IN THE SUPREME COURT OF FLORIDA

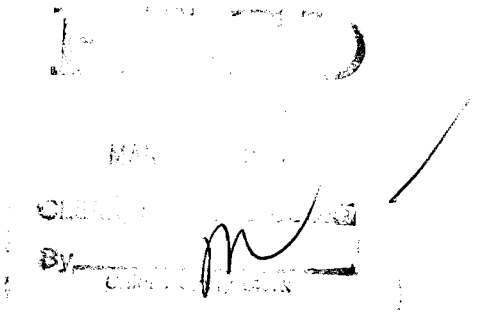
TRAILER RANCH, INC.,
et al.,

Petitioners,

vs. CASE NO. 68,190

CITY OF POMPANO BEACH,
etc.,

Respondent.
_____/



RESPONDENT'S BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

INTRODUCTION

In this Brief the Petitioners, Trailer Ranch, Inc., et al, will be referred to as "Petitioners." The Respondent, City of Pompano Beach will be referred to as the "City", "City of Pompano Beach", or "Respondent".

References to pages of the record will be denoted by the symbol "R". References to pages of the Appendix to Petitioners' Initial Brief on the Merits will be denoted by the symbol "PA". References to Respondent's Appendix filed herewith will be denoted by the symbol "RA".

STATEMENT OF THE CASE AND FACTS

Respondent agrees with the Statement of the Case and Facts set forth in Petitioners' Initial Brief, except to the extent that certain facts pertaining to current use of the surface area of the City's easement by the Petitioners have been omitted. These facts are uncontroverted and were included in the Statement of the Case and Facts in the City's Brief filed in the district court. With reference to the site sketch reproduced in Petitioners' Appendix at page A-6, the facts are as follows:

1. The northerly portion of Segment "A" on Federal Highway is paved over and is used for vehicular access to a restaurant and bowling alley located on Petitioners' property to the west.

2. The southerly portion of Segment "A" comprises the easterly perimeter of a used-car sales facility with the easement being used for a used-car display area.

3. Segments "B", "C" and "E" are located at the perimeter of the property. A fence or barrier separating Petitioner's property from adjoining property to the south traverses the entire length of Segment "B".

4. Segment "D" is paved over and utilized as a driveway through a trailer park located on a portion of Petitioners' property.

5. The uses being made of their property by Petitioners are essentially the same uses which were made of the property before the taking.

SUMMARY OF ARGUMENT

The exclusion by the trial court of the City's plans and specifications for its sewer project, the testimony of its engineer in explanation thereof and the testimony of its expert appraisal witness was clearly reversible error which the district court correctly reversed on the basis of that court's own clear precedent which is the leading case in Florida on the admissibility of project plans and specifications as a positive evidentiary statement by the condemnor as to the manner in which condemnee's property will be utilized, which manner may not damage condemnee's property according to the worst possible assumption or inflict the most serious damage the legal title acquired might imply.

The City has acquired underground easements for construction of a sanitary sewer line. However, since the underground sewer line must be constructed and, if necessary, repaired from above the ground, it was necessary to also acquire above-ground rights of access across and over the real property for purposes of construction and repair. Therefore the Order of Taking describes the easements as being not only "under" the real property, but also "across" and "over" it, and gives the City the right to construct, maintain, operate and repair its sewer facility in, on or under Petitioners' land.

However, an easement "across" and "over" Petitioners' land for the limited purpose of construction and repair of an underground sewer line does not mean, as contended by Petitioners, that the Petitioners have thereby been deprived of all rights to use of the surface of their land. Such easements by their very nature do not require the exclusive occupation by the condemnor of the surface of the land. Landowners retain their right to use the fee in any manner they choose so long as such

use does not interfere with the condemnor's right to use of the land for construction and repair. In essence, the only limitation placed upon use by the landowner is that he cannot erect permanent structures on the surface of the easement. Petitioners here are currently using the surface of the City's easement for vehicular access to commercial businesses located elsewhere on their property, for a used-car display area, a fence and a driveway through a trailer park located on a portion of their property, essentially the same uses of their property as before the taking.

The position taken by Petitioners is based upon the erroneous premise that property owners from whom easements such as this are taken are barred (or potentially barred) from any use whatever of the surface of the easement unless the petition and/or the declaration of taking specifically reserve such use to the landowner. This proposition flies in the face of reality and is clearly not the law in Florida.

However, there is a Florida case, Houston Texas Gas & Oil Corporation v. Hoeffner, 132 So. 2d 38 (Fla. 2nd DCA 1961) which at first glance gives a certain surface plausibility to Petitioners' argument if looked at in a vacuum to the exclusion of all other Florida cases on the subject. In that case the condemnor acquired a 50 foot easement "for the construction, maintenance, and operation of natural gas transmission pipelines and works." The trial judge refused to admit proffered evidence regarding a permissive policy of the condemnor to permit fee owners to continue making various uses of their land after condemnation. The district court held that the condemnor was bound by its petition and that the taking of the easement described in the petition was tantamount to the taking of the full value of the fee.

However, there is a crucial distinction between the Houston case and the case sub judice. In Houston there is nothing to indicate that the condemnor attempted to introduce plans and specifications or testimony of an engineer as to what the condemnor intended to construct on the particular parcel which was the subject of the litigation. In the case sub judice the City has proffered its plans and specifications for the project and the testimony of its engineer in order to provide a positive declaration of the manner in which Petitioners property will be utilized, which use by the City will allow Petitioners unrestricted use of the surface of their property except that they may not construct a permanent structure thereon. Yet the trial court erroneously looked upon the Houston case as authority for exclusion from evidence of the plans and specifications of the City and the testimony of its engineer and expert appraisal witness.

This action of the trial court was clearly contrary to the controlling authority on the subject, the case of Central & Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So. 2d 323 (Fla. 4th DCA 1974), relied upon by the district court here in reversing and remanding. In that case the court, obviously disturbed by the unfairness to condemnors and the windfall profits to condemnees which would result from indiscriminate application of the Houston rationale in cases where the condemnor offers into evidence specific plans and specifications to show the manner in which the property taken will be utilized, held that plans and specifications for construction of a public project are admissible in evidence to provide "a positive declaration of the manner in which the property will be utilized, which manner may not damage the remaining property according to the worst possible assumption or inflict the most serious damage the legal title acquired might imply" 297 So. 2d 323, 327. The court disposed of the Houston argument by

restricting the application of Houston to situations "where there are no plans and specifications in evidence and there is nothing to show the manner of construction of the project." 297 So. 2d 323, 328.

Despite the ineffectual attempts of Petitioners to distinguish it, the Wye River Farms case is squarely on point, is the controlling authority and was properly relied upon by the district court in City of Pompano Beach v. Abe, 497 So. 2d 863 (Fla. 4th DCA 1985). According to Wye River Farms, there must be a new trial at which the City will have an absolute right to introduce its plans and specifications (assuming they are sufficiently specific and otherwise admissible) and the testimony of its engineer and expert appraisal witness to show that the manner in which the City will utilize Petitioners' property will not damage their property according to the worst possible assumption or inflict the more serious damage that the legal title acquired might imply. Only after hearing such testimony and reviewing such evidence can the jury possibly determine just compensation.

If this Court reverses the district court and the final judgment of the trial court is allowed to stand, the result will not be just compensation, but a windfall profit to Petitioners in the amount of hundreds of thousands of dollars.

The district court must be affirmed because a new trial at which the jury will be allowed to consider all of the evidence is the only way in which this case can proceed in accordance with the requirements of the Florida Constitution that eminent domain proceedings must provide just compensation to property owners, and no more.

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?

The certified question must be answered in the affirmative.

One of the most common exercises of the power of eminent domain is the acquisition of underground easements required for the installation of utilities such as sanitary sewer lines. Such easements by their very nature do not require the exclusive occupation by the condemnor of the surface of the land under which the underground utility line is installed. see Jones v. City of Tallahassee, 304 So. 2d 528 (Fla. 1st DCA 1974). However, since the underground pipeline must be constructed, and, if necessary, repaired, from above the ground, the condemnor must also acquire above-ground rights of access across and over the real property for purposes of construction and repair. The landowners retain the right to use the fee in any manner they choose so long as such use does not interfere with the condemnor's right to use of the surface of the land for construction and repair. Jones v. City of Tallahassee, supra. In essence this means that the landowners cannot erect permanent structures on the surface of the easement.

In the instant case the Respondent City, for the purpose of constructing an extension of its sanitary sewer facilities, acquired perpetual underground utility easements under, across and over numerous parcels of

real property for underground sanitary sewer lines with the right to "construct, maintain, operate and repair facilities and appurtenances in, on or under said lands. . ." (R325) (PA-4) As to the land owned by Petitioners Trailer Ranch, et al, the plans and specifications for the project do not call for any above-ground appurtenances; the only facility installed in that particular portion of the project is an 8 inch underground sanitary sewer force main.

Since an easement is a sufficient interest or estate in the property to serve the purpose of installation of an underground sewer line, the City was limited to acquisition of an easement and would not have been allowed to acquire fee simple title, it being established in Florida that an acquiring authority will not be permitted to take a greater interest or estate than is necessary to serve the particular public use for which the property is being acquired. Canal Authority v. Miller, 243 So. 2d 131 (Fla. 1970).

However, Petitioners' appraiser disregarded the intended use and the plans and specifications for the project and valued the easement taking as the taking of a fee simple, based upon the premise that the City "could have the right at any time during the existence of the easement to totally utilize the land area to the exclusion of any use thereof by the underlying fee ownership interest." (RA-7) In calculating damages to the remainder (severance damages) Petitioners' appraiser used the "before and after" approach with the "after" valuation of the remainder based upon valuation of comparable parcels without any frontage or direct access to Federal Highway (US #1), based upon "the premise that the easement may be so employed as to cut off the balance of the parent tract from the frontage along U. S. Highway #1." (RA-7) In this connection it

is important that the Court note that it is clear from the Order of Taking that the City originally planned its easement to traverse Petitioners' property "in a more or less straight line from east to west, more or less bisecting" said property. (R323) (PA-2). Thus the easement as originally proposed would have traversed Petitioners' property from the northern-most point of Segment "E" to the northern-most point of Segment "A" as shown on the site sketch, (PA-6). According to the Order of Taking, Petitioners demonstrated to the satisfaction of the original trial judge that "minimum inconvenience and minimum economic impact on their property" would result if the easements traversed the periphery of the property rather than bisecting it. (R323) (PA-2). Obviously recognizing that the above-ground rights acquired by the City would not allow Petitioners to erect any permanent structures on the surface of the easement, the court accommodated the Petitioners by rerouting the easement over a considerably longer distance around the periphery of their property (where zoning setback regulations would presumably prohibit a permanent structure whether the easement were there or not) and required that Segment "A" be placed adjacent to the right-of-way of Federal Highway (US #1). However, prior to trial before a different judge than the one who issued the Order of Taking, the Petitioners completely reversed their position as to "minimum inconvenience and minimum economic impact on their property."

They now contend that the rerouting of the easements by the original trial judge has resulted in <u>maximum</u> economic impact on their property because, inter alia, the "magic words" "across and over" which appear in the easement description have transformed this easement taking into a fee simple taking, and Segment "A" as rerouted by the original trial judge adjacent

to the US#1 right-of-way "may be so employed as to cut off the balance of the parent tract from the frontage along US Highway #1 . . ." (R463) (RA-7) Based upon this premise, Petitioners' appraiser calculated damages to the remainder (severance damages) at $266,150.00, and valued the 15 foot easement strip at its full fee simple value of $135,750.00, for a total valuation of $401,900.00. (RA-8).

The trial court agreed with Petitioners' appraiser as to the magical effect of the words "across and over", ruled that the use of these words did transform these easements into the equivalent of a fee simple taking, refused to admit into evidence the plans and specifications which would have shown the jury what the project consisted of with respect to Petitioners' property, and excluded the testimony of the City's expert appraisal witness who would have testified to an easement valuation of 10 percent to 25 percent of unencumbered fee value for a total of $25,832.00 (RA-5).

After hearing only one witness, Petitioners' appraiser, who testified to a valuation of $400,000.00 based upon his "fee simple taking" theory, the jury returned a verdict of $200,000.00, following which the trial court entered judgment notwithstanding the verdict in the amount of $400,000.00.

In City of Pompano Beach v. Abe, 479 So. 2d 683 (Fla. 4th DCA 1985), the District Court of Appeal, Fourth District, reversed and remanded on the authority of the leading case, Central & Southern Florida Flood Control District v. Wye River Farms, Inc., 297 So. 2d 323 (Fla. 4th DCA 1974).

Petitioners' Initial Brief on the Merits constitutes a valiant effort to distinguish Wye River Farms and convince this Court that the district court was mistaken in its reliance upon its own clear precedent. However, the position taken by Petitioners is completely without merit.

As they did in the trial court and the district court, Petitioners rely

primarily on Houston Texas Gas & Oil Corporation v. Hoeffner, 132 So. 2d 38 (Fla. 2d DCA 1961) to support their position. In that case the condemnor acquired a fifty foot easement "for the construction, maintenance, and operation of natural gas transmission pipelines and works." The trial judge refused to admit proffered evidence regarding a policy of the condemnor to permit fee owners to continue making various uses of their land after condemnation. It does not appear that the condemnor attempted to introduce plans and specifications or testimony of an engineer as to what the condemnor intended to construct on the particular parcel which was the subject of the litigation. The court held that the condemnor was bound by its petition and that the taking of the easement described in the petition was tantamount to the taking of the full value of the fee.

The district court in Central & Southern Florida Flood Control District v. Wye River Farms, Inc., supra, was obviously bothered by the inequitable windfall to condemnees which would result from blindly applying the rationale of the Houston Texas case in situations where the condemnor was prepared to offer evidence, not of a permissive policy intended to change or alter the legal effect of the estate acquired according to the pleadings, but in mitigation of damages to show that the condemnee's damages will not be as great as might conceivably be implied from the pleadings in the absence of such evidence. There, the Flood Control District actually acquired fee simple title to certain land for use as a water storage area. The District offered a resolution of its governing board committing it to construction and maintenance of bridges allowing access by the property owners to their remaining lands, thereby reducing the severance damages which the landowners would otherwise suffer as a result of the fee simple taking of a strip of their property. The resolution further authorized the District's engineer to make committments for the District on details of the matters set forth in the resolution and the engineer offered into evidence certain design memorandums

presumably referring to the bridges.

The landowners, relying as do Petitioners here on Houston Texas Gas & Oil Corporation v. Hoeffner, supra, argued that the attempt of the District to put into evidence its resolution and to delegate authority to its engineer was a statement of permissive policy which later may be withdrawn and was therefore contrary to the rule set forth in Houston. The Fourth District Court disagreed, distinguishing Houston in situations where the condemnor offers evidence as to what he intends to construct.

Observing that "plans and specifications for construction of a public project are admissible in evidence by either party," the court states:

> ". . . (A)dmission of such evidence provides a positive declaration of the manner in which the property will be utilized, which manner may not damage the remaining property according to the worst possible assumption or inflict the more serious damage the legal title acquired might imply." (297 So. 2d 323, 327)

and

> "Plans and specifications and indeed any matter in explanation of the way in which the public project is to be constructed, are evidentiary in nature and as such, may explain the manner in which the property acquired will be utilized." (297 So. 2d 323, 328)

In distinguishing Houston, the court states:

> "Since the evidence under scrutiny is not a statement of permissive policy intended to change or alter the legal effect of the estate acquired according to the pleadings, the Houston case, supra, although a valid statement of the law, has no application here." (297 So. 2d 323, 328)

Thus the Fourth District has solved the problem of the unreasonably harsh effect of unquestioning application of the Houston rationale in all cases by relegating it to situations "where there are no plans and specifications in

evidence and there is nothing to show the manner of construction of the project." 297 So. 2d 323, 328.

It is submitted that the rationale of Wye River Farms is much more in accordance with the intent of Article X, Section 6 of the Florida Constitution than would be an indiscriminate application of the Houston rationale regardless of what the condemnor proposes to construct under or upon the property taken. The Constitution provides for full compensation for property rights actually taken. Remembering the fundamental concept of real property law that the ownership of real property consists of a "bundle of rights", the question of how many "sticks" are taken from a property owner's bundle by a condemnor in any given eminent domain case is a matter for the jury based upon the facts of that particular case. In the case at bar the City's appraiser will testify upon remand that the City has taken 10 percent to 25 percent of the unencumbered fee value of Petitioners' land. Petitioners' appraiser is free to testify as to any higher percentage less than one hundred percent, and the jury will determine just compensation based upon that testimony, the plans and specifications of the City and the testimony of its engineer, and its view of the property. If the position of the Petitioner prevails in this Court and the decision of the district court is reversed, the result will not be "just compensation" but a windfall to Petitioners based, not upon the property rights which have actually been taken from them, but upon the erroneous proposition, soundly rejected by the district court in Wye River Farms, supra, that the use of certain "magic words" precludes any further inquiry into the actual extent of the taking, regardless of any evidence which the condemnor is prepared to present as to the rights which have actually been taken. Such a glorification of form over substance would be a travesty.

This Court should affirm the district court because the result in the Wye River Farms case is completely fair to both condemnor and condemnee, leaving the jury free to determine just compensation based upon the evidence as to what has actually been taken.

Further, despite the reference of the district court in City of Pompano v. Abe, supra, to "the unsettled posture of appellate law", Respondents have been unable to find a single case where the exclusion of a condemnor's plans and specifications by a trial court has been upheld by an appellate court in the circumstances of the instant case. In Houston Texas Gas & Oil Corporation v. Hoeffner, supra, so heavily relied upon by Petitioners, there is no indication that the condemnor attempted to introduce plans and specifications or testimony of an engineer as to the nature of the project. In In re Division of Administration v. St. Regis Paper, 402 So. 2d 1207, (Fla. 1st DCA 1981), the plans proffered by the condemnor did not show the existence of turnouts which would provide access to condemnee's remaining property. The trial court denied admission into evidence of the plans and specifications as they related to access and directed a verdict for the landowners based upon the assumption that the worst possible damage would occur to the remaining property. The district court affirmed, stating that the trial court was correct in denying admission of the plans, absent specific plans and a binding witness. In the case sub judice, the Respondent City has proffered complete specific plans showing every detail of construction of the project and a binding witness to explain them to the jury.

When actual specific construction plans have been offered into evidence, the courts of Florida have consistently upheld their admissibility. In addition to Central & Southern Florida Flood Control District v. Wye River Farms, supra, the Second District in Division of Administration, State of Florida Department of Transportation v. Decker, 408 So. 2d 1506 (Fla. 2d DCA 1981) has held that the

trial court properly admitted the plans and specifications for the purpose of providing a positive declaration from the condemnor of the manner in which the condemned property would be utilized, that it was proper for the condemnor's witnesses to base their valuation estimates on the use of an easement as limited by the plans and specifications, and that it was error to exclude the condemnor's engineering and appraisal witnesses because their proffered testimony was based on their opinions as to the proposed construction according to the plans and specifications (citing Wye River Farms). In Division of Administration, State of Florida Department of Transportation v. Mobile Gas Company, Inc., 427 So. 2d 1024 (Fla. 1st DCA 1983) the plans and specifications for the project had been placed into evidence at the eminent domain trial, apparently without question, and the only issue before the appellate court was the effect of an alleged failure by the condemnor to construct the project in accordance with those plans and specifications.

It is therefore clearly established by all of the reported cases that specific plans and specifications are admissible for the purpose of providing a positive declaration of the manner in which the condemned property will be utilized, and that it is proper for the condemnor's expert witnesses to base their evaluation testimony on the use of the condemned property as limited by the plans and specifications. Indeed, this Court in Belvedere Development v. Department of Transportation, 476 So. 2d 649, 653 (Fla. 1985) has agreed that:

> "(T)he damages caused by a project as contemplated by the construction plans in existence on the date of valuation and the pleadings govern the evidence of valuation. . . ."

Moreover, despite the protestations of Petitioners to the contrary, the cases establish that condemnees are not prejudiced by admission of plans and

specifications and valuation testimony based thereon in the event that the condemnor ultimately fails to adhere to the use of the easement as limited by the plans and specifications. The remedy of the landowner in such situations is to come back into court and claim additional damages. Division of Administration, State of Florida Department of Transportation v. Decker, supra; Central & Southern Florida Flood Control District v. Wye River Farms, supra; Division of Administration, State of Florida Department of Transportation v. Mobile Gas Company, Inc., supra; cf Mainer v. Canal Authority of State, 467 So. 2d 989, 992 (Fla. 1985), where this Court recognized "that if a condemning authority claimed enhancement to offset damages to the remaining property, and then failed to complete the improvement, the property owner would have a cause of action for additional compensation . . ." (citing Wye River Farms).

The attempts by Petitioners to distinguish the Wye River Farms case fall far wide of the mark.

They attempt to make much of the district court's observation in dictum at 297 So. 2d 329 that, if the trial court found either the condemnor's resolution or the testimony of its engineers to be improper, the only correct ruling would have been to strike the resolution and testimony from the record. Certainly trial courts always have the discretion to refuse to admit evidence for numerous reasons such as lack of relevance, lack of a proper foundation, etc. Indeed, in In re Division of Administration v. St. Regis Paper, supra, it was held that the trial court was correct in denying admission of condemnor's plans because the plans were not sufficiently specific. Upon remand in the case sub judice, the trial court will still have discretion to refuse to admit the City's plans and specifications and testimony if it finds that they are not sufficiently specific. In the trial court proceedings leading to this appeal the trial court never got that far; its refusal to admit the plans and specifications was based upon a premise found to be reversible error by the district court.

Petitioners also overlook the fact that in Wye River Farms the property interest taken by the condemnor was fee simple title. IF the condemnor's plans and specifications are admissible in mitigation of damages to condemnee's remainder caused by taking of fee simple title, then a fortiori, plans and specifications are certainly admissible in mitigation of damages caused by the taking of a mere easement, as in the case sub judice.

Petitioners' emphasis on the resolution of the condemning authority in Wye River Farms is also quite misleading. Petitioners would have this Court overlook the fact that the condemnor in Wye River Farms also offered into evidence "General and Detailed Design Memorandums", found by the district court to be "complete and detailed enough to pass judicial scrutiny", and that the holding of the district court is replete with references to "plans", "specifications", and "details of construction", rather than merely referring to a resolution of the condemnor.

Petitioners' attempts to distinguish Jones v. City of Tallahassee, supra, fall equally wide of the mark. While it is true that the condemnor in that case filed a motion to amend the order of taking to expressly reserve various uses to the defendants, that motion was never ruled upon by the trial court. The court sua sponte entered a pre-trial order declaring the nature and extent of the estate taken by an order of taking describing an easement which, as in the instant case, by its very nature did not require the exclusive occupation of the surface of the land by the condemnor. Clearly it is not essential in the taking of an easement that the petition or the order of taking expressly reserve to the condemnee rights to occupy the land in a manner consistent with the use of the land by the condemnor. No Florida case so holds, with the possible exception of Houston Texas Gas & Oil Corporation v. Hoeffner, supra, which has been held by the Fourth District Court to be inapplicable in the instant situation where the condemnor offers into evidence plans and specifications which provide "a positive declaration

of the manner in which the property will be utilized, which manner may not damage the remaining property according to the worst possible assumption or inflict the more serious the legal title acquired might imply." 297 So. 2d 327.

Petitioners' reliance upon Smith v. City of Tallahassee, 191 So. 2d 446 (Fla. 1st DCA 1966) is equally as misguided as their reliance upon Houston Texas Gas & Oil Corporation v. Hoeffner. In Smith, as in Houston, the condemnor city did not offer into evidence any plans and specifications. Instead, the city attempted to show a right of the property owners to bridge over the city's drainage ditch merely by cross examination of the property owner's expert. On appeal it was held that such cross examination was improperly allowed since such testimony could, at most, merely establish a permissive privilege subject to revocation by the condemnor. The Fourth District in Wye River Farms, in holding that plans and specifications are not "statements of permissive policy" has, without expressly citing Smith, distinguished Smith to the same extent as it expressly distinguished Houston. It is also important to note that the Smith case was distinguished by the same district court which decided it in the later case of Jones v. City of Tallahassee, supra, where the First District pointed out that in Smith, the condemnor had taken a thirty foot ditch across the owner's land, which would deprive the landowners of all practical use of the remaining fee, whereas in Jones the taking was of an easement for an electric transmission line, which left to the property owners substantial use rights in the land. The City of Pompano Beach in the instant case has not taken a thirty foot ditch across Petitioners' property; it is submitted that the taking of an easement for an underground sewer line leaves to the property owners even more substantial use rights in their land than would be left to them by an aboveground easement for an electric transmission line as in Jones.

Equally misplaced is the reliance of Petitioners on Peebles v. Canal Authority, 254 So. 2d 232 (Fla. 1st DCA 1971). This was a fee simple taking which deprived the property owners of access to a waterway from their remaining property. The First District affirmed the trial court which had refused to admit evidence of the condemnor's permissive policy of allowing limited access to a waterway. Since the Fourth District in Wye River Farms has held that plans and specifications are not mere statements of permissive policy intended to change or alter the legal effect of the estate acquired according to the pleadings, that court has distinguished, without expressly citing it, Peebles v. Canal Authority just as it has distinguished Houston and Smith.

In the final analysis, Petitioners' position should not prevail because the result would be a gross miscarriage of justice. If Petitioners are to receive the just compensation required by the Florida Constitution, and no more, the decision of the district court must be affirmed and the case must be remanded for a new trial where the jury will be allowed to consider the City's evidence which has been heretofore improperly excluded.

CONCLUSION

In deciding Central & Southern Florida Flood Control District v. Wye River Farms, 297 So. 2d 323 (4th DCA 1974), upon which it based its reversal of the trial court in the instant case, the district court established a salutary rule of eminent domain law which should be followed by this Court in affirming City of Pompano Beach v. Abe, 479 So. 2d 863 (Fla. 4th DCA 1985).

If Petitioners are to receive the just compensation to which they are entitled under the Florida Constitution, and no more, the certified question must clearly be answered in the affirmative. Were this Court to decide otherwise and allow the final judgment of the trial court to stand, Petitioners will receive a windfall profit in an amount in excess of $350,000.00 (plus interest thereon from 1976) in compensation for property rights which clearly have not been taken by the Respondent City, as shown by the plans and specifications for the project.

If the Petitioners are to receive the just compensation to which they are entitled, and no more, the jury must be allowed to hear all of the evidence, including the City's plans and specifications and its expert appraisal testimony based thereon. To effectively eliminate the role of the jury in the determination of just compensation by excluding from its consideration all of the City's evidence because the City has used certain "magic words" in describing its easement would be the ultimate glorification of form over substance clearly contrary to Florida law as expressed in the Wye River Farms case, subsequent decisions of other district courts and this Court in Belvedere, supra. The purpose of eminent domain law is to provide just compensation for property owners, not to provide them with windfall profits in compensation for property rights which the condemnor has clearly not taken.

The certified question should be answered in the affirmative and the cause remanded for a new trial in accordance with the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits and separately bound Appendix to Respondent's Brief on the Merits has been furnished by United States mail to JOE EASTHOPE, 150 Southeast 12th Street, Fort Lauderdale, Florida 33316 and THOMAS M. FRVIN, JR., Ervin, Varn, Jacobs, Odom & Kitchen, Attorneys for Petitioners, Post Office Drawer 1170, Tallahassee, Florida 32302 this 14 day of March, 1986.

Donald C. Roberge

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