IN THE SUPREME COURT OF FLORIDA

PALM BEACH COUNTY, FLORIDA,

Petitioner,

vs. CASE NO. 71,962

MILDRED TESSLER and
HELEN WHITENER,

Respondents.

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AMICUS CURIAE BRIEF
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

For purposes of this brief the following shall apply:

The Petitioner, PALM BEACH COUNTY, FLORIDA, shall be referred to as the "County";

The Respondents, MILDRED TESSLER and HELEN WHITENER, shall be referred to collectively as "Tessler";

The DEPARTMENT OF TRANSPORTATION, amicus curiae, shall be referred to as the "Department;

References to the Record on Appeal shall be indicated as (R:) followed by the appropriate page number; and,

References to the Appendix accompanying this brief shall be indicated as (A:) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Department of Transportation accepts the Statement of the Case and Statement of The Facts as set forth in the Petitioner's Initial Brief and adds that by order dated March 22, 1988, this Court granted the Department's Motion to File Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Florida Constitution does not authorize a remedy for every diminution in the value of property that is caused by a public improvement. An impairment of the use of property by the exercise of the police power, where property itself is not taken by the state, does not entitle the owner of such property to a right of compensation. There is no compensable taking when direct access to a particular abutting road is denied where other access otherwise exists or is given. Tessler does not claim that she has been denied all reasonable and beneficial use of the property, or that she has been denied all access to the abutting public road system.

Tessler did not lose access (an incidental property right under the law), but accessibility (a factor in the economic analysis of value). Loss of accessibility is not compensable unless access has been taken. In the instant cause, there was no showing that access was taken because Tessler retains the ability to ingress and egress her property directly from and to the abutting public road system.

ARGUMENT

THE OWNERS OF COMMERCIAL PROPERTY LOCATED ON A MAJOR PUBLIC ROADWAY ARE NOT ENTITLED TO A JUDGMENT OF INVERSE CONDEMNATION WHEN THE COUNTY GOVERNMENT BLOCKS OFF ANY ACCESS TO THE PROPERTY FROM THE ROADWAY AND LEAVES ACCESS THERETO ONLY THROUGH A CIRCUITOUS ALTERNATIVE ROUTE THROUGH RESIDENTIAL STREETS

The issue presented in the instant cause arises from an inverse condemnation action in which Tessler claimed that the County, by erecting a barrier within the right of way of an abutting road, had taken her right of access to such road. In an inverse condemnation case, a taking occurs only where the owner is deprived of all reasonable and beneficial use of the property involved. Graham v. Estuary Properties, 399 So.2d 1374 (Fla. 1981). Tessler does not claim that she is unable to use her property, but merely that it's accessibility is diminished. Tessler fails to distinguish between access (an incidental property right under the law) and accessibility (a factor in the economic analysis of value). Clearly, Tessler lost accessibility, not access.

In the instant cause, Tessler's claim is based on the loss of the ability to directly cross from her property to Palmetto Park Road even though the subject property retains two points of direct access to Spanish Trail, a public street adjoining the property. Tessler does not claim, nor is there any evidence, that Tessler has been denied all access to the public street system. Nor is there any evidence that the access to Spanish Trail does not afford a reasonable means of crossing from Tessler's property directly to the public road system. Rather Tessler's claim is premised on the inconvenience of the accessibility of her property to a particular street and the resulting circuity of travel. Although Tessler

may actually suffer a diminution in the value of her property, the Florida Constitution does not authorize a remedy for every diminution in the value of property that is caused by a public improvement. A taking must occur.

Article X, Section 6(a), of the Florida Constitution (1968), states:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

Clearly, the Constitution provides that compensation must be paid for private property taken for public use, but not for damage or injury to property. Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 462 (Fla. 1891). Thus, there can be a recovery when access to the public streets is destroyed (or diminished to the point of being virtually destroyed), but not when access is simply limited or regulated and the ability to reasonably ingress and egress one's property remains. Applying these constitutional principles to the instant cause, the inconvenience caused by the required use of a more circuitous route which may render certain property less desirable for certain uses does not constitute a taking.

In Florida, the right of access involves the right to ingress and egress one's property from and to the abutting public road system. It does not include the right of accessibility to a particular road or a particular segment of road. There is no taking where an alternate means of access exists which allows the landowner to ingress and egress in a reasonable manner directly from her property to the public road system. See Florida Audubon Society v. Ratner, 497 So.2d 672 (Fla. 3rd DCA 1986). Access to land abutting public roads has always been held subject and subordinate to

the right of the public to have the roads improved to meet the public need. In Selden, supra at 458, the Court stated:

> The meaning given by the courts and commentators to the words "taken" or "appropriated," as used in such a provision, is that there must be a trespass upon or a physical invasion of the abutting property, to bring municipal authorities within the constitutional prohibition, so long as such authorities keep within the scope of their powers in using or improving the street. If they do no illegal act, as by creating a nuisance, or do not appropriate the street to other than street purposes, or do not invade, or do physical injury to, the abutting property, there is, in the absence of negligence, or of the want of due skill and care in making improvements, (which negligence or want of care or skill may, of itself, be a ground of corporate responsibility for damages,) no liability to the owners of such property for any damage resulting from a change of grade or other improvement in the street made by the municipal powers for the convenience or benefit of the public in using the highway as such.

Then the Court classified the right of ingress and egress as incidental rights of property and further stated:

> . . . These incidental rights of property are, under a constitutional guaranty, simply against the "taking" or "appropriation" of property, subordinate to the right of the state, or any duly-authorized governmental agency acting for it, to alter the grade or otherwise improve the streets for street purposes. An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the use or improvement of the streets as highways.

Id. at 459.

In subsequent cases, the Court has consistently applied the rationale expressed in Selden, supra, in holding that a change in the elevation of a

street, when conducted within the right of way, may give rise to consequential damages, however, such are non-compensable. In Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (Fla. 1906), the Court said:

> . . . in the absence of legislation or a valid contract the owner has no right of action against a city authorized by law to grade and improve the street for injury to the lot or property thereon, or for the impairment or destruction of the incidental rights of ingress and egress and of light and air which the street affords, because of changes made by the city in the grade of such street by building or rebuilding a viaduct thereon for the improvement of such street, even though such changes in the grade prove inconvenient or expensive to the lot owner in the use of his property, where there is no diversion of the street from its proper street purposes, and where the injury to the lot or property thereon or the impairment or destruction of the incidental rights is a mere consequence from the lawful use or improvement of the street as a highway, and where there is no physical invasion of or trespass upon the lot or property, and no malice, negligence, or unskillfulness in the use or improvement of the street for street purposes to the injury of the lot owner. (cites omitted)

Id. at 396.

The Court again reiterated this rule in Lewis v. State Road Department, 95 So.2d 248 (Fla. 1957). In this case, the Court applied the doctrine of damnum absque injuria and held that " the change of grade of a street is not a taking or an appropriation of private property within the constitutional guaranty against such taking or appropriation without compensation, even though the rights of light, air and view are destroyed. Id. at 254. See also Jacksonville Expressway Authority v. Milford, 115 So. 2d 778 (Fla. 1st DCA 1959); City of Tampa v. Texas Co., 107 So.2d 216 (Fla. 2nd DCA 1958), cert. dismissed, 109 So.2d (Fla. 1959).

In Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956) the Court extended the rationale of Selden, supra, and Bowden, supra, to a retaining

wall built along the entire length of Weir's property abutting Atlantic Avenue in Delray Beach. (See Sketch attached at A:1). Although the plaintiff no longer had direct access to an abutting street, the Court affirmed the dismissal of the inverse claim:

> We, therefore, hold that the interference with the so-called consequential rights of the plaintiff under the facts alleged in this complaint are not tantamount to the "taking" or appropriation of plaintiff's property for which the Florida Constitution requires compensation.

Id. at 869. Like the plaintiff in Weir, supra, Tessler no longer has the ability to directly access one abutting street, yet her right of access has not been "taken" since the subject property still has access to the public road system via Spanish Trail which abuts the property.

The courts in Florida have consistently held that damages due to loss of accessibility, i.e. circuity of travel, diminution in traffic flow, diversion of traffic, etc., are non compensable. In Division of Admin., Department of Transportation v. Capital Plaza, Inc., 397 So.2d 682 (Fla. 1981), the Court held that damages resulting from the construction of a median strip within pre-existing right of way was noncompensable as resulting from mere circuity of travel. The Second District Court of Appeal in both Meltzer v. Hillsborough County, 167 So.2d 54 (Fla. 2nd DCA 1964) and Jahoda v. State Road Department, 106 So.2d 870 (Fla. 2nd DCA 1958) found damages due to diversion of traffic to be noncompensable even though the market value of the property may be adversely affected[1]. In

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[1]This Court expressly agreed with this part of the Jahoda opinion in Department of Transportation v. Stubbs, 285 So.2d 1, 4 (Fla. 1973).

Travis v. Department of Transportation, 333 So.2d 86 (Fla. 1st DCA 1976) and Awbrey v. City of Panama City Beach, 283 So.2d 114 (Fla. 1st DCA 1973), the First District Court of Appeal applied this Court's Weir holding in affirming the dismissal of inverse condemnation cases which alleged takings of access. Of interest in the Awbrey case is the activities the court listed which may be carried on it the right of way without constituting a taking of access:

> . . . It is a matter of common knowledge that governmental agencies such as cities, counties, and departments of state frequently construct and install, in street and road rights-of-way abutting private property, devices and facilities intended to promote and protect the lives, safety, and welfare of the public, such as guardrails, telephone poles, manholes, metered water lines, fire hydrants, parking meters, electric power poles, street light standards, public mail boxes, retaining walls, street and traffic signs, gas main valves, traffic retaining devices, curbs, guy wires, concrete marker posts, planted shrubbery, trees, and the like. Each of such facilities impairs to a greater or lesser degree the landowner's free and uninterrupted access to streets and highways on which their land abuts. Such loss of access is considered to be a consequential damage for which the governmental entity incurs no liability to the landowner for compensation and falls within the doctrine of damnum absque injuria. (underlining added)

Id. at 117. The Fifth District Court of Appeal in City of Orlando v. Collum, 400 So.2d 513 (Fla. 5th DCA 1981) held that the closing of an abutting street to construct a pedestrian mall was not a deprivation of a property right, but a valid exercise of the police power. And finally, the Fourth District Court of Appeal, contrary to its decision in the instant case, held in both City of Port St. Lucie v. Parks, 452 So.2d 1089 (Fla. 4th DCA 1984) and Division of Admin., Department of Transportation v. Ness Trailer Park, 489 So.2d 1172 (Fla. 4th DCA 1986) that damages resulting

from a circuitous route of travel which did not constitute a taking were not compensable even where the governmental entity terminated access to a road. In all of these cases, no right of access was taken since the landowners retained the ability to ingress and egress their property directly from and to the abutting public road system. Likewise, Tessler, via Spanish Trail, retains the ability to ingress and egress her property directly from and to the public road system.

Although this Court has awarded damages for the taking of access in several cases, these cases are all distinguishable from the instant cause. In Department of Transportation v. Stubbs, 285 So.2d 1 (Fla. 1973), the landowner was placed in a cul de sac as a result of a limited access taking. As a result of the cul de sac, the landowner lost complete access to Firestone Road in one direction and could only regain access by traveling in the opposite direction over an abandoned Firestone Road, jogging across a few local roads and then crossing by an overpass over the newly constructed Interstate 295. The Stubbs Court found the substitute access provided to be a serious disturbance of access, if not a complete destruction of access. Additionally, under §338.04, Florida Statutes (1971), severance damages resulting from loss of access are to be put before the jury whenever there is a direct physical taking of property for the construction of a limited access road. Thus, the determination of whether access had been taken was already decided merely by application of the statute. In the instant cause there has been no taking of property, let alone a §338.04, Florida Statute, taking. In both Capital Plaza, supra, and Ness Trailer Park, supra, Stubbs was held to apply only where the property taken was for limited access.

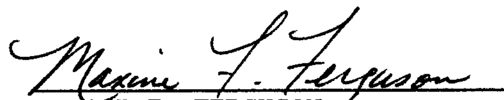
The most recent decision allowing damages for the destruction of access is Division of Admin., Department of Transportation v. Jirik, 498 So.2d 1253 (Fla. 1986). This case is readily distinguishable from the instant cause in that in Jirik, the construction of a retaining wall adjacent to Lot 1 cut off all ingress and egress from Lot 1 directly from and to the public road system. After the construction of the retaining wall, access from Lot 1 was only by travelling through an adjacent lot. Lot 1 had no "Spanish Trail".

In summary, the County has not taken Tessler's right of access by the building of a retaining wall entirely within existing right-of-way. Such action on the part of the County is within its police powers and absent a showing of the denial of all reasonable and beneficial uses of Tessler's property does not constitute a taking. Tessler still retains the ability to ingress and egress her property directly from and to the public road system. Inconvenience caused by the required use of a more circuitous route to gain access to property does not constitute a taking of access. Tessler may have lost accessibility, but not access.

CONCLUSION

The Department requests this Court to reverse the decision below and answer the certified question in the negative.

Respectfully submitted,



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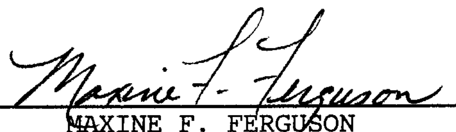
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 11th day of April, 1988 to JAMES W. VANCE, ESQ., Barristers Building, Suite 200, 1615 Forum Place, West Palm Beach, FL, 33401; JAMES J. RICHARDSON, ESQ., P.O. Box 12669, Tallahassee, FL, 32317; and SHIRLEY JEAN McEACHERN, ESQ., 301 North Olive Avenue, P. O. Box 1989, West Palm Beach, FL, 33402



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