047

IN THE SUPREME COURT OF FLORIDA

TRAILER RANCH, INC., et al.,

Petitioners,

vs.

CITY OF POMPANO BEACH, etc.,

Respondent.

CASE NO. 68,190

PETITIONERS' INITIAL BRIEF ON THE MERITS

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LANES OF POMPANO, INC.

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IN THE SUPREME COURT OF FLORIDA

TRAILER RANCH, INC., et al.,

Petitioners,

vs. CASE NO. 68,290

CITY OF POMPANO BEACH, etc.,

Respondent.
_____/

PETITIONERS' INITIAL
BRIEF ON THE MERITS

PRELIMINARY STATEMENT

This case, which is now before the Court on a certified question of great public importance, was commenced by respondent, City of Pompano Beach, as the condemning authority in April, 1976. Under the applicable briefing schedule, the case will be a full decade in duration by the time of filing of reply brief in these proceedings.

The decision of the district court of appeal being reviewed is City of Pompano Beach v. Abe, et al., 479 So.2d 863 (Fla. 4th DCA 1985), wherein final judgment for petitioners, Trailer Ranch, Inc., and Bowlero Lanes of Pompano, Inc., was reversed. The sole ground for reversal cited by the district court was that the trial court erred in excluding from evidence plans and specifications of the already-completed

project which were proffered by the respondent condemning authority (A 13).

Having reversed on this issue, the district court certified to this Court the question of whether a condemning authority is entitled as a matter of law to introduce plans and specifications in proceedings for condemnation of a permanent utility easement. Petitioners respectfully submit that the certified question must be answered in the negative; that the plans and specifications were properly excluded by the trial court; and that the decision of the district court should be reversed with instructions to reinstate the final judgment.

ISSUE PRESENTED

As the District Court of Appeal, Fourth District, set forth only the exclusion from evidence of plans and specifications as the basis for reversal, and then certified a single question regarding that one issue, petitioners submit that the issue presented is as follows:

> IS A CONDEMNING AUTHORITY WHICH SEEKS A PERMANENT UNDERGROUND UTILITY EASEMENT, TOGETHER WITH THE NECESSARY ABOVE-GROUND USES TO CONSTRUCT AND MAINTAIN SUCH UTILITIES, ENTITLED TO INTRODUCE INTO EVIDENCE THE PLANS AND SPECIFICATIONS REFLECTING THE DETAILS OF THE UTILITY PROJECT BEFORE THE JURY DETERMINING THE DAMAGES TO WHICH THE PROPERTY OWNER IS ENTITLED?

As this issue was the sole basis of the district court for its reversal, and the subject of the certified question, petitioners will restrict this brief and argument to that issue.

STATEMENT OF THE CASE AND FACTS

As noted above, the district court based its decision and reversal on the sole ground or holding that the trial court had erroneously excluded from evidence the condemnor's plans and specifications. The district court then certified to this Court the single question of whether such a condemnor is "entitled" to introduce such plans. Because the issues are so limited, this statement will be restricted to pertinent aspects of the case and facts.

In April, 1976, respondent, City of Pompano Beach, commenced these condemnation proceedings. On October 8, 1976, the circuit court entered an Order of Taking (R 322-326) (A 1-5) granting to the respondent City a perpetual utility easement under, across and over real property of petitioners. The Order of Taking granted to the City an easement described therein as follows, in pertinent part:

> 9. That Petitioner is entitled, prior to final judgment herein, upon payment into the Registry of the Court of the sum of Nineteen Thousand Seven Hundred Fifty ($19,750.00) Dollars, to perpetual underground utility easements and temporary construction easements under, across and over the real property located in Broward County, Florida described hereinabove, for underground sanitary sewer lines with the right to construct, maintain, operate and repair facilities and appurtenances in, on or under said lands which may be required for the full enjoyment of the rights hereby acquired.

(A 4)

Deposit of the sum required was made by the respondent City (R 327) and the taking of the above-described easement was thereby effectuated.

Thereafter, in 1977, the respondent City installed within the easement an eight-inch (8") diameter underground sanitary sewer force main. Upon completion of construction, there were no above-ground facilities located within the above-described easement. Construction plans, later proffered and excluded, reflected construction with no surface facilities or appurtenances.

In subsequent proceedings, on June 24, 1981, the parties filed a Pretrial Stipulation (R 353-356) (A 7-10) setting forth the following issue of law for determination prior to trial:

> Whether the taking of the underground utility easements in this proceeding must, as a matter of law, be considered equivalent to a taking of fee simple title for purposes of determining just compensation.

(A 8)

The parties thereafter filed memoranda of law respecting this issue, as well as opposing Motions in Limine directed to exclusion of the proposed testimony of the other's appraiser (R 358-359; R 360-361).

A pretrial conference was held on February 14, 1984 (R 367-402) following which the trial court, on March 7,

1984, entered its Order granting petitioner condemnees' Motion in Limine (R 365) and excluding the City appraisal testimony from trial. At further pretrial conference on June 1, 1984 (R 405-430) the court ruled that the City's plans for the project and related engineering testimony would be excluded.

The basis for the trial court's above orders was its holding that the easement taken by the City in 1976 was defined by the prior Order of Taking (A 1-5) and was tantamount to a taking of the fee.

Trial was held on August 14, 1984 (R 1-183). At trial the City proffered, out of the presence of the jury, plans and specifications for the already constructed project (Petitioners' Exhibits 1 and 2) and testimony of its engineer regarding the plans (R 67-98). The City also proffered its Appraisal Report which, by Order granting motion in limine, had five months earlier been excluded (Petitioners' Exhibit No. 3). Consistent with the pretrial rulings, the proffered materials and testimony were excluded.

The foregoing having been excluded, the City offered no further witnesses at trial. During trial the jury was taken to, and afforded a view of, the easement and completed project. The only testimony presented to the jury at trial

was that of petitioner condemnees' expert appraisal witness, who testified to a total valuation of $400,000 (R 135).

The jury returned a verdict of $200,000, after which petitioner condemnees filed a Motion for Judgment Notwithstanding the Verdict, which was granted, thereby granting judgment in the amount of $400,000 (R 464).

After subsequent hearing on attorneys' fees and costs (R 185-271), the trial court entered its Final Judgment awarding condemnees compensation in the amount of $400,000, plus interest from the date of taking, for a total of $676,344.97 (R 465-466) (A 11-12). Attorneys' fees and costs were also awarded to respondent condemnees (A 12).

The City instituted appeal to the District Court of Appeal, Fourth District of Florida. In City of Pompano Beach v. Abe, 479 So.2d 863 (Fla. 4th DCA 1985), the appellate court reversed. In stating the basis for reversal, the decision of the district court was as follows:

> We reverse and remand the final judgment entered in this condemnation proceeding on the authority of **Central and Southern Florida Flood Control District v. Wye River Farms, Inc.**, 297 So.2d 323 (Fla. 4th DCA 1974), **cert. denied**, 310 So.2d 745 (Fla. 1975), which upheld the admissibility of a condemning authority's plans and specifications for the public works project requiring condemnation in order to determine the extent of taking and the damages caused thereby. In this case the condemnor sought to secure 'perpetual underground utility easements . . . under, across and over' a portion of appellees' property. The appellees successfully contended below that this taking

> amounted to an acquisition of the complete legal interest in the property which would make the contents of the plans and specifications irrelevant to a determination of damages. **Houston Texas Gas & Oil Corp. v. Hoeffner,** 132 So.2d 38 (Fla. 2d DCA 1961), **cert. denied,** 136 So.2d 349 (Fla. 1961.

(A 13)

The district court also certified to this Court a question of great public importance. The decision of the district court as to certification was as follows:

> Notwithstanding our reversal we believe that the issue raised is one of great public importance because of the substantial interests of the landowners and the governmental bodies involved. In this case, for instance, the underground easement was originally valued by the condemnor at $19,000.00 while the total award eventually entered by the trial court amounted to $676,344.97. In light of this substantial disparity and the unsettled posture of appellate law we certify the following question to the Florida Supreme Court for resolution, should the parties seek further review:
>
> > IS A CONDEMNING AUTHORITY WHICH SEEKS A PERMANENT UNDERGROUND UTILITY EASEMENT TOGETHER WITH THE NECESSARY ABOVE GROUND USES TO CONSTRUCT AND MAINTAIN SUCH UTILITIES, ENTITLED TO INTRODUCE INTO EVIDENCE THE PLANS AND SPECIFICATIONS REFLECTING THE DETAILS OF THE UTILITY PROJECT BEFORE THE JURY DETERMINING THE DAMAGES TO WHICH THE PROPERTY OWNER IS ENTITLED? (A 13)

Petitioners, Trailer Ranch, Inc., and Bowlero Lanes of Pompano, Inc., filed their timely notice invoking the jurisdiction of this Court. By Order of January 21, 1986, this Court directed a briefing schedule, pursuant to which this brief is submitted.

SUMMARY OF ARGUMENT

The District Court of Appeal, Fourth District, erred in reversing the final judgment because plans and specifications for this completed utility project were excluded from evidence.

In the instant case the easement taken by the City, as established by the Order of Taking, states that it is a perpetual underground utility easement, but further states that the easement being taken "under, across and over" the lands includes the right to construct, maintain, operate and repair facilities and appurtenances in, on or under said lands. The Order of Taking contains no provisions reserving any rights in the condemnee. The easement taken was clearly under, across and above the land, so as to be tantamount to taking of the fee.

Under these circumstances, where the easement taken was virtually unrestricted and the condemnee retained virtually no rights as to use, the trial court properly held that the easement was, for all practical purposes, tantamount to the taking of the fee. Houston Texas Gas & Oil v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961); Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966).

In such a case the plans and specifications are in no way reflective of that being legally taken by the

condemnor. They would be actually misleading to the jury, for a picture of pipes underground in no way conveys a correct impression of the perpetual rights taken by the condemnor above the ground. The plans and specifications, if introduced, would in noway alter or limit the fact that the owner is stripped of virtually all practical aboveground right of use of the lands being taken. If respondent desired to restrict the extent of its taking, and enjoy an evidentiary entitlement as to such restrictions, it should have done so by its petition and Order of Taking. Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1st DCA 1971). It did not!

The district court erred in its citation and reliance upon Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), as authority for the proposition that plans and specifications must be admitted when offered. In that case the disputed document was Resolution No. 1019, which committed the condemning authority to construct and provide three access bridges to minimize damages to the owner's remainder. The resolution did not purport to alter the affect of the legal interest being acquired.

In the instant case the proffered plans and specifications would have merely shown pipes underground with nothing on the surface. In fact, this physical state

of affairs was amply demonstrated to the jury by a view of the then-completed project. In this case, however, respondent has effectively and perpetually taken from petitioners the right to use of the surface of the easement. It is clear that the plans and specifications showing no permanent equipment on the surface are irrelevant as to what has been taken from petitioners.

Stated perhaps more clearly, if the plans and specifications were proffered as an attempt to somehow give back the full surface use to petitioners, then they were properly excluded as conflicting with the petition in condemnation and attempting to alter the legal interest being taken. If they were proffered as evidence of what has been legally taken, then they were properly excluded as nothing less than an affirmative effort to mislead the jury as to the scope of the taking.

Finally, in Central and Southern Florida Flood Control District v. Wye River Farms, Inc., supra, the trial court had dismissed the condemnation case with prejudice. The district court reversed this dismissal, holding at page 329 that:

> At this point, we observe that if the trial court found either Resolution 1019 or the testimony of the engineer concerning the construction of the bridges improper, the only correct ruling

> would have been to strike the Resolution and testimony from the record but not to dismiss the cause with prejudice. (Emphasis supplied.)

That was precisely the "correct ruling" made by the trial court in the case sub judice.

This Court should answer the certified question in the negative. Trial courts should not be mandated by law to always admit over objection plans and specifications that are irrelevant to, or even misleading regarding, the nature of the legal interest being taken.

This Court should also quash the decision of the district court of appeal, with instructions that, upon remand, the final judgment be reinstated. It is time for this decade-old case to come to an end by just compensation to petitioners for that taken from them.

ARGUMENT

ISSUE PRESENTED

IS A CONDEMNING AUTHORITY WHICH SEEKS A PERMANENT UNDERGROUND UTILITY EASEMENT, TOGETHER WITH THE NECESSARY ABOVE-GROUND USES TO CONSTRUCT AND MAINTAIN SUCH UTILITIES, ENTITLED TO INTRODUCE INTO EVIDENCE THE PLANS AND SPECIFICATIONS REFLECTING THE DETAILS OF THE UTILITY PROJECT BEFORE THE JURY DETERMINING THE DAMAGES TO WHICH THE PROPERTY OWNER IS ENTITLED?

It is respectfully submitted that the certified question must be answered in the negative. The district court erroneously held that respondent condemning authority had an absolute right to admission of its plans and specifications, citing as authority for that holding Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), cert. den. 310 So.2d 745 (Fla. 1975).

In the trial court the plans and specifications had been excluded based upon the court's holding that the easement taken across petitioners' land was so unrestricted as to be tantamount to a taking of the fee. Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961), cert. den. 136 So.2d 349 (Fla. 1961); see also Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966). As the taking, as established by the respondent's petition and

Order of Taking, was so unrestricted as to constitute a taking of the fee, plans or specifications depicting only underground pipe were properly excluded.

Unfortunately, after years of litigation culminating in final judgment in favor of petitioners, the respondent on appeal prevailed upon the district court to reverse on the basis that it was error, as a matter of law, to exclude respondent's plans.

It is clear that the district court's decision is both a misreading and misapplication of Central and Southern Florida Flood Control District v. Wye River Farm, Inc., supra. As to the first point of distinction, in the Wye case the trial court had dismissed the condemnation action with prejudice. The district court reversed this action, but specifically noted at page 329 that if the trial court found the resolution or testimony improper, the "proper" ruling would be to strike them from the record. The decision clearly is not authority for the proposition that plans must be admitted, where it acknowledges that such plans could be found improper and stricken.

Other distinctions establish that the district court's reliance on the Wye case was misplaced. In the Wye case the resolution and testimony in question did not deal with the intended use by the condemnor of the land

being taken; they dealt, rather, with a commitment to construct three separate access bridges to minimize damage to the condemnee's remaining lands. Indeed, at page 328 the court in Wye, supra, expressly noted that the resolution and testimony did not purport to amend the petition in condemnation and did not alter the quality of title or legal interest of any parcel.

In contrast, the plans excluded in the case sub judice dealt directly with the land which had been taken. They clearly, and erroneously, would have suggested to the jury a prospective use more restrictive than the legal interest taken in 1976 by respondent. They would have clearly represented an unauthorized attempt at "limiting the effect of the title or legal interest acquired as contained in the pleadings." Wye, supra, at p. 328.

Finally, and perhaps most importantly, there is a critical distinction between the nature of the material and information offered in Wye, supra, and that which was offered, and properly excluded, in the case sub judice. In Wye, supra, that which was offered was a formal Resolution of the condemning authority which specifically and formally committed the condemning authority to construct the three access bridges and which specifically authorized and directed

the designated engineer to so commit the condemning authority in pending litigation.

By contrast and distinction, in the instant case the materials which were offered, and properly excluded, were merely plans and testimony of an engineer prepared after formal action of the condemning authority. That which had been taken was, however, defined by the Order of Taking of October 8, 1976 (A 1-5) and constituted the easement so unrestricted in nature as to be tantamount to a taking of the fee.

Based upon the foregoing, it is respectfully submitted that the district court's reliance on Central and Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), as authority for reversal was clearly error. That case neither compels, nor authorizes, the action of the district court.

In the instant case the determinative document as to the scope of the interest being taken by respondent condemnor was the Order of Taking entered on October 8, 1976 (A 1-5). That Order of Taking provided in pertinent part as follows:

> CONSIDERED, ORDERED AND ADJUDGED by the Court as follows:
>
> * * *

> 9. That Petitioner is entitled, prior to final judgment herein, upon the payment into the Registry of the Court of the sum of Nineteen Thousand Seven Hundred Fifty ($19,750.00) Dollars, to perpetual underground utility easements and temporary construction easements under, across and over the real property located in Broward County, Florida described hereinabove, for underground sanitary sewer lines with the right to construct, maintain, operate and repair facilities and appurtenances in, on or under said lands which may be required for the enjoyment of the rights hereby acquired. (Emphasis supplied.)

From the foregoing Order of Taking it is clear that the easement respondent condemnor chose to take was "under, across and over" petitioners' lands. It is equally clear that respondent took the perpetual right to construct, maintain, operate and repair facilities and appurtenances "in, on or under" said lands.

Further perusal of the Order of Taking demonstrates a total lack of any supplementary provisions restricting the taking by respondent condemnor (A 1-5). There is no provision declaring any continuing rights in petitioner condemnees, as was present in Jones v. City of Tallahassee, 304 So.2d 528 (Fla. 1st DCA 1974). There is no stated restriction on the nature or location of "appurtenances" which may be placed "in, on or under" the said lands.

The unrestricted easement in this case clearly falls within the ambit of Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961). In that case

the condemnor filed its petition to condemn a fifty-foot easement through the property owner's orange grove "for the construction, maintenance, and operation of natural gas transmission pipelines and works."

In the Houston case, supra, as in the instant case, the petition and the Order of Taking described an unrestricted type easement. In the Houston case, as in the instant case, the condemnor attempted unsuccessfully to introduce evidence at trial purporting to place restrictions on the extent of the easement taken.

In affirming the trial court and approving the exclusion of the proffered evidence, the court held as follows in Houston Texas Gas & Oil Corp. v. Hoeffner, supra, at page 39:

> The point of the rulings simply was that Houston had described in its petition an unrestricted type of easement which would permit it at any time to enter upon and occupy the property for the purpose of constructing, maintaining and operating its pipeline. In view of the trial judge, which we think was sound, the petitioner Houston was bound by its own petition. Certainly any attempt by the owner to use or occupy the land in question would always be subject to Houston's right of entry and occupancy for the purposes stated in the easement. Any restriction on the extent of the easement should have been stipulated in the petition and in the order of taking. The attempt to do so by testimony at the trial without proper foundation in the pleadings came too late. The taking of an easement such as the one described in the petition was, for all practical purposes, tantamount to the taking of the fee with resultant severance damages. While it may be true that

> the naked fee title would remain in the property owner, the use of the property would be entirely committed to the control of the gas company. 18 Am.Jur., Eminent Domain, Section 251, page 889; Louisiana Power and Light Co. v. Simmons, 229 La. 165, 85 So.2d 251; Arkansas Power and Light Co. v. Norris, 221 Ark. 576, 254 S.W.2d 684; Nichols on Eminent Domain, 3rd Edition, Volume 4, Section 12.41; Orgel, Valuation Under Eminent Domain, 2nd Edition, Volume 1, pages 452-455.
>
> While the taking of an easement will not in all situations amount to the equivalent of a taking of the full value of the fee, the fact remains that in many situations it will be tantamount to the same. In the instant case the nature of the easement described in the petition and in the order of taking was unrestricted and unlimited. It authorized occupancy of the land at any time by the condemnor. The record here sustains the position of the trial judge to this effect. (Emphasis supplied.)

In the case sub judice the action of the trial court excluding plans and engineering testimony was equally appropriate and correct where the Order of Taking set forth an unrestricted easement. The district court erred in holding to the contrary and reversing.

Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961), is not the sole authority establishing the error of the district court in the case sub judice. The District Court of Appeal, First District of Florida, considered an easement legally indistinguishable from the one presented in this case in Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966).

In the Smith case, supra, the easement sought to be condemned for construction, operation and maintenance of a drainage system was described in the petition as "over, under and across" the lands of respondent. The petition did not otherwise restrict the easement, which was clearly indistinguishable in its scope from the easement in the instant case.

In Smith, supra, the lower court had admitted, over objection by the landowner, a line of questioning and testimony calculated to show that if the landowners bridged over the easement, there would be ample access and no severance damage. The trial court's view was that the landowners would have a right to bridge over.

On appeal by the condemnee, the district court reversed, holding that the testimony as to "bridging over" should have been excluded. Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966). In so holding, the appellate court quoted extensively and with approval from Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961), and, at the conclusion of same stated in pertinent part at page 448:

> This was substantially the situation here. An easement **over, above** and **under** the thirty foot ditch, effectively prohibited the required use by the owners without the consent of the City, which it could withhold or grant, at its will, with such restrictions or limitations as it wished.

> We cannot understand how the appellants could possibly go **over** the ditch in the light of the express terms of the taking. In 4 Nichols on Eminent Domain, § 12.41(2), the author summarizes the general rule:
>
> > 'Privileges in the property taken, the enjoyment of which is not ordinary compatible with the exercise of the easement taken, cannot, however, be considered in awarding compensation unless they are formally established by the condemnation proceedings; privileges which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in reduction of damages, and in allowance of certain privileges as damages after a definite public easement has been taken is objectionable as a payment of compensation in a medium other than money.'
>
> In our opinion the erroneous line of questioning undoubtedly had the effect of leading the jury to the belief that the owners would be able to bridge over the ditch and thereby develop the remainder of their property with minimal or no severance damage. (Emphasis by court.)

It is clear that in the case sub judice a like ruling was correctly entered by the trial court where the easement in question was stated in the Order of Taking as "under, across and over" the lands of petitioner condemnees. Admission of the evidence in question would have simply misled the jury. Engineering plans showing only underground pipes would not have restricted or eliminated the easement taken "over" the lands of petitioners in 1976, nor eliminated any right of the condemnor to occupancy of the land at any time. Such plans would not have eliminated the express

perpetual right of the condemnor to use of the easement "in, on or under said lands" for sewer facilities or "appurtenances."

More recently, in Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1st DCA 1971), the court at page 233 held in pertinent part as to condemnation proceedings:

> Any restriction on the extent of the taking should be stipulated in the petition and the Order of Taking, for the condemnor is bound by these instruments.

The trial court properly applied the foregoing cases in excluding the plans and specifications. The district court erred in holding to the contrary.

In final analysis, the error of the district court was based upon its erroneous view, championed by respondent, that a condemnor has an absolute right or "entitlement" to place before the jury its plans and specifications irrespective of all other factors. This erroneous view is reflected in the certified question which speaks in terms of "entitlement" of the condemning authority to introduce such plans.

This is simply not the law of Florida. The district court's erroneous reliance upon Central and Southern Florida Flood Control Dist. v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), has been treated earlier, but deserves

additional comment as to this issue of absolute right or entitlement to admission.

It is true that at page 327 the district court in Wye, supra, did state in pertinent part:

> Of course, plans and specifications for construction of a public project are admissible in evidence by either party. Doty v. City of Jacksonville, Sup.Ct. Fla. 1932, 106 Fla. 1, 142 So. 599.

This is not the stuff of which an absolute right or entitlement is created, particularly where the same court observed at page 329 of the opinion that the Resolution and testimony could properly be stricken from the record if found improper by the trial court.

Resort to Doty v. City of Jacksonville, 106 Fla. 1, 142 So. 599 (1932), certainly provides no support for an absolute right in the condemnor to admit its plans and specifications. In Doty the condemnor city objected to introduction of its own plans, and the Supreme Court held that the condemnee should have been allowed to admit the plans in order to show the intended grade of the street adjoining the condemnee's property.

Respondent has, in earlier briefs before the district court, also cited Division of Administration, etc. v. Decker, 408 So.2d 1056 (Fla. 2d DCA 1982), in support of condemnor's "entitlement" to admit plans and specifications. Upon scrutiny

of Decker, however, it appears that while the district court observed at page 1058 that the plans and specifications had been properly admitted into evidence, the propriety of the introduction of the plans was not a contested issue in the appeal. The opinion does not reflect objection to introduction of the plans. Properly read, Decker, supra, merely holds that once the plans and specifications were admitted in evidence, it was error to prohibit testimony of condemnor's witnesses based on those plans.

Respondent has also cited Division of Administration, etc. v. Mobile Gas Company, 427 So.2d 1024 (Fla. 1st DCA 1983), in earlier proceedings, but in final analysis all that case holds is that the landowner could maintain a subsequent inverse condemnation action where, after the first condemnation action, the state had failed to construct an access road which was specifically promised and testified to in the first action.

Such cases are clearly not controlling. In the instant case the easement as established by the Order of Taking in 1976 expressly encompasses the surface of the land, and above. The easement clearly authorizes respondent condemnor to use that surface at any time to the exclusion of petitioner. The easement clearly and expressly authorizes

respondent condemnor to construct sewer line "appurtenances" "in, on, or under" said lands at any time.

The term "appurtenance," in the present context would encompass a future series of manholes if found necessary for the underground utility easements. The same would be true of a lift station for the sewer line. These uses would not violate the easement taken by respondent condemnor, for they are clearly encompassed within its terms.

Such uses in the future, where authorized by the easement taken in these initial proceedings, would not entitle petitioners to seek further judicial relief. By way of analogy, in Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906), and numerous subsequent cases, it has been recognized that damages suffered by a landowner by reason of a change in grade of an adjoining roadway are nonrecoverable.

In Kendry v. Div. of Admin., 366 So.2d 391 (Fla. 1978), however, the property owner was allowed to recover in a second action where the state changed the grade of a road previously taken by easement in condemnation proceedings.

The latter decision does not support the decision of the district court or the contentions of respondent, however, for in Kendry, supra, the perpetual easement contained a restriction expressly prohibiting the state from increasing

the elevation of the road. Indeed, at page 394 the supreme court expressed and restricted its holding as follows, in pertinent part:

> We hold that where a portion of a landowner's property is taken by the state by virtue of its violation of a restriction contained in a perpetual easement, the landowner may, upon sufficient proof, recover those damages to the remainder which were caused by the taking. (Emphasis supplied.)

This Court will readily note that in the instant case the easement as established by the Order of Taking (A 1-5) contains no such restriction. It is, literally, unrestricted as to the use of the land taken.

In proceedings below respondent placed heavy emphasis on Jones v. City of Tallahassee, 304 So.2d 528 (Fla. 1st DCA 1974). In that case, however, the condemnor had filed a motion to amend its petition to expressly reserve to the defendants various uses. The trial court, in its pretrial order, specifically interpreted the Order of Taking as leaving absolute specified rights in the landowner.

In the instant case the respondent condemnor made no attempt whatsoever to amend its petition or the Order of Taking so as to restrict the easement taken. No general or specific reservation of rights in petitioner was set forth in the Order of Taking. Absent such provisions, the decision in Jones v. City of Tallahassee, 304 So.2d 528 (Fla. 1st DCA 1974), is clearly inapplicable.

Indeed, in Jones, supra, the court expressly acknowledged at page 532 that:

> It is true that under certain circumstances the use of an easement can be tantamount to a deprivation of the owner's use of the fee, particularly where such easement use for all practical purposes prevents the owner from any profitable use of the remaining fee. Where this is evident, then the landowner is entitled to compensation as for the taking of the fee simple title. Such was the case in Smith v. City of Tallahassee, Fla.App., 191 So.2d 446, relied upon by appellants. There the City's proposed use under its easement was the construction and operation, as part of its drainage system, over, under and across the owners' land, of a thirty foot ditch. Such construction and use would deprive the landowners of all practical and profitable use of the remaining fee.

Thus, the court in Jones, supra, clearly recognized and approved the principles established in Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966), and Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961); it simply held them inapplicable because in that case the easement as established by the Order of Taking left express, absolute rights in the landowner and was, therefore, not tantamount to a taking of the fee.

In this case, however, where the easement was not so restricted by the Order of Taking (A 1-5) and was unlimited in its terms (i.e., "under, across and over"; "in, on or under said lands"), the trial court properly held that it was tantamount to the taking of the fee. The

district court erred in reversing this determination by the trial court.

The district court in its decision took note that while the condemnor originally valued "the underground easement . . . at $19,000," the final judgment entered by the trial court amounted to $676,344.97. Several observations as to this statement by the court are appropriate.

The first is that the very terminology used by the district court is reflective of the mistaken premise championed by respondent and accepted by the district court. The respondent may have valued the "underground" aspect of the easement at $19,000, but contrary to the district court's terminology, that which was taken in 1976 was <u>not an underground easement</u>; it was an easement "under, across and over" the lands with perpetual rights "in, on or under" said lands. It is clearly a misconception of law to categorize, or value, that which condemnor took as an "underground" easement.

Had respondent condemnor so chosen, it could have by its petition and the ensuing Order of Taking restricted the taking to an "underground" easement. It could have provided that upon the completion of construction the landowner would have and enjoy all use and rights of the surface not destructive of the actual utility line. It could have stated

that the easement did not extend any right of occupancy of the surface to the condemning authority after completion of construction. It could have stated that the easement taken did not extend to any surface appurtenances.

Had respondent chosen to so limit its petition, the Order of Taking and the easement in question, then the district court's terminology would have been appropriate, for that perpetually taken would have been an "underground easement." The respondent, however, chose to take an unlimited easement "over" the lands. The district court's characterization, therefore, is clearly in error and reflective of the misconception that precipitated erroneous reversal of the trial court.

As to disparity of the original valuation versus final award ($19,000 vs. $676,344.97) which apparently troubled the district court, it is respectfully submitted that such a notable disparity would have been non-existent if the condemnor's original valuation had been reflective of the entire, unrestricted easement actually taken in 1976 rather than merely the "underground" portion of same. The City, however, chose throughout trial to adhere to its erroneous method of valuation and, despite pretrial ruling of exclusion, chose not to secure and submit any properly based valuation.

In this respect, it is also pertinent to note that of the final judgment of $674,344.97, a total of $296,094.97 represents properly calculated, statutorily required interest to which petitioner is entitled because of a lapse of eight years and one month from the time of taking (October 8, 1976) until final judgment awarding petitioners compensation (November 29, 1984). It was, of course, within the condemning authority's sole power and discretion to have avoided or substantially reduced these extra statutory charges by having originally properly valued the entire easement being taken and deposited an appropriate and rational sum for payment upon taking. This, respondent declined to do.

Finally, it is clear that there was no real, meaningful error in the trial proceedings as a product of the exclusion of the plans in question. The jury, and the trial judge, were well aware that original construction contemplated only underground pipes. Indeed, the record reflects that the jury had the benefit of a view after the initial construction was completed. The plans, if admitted, would have added nothing to the knowledge of the court or jury below.

Equally clear is that the plans, if admitted, would not have stricken one word from the easement that respondent chose to condemn. The plans, testified to out of the presence of the jury by an independent engineer who

was not even familiar with the terms or scope of the easement taken (T 81-82), would not have changed the unrestricted nature of the easement as expressly set forth in the 1976 Order of Taking (A 1-5). That respondent initially only planned to place pipes of a certain size underground does not change the fact that respondent chose to legally take in 1976 greater rights and entitlement.

The cases relied upon by respondent and the district court do not authorize or support the decision of the district court. Those cases do not authorize a condemning authority to use an Order of Taking to take substantial, unrestricted present and perpetual rights above and below ground from the property owner with damages to his remaining lands, construct the project, and then later reduce the just compensation for what was taken by introduction of drawings of an engineer depicting only the immediate use contemplated.

For the foregoing reasons, the question certified by the district court should be answered in the negative. Trial courts should not be compelled as a matter of law on a principle of "entitlement" to admit plans and specifications which are contrary to, and misleading regarding, the rights taken under the prior Order of Taking.

It is clear that testimony or evidence based upon a misconception of law can, and should, be excluded by the

trial court in condemnation cases. Stubbs v. State, Department of Transportation, 332 So.2d 155 (Fla. 1st DCA 1976). A like rule clearly should apply to plans and specifications such as those in the instant case.

In point of fact, given the rights actually taken in 1976, the plans prepared by an engineer with no consideration to the actual easement are of no more import than the evidence held properly excluded in Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961), and Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966). If a condemning authority desires an absolute entitlement to place before the jury a restriction on its taking, then it should so stipulate in the petition and Order of Taking, those being binding on the condemnor. Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1st DCA 1971).

As the sole ground cited for reversal by the district court was in error, the decision of the district court should be quashed with instructions to reinstate the final judgment. This case should thereby be brought to its long-awaited conclusion by just compensation to petitioners for that which respondent took almost ten years ago.

CONCLUSION

The decision of the District Court of Appeal, Fourth District, is clearly erroneous and should be quashed with insructions to reinstate the final judgment of the trial court. The certified question must, likewise, be answered in the negative.

Respondent chose in 1976 to condemn and take a broadly described easement under and over petitioners' lands, which did not state any reserved or retained rights in petitioners. Had respondent desired to limit the scope of its taking, and enjoy a corresponding evidentiary entitlement, it should have done so by amendment to its petition and Order of Taking. Absent such binding limitation, the taking was tantamount to the taking of the fee.

Under such circumstances, the trial court properly excluded the plans and related evidence. The plans were offered in service to, and based upon, a patent misconception of law. The trial court committed no error in excluding same. The district court erred in holding to the contrary and reversing. This case should be resolved by reinstatement of the trial court's final judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioners' Initial Brief on the Merits and separately bound Appendix to Petitioners' Initial Brief on the Merits has been furnished by U.S. mail to DONALD C. ROBERGE, ESQ., Post Office Box 2083, Pompano Beach, FL 33061, this 17th day of February, 1986.

Thomas M. Ervin, Jr.
ATTORNEYS