IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 69,069

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

VIRGINIA S. ROBERTS, et al.,

Respondents.

BRIEF OF RESPONDENTS

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL, FIFTH DISTRICT, STATE OF FLORIDA

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PREFACE

Throughout this Brief, Florida Power & Light Company, the Petitioner/Appellant in this appeal and the Petitioner in the eminent domain trial proceedings below, will be referred to as "FPL." The Defendant-landowners who are Respondents in this appeal are: (1) members of or associated with the Roberts family with respect to Parcels P-1.88, P-4, P-6 and a substation site comprising sixty acres and (2) members of or associated with the Whitehead family with respect to Parcels P-76, P-79.1, P-79.2 and P-79.3. They will be referred to as "Roberts," "Whitehead" and/or "owners." FLORIDA POWER CORPORATION and TAMPA ELECTRIC COMPANY, as Amici Curiae, will be referred to as "FPC" and "TEC," respectively or as Amici.

All references to pages in the transcript of the trial will be designated by the symbol "T." followed by the page number of the transcript. References to the record of the trial court below will be designated by the symbol "R." followed by the page number. References to the transcript of the hearing on fees and costs will be designated by the symbol "F.T." followed by the page number. References to the term "A" refers to the Appendix to this brief.

Florida Power & Light Company v. Roberts, 490 So. 2d 969 (Fla. 5th DCA 1986) is herein referred to as Roberts. The companion decision of the First District Court of Appeal in Florida Power & Light Company v. Jennings, 485 So. 2d 1374 (Fla. 1st DCA 1986) is herein referred to as Jennings.

Statement of the Case

The Statement of the Case and of the Facts, as set forth by FPL in its Initial Brief, is correct. However, because of the Points on Appeal raised by FPL, as well as the Amici, the owners will herewith submit their supplemental Statement of Facts. The point on appeal involves severance damages to the owners' remaining property caused by the taking by FPL of a 280 to 300 foot wide right of way for a 500,000 volt (500 Kv) electric transmission line and the only issue certified by the Fifth District Court of Appeal involves whether or not, and the manner in which, proof as to health effects from said lines may be presented in order to shown a depreciation in value of lands immediately adjacent thereto.

Statement of Facts

POINT I. HIGHEST AND BEST USE

The first point raised by the Petitioner, in which the

District Court of Appeal found no merit, deals with evidence in support of the highest and best use of the Whitehead property.

The Whithead property, being the largest single undeveloped tract adjoining the city limits of Palatka (T.801), lies in a unique geographical location immediately adjacent to the southern city limits and borders the St. Johns River on the south and east (Pl. Exh. 5; Def. Whitehead Exh. 2).

The valuation appraisal witness for FPL, Walter M. Lampe, testified that his opinion of the highest and best use thereof was predicated on his "look" at the property and the surrounding area and was also "based on the existing market within Putnam County and the City of Palatka" (T. 365-368). FPL presented no evidence whatsoever, through the witness Lampe or otherwise, what the "existing market" was in the area to support his opinion.

Richard D. Tarbox, an independent professional land planner since 1971, was produced by Whitehead and testified concerning the highest and best use of the property, both as to physical adaptability and need for residential use within the reasonable foreseeable future (T. 775-865).

Tarbox, with a master's degree in land planning, formerly served as Director of the Regional Planning Council for North-Central Florida with responsibility for setting guide-

lines for the development of the area, all of which involved population and economic studies and analyses (T. 777-778).

Tarbox demonstrated the physical adaptability of the Whitehead land for residential, commercial and development use by means of exhibits showing the nature of the soils (Whitehead Exh. 8; T. 812), which determines how much property is developable and helps establish guidelines as to kinds of development (T. 818). The next exhibit showed the topography and hydrology of the land (Whitehead Exh. 9) to show drainage capability, followed by a vegetation analysis (Whitehead Exh. 10). When combined, these maps showed development compatibility, demonstrating acres most suitable for development (Whitehead Exh. 11) and were followed by a use plan showing some commercial and industrial, with predominate potential residential of lots of five acres or less. (Whitehead Exh. 12; T. 820, 823).

To confirm the above, Tarbox referred to two reports known as The Putnam County Comprehensive Plan, prepared under the direction of the Putnam County Commission (T. 788) and the Palatka 201 Facility Plan, prepared for the City of Palatka for waste water facilities in the Palatka area (T. 798).

The Whitehead property was specifically designated in the Comprehensive Plan for urban use, to wit: "Development which occurs on plats of land of five acres or less" and even up to higher densities (T. 800).

Tarbox testified that the Comprehensive Plan, which covers the planning period from 1977 to 1995 (T. 836), placed the Whitehead property in the "Urban Reserve" and "Protection Areas" and added that if the Plan were updated to date of taking on August 22, 1983, the developable part of Whitehead would be place in the "urban development area" which would mean ready for development as of the date of taking (T. 800).

As a basis for this opinion, Tarbox referred to the Palatka 201 Facility Plan, prepared in 1982. This Plan called for a waste water facility for the Palatka area (T. 798) and provides that the Whitehead property is to be served by the sewage treatment plant (T. 799-800) all of which has been implemented by the City by the purchase of 22 acres for this purpose (T. 879). Also, the land had readily available water and gas from the City of Palatka (T. 1015). Further, the Comprehensive Plan encouraged development in areas served by public water and sewer facilities (T. 790,799).

As to the market need of the Whitehead property for residential development within the reasonable foreseeable future, Tarbox testified that the Comprehensive Plan projects approximately 7,400 additional housing units required by 1995 in Putnam County, outside the City of Palatka, which averages 411 per year, (T. 789) and that Putnam County is growing faster than originally projected, according to the Florida

Statistical Abstract prepared by the Bureau of Economic and Business Research at the University of Florida (T. 793-795).

Tarbox also testified that based on his study, the Whitehead property could be developed for residential use without rezoning, but that if necessary, it could be rezoned for higher density residential, commercial and industrial use as such uses would conform to the Putnam County Comprehensive Plan; that there is a demonstrated need for the development of the property; and that such development would be profitable (T. 849-850; 854; 857-860).

Philip Pickens, valuation appraiser for Whitehead and Roberts also testified as to highest and best use of the Whitehead property. Pickens, Member of the American Institute of Appraisers, former President of the Florida Association of Realtors and former member of the Florida Real Estate Commission, stated that he had independently made many highest and best use studies of undeveloped land and in connection therewith had appraised right of way easements numerous times for Florida Power Corporation and FPL. In fact, he had appraised, for FPL, right of way easements for the subject 500 Kv line in Duval and Nassau Counties (T. 997). He also had authored a paper on power line condemnation, published by the American Right of Way Association (T. 988-997).

Pickens stated that the unique character of the White-

head property was due to the fact that Palatka, as verified by the Geology Department at the University of Florida, is perched on a marine terrace, and that as a result, expansion of Palatka can only be accomplished, because of low land in other directions, in two directions, one of which is through the Whitehead property (T. 1013). In addition, Pickens testified that the property had immediate access to sewage, water and gas and that as of the date of taking, or within the reasonably near future, the property could be readily sold off for residential development, along with some commercial and industrial use near the railroad and sewer plant site (T. 1016). He also stated that notwithstanding the 1977 designation of the property for "urban reserve" in the Comprehensive Plan, the market place "now" dictated that the property could be sold in "forty, fifty, two hundred acre tracts" for development (T. 1016; 1120) all within five years after the date of valuation (T. 1095). In addition, Pickens based his determination of highest and best use on the sales of property for residential use in Country Club Estates and Rolling Hills, immediately adjacent to the Whitehead property, for $30,000-$45,000 per acre (T. 1099).

U. D. Floyd, in stating his opinion as to the highest and best use of the Whitehead property for residential, referred to his independent study of fifteen urban developments in

Putnam County, all of which were substantially sold out (T. 981). He also stated, in researching the number of annual real estate transactions in Putnam County (T. 874), that the market place confirmed the need of the Whithead property for residential development (T. 877).

The proof also showed that lands immediately adjacent to the Whitehead property had been rezoned to higher density residential use. One such parcel was owned in part, by Bill K. Turner, valuation appraiser for FPL, who obtained rezoning from agricultural to multi-family use and thereafter rezoned to single-family residential (T. 1054-1055).

As further pointed out by Pickens, his "investigation indicates that a change in zoning would be absolutely compatible with the remainder of the neighborhood. . ." (T. 1057). He also stated that the "demand for residential land similar to the Whitehead land, [is] indicated by sales in the subdivision" (T. 1056).

POINT II. FEAR OF HEALTH HAZARDS

The evidence of adverse effects of 500 Kv lines, as it relates to the depreciation in value of lands adjacent to said lines, took the form of what the electromagnetic field is and how it is transmitted from the transmission lines; how it is coupled into the human body; the radio and television interfer-

ence; and the interference with mechanical devises such as pacemakers, all of which was testified to by the electrical engineer, Dr. John Dennis Norgard (T. 626-645).

Dr. Nancy Wertheimer, an Epidemiologist, testified about her research and epidemiological studies which demonstrated that constant exposure to electric transmission lines showed there was a relationship between adverse health effects and the electromagnetic field (T. 710, 717).

In addition, evidence was presented by Pickens and Floyd, valuation appraisers for the owner, from actual comparable sale studies along power lines of all sizes, in Clay, Putnam and Hernando Counties, that lands adjacent to transmission lines sold for less than lands some distance away (A. 3-6; Defs.' Exh. 7; T. 897, 919, 1026, 1034-1043). There was also evidence that the public is becoming more aware of health problems associated with transmission lines (T. 909; A. 6).

The witness Norgard, Professor of Electrical Engineering at the Georgia School of Technology for fifteen years, had received Master of Science and Ph.D degrees from the California Institute of Technology and was a postdoctral Fellow for one year at the University of Oslo in Norway. He had worked as an electronics engineer at the Charleston Navy Yard, at the Jet Propulsion Laboratory in Pasadena, California and was involved with the Martian Lander Program, having helped

design the Viking Lander that landed on Mars. In addition, he worked at the Bell Telephone Laboratories and Western Electric Company, involving transmission lines and in addition to teaching the design of electric transmission lines, has been involved in research dealing with electromagnetics which is the study of electric fields and magnetic fields that are emitted from high power electric transmission lines, having written approximately fifty scientific papers dealing with the entire subject (T. 576-581). In addition, he has been involved in research dealing with the coupling of the electric field into the nerve cells of the human body (T. 637-639). His research also includes review of scientific studies dealing with constant exposure to the electromagnetic field such as the increased incidence of heart attacks, mental disturbances, disrupted body temperature cycles, growth rate in animals, reproductive problems, behavioral disorders, blood chemical changes, nervous system changes and higher rates of cancer (T. 644).

Based on the measurement of actual meter readings of the electric field directly under a 500 Kv line and at the edge of the right of way, Norgard expressed the opinion that human habitation should not take place within 424 feet from the center line of the electric transmission lines easement (T. 648), concluding that while the intensity of the electric

field is important, it is that, combined with the duration of the exposure, which accounts for the very long subtle effects that have been missed in previous medical research dealing with this subject (T. 649).

The witness Wertheimer received her Bachelor of Science degree from the University of Michigan and her Master's and Ph.D degrees from Harvard and Radcliffe in experimental psychology, dealing primarily in scientific methodology. Also, she took postdoctoral work in epidemiology at the University of Minnesota (T. 676-677).

Wertheimer defined an epidemiologist as one who studies disease "as it occurs out in the real world" as opposed to experimentalists in the laboratory (T. 678).

Presently associated with the Department of Preventive Medicine at the University of Colorado Medical School as a clinical assistance in research on a non-paying status, she has engaged in two published epidemiological studies. The first was in 1979, entitled "Electrical Wiring Configurations and Childhood Cancer," published by the Johns Hopkins University School of Hygiene and Public Health in the American Journal of Epidemiology (Vol. 109, No. 31919, 1979), and the second was in 1982, entitled "Adult Cancer Related to Electrical Wires Near the Home," published by the Oxford University Press in Great Britain in the International Journal of Epidem-

iology Vol. II, No. 4, 1982). She is also a member of the American College of Epidemiology and the Bio-electromagnetic Society, which is a society of people who study the biological effects of electrical and magnetic fields. Membership in both of these groups is by invitation only (T. 680-681).

Joining Dr. Wertheimer in the aforesaid studies was Ed Leeper, a physicist with a Master's degree from Columbia University, who is now engaged in designing electronic mountain climbing equipment, as well as involvement with Westinghouse and the Illinois Industrial and Technological Research Institute (T. 689-690).

The result of both of the aforesaid studies showed a definite link between electric transmission lines and cancer with both children and adults who live in close proximity to the lines (T. 691-692). This was graphically shown in a chart which demonstrated the major findings of the studies, as well as the kinds of measurements being used to validate that the homes showing a higher rate of cancer had higher magnetic fields (A. 1; T. 693-697).

Wertheimer also demonstrated a chart showing the published epidemiological studies, both in the United States and abroad, dealing with the relationship of cancer to the electromagnetic field (A. 2; T. 703-711) pointing out that until approximately 1980, it was the general consensus in the scien-

tific community that the electric field had no adverse health effect and that most of the prior studies had been funded by the power industry; but that in the last few years there had been "a real explosion of positive results" particularly due to the epidemiological studies which show "conditions as they occur in the real world" as opposed to laboratory experiments (T. 700-701, 712).

Wertheimer also pointed out that the various studies do not show that the electric field causes cancer, but the studies do show that it promotes cancer in that the constant and prolonged exposure to the field makes it harder for the body to fight off cancer (T. 762).

In rebuttal to the above scientific evidence, FPL produced Dr. Morton Miller, Associate Professor of Radiation Biology and Biophysics at the University of Rochester, who had obtained Master's and Doctorate degrees in botany and zoology (T. 1171). Dr. Miller has published a number of scientific papers in the field of radiation biology (T. 1124, 1127) and has studied the effects of high power transmission lines on plant life, the sensitivity of the human eye to electric fields, anatomical effects from exposure to a DC magnetic field, the laboratory design of an animal exposure facility and the use of ultrasound in clinical practice, all of which was restricted to laboratory experiments (T. 1173-1174).

Miller also stated that other than the aforesaid laboratory experiments, his analysis of the effects of the electromagnetic field from high power transmission lines came solely from the literature in the field, having made no epidemiological studies dealing with transmission lines (T. 1177-1178). He also acknowledged statements in his publications to the effect that it is not possible to state categorically that transmission line environment is safe (T. 1180).

Also, Dr. Miller had previously testified as an expert witness concerning this issue for FPL in Florida, for Rochester Electric Company in New York, for Tuscon Electric Power Company in Arizona, for Montana Power Company in Montana, for Philadelphia Electric Company in Pennsylvania and for Pacific Gas and Electric Company, Department of Water and Power for the City of Los Angeles and San Diego Gas and Electric Company, all in California (T. 1171-1172).

POINT III. WITNESS FEE

As with Point I, the District Court of Appeal found no merit on the issues of the witness fee. The points on appeal, raised by FPL however, include the appraisal fee to U. D. Floyd as being excessive.

The record reflects that Floyd not only made appraisals

of the subject Whitehead and Roberts parcels which went to the jury, but that he also made appraisals of thirty-two other parcels involving Roberts and Miller which were settled immediately prior to trial (F.T. 79). The aggregate fee for the Roberts parcels, of which there were a total of nineteen parcels, including the sixty acre substation, was $19,450. The aggregate fee for the Miller parcels, of which there were a total of seventeen parcels, was $18,370 and the aggregate fee for the Whitehead parcels, being four in number, was $20,010. (Defs.' Exhs. 4, 5 and 6; F.T. 81, 82). In addition to a breakdown of actual time spent on the respective appraisals, Floyd also presented a breakdown of the time spent on the power line damage study, (Defs.' Exh. 7, T. 907), and the time reviewing the various appraisals and comparable sales of the appraisals for FPL on which he prepared separate written reports to trial counsel, both at the hearing on the Order of Taking, which strenuously contested the validity of the good faith appraisals (F.T. 31) and at the trial on valuation (F.T. 83, 87). The record reflects that FPL employed a total of four separate valuation appraisers (F.T. 27). Floyd's charge per hour is $65 which the owners are obligated to pay (F.T. 88). In addition to three separate depositions, Floyd was also involved in innumerable conferences with trial counsel, both in Jacksonville and Palatka (F.T. 90).

FPL also has made reference in its Statement of the Case and the Facts to the attorney's fees awarded to counsel for the several Defendant-owners, suggesting that the fee award should be reversed in the event there is a subsequent retrial. However, FPL does not herein appeal the attorney's fee award nor was this issue dealt with by the District Court of Appeal as having any merit. FPL waived any argument in its brief in connection therewith except to cite in its Statement of the Case and of the Facts (F.N. 5) the decision of Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., 476 So. 2d 224 (Fla. 4th DCA 1985).

In view of this reference, the Respondents have no alternative but to, at this point, respond thereto. The record in the subject proceedings reflects that the attorney's fee awarded was not predicated solely on the increase in the award to the owners, but to a substantial degree on the complexity of the issues and the time involved (R. 593-605). Moreover, out of an aggregate of forty parcels, the fee covered thirty-two parcels which were settled immediately prior to trial and on which there can be no retrial even if the judgment on the contested eight parcels is reversed. Based on time alone, the amount per hour, computed by the Trial Judge at $248.87 (F.T. 27) is consistent with the holding of the Fifth District in Florida Power and Light Company v. Flichtbeil, 475 So. 2d 1250

(Fla. 5th DCA 1985) [approving $266.56 per hour], where all the parcels were settled prior to trial and Division of Administration, State of Florida Department of Transportation v. Denmark, 354 So. 2d 100 (Fla. 4th DCA 1978) [approving $340 per hour].

Summary of Argument

Response is made to the arguments of FPL based on the specific points as stated in the Initial Brief of Petitioner.

POINT I. HIGHEST AND BEST USE OF WHITEHEAD PROPERTY

The fair market value of the Whitehead parcels, as to lands taken and damages to the remainder, was expressed by each of the valuation appraisers for Whithead based on the undeveloped condition of the property as of the date of valuation; to wit, August 22, 1983, not as to some date in the future.

The jury was properly allowed to have the testimony of value, as of the date of valuation, based on the highest and best use of the property at the date of valuation or within the reasonable foreseeable future.

While no firm rule exists to govern evidence determining highest and best use, all facts should be considered which would reasonably be given weight in negotiations between a willing seller and a willing buyer. This clearly excludes consideration of purely speculative uses for which the property might be adaptable, but permits consideration of uses for which the land is adaptable and for which it is, or in

reasonable probability would become, available within a reasonable time.

A potential future use of condemned property should be considered, not as the present measure of value, but only to the extent that the prospect of demand for such use would have affected the price a willing buyer would have offered for the property just prior to the taking. The prerequisite to having land valued on the basis of a particular potential use is proof that the use is practicable and that there is a reasonable likelihood that the land will be so used in the future.

In summary, to warrant the admission of testimony as to the value of land for purposes other than that to which it is being put, or to which its use is limited by ordinance at the time of taking, the property owner must shown:

1. That the property is physically adaptable to the other use;

2. That it is reasonably probable that such property can be put to the other use within a reasonable time;

3. That the market value of the property has been enhanced by the other use for which it is adaptable.

The testimony showed clearly that the Whitehead property was physically adaptable to a development use which was the primary purpose of the Tarbox studies. It was also shown by Tarbox that the Putnam County Comprehensive Plan, which

designates the subject property for future urban use, is a guide for future development and can be amended from time to time, as is permitted by law, due to change in circumstances.

Further, there was substantial testimony showing the unique location of the Whitehead property immediately adjacent to the city limits of Palatka, the provision by the City of Palatka for new sewage facilities adjacent to the property, the demand for new housing in the area as reflected by increased population and the fact that lands adjacent to Whitehead had been recently rezoned for residential development. There was a clear showing of market need.

In view of the fact that the electric transmission line easements, taken by FPL, are perpetual in nature, the landowners should be allowed to show the jury how such lines will adversely effect the probable highest and best use of the remaining land.

POINT II. ADVERSE EFFECT DUE TO HEALTH HAZARDS

The record on appeal in these proceedings, is totally different from the situation in the 1963 decision of Casey v. Florida Power Corporation, 157 So. 2d 168 (Fla. 2d DCA 1963). The proof of health hazards in the subject proceedings was not based on unfounded fear, ignorance, conjecture or speculation as was the basis for the holding in Casey. On the contrary,

there was creditable, scientific evidence presented by qualified experts clearly showing a direct relationship between adverse health effects and the electromagnetic field, which is emitted from high power electric transmission lines and that, therefore, lands within three hundred feet of the edge of the right of way easement should not be used for human habitation. Such testimony was not based on fear or ignorance, but from recent, actual and supportable scientific research in the field.

Furthermore, the valuation appraisers for the owners, as would be done in the market place, satisified themselves that the health effects were based on creditable evidence and incorporated this scientific evidence in their respective studies pertaining to severance damages which showed that in the market place, based on power line comparable sale studies, there was clear and convincing proof that lands adjacent to such lines did, in fact, suffer a depreciation in value.

The guaranty of full compensation in eminent domain actions provided by Article X, Section 6 of the Florida Constitution, requires that courts take into account all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken.

POINT III. WITNESS FEE

The witness U. D. Floyd was involved in the subject proceedings from approximately the time the proceedings commenced in April 1983 up to and including the trial as to value in December 1984 during which time he performed services for the three basic family Defendant-ownerships pertaining to the Order of Taking hearing, written valuation appraisals, power line comparable sales research in Putnam County, numerous conferences with trial counsel, depositions and attendance upon the Court at the valuation trial.

Floyd's detailed time sheets of how his time was spent in the subject proceedings demonstrates that the expert witness fee allowed by the trial court is neither excessive or arbitrary.

Argument

Point I

THE TRIAL COURT WAS CORRECT IN ALLOWING THE JURY TO DETERMINE THE HIGHEST AND BEST USE OF THE PROPERTY UPON A SHOWING THAT IT WAS REASONABLY PROBABLE THAT THE PROPERTY COULD BE PUT TO A DIFFERENT USE WITHIN THE FORSEEABLE FUTURE.

This issue raised by the Petitioner before the Fifth District, was found to have no merit by the Appellate Court and was, therefore, not certified for further review by the Court.

The Defendant-owners submit and agree that in the determination of full compensation, as required by Article X, Section 6 of the Florida Constitution, they are relegated to the date of valuation in making this determination which, for Whitehead, was August 22, 1983. §73.071(2), F. S. The testimony as to value, as offered through the valuation witnesses for the owners, as well as the physical condition and marketability of the properties, was as of that date (T. 369, 951, 1047).

The valuation of condemned land does not depend necessarily upon the use to which the owner is devoting the property as of the date of valuation or, for that matter, upon the use to which he expected to devote it. McCandless v.

United States, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936). As pointed out by the United States Court of Appeals in Atlantic Coastline Railroad Company v. United States, 132 F.2d 959 (5th Cir. 1943):

> Evidence as to all such uses may be offered by either side, the jury being the final judge under proper instructions as to what uses it was suitable for, and was most valuable.

The Supreme Court of Florida in State Road Department v. Chicone, 158 So. 2d 753 (Fla. 1963), stated that the whole purpose of, and reason for, the constitutional provision of full compensation is to insure that the property owner will be adequately and fairly compensated in money for that property which is taken from him. The Court therein reiterated the principal that full "compensation is to be determined by equitable principles and that its measure varies with the facts." Orange State Oil Company v. Jacksonville Expressway Authority, 110 So. 2d 686, (Fla. 1st DCA 1959). Also as pointed out by the Supreme Court of Florida in Dade county v. General Water Works Corporation, 267 So. 2d 633, (Fla. 1972), the proper valuation method or methods for any given case are inextricable bound up with the particular circumstances of the case.

FPL cites Yoder v. Sarasota County, 81 So. 2d 219 (Fla. 1955) in support of its position that the owners failed in

their attempt to show the highest and best use of the Whitehead property.

In Yoder, the owner sought to speculate on what could be done to the land or what might be done to it to make it more valuable and then solicited evidence on what it might be worth at the time of such speculative improvement at some unannounced future date. The Court declined to permit such evidence as being too speculative.

In the subject proceedings, the owners valued the property, based on the highest and best use, as of the date of taking, not at some unannounced future date (T. 369, 951, 1047). As pointed out by the Appraiser Pickens, his values were for raw, unimproved land. (T. 1121). In Boynton v. Canal Authority, 265 So. 2d 722 (Fla. 1st DCA 1972), the owner sought to introduce evidence of the highest and best use of raw land to be used for water oriented, recreational development. The trial Court excluded this testimony as being too speculative on the basis of Yoder, supra and Coral Glade Company v. Board of Public Construction, 122 So. 2d 587 (Fla. 1st DCA 1960). The Appellate Court reversed and stated that:

> [t]he testimony sought to be adduced was based on the actual value of the property at the time of the taking if sold for recreational development, its highest and best use. Nothing had to be done to the property in order to enhance its value.

The Appellate Court, in Boynton held that it was perfectly proper to admit proof concerning highest and best use in order to demonstrate to the jury the "present value of the property in terms of what a developer would be willing to pay at the present for the land." The Defendants in the subject proceedings, did not seek, as was done in Yoder and Coral Glade, to show what the property would be worth if developed and then valued as if developed.

Even in Yoder, the Supreme Court confirmed that:

> [i]t is appropriate to show the uses to which the property was or might reasonable be applied and the damages, if any, to adjacent land.

In Swift and Company v. Housing Authority of Plant City, 106 So. 2d 616, (Fla. 2nd DCA 1958), it was held that the owner has the right to introduce testimony to demonstrate a highest and best use different than that to which the land is being put by showing (1) that the property is adaptable to other uses; (2) that it is reasonably probable that it will be put to other uses within a reasonable time; and (3) that the market value of the land has been enhanced by this other use for which it is adaptable.

While no firm rule exists to govern evidence determining highest and best use, all factors would be considered which would reasonably be given weight in negotiations between a willing seller and a willing buyer. This clearly excludes consideration of purely speculative uses for which the property might be adaptable, but permits consideration of uses for which the land is physically adaptable and for which it is, or in reasonable probability, would become available within a reasonable time. Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Company, 100 So. 2d 67, 69 (Fla. 1st DCA 1958). Swift & Company v. Housing Authority of Plant City, supra.

A potential future use of condemned property should be considered, not as the present measure of value, but only to the extent that the prospect of demand for such use would have affected the price a willing buyer would have offered for the property just prior to the taking. The prerequisite to having land valued on the basis of a particular potential use is proof that the use is practicable and that there is a reasonable likelihood that the land will be so used in the reasonably near future. United States v. Cooper, 277 F.2d 857 (5th Cir. 1960). For example, in State Road Department v. Stack, 231, So. 2d 859 (Fla. 1st DCA 1969), in which the highest and

best use of the land was alleged to be for a dirt borrow pit, the Court stated:

> Whether or not there is a reasonable probable use for this property other than timber lands [its current use], will depend upon the proximity of the other borrow pits on said land, the accessibility thereto and the probable need therefore in the foreseeable near future.

At a minimum, the trial judge has a duty to screen the offered potential uses and to allow the jury to consider those which have been demonstrated to be practicable and reasonably probable. Once the landowner has produced credible evidence that a potential use is reasonable, it is for the jury to decide whether the property's suitability for this use enhances its market value, and, if so, by how much. To that extent, the jury decides the highest and best use issue. United States v. 320 acres of Land, More or Less, in Monroe County, Florida, 605 F.2d 762 (5th Cir. 1979). The reasoning behind this rationale is that "adaptability or suitability for nonexisting uses is an inextricable factual element of market value."

For example, consider a hypothetical situation in which the condemnor contends that the highest and best use of property on the edge of a growing town is its existing use, for growing timber. The property owner offers evidence showing

that reasonably practicable and probable alternative uses in the reasonably near future include: subdivision into residential lots or a combination of timber-growing and residential subdivision. If the trial court alone were to decide that any of these alternatives was the highest and best use, he would in effect be deciding the highest and best use. To do that would require a detailed evaluation of the characteristics of the property and its immediate environs, the likely pattern of land use in the area and current and future market demand in the area. In making that decision, the trial court would be deciding in part the very issue of just compensation which is committed to the jury. §73.071, F. S. (1983). As defined in Olson v. United States, 292 U. S. 245, 255, 54 S. Ct. 704, 708 (1934) "just compensation includes all elements of value that inhere in the property . . . [and is] to be arrived at upon just consideration of all the uses for which it is suited."

Therefore, if suitability for a particular use might reasonably affect fair market value, and the owner has met his threshold burden, evidence concerning that use must be admitted for consideration by the jury. It is then for the jury to decide, on the basis of all the evidence admitted and upon proper instructions, whether the property has any additional market value as a result of its suitability for other uses. United States v. 320 Acres of land, supra.

The entire thrust of FPL's position is predicated on the argument that the Tarbox highest and best use study as to the physical adaptability of the property for development use was inadmissible. Such a position overlooks the first requirement set forth in Swift & Company v. Housing Authority of Plant City, supra and State Road Department v. Stack, supra that the owner, in order to show a different use, must show that the property is adaptable for that other use.

FPL reads into the above referred to appellate decisions that a "market study" is required as a condition precedent to establishing a different highest and best use. No such requirement is therein set forth--only that the owner show that it is reasonably probable that the property can be put to the other use within a reasonable time.

Notwithstanding, the owners not only met this test, but likewise demonstrated that a market for the property did exist by showing that:

1. The Whitehead property was designated urban use in the Putnam County Comprehensive Plan (T. 836).

2. The Comprehensive Plan, dated 1977, six years prior to the date of valuation classified the property as "urban reserve" but the Plan is subject to amendments as dictated by changing conditions (T. 800). See §163.3167(1)(b) and (c), F. S. (1983). See also, §163.3191(1), F. S. (1983),

which specifically provides, in part, that "[t]he planning program shall be a continuous and ongoing process." As pointed out by Tarbox, and affirmed by valuation appraiser Pickens, there is no question but that the Comprehensive Plan would be updated to reflect changed conditions and current market conditions which would classify the property for residential development as of the date of taking (T. 800, 1061, 1102).

3. The Palatka 201 Facility Plan which provides for a waste facility to serve the Whitehead property, as well as the availability of municipal gas and water to the property (T. 799-800; 1015).

4. The acquisition by the City of Palatka in 1983 of specific property next to the Whitehead lands for the purpose of implementing the Palatka 201 Facility Plan and the agreement that the Whitehead property would have the right to tap into the system (T. 879).

5. The upward population trend in Putnam County, which is growing faster than projected by the Florida Statistical Abstract (T. 793-795), as well as the analysis of the new building permits in the area showing substantial activity.

6. The fact that because the marine terrace on which the City of Palatka lies, the City can only expand in two directions, one of which is across the Whitehead property which

is the largest single undeveloped tract of land lying immediately adjacent to the city limits, as well as having extensive frontage along the St. Johns River (T. 1013).

7. The recent rezoning of properties adjacent to the Whitehead property for residential development use (T. 1054-1055).

8. The recent development of residential complexes, Country Club Estates and Rolling Hills, both adjacent to the Whitehead property which showed substantial value increases in comparable property and a market demand for said property (T. 895, 1099), as well as the change in the character of the neighborhood (T. 1056).

9. The Comprehensive Plan projects approximately 7,400 additional housing units required by 1995 in Putnam County outside the city limits which averages 411 permits per year (T. 789).

10. The testimony of Pickens, valuation appraiser, based on his own independent highest and best use study, reflecting that the property could be sold off in acreage increments within five years for immediate residential development use and that the market place, as of the date of taking, proved this (T. 1094-1095, 1102).

11. The study by U. D. Floyd, valuation appraiser, of 15 urban developments in Putnam County, all of which had

almost sold out (T. 981, 877), from which he, along with other factual research, arrived at his opinion of highest and best use, independent from that of Tarbox (T. 877).

Clearly, Whitehead went far beyond the requirement of meeting the threshold test of showing a probable different highest and best use within reasonable time. The facts above recited cannot, under any stretch of the imagination, be classified as speculation or conjecture.

It cannot be overlooked that the acquisitions by FPL are for perpetual high power electric transmission lines. Thus, in order to insure the payment of full compensation as required by the Constitution and which includes both land acquired and severance damages, it is essential that the jury be allowed to make a determination of any severance damage on the basis of probable highest and best use. To limit the jury in making this factual determination would be highly prejudicial to the owners.

As pointed out in Honeywell, Inc. v. Trend Coin Company, 449 So. 2d 876 (Fla. 3rd DCA 1984), quoting the Supreme Court of Florida in Buchman v. Seaboard Coastline Railroad Company, 381 So. 2d 229 (Fla. 1980), the method used by an expert appraisal witness is not a matter relating to the competency of his testimony to be ruled upon by the trial judge unless the method used departs from all common sense and rea-

son. Also in Musleh v. Division of Administration, State of Florida Department of Transportation, 299 So. 2d 101 (Fla. 1st DCA 1979), the Appellate Court held that the jury should receive all evidence relevant to the value of the property being taken and that "it is better to let the jury have too much information rather than too little." See also State Road Department v. Thibaut, 190 So. 2d 53 (Fla. 4th DCA 1966). Even where an established market is nonexistent, the process of valuation must comprehend not only one but all of the influencing factors going to make up the intrinsic value of the property. Dade County v. Miami Herald Publishing Company, 285 So. 2d 671 (Fla. 3rd DCA 1973).

In summary, the trial court was correct in letting all pertinent testimony on this issue go to the jury for an evaluation based upon all of the evidence in the case. FPL can show no prejudice in such a procedure.

Point II

A. THE TRIAL COURT AND THE FIFTH DISTRICT COURT OF APPEAL WERE CORRECT IN HOLDING THAT THERE WAS A REASONABLE BASIS FOR THE ADMISSION OF EVIDENCE OF ADVERSE HEALTH EFFECTS AS A FACTOR OR CIRCUMSTANCE, AMONG OTHERS, TO BE CONSIDERED BY THE TRIER OF FACT IN A PROPERTY VALUATION PROCEEDING.

In support of its position that testimony of adverse health effects from high power electric transmission lines should not be submitted to the trier of the fact in connection with the ultimate issue of severance damages, FPL relies on Casey v. Florida Power Corporation, supra.

Casey involved only the testimony of a valuation appraiser to the effect that it was his opinion, without any supporting testimony or evidence whatsoever, that there would be a "general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement" and that "[t]his reluctance would be caused by general appearances of the towers and lines and the apprehension of hazard that the towers and power lines would present." The Appellate Court, in Casey, simply ruled that such testimony is too speculative in that it was based on ignorance and fear.

The controlling question is whether, under the circumstances presented by the record in the subject proceedings,

the opinions of the owners' valuation experts were based upon speculation and conjecture or whether their opinions were based on (1) acknowledged and creditable scientific evidence; (2) knowledge thereof by the buying public; and (3) factually supported power line market studies. In both Jennings and Roberts, the respective Appellate Courts found the latter to be present.

In the subject proceedings, not only was the effect of electric transmission lines on adjacent lands supported by market studies, but the effect was corroborated by trained specialists in their respective disciplines who have carried out scientific studies in the field to support their opinions, thus eliminating the problem of speculation or conjecture as was the situation in Casey. The evidence presented by the owners demonstrated that there is clear and convincing proof that extended exposure to electric transmission lines can adversely effect human life and, as a result thereof, create a depreciation in the value of adjacent lands for residential use. supra.

The decision in Casey, rendered in 1963, is based on the knowledge of the health effects from transmission lines which was known at that time and was, therefore, predicated on "fear" and "apprehension," which falls in the category of speculation and conjecture, especially when such testimony comes

solely from a lay person in the form of a real estate appraiser who offers no proof in support of his opinion. Furthermore, the appraiser in Casey provided no evidence of what the market reflected concerning property adjacent to high power transmission lines.

The record in the subject proceedings amply demonstrates that more than twenty years later, the technology and scientific research concerning these lines has advanced far beyond the "blue corona" era of Casey. As referred to by the highly qualified electrical engineer Norgard (T. 649) and confirmed by the equally qualified epidemiologist Wertheimer, there has been an explosion of positive results within the last few years that there is, in fact, a substantial health problem with high power electric transmission lines (T. 700). The Wertheimer epidemiological studies, performed in the field, not the laboratory, and published in creditable scientific journals which require peer review, indicate that the health effects are not based on "fear," "apprehension," "speculation" or "conjecture," as was the situation in Casey, but on hard scientific evidence which has been accepted by the scientific community (A. 1, 2; T. 693-697; 700-701; 712).

Since the adoption in 1963 by the Second District Court of Appeals of its opinion in Casey, not only has there been a substantial change in the scientific evidence pertaining to

the harmful effects of high power transmission lines, (supra), but the more recent decisions from other jurisdictions concerning this issue indicate that the so-called "majority rule" as stated in Casey, is not the majority rule today and that these more current decisions would clearly tilt the scales in favor of the adoption of the "intermediate" rule espoused by Judge Allen in Casey and adopted by the Fifth District in the subject proceeding, as well as the First District in Jennings.

This is pointed out in the power line decision of Willsey v. Kansas City Power, 631 P.2d 268 (Kan. 1981) where the Court sets forth an in depth analysis of the major appellate decisions on this subject. The Court summarized the three views, referred to in Casey, as follows:

1. Fear of danger from power lines based on pure speculation by an ignorant public can never be an element of damage.

2. While conjectural damages are noncompensable, if the fear is shown to be reasonable (or at least not wholly unreasonable) the loss is compensable.

3. The dangerous nature of power lines is a fact proven by common experience and the impact of public fear of such danger on market value may be shown without independent proof of the reasonableness of that fear.

The United States Sixth Circuit Court of Appeals, with its vast experience in federal condemnation for the Tennessee Valley Authority power lines, acknowledged in United States et al. T.V.A. v. Easement and Right of Way, 405 F.2d 305 (6th Cir. 1968), that in 1968 some studies at that time suggested power line structures to be safe, but stated that:

> We are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the property as they otherwise would.

How can it be said by FPL, that the buying public is not aware of the damages of these lines when, by FPL's own newspaper advertisements and notices, they advise the public of the dangers of these lines (Defs.' Exh. 15, A. 7). In addition, one of the appraisal witnesses also testified "that the public is becoming more cognizant of the fact that [there is] health hazards cause a problem" (T. 909). It seems highly inconsistent for FPL to warn the public repeatedly of the danger with which an instrumentality is fraught, and then say that the public fear of that instrumentality is groundless or does not exist. In Willsey, supra (p. 269), it was a similar advertisement by the utility on which the Court relied in showing that the public, in fact, has knowledge and a justifiable fear of the transmission lines.

The Arizona Appellate Court in the recent electric transmission line case of Selective Resources v. Superior Court of Arizona, et al., 700 P.2d 849 (Ariz. App. 1984), almost identical to the subject proceedings, stated that:

> The condemnee . . . need only establish that the severance or the construction of the improvement in the manner proposed by the condemnor will affect his remaining land in a manner which would diminish its value to a prospective buyer who is informed of the conditions resulting from the severance. Such conditions may affect the suitability of the remaining land for the purposes for which it was used or capable of being used prior to condemnation, or may completely change its highest and best use. In either event, evidence of the changed conditions resulting from the severance or the construction of the improvement in the manner proposed [is] directly relevant to the issue of damages. . .and is also admissible to support the conclusions of valuation experts. (Underlines added).

It is inescapable that the fear of adverse health affects is a factor with which the landowner is confronted in the market place. Why, then, should the condemnor, as FPL and Amici suggest, be allowed to hide behind the cloak of judicial immunity on the pretense that such evidence is "inflamatory," in order to avoid the payment of full compensation?

When considered in light of Section 73.071(3)(b), Florida Statutes, supra, which provides for "any damage to the

remainder caused by the taking" and the Florida rules of evidence, it is obvious that the evidence of health effects is highly relevant and is in no way prejudicial to FPL, particularly when considered in light of the aforesaid comparable sale studies.

The rulings of Jennings and Roberts are totally consistent with the decision of Miller v. State of New York and Power Authority of the State of New York, 458 N.Y.S. 2d 973 (Ct. Claims, 1982), cited by FPL in its brief (Pg. 6). There, the Court was dealing with the hearsay rule concerning the testimony of one Dr. Andrew Marino at a previous PSC hearing. The Court rejected this testimony as hearsay, but said that the owner's case was also deficient for failure to show knowledge of adverse health effects by the buying public, failure to present any scientific expert on the subject and a total absence of any market data in the form of comparable sales, which is a necessary pre-requisite to showing severance damages. In the subject proceedings, each of these deficiencies was met.

When considered in light of the proof submitted, the owners have not only met the evidentiary tests of Casey, but have gone far beyond in showing that all of this evidence has a direct bearing upon the ultimate issue of severance damages. The Fifth District Court was therefore correct in adopting the

so-called "intermediate" view as expressed in Jennings, that:

> Evidence of the existence of fear and its effect on market value may be admitted into evidence as a factor or circumstance to be considered by the trier of fact in a property valuation proceeding, so long as it is shown that the fear has a reasonable basis.

In summary, unless the scientific studies and tests performed by experts are so unreliable and scientifically unacceptable that the opinions of expert witnesses who rely thereon have absolutely no credibility, the trial judge must allow such evidence to go to the jury. Coppolino v. State of Florida, 223 So. 2d 68, (Fla. 2nd DCA 1968). As pointed out in Horowitz v. City of Miami Beach, 420 So. 2d 936, (Fla. 3rd DCA 1982), and long ago adopted by this Court, "Florida constitutional guaranty of full and just compensation in eminent domain actions requires that courts take into account all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken. Behm v. Department of Transportation, 383 So. 2d 216 (Fla. 1980); Jacksonville Expressway Authority v. DuPree, 108 So. 2d 289 (Fla. 1959)."

POINT II

B. THE TRIAL COURT AND THE FIFTH DISTRICT COURT OF APPEAL WERE CORRECT IN HOLDING THAT SO LONG AS THE EVIDENCE HAS A REASONABLE BASIS, ALL FACTS AND CIRCUMSTANCES WHICH BEAR A RELATIONSHIP TO THE LOSS OCCASIONED AN OWNER SHOULD BE ADMITTED FOR JURY CONSIDERATION.

The argument of FPL to the effect that it is not necessary for the owners to present creditable proof of adverse health effects to support their claim of severance damages is a contradictory, spurious argument and at best is a post hoc change of stripes, having heretofore strenuously contended that Casey is the proper rule to follow. This position serves only as an attempt to avoid the reality of what the owner is confronted with in the market place in connection with a portion of his remaining property. It has long been established that the jury, in a condemnation action, must be put in the same position as a willing seller--willing buyer, each having full knowledge of all facts and circumstances which bear on the issue of full compensation. Gwathney v. United States, 215 F.2d 148 (5th DCA 1954); Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, supra.

The First District, in Jennings, pointed out that:

> Florida's constitutional guaranty of full and just compensation in eminent domain actions requires the courts to take into account "all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken." Behm v. Division of Administration, Department of Transportation, 388 So. 2d 216, 218 (Fla. 1980); Dade County v. General Waterworks Corporation, 267 So. 2d 633 (Fla. 1972); Jacksonville Expressway Authority v. Henry G. DuPree Company, 108 So. 2d 289 (Fla. 1958); Orange State Oil Company v. Jacksonville Expressway Authority, 110 So. 2d 687 (Fla. 1st DCA 1959).

In effect, FPL suggests that this Court should now adopt the so-called "minority rule" concerning adverse health effects in power line cases, as set forth in Casey, which only requires a simple showing that fear affects market value. The question logically arises as to why the owners in the subject proceedings should suffer a reversal of the final judgment, having "gone the extra mile" in presenting competent evidence to meet both the tests of the "majority rule" and the "intermediate rule," as set forth in Casey.

This specific point was made in Willsey, supra. The Kansas Court of Appeals stated that while it preferred the "misnamed 'minority rule'," it was not necessary to adopt it because the facts in that proceeding met "the test of the 'intermediate' rule, which we believe is the most stringent rule which can justifiably be applied against the landowner."

The Willsey Court also pointed out that:

> If the requirement of reasonableness is to be made, we prefer the formulation in Heddin v. Delhi Gas Pipeline Company, 522 S.W.2d 886, 888 (Tex. Civ. App. 1975):
>
> > It is clear that compensation for land taken by eminent domain is measured by the market value of the land at the time of the taking. [Citations omitted] It is equally clear that fear in the minds of the buying public on the date of taking is relevant to the proof of damages when the following elements appear:
> >
> > 1. That there is a basis in reason or experience for the fear;
> > 2. That such fear enters into the calculations of persons who deal in the buying and selling of similar property; and
> > 3. Depreciation of market value because of the existence of such fear. [Citations omitted]
> >
> > To establish that there is a basis in reason or experience for the fear, it is incumbent upon the landowners to show either an actual danger forming the basis of such fear or that the fear is reasonable, whether or not based upon actual experience. Reduction in market value due to fear of an unfounded danger is not recoverable. [Citations omitted] This rule is designed to exclude consideration only of those few situations in which the danger underlying the fear finds its basis in neither reason nor experience but is predicated rather on fancy, delusion or imagination. (Some emphasis added, some original).

The above is precisely what the Fifth District (and the First District in Jennings) held in the subject proceedings. Further, this test comports with existing Florida law dealing with the subject of severance damages in eminent domain. Behm, supra.

It is likewise established that, in the determination of severance damages, consideration may be given to all conceivable uses to which the property taken could be put by the condemnor. 5 Nichols, Eminent Domain §16.1 (rev. 3rd ed. 1981). Any matter in explanation of the way in which the public project is to be constructed, being evidentiary in nature, is admissible to explain the manner in which the property acquired will be utilized. Central and South 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); Division of Administration, State of Florida Department of Transportation v. Decker, 408 So. 2d 1056 (Fla. 2nd DCA 1981); Division of Administration, State of Florida Department of Transportation v. St. Regis Paper Company, 402 So. 2d 1207 (Fla. 1st DCA 1981).

This Court, in Belvedere Development Corporation v. Department of Transportation, Division of Administration, 476 So. 2d 649 (Fla. 1985) recently re-affirmed the basic principle set forth by the Court 54 years ago in Doty v. City of

Jacksonville, 142 So. 2d 599 (Fla. 1932), where it was stated that the purpose of allowing evidence of the use to which the property taken is to be put is because it "would have some bearing on the extent and amount of the damage, if any, which would be done to that portion of Defendant's property which would be left after the condemnation proceeding." This principle is also consistent with the Court's decision of State of Florida, Department of Transportation v. Stubbs, 285 So. 2d 1 (Fla. 1973) wherein it was held that use of the property taken for a limited access highway supported a claim for severance damage to the remainder where there was adequate proof of a substantial impairment of access.

Thus, the use of the property taken in the subject proceedings for a 500,000 volt electric transmission line and the effect which such a line has on remaining property in the form of adverse health effects is not remote or collateral to the issue of severance damages, but has a direct bearing on that issue.

§73.071(3)(b), F. S., dealing with severance damages, provides and calls for the recovery by the owner of "any damage caused to the remainder by the taking." (Underline added). This provision does not limit severance damages to damages sustained by the severance of the land only, without consideration of the use to which the part taken is to be put

and the manner in which this use impacts the remainder. At no place in this statutory provision is there such a limitation.

As pointed out in Daniels v. State Road Department, 170 So. 2d 846 (Fla. 1964), the declaration of policy of the Legislature with regard to compensation, while not conclusive or binding, is persuasive and will be upheld unless clearly contrary to the judicial view of the matter. This Court also noted that the Legislature may "impose upon itself, and upon those to whom it delegates the right of eminent domain, an obligation to pay more than what the courts might consider just compensation." The words "any damage," as set forth in §73.071(3)(b), F. S., supra, must therefore, have some significance particularly with a private corporation having the power of condemnation, such as FPL and Amici which, as stated in Daniels, may be treated differently than a public body.

Furthermore, §73,071(4), F. S., also provides for a set-off of enhancement, against severance damages allowed by §73.071(3)(b), F. S., supra, where the enhancement is "by reason of the construction or improvement made or contemplated by the Petitioner." Thus, if the "use" by the condemnor may be considered by the jury in determining whether there should be an offset against severance, then it would be patently unfair not to allow the jury to consider the "use" by the condemnor in the determination of severance damages in the first place.

This Court's holding in Kendry v. Division of Administration, State of Florida Department of Transportation, 366 So. 2d 391 (Fla. 1978) is entirely consistent with this reasoning, involving the interpretation of §73.071(3)(b), F. S. and the rulings in both Jennings and Roberts, stating that severance damages may be recovered "upon sufficient proof" that they were caused by the taking. In Kendry, the increase in elevation of the new highway (the use) and the effect of this elevation on the remainder was the basis for the alleged severance on which this Court ruled the owners had a right to submit proof.

The thrust of the argument of FPL, as well as the Amici, is that the damages sought by the Defendants constitute consequential damages.

As pointed out above, the damage to the remaining property of the owners is as a direct result of the taking by FPL and the use to which the property has been put. Under the Statement of Facts, as present in the subject proceedings where there was an actual taking of the owners' land, the damages sought can in no way be characterized as consequential. Adverse health effects have been shown to be real, not imaginary or speculative, and have been manifested in the market place.

Amici cites Northcutt v. State Road Department, 209 So. 2d 710 (Fla. 3rd DCA 1968), as support for their position that such damages are consequential and, therefore, not recoverable. This was a proceeding where there was no taking whatsoever from the owner who brought an inverse condemnation action for alleged damages created by noise and vibration emanating from a nearby road, no part of which was built on the owner's property. In Northcutt, the Court, in holding that such a damage is consequential, pointed out that:

> [i]n Florida, in order for the 'taking' or 'appropriation' of private property for public use, under the power of eminent domain, to be compensable, there must generally be a 'trespass or physical invasion.' Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L.R.A. 370 (1891) and Weir v. Palm Beach County, Florida, 1956, 85 So. 2d 865."

As pointed out in Weir v. Palm Beach County, Florida, 85 So. 2d 865 (Fla. 1956), cited in Northcutt, "if the damage is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque injuria . . ." The owners here do not fall within the category of Northcutt or Weir as there was, in fact, an actual taking or "physical invasion" by the power lines. As pointed out in 4 Nichols, Eminent Domain, §14[1] (rev. 3rd ed. 1981), in distinguishing consequential damages, severance damages may

be recovered if there is a physical invasion. The owners in the subject proceeding clearly meet this test.

In the same context, Amici cite Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th DCA 1977) and Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., 476 So. 2d 224 (Fla. 4th DCA 1985). While there was an actual taking in each of these cases, the Fourth District held that severance damages caused by noise and exposure to the highway of a city park in Garden Club and a golf course in Frenchman were, under the facts in each case, not justified.

In Garden Club, the Court simply ruled that the noise from the highway was insufficient to affect the highest and best use as a park, particularly when the park was already surrounded by an airport, railroad and other major highway arteries and the further fact that the City officials were guilty of some degree of estoppel where it was shown that they had actively urged the location of the subject highway next to the park.

Likewise, in Frenchman, dealing solely with a cost to cure problem, the Court ruled that increased traffic visibility and noise, fumes and dust, where only a part of an existing buffer for a golf course was taken, did not constitute

compensable severance damages justifying a cost to cure, where the golf course remains entirely playable after the taking. Also, the Court acknowledged that depreciation in value of remaining property from noise, etc. could be recoverable where the remainder use was something other than a golf course, stating that the legal effect in such a situation would be different.

The subject property does not fall within either of the unique categories of Garden Club or Frenchman, especially where the proof of adverse health effects from high power transmission lines dealt with residential property. Further, there was a total absence of market data to show a depreciation in value in each of those cases. Quite the opposite was present in the subject proceeding. There was ample proof covering market studies of identical property, both before and after the taking, showing a depreciation in market value of remaining property after the taking, caused in substantial part by the adverse health effects of a 500,000 volt transmission line.

Accordingly, because of the substantially different facts involved, the decisions of Northcutt, Garden Club and Frenchman have no bearing on the basic issue in the subject proceedings. The application of these decisions to the issue here is illusory, to say the least.

In Division of Administration, State of Florida Department of Transportation v. Samter, 393 So. 2d 1142 (Fla. 3rd DCA 1981), the Court pointed out that in the field of eminent domain, as well as in every other, "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning." Accordingly, adverse health effects have to be a necessary part of the chain of "underlying reasoning" and are "circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken." As pointed out in Jennings and Roberts, it is proper (and necessary) in order to demonstrate severance damages to show the scientific reasoning behind the fear which causes the depreciation in the value of remaining property--so long as it has a reasonable basis. As such, it is improper to characterize such evidence as inflamatory, prejudicial or collateral to the basic issue of full compensation. Clearly, as shown by the evidence in the subject proceedings, the seller and the buyer in the market place would have knowledge of such adverse health effect. Why, then, should the jury be prevented, in determining severance damages, from considering the same evidence if it is shown to have a reasonable basis?

POINT III

THE AWARD OF THE APPRAISAL FEE TO U. D. FLOYD WAS REASONABLE AND PROPER

This issue, raised by the Petitioner before the Fifth District, was found to have no merit by the Appellate Court and was, therefore, not certified for further review by this Court.

In Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950) the Supreme Court stated that the Defendant-owners, in defending a condemnation proceedings, are entitled to be placed upon an "equal footing" with the Condemnor in the utilization of expert witnesses and other costs. In quoting from the order of the Circuit Court, the Supreme Court affirmed, in toto, the following language:

> The Courts should not be blind to the realties of the condemnation process. Any excuse which the Court might have for disclaiming knowledge of just what goes on, is entirely removed by the fact that the Court itself views the trial and proceedings and has personal knowledge of all such matters. The Court sees that the County is armed with engineering testimony, engineering data, charts and drawings prepared by expert draftsmen.
>
> The Court sees that the County produces appraisers, expert witnesses relating to value, usually more than one in number, whose elaborate statement of their qualifi-

> cations, training, experience and clientele indicate a painstaking and elaborate appraisal by them calling for an expenditure by the County of fees to such experts and appraisers which are commensurate therewith, and customary for like service of such persons. A lay defendant whose property is to be taken is called upon to defend against such preparation and expert testimony of the County. It is unreasonable to say that such a defendant must suffer a disadvantage of being unable to meet this array of able, expert evidence, unless he shall pay for same out of his own pocket.

Grinaker v. Pinellas County, 328 So. 2d 880, (Fla. 2nd DCA 1976) held that it was an abuse of discretion for the Circuit Court not to allow "full" reasonable fees for each of the appraisal experts and that to do otherwise would deprive the owner from receiving "full compensation" as required by the Constitution. As pointed out in Florida East Coast Railway Company v. Martin County, 171 So. 2d 873 (Fla. 1965), the owner "should be accorded the right to meet the condemning authority upon an equal footing without loss to himself."

In the subject proceedings, there were four basic issues which were vigorously contested by the parties:

1. Validity of appraisals made for FPL as a basis for the Order of Taking.

2. The highest and best use of the subject lands.

3. The adverse effect of high power transmission lines or adjacent property.

4. The value of lands taken and severance damages to remainder.

In connection with these issues, FPL utilized four separate valuation appraisers (F.T. 27; R. 593-605).

Accordingly, the decision in Florida Power and Light Company v. Flichtbeil, et al., 475 So. 2d 1250 (Fla. 5th DCA 1985), dealing with the appraisal fee of U. D. Floyd, should not be applicable here as the services rendered by Floyd in the subject proceedings were substantially greater and different than in Flichtbeil.

The time records of Floyd (Defs.' Exhs. 4, 5 and 6; F.T. 81, 82) reflect that from the very beginning of this litigation in April 1982, he played a major role. FPL had originally obtained valuations from three separate appraisers (F.T. 27). The Floyd records reflect that he performed substantial services reviewing the FPL appraisals (F.T. 83), that as a result thereof, meritorious questions were raised by the owners as to whether the FPL appraisals were valid which met the test of §74.031, F. S. After a three day trial solely on the propriety of the entry of an Order of Taking, the trial court ultimately entered the Order (R. 15-17). However, the Court pointed out that because "the appraisals by the power company were dismantled piece by piece either by the attorneys or by someone on behalf of the landowners, . . ." "I came very close

to denying the Order of Taking" (F.T. 32). The Appraiser Pickens was not involved in this phase of these proceedings.

In addition, the Putnam County power line study (Defs.' Exh. 7, T. 907) prepared solely by Floyd in which Pickens played no part and to which FPL offered no objection took considerable time and was the only power line study available in Putnam County.

Further, in contrast to Flichtbeil, the subject proceedings were strenuously contested, not only as to the Order of Taking, but in the valuation trial. While some of the parcels appraised by Floyd were settled several days prior to trial, the contested issues on highest and best use and severance damages were thoroughly investigated by Floyd, all of which played a major role in the presentation of the owner's defense as to value.

This Court can property take judicial notice of the fact that a seven day trial, as to value alone, is but the "tip of the iceberg" in vigorously contested complicated litigation involving numerous expert witnesses. The time sheets of Floyd clearly bear this out.

In the 1975 decision of Division of Administration, State of Florida Department of Transportation v. Condominium International, Inc., 317 So. 2d 809 (Fla. 3rd DCA 1975), the Court approved, under strikingly similar circumstances a total

of $62,572.75 as reasonable appraisal fees, stating that "[t]he trial itself involved complex appraisal problems, as well as substantial and unique questions of law."

In view of the amounts involved, the complexity of the issues and the necessary factual research, the trial court did not abuse its discretion in setting the Floyd fee and the Fifth District was correct in finding no merit as to this issue.

The Defendant-owners concede that the Court must carefully scrutinize the reasonableness of the costs incurred for experts; however, in light of the basic principle that the owner is entitled to be placed on an equal footing with the condemnor, the benefits achieved for the owners, the complexity of the factual issues, the obvious preparation of Floyd, it is clear that the charges made by Floyd for services rendered are fair and reasonable.

In summary, FPL cannot logically "contend that such high priced evidentiary items are not a part of the costs of the proceedings when they themselves by presentation of the same in their case, [with four valuation appraisers] make them a part of the proceedings in their behalf." Dade County v. Brigham, supra.

Conclusion

The evidence adduced in these proceedings was clearly sufficient to allow the jury to consider the issue of severance damages with facts that would reasonably be given weight in negotiations between a willing seller and a willing buyer. The owners, in presenting their case with creditable testimony on this point more than met their burden of proof as required by Casey.

Further, the evidence of adverse health effects, presented by the witnesses Norgard and Wertheimer, cannot logically be classified as based on unfounded fear, ignorance or conjecture, as was present in Casey, but was the result of current, actual, supportable and acknowledged scientific research in the field. Such being the case, the testimony of adverse health effects cannot, under any stretch of the imagination, be considered as inflamatory. In addition, the owners went a step further by presenting comparable sale power line studies of identical lands to demonstrate that the market place has, and is, giving consideration to these adverse effects.

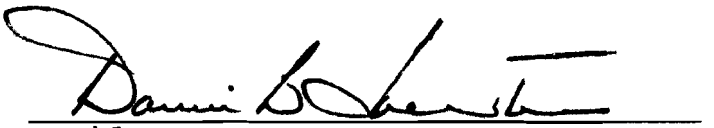
Certainly, if the test of full compensation is what information the willing-seller-willing buyer would consider in negotiation with all the facts at hand, it is elementary that

the jury should be afforded the same information. As our Appellate Courts have repeatedly said, it is generally better to let the jury have too much information rather than too little.

No prejudice has been shown to have been imposed on FPL in these proceedings and the decision of the Fifth District should, accordingly, be affirmed.

Respectfully submitted,

DAVID W. FOERSTER, P. A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to H. REX OWEN, ESQUIRE, Post Office Drawer "O," St. Petersburg, Florida 32731, HARRY A. EVERTZ, ESQUIRE, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733, SHEILA McDEVITT, ESQUIRE, Tampa Electric Company, Post Office Box TE, Tampa, Florida 33601 and BARRY R. DAVIDSON, ESQUIRE, 4000 Southeast Financial Center, Miami, Florida 33131-2398 by U. S. Mail this 29th day of September, 1986.

Attorney