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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,416

DIST.COURT OF APPEAL
4TH DISTRICT - NO. 91-1301

BROWARD COUNTY, etc.,

Petitioner,

vs.

BHARAT PATEL, et al.,

Respondents.
_____/

RESPONDENTS', WARREN & SELINA PICILLO'S,
ANSWER BRIEF

Parcels 44 & 44TCE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

This eminent domain case was filed in Broward County in 1988. The Date of Taking was July 13, 1989. The trial was held on February 11-22, 1991 and was completed on March 14 & 15, 1991.

WARREN PICILLO and SELINA PICILLO, his wife, owners of Parcels 44 and 44TCE, together with BHARAT PATEL and GITA PATEL, owners of Parcels 47 and 47TCE, filed an appeal to the Fourth District Court of Appeals.

Oral argument was held in April, 1992, and the Opinion was rendered by the Fourth District Court of Appeals on February 10, 1993. The Fourth District Court of Appeals reversed the trial court based on the doctrine of State Dept. of Transportation v. Byrd, 254 So.2d 836 (Fla. 1st DCA 1971) and Williams v. State Dept. of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991) and certified the following question to the Supreme Court of Florida:

> "MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING ZONING JURISDICTION OVER THE PROPERTY?"

(APP.12)

STATEMENT OF FACTS

The thirteen unit motel owned by WARREN and SELINA PICILLO is located on three fifty-foot wide lots on the east side of State Road A1A in Pompano Beach, Florida. Three buildings are arranged in the shape of a U around a central patio on the two southernmost fifty-foot lots. On the eastern portion of the northern lot behind a fence is a swimming pool, pool deck, shuffle board court, pool pump and heater. On the west end of the northernmost lot, separated by the fence, is a grassed and dirt parking area along with a dumpster pad and telephone booths, an air conditioner pad, and a TV dish antenna. (See drawing on facing page.)

The motel was completed in 1953 (ROA 513) and has been operated continuously by various owners as a motel since that time. The motel units contain complete kitchenettes and guests often stay for several months at a time. (ROA 802, 811) On the westerly side of the two southernmost lots was a paved strip of parking comprised of nine parking places perpendicular to the street. There was no curb or public sidewalk on A1A in front of this motel at the time of Taking. The grass parking area would accommodate from seven to eight additional cars (ROA 831) (APP.1). It is fenced off from the pool and shuffleboard area. (ROA 524 & 804) One of the thirteen motel units was at various times set aside as an office for the motel. The Taking consisted of a narrow strip of property across the front of the Santa Rosa Motel containing approximately 594 square feet. (ROA 203, 617) The construction plans offered into

evidence by the County showed a curb to be built running the entire width of the front of the Santa Rosa Motel. (ROA 217) The Taking eliminated the use of all nine perpendicular, paved parking places. (ROA 664, 924)

The County's position at the Order of Taking hearing and at the trial was that the motel in the "Before Condition" only had nine legal parking places and that the side yard was simply that, a yard that could not legally be used as unpaved parking. At the Order of Taking hearing the County's appraisal position was that the swimming pool could be filled in and a new pool built in the patio between the three buildings, thus recapturing ten parking places on the northernmost lot without needing variances. This testimony was stricken on the Defendant's motion based on the BYRD case because the testimony was based on a misconception of the law of severance damages, and the Order of Taking was denied. (ROA 358-359)

For the trial, the same appraiser opined that eight parking places could be put in the unpaved yard portion of the western portion of the northernmost lot and that two parallel parking places could be recaptured in front of the motel buildings on the two southernmost lots (APP.2), thereby reducing the severance damages to merely the cost of paving the side yard and re-striping the old paved parking. This plan would need two driveways on to the remaining tract, a violation of DOT standards (TR.848), and all ten parking spaces would violate at least one (and some several) zoning code requirements (TR.851)(APP.5-9).

At the trial the owners' position was that in the "Before Condition" the motel had parking for sixteen or seventeen automobiles and in the "After Condition" had parking space for only five that fully complied with the zoning code existing on the date of taking, and therefore claimed severance damages in the amount of $255,180 (ROA 972). The zoning code had a grandfather clause that rendered the parking in the side lot legal. (APP.3) Business damages were claimed in the amount of $300,000 (ROA 1097), in addition to the value of the part taken of $3,300 (ROA 971).

The County's position at the trial was that business damages were zero, reasoning that they were not legally allowable because they were duplicative of severance damages, that the value of the part taken was $9,100.00, and the severance damage was merely the cost to pave the side yard, in the amount of $26,117.25. The jury returned the verdict exactly on the County's figures for real estate and returned a business damage figure of zero (APP.10).

Mr. Don Sutte was the County's appraiser. A Motion in Limine was filed (ROA 354), prior to his testimony, moving to prohibit his testimony due to the facts that: 1) his testimony was based on a misconception of law in that he was concluding that the lost nine paved parking spaces could be recaptured by relocating them onto the side yard area in violation of the doctrine in State Dept. of Transportation v. Byrd , 254 So.2d 836 (Fla 1st DCA 1971); 2) that he relied on the testimony of a land planner who was using a zoning ordinance that was not in effect as of the Date of Taking; and 3) that the land planner and Mr. Sutte

were relying on the testimony of the City officials that a variance would be granted, which testimony is also a misconception of the law. Severance damages cannot be reduced by relying on the possibility that a permissive act by governmental authority would be granted. Objections were continually made during his testimony and motions for directed verdict were made at the end of the County's case and the end of the entire case based on the same grounds as above. (ROA 1497) All Motions and objections were denied.

A Motion In Limine was filed before the testimony of the land planner, Ms. Sheila Rose, (ROA 354) based on the fact that she was using a zoning ordinance that was adopted seven months after the Date of Taking and that she in part was erroneously relying on testimony of City officials as to their opinion of the action the City Commission would take, and that she was relying on an erroneous conception of the law of severance damages as set forth in State Dept. of Transportation v. Byrd, supra. Continuing objections were made during her testimony, including a motion for directed verdict, which was made at the conclusion of Plaintiff's case and again after Defendants' case. (ROA 796, 1497) All motions and objections were denied.

Motions in Limine were made prior to the testimony of City officials Reagan Yarbrough and Elmer F. Kleingartner (ROA 226-269) due to the fact that 1) they were not qualified to give opinions as to what the City Commission would do in granting a variance, 2) they were testifying as to the interpretation of a

zoning ordinance, which is the providence of the court, and 3) they were testifying as to the erroneous conception of the law that severance damages could be cured based on the assumption that a permissive act would be done in the future by governmental authority. Continuing objections and motions for directed verdict were made as to their testimony also. These motions and objections were all denied.

Prior to the testimony of Mr. Gary Gerson, the County CPA, a Motion in Limine was made to disallow his testimony (ROA 1422) on the grounds that 1) he was not qualified to give an opinion as to the legal conclusion that business damages were not allowable in a motel case because they were identical to severance damages and 2) that he was not qualified to give that opinion because he was not qualified as a real-estate expert to give an opinion as to what constitutes severance damages. An objection was also made as to his qualifications to testify as to motel damages. (ROA 1433, 1456) These motions were denied.

The Defendants presented evidence from a qualified civil engineer that in the "After Condition" under the Zoning Law of the City of Pompano in effect on the Date of Taking only five parking places could legally be placed on the site. (ROA 844, 845) A land planner who was presented by the Defendants testified merely in rebuttal of the County's land planner to a limited point that since A1A is a state road, state road regulations would apply, that only one driveway would be allowed for a 150 foot frontage and that therefore the second driveway to allow two parallel parking places

in front of the motel buildings would not be allowed (ROA 1038-1052). The engineer had previously testified that both of those parallel parking places would violate requirements of the City Code that was in existence on the Date of Taking (APP.5, 6, 8). In fact the Defendant's civil engineer testified in rebuttal that all ten of the parking spaces proposed by the County's land planner and appraiser violated provisions of the Zoning Codes that were in effect both on the Date of Taking and seven months after that date. (ROA 851-861)

The Defendant's real estate appraiser testified that small "mom and pop" motels were not bought and sold on an income basis but that they were only done on a per unit approach. (ROA 954-955) The Defendant's appraiser testified that thirteen unit motels should be valued in both the Before and After conditions on a per unit basis (ROA 952-955), and that in the After Condition, due to there being only five parking places remaining, the motel could only have five units, albeit they would be five larger units. (ROA 986-987) The County's appraiser even admitted that motels of this size were usually listed on a per unit basis, (ROA 637), and his market approach analysis was done on a per unit basis (ROA 618). His conclusion of value was based on the market approach, i.e., $30,000 per motel unit, and not on the income approach (ROA 618). The Defendants presented Mr. Phil Disque, a CPA and lawyer, who testified as to business damages of $300,000 (ROA 1097) based on a capitalization of income theory, and he concluded that 5/12's of their income was lost. The County's C.P.A. Gary Gerson did not

do a business-damage analysis and testified that as a matter of law motels do not get business damages because they are the same as severance damages.

SUMMARY OF ARGUMENT

(1) The question certified is, in fact, a moot question in this case for a number of reasons, and is not really one of a great public interest. The Fourth DCA in this case reversed for a new trial on the doctrine of State Dept. of Transportation v. Byrd, 254 So.2d 836 (Fla. 1st DCA 1971), as well as Williams v. State Dept. of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991). The Byrd case alone is enough to reverse and Byrd does not even address the issue of the probability of variances nor of zoning in any manner. Therefore, even assuming that no variances at all were required to place eight parking places on PICILLO's side yard, the case should be reversed on the Byrd doctrine. The 4th DCA did not certify the Byrd doctrine nor even question its validity. The County in its Brief recognizes the validity of Byrd in footnote (5) on Page 13.

(2) The evidence presented by the County concerning the probability of a variance being obtained was predicated upon a zoning ordinance that was not in existence on the Date of Taking and was not adopted until seven (7) months after the Date of Taking. That being the case, the County's testimony was all based on the wrong zoning ordinance and the testimony should not have been allowed for that reason. When the premise for an opinion falls, the opinion must also fall.

(3) The trial court allowed the County's C.P.A. to testify as a matter of law that business damages were not allowed

on motel cases and they are the same thing as severance damages. (ROA 1438) This is an incorrect statement of the law. Fla. Dept. of Transp. v. Ness Trailer Park, Inc., 489 So.2d 1172 (4th DCA 1986). Both conclusions are beyond the legal expertise of a C.P.A. as he is neither a lawyer nor a real estate broker and the determination of whether business damages and severance damages are duplicative is one for the court to make after the jury verdict has come in. The case should have been reversible on that point also.

(4) The trial court allowed city zoning officials to testify as to legal interpretation of zoning ordinances, which is beyond their legal expertise and is a matter that should be ruled on by the trial judge and not be allowed in testimony by lay zoning officials. Among other things, they interpreted the zoning code in such a way as to opine that parking on the side yard was not grandfathered in.

(5) The trial court established the law of the case in the PATEL/PICILLO matter when at the Order of Taking the Court struck the testimony of the County's appraiser because of the Byrd case doctrine that lost parking could not be recaptured by putting it in the side yard, because this would deprive the motel of its area of expansion and the area for other amenities for its guests to enjoy. Therefore, the Court should not have allowed at the jury trial the testimony which was based on exactly the same theory.

(6) The testimony concerning the probability for a variance should not be allowed because a variance is vastly different from the probability of a zoning change. A variance

is purely permissive and can have many conditions attached thereto that make such opinion totally speculative. It would further cause the owner to have a motel in the after situation that did not meet in all respects the zoning then in existence; whereas, in the before situation, when the motel was built, it complied with all of the current zoning regulations.

POINT I

THE QUESTION AS CERTIFIED IS NOT OF GREAT PUBLIC INTEREST.

The case of Williams v. State Dept. of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991), which was decided in April, 1991, is the case from which the Fourth District Court of Appeals derived its conclusion that a condemning authority could not base its cure upon the reliance of or the presentation of testimony upon the possibility of obtaining a variance from zoning codes. Since that time, the legislature has met twice - in both 1992 and in 1993 - and there has been no great hue and cry from the Department of Transportation or any other group of condemnor representatives that this case should be overridden by some legislative action. There have been no editorials in newspapers that this is an incorrect ruling nor any law review articles, known to this writer, condemning such a ruling.

This law derives from the Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2 DCA 1961) case, which upheld the trial court when the court refused to permit evidence of value based on some nonobligatory of the policy of the condemnor to permit the defendants to make use of land within an easement after condemnation. This suit is no different than a permissive act of zoning authority to give relief from the zoning. The Houston Texas Gas case is some 32 years old and State Dept. of Transportation v. Byrd, 254 So.2d 836 (Fla 1st DCA 1971), the case which the 4DCA

relied on, is 22 years old. There has been no public outcry of any kind concerning those cases.

In fact, in the case of Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966) the Appellate Court reversed the trial court for allowing testimony that the City might grant its consent to bridge over a drainage ditch, "which consent could have been withheld or granted at its will with such restrictions or limitations as it wished" (PG. 448) The Smith case is some 27 years old; again, without any great public interest being shown in that opinion.

POINT II

THE QUESTION CERTIFIED IS MOOT IN THIS CASE AND, THEREFORE, NEED NOT BE DECIDED.

The Fourth District Court of Appeals has completely missed the point in Byrd, supra, and in Williams, supra. In the Byrd case there was no issue at all discussed about a variance nor a zoning change and, in fact, the PATEL/PICILLO case stands reversed based on the doctrine of Byrd, that you cannot cure the damages for loss of parking in front by placing parking in another portion of the remainder tract without subscribing the damages that are caused due to the loss of future expansion space or the loss of amenities for guests of the hotel to enjoy, or the loss caused by destroying other uses already on the remainder. The main thrust of the Williams case, supra, was to the same effect that the condemnor could not cure parking on the electronics business site by disrupting and taking space away from the business in their maintenance area and in their expansion area in the rear. In the Williams case, the point of the proposed changes having to meet with Code in all respects before they were admissible was a secondary point and totally unnecessary to the final decision of the case. As in the PICILLO case the issue of the probability of rezoning was also a totally secondary issue because even if one were to concede that they did not need to have any variances in order to place eight parking spaces in PICILLOS side yard, such testimony is inadmissible to cure damages based on the doctrines

in the Byrd and Williams cases about the cure encroaching on an expansion area, an area for the enjoyment of guests and on a maintenance area. In the Byrd case the cure destroyed a shuffleboard court, which was not replaced. In the PICILLO case a pool heater was caused to be moved, a television disk was caused to be destroyed and the fenced-in courtyard area around the pool was caused to be made smaller and the hotel lost its ability to park campers, trucks and boats in the side yard for its guests who stayed for months at a time.

The evidence presented by the County for a variance was predicated upon a zoning ordinance that was non-existent on the Date of Taking. It was not adopted until seven months after the Date of Taking. That being the case, even assuming a condemnor can present a reasonable probability of a variance, the testimony should have been stricken because it was based on the wrong zoning ordinance. This court has stated in Yoder v. Sarasota County, 81 So.2d 219 (Fla. 1955) at page 221:

> Nevertheless, the value must be established in light of these elements as of the time of lawful appropriation. (Emphasis by Court.) It is not proper to speculate on what could be done to the land, or what might be done to it to make it more valuable, and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date. To permit such evidence would open a floodgate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest. (Emphasis added.)

In Stubbs v. State Dept. of Transportation, 332 So.2d 155 (Fla. 1st DCA 1976) the Court stated at page 157:

> Further, the law of Florida is clear that in eminent domain proceedings a property owner's damages must be related to the time of taking, and the testimony of the expert appraisers must be related to that time.

This unrelenting line of cases continued in Jacksonville Transportation Authority v. ASC Associates, 559 So.2d 330 (Fla. 1st DCA 1990) which said at page 333:

> ...the evidence presented on that issue must be restricted to the value of the land taken at the time of the lawful appropriation (emphasis by Court) . . . The value must be established in the light of these elements as of the time of lawful appropriation. (Emphasis added.)

Therefore, the County's experts based their conclusions on a possible cost-to-cure on a date and time some seven months after the date of lawful appropriation and their testimony should not have been admitted.

To further show the mootness and the total irrelevance of any testimony concerning a variance being possibly granted to locate parking in PICILLO'S side yard, one needs but remember that the testimony of the witnesses for both the County and the owner was to the effect that PICILLO was already parking cars, campers, trucks, and boats in the side yard and was able to have eight cars parked there in unmarked parking on the grass. There were specific ordinances in the city of Pompano grandfathering in such parking (APP.3, 4); therefore, whether or not a variance could be granted, or whether or not a variance was needed, the condemnor cannot cure a loss of parking in the front by putting parking in the side where

parking is already occurring, and other amenities are already located.

Since the Fourth District waited nine months after the oral argument to enter their Opinion, they must have overlooked some of the facts of this case. The above recited facts also show that the trial court was absolutely in error in refusing to grant Motions in Limine, Motions to Strike and Motions for Directed Verdict directed to the County's proposed cure in the PICILLO case, regardless of the variance issue. Had the trial court adhered to its ruling at the Order of Taking hearing (which established the law of the case) and granted the Motions in Limine filed by PICILLO, the issue of allowing testimony concerning a variance would never have been reached.

POINT III

MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING ZONING JURISDICTION OVER THE PROPERTY.

The question as certified by the Fourth District Court of Appeals was totally an unnecessary and secondary point in the Williams case, supra, and was an unnecessary and secondary point in the PATEL/PICILLO case, which is currently before the Court. Contrary to the statement by the 4DCA, the Byrd case, supra, did not address this question at all.

The only reason that it came up in PATEL/PICILLO is that the trial court erred in the fist instance in allowing testimony concerning moving parking into the side or back yards of the respective business establishments in order to cure severance damages. Both the Byrd and Williams appellate courts based their reversal on their conclusion that such a theoretical mitigation of damages (1) was impermissibly based on a premise that would require destruction by the property owners of property that is outside the area of taking, (2) impermissibly ignored the fact that the new proposed parking area would intrude into a previous service area, (3) ignored the impacts of rear parking for customers, (4) ignored the impact which rear parking for the customers might have on the value of the property as a business site, and (5) ignored the fact that the new parking would prevent further expansion of the business.

In the PICILLO matter parking was already located in the grassy side yard, and the County's plan required the relocation of a television disk antenna, a reduction in the size of the pool patio area and the relocation of other items.

Notwithstanding the above, the variance testimony in reduction of severance damages should not be allowed because the granting of variances is a totally permissive act of some other governmental authority which may be granted, denied, or granted with any number of concessions or conditions that the grantee must meet that would also cause additional severance damages, such as additional costs to install whatever the conditions are (i.e., installation of mature landscaping, decorative walls, alteration of access, etc.). Such conditions would cause reduction in the value of the remainder cite in the eyes of the prospective, willing buyer knowing all of the surrounding facts. Such opinions that variances would be granted are purely speculative. The granting or denial of variances also can become a political problem where neighbors come down and object at the hearing making such opinion even more speculative.

It has been held in Peebles v. Canal Authority, 254 So.2d 232 (Fla. 1st DCA 1971) that privileges that are merely "permissive" cannot be availed of in reduction of damages in an eminent domain case. The court stated at page 233:

> . . . Appellee could not base its appraisal upon a policy of allowing access to the pool, as such access would be conditioned upon the benevolence of Appellee.

In Peebles, testimony concerning the probability of obtaining such a grant of access was allowed into evidence and the verdict and judgment was reversed and sent back for a new trial.

Of similar import is the case of Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So.2d 38 (Fla. 2 DCA 1961) which also is an eminent domain case that upheld the trial court when the Court refused to permit evidence of value based upon some non-obligatory policy of the condemnor to permit the defendants to make use of the land within an easement after condemnation. In that case the permission of the condemnor itself was held to be too speculative upon which to base a reduction of severance damages. In PICILLO the variance would have to be granted by the City of Pompano Beach over whom the County as condemnor had no influence.

In Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966), the appellate court reversed the case because the trial court denied motions to strike testimony based upon a hypothesis that the owners could bridge over the ditch that the condemnor was going to put on the part taken. The court stated at page 448:

> An easement over, above and under (Emphasis by Court) the thirty foot ditch effectively prohibited the required use by the owners without the consent of the City, which it could withhold or grant, at its will, with such restrictions or limitations as it wished. (Emphasis added.)

Since the jury awarded only the cost of paving new parking places, we can only speculate on how much the damages might be, should the city not allow all of the parking proposed by the

County, but rather allow only 75% of the spaces due to the large number of exceptions requested or should the city require decorative walls or mature landscaping or some other restriction as a condition to granting some or all of the variances.

Quite another reason for disallowing opinion testimony as to the possibility of a variance being obtained here is that at the time the building was built, the owners complied in all respects with any then existing zoning regulations and in the "after" situation they deserve to be able to have parking that complied in all respects with the parking regulations in effect on the date of taking. The requirements in the Code of Ordinances concerning size of parking places, handicapped parking, location and number of driveways, cross-vision triangles and back-up turning room in parking lots are for safety. The plan proposed by the County violated a great number of these safety regulations, which would endanger not only the guests of the motel but passing motorists on the improved A-1-A. An owner should not be compelled to accept as a "cure" parking that violates safety regulations. Every parking space designed by the County in their cure, which was allowed into evidence, violated at least one portion of the Ordinance concerning design and lay out of parking lots. (ROA.863; APP.5-9) The County's appraiser has ignored the effect that an unsafe or sub-standard parking arrangement would have on the price that a willing purchaser would pay for this property, particularly when other motels in the area have parking that does not violate these safety regulations of the Code.

In other words, the owner has the right not to be forced to endure a sub-standard cure. He should have the absolute right to have any cure proposed to be of equal dignity to that which he has lost; and, if that cannot be done, he should be paid monetary damages. In this case, the owner lost parking that when built met all of the requirements to whatever code was then in existence.

The question of the admissibility of testimony concerning obtaining a variance in this case is a total "red herring" and was not necessary to the case at all for two reasons:

1) The parking already existed in the side yard, so any put there was not a "recapture of lost spaces."

2) Even if no variances were needed, the parking could not be put in the side yard under the doctrine of the Byrd and Williams cases, which the Fourth DCA has specifically recognized as being the law in Florida.

POINT IV

THE CASE SHOULD BE REVERSED BECAUSE THE TRIAL COURT ALLOWED CITY ZONING OFFICIAL TO TESTIFY CONCERNING THE "LEGAL" INTERPRETATION OF THE ZONING ORDINANCE.

The trial court allowed a Mr. Reagan Yarbrough, an official of the City of Pompano Beach Zoning Department to testify, over objection, that the current zoning code did not grandfather in PICILLOS allowing parking on his side lot. The zoning official admitted that the zoning code was not adopted until August, 1957, and the uncontroverted testimony is that the motel was built as a 13-unit motel in 1952-53 and there had been parking on that lot since that time.

The Pompano Code, Section 155.128 (APP.3, 4) is a grandfathering subsection which reads as follows:

> This subchapter shall not apply to parking areas in existence as of the effective date of this subchapter.

This is clear and absolute evidence that the parking on the unpaved side lot is, as a matter of law, grandfathered in and the City employee should not have been allowed to testify otherwise.

In Edward J. Seibert v. Bayport B&T Club, 573 So.2d 889 (Fla. 2 DCA 1990) at page 891 the Court said: "An expert should not be allowed to testify concerning questions of law." This case dealt with the interpretation of a building code. The court's direct holding at page 892 was:

> The trial court not only erred by submitting a question of law to the jury, but under the circumstances of this case it also erred by not interpreting the Standard Building Code . . . and then directing a verdict for Seibert.

The question of grandfathering in the seven or eight parking spaces in the unpaved, side yard would prove that even if the County's plan for placing eight parking places in the side yard did not need any variances at all, the parking could not be recaptured in an area that was already being used for parking.

It should be noted that Mr. Sutte stated on cross-examination that if the grandfathering allowed parking on the side lot the Santa Rosa Motel would have seventeen spaces in the "before" situation (TR.679) and further admits that if they already had parking on the side lot, the parking lost in front could not be replaced there in the "after" situation (TR.650, 651) and that the hotel would be worth less if it had only eight parking spaces in the side lot as opposed to thirteen or more (TR.681). Mr. Sutte testified that the uncured loss of nine front spaces would totally damage out the property's improvements and the remainder would be worth land value only (TR.664).

The trial court should not have allowed testimony from Mr. Reagan Yarbrough concerning his interpretation of the grandfathering clause and the trial court should have ruled as a matter of law that the grandfathering clause did apply. In that case, the question of whether or not a variance would be granted had no meaning, since the parking could not be put in the side yard

which was already utilized for parking. This error alone makes the question of probability of a variance moot and meaningless in this case.

POINT V

IT WAS ERROR TO ALLOW THE COUNTY'S C.P.A. TO TESTIFY AS A MATTER OF "LAW" THAT BUSINESS DAMAGES WERE NEVER ALLOWED IN A MOTEL CASE.

A Motion in Limine was made to disallow the County's C.P.A. Mr. Gerson to testify. This Motion was denied and Mr. Gerson was allowed to testify as to what amounted to a "legal" opinion - that business damages are not allowed in a motel case where there is a partial taking and a claim for severance damages. Mr. Gerson testified, "What I am an expert to is that you just can't do both together" (TR.1444); and at the Transcript, Page 1428: "I was trying to make a point that you do not give business damages to a motel. You give severance damages. Business damages are duplicative of a - damages to a motel or hotel."

In Williams v. Dept. of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991) the Court held that an expert should not be allowed to testify concerning questions of "law." Mr. Gerson's statement was in fact a question of law and, not being an attorney, he was not qualified to make such a statement and in fact the statement was "dead wrong" anyway.

The Fourth District Court of Appeal has very succinctly stated the law in this area in the case of Fla. Dept. of Transp. v. Ness Trailer Park, Inc., 489 So.2d 1172 (Fla. 4 DCA 1986) by saying at page 1181:

> The Statute permits both severance damages - if suffered - and business damages, if proven. It does not say the condemnee may have one or the other but not both. . . ." (Emphasis added.)

The Court did go on to say that if severance damages and business damages turn out to be identical, a double compensation will be disallowed. The court continued on the same page as follows:

> Moreover, logically if one is compensated for decrease in the value of one's remaining land resulting from the taking of a portion of the original parcel, how does that repay one for the loss of income that also results from the taking? No matter how one calculates the severance damages, those are compensation for reduction in value of the condemnee's remaining land, and not for damages to his business. (Emphasis added.)

In the instant case, the jury should have considered testimony about the amount of business damages and the amount of severance damages. At a later hearing, if the trial judge were to conclude that they were duplicative, then it would be a simple question of election of remedies and the owner could choose which he wanted, severance damages or business damages.

It is interesting to note that Mr. Gerson assumed that the only way to value motel real estate was by the income approach and that therefore an analysis by an accountant of the loss of income of the motel would be the same as an analysis of severance damages to the real estate. However, in the PICILLO case, both the owners' appraiser and the County's appraiser appraised the motel on a per unit basis, which is not an income approach.

Not only was Mr. Gerson testifying as to a legal opinion, the legal opinion that he gave to the jury was dead wrong. Since

the jury awarded zero business damages, as against testimony from the owner's witness, who was both a C.P.A. and lawyer, that the business damages were $300,000, the owner has been grievously injured by this error.

CONCLUSION

The probability of obtaining variances is far too speculative to be reliable evidence of the "full compensation" guaranteed by the Florida Constitution.

The main thrust of the County's case is not whether a variance can be granted but whether or not damages can be cured by putting parking in PICILLO'S side lot. Since that threshhold question has been answered in the negative by Byrd and Williams, the question of variances need not be addressed here.

Further, since the First District did not recognize that the variance question was one of great public interest, and since two legislative sessions have passed since it was enunciated in Williams, and there has been no outcry from the public, lawyers, nor administrators of the various public bodies with rights of eminent domain it cannot be said there is any great public interest in this issue.

IT IS THEREFORE SUBMITTED THAT JURISDICTION SHOULD BE DENIED BUT IF GRANTED THE QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

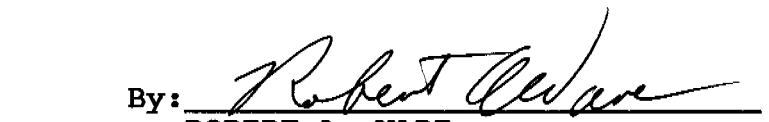
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 3rd day of June, 1993, to:

ANTHONY C. MUSTO, ESQ., Atty. for Plaintiff, at 115 S. Andrews Ave., #423, Ft. Lauderdale, FL 33301; and to

DAVID WELCH, ESQ., Atty. for Patel, at Welch & Finkel, P. O. Drawer 1839, Pompano Beach, FL 33061.

ENGLISH, McCAUGHAN & O'BRYAN, P.A.
Attorneys for Picillos
P. O. Box 14098
Ft. Lauderdale, FL 33302-4098
(305) 462-3300

By: 
ROBERT A. WARE
Florida Bar No. 084789

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,416

BROWARD COUNTY, etc.,

Petitioner,

vs.

BHARAT PATEL, et al.,

Respondents.
_____/

DIST.COURT OF APPEAL
4TH DISTRICT - NO. 91-1301

RESPONDENTS', WARREN & SELINA PICILLO'S,
APPENDIX TO ANSWER BRIEF

Parcels 44 & 44TCE

ENGLISH, McCAUGHAN & O'BRYAN P.A.
Attorneys for Picillos
100 N. E. Third Ave., #1100
P. O. Box 14098
Ft. Lauderdale, FL 33302-4098
(305) 462-3300; Miami: 947-1052

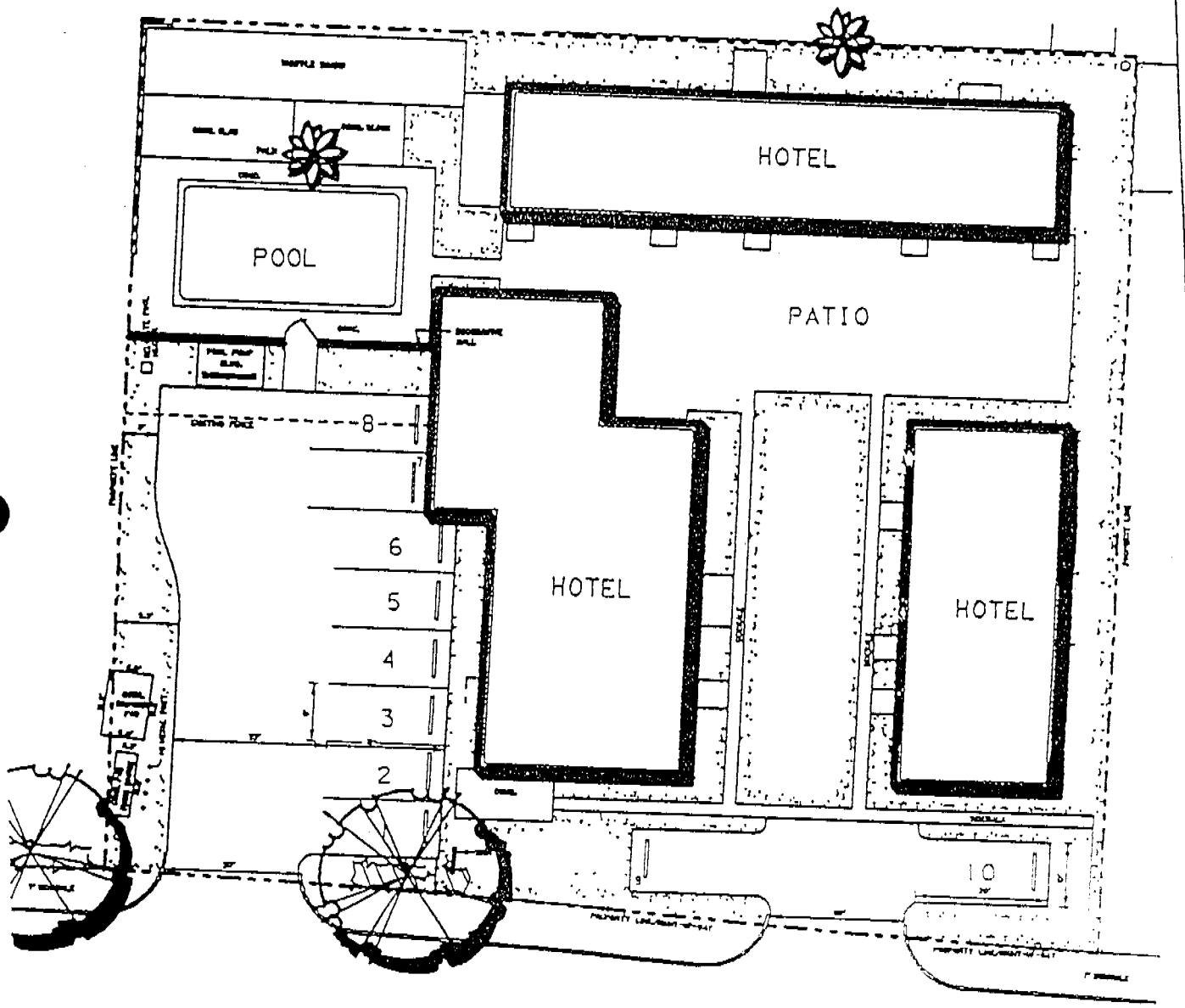
By: Robert A. Ware
ROBERT A. WARE
Florida Bar No. 084789

APPENDIX

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



OCEAN BLVD (S.R. A1A)

ALTERNATE 2

2

NORTH

0' 8' 16'

SCALE: 1"=8'-0"

way, private roadways, alleys, and points of access. When a vehicular accessway intersects a right-of-way whether public or private, or when the subject property abuts the intersection of two or more rights-of-way, all landscaping within the triangular areas described below shall provide unobstructed cross visibility at a height between three feet and six feet. However, trees or palms having limbs and foliage trimmed so that no limbs or foliage extend into the cross visibility area shall be allowed, provided they are so located so as not to create a traffic hazard. Landscaping, except required grass or ground cover, shall not be located less than three feet from the edge of any accessway pavement. The triangular areas above referred to are the areas of property on both sides of an accessway formed by the intersection of each side of the accessway and the right-of-way line with two sides of each triangle being ten feet in length from the point of intersection and the third side being a line connecting the ends of the two other sides; and the area of property located at the corner formed by the intersection with two or more rights-of-way with two sides of the triangular area being 30 feet in length along the abutting right-of-way lines, measured from their point of intersection, and the third side being a line connecting the ends of the other two lines.

(12) Existing plant material. In instances where healthy plant material exists on a site prior to its development, in part or in whole, for purposes of off-street parking or other vehicular-use areas, the Planning Department may adjust the application of the above-mentioned standards to allow credit for the plant material if, in its opinion, an adjustment is in keeping with and will preserve the intent of this subchapter.

(13) Vehicle projections. No vehicle shall project into, over, or occupy any required landscaping area.

(B) Building code certificate of completion. The Planning Department shall have the authority to issue a certificate of completion to the owner or to the contractor or subcontractor only when all provisions of this subchapter have been complied with. The certificate of completion shall not authorize occupancy or partial occupancy of the building or premises.

(C) Plan approval. Except for single-family dwellings, prior to the issuance of any permit for paving which is included under the provisions of this subchapter, a plot use plan shall be submitted to, and approved by, the Planning Department. The plot plan shall be drawn to scale showing the landscaped area required by this subchapter, including the calculations made to meet minimum landscaping area requirements. The plot plan shall further include dimensions and distances; clearly delineate the existing and proposed parking spaces or other vehicular use areas, access aisles, driveways, walks, sprinklers, and drainage plans; the location, size, and description of all other landscaped materials; the location and size of buildings, if any, to be served; and shall designate by name and location the plant material to be installed or, if existing, to be used in accordance with the requirements hereof. No permit shall be issued for the building or paving unless the plot plan complies with the provisions hereof, and no certificate of use and occupancy shall be issued until the landscaping is installed in accordance with the approved lot plans and requirements hereof.

(D) Off-street parking landscape manual. The city shall prepare and from time to time revise an off-street parking landscape manual and make it available to the public. The manual shall provide an illustrative interpretation of the above standards and suggested guides for landscaping in accordance with the above standards.
('58 Code, § 50.46.1(D) through (G)) (Ord. 73-90, passed 10-30-73; Am. Ord. 75-15, passed 12-30-74; Am. Ord. 75-41, passed 3-25-75; Am. Ord. 79-30, passed 1-16-79; Am. Ord. 82-1, passed 10-20-81) Penalty, see § 10.99

§ 155.127 MULTI-FAMILY DISTRICTS.

In multi-family zoning districts, landscaped areas shall be counted in the open space requirements of this chapter. ('58 Code, § 50.46.2) (Ord. 73-90, passed 10-30-73) Penalty, see § 10.99

§ 155.128 EXISTING PARKING AREAS.

This subchapter shall not apply to parking areas in existence as of the effective date of this subchapter. However, in the event buildings existing as of the effective date of this subchapter are enlarged or new buildings constructed on the same parcel that increases the building size 20% or more, then the entire parking area for that parcel shall be governed by this subchapter. Further, when an existing parking area is enlarged or another parking area is added to the same parcel in an amount of 20% or more, the entire parking area including the parking in existence on the effective date of this subchapter shall come under the provisions of this subchapter.
('58 Code, § 50.46.3) (Ord. 73-90, passed 10-30-73) Penalty, see § 10.99

§ 155.129 ACCESSWAYS.

The maximum width of a residential accessway through the perimeter landscaped

(8) The following exceptions will apply:

(a) Special vehicular use areas which are not open to the general public for automobile parking, such as storage areas for new, used or rental motor vehicles, watercraft, trailers or construction equipment, inter-urban bus stations and trucking terminals shall provide interior landscaping equal to 15% of the special vehicular use area. The required landscaping shall be distributed over the special vehicular use area so as to avoid the appearance of an unbroken expanse of paved area.

(b) Covered parking garages.

155.132 **EXISTING USES**

(1) This subchapter shall not apply to existing uses of land as of the effective date of this section. However, in the event buildings existing as of the effective date of this section are enlarged or new buildings constructed on the same parcel that increases the building size twenty percent (20%) or more, then that parcel shall be governed by this section. Further, when an existing parking area is enlarged or another parking area is added to the same parcel in an amount of twenty percent (20%) or more, the entire parcel including the parking in existence on the effective date of this section shall come under the provisions of this section.

155.133 **ADDITIONAL SCREENING**

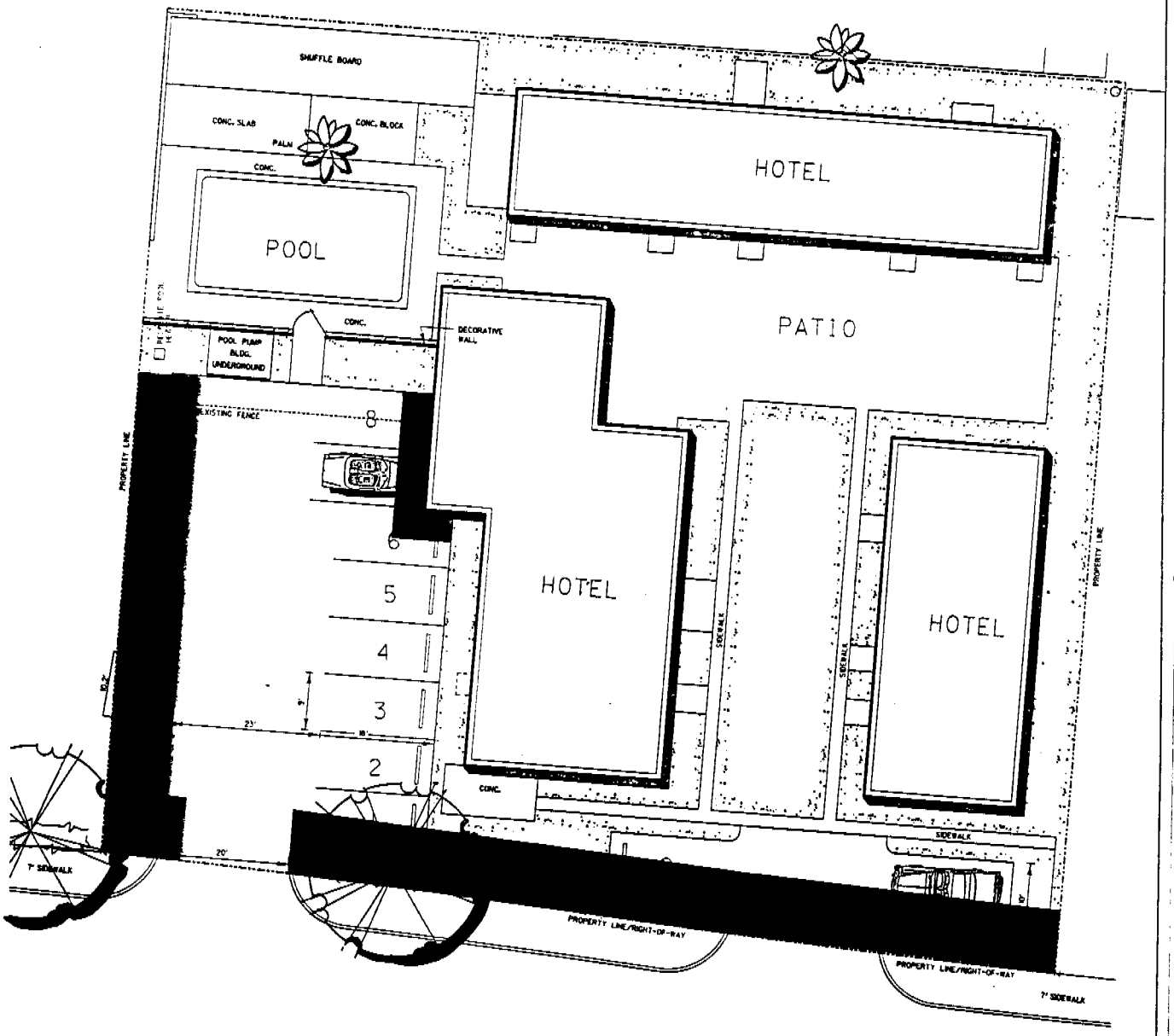
(1) Dumpsters: Dumpster areas shall be enclosed fully by a six foot (6) foot high painted masonry wall and a fully opaque access gate. A twenty-four (24) inch high continuous hedge shall be provided around the dumpster enclosure except for the access gate and pedestrian opening.

(2) All mechanical equipment and outdoor storage uses, such as but not limited to, air conditioning units, swimming pool pumps, bottled gas tanks, and garbage containers which are located at ground level on

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



OCEAN BLVD (S.R. A1A)

SETBACK REQUIREMENTS

*City Code Sec. 155.131(B)(1)
*City Code Sec. 155.131(c)(1)
*City Code Sec. 155.131(D)(7)

ALTERNATE 2

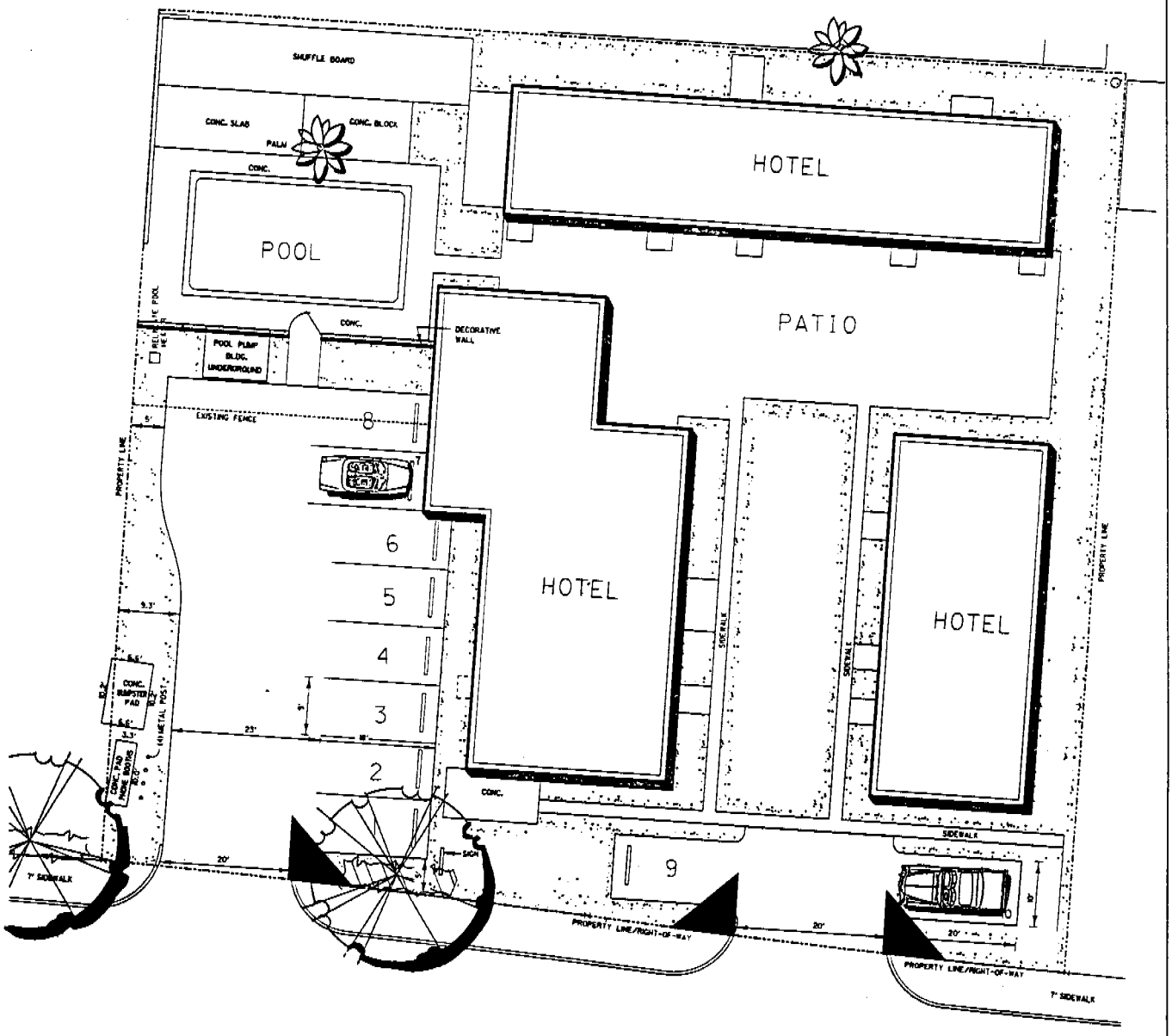
NORTH 0' 8' 16'

SCALE= 1"=8'-0"

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



OCEAN BLVD (S.R. A1A)

SIGHT VISIBILITY TRIANGLE
*City Code Sec. 155.126(A)(11)

ALTERNATE 2

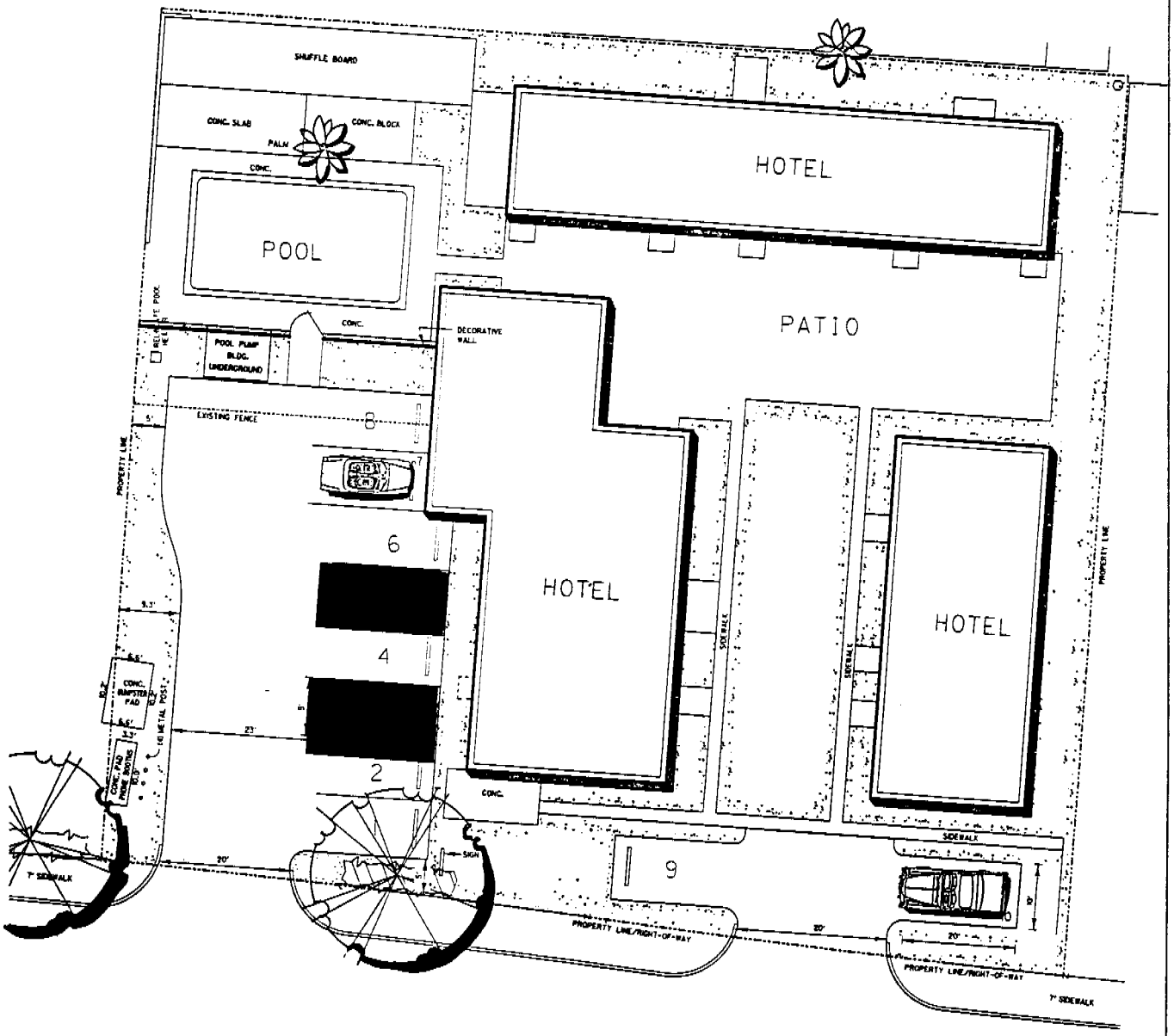
NORTH 0' 8' 16'

SCALE= 1"=8'-0"

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



OCEAN BLVD (S.R. A1A)

PARKING SPACE SIZE
*City Code Sec. 155.111
*SFBC Sec. 515.5

ALTERNATE 2

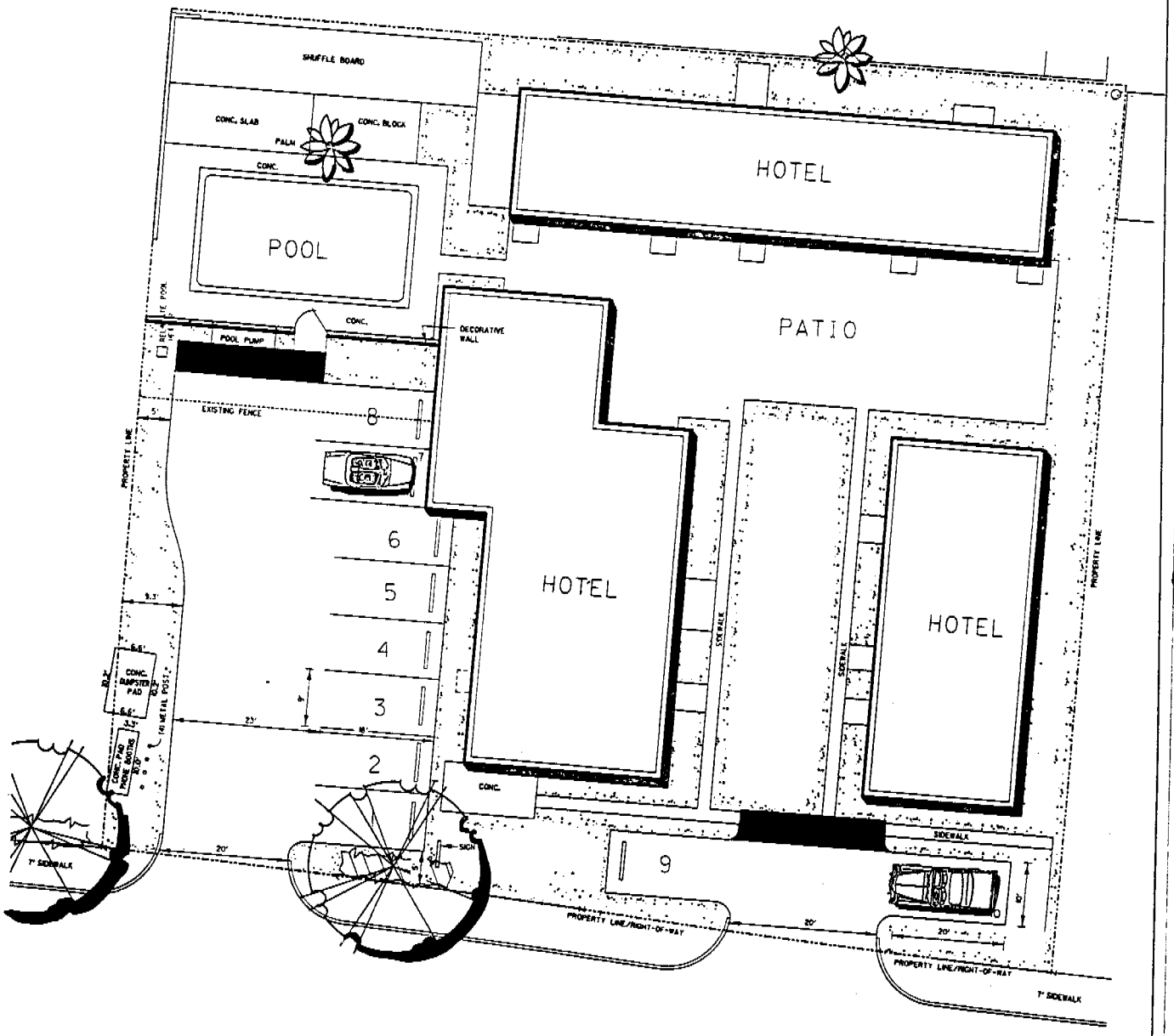
NORTH 0' 8' 16'

SCALE= 1"=8'-0"

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



BACK-UP AREA
*Landscape Manual p.17

ALTERNATE 2

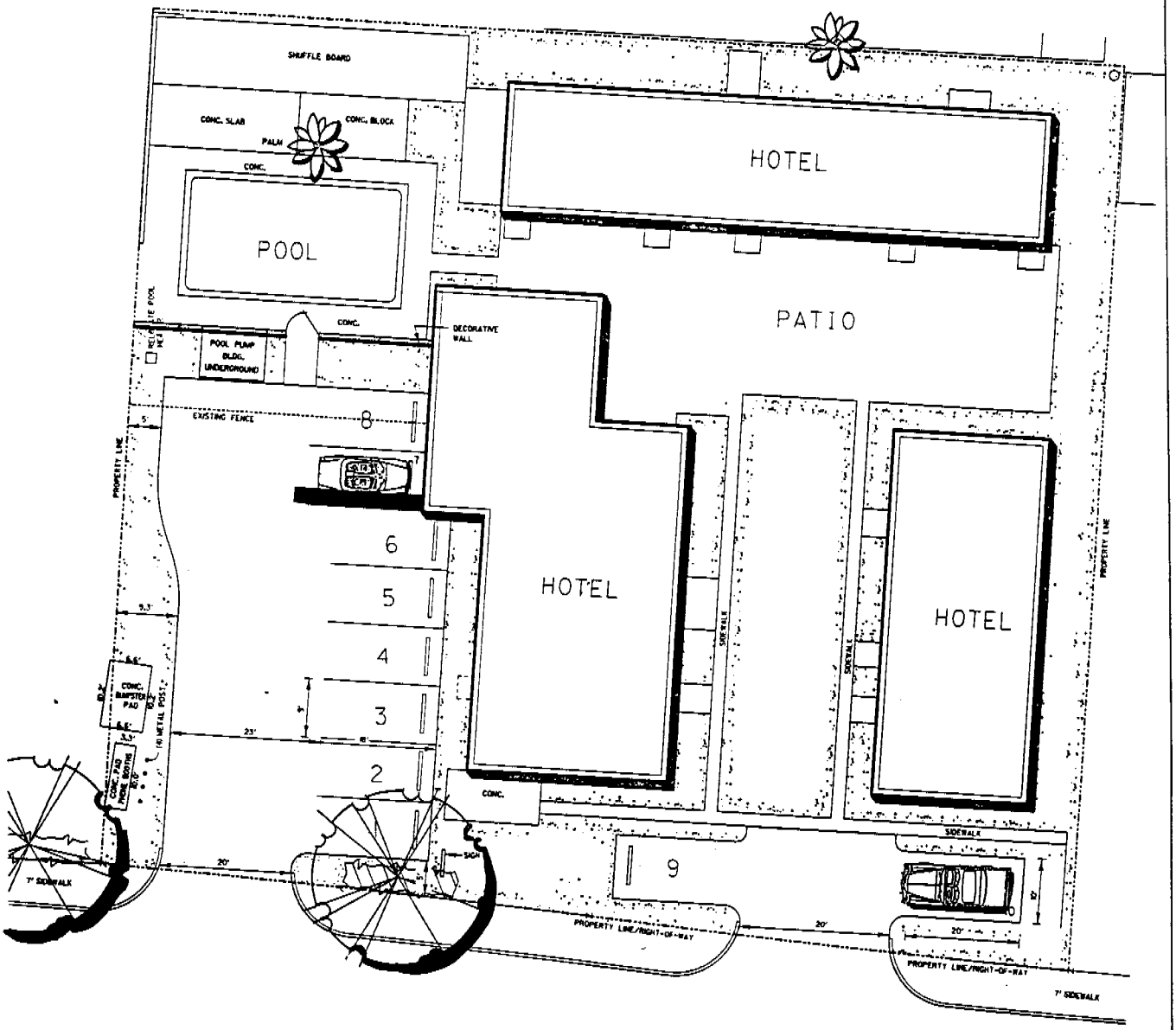
NORTH 0' 8' 16'

SCALE= 1"=8'-0"

THE SANTA ROSA MOTEL

POMPANO BEACH, FLORIDA

PARCEL 44



OCEAN BLVD (S.R. A1A)

INTERIOR LANDSCAPING

*City Code Sec. 155.126(A)(7)(a)

*City Code Sec. 155.126(A)(7)(c)

ALTERNATE 2

NORTH 0' 8' 16'

SCALE= 1"=8'-0"

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 88-23659 21

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. GITA PATEL, et al., Defendant(s).	:	PARCEL NOS. 44, 44-TCE, 47 AND 47-TCE

VERDICT

WE, THE JURY, FIND AS FOLLOWS:

FIRST: That an accurate description of the property taken herein is as follows:

SEE ATTACHED LEGAL DESCRIPTION.

SECOND: Full compensation due for the taking of Parcel 44 is:

Value of Part Taken: $ 9,100.00

Severance Damages: $ 26,117.25

Business Damages: $ -0-

THIRD: Full compensation due for the taking of Parcel 44-TCE is:

Value of Part Taken: $ 700.00

FOURTH: Full compensation due for the taking of Parcel 47 is:

Value of Part Taken: $ 18760

Severance Damages: $ 9360

FIFTH: Full compensation due for the taking of Parcel 47-TCE is:

Value of Part Taken: $ 3300

SO SAY WE ALL THIS 15th DAY OF March, 1991, AT CITY OF FORT LAUDERDALE, BROWARD COUNTY, FLORIDA.

James C. Cox
FOREPERSON

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

BHARAT PATEL, WARREN PICILLO, and SELINA PICILLO,

Appellants,

v.

BROWARD COUNTY, a political subdivision of the State of Florida, and GITA PATEL, et al.,

Appellees.

CASE NO. 91-1301.

L.T. CASE NO. 88-23659.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed February 10, 1993

Appeal from the Circuit Court for Broward County; Dale Ross, Judge.

David D. Welch of Welch & Korthals, Pompano Beach, for Appellant-Bharat Patel.

Robert A. Ware of English, McCaughan & O'Bryan, P.A., Fort Lauderdale, for Appellant-Warren & Selina Picillo.

John J. Copelan, Jr., County Attorney, Alexander Cocalis, Chief Trial Counsel, William J. Bosch, Assistant County Attorney, and Andrea Karns Hoffman, Assistant County Attorney, for Appellee-Broward County.

PER CURIAM.

We reverse and remand for a new trial on the authority of Williams v. State Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991), and State Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971). These cases stand for

the proposition that the government, when attempting to prove cost-to-cure severance damages, cannot present evidence of proposed alterations to a condemnee's property when those alterations are predicated upon the grant of a variance from the controlling zoning authority.[1] Here, virtually the government's entire case on cost-to-cure was predicated upon speculation that such variances would be granted to permit the appellants to relocate and reconstruct parking facilities lost by virtue of the taking. In addition, the government's experts failed to consider any loss to the condemnees by virtue of the appropriation of other areas of their property for parking. See Williams, 579 So. 2d at 229.

---

[1] In Byrd, on facts similar to those here, the First District reasoned:

> [T]he state appraiser's estimate of damages sustained by appellees is impermissibly based on a premise which would require destruction by the property owners of property which is outside the area of taking as a means of theoretical mitigation of damages.

Byrd, 254 So. 2d at 837. In Williams, in addition to following Byrd, the court also held:

> But it was not the province of the jury to determine whether the Department's proposed cures met the requirements of the code based on the witnesses' opinions or whether it was possible to obtain a variance for any deviations therefrom. The trial court committed reversible error in allowing Varnum to testify, over objection, on these questions of law and in submitting these questions to the jury.

Williams, 579 So. 2d at 231.

While we agree with appellants that a new trial is required, we admit concern over the government's claim that it should be allowed to present evidence as to the possibility of a variance, much in the same way that a property owner may submit evidence that its property should be valued at its highest and best use even if that use would require a change in zoning. Here, the variances in question involve parking regulations in the building and zoning code rather than rezoning of the property.

Florida cases have held that the reasonable probability of rezoning is a factor the trier of fact may consider when determining the value of condemned land. See, e.g., Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co., 100 So. 2d 67 (Fla. 1st DCA 1958)(Tallahassee #1); Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust, Co., 108 So. 2d 74 (Fla. 1st DCA 1958)(Tallahassee #2), cert. quashed, 116 So. 2d 762 (Fla. 1959); City of Miami Beach v. Buckley, 363 So. 2d 360 (Fla. 3d DCA 1978), cert. dismissed, 374 So. 2d 98 (Fla. 1979).

The county argues that rezoning and variances are sufficiently analogous to require application of the above-cited cases. In fact, the county relies on language from our supreme court to the effect that "to grant a variance or exception is to rezone." Troup v. Bird, 53 So. 2d 717, 720 (Fla. 1951). Arguably, the language used in some of the cases cited above is broad enough to support the county's position. For instance, in Tallahassee #2, the first district announced the rule, based on a "consistent line of modern authority," that:

> [E]ven though an existing municipal zoning ordinance may prohibit the use of property for stated purposes at the time of condemnation, nevertheless, if there is a reasonable probability that the ordinance may be changed or an exception made in the foreseeable future, then the value for such use as may be included in the amendment or exception may be considered.

108 So. 2d at 83. Given the fact that a variance is also known as an exception to a zoning ordinance, this language suggests that the possibility of obtaining a variance in the near future may be considered by a jury. In fact, a few jurisdictions have permitted consideration of the reasonable probability that a variance will be granted. See, e.g., Sorenson Transp. Co., Inc. v. State, 488 A. 2d 458 (Conn. App. Ct.), cert. denied, 491 A. 2d 1105 (Conn. 1985); In re Old Riverhead Road, 264 N.Y.S. 2d 162 (N.Y. Sup. Ct. 1965). For the reasons expressed in Williams and Byrd, we decline to follow these holdings. See supra note 1.

However, because of our concerns, and in order to allow the government the opportunity to seek further review of this important issue, we hereby certify the following to the supreme court as an issue of great public importance:

> MAY THE GOVERNMENT SUBMIT EVIDENCE THAT THE SEVERANCE DAMAGES OF A CONDEMNEE MAY BE CURED OR LESSENED BY ALTERATIONS TO THE CONDEMNEE'S PROPERTY WHEN THOSE ALTERATIONS REQUIRE THE GRANT OF A VARIANCE FROM THE APPROPRIATE GOVERNMENTAL ENTITY HAVING ZONING JURISDICTION OVER THE PROPERTY?

ANSTEAD and HERSEY, JJ., concur.
LETTS, J., concurs in conclusion only.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 3rd day of June, 1993 to:

ANTHONY C. MUSTO, ESQ., Atty. for Plaintiff, at 115 S. Andrews Ave., #423, Ft. Lauderdale, FL 33301; and to

DAVID WELCH, ESQ., Atty. for Patel, at Welch & Finkel, P. O. Drawer 1839, Pompano Beach, FL 33061.

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