recognize that not only did Frenchman's witnesses testify to the adverse effects of the taking upon the remainder property, DOT's own golf course architect, Bill Watts, also opined that the taking and loss of the buffer had adversely affected the golf courses. (R. 456-458). Mr. Watts recommended hedges, trees and a cypress fence be used to cure the adverse affects. (R. 460-466, 473). Mr. Watts also testified as to the necessity and costs for moving the green for hole 4 North and for moving a cart path. (R. 480, 481, 492). Additionally, as noted above, Mr. Rood, the DOT's landscape architect, testified to the problem which existed as a result of the buffer being taken and the modifications which he proposed in an attempt to restore the buffer.

The third reason or holding of the Fourth District is that damage from effects of traffic visibility and noise, fumes and dust, and aesthetic loss are compensable in Florida "only when there has been a physical invasion or trespass amounting to a

taking, such as to substantially oust the owner or deny it the beneficial use of the property". (A. 6). The District Court relies for that statement on the Garden Club case.

Frenchman respectfully submits that the Fourth District in Garden Club completely misapprehended the applicable law when it cited in support of its holding the above quoted language. That misapprehension has now been further engrafted onto the law of Florida through the Opinion at issue here. The case at bar and the Garden Club case are both condemnation cases wherein the State actually took or appropriated (took fee simple title to) a portion of the landowner's property. Each and every case relied upon in Garden Club in support of the very broad proposition set forth in Garden Club and incorporated in the Opinion of the Fourth District in the case at bar are inverse condemnation cases wherein no land was taken or appropriated by the State. See Travis v. Department of Transportation, 333 So. 2d 86 (Fla. 1st DCA 1976); Northcutt v. State Road Department, 209 So. 2d 710 (Fla. 3d DCA 1968) and Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956). That is, title to all or a portion of the landowner's property did not pass to the State. Rather, the landowner was asserting in those cases that the existence of a road in close proximity had the effect of a taking. Northcutt, Travis and Weir cited in Garden Club make the distinction that when a portion of a landowner's property is actually taken, as here, the Florida Constitution itself recognizes the right of the landowner to compel full compensation for all damages sustained. It is

respectfully submitted that the Fourth District did not correctly interpret the holdings in those cases. The very essence of the difference between a straight condemnation case such as this and an inverse condemnation case lies in the full compensation clause of the Florida Constitution which compels the condemning authority to pay full compensation when a portion of land is taken in fee simple by the State. Only when a landowner asserts that the effect of a road built in close proximity to his property is the equivalent of and amounts to a taking is the landowner held to the burden of showing "a physical invasion or trespass amounting to a taking, such as to substantially oust the owner or deny it the beneficial use of the property." Classic inverse condemnation cases involve such things as jet airports that create such noise levels that landowners who live in very close proximity find themselves, in fact, ousted from their property because they cannot reasonably live with such noise levels. This ouster occurs even though there has been no taking of their land other than by the effect of being so close to the airport.

In short, the proposition set forth in Garden Club and relied upon by the Fourth District in its Opinion in this case is based on non-applicable inverse condemnation cases. Carrying through the logic of the Garden Club and the Opinion below would eviscerate the concept of severance damages in cases where the State actually takes title to a portion of a landowner's property.

Nevertheless, if this Court chooses to leave undisturbed the language of Garden Club, it may do so because Garden Club and the Opinion below recognize the Dennison exception which, the evidence has shown, describes the Frenchman property. That is, the Frenchman property was secluded, private, peaceful and tranquil because of the buffer which existed prior to the taking.

Based upon all of the foregoing, Frenchman respectfully submits that the Fourth District's Opinion with regard to the noncompensability of the damages is incorrect and should be reversed by this Court in order that Frenchman may receive the full compensation awarded by the jury.

III.

A LANDOWNER IS ENTITLED TO BE COMPENSATED FOR DRAINAGE DAMAGES WHICH ARE CAUSED BY A TAKING AND THE USE TO WHICH A CONDEMNING AUTHORITY INTENDS TO PUT THE PROPERTY.

In its Opinion, the Fourth District criticized Frenchman's testimony relating to drainage problems as not clearly delineating that the drainage damage was caused by the taking and not that which was consequential from the manner in which the construction was performed. (A. 7). The Fourth District raised its cirticism, despite the fact that such an issue was not raised by the DOT at either trial or on appeal in the Fourth District. Assuming, arguendo, that such an issue had been raised, it is nonetheless clear that Frenchman was entitled, based on the evidence presented, to claim costs for

correcting drainage damages caused by the taking and the manner in which DOT was using the property.

On page 7 of its Opinion, the Fourth District relies upon the cases of Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956, Paty v. Town of Palm Beach, 29 So. 2d 363 (Fla. 1947), and Div. of Adm. v. Hillsboro Association, Inc., 286 So. 2d 578 (Fla. 4th DCA 1973) in ruling that because the drainage damages claimed by Frenchman had not been adequately shown to result from the taking rather than the manner of construction, Frenchman was not entitled to claim compensation for those damages. In relying upon those cases, the District Court has, in contravention of this Court's decision in Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980), misapplied the law by relying upon decisions which involve a situation materially at variance with the one under review. None of those decisions dealt with a claim for compensation occurring as a result of drainage damages, and the Weir and Paty cases were not even condemnation matters. The Hillsboro case merely stated that if damage to remainder property results from negligence or misconduct in performing construction which was the object of the taking, those damages are the proper subject of a separate action in tort where soverign immunity is waived or as the proper subject of a claims bill. In the case at bar, there was never a claim made by Frenchman that drainage damages resulted from negligence or misconduct in performing construction by the DOT, and accordingly, Hillsboro is not on point. Rather, in the case at bar, Frenchman's drainage

engineer specifically testified that, as a result of the taking, water backed up onto the golf courses and created a problem with the play because it now took considerably longer following a rain for the courses to be returned to playability so that golfers could play the hole. (R. 315). The drainage engineer further testified that his suggestion to cure the problem was as a result of the taking and it would have been unnecessary without the taking to provide the proposed facilities to cure the problem. (R. 706).

In addition to the foregoing, in express and direct conflict with the Fourth District's Decision, is Poe v. State Road Department, 127 So. 2d 898 (Fla. 1st DCA 1961) wherein the Court held that injury by a condemnor to remaining land caused by obstructing, diverting or increasing the flow of surface waters is a damage resulting from the taking in an eminent domain proceeding and must be recovered in that proceeding. Id. at 901. (Emphasis supplied). Furthermore, the Fourth District's ruling that to the extent the alleged drainage problem is the result of the manner of construction rather than the taking, it should not be considered in determining severance damages, flies in the face of the decision of this Court rendered in Doty v. City of Jacksonville, 142 So. 599 (Fla. 1932) wherein this Court held that the exclusion of plans and specifications for the widening of a street offered in evidence by the property owner was error because the purpose of such evidence was to show the grade of that portion of the street adjoining the owner's property which would have a

bearing on the extent and amount of damages, if any, to the owner's remaining property. In the case at bar the DOT introduced its plans for the road widening and bike path, and Franchman's drainage engineer, Mr. Searcy, testified that he studied those plans in reaching his opinion. Furthermore, the Fourth District itself has previously held that the law takes into consideration all conceivable uses to which the property taken could be put by the condemnor by virtue of the legal title sought or awarded and so long as the taking is sufficient in extent, that use may be considered which would most fully utilize the property taken and inflict the most serious damage. See Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So. 2d 323 (Fla. 4th DCA 1974). Accordingly, the use to which the condemning authority intended to put the remainder property was totally relevant in determining drainage damages which occurred as a result of the taking, and Frenchman respectfully submits that the Fourth District's Opinion to the contrary shold be reversed by this Court.

IV.

THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES FOR SERVICES RENDERED IN THE TRIAL COURT ON BEHALF OF FRENCHMAN SHOULD BE REINSTATED.

Based upon the foregoing, Frenchman respectfully submits that the Court should reverse the opinion of the Fourth District Court of Appeal and reinstate the Final Judgment which has been entered in this cause. Accordingly, inasmuch as the Attorney Fee Judgment has been reversed by the Fourth District

because it had been predicated in part upon the Final Judgment, Frenchman also requests that the Court reinstate the Attorneys' Fee Judgment.

CONCLUSION

For the reasons expressed herein, Frenchman, respectfully submits that the Opinion of the Fourth District Court of Appeal should be overturned by this Court, and accordingly, the Final Judgment and Attorneys' Fee Judgment entered by the trial court should be reinstated. Frenchman further requests that the Court assess attorneys' fees relating to this appeal in favor of Frenchman in accordance with Frenchman's Motion for Attorneys' Fees.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by via Federal Express to MAXINE F. FERGUSON, Attorney at Law, at the Division of Administration, State of Florida Department of Transportation, 605 Suwannee Street, MS-58, Tallahassee, Florida, 32301, this 21st day of April, 1986.

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