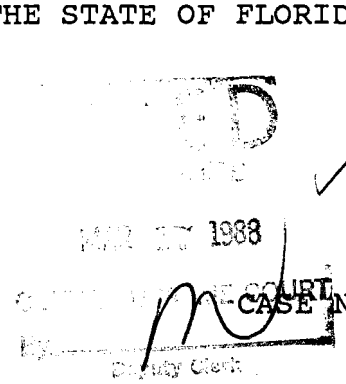
IN THE SUPREME COURT OF
THE STATE OF FLORIDA



TEXACO, INC.,

Petitioner,

v.

CASE NO. 71,914

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER TEXACO, INC.

(ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT)

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CITATION OF AUTHORITIES

STATEMENT OF CASE AND FACTS

The appeal in this cause arises from a taking in eminent domain in which the Department of Transportation acquired a substantial portion of the property located at the corner of U.S. 19 (S.R. 55) and Lake Street, in Tarpon Springs, Florida. The taking was designated as Parcel 105 (R:1-9) and caused the closing of the station in September, 1986. (R:218-219; 235).

Located upon the property was a Texaco service station. The general layout of the station and other improvements are reflected on the sketch found on the following page. The property has been leased by Texaco since September, 1971. The initial term of the lease was for 15 years, but contained an option for renewal of an additional 15 years. (R:135; 214). Under the lease agreement, Texaco was responsible for the payment of all general real estate taxes assessed on the land or improvements. (R:135).

Texaco constructed all of the service station improvements at the site including the building, pump islands, asphalt drives, curbs, and any concrete approaches. Texaco also provided, at the site, all of the improvements such as lighting, gasoline pumps, three 8,000 gallon underground tanks, automobile lift, air compressors, power lubricating units, waste oil tanks, and station signs. (R:135).

Also as part of its lease, Texaco was to "indemnify and save the lessor harmless" from all "liabilities, damages, or judgments" occasioned by the negligent use of the site by Texaco, its assigns, or successors. (R:135). Texaco carried its own liability insurance coverage for accidents that might occur on the site. (R:220)

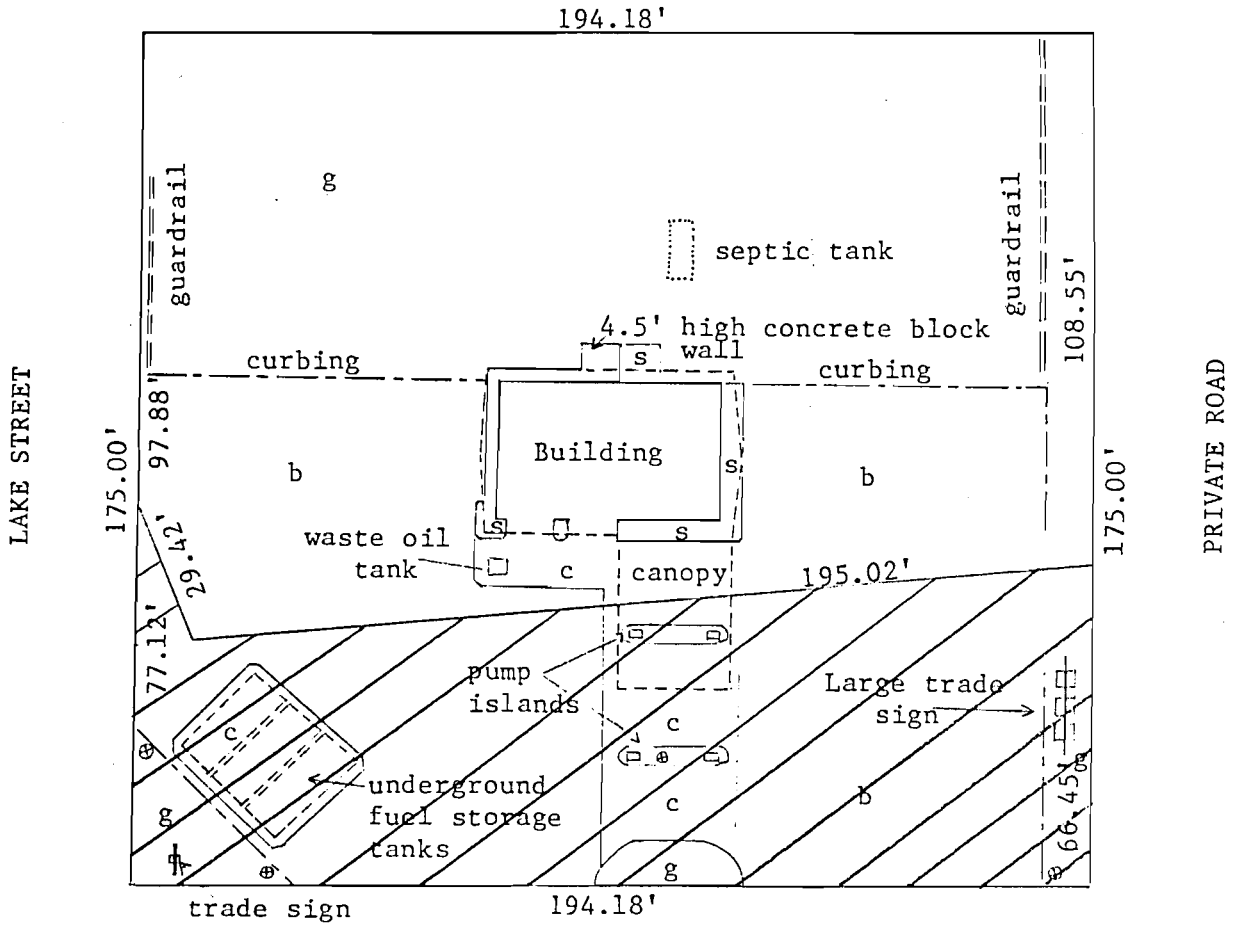
PROPERTY SKETCH

(Texaco - Parcel 105.1)

Parent Tract	33,982 SF (0.780 Ac)	
Taking	11,387 SF (0.261 Ac)	
Remainder	22,595 SF (0.519 Ac)	

Notes: Scale 1" = 40'
⊕ = light
s = sidewalk
c = concrete paving
b = blacktop paving
g = landscaped or sodded area

The crosshatched area indicates the taking.



U. S. HIGHWAY 19 (S.R. 55)

At the time of the taking, Texaco was engaged in the business of selling petroleum products to the motoring public. At some station locations it sold these products through employees, and at other locations through a dealer. (R:210). At this particular site, Texaco marketed its products through a dealer, Stephen Magyer. (R:212).

Several agreements were executed by Texaco and the dealer which governed how business was to be conducted on the site. (R:212; 214). Texaco and the dealer first entered into the agreements on April 10, 1980 and they were renewed on June 28, 1983. (R:135).

Under the sub-lease agreement, the dealer was to use the premises as a service station and upon expiration of the agreement, the dealer was required to return all buildings, improvements, fixtures, tools, and equipment to Texaco. The dealer could sell only Texaco brand of motor fuel. (R:135). Additional agreements between Texaco and the dealer specified further requirements for operation of the station in accordance with Texaco standards and included everything from painting to plumbing; lighting to landscaping; and tanks to toilet paper. (R:135).

Texaco regularly inspected the premises to insure compliance by the dealer. This inspection was performed by a Texaco employee who also worked with the dealer with regard to business operation and improving business. (R:215). Texaco retained the right to enter the premises to make changes, additions, and repairs in connection with the buildings, fixtures, or equipment located at the site. (R:135). Texaco retained control over maintenance of the service station equipment located at the site including pumping equipment,

gasoline dispensers, hoists, air compressors and other trade fixtures owned by Texaco. (R:214-215)

Texaco delivered its petroleum products to the site and stored it in Texaco's underground tanks. (R:215-216). Under the agreements relating to the petroleum products, Texaco maintained strict requirements to insure the quality and integrity of the product while at the site. (R:215). Texaco had the right to enter the premises at any time to obtain samples or conduct tests to insure that the dealer was complying with its obligations under the agreement. (R:135; 215).

Texaco required the dealer to keep inventory control records, including daily "stick" readings and daily pump meter readings to insure that the underground tanks were not leaking. (R:135). Texaco also directed the dealer to maintain continuous operation of the cathodic protection system installed by Texaco. Use of the system prevented corrosion in the underground tanks and was installed as a safeguard against leaks. (R:135).

Pursuant to one agreement, Texaco licensed the use of its trade name, trademarks and brand-names in connection with the sale of its products at the site. Texaco retained sole discretion in determining how the products were to be displayed and advertised. (R:135).

Under the agreements, non-compliance by the dealer with any of the obligations could result in the termination of all the agreements relating to the station. (R:135; 228)

Texaco provided other services to the dealer to assist in the marketing of petroleum products at the site. These included

advertising, identification signs, the expertise of a marketing representative, and the expertise of "specialty" people who advised the dealer in regard to automotive problems. (R:217). In addition to the above, Texaco assisted the dealer in marketing petroleum products from the site by authorizing the dealer to accept Texaco Travel cards at the service station. (R:135; 217).

While Texaco and the dealer had no commonly-held assets (R:220), Texaco was authorized to initiate debit entries in the dealer's checking account. (R:135). The amount paid by the dealer to Texaco under the sub-lease agreement was fixed and was not tied to the amount of gasoline sold. (R:221).

Texaco had the responsibility of collecting and remitting the sales tax for the petroleum products sold at the site. (R:222; 229).

The Texaco representative who testified before the trial judge below explained the difference in how Texaco derived its profits from the sale of petroleum products at different station sites. Where a salaried employee is used at a station site, the profit derived from the sale of petroleum products at that site is not shared with anyone. (R:211). The profit earned would be the difference between the pump price (posted price) and the marketer price (bulk plant price). Where products are sold through a dealer, then the dealer shares in the profit. Texaco sells to the dealer at what is called the "retailer price" and the dealer then sells to the public at the pump (posted) price. (R:211). Texaco's profit is the difference between the marketer (bulk plant) price and the retailer price, that is the price the dealer pays. The dealer's profit is

the difference between the retailer's price and the pump (posted) price. (R:216-217).

Through its expert accounting witness (R:232), Texaco established that its business damages, caused by the taking, would be $217,868.00. (R:232; 236). In arriving at this opinion, the witness examined gasoline sales from January, 1981 through September, 1986, which is when the station was closed. (R:233; 235). The accountant also examined Texaco's depreciation schedules for the improvements located on the site; real estate costs and taxes; and Texaco's maintenance costs for the site. (R:233-235).

The Department and Texaco stipulated that "if the evidence presented adequately established the predicate under F.S. 73.071(3)(b) for the recovery of business damages by Texaco, the agreed compensation for those damages will be in the amount of ONE HUNDRED SEVENTY THOUSAND AND NO/100 ($170,000.00) DOLLARS." (R:191-193) (A:75-77)

On appeal from the Final Judgment (R:202), the District Court reversed the lower court's final judgment which awarded business damages to Texaco. (A:1-4). The basis of the district court's opinion was its conclusion that Texaco was engaging in a "wholesale" business which was not located on the property. The court also denied the owner's claim that the distinction drawn by the Department resulted in a denial of equal protection under the law.

QUESTION CERTIFIED

The District Court then certified the following question to this Court as one of great public importance.

IS A LESSEE OF PROPERTY PARTIALLY TAKEN BY EMINENT DOMAIN ENTITLED TO BUSINESS DAMAGES PURSUANT TO SECTION 73.071(3)(b), FLORIDA STATUES (1985), WHEN THE LESSEE IS A WHOLESALE SUPPLIER OF PRODUCTS TO A SUBLESSEE WHO OPERATES A RETAIL BUSINESS ON THE PROPERTY AND THE LESSEE ASSISTS ITS SUBLESSEE IN THAT RETAIL BUSINESS BY, FOR EXAMPLE, HAVING CONSTRUCTED THE BUILDING AND OTHER PHYSICAL IMPROVEMENTS USED BY THE RETAIL BUSINESS, ALLOWING THE BUSINESS TO BE OPERATED UNDER THE LESSEE'S NATIONALLY RECOGNIZED COMPANY NAME WITH LESSEE'S SIGNS AND TO USE THE LESSEE'S CREDIT CARD SERVICES, CONDUCTING SITE INSPECTIONS AT THE BUSINESS TO ENSURE COMPLIANCE WITH THE LESSEE'S STANDARDS, AND PAYING THE REAL ESTATE TAXES ON THE PROPERTY? (A:3-4)

SUMMARY OF ARGUMENT

The trial court was correct in deciding factually and legally that Texaco was doing business at the Texaco service station, which is the subject of the instant condemnation action. This evidence included: Texaco's use of the site as a service station for 15 years, with another 15 years remaining on the lease; Texaco's extensive control over the operation of the service station at the site; Texaco constructed all of the improvements and supplied the equipment necessary for operation of a service station; the only petroleum products that could be sold at the site were Texaco's; Texaco provided its tradename, signs and credit cards for use at the site; non-compliance with any of the Texaco operation standards or requirements would result in the loss of the right to act as Texaco's dealer at the site; Texaco paid all real estate taxes on

the proprety and was responsible for collecting and remitting all sales taxes from the sale of fuel at the site.

Texaco not only had a "business" on site, which was destroyed by the DOT, but also had a "physical existence" on the condemned land and its adjoining remainder.

To deny compensation via the business damage statute on the grounds offered by the DOT would create an absurd result and be a clear denial of equal protection of the laws.

The use of the wholesale vs. retail comparison alone, in order to resolve the question of entitlement to business damages under Sec. 73.071(3)(b), Fla. Stat., denies the consideration of any factual evidence which would establish that a claimant is conducting "business" at the site or that the business location was a valuable asset to the claimant.

The use of the wholesale vs. retail comparison is contrary to the legislative intent in that: (1) no such distinction can be gleaned from the language used in the business damage statute, and (2) no determination can be made as to whether the claimant has a substantial business interest in the location.

The certified question should be answered in the affirmative, the decision of the above district court quashed, and the judgment awarding damages to Texaco should be reinstated.

PRELIMINARY CONSIDERATIONS

The issue of Texaco's entitlement to business damages was submitted by the DOT and the owner to the trial court for resolution. (R:191-193; 202-203). Upon consideration of the

testimony presented, arguments of counsel and the memoranda of law submitted (which included copies of the leases and other agreements between Texaco and the sub-lessee), the trial court found that Texaco was entitled to claim business damages under Sec. 73.071(3)(b), Fla. Stat. (1985) for lost profits due to the taking at the service station site. (R:202-203).

The owner, Texaco, was the only party to present evidence on the issue before the court. This included the testimony of a Texaco representative, (R:209-230) the testimony of a certified public accountant, (R:230-239) and several documents, all of which were entered without objection. (R:208; 209; 212-214; 239). No rebuttal testimony or documentary evidence was offered by the DOT.

The question before the trial court was one of fact and application of those facts to the statutory criteria relating to business damages. The decision of the lower tribunal should not be reversed unless (1) it can be concluded that the record is totally without evidence to support the lower court's conclusion, or (2) if it could be concluded that the trial court abused its discretion. Neither reason can serve as a basis for overturning the trial court's order in this cause. The evidence of Texaco's "business" activity on the site was more than substantial. Thus, the district Court erred when it essentially reweighed the evidence submitted to the trial court and arrived at its own conclusion in the matter.

THE STATUTORY PROVISION

Sec. 73.071, Fla. Stat. outlines the "compensation" that is to be paid in an eminent domain proceeding. Specifically Sec. 73.071(3) provides:

> (3) The jury shall determine solely the amount of compensation to be paid, which compensation shall included:
> (a) The value of the property sought to be appropriated;
> (b) Where less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, county, municipality, board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recovery such special damages shall set forth in his written defenses the nature and extent of such damages . . .

Under the provision, there are basically four criteria to be met:

(1) The action must be brought by the Department of Transportation, a county, municipality, board, district or other public body;

(2) the taking must be for right-of-way;

(3) less than the entire property taken;

(4) the taking must damage or destroy an established business:

- of more than 5 years standing
- owned by the party whose land is being taken;
- located upon adjoining lands owned or held by such party.

In the proceedings below, DOT argued that Texaco's business damage claim should be denied because it "does not own a business on Parcel 105. (R:61-62). It was on this basis that the district Court denied Texaco's claim, overruling the trial court's determination of this issue.

The resolution of the issue presented in this cause is simply one of defining the meaning of the term "business" as used in the statute. Once the term is defined, then it is merely a question of applying it to the facts of this cause to determine if the trial court correctly ruled based of the evidence before it.

BUSINESS DEFINED

Sec. 73.071(3)(b), Fla. Stat., uses the term "business" only one time. Whatever the meaning given to the term would, logically, be applied to all of the criteria listed.

The term "business," as used in the statute, has been specifically defined on two separate occasions by the courts when confronted with the issue of what is an "established business." In both cases, the definition announced was the same:

> Business, . . . does not, generally speaking, mean property. It means the activity, the energy, the capacity, the opportunities by which

> results are reached - a condition rather than fixed tangible objects from conditions arise. (citation omitted) On the other hand, a place of business is simply a location where business is transacted. (Emphasis supplied).

Division of Administration, State of Florida DOT v. Lake of the Woods, Inc., 404 So.2d 186, 188 (Fla 4th DCA 1981) (A:70-72); Hodges v. Division of Administration, State of Florida DOT, 323 So.2d 275, 277 (Fla. 2nd DCA 1975).

Considering the above definition, the evidence weighed by the trial court overwhelmingly supports the trial court's conclusion that Texaco was conducting an established business on the site.

- Who chose the site for a service station over 15 years ago? Texaco!

- By whose plans and specifications was the site improved for use as a service station? Texaco !

- Who constructed all of those improvements and installed the necessary equipment so that the site could function as a service station? Texaco!

- Who took the risk of a 15 year lease of the site, with options to renew for another 15 years? Texaco!

- Who specified, to minute detail, the standards of the service station site with regard to appearance, cleanliness, and servicibility of the equipment? Texaco!

- Who maintained regular on-site inspections to insure compliance with the above? Texaco!

- Who specified, again to minute detail, the standards relating to the sale and storage of the petroleum products sold at the site? Texaco!

- Who maintained regular on-site inspections to insure compliance with the above standards? Texaco!

- Who had the authority to terminate the sub-lease agreement, as well as all of the other agreements relating to the operation of the station, for failure to comply with any of the standards established for operation of the station at the site? Texaco!

- Who paid all real estate taxes on the site? Texaco!

- Who had the responsibility of collecting and remitting the sales tax for the products sold at the site? Texaco

- Whose trade name, trademarks, brand names and signs were displayed at the site? Texaco's!

- Whose gasoline and other petroleum products were the only ones permitted to be sold at the site? Texaco's!

- Who authorized the acceptance of credit cards as a means of paying for the fuel products sold at the site? Texaco!

- Whose credit cards were they? Texaco's!

- Who had sole authority over the display and advertising of the fuel products sold at the site? Texaco!

- Who provided marketing experts and other "specialty" automotive experts to assist in the marketing of petroleum products from the site? Texaco!

- Who is, by stipulation, losing $170,000.00 in profits as a result of the taking from the service station site? Texaco!

In light of "the activity, the energy, the capacity, [and] the opportunities by which results are reached," it defies reality to deny that Texaco is conducting business at the service station site! Texaco's "activity" and control over the business conducted at the site is far greater than that of the dealer, who literally does nothing more than pump Texaco's fuel into the vehicles of the motoring public.

The litany of business activity at the site, listed previously, serves to firmly establish Texaco's presence and control at the site. It serves to establish that the trial court had more than sufficient competent, and totally unrebutted, evidence from which it could be concluded that Texaco was engaged in "business" at the site. Further, as discussed below, the summary of business activity serves to demonstrate why the use of "wholesale" vs. "retail" is totally inadequate to resolve the issue presented.

WHOLESALE vs. RETAIL

To rely upon the wholesale vs. retail distinction may be convenient and it is indeed an approach that is disarmingly easy to take. It requires absolutely no analysis or consideration of the"facts" surrounding the operation of the business at the site. But, as this cause clearly demonstrates, to ignore the facts would be tantamount to the court closing its eyes to the reality of the situation. If "business" means "the activity, the energy, the capacity, [and] the opportunities by which results are reached," then the wholesale/retail is wholly deficient in analyzing entitlement to business damages under the statute. The facts must

control. Each case must be analyzed and resolved in light of the "business" conducted at the site by a potential claimant.

The non-factually based approach taken by DOT would lump into the same category a soft-drink machine placed at a service station site and Texaco's "business" at that same site. The first factual distinction that this simplistic approach ignores is that the soft-drink vendor is not an "owner," while Texaco as the holder of a 30-year lease of the site is indeed an owner for purposes of the business damage statute. State Road Department v. Carter, 189 So.2d 793 (Fla. 1966); State Road Department v. White, 148 So.2d 32 (Fla. 2nd DCA 1962), cert. dischgd., 161 So.2d 828.

The DOT approach would ignore the "fact" that the soft-drink vendor's presence does nothing to solicit the sale of products at that particular site; while everything Texaco does at the station is to encourage and solicit the sale of fuel at the site and to convince the consumer to return to that site again in the future.

The DOT approach ignores the "fact" that a soft-drink vendor has absolutely no influence over the standards under which business must be conducted at the site for the dealer to remain there. In contrast, Texaco maintains a tight reign over nearly everything at the site, with strict standards to be met if the dealer wishes to stay in operation.

Contrary to the suggestion of the District Court, to adopt Texaco's position would not open the door to "innumerable claims." A factual inquiry to determine what "business" the claimant is engaged in at the site would have the exact opposite effect. Unless a claimant could establish, as a matter of fact, that it was an

"owner" and that it was engaged in "business" at the site, the claim would be denied. Vendors of soft-drinks, snack foods, as well as most other wholesale suppliers, who had no ownership interest in the property, would be precluded from making a business damage claim. Only those, such as Texaco, which could demonstrate the requisite ownership interest and business activity at the site would be eligible to make a claim.

DENIAL OF EQUAL PROTECTION

Because the wholesale/retail distinction ignores the factual realities of a particular site, it gives rise to a statutory construction which denies Texaco equal protection under the law.

"The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in a like situation." State v. Bryan, 99 So.2d 327, 329 (Fla. 1924). This protection applies to corporations like Texaco, as well as to individuals. Seaboard Air Line Ry v. Simon, 47 So. 1001, 1002 (Fla. 1908). Regulations and statutes should affect alike all persons similarly situated and conditioned with reference to the subject of the regulation. 10 Fla.Jur.2d Constitutional Law Section 342.

Consider, please, a similarly conditioned owner, say, a lumber yard-houseworks store. The owner buys from the mill direct, skips the middle-man, and sells on-site to drive-in customers. The DOT takes 3/4 of his site, effectively destroying the business. Florida's remedy to that loss is Section 73.071(3)(b), the business

damage statute. Under that statute, if our lumber yard owner had owned his business at that site for more than 5 years, and was the subject of a partial condemnation, he would be entitled to all damages caused by the taking.

The lumber yard's damages would probably be expressed in terms of lost profit, based upon the difference between his customer-sale price and the cost of his product as purchased from the mill, less expenses. That profit loss would be computed for the expected duration of the business (or for the term of the lease, if the owner were a lessee).

No argument offered by the DOT, or contained in the decision below, would even remotely serve to diminish the full measure of damages due the lumberyard owner.

Moving to the petroleum business, if the Oil Company owned the fee or had a long-term lease (as here) and had an employee on site to pump gas, the proper measure of damages due to a partial condemnation would be the difference between the posted pump price and the price paid to the bulk plant for the refined product, again skipping the middle-man (marketer).

Again no argument offered by the DOT or contained in the opinion below, would contend that the business loss caused by a taking should not be reimbursed.

Now the problem. A different class has been carved out by the DOT and the District Court; a special segment of entities - the wholesale oil business. To understand this invidious classification and its irrationality, one must review briefly the pricing levels

involved in the oil business. There are four levels of business pricing involved herein.

First - the price of petroleum at the refinery after the product has been manufactured. This is the refinery price, or "Gulf Coast price." (R:233). Let's say that this price is $.50/gallon, for illustration purposes.[1]

Second - the price after the product has been shipped to the bulk plant in Tampa. This is the distributor or "marketer price." (R:211). Let's say that price is $.75/gallon.

Third - the price the marketer charges the on-site station operator, i.e., the "retailer price." Say that price is $.85/gallon. (R:211).

Fourth - the price the motorist pays the operator-dealer, i.e., the "posted pump price." (R:211; 216; 216; 217). Say $1.00/gallon.

OFF-SITE

The refinery would, of course, make a profit under this illustration, on its sale of refined product to the bulk plant in Tampa. This profit would be on the difference between the crude

[1] Not considerd here is the price of crude oil per barrel charged to the refinery. This is a true raw material price and not claimed here.

price and the "Gulf Coast" price received from the bulk plant, and is not being sought for reimbursement here. (R:233).

The bulk plant then sells the product to the distributors or "marketers" for delivery to the individual stations. The bulk plant's profit would be $.25 per gallon (the difference between the $.75 per gallon sale to the marketer and the $.50 per gallon cost of purchase from the Gulf Coast terminal). This, again, would be a higher level of wholesale profit, more difficult to prove and not attributable to a specific site location, and is not claimed here. (R:233).

AT THE SITE

The marketer then takes the product, purchased for $.75 per gallon, and sells it to the individual service station dealer, on-site, for $.85 per gallon. This $.10 profit is the marketer's business profit, and is the subject of Texaco's claim herein. It is a profit related directly to Texaco's business at the condemned site, which is the condemned property at bar.

The dealer-operator then sells the same product for $1.00 per gallon, or a $.15 profit over his purchase price. This is the final retail profit.

Thus, $.25 profit has been engendered by the condemned property. Under a typical relationship where the Oil company has an employee on-site (a company run station), the Oil company would seek and receive compensation for the profit lost between the marketer's price of $.75 and the pump price of $1.00, or $.25.

However, if the company chooses to enter into a lease (or sub-lease) with a dealer, the oil company would be entitled to a $.10 per gallon profit only. That profit would be the difference between the price received from the retailer-operator ($.85 per gallon) and the cost of purchasing that gallon from the bulk plant ($.75 per gallon). The dealer-operator would then be entitled to the remaining $.15 per gallon profit on the difference between the pump price of $1.00 and the retailer price he paid of $.85. Total profit to <u>both</u> business entities: $.25 per gallon. No double compensation, no unequal treatment under the law, and both businesses rewarded for their industry as guaranteed by Article I, Section 2 of Florida's Constitution.

However, under the DOT's theory and the decision below, a new "profit taker" appears: the Department of Transportation. This party took none of the initiative of the business venture, incurred none of the cost, and bore none of the considerable risk of the oil business. Yet the DOT, using the protection of the decision below, seeks to reap the marketer's profit of $.10 per gallon on every gallon lost DUE TO THE DOT'S OWN CONDUCT! DOT gets its road, destroys the business, and keeps part of the profit its victim lost!

The equal protection problem is apparent. Why should one oil company in the same situation be reimbursed its $.25 per gallon lost profit; yet is neighbor, subjected to the same kind of taking, receive zero? The only difference between the two classes is that one collects the retailer's profit, while the other not only loses the retailer's profit, but also the marketer's profit.

"The classic criterion for assessing the validity of a statutory classification is whether that classification rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." State v. Lee, 356 So.2d 276, 279 (Fla. 1978). Clearly no fair and proper purpose, within this criterion, exists in compensating one class of property owners (who also receive retail profits), while denying the same type of compensation to other property owners (who only claim the marketer's profit).

It should be understood that in the company-run station case, both the retailer profit and the marketer's profit are compensable and collected routinely. But only when the station is dealer-run does the company lose both retailer's profit (which belongs to the dealer) as well as the marketer's profit (which undeniably has been taken from the company).

Consider the following factual setting, assuming that in both cases, the activity conducted on site is similar to that presented in this cause. In both of the situations diagramed below, the oil companies receive a profit from the petroleum delivered to the site. In the case of the hypothetical Mobil station, the oil company also receives the retail profit; while Texaco's dealer is entitled to the only retail profit at that site. But a taking, as in this cause, occurs and due to the taking, the businesses are destroyed.

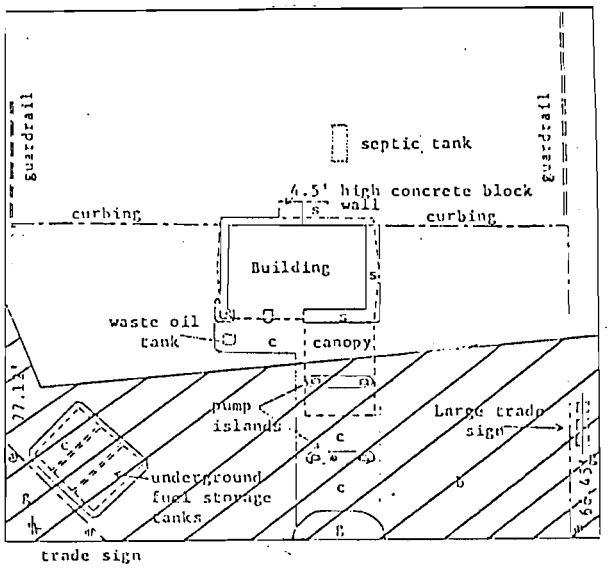
TEXACO

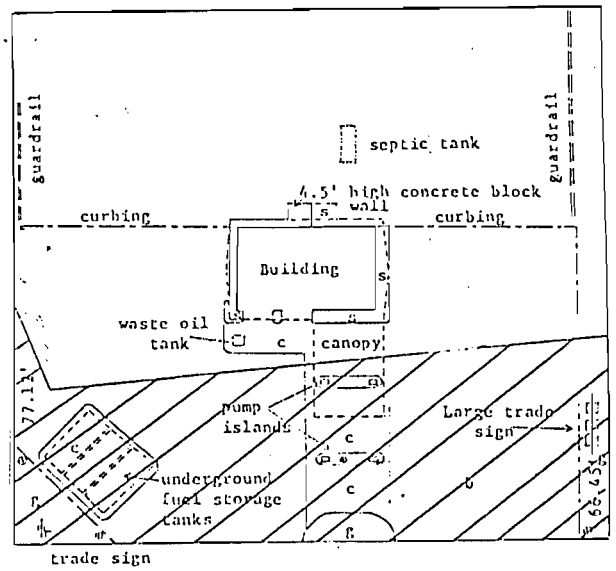
(DEALER RUN STATION)

MOBIL

(EMPLOYEE RUN STATION)

The crosshatched area indicates the taking.





The DOT would not deny that Mobil may be compensated for all of its loss, both marketer's profit and retail profit. Texaco, however, receives no compensation. Why? Because Texaco had a dealer-lease. Is this a "rational classification?" Or is this the absurd result this Court cautioned against in Tampa-Hillsborough County Express Auth. v. Morris Alignment, 444 So.2d 926 (Fla. 1984)?

"When a statute is susceptible to and in need of interpretation or construction, it is axiomatic that courts should endeavor to avoid giving it an interpretation that will lead to an absurd result." Id. at 929.

> ". . . two property owners operating businesses, both equally damaged by a partial taking of their respective properties . . . would (under the district court's view) be treated differently insofar as their eligibility to claim business damages is concerned if one of them had been in existence as a business entity (although off site) for more than five years and the other had not.
>
> Thus the different treatment of the two landowners on the question of eligibility to claim business damages would be based upon a factor having nothing whatsoever to do with the duration of their operation at the respective locations and therefore the degree of hardship imposed upon them by the partial taking of their respective premises. THIS WOULD BE AN IRRATIONAL DISTINCTION UPON WHICH TO JUSTIFY SUCH DIFFERENTIAL TREATMENT. (emphasis supplied). Morris Alignment at 929, 930.

The wholesale vs. retail distinction has absolutely nothing to do with the owners "duration" of operation at the site. An oil company, such as Texaco can maintain a "business" (energy, activity, and opportunities that achieve results) at the site while selling fuel to the dealer at what would normally be considered wholesale prices. To ignore Texaco's business activity, and to then rely solely on the wholesale vs. retail comparison, creates an irrational distinction.

Why was the different treatment irrational in Morris Alignment, and rational in the case at bar? Neither the DOT, nor the opinion rendered below, provide any suggestion as to why such different treatment should be tolerated. Indeed there is none!

STATUTORY INTENT

Use of the wholesale-retail comparison, in addition to subjecting an owner to a denial of equal protection, also leads to a construction of the statutory provision that is contrary to legislative intent.

A. To begin with the statute, on its face, makes no attempt to distinguish between different types of business activity conducted at the site. As discussed previously, the term "business" is used once in Sec. 73.071(3)(b). The term is not qualified, limited, or restricted in any fashion. Consistent with the unqualified nature of the term as used in the provision, the courts have consistently construed "business" to be something more than a mere place of business. Rather, it is "the activity, the energy,

the capacity, the opportunities by which results are obtained." Lake of the Woods, supra at 188.

The wholesale-retail comparison totally ignores the "business" conducted, on the site, by an owner such as Texaco. It ignores all the "energy" and "activity" Texaco has put into the site over the last 15 years to insure the continued sale of petroleum products from that site. It ignores all of the control exercised by Texaco over the manner in which the particular station is to be operated, to create "opportunities by which results are obtained" - the sale of petroleum products to the motoring public.

To compare all the energy and activity directed by Texaco to the particular site, to a wholesaler who does nothing more than provide a product to be sold is a useless comparison which evidences a total lack of concern for the realities of the situation. The facts should not be treated in such disdainful fashion.

B. This court in Tampa-Hillsborough County Expressway Authority v. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1984), after stating that statutes should be construed in light of the manifest purpose to be achieved by the legislation, went on to hold:

> The purpose of section 73.071(3)(b) is to mitigate the hardship that may result when the state exercises the power of eminent domain paying only the constitutionally required full compensation for the property actually taken. The legislature in doing so has recognized that a business location may be an asset of considerable value and susceptible of being

> substantially damaged by a partial taking. Id. at 929.

The wholesale-retail comparison would clearly defeat the statutory purpose because it disregards all activity at the business location by an owner such as Texaco. If the business location is an asset of considerable value, and the legislative intent was to avoid the hardship that may result from a taking, are not the facts relating to the activity at the site a relevant consideration? Indeed they are!

C. In discussing the legislative intent of Sec. 73.071(3)(b) further, this court went on to state:

> To assure the existence of a substantial business interest in the location as a prerequisite to an award of business damages, the legislature included the requirement of five years of operation at the location. The requirement of "more than 5 years' standing," seen in the light of the legislative purpose, obviously refers to the length of the time the business has operated at the location where business damages are claimed to have been incurred due to condemnation of adjoining land. Id. at 929.

Can the issue of whether the claimant has "a substantial business interest in the location" be determined by merely applying the wholesale-retail comparison? The answer is obviously no! The facts must be considered. Facts such as: Who is demonstrated to have a past and continuing possessory interest in the site? Who constructed the improvements so that the specific type of business

can be conducted at the site? Who imposed standards upon just about every aspect of the operation at the site? Who has the authority to terminate agreements, including a sub-lease of the site, for non-compliance with the standards set above? Who has prominently displayed its signs and trade name to solicit business to that particular site?

Once these inquiries are made, then, and only then, can the court discern if the claimant has a "substantial business interest in the location." Only the most uninformed and uninquiring person could deny that Texaco has a substantial business interest in the site. Yet, the DOT would seek to lump Texaco in the same category as a soft-drink vending machine placed at the site. Can such a wholesaler of soft drinks respond the inquiries listed above with an affirmative answer? Obviously not! Only those which would choose to be ignorant of the facts could commit the error of believing that Texaco and a soft-drink vending machine are comparable under the statute.

This court should reject the "ignorance is bliss" approach offered by the DOT. The owner Texaco requests that this Court answer the question certified in the affirmative. In doing so, it should flatly reject the wholesale-retail comparison as the only inquiry to be made. Instead, the claimants case should be examined factually to determine if it has a substantial business interest in the location and whether it is, in fact, engaged in "business" at that location. To require anything less is contrary to the legislative intent and results in, as in this cause, a denial of equal protection under the law.

The District Court, in this cause, erred when it overruled the trial court's findings. There was substantial competent evidence that Texaco met each of the statutory criteria and was, in fact, engaged in business at the site.

It is undisputed that Texaco has suffered business damages as a result of the taking. DOT has stipulated that those damages amount of $170,000.00. Yet the owner, Texaco, has been denied those damages by a misconstruction of a statutory provision which has as its purpose the mitigation of the "hardship" suffered by owners such as Texaco. The denial is not logical, reasoned, or factually supported and should be reversed.

FULL COMPENSATION: REVISITED

In rendering its decision, the District Court made reference to a premise that is often stated without being given a second thought: business damages are not part of full compensation.

The premise appears to have had its origin in City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2nd DCA 1958), where the court merely reiterated a statement found in the treatise American Jurisprudence. Id. at 225. It did not specifically hold that the law in Florida was consistent with the American Jurisprudence statement, but that is the implication given.

Since City of Tampa, the premise has been repeated over and over, with the most recent pronouncement being found in the opinion now before this Court. The problem, however, is that the assumption made in City of Tampa - that Florida followed the general rule given in American Jurisprudence - was absolutely wrong.

Perhaps through a research error, the court in City of Tampa overlooked a decision of this Court rendered nearly 10 years earlier: Myers, et al. v. City of Daytona Beach, 158 Fla. 859, 30 So.2d 354 (Fla. 1947). (A:73-74) In Myers, the court had under review a business damage award which the owner alleged was less than the compensation required under the evidence presented.

After reciting the compensation clauses of the Florida Constitution, as it existed then, this Court went on to state:

> Pursuant to the Constitution, the legislature enacted Section 73.10, Fla.Stat. 1941, F.S.A., which reads in part: "* * * when the suit is by a board, district or other public body for the condemnation of a right-of-way, and the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing owned by the party whose lands are being so taken, located upon adjoining, adjacent or contiguous lands owned or held by such party, the jury shall consider the probable effect the use of the property may have upon the said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the use of the property so taken may reasonably cause. * * *"
>
> The general rule elsewhere has been cited to the effect that evidence of profits derived from a business conducted upon the property is too remote to compute value. See 18 Am.Jur., Sec. 345, page 988. This rule must yield to our statute, Section 73.10, which was enacted pursuant to the Constitution, Article XVI,

> Section 29, which requires that full compensation must be made. Full compensation means nothing less than payment for that which the property owner is being deprived of. See Brown et al. v. Town of Eustis, Florida, D.C., 293 F. 197; Doty v. City of Jacksonville, 106 Fla. 1, 142 So.599. Id. at 355.

The fact that City of Tampa and Myers are in conflict is indeed apparent. But the mistake made in City of Tampa is more than a minor error. It is in fact an error of constitutional proportion that has been perpetuated, without a second thought, in decisions such as the one pending before this Court.

What is more disturbing is that as the erroneous premise was passed down over the last 30 years, not one court has bothered to provide a reasoned or well-founded basis for excluding business damages from the concept of full compensation. Instead, they apparently rely upon the reasoning found in 18 Am.Jur. Sec. 259, which was cited by the court in City of Tampa.

In the section cited above, the comment is made that a business is "less tangible in nature and more uncertain in its vicissitudes that the rights which the Constitution undertakes absolutely to protect." This is but a long-hand version of saying that business damages are too speculative to be compensated as part of full compensation. Obviously when this Court wrote the Myers decision, it did not agree with this premise. There is even less support for the proposition today in light of the computerized technology available. The availability of computer programming for record keeping, as well as cost and profit projections, have eliminated the

speculation or guesswork related to the estimation of damages which might be incurred as a result of the taking of property.

In this cause, the owner's accountant assessed the damages cause by the destruction of the business at the site without difficulty. DOT apparently had no problem in assessing the damages incurred either since it stipulated that those damages amounted to $170,000.00. Thus the "uncertainty," which served as the basis for rule announced in American Jurisprudence, is no longer a viable objection.

Business damages, like other aspects of compensation described in Sec. 73.071(3), are determined by the jury upon consideration of all the evidence. Under proper jury instructions, the jury weighs the testimony relating to business damages in the same way they do with other items of compensation. The credibility of the business damage expert witness is subject to the same scrutiny as any of the witnesses offered on the issues of the value of the property taking and severance damages. Why then should the claim of business damages be viewed as a suspect category of damages not to be included as part of full compensation? There is really no rationale justification for the exclusion.

Prior to Myers, this Court held that:

> One's business is recognized as property. Both are protected by due process of law and it is as reprehensible to destroy or injure one as it is the other. Paramount Enterprises, Inc. v. Mitchell, 140 So. 328, 332 (1932).

In Myers, this Court confirmed the concept that business is a property right when it construed the enactment of the business

damage statute as a fulfillment of the constitutional requirement of the compensation clause. In the words of this Court:

> Full compensation means nothing less than payment of that which the property owner is being deprived of. Myers, supra at 355.

The owners respectfully suggest that as a basis for answering the certified question in the affirmative, this Court can and should rely upon a finding that business damages are part of full compensation.

CONCLUSION

The district court erred when it reweighed the evidence presented to the trial court on the issue of whether Texaco was engaged in "business" at its service station at the time of the taking. Since the parties agreed to submit the factual issue of whether Texaco met the statutory predicate to the trial court, the lower court's resolution of the issue was presumed correct. The trial court's ruling should not have been overturned in light of the substantial, competent, and unrebutted evidence presented.

The certified question should be answered in the affirmative and the decision of the district court quashed. The final judgment of the trial court should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Maxine Ferguson, Attorney, Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458, this 14th day of March, 1988.

Alan E. DeSerio, Esquire