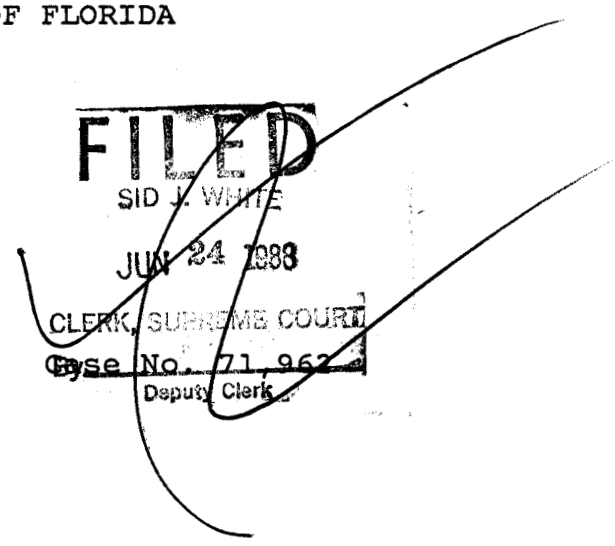
IN THE SUPREME COURT OF
THE STATE OF FLORIDA



PALM BEACH COUNTY, a political subdivision of the State of Florida,

Petitioner,

v.

MILDRED TESSLER and HELEN WHITENER,

Respondents.

AMENDED
ANSWER BRIEF OF RESPONDENTS
MILDRED TESSLER AND HELEN WHITENER
(ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT - CERTIFIED QUESTION)

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PRELIMINARY STATEMENT

The Respondents, Mildred Tessler and Helen Whitener, will be referred to as the "owners." The Petitioner, Palm Beach County, and the Amicus Curiae, Department of Transportation, will be referred to as the government.

Reference to the Appendix accompanying this brief shall be made by use of the symbol "A."

STATEMENT OF CASE AND FACTS

The Respondents accept the Statement of Case and Facts provided by the Petitioner. However, this Court should review the order of the lower court, contained in the Appendix to this Answer Brief, for a complete understanding of the findings made by the trial judge.

QUESTION CERTIFIED

> ARE THE OWNERS OF COMMERCIAL PROPERTY LOCATED ON A MAJOR PUBLIC ROADWAY 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?

SUMMARY OF ARGUMENT

The factual determinations made by the trial court in an inverse condemnation action are presumed correct. The factual findings of the trial court made in this cause have not been disputed.

Access to an owner's land is a valuable property right and consists of an abutter's easement to the adjacent roadway. When the ease and facility of an owner's abutter's easement has been substantially impaired or destroyed, the owner is entitled to be compensated.

When an owner's abutter's easement to a particular roadway has been substantially impaired or destroyed, the existence of an alternate means of access to the owner's property, via a secondary road, to which the owner also has an abutter's easement, does not serve to defeat the owner's claim. The existence of an alternate means of access is relevant only to the issue of damages suffered by the owner for the loss of its access easement. While the existence of an alternate means of access may mitigate the damages, or reduce them to a nominal amount, it does not serve as a defense to the owner's claim that the access easement has been taken.

The trial court, as well as the district court, correctly ruled that the owners' existing abutter's easement to Palmetto Park Road had been destroyed by the construction of a retaining wall across the entire front of the owners' property. Because the government activity terminated, rather than regulated, the owners' access easement to the roadway, a taking of the access easement occurred. The owners are entitled to seek full compensation for the taking of their property.

PRELIMINARY CONSIDERATIONS

This cause was considered by the trial court as an inverse condemnation claim. The evidentiary proceeding was non-jury and

resulted in the entry of a final order sustaining the owners' claim of a taking. That order contained findings of fact which have not been disputed by the County or the amicus party.

The conclusion of a trial court, sitting as fact-finder arrives at the appellate court with a presumption of correctness and is given the same weight as a jury verdict. As recognized by the majority opinion, it is not the province of an appellate court to reweigh the evidence presented. Rather, so long as there is competent evidence to sustain the determination of the trial court, the findings will be sustained.

While the district court has certified a specific question to this Court for determination, the core issue is whether the trial court correctly determined that a "taking" of the owners' access, along Palmetto Park Road, occurred as a result of the construction of a retaining wall between the owners' property and the abutting roadway.

ARGUMENT

> The first to present his case seems right,
> till another comes forward and questions him.
> Proverbs 18:17 (NIV).

There is indeed much to question with regard to the position taken by the County and the amicus (Department of Transportation). If taken to its logical extreme, the government's position would deny an owner's claim for the taking of access in all situations except where the property is totally landlocked. Through the process of misapplying certain case precedent, while at the same

time attempting to exclude from consideration other applicable decisions, the government's position exalts the police power as unassailable, while it reduces well-established property rights to a mere memory. The Constitution of this state, existing case precedent, and simple common sense dictate the rejection of the County's position.

ACCESS DEFINED

The government's position, denying a taking in this cause, is based primarily upon an inaccurate understanding of the concept of "access." As noted in Nichols, the owner's right of access attaches to the abutting lands, and that this is a "property right in the nature of an easement in the street which is appurtenant to this property and which is his private right, as distinguished from his right as member of the public." (Emphasis by Author). 3 Nichols on Eminent Domain, Sec. 10.221[2], pp. 373-375. McQuillan states:

> The most important right of the abutter incident to his ownership of property abutting on a street or alley is his right of access . . .. It includes not merely the right . . . to go into and come out of his premises, but also the right to have the premises accessible to patrons, clients and customers.
> In most jurisdictions, this right of access is held to be a proprietary right, an easement in the street attached to the estate or ownership of property abutting on a street or alley, and property which cannot be appropriated to the use of the public without compensation.
> McQuillan, On Municipal Corporations
> Section 1429.

In Benerofe v. SRD, 217 So.2d 838 (Fla. 1969),[1] the Supreme Court upheld the ruling that the mere taking of fee simple title in a strip of land acquired by the State did not in itself affect the adjacent remaining property rights of the private owner with respect to ingress and egress. Only a physical or legal limitation would extinguish those rights, for which compensation must be paid. This Court went on to state:

> We agree that even when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easements of access, light, and air from the street or highway appurtenant to their land, and unreasonable interference therewith may constitute a taking or damaging within constitutional provisions requiring compensation therefor.
> Benerofe at 839. (Emphasis supplied).

This Court held that this abutter's right, when actually interfered with (as in the case at bar) may be compensated by relief pursuant to injunction or inverse condemnation. Benerofe at 839.

In defining the right of access as it exists under Florida law, the Court in Anthony v. Franklin County, 799 F.2d 681 (11th Cir. 1986) stated:

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[1]The County has incorrectly stated that Benerofe involved a limited access taking and therefore was inapplicable to this cause. See: Benerofe v. SRD, 210 So.2d 28, 30 (Fla. 1st DCA 1968). The principles set forth in this Court's Benerofe decision, and later reiterated in Div. of Admin., State of Fla. DOT v. Ness Trailer Park, Inc., 489 So.2d 1172, 1178 (Fla. 4th DCA 1986), are indeed applicable, and this cause clearly falls within the category of cases where "the public authority erects a physical barrier impeding ingress or egress." Ness, supra at 1178, fn. 5.

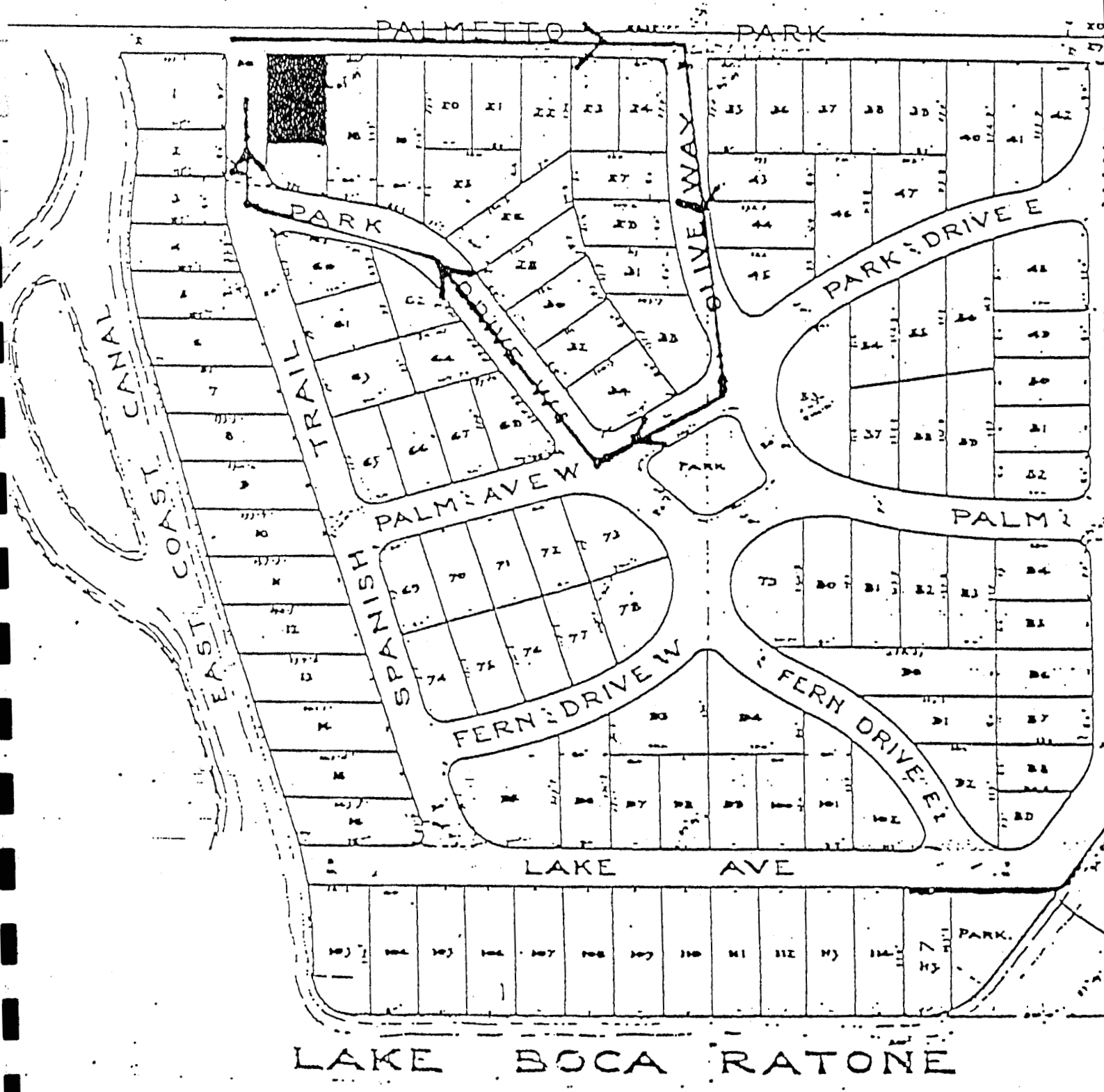
> Property ownership includes two access-related rights: "the right to pass to or from the public way immediately adjacent to the land" and "the right to go somewhere once the owner is upon the abutting road - to have access to the system of public roads." Id. at 685.

In the case at hand, as reflected on the diagram found on the following page, the owners had direct access to Palmetto Park Road, which abutted the property. In other words, the owners had an "easement" of access to the existing roadway. Benerofe, supra. The construction of the retaining wall will physically prevent the owners from utilizing their previously existing "easement" of access. The net effect was the substantial impairment, by the physical barrier constructed, of the previously existing right of access.

ACCESS IS PROPERTY

The position taken by the government requires a regression into the proverbial "dark ages," when property was restrictively defined and "The King Could Do No Wrong." Over the years, the concept of property has been expanded to include items that were defined as merely "incidental" to the ownership of property.

In State of Florida, DOT v. Stubbs, 285 So.2d 1 (Fla. 1973), the court stated that the rationale for granting compensation for the loss of access rights, although not always expressed in judicial pronouncements, is that property is something more than a physical interest in land. It also includes certain legal rights and privileges constituting appurtenants to the land and its enjoyment.



OWNERS ABUTTERS EASEMENT TO PALMETTO PARK

Quoting the court, "This is part of a gradual process of judicial liberalization of the concept of property so as to include the taking of an incorporeal interest such as the acquisition of access rights resulting from condemnation proceedings." Id. at 2.

The court in Stubbs went on to state: "Ease and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated." Id. at 3. Contrary to the government's position, this Court should not look for an opportunity to limit the concept of access, but should, as it did in Stubbs, follow the "spirit" of such decisions as Benerofe, supra, State Road Dept. v. McCaffrey, 229 So.2d 668 (Fla. 2nd DCA 1969), and Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962). Stubbs, supra at 3.

Indeed, this Court should continue to stand firm on the principle announced in Department of Transportation v. Jirik, 498 So.2d 1253 (Fla. 1986)[2] where, relying upon Stubbs, it was stated:

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[2]The reliance by this Court upon Stubbs, a limited access taking case, in Jirik, which did not involve limited access, serves to rebut the government's attempts to pigeon-hole certain access cases, declaring them to be inapplicable, solely because they involved limited access takings under Sec. 338.04, Fla. Stat. The principles set forth in cases such as Anhoco, supra, McCaffrey, supra, and Stubbs, supra can be equally applied to non-limited access takings. This Court in Anhoco, 144 So.2d at 797, when discussing the taking of an abutter's easement stated unequivocally:

> The rule requiring compensation under such circumstances aplies regardless of the specific requirements of a statute. Id. at 797. (Emphasis supplied).

The nature of access does not vary on the basis of the means by which the government takes an owner's access. Whether access is

(Footnote Continued)

> It is well-established that government action which eliminates direct access to real property amounts to a taking for condemnation purposes. Id. at 1255.

Contrary to the position taken by the government, the principle cited in Jirik, supra, was not limited to a particular set of circumstances. The principle was stated in a general fashion and is applicable to the factual setting of this cause.

Comparing the definition of access - an abutter's easement which includes the right of direct ingress and egress to the abutting roadway - to the factual setting of this cause leaves no doubt that the trial court correctly determined that, as a matter of fact and law, the owners' access to Palmetto Park Road has been taken. Prior to the construction of the retaining wall, the owners' had direct access to and from the abutting roadway. The physical barrier constructed by the County has substantially impaired the owners' easement to that abutting roadway. As reflected in the diagram contained in the District Court's opinion, the owners are now relegated to the use of a different secondary street (Spanish Trail) that abuts one side of the owners' property.

(Footnote Continued)
formally condemned or taken by the construction of a physical barrier is not determinative. Access is taken in either case and the effect on the property owners is identical. The government cannot avoid payment for the taking by merely applying a particular label to the type of roadway.

EXISTENCE OF ALTERNATE ACCESS

While the government does not deny that the owners' ability to ingress and egress Palmetto Park Road has been virtually eliminated, it contends that the existence of Spanish Trail, as an alternate form of access, defeats the owners' claim. This same argument was rejected by the court in Stubbs, supra, and Anhoco, supra.

In Stubbs, the government contended, as in this cause, that the access claim should be denied because the owners still had some form of access to the property. Id. at 3. Stubbs rejected this position noting it was contrary to the "spirit" of such cases as Anhoco, supra, Benerofe, supra, and McCaffrey, supra. Stubbs at 3. After recognizing that the owners' commercial property had been adversely affected by the loss of access and that the "availability of ingress and egress to their property that previously existed has been seriously disturbed, if not destroyed," the court went on to hold:

> The important question is whether there has been a substantial diminution in access as a direct result of the taking. What is 'substantial' is a question of fact posing practical problems of proof for a jury's consideration. Where some right of access is still available, as would appear in the cause under consideration, it is for the jury to determine whether the resulting damages are nominal or substantial. Id. at 3.

The existence of an alternate form of access is relevant only to the issue of damages, but it is not a defense to the claim that access has been taken.

The Anhoco line of decisions also provide insight on the issue whether an owner can claim a taking of access from the abutting roadway while it retains access to another public street.

The owners in Anhoco operated two outdoor movie theatres on property which abutted State Road 826. Anhoco Corp. v. Florida State Turnpike Authority, 116 So.2d 8, 11 (Fla. 1959). The government, while in the process of converting the roadway into the "Palmetto Feeder Road," excavated dirt along that portion of the owners' property which abutted the existing roadway. Id. at 12. The opinion noted that as a result of the Road Departments activity, the owners were "relegated to entrance and exit via secondary roads running at right angles to the highway in question [S.R. 826] which their property fronts." Id. at 14. (See diagram on following page).

While this Court in Anhoco, supra, acknowledged that access may be "regulated," it went on to find that the owners' right of access to S.R. 826 "is not being regulated, but is being destroyed," and that such action "cannot be summarily done . . . without compensation to the owners for loss that might be suffered by them." Id. at 14.[3]

The presence of "secondary roads" in Anhoco did not prevent the owners' claim for the destruction of its abutter's easement to S.R. 826. Instead, as noted by the court, the secondary roads merely served to "minimize" the damages. Anhoco, 144 So.2d at 797-798. Likewise, the presence of a "secondary road" (Spanish Trail)

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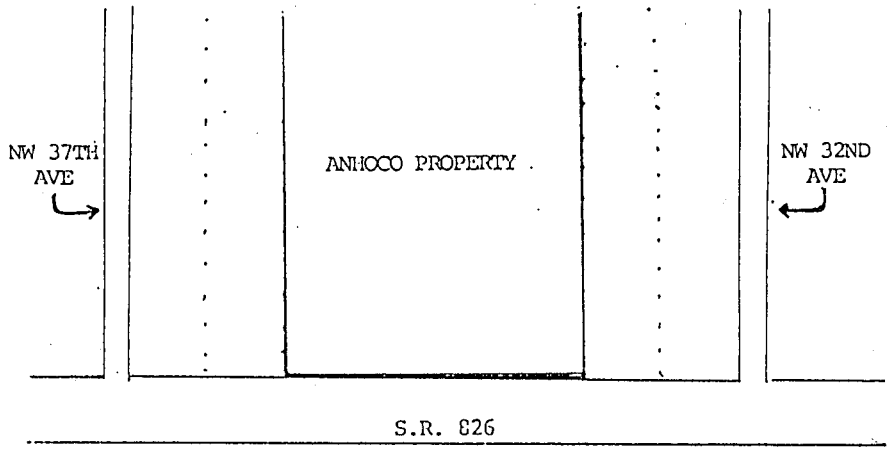
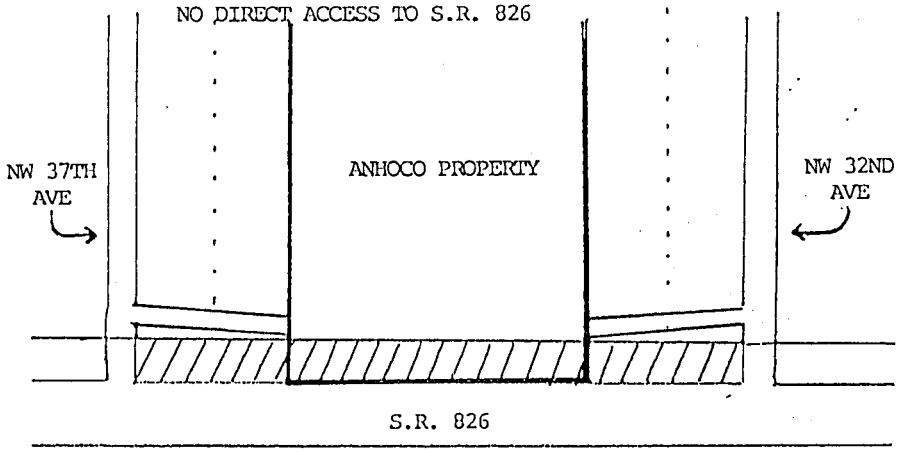
[3]The diagrams presented on the following page represent the owners' representation of the factual setting in Anhoco (a) before the owner's abutter's easement was taken; (b) after the abutter's easement was taken; and (c) after the owner was provided with a frontage road. The diagrams were derived from DOT right of way maps, as well as the facts as stated in the Anhoco decisions.

A. PROPERTY PRIOR TO EXPANSION OF S.R. 826
DIRECT ACCESS TO S.R. 826

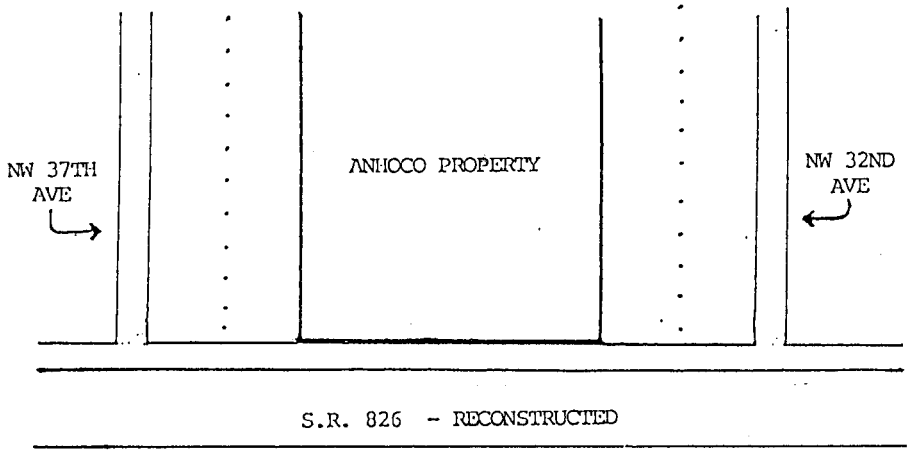


B. PROPERTY AFTER EXPANSION - "SERVICE ROADS" PROVIDED
NO DIRECT ACCESS TO S.R. 826



(FACTUAL SETTING DESCRIBED IN ANHOCO, 116 So.2d at 14; DESCRIPTION OF SERVICE ROADS ALSO DESCRIBED IN ANHOCO, 144 So.2d at 794.)

C. PROPERTY AFTER CONSTRUCTION - FRONTAGE ROAD
NO DIRECT ACCESS TO S.R. 826



(FACTUAL SETTING AT THE TIME OF AND DESCRIBED BY THE COURT IN ANHOCO, 144 So.2d at 794-795)

in this cause does not serve as a defense to the owners' claim. See also: Glessner v. Duval County, 203 So.2d 330 (Fla. 1st DCA 1967), where the government condemned the owners' access easement to Highway 27, leaving them solely with their alternate pre-existing access to a different secondary road. The court held that the owners could recover severance damages for the loss of their access easement to Highway 27, and the existence alternate, remaining access, did not preclude the claim. The existence of an alternate form of access may "minimize" the damages or even reduce them to a "nominal amount." It would simply be a matter for the jury's consideration and determination based upon all the facts. McCaffrey, supra at 669.

TRAFFIC-FLOW

The government also attempts to analogize this cause to the situations presented in various cases where the claim was denied because it was based upon an impairment of "traffic flow." This position is based upon a misunderstanding by the government of the concept of "traffic flow."

In every case where the owner's claim was denied, on the basis of traffic flow, there was no interference with the owner's abutter's "easement" to the existing roadway. Jahoda v. State Road Dept., 106 So.2d 870 (Fla. 2nd DCA 1958) is a classic traffic-flow case. There some of the road's traffic was diverted to another roadway at a point before it reached the owner's property. Id. at 871. The same is true of Jacksonville T & K Ry. Co. v. Thompson, 34 Fla. 346, 16 So. 282 (1894). The obstruction complained of did not

come into contact with the property of the owner or that portion of the public road which abutted the owner's property. Id. at 283.

In Div. of Admin., State of Fla. DOT v. Capital Plaza, Inc., 397 So.2d 682 (Fla. 1981), a median diverting northbound traffic was constructed within the existing right of way of Thomasville Road. While some of the owner's property was acquired for the road widening, the owner's abutter's easement was not altered. In fact, the court noted that there was still "free, unimpeded access" to the owner's property. Id. at 683.

In Div. of Admin., State of Fla. DOT v. Ness Trailer Park, Inc., 489 So.2d 1172 (Fla. 4th DCA 1986), the impairment complained of by the owner was the closing of one end of the road passing in front of it's property. There was no interference with the abutter's easement to the existing road. Instead, the road essentially became a one-way street. Id. at 1174.

In each of the above cases, the abutter's easement was not affected or impaired. Instead, traffic was diverted away from the property by various governmental actions. By comparison, the governmental activity in this cause - the construction of a retaining wall - substantially impaired, if not destroyed, the abutter's easement to Palmetto Park Road. The owners' claim is based upon the loss of that easement, not the redirection of traffic-flow.

POLICE POWER ACTIVITIES

The government suggests that the construction of the retaining wall is nothing more than an exercise of the "police power," for

which no compensation is due. As mentioned previously, the application of the government's theory would essentially reduce the property right of access to no right at all. This Court has rejected such attempts in the past and should continue to do so.

This Court, in Anhoco, described the types of activity that could legitimately be conducted - to prevent a public harm - without complaint by a land owner: control over the number of driveways to the abutting road; prohibiting U-turns; establishing one-way traffic. Anhoco, 144 So.2d at 798. As noted by the Court, such activities relate to the right to regulate, under the police power, the "flow of traffic." Id. at 798. Cf., Awbrey v. City of Panama City, 283 So.2d 114, 117 (Fla. 1st DCA 1973).

But the right to regulate does not include the right to destroy an owner's previously existing access easement. Under such circumstances, the government is exercising the power of eminent domain, not the police power. Once that occurs, compensation must be paid. Anhoco, 144 So.2d at 798. The police power is a source and basis for government action, as opposed to the protection of Art. X, Section 6A, which requires payment of full compensation whose private property is taken through actions of the government.

The government's reliance upon Awbrey v. City of Panama City Beach, 283 So.2d 114 (Fla. 1st DCA 1973), as support for denying the claim in this cause is misplaced. In Awbrey, the owner had 167 feet of frontage on an abutting roadway. Id. at 115. Within the existing right of way, the city constructed a sewer lift station. The lift station was built entirely underground, but contained a single manhole that projected up a distance of 1 3/4 feet above the

ground. The city constructed a guardrail around the manhole and a light pole. As a result of the construction, only 24 feet of the owner's frontage was obstructed. Id. at 115. The court concluded that under the circumstances, the owner could not establish that its access "has been seriously disturbed or destroyed." Id. at 117.

By comparison, the owners in this cause have lost all of their pre-existing access to S.R. 826. The retaining wall runs the entire length of the property! Awbrey, in fact, confirms the principles announced in Anhoco, as discussed previously in this brief, under which the claim of the owners in this cause can be sustained. Where, as in this cause, the access easement is substantially impaired or destroyed, the owners are entitled to be compensated.

The government's reliance on Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956), is likewise misplaced. Weir has been cited for the proposition that governmental activity within the existing right of way can destroy all of the owners' access without requiring compensation. This is simply not the law as it exists today.

In Weir, the court referred to owner's access rights as "so-called consequential rights" of the owner. Id. at 869. However, since Weir, decisions such as Anhoco, McCaffrey, and Stubbs have substantially elevated the status of access to where it is considered valuable "property" in and of itself. Stubbs, supra at 2; 3.

The first limitation on the holding of Weir, in access cases where there is a substantial impairment or destruction of the abutter's easement, is found in Anhoco, 116 So.2d at 14. There,

this Court cited Weir as holding only that the rights of abutting owners may be "regulated." It immediately went on to state:

> But the situation in the present case is much more extreme. The right of access is not being regulated but is being destroyed. The petitioners are being relegated to entrance and exit via secondary roads running at right angles to the highway in question which their property fronts. Id. at 14.

The Court in Awbrey, supra at 116-117, recognized the same limitation on the holding in Weir.

More recently, in Div. of Admin., State of Fla. DOT v. Jirik, 471 So.2d 549 (Fla. 3rd DCA 1985), the court distinguished Weir as applying only to cases where the owner's access was "regulated." It went on to note that Weir "appears to have been modified" by the Supreme Court's decision in Stubbs. Jirik, supra at 551, f.n. 4. The dissent strongly disagreed, citing Weir as controlling the disposition of the cause. Id. at 556.

Upon review, this Court, in Dept. of Transportation v. Jirik, 498 So.2d 1253 (Fla. 1986), approved the decision of the majority and went on to hold:

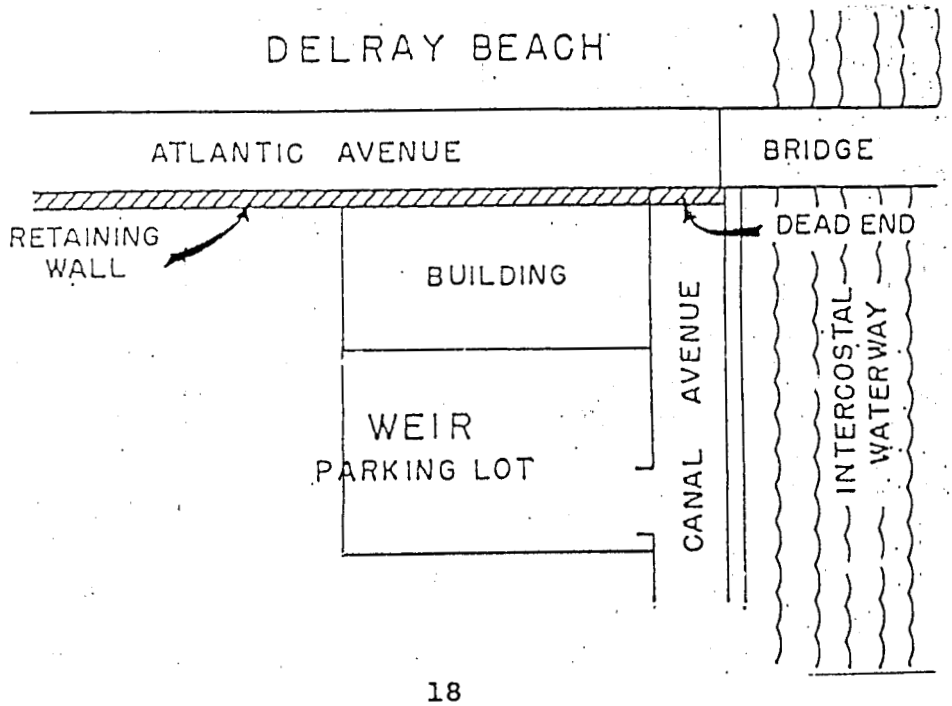
> It is well-established that government action which eliminates direct access to real property amounts to a taking for condemnation purposes. Id. at 1255.

In support of the above statement of the law, this Court cited Stubbs, in an approval of the lower court's opinion that Weir had been modified by Stubbs.

In light of the limitation placed upon the Weir holding by Anhoco, Stubbs, and this Court's opinion in Jirik, Weir can be applied only in cases where access is merely "regulated." Where as in this cause, the access easement has been destroyed or substantially impaired by governmental activity, the rationale of Weir is inapplicable and a "taking" has occurred.

Weir is distinguishable from a factual standpoint likewise. The DOT has included a diagram of what they believe the owner was complaining of in its claim. (Amicus Appendix, p. A-i). When the diagram is compared to the facts, as outlined in the decision, its inaccuracy is apparent.

The decision states that the owner's building faced Atlantic Avenue and that "a parking lot to the rear of the building was accessible from Atlantic Avenue via Canal Avenue." Weir, supra at 866. There is no indication in the opinion that the owner had any vehicular access from Atlantic Avenue to the parking lot except via Canal Avenue. As such, a proper diagram of the situation would be as follows:



A correct representation of the situation reveals that the owners real complaint was the closure of Canal Avenue where it intersected with Atlantic Avenue. The owner actually had the same abutter's easement before and after the construction of the retaining wall along Atlantic Avenue. The owner had only pedestrian access to Atlantic Avenue before and that is exactly what he had afterward. According to the decision, the owner's customers were provided with "stairs" leading to the owners' building after the wall was constructed. Id. at 866.

This is similar to what occurred in City of Orlando v. Cullom, 400 So.2d 513 (Fla. 5th DCA 1981), review denied, 411 So.2d 381 (Fla. 1981). There, the owner had only pedestrian access from Wall Street. The city converted the street into a pedestrian mall, leaving the owner with the same access to Wall Street as he had earlier. Id. at 514-515.

By comparison, the owners in this cause had and utilized their abutter's easement for both pedestrian and vehicular access. Vehicles could turn directly from the eastbound lanes of the abutting roadway onto the property and could leave the property in the same manner. Pedestrians walking along the sidewalk could merely turn into the property and walk to the owners' business. But as a result of the retaining wall, the owners' pre-existing access easement has been substantially impaired, if not destroyed. Vehicles can no longer turn into or leave the property via the abutter's easement to Palmetto Park Road. Pedestrians will have to climb the retaining wall and endure a substantial drop to the ground to reach the property via the pre-existing easement.

Considering the above, Weir is neither legally nor factually comparable to the cause before this Court.

ROAD CLOSURE DECISIONS

The government cites to the decision of City of Port St. Lucie v. Parks, 452 So.2d 1089 (Fla. 4th DCA 1984) in support of its position. The district court correctly rejected the application of Parks to the cause at hand.

In Parks, according to the opinion of the district court, the city did not interfere with the owner's access easement to Cane Slough Road, which is the road that the owner's property abutted. Rather the dead-ending of the road prevented the owner from getting to Port St. Lucie Blvd., from Cane Slough Road, with the same ease as it could prior to the realignment. Id. at 1090.

The setting in Parks is simply not comparable to this cause where the easement to the abutting road has been destroyed.

Pinellas County v. Austin, 323 So.2d 6 (Fla. 2nd DCA 1975), also does not support the government's position in this cause. There, the owners complained of the impact of the vacating of a street that led to their property. The court found that in such cases, a landowner must demonstrate that he has suffered special damages which are not common to the general public. Id. at 8.

If the Austin test were applicable, the owners can easily meet the special damage requirement. As noted by the district court in the present case:

> The retaining wall extends directly in front of the owners' property and approximately twenty feet easterly to the adjoining lot; but it ends

> there and it does not affect any of the remaining seven lots fronting on Palmetto Park Road to the east. Opinion, p. 4.

As the opinion clearly establishes, the owners in this cause are the only ones who have the retaining wall extending along the entire front of their property where it abuts Palmetto Park Road. The damage they will suffer is not a damage common to the general public. In fact, the general public is unaffected. Only those unfortunate enough to be located behind the wall will suffer any damages. The seven lots referred to by the district court still have their abutter's easement to the roadway and have not suffered at all.

It is respectfully suggested that the court in Austin reached the right result, but for the wrong reasons. Contrary to the position taken in Austin, where an owner's previously existing abutter's easement is destroyed, the owner need not show a special damage or injury in order to sustain its claim.

This Court in Stubbs, supra, rejected a similar argument holding:

> Whether the damage Respondents suffered is "different in kind" from that of their neighbors, whose lands were not condemned, is not entirely dispositive of the issue involved. The important question is whether there has been a substantial diminution in access as a direct result of the taking. What is "substantial" is a question of fact posing practical problems of proof for a jury's consideration. Where some right of access is still available, as would appear in the cause under consideration, it is

> for the jury to determine whether the resulting damages are nominal or substantial. Id. at 3.

See also: Anhoco, 116 So.2d 8 (Fla. 1959), where the court imposed no special damage requirement.

According to the Austin decision, the vacated road "led to the Austin's land from the north and the west." Id. at 8. The owners had an access easement to those roads if they actually abutted the owners' property. By vacating the roads, the government destroyed that abutter's easement and the owners were entitled to a finding that a taking had occurred.

The court in Austin went on to correctly hold that the "existence of the other possible means of access may reduce the amount of recovery," but did not defeat the owners' claim. Id. at 9.

ANSWER TO CERTIFIED QUESTION

The narrow issue certified to this Court by the district court asks:

> ARE THE OWNERS OF COMMERCIAL PROPERTY LOCATED ON A MAJOR PUBLIC ROADWAY 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 ROUT THROUGH RESIDENTIAL STREETS?

Considering that access, as a matter of law, is an abutter's easement to the adjacent roadway and is a "property" right, governmental activity which substantially impairs or destroys that easement gives rise to an inverse condemnation claim by an owner.

While the government, via the police power, may "regulate" an owner's access, by restricting the number of driveways to the abutting road, it cannot destroy or substantially impair the owners' access easement. When this occurs, it is an exercise of the power of eminent domain, not the police power.

The government activity in this cause - building a retaining wall across the entire front of the owners' property - has destroyed the owners' existing access easement to that roadway. As such, the certified question can only be answered in the affirmative. To do otherwise would reduce the property right of access to a mere memory.

Over 45 years ago, Justice Terrell rebuffed the idea that the constitution of this state would permit governmental action which reduce the guaranty of the right to own property to "nothing more than the tinkling of empty words."[4] His enduring expression concerning the institution of private property is keenly applicable to the modern-day threat embodied in the government's position before this Court:

> American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation of it, but it will not be permitted to grab or take it by force . . .. Forceful

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[4] State Road Dept. v. Tharp, 1 So.2d 868 (Fla. 1949).

taking is abhorrent to every democratic impulse and alien to our political concepts.

If American democracy survives and lives up to the function of its creation, it must do so by adherence to the code of moral and legal conduct which promulgated by the Constitution, one provision of which is the sanctity of private property. No principle has contributed more to the material development of the country or done more to stabilize and balance its citizenship . . .. It is one of the first duties of constitutional government to protect, and where the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes. The current of the law on this point will not lead to any other conclusion.[5]

CONCLUSION

The question certified to this Court should be answered in the affirmative and the decision of the district court, as well as the judgment of the trial court, should be affirmed.

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[5] Id. at 870.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Shirley J. McEachern, Assistant County Attorney, 301 N. Olive Avenue, P.O. Box 1989, W. Palm Beach, FL 33402, and Maxine Ferguson, Attorney, Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, FL 32399-0458, this 22 day of June, 1988.

Respectfully submitted,

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