O/a 8-26-86

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 REPLY BRIEF

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PREFACE

Petitioner, FRENCHMAN, INC., was the Defendant at the trial court and Appellee at the Fourth 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.

"A" refers to the Appendix accompanying Petitioner's Initial Brief.

STATEMENT OF THE CASE AND OF THE FACTS

On page 1 of the Answer Brief, DOT states that it accepts the Statement of the Case and Facts recited in FRENCHMAN'S Initial Brief with the exception that FRENCHMAN'S statement that one of the grounds for the Fourth District Court of Appeal's reversal of the Final Judgment was that "FRENCHMAN had employed an improper method of valuation in assessing damages to the remainder property" is incorrect. Rather, DOT asserts, in its Answer Brief, that the opinion of the Fourth District states that FRENCHMAN failed to establish its severance damage claim. To the contrary, the Fourth District's opinion centers upon the court's holding that FRENCHMAN's use of a cost to cure appraisal method in assessing damages to FRENCHMAN's remainder property was improper (A.3-5). Additionally, DOT's Answer Brief, throughout point I of the Brief continually maintains the position that the appraisal methodology employed by FRENCHMAN was improper and therefore, FRENCHMAN should not be allowed to receive any damages to its remainder property. Thus, the issue of methods of valuation that may be required in assessing damages to a landowner's remainder property is squarely presented to the Court.

SUMMARY OF ARGUMENT

A landowner is entitled to receive full compensation for the taking of property through the exercise by the State of the eminent domain power. In determining what constitutes full compensation, all valuation methods are merely tools and the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case. The uncontroverted

evidence below demonstrated that the taking of the property involved was unique, that the remaining property had been damaged by the taking, and the award of cost to cure damages in order to place the remainder property as closely as possible to the condition it existed in prior to the taking did not enhance the value of the remainder property subsequent to the taking. Accordingly, FRENCHMAN should be allowed to receive those damages awarded by the jury as part of the constitutional guarantee of full compensation.

FRENCHMAN, in making its claim for damages to the remaining property, uncontradictedly demonstrated that the strategic value, maintenance and safety factors relating to the golf courses had been adversely affected by the taking and therefore should be allowed to receive the compensation the jury awarded. Additionally, FRENCHMAN should be allowed to receive the jury award which was also based upon FRENCHMAN's claim of loss of view, privacy, seclusion and aesthetics. In disallowing FRENCHMAN's claim for damages based upon loss of view, privacy, seclusion and aesthetics, the Fourth District both misinterpreted the Constitutional requirement of payment of full compensation for damages to a landowner's remainder property and improperly reevaluated and reassessed the jury's determination with regard to those damages in finding that the FRENCHMAN property was not secluded prior to the taking.

The evidence adduced at trial by FRENCHMAN clearly 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. FRENCHMAN was not attempting, nor did it present evidence, to collect drainage damages resulting from

the negligence or misconduct of DOT in performing the construction which was the object of taking. Accordingly, FRENCHMAN's claim for drainage damages was properly considered by the jury.

The Final Judgment entered by the Trial Court, upon which the attorney's fee judgment is predicated in part, should be reinstated and accordingly, FRENCHMAN should be allowed to receive the funds owing under both Judgments.

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.

Throughout the course of its Answer Brief, DOT takes the position that FRENCHMAN employed an improper appraisal methodology in evaluating the damages to the remainder property and that the jury was left to speculate on the viability of FRENCHMAN's damages claim because FRENCHMAN did not produce testimony to show that the amount of the cost to cure damages claimed by FRENCHMAN did not exceed the decrease in market value if the property were left as it stood after the taking. In maintaining such a position, the DOT has totally ignored, and left unrebutted, those portions of FRENCHMAN's Initial Brief which clearly pointed out the fact that it was not only FRENCHMAN's witnesses, but also DOT's own witnesses who testified as to those damages and their estimates as to costs to

attempt to restore the property to the condition it was in prior to the taking (see pages 10-13 of the Initial Brief). In fact, DOT not only ignores that testimony, but then asserts on page 12 of its Answer Brief that the Fourth District's opinion was correct in disallowing FRENCHMAN's "flippant attitude toward property valuation."

Due to the uniqueness of the taking (a position concurred in by the Fourth District in its opinion on page 4), FRENCHMAN employed the only valuation method which was appropriate under the circumstances. Note that DOT's appraiser admitted during his testimony that he did not even attempt to make 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). Additionally, the DOT appraiser stated at trial that he had contacted Bill Watts, the DOT golf course architect, 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 from Watts containing his estimates with regard to cost to cure damages to the golf course (R. 552). At trial, the DOT golf course architect in fact testified to those cost to cure estimates (R. 480-484).

Accordingly, based upon the very evidence put on by DOT at trial, independent of FRENCHMAN's evidence showing its appraiser's efforts to determine the damages to the golf course, the valuation methodology utilized by FRENCHMAN should not be branded as "flippant."

On pages 6 and 7 of its Answer Brief, DOT cites cases rendered in other states as support for its position that cost to cure

damages must be shown to be less than the reduction in value of the remainder property caused by the taking. Those cases are clearly not dispositive of the issues involved in the case sub judice. First, each of those cases is factually distinguishable from the instant case due to the uniqueness of the taking involved in this case, and due to the fact that the proposed cost to cure in this case did not cause an enhancement to the property after the taking. Additionally, and more importantly, this Court has previously decided, in Jacksonville Expressway Authority v. Henry G. Du Pree Company, 108 So. 2d 289 (Fla. 1958) that although the weight of authority in the United States is against the award of moving expenses to a landowner because such costs would have no bearing on the fair market value of the property, nonetheless under the full compensation guarantee of the Florida Constitution, a landowner is entitled to collect such expenses because the theory and spirit of such a guarantee requires a practical attempt to make the owner whole. Accordingly, assuming arguendo that the out of state decisions cited by DOT were factually on point to the instant case, it is nonetheless clear that this Court is not bound by, and in fact has refused, to follow legal precedent from other jurisdictions which would serve to disallow a landowner the full compensation to which he is entitled. See also State ex rel. Herman v. Southern Pacific Co., 8 Ariz. App. 238, 445 P. 2d 186 (1968) (wherein the Court held that if the character of the property precluded ascertainment of fair market value, consideration may be given to cost to cure or any other method which would be a fair method of compensating a landowner for damages to his property).

In attempting to bolster its position, the DOT relies on page 6 of its Answer Brief upon the decisions rendered in Mulkey v. Division of Administration, State of Florida Department of Transportation, 448 So 2d 1062 (Fla. 2d DCA 1984) and Canney v. City of St. Petersburg, 466 So. 2d 1193 (Fla. 2d DCA 1985). A close reading of each of those decisions clearly reveals that neither case decided the point which is on appeal before this Court, to-wit, whether or not FRENCHMAN was entitled to claim cost to cure damages to its remainder property without showing that such damages were less than the decrease in the market value of the property if left uncured, where the taking involved was unique, where damages were shown to have existed as a result of the taking, and where the damages claimed were shown to not cause an enhancement of the property after the taking. In fact, Frenchman's appraisal expert testified that he had spoken to a prospective purchaser of the property who had said he would not buy the property until the damage to the golf courses had been cured (R. 167).

In attempting to show that there existed no justification for departing from the fair market value concept, DOT attacks, on pages 10 through 12 of its Brief, the appraisal testimony put forth by FRENCHMAN's appraiser. FRENCHMAN would respectfully suggest to the Court that the appraisal testimony of Mr. Holden which was presented at trial, detailed on pages 7 through 9 of its Initial Brief, clearly demonstrates that Mr. Holden performed a proper appraisal methodology in evaluating the damages to the remaining property. Florida courts have recognized that when property is of a kind seldom exchanged, or of a special use, general standards of appraisal cannot be used in determining full compensation. See

State of Florida, Department of Transportion v. Byrd, 273 So. 2d 400 (Fla. 1st DCA 1973); Orange State Oil Co. v. Jacksonville Expressway Authority, 110 So 2d 687 (Fla. 1st DCA 1959), cert. denied, 114 So. 2d 4 (Fla. 1959). Accordingly, due to the uniqueness of the taking and the special use of the property, Mr. Holden employed the only appropriate appraisal method in evaluating the damages to the remainder.

Based upon the foregoing, FRENCHMAN would respectfully submit to the Court that DOT's attempt to discredit FRENCHMAN's appraisal testimony and to distinguish DuPree, supra, and Dade County v. General Waterworks Corporation, 267 So. 2d 633 (Fla. 1972), discussed in detail on pages 14 and 15 of the Initial Brief, is without merit. Additionally, DOT has ignored the decisions rendered by this Court, which were cited on page 15 of the Initial Brief. See Meyers v. City of Daytona Beach, 30 So. 2d 354 (Fla. 1947) (full compensation means nothing less than payment for that of which the property owner is being deprived); State Road Department v. Chicone, 158 So. 2d 753 (Fla. 1963) (just compensation for the taking of property must be determined by equitable principals and its measure varies with the facts). 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. Both the DOT's position in this Court, and the Fourth District's decision, in light of the record before it, clearly contravene 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 award of cost to cure damages 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.

DOT's Answer Brief fails to reflect FRENCHMAN's golf course architect's testimony that the strategic value and maintenance aspects of the golf courses' had been adversely affected by the taking and its appraiser's testimony that building 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). FRENCHMAN respectfully requests that the Court bear in mind that damages related to impairment of the strategic value, maintenance and safety factors of the golf courses was also claimed and if the Court is inclined to rule that loss of view, privacy, seclusion and aesthetics were non-compensable, FRENCHMAN should nonetheless be entitled to receive the compensation awarded by the jury based upon the factors of strategic value, maintenance and safety.

On page 13 of its Answer Brief, citing the rationale expressed by the Fourth District, DOT argues that damages emanating as a result of loss of view, noise, fumes, dust, privacy and aesthetics are compensable only where there has been a physical invasion or trespass amounting to a taking, such as to substantially oust the owner or to deny it the beneficial use of the property. In support of that position, DOT cites the cases of Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th DCA 1977) and Northcutt v.

State Road Department, 209 So. 2d 710 (Fla. 3d DCA 1968), cert. dismissed 219 So. 2d 687 (Fla. 1969).

Northcutt, supra, was not a condemnation case, but, rather involved an inverse condemnation action for damages resulting in increased noise, dust and vibration as a result of the State Road Department's placing an interstate highway close to, but not upon, the owner's property. The Court refused to allow the claim for damages because there had been no physical taking or actual appropriation of the Plaintiff's property. Id. at 712. The Northcutt Court in no way suggested that where there had been an actual taking of a portion of a landowner's property, that the landowner would not be entitled to collect damages to his remaining lands caused by the taking, as such a holding would have been in contravention of the full compensation clause of the Florida Constitution and Florida Statutes.

In Garden Club, supra, the Fourth District misapprehended the applicable law when it failed to distinguish Northcutt on the basis of it being an inverse condemnation case. Id. at 1180 Fn. 3. The very distinction between a straight condemnation case such as the instant case 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. In Du Pree, supra, this Court recognized that full compensation includes compensation for damage to remaining lands. Id. at 292. Accordingly, FRENCHMAN respectfully requests the Court to overturn the holding expressed by the Fourth District below and in Garden Club that Florida law permits damages for such effects as traffic visibility and noise,

fumes and dust, and aesthetic loss only when there has been a physical invasion or trespass amounting to a taking, such as to substantially oust the owner or to deny it the beneficial use of the property. Such a holding should be limited to those cases wherein no portion of a landowner's property has been taken and the owner is, in effect, seeking damages for inverse condemnation.

To the extent that the Court refuses to leave undisturbed the Fourth District's above quoted language FRENCHMAN nonetheless respectfully urges the Court to overturn the Fourth District's decision in the case at bar due to the fact that the Fourth District had improperly and impermissably reevaluated the uncontroverted evidence showing that the FRENCHMAN property was secluded, private, peaceful, and tranquil prior to the taking which occurred. The Court may properly do so due to the fact that the Fourth District recognized, as an exception to the substantial ouster rule, the case 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 allows damages to a property owner for loss of view, privacy, seclusion and aesthetics. Such reevaluation took place despite the Fourth District's own express recognition that the land taken was "covered with brush and trees and had been previously used to obscure the highway from the golf course." (A. 5).

DOT has argued in its Answer Brief that Garden Club is factually similar to the facts involved in the case at bar. Such a contention is incorrect. DOT states on page 16 of its Answer Brief that there is nothing to indicate in the facts of the Garden Club case that before I-95 was built, Dreher Park did not have the same seclusion and sylvan setting as the FRENCHMAN property. DOT further states

that it should be presumed that Dreher Park was more secluded on its western boundary than the property involved in this case, since no road at all existed in the before situation. Such a description of the facts involved in Garden Club is simply inaccurate. The facts of Garden Club make clear that in the before taking condition, Dreher Park did not have a serene setting. The court notes that Dreher Park was one and one half (1-1/2) miles away from touchdown, next to a screaming jet glide path for a major airport, six blocks from U.S. 1, bounded on the North and South by major arteries, bisected by a third, and bordered by the Seaboard Airline Railroad tracks. Moreover, the court noted that the Park itself had a zoo, a museum, ball fields, model airplane club immediately to the north and an electrical sub-station.

In addition to the record of testimony set forth in the Initial Brief, the Court will also be able to evaluate the peacefulness, solitude and serenity of the FRENCHMAN golf courses in the before taking condition by review of the photographs taken of the golf courses prior to removal of the buffer. (Photographs located in yellow box sent by District Clerk's office).

It should also be noted that the Second District Court of Appeal has noted in Lee County v. Exchange National Bank of Tampa, 417 So. 2d 268 (Fla. 2d DCA 1982) pet. for rev. denied, 426 So. 2d 25 (Fla. 1983), that "the holding in Dreher Park must be tempered by the fact that the decision was clearly influenced by considerations of estoppel against the City of West Palm Beach." Id. at 271. With regard to the estoppel elements, the Garden Club court on pages 1178-1181 discusses in detail how the City in fact urged the construction of I-95 at the location taken.

On page 17 of its Answer Brief, DOT cites the case of State Road Department v. Abel Investment Co., 165 So. 2d 832 (Fla. 2d DCA 1964) as support for the proposition that the right of an owner to consequential damages is derived solely from the statutes and not the full compensation clause of the Constitution. Consequential damages, as expressed in Abel, refers to business damages, which were held to not come within the full compensation clause. Prior holdings of this Court make clear, however, that the determination of full compensation is a judicial function and not a legislative one. See Behm v. Department of Transportion, 383 So. 2d 216 (Fla. 1980); Daniels v. State Road Department, 170 So. 2d 846 (Fla. 1964). On page 18 of its Brief, the DOT cites the cases of Leeds v. City of Homestead, 407 So. 2d 920 (Fla. 3d DCA 1981); Department of Transportation v. Hillsboro Association, Inc., 286 So. 2d 578 (Fla. 4th DCA 1963); Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Paty v. Town of Palm Beach, 29 So. 2d 363 (Fla. 1947) as support for the proposition that compensable severance damages excludes that which is consequential as a result of the manner in which the construction was performed. Those cases are clearly distinguishable from the facts involved in the case at bar as FRENCHMAN never made a claim for damages accruing as a result of the manner in which construction was performed. Rather, FRENCHMAN'S claim for damages resulted from taking of the pre-existing buffer by DOT.

DOT further cites, on page 18 of its Answer Brief, the case of City of Tampa v. Texas Company, 107 So. 2d 216 (Fla. 2d DCA 1958) as support for the proposition that the condemnee was required to prove that damage to his remainder is derived from the property taken, not simply from the use of the condemned land. Assuming arguendo that

such a proposition was enunciated in the Texas Co. decision, the damages to FRENCHMAN's remainder property were in fact derived from the property taken to-wit, the pre-existing buffer, not simply from the use of the condemned land. Furthermore, DOT's stating of the holding in the case is not accurate as the Court actually noted on Page 218 that the claimed damages to the remainder were not caused by the taking of the owner's land but of land owned by others. this distinction has been noted by the Second District in its subsequent decision in Lee County, supra. Lee County holds that a landowner is entitled to damages to the remainder attributable to the use of lands taken from the owner and also allows a condemnee consequential damages to his remainder from activity occurring on land taken from others where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put. Id. at 269. See also Doty v. City of Jacksonville, 142 So. 599 (Fla. 1932) and Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So. 2d 323 (Fla. 4th DCA 1974) (both of which hold that the intended use of land taken is relevant in determining damages to an owner's remainder property). Accordingly, the use to which a condemning authority intends to put property taken from a landowner is totally relevant in determining damages which occur to remainder property.

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.

On page 22 of its Answer Brief, DOT takes the position that the Fourth District was correct in disallowing FRENCHMAN's drainage claim on the basis that there was not enough factual testimony to

adequately sustain its drainage claim. The Fourth District improperly raised this point as no such objection was made by DOT at trial or on appeal. See e.g., Lineberger v. Domino Canning Co., 68 So. 2d 357 (Fla. 1953); Tabasky v. Dreyfuss, 350 So. 2d 520 (Fla. 3d DCA 1977); Kelly v. Kaufman, 101 So. 2d 909 (Fla. 3d DCA 1958) cert. denied, 106 So. 2d 199 (Fla. 1958). Accordingly, the Court should not allow the Fourth District's ruling to stand. Assuming such a point was properly raised in the trial court, DOT's position is nonetheless ill-founded as FRENCHMAN's drainage engineer specifically testified that the taking of the land and use of the land acquired as an elevated bicycle path was the cause of drainage damages to the golf courses (R. 313-315, 706). In supporting his opinion, the drainage engineer testified that he had visited the property six (6) times, totalling ten (10) hours, and spent numerous additional hours in reviewing the construction plans and other documents relating to the taking (R. 311-312).

Accordingly, sufficient evidence existed in the record to support FRENCHMAN's contention that as result of the taking, the drainage facilities had been impaired. The Fourth District's re-evaluation and reassessment of that evidence was clearly impermissable under the decisions of this Court cited on page 23 of the Initial Brief.

DOT's citations on page 21 of its Answer Brief to the Weir, Paty, Hillsboro, and Leeds decisions, supra are once again inappropriate as FRENCHMAN was not claiming that drainage damage resulted from negligence or misconduct in performing construction by the DOT. Rather, FRENCHMAN had asserted that as a result of the taking and the use to which the condemning authority intended to put

the remainder property, drainage damages had occurred to the remainder.

IV.

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

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 requests that in the event the Court reinstates the Final Judgment, that the Court also 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 U.S. Mail 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 6th day of June, 1986.

BY: Paul A. Turk, Jr.
PAUL A. TURK, JR.

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