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 REPLY BRIEF

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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?

ARGUMENT

Respondents begin their brief as follows:

> The first to present his case seems right, till another comes forward and questions him.
>
> Proverbs 18:17 (NIV)
>
> Answer Brief, page 3.

Respondents forget that it was they, and not this Petitioner, who initiated this case and from that day that their Complaint was filed, Petitioner has persistently come forward and questioned them. Respondents cry that:

> 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."
>
> Answer Brief, page 6

Respondents should tread more carefully in their attack, for the Petitioner's position emanates directly from a history of established precedent from the very Court Respondents now seek to rule in their favor and whose opinions Respondents indirectly, yet poignantly, ascribed as medieval.

Whether or not "The King Could Do No Wrong" is not relevant; nor is such even a disguised position of Petitioner who is ever mindful of President Abraham Lincoln's exhortations that in order that our nation might live, we must be a

> . . . government of the people, by the people, for the people . . .
>
> The Gettysburg Address
> 19 November 1863

So in that same spirit, this Court in 1956, while recognizing the "abutter's easement" described in Respondents' brief, ruled in a case not too unlike that presented now that:

> The owners of property abutting a public way has a right of ingress 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 have the way improved to meet the demands of public convenience and necessity. If the improvements 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 an actual physical invasion of the land of the property owners, then again we have a situation where the individual right is subordinated to the public good and any damage 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 . . .
>
> We, therefore, hold that the interference with the so-called consequential rights of the plaintiff under the facts alleged in this compliant are not tantamount to the "taking" or appropriation of plaintiff's property for which the Florida Constitution requires compensation.
>
> Weir v. Palm Beach County, 85 So.2d 865 at 868-869 (Fla. 1956)

Respondents continue their outcry that:

> 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 mere memory.
>
> Answer Brief, pages 3-4

Not so. No where in Petitioner's briefs is such a position taken. In fact, Petitioner has repeatedly noted that a compensable loss of access was in fact presented in Pinellas County v. Austin, 323 So.2d 6 (Fla. 2d DCA 1975) which was in nowise a "landlocked" situation. Rather, the loss of one access by a county resolution for abandonment, forced the courts to examine the quality of the remaining access to determine if such loss of the one access reached that certain required degree demonstrating a substantially impaired accessibility to the property. Of the two accesses of which remained to the Austin property, only one was actually used as a road; the other while platted on the map (i.e. the plat) was not actually built. Thus only one existing road remained. The quality of access offered by this remaining road could not equal the quality of access offered prior to the road abandonment, because all who could access the property before, could not in the after situation. An old wooden bridge along the remaining access road could not support the customary heavier vehicles that frequented the property in the before situation. Thus, the quality was diminished.

It is Respondents and not Petitioner, who misinterprets. Respondents quote the following as if Petitioner's position is somehow an attempt to abrogate the spirit contained therein:

> It is well-established that government action which eliminates direct access to real property amounts to a taking for condemnation purposes.
>
> Department of Transportation v. Jirik
> 498 So.2d 1253 (Fla. 1986)

Petitioner's position is not in any degree in contravention of that spirit but what Respondents somehow do not comprehend is that direct access to their property has not been destroyed. Two direct access points to Respondents' property, as found specifically by the trial court, remain to their property from Spanish Trail. Construction of the wall, well within the public right-of-way, only cut off direct access to Palmetto Park Road; it did not cut off direct access to Respondents' property . . . a distinction with a recognized difference in Florida law. Both Jirik and Benerofe v. State Road Department, 217 So.2d 838 (Fla. 1969) involved factual situations wherein the government built a physical barrier which cut off the only access to the subject property directly from a street; thus no access remained. Such is not the case here today. Further, contrary to Respondents' statement in the footnote on page 5 of its Answer Brief, nowhere in any of Petitioner's briefs has Petitioner stated that Benerofe involved a limited access taking.

Petitioner at all times acknowledges that the right of access to one's property is a property right, but not every loss of that right is a compensable one. When one of three access points is cut off, as here, the resulting circuity of travel, change in traffic flow, loss of view that result in adverse economic effects, and loss of the most convenient access where others remain, do not, under existing Florida law, give rise to a "taking." Yet, these resulting effects are all that were found by

the trial court and which constituted the basis for the decision subsequently under review by the higher courts. Again, Petitioner directs attention to Division of Administration, State of Florida Department of Transportation v. Ness Trailer Park, Inc., 489 So.2d 1172 at 1178 (Fla. 4th DCA 1986) wherein 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).

Because the facts presented do not evolve from a limited access facility case nor from the building of a physical barrier which impedes all access, since access remains, Petitioner still maintains that the applicable test is that set forth in Austin and as further developed in City of Port St. Lucie v. Parks, 452 So.2d 1089 (Fla. 4th DCA 1984), to-wit: whether or not the facts show that the loss of one access, where others remain, results in a substantial diminution in the quality of access remaining. Substantial diminution is an actual impairment to the property but is not supported when the facts show, as here, a loss only of the most convenient access which in turn necessitates a circuity of travel, some loss of view, and possibly, some loss of commercial value. The quality of access to Respondents' property before the construction of the wall and the quality of access after construction of the wall

is the same. Access is just not as convenient as before, but the resultant effects, as found by the trial court, of circuity of travel, change or loss of flow of traffic and a change of view that results in adverse economic effects have specifically and repeatedly been held as insufficient to amount to a substantial diminution in the quality of access to support a claim of inverse condemnation. Again, Petitioner urges this Court to answer the question certified in the negative and reverse the decision reviewed.

CONCLUSION

Direct access to Respondents' property remains, only direct access to Palmetto Park Road is lost. Petitioner concludes, therefore, as it did in its initial brief: 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; JAMES J. RICHARDSON, ESQ., P.O. Box 12669, Tallahassee, FL, 32317; and MAXINE F. FERGUSON, Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, FL, 32399-0458, this 20th day of May, 1988, by United States mail.

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