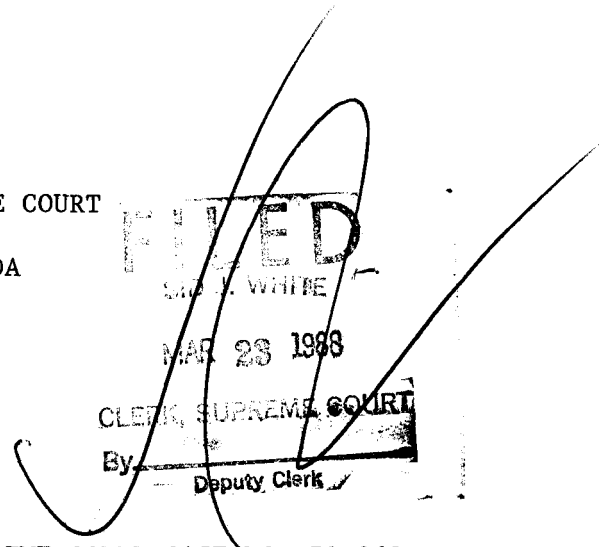
IN THE SUPREME COURT

OF FLORIDA



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

Petitioner,

v.

MILDRED TESSLER and HELEN WHITENER,

Respondents.
_____/

SUPREME COURT CASE NO. 71,962

FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4-86-2973

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

In the middle of winter, 1988, the Fourth District Court of Appeal rendered its decision in Palm Beach County v. Tessler, Case No. 4-86-2973, 13 FLW 249 (Fla. 4th DCA January 20, 1988) wherein the decision of the trial court was affirmed. Notwithstanding that affirmance, the appellate court acknowledged that the issue presented was a close one and therefore, certified the issue presented as a matter of great public importance. (Appendix 5) This Court has accepted jurisdiction. The case originated on or about April 3, 1985 when the Respondents as Plaintiffs filed their Complaint for inverse condemnation in the Fifteenth Judicial Circuit Court of Florida, in and for Palm Beach County. (R. 155-157). The case was tried without a jury before the Honorable Timothy P. Poulton on September 29, 1986. Two issues were presented: 1) Whether or not Petitioner's construction of a retaining wall as part of a bridge improvement project occurred on the private property of Respondents' or in the public right-of-way; and 2) Whether or not the construction of this wall, which cut off Respondents' direct access to Palmetto Park Road, a major thoroughfare in Boca Raton, although two other access points remained, amounted to a taking for purposes of inverse condemnation. After consideration of the evidence and the testimony, the trial court found that the wall was to be constructed in the public right-of-way and therefore there was no physical taking. However, the trial court nevertheless determined that a case of inverse condemnation had been proven because after construction of the wall, traffic travelling on Palmetto Park Road would no longer be able to directly turn into

Respondents' commercial property but would be forced to travel a three-block circuitous, inconvenient route to the two back access points to Respondents' business establishment. (R.230-233). Petitioner timely filed its Notice of Appeal to review the decision of inverse condemnation. (R.237). The parties presented their oral argument on July 1, 1987 before the Fourth District Court of Appeal, whose decision in late January of 1988, affirmed the decision below but certified the following question to the Florida Supreme Court as a matter of great public importance:

> 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?
>
> (Appendix 5)

Palm Beach County, the Defendant/Appellant/Petitioner, timely filed its Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court. Thereafter, jurisdiction was accepted.

STATEMENT OF THE FACTS

Respondents as plaintiffs filed their Complaint whereby they sought determination that the effect of Petitioner's bridge construction and road widening project on Palmetto Park Road in Boca Raton amounted to a taking of their property. (R.155-157). Respondents claimed that part of the project would be constructed on a portion of their property and constituted a taking for purposes of condemnation. They also claimed that Petitioner's construction of a retaining wall along the front of their property, which cut off their direct access to the major thoroughfare, also constituted a taking. As to the first issue, the trial court found that Petitioner's construction activities were confined to the pre-existing right-of-way and therefore, there was no physical taking from the Respondents. (R.230-233).

As for the second issue, the trial court found that the Plaintiffs' (Respondents') property is zoned B-1 under the Boca Raton Zoning Code which allows the mixed residential and commercial use now being undertaken. (R.230-233). The Plaintiffs (Respondents) have lived on the premises since 1977 and have operated a beauty shop business thereon since shortly after acquiring the property. The trial court further found that after construction of the retaining wall, Plaintiffs (Respondents) will maintain their pre-existing access to Spanish Trail, a street which adjoins their property on the west side. Plaintiffs (Respondents) will continue to have two driveway access points to Spanish Trail. By accessing Spanish Trail and going under the newly constructed bridge, indirect access can be gained to Palmetto Park Road after

construction of the retaining wall. Based upon these facts, the trial court determined that a taking by inverse condemnation had occurred and stated:

> The plaintiffs own a valuable parcel of commercial property fronting on Palmetto Park Road, a major east-west thoroughfare in Boca Raton. Before the taking, east bound traffic on Palmetto Park Road could turn right, directly into plaintiff's parking lot.[1] Following the taking, for east bound traffic to reach the property, it will be necessary for that traffic to take about a three-block circuitous route through a residential neighborhood to the rear of plaintiff's property. If the plaintiff wants to advise potential patrons about access to the property, it will be necessary to post a large sign (or at least a sign as large as Boca will allow) which will say something to the effect:
>
> > "To gain access to this property go one block east and turn right onto Olive Way; take the first right and go one-half block; turn right onto Park Drive West; turn right onto Spanish Trail and take the first driveway to the rear of this property."
>
> [1]Also, traffic west bound on Palmetto Park Road could turn left into plaintiffs' parking lot. The flow of east bound traffic is an obvious impediment to this maneuver. But after the improvement, there will be no flow into the front of the property.
>
> (R.232-233)

Based upon the preceding, Judge Poulton ruled that the plaintiffs have been denied "suitable access."

In affirming that decision from the trial court, Judge Letts of the Fourth District Court of Appeal wrote:

> Under the circumstances we must agree with the trial court's conclusion that the owners lost more than their most convenient method of access. They have shown that the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property. The wall will also block visibility of the commercial store front from Palmetto Park Road.
>
> (Appendix 4)

However, Judge Dell's dissent correctly warns that although the property owners may suffer a decline in their business as a result of the retaining wall, business damages are strictly a matter of legislative grace, not constitutional imperative. Petitioner respectfully submits that both the ruling of the trial court and of the appellate court are contrary to Florida's law of inverse condemnation and that this Court find that the evidence is not substantial and is incompetent to support the rulings below.

QUESTION CERTIFIED AS ONE OF
GREAT PUBLIC IMPORTANCE

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 THE ARGUMENT

Florida law clearly holds that when a governmental entity takes no real property from a property owner, any improvement to a public right-of-way that results in some loss of access is not a compensable loss unless the facts show a substantial diminution in the quality of access remaining. Substantial diminution is defined as an actual impairment to the property but is not supported when the facts only show, as here, only loss of the most convenient access has occurred that has resulted in near circuity of travel, some loss of view, and possibly, some loss of commercial value. Property owners abutting a public thoroughfare take that property subject to the public's right to have the way improved for the public good and any damages resulting to the property owner when no real property has been taken, does not amount to a taking for condemnation purposes. Respondents have lost no beneficial use of their property, they have only lost their most convenient access.

ARGUMENT

Both decisions below held that circuity of travel, change of traffic flow and loss of view of commercial property substantially diminished the quality of Respondents' remaining access and therefore, construction of the subject retaining wall in the public right-of-way constituted a "taking" for purposes of condemnation. Both decisions are contrary to the law in Florida.

Had all access to and from the Respondents' property been blocked off by Petitioner's construction of its retaining wall in the public right-of-way, the particular factual setting before this Court would be akin to that of Department of Transportation, Division of Administration v. Jirik, 498 So.2d 1253 (Fla. 1986), wherein this Court held that the elimination of all direct access to real property amounts to a taking for condemnation, and therefore, this Petitioner's actions would indeed amount to a cause of inverse condemnation. However, Respondents have not suffered elimination of all direct access to their property but in fact, as the trial court specifically found, Respondents enjoy two direct access points to Spanish Trail from which indirect access can be gained onto Palmetto Park Road after construction of the retaining wall. (R.231) The taking of "any" access when other access remains, in and of itself and without a physical invasion of a property owner's land, has never in the State of Florida amounted to a "taking" as defined by the law of eminent domain. Although this Court has repeatedly adhered to the principle of law it recognized in State of Florida Department of Transportation v. Stubbs, 285 So.2d 1 at 3 (Fla. 1973) that "[e]ase and

facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated," this Court has also repeatedly warned against the misapplication by lower courts of its Stubbs ruling by continually distinguishing the limited applicability of that principal to Section 388.04, Florida Statutes (1971) cases. As Justice McDonald wrote in 1981, "Stubbs held that Section 388.04, Florida Statutes (1971), requires jury consideration of severance damages where there is a direct physical taking of property for the construction of a limited access road." Division of Administration, State Department of Transportation v. Capital Plaza, Inc., 397 So.2d 682 at 683 (Fla. 1981). The import of this limited applicability is that the taking of "any" access, in and of itself, is only compensable, albeit perhaps nominally, where there is a physical taking of land from the property owner for the building of a limited access facility, as statutorily defined, and as a direct result of that physical taking by the condemning authority, the property owner has lost some access.

Petitioner's construction of the subject wall in the front of Respondents' property, but not on Respondents' property, was not a Section 388.04, Florida Statute (1971) public project nor, as just mentioned and as found by the trial court, was there any physical taking away of Respondents' real property. The trial court in this case determined that the Petitioner's construction in the public right-of-way of a retaining wall that cut off one of three access points to Respondents' property was a taking because:

> The plaintiffs own a valuable parcel of commercial property fronting on Palmetto Park Road, a major east-west thoroughfare in Boca Raton. Before the

taking, east bound traffic on Palmetto Park Road could turn right, directly into plaintiff's (sec) parking lot.[1] Following the taking, for east bound traffic to reach the property, it will be necessary for that traffic to take about a three-block circuitous route through a residential neighborhood to the rear of plaintiff's property. If the plaintiff wants to advise potential patrons about access to the property, it will be necessary to post a large sign (or at least a sign as large as Boca will allow) which will say something to the effect:

> "To gain access to this property go one block east and turn right onto Olive Way; take the first right and go one-half block; turn right onto Spanish Trail and take the first driveway to the rear of this property."

(R.230-233)

Circuit Court Judge Poulton provided the following footnote to his decision:

> [1]Also, traffic west bound on Palmetto Park Road could turn left into plaintiffs' parking lot. The flow of east bound traffic is an obvious impediment to this maneuver. But after the improvement, there will be no flow into the front of the property."

(R.230-233)

In affirming the trial court's decision, Judge Letts wrote in the opinion of the Fourth District Court of Appeal that:

> Under the circumstances we must agree with the trial court's conclusion that the owners lost more than their most convenient method of access. They have shown that the retaining wall will require their customers to take a tedious and circuitous route to reach their business premises which is patently unsuitable and sharply reduces the quality of access to their property. The wall will also block visibility of the commercial storefront from Palmetto Park Road.
>
> 13 FLW at 250 (Fla. 4th DCA January 20, 1988)

Where there has been no physical taking of real property from a property owner whose lands, whether residential or commercial, abut a public thoroughfare, the loss of one but not all access is not a compensable loss that amounts to a taking for purposes of condemnation when the effect of that loss results in a circuity of travel, change or loss of traffic flow, or loss of view. In fact, this Court in its Stubbs decision acknowledged that "access" as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic. 285 So.2d at 4. See also Division of Administration, State Department of Transportation v. Capital Plaza, 397 So.2d 682 (Fla. 1981); City of Orlando v. Cullom, 400 So.2d 513 (Fla. 5th DCA 1981).

In the 1956 case of Weir v. Palm Beach County, 85 So.2d 865 (Fla. 1956) this Court addressed the question of whether interference with ingress, egress and view or interference with convenient accessibility all resulting from improvement of a public way and not involving any actual taking or physical invasion of the land of the complaining property owner is compensable as a taking under the Florida Constitution. In Weir as in this case, direct, convenient access to the complaining property owner's business establishment was cut off by the construction of a retaining wall in the public right-of-way and thereby forced customers to access the business establishment by way of a circuitous route. The Weir property owner further claimed loss of business and damages through enforced reduced rentals and for loss of view. Thus in a factual setting

paralleling that now under consideration, this Court found no taking and ruled:

> The owner of property abutting a public way has a right of ingress to and egress from his property as well as a right to enjoy the view therefrom. However, these are rights which are subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the way improved to meet the demands of public convenience and necessity. If the improvement for the benefit of the public interferes with the pre-existing means of ingress and egress and view enjoyed by the individual property owner, without actual physical invasion of the land of the property owner, then again we have a situation where the individual right is subordinate to the public good and any alleged damaged suffered is damnum absque injuria. This is so for the simple reason that one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need.
>
> 85 So.2d at 868-869

Thus, while the right of access to one's property is recognized as a property right, not every loss is compensable. The answer to the question as to when such a loss is compensable is found in Section 388.04, Florida Statutes (1971) (limited access facility cases) and in the Florida's case law of eminent domain. Interestingly, the answer is summed up in a footnote found in another opinion from the Fourth District Court of Appeal. In Division of Administration , State of Florida Department of Transportation v. Ness Trailer Park, Inc., 489 So.2d 1172 at 1178 (Fla. 4th DCA 1986), Judge Glickstein wrote:

> Besides takings for the purpose of building limiting access to existing ones - which the present facts do not fit - there are two other types of situations in which compensation is available. One is like that described in Benerofe v. State Road Department, 217

> So.2d 838 (Fla. 1969), where access is lost because the public authority erects a physical barrier impeding ingress or egress; and a second is where there has been a substantial diminishment of access by the closing off of principal access points of the landowner's property, as in Pinellas County v. Austin, 323 So.2d 6 (Fla. 2d DCA 1975).

The first two situations do not fit the facts presented here. Construction of the retaining wall was not part of a limited access facility and while the retaining wall is indeed a physical barrier, ingress and egress to the property remains. Thus, we are left with determining applicability of the final scenario found in Austin, wherein it was held that the County's vacation, by resolution, of certain portions of platted streets leading to the Austins' land resulted in a compensable loss because the quality of the two remaining access roads was so substantially diminished from that of the previously travelled dirt road, that a taking had occurred. One of the two remaining access roads was an unimproved, platted street which in simple terms meant no actual road existed although it was drawn on a map. The only actual access remaining to the Austins' property was by way of a road that necessitated travelling over an old wooden bridge that could not support heavy vehicular traffic, such as sanitary and emergency trucks. Prior to the vacation of the dirt road, such heavy trucks could access the property. In reaching its decision the Second District Court of Appeal held:

> The fact that a person loses his most convenient method of access is not such damage which is different in kind from damage sustained by he community at large where his property has suitable access from another street even though the alternative route is longer . . .
>
> On balance, we believe the record is sufficient to support the conclusion that the Austins suffered a

> sufficient impairment of their right of access as to be different in kind from the public at large. The existence of the other possible means of access may reduce the amount of the recovery but because of the limitations upon the other access, the Austins are entitled to be compensated for the loss suffered by the vacation of the streets in question. (Emphasis added.)
>
> 323 So.2d at 9

In writing for the court, Judge Dell in City of Port St. Lucie v. Parks, 452 So.2d 1089 (Fla. 4th DCA 1984) further defined substantial diminishment in the quality of access to mean an actual impairment which results in some deprivation to the property but does not include mere inconvenience; although the loss of one access, where another remains, may be a loss of the most convenient access, mere inconvenience without actual impairment is not compensable. 452 So.2d at 1091.

In the much cited case of Capital Plaza, an owner of commercial property sought damages for an alleged substantial impairment of access resulting from a road widening project's construction of a median strip. This in fact involved a physical taking of land from the commercial property owner whose service station fronted a two-lane road, that prior to reconstruction, had no median strip. After reconstruction, the road was six lanes divided by a raised four-foot-wide median. Due to the median, northbound traffic no longer could turn across traffic directly into the service station. This Court reversed the First District Court of Appeal decision which held that the jury should have been allowed to consider evidence relating to free access by north bound traffic. In reversing, this Court made the distinction so often overlooked in these cases, i.e. that the alleged damages are a result of a change in the flow

of traffic, not a deprivation of access. The service station still enjoyed "free, unimpeded access to Capital's service station albeit only by southbound traffic." 397 So.2d at 683. Justice McDonald offered this further insight into the Court's decision:

> Although the holding in Stubbs is not applicable here, that case does provide guidance. The Stubbs Court also said that "'access' as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic." 285 So.2d at 4. Thus, this state has joined the numerous other jurisdictions which have found that a landowner has no property right in the continuation or maintenance of traffic flow past his property. See Annot. 73 A.L.R. 689, §4 (1960); 2A Nichols Eminent Domain §6.445 (rev. 3d ed. 1979).
>
> 397 So.2d at 683

Perhaps the law in this area was most simply stated in the following words of the Second District in State of Florida Department of Transportation v. ABS, Inc., 336 So.2d 1278 at 1280 (Fla. 2d DCA 1976): "But as we understand the law, the right to such compensation doesn't depend upon whether the right of access taken was a direct route of access; rather, it appears the question is whether, where as here some right of access is still available, there has been a substantial diminution in access as a result of the taking."

Circuity of travel, change or loss of flow of traffic, and change of view that result in adverse economic effects have specifically and repeatedly been held by the Courts of the State of Florida insufficient to amount to a substantial diminution in the quality of access to support a claim of inverse condemnation. Petitioner urges this

Court to answer the question certified in the negative and reverse the decision reviewed.

CONCLUSION

Although the right of access to one's property is recognized as a valuable property right, not every loss is compensable. Never has this Court ever held, as the appellate court and trial court have indeed done so in this case, that circuity of travel, loss or change in traffic flow, loss of view, and loss of the most convenient access where other access remains, constitutes a substantial diminution in the quality of access. Petitioner's challenged public project is not a limited access facility project. No private property has been taken for the subject right-of-way improvement. Petitioner urges this Court to quash the decision below and answer the question certified in the negative. Where, as here, a substantial diminution in the quality of access is not shown, the law remains as this Court held so long along in Weir v. Palm Beach County, 85 So. 2d 865 at 869 (Fla. 1956), " . . . that one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to JAMES W. VANCE, ESQ., James W. Vance, P.A., Barristers Building, Suite 200, 1615 Forum Place, West Palm Beach, FL, 33401; and JAMES J. RICHARDSON, ESQ., P.O. Box 12669, Tallahassee, FL, 32317, this 22nd day of March, 1988, by United States mail.

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