IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 67,934

FRENCHMAN, INC., etc.,

Defendant/Petitioner,

vs.

DIVISION OF ADMINISTRATION,
STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

Plaintiff/Respondent.

_____/

DEFENDANT/PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Defendant/Petitioner, FRENCHMAN, INC. (hereinafter "Frenchman") seeks to invoke the jurisdiction of this Court pursuant to Art. V, §3(b)(3), Fla. Const. in order to review the Opinion of the Fourth District Court of Appeal filed August 7, 1985 (Motion for Rehearing denied October 23, 1985), which reversed a Final Judgment entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida, dated February 8, 1984, and reversed an Attorney's Fee Judgment entered in favor of Frenchman.

This case involves an action by Plaintiff/Respondent, DIVISION OF ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (hereinafter "DOT") in eminent domain by which DOT sought to condemn a strip of property owned by Frenchman. The property consisted of approximately 11.756 acres of land, being approximately 95 feet in width and 1 mile long. (R. 1276-1284). The purpose of the taking was for right-of-way for Alternate A-1-A roadway expansion. (R. 1276-1284). The parties agreed as to the value of the land taken by DOT but disagreed as to whether or not the remainder property had been damaged, thus a jury trial was held solely on the issue of damages to the remainder property. At the time of acquisition by the DOT, the land taken was being used as a buffer from the roadway for 3 holes of the Frenchman's Creek golf courses and subsequent to the taking, DOT removed all trees and vegetation from the strip of land acquired. (R. 122,207).

As a result of the removal of the trees and vegetation which acted as a buffer for the golf courses from Alternate A-1-A, Frenchman contended that it was necessary to build a substitute buffer at certain points along the 3 holes and to make certain modifications to the golf courses. Frenchman also claimed that the drainage for the golf courses had been damaged by the taking. The case went to trial before the jury on the issue of damages to the remainder property. The jury returned an award in favor of Frenchman in the amount of

$190,000. (R. 846). On February 8, 1984, the trial court entered its Final Judgment in favor of Frenchman. (R. 1368-1373).

Subsequent to the Final Judgment, the trial court assessed attorneys' fees in favor of Frenchman. (R. 1535-1536). From the Final Judgment and Attorneys' Fee Judgment, DOT appealed to the Fourth District Court of Appeal, which reversed the Final Judgment, and the Attorneys' Fees Judgment, which had been predicated in part on the jury award to Frenchman.

An Appendix consisting of the the Decision of the Fourth District Court of Appeal is attached hereto. The Appendix is cited: (A. __).

ARGUMENT

I. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUES A PROVISION OF THE FLORIDA CONSTITUTION THUS CONFERRING JURISDICTION ON THE SUPREME COURT PURSUANT TO ART. V, §3(b)(3), FLA. CONST.

In the body of its Decision, the Fourth District expressly construes the requirements of Art. X, §6(a), Fla. Const., which provides that:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by a deposit in the registry of the court and available to the owner.

The Court recites the requirements of the full compensation clause on page 2 of its Decision and expressly construes those requirements on page 6 of its Decision where it states 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. 2,6).

The effect of the ruling by the Fourth District is to deny the full compensation awarded by the jury to Frenchman because a recreational facility occupied the property as opposed to a church or school. In articulating such

a dichotomy in construing Art. X, §6(a), the Court transgressed its requirements which states that full compensation shall be paid to each owner. Based on the Fourth District's construction of the Constitution, property owners are now treated differently, according to the use made of the remainder property. Obviously, the effect of the Fourth District's decision has a far reaching implication on property owners in Florida whose property is taken by a condemning authority, and Frenchman respectfully urges the Court to take jurisdiction of this matter to consider the issue as to whether or not the Constitution allows only certain landowners to collect damages to their remainder property depending upon the use being made of the remainder.

II. THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT AND OF OTHER DISTRICT COURTS OF APPEAL THUS CONFERRING JURISDICTION UPON THE COURT PURSUANT TO ART. V, §3(b)(3), FLA. CONST.

Frenchman respectfully submits that the Fourth District's Decision is in express and direct conflict with prior decisions of this Court and of other District Courts of Appeal on several grounds. The grounds for which express and direct conflict occurs are noted below. As previously stated by this Court, it is not necessary that the District Court's opinion explicitly identify conflicting decisions in order to create a conflict under Art. V, §3(b)(3), Fla. Const.; rather, the District Court's discussion of the legal principles which the Court applied supplies a sufficient basis for conflict review. See, Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

A. PART I OF THE DISTRICT COURT'S DECISION REGARDING ITS RULING ON REQUIRED VALUATION METHODS IN ORDER TO ACHIEVE FULL COMPENSATION EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

In the landmark case of Jacksonville Expressway Auth. v. Henry G. Dupree Co., 108 So.2d 289 (Fla. 1958), this Court stated that although fair market value is an important element in the compensation formula, it is not an exclusive standard in Florida. The Court noted that fair market value is merely a tool to assist in determining what is full or just compensation. Id.

at 291. The 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 addition to the Jacksonville 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 Jacksonville 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 futher 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.

In contravention of the above-noted decisions, the District Court 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 Court noted that the owner's appraisal witness plausibly explained that he could not find usable comparable sales of golf courses and that the income

approach could not be utilized in evaluating the impact of the taking until several years had elapsed from the taking. (A. 4). However, the Court critized the appraisal witness because he did not state why he did not use the cost approach and because he did not put a value on the damages to the remainder property. (A. 4).

In point of fact, the appraisal witness clearly and uncontradictedly testified that the approach which he used in measuring the damages to the remainder property, to wit: cost to cure damages to the golf courses by replacing the buffer which was taken with a substitute buffer was in fact the only valuation method which could be utilized under the circumstances due to the uniqueness of the taking. (R. 136). Frenchman's appraisal witness testified that the cost of building the substitute buffer proposed by Frenchman, to replace the buffer taken by DOT, was an attempt to restore the property to the condition it was in prior to the taking; however, even with the substitute buffer, the golf courses would not be enhanced but would be lesser golf courses than before the taking. (R. 163,192). Thus, in effect, a cost approach was utilized by the appraisal witness. Additionally, the appraisal witness testified that he had spoken to a potential purchaser of the property who advised him that his company would not buy the property until the damages to the golf courses had been corrected, thus again clearly demonstrating that the remainder property had been damaged. (R. 167).

As noted by the above-noted decisions of this Court, it is the objective in an eminent domain proceeding to insure that a property owner is compensated for that which he has lost as a result of the taking. 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. The importance of the buffer was recognized even by the DOT witnesses, particularly their landscape architect, Mr. Roy Rood, who testified that after the taking a real problem occurred to the golf courses in

the sense of not having that strip of buffer any more. (R. 670). 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, especially because the testimony was uncontroverted that the substitute buffer would in no way enhance the value of the golf courses.

B. THE FOURTH DISTRICT IMPERMISSIBLY REEVALUATED AND REASSESSED THE EVIDENCE IN RULING THAT FRENCHMAN WAS NOT ENTITLED TO RECOVER DAMAGES TO ITS REMAINDER PROPERTY FOR LOSS OF VIEW, PRIVACY, SECLUSION AND AESTHETICS.

The District Court, in part II of its Opinion, reassessed and reevaluated the evidence which was presented to the jury, including 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 totally improper. As this Court has recently stated in Cripe v. Atlantic First National Bank of Daytona Beach, 422 So.2d 820 (Fla. 1982), an Appellate Court may not reweigh evidence and substitute its Judgment for that of the trier of fact. See also Marshall v. Johnson, 392 So.2d 249 (Fla. 1980); Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Helman v. Seaboard Coastline Railroad Co., 349 So.2d 1187 (Fla. 1977); Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); and Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

In the District Court's Opinion, it found inappropriate a decision rendered by the New York Court of Appeals in Dennison v. State, 265 N.Y.S. 2d 671, 48 Misc. 2d 778 (Ct. Cl. 1965), aff'd 22 N.Y.2d 409, 239 N.E. 2d 708 (1968) which allows damages in a condemnation action for loss of view, privacy, seclusion and aesthetics. The basis of the District Court's ruling was that the seclusion of Frenchman Creek's golf courses was already limited prior to the highway's widening due to an unbuffered widened highway along

another segment of its perimeter and a railway just beyond the highway involved. (A. 6). In making such a determination, the Court totally and improperly reevaluated and reassessed the evidence relating to the buffer which had existed in the before condition. The jury, in additon to its view of the property, had been provided with aerial and ground photos introduced into evidence showing the surrounding area prior to the taking, which established 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, it was testified to by Frenchman's golf course architect at trial that the perimeter road which bordered one hole of the golf courses was a smaller, less traveled road than A-1-A, that the playing area was further in than the holes along A-1-A, and that there was foliage along the perimeter road which in fact provided buffering from the hole from Donald Ross Road. (R. 281). Clearly, all of such evidence was relied upon by the Judge and jury below in assessing damages to the remainder property.

The District Court'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 the DOT's own 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 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).

C. THE FOURTH DISTRICT HAS CREATED AN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL IN ITS RULING, BY REJECTING THE BASIS FOR FRENCHMAN'S CLAIM FOR DRAINAGE DAMAGES.

On page 7 of its Opinion, the Court 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); Div. of Adm. v. Hillsboro Association, Inc., 286 So.2d 578 (Fla. 4th DCA 1973) in ruling that the alleged drainage problem had not been adequately shown to result from the taking rather than the manner of construction. 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 futher testified that his suggestion to cure the property 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. Furthermore, the District Court's ruling that to the extent the alleged drainage problem is the result of the manner of construction rather than taking, it should not be considered in determining severance damages, flies in the face of prior decisions of the Court wherein it has been specifically 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.

CONCLUSION

Frenchman respectfully contends that the points enumerated above each constitute a sufficient basis for this Court to invoke its discretionary jurisdiction in reviewing the Fourth District Court of Appeals' decision. Even if this Court determines that only one of those points is sufficient for invoking its jurisdiction, it is respectfully submitted that the Court should review the entire cause on the merits. See e.g., Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Fla. R. App. P. 9.040(a). In the case at bar, Frenchman respectfully submits that the Court should exercise its discretionary jurisdiction in reviewing the Fourth District Court of Appeals'Decision in view of the far reaching implication of its rulings regarding full compensation upon property owners in Florida whose lands are taken by eminent domain proceedings and in view of the fact that the District Court's Decision in reversing the award of damages made by the jury to Frenchman expressly and directly conflicts with prior decisions of this Court

which guarantee Frenchman the right to collect full compensation for the damages to its remaining property which were shown to be caused by the taking in this case.

Respectfully submitted.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to FRANZ E. DORN, ESQUIRE, Department of Transportation, 605 Suwannee Street, Haydon Burns Building, MS 58, Tallahassee, FL 32301, this 27th day of November, 1985.

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