IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,416

BROWARD COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

BHARAT PATEL, et. al.,

Respondents.
_____/

FOURTH DISTRICT COURT OF APPEAL
CASE NO. 91-1301

AMENDED ANSWER BRIEF OF RESPONDENT, BHARAT PATEL

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PREFACE

The Respondent, BHARAT PATEL, was the Defendant in the trial court, and will be referred to in this Brief as "PATEL," or "the Respondent."

The Appellee, BROWARD COUNTY, a political subdivision of the State of Florida, was the Petitioner in the trial court, and will be referred to in this Brief as "the COUNTY," or "the Petitioner."

The following are the symbols which are used in this Brief:

"ROA" refers to the Record on Appeal.

"APP" refers to the Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

PATEL disagrees with the Statement of the Case and of the Facts presented by the COUNTY, and respectfully submits that the COUNTY's statement of the facts and the posture of this case in the lower courts and on certification to this court is both inaccurate and incomplete.

First of all, the statement at page 2 of the COUNTY's Initial Brief that PATEL had 17-18 parking spaces before the taking and 18 spaces afterwards is a false and not supported by any competent evidence in the record. As authority, the COUNTY cites the testimony of their appraiser, Donald Sutte, at ROA 702, 706, 760, 786, and 791. However, this testimony establishes only than that at some unspecified time before date of taking, Mr. Sutte reviewed a drawing by Ark and Associates and concluded that there were 17 usable parking spaces on PATEL's property, excluding three spaces actually in use at the southwest corner of the motel parking lot.[1] On cross examination, Mr. Sutte admitted upon review of photographs in evidence as Petitioner's Exhibits 19 and 20, and PATEL's exhibit 9, that his count of 17 spaces did not include the three additional spaces shown to be in use at the southwest corner of the parking lot in front of the two story motel building, and that if those spaces were included, there would have been a total of twenty spaces before the taking. An excerpt of Mr. Sutte's trial testimony on this point is set forth in the Appendix to this Brief at APP. 1 through 2.

The Ark Associates drawing showing 17 spaces, not including any spaces in the Southwest corner of the parking lot in front of the two story motel building (identified on the drawing as "EXIST. BLDG.") is reproduced in the Appendix to this brief as APP. 3. Copies of the photographs introduced by the COUNTY as exhibits 19 and 20, and by

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[1] *Apparently, Mr. Sutte intentionally disregarded these three spaces due to his erroneous belief that they were not lawfully in use. See discussion below regarding Mr. Sutte's misconception that no more than thirteen spaces had been authorized by the City based on erroneous information supplied to him by his assistant, Henry Alexandrowicz.*

PATEL as exhibit 9, showing the three parking spaces in the Southwest corner of the parking lot in use which were examined by Mr. Sutte during cross-examination are included in the Appendix to this brief as APP. 4 through 8.

According to James Zook, a civil engineer called by PATEL, there were twenty spaces on PATEL's motel property before the taking, including three spaces in the Southwest corner of the parking lot in front of the two story building where the ARK drawing had shown none. Mr. Zook testified that there were sixteen spaces after the taking, and thus, a loss of four parking spaces (ROA 1138, ROA 1145, and ROA 1153). An excerpt of his testimony on this subject is set forth in the Appendix to this brief at APP. 9.

Mr. Zook's drawing of PATEL's parking lot in the before condition, showing twenty spaces including the three spaces in front of the motel building initially overlooked by Mr. Sutte, was introduced at trial as PATEL's Exhibit one, and is reproduced in the Appendix to this brief as APP. 10.

Notwithstanding Donald Sutte's initial failure to take into account the three spaces in use in the southwest corner of the parking lot depicted on Mr. Zook's before conditions drawing (and inexplicably absent from the Ark Associate's before conditions drawing), it is obvious that the COUNTY's appraiser recognized that the taking of PATEL's property did in fact result in a loss of parking spaces. That is so, because he testified that the loss of parking spaces caused PATEL to suffer severance damages, which he calculated to be $270,618.00, without cure.[2] The certified question posed by the Fourth District Court

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[2] *Mr. Sutte's testimony on cross examination at ROA 729 through 737 and again at ROA 750-751 details his calculation of severance damages to PATEL's property resulting from the loss of parking. He concluded that the damage to the remainder caused by the taking was $270,618.00, if the loss of parking spaces could not be cured by a redesign of the parking lot in accordance with a plan by Sheila Rose, which would only be permitted if variances from existing zoning laws were granted.*

of Appeal postulates a loss of parking by PATEL as its basic premise. If, as the COUNTY suggests in its brief, PATEL had more parking spaces after the taking than he had before, there would have been no reason for the certification of any question to this court. The question of whether opinion testimony on the reasonable probability of variances being granted should have been admitted into evidence as a cure or in mitigation of the COUNTY's own estimate of severance damages resulting from a loss of parking obviously would not even have been an issue in the case unless there had been in fact a loss of parking.

The COUNTY's statement that because of a site plan on file with the City of Pompano Beach, PATEL was only lawfully authorized to utilize 13 parking spaces, is likewise untrue and totally contradicted by undisputed evidence presented at trial. The basis for this statement is the opinion testimony of City Employee Regan Yarbrough, land planner Sheila Rose, and Donald Sutte, that PATEL was not lawfully authorized more than the 13 spaces shown on a 1959 site plan filed with the City of Pompano Beach, without approval of the City.[3] The opinions of these witnesses were all based upon the testimony of one Henry J. Alexandrowicz, an employee of Real Property Analysts (Donald Sutte's appraisal firm) who stated that he had searched the City of Pompano Beach building department records and that the only "site plan" he had found was one dated in 1959, which showed 33 parking spaces located on PATEL's property and the adjacent property, then under the same ownership, only 13 of which were located on the PATEL portion of the property (ROA 444). Mr. Alexandrowicz was never asked whether there

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[3] *This testimony was objected to on the basis that it was improper to permit these witnesses to express legal opinions to the jury, and other grounds, but these objections were overruled. ROA 412, ROA 560-561, ROA 784-785.*

were any other City records found in which the additional seven (7) spaces were approved, the COUNTY's attorney apparently being under the mistaken impression that the only method by which City approval of parking was ever officially documented would be by the recording of a "site plan" or "plot plan."[4]

The absence of any further "site plans or plot plans" became the focus of the questioning by the COUNTY of Mr. Yarbrough, Ms. Rose and Mr. Sutte, which sought their opinions on the issue of whether more than thirteen spaces by PATEL would be lawful without approval by the City. The COUNTY's primary witness on this point was City employee Yarbrough. However, Mr. Yarbrough never testified that a further "*site plan*" or "*plot plan*" was required in order to legally use more than the thirteen spaces shown on the 1959 site plan. He testified only that the owner would not be entitled to use more than thirteen spaces "*without application to*" and "*approval from*" the City (ROA 413, 420). An excerpt of Mr. Yarbrough's testimony on this issue is included in the Appendix to this Brief as APP. 11.

The fallacy of the COUNTY's position that PATEL was lawfully authorized to use just thirteen spaces was brought out by the testimony of Jesse Vance at ROA 1341-1345, which disclosed that in his search of the records, Mr. Alexandrowicz had overlooked a Certificate of Occupancy and parking plan approval amongst the City of Pompano Beach

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[4] *At trial, the COUNTY's attorney asked only about "site plans" or "plot plans." Thus, at ROA 444, the following colloquy took place:*

Mr. Bosch: Were there any other site plans or plot plans found within the City records of Pompano Beach (emphasis added)?

Mr.Alexandrowicz: No sir. One was found, the plot plan I found in the Building Department and the microfiche. It's the only one that they have recorded there, the only one of record.

records which specifically and expressly approved the additional seven (7) parking spaces on PATEL's property for a total of twenty authorized on site parking spaces.[5]

The Certificate of Occupancy and parking plan approval were introduced into evidence at trial as PATEL's exhibits 12 and 13, and are reproduced in the Appendix to this Brief as APP. 12 and 13.

The testimony of Ms. Rose and Mr. Sutte was likewise based upon the erroneous assumption that no further approval of the City of Pompano Beach had been given for parking spaces in addition to the thirteen shown on the site plan which Mr. Alexandrowicz had found in his search to the City's records.[6]

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[5] *Mr. Vance testified as follows:*

Q. Did you find any other documents on file with the City of Pompano Beach?

A. I did, sir.

Q. And what did this include?

A. They included in September of 1959 another document. And it was entitled certificate of occupancy. And on that certificate of occupancy there was the same thirty-three parking places required, but there was also another number and that was forty parking places approved. And then there was the signature of the Chief Building Inspector, approving forty parking spaces in September of 1959.

Q. What is the significance of the information on the certificate of occupancy concerning the parking?

A. I've been talking about September of 1959. The actual date was December 23, of 1959. The significance of this document is that as of that date the City of Pompano approved forty parking places on the site there. That would be the same parking places that Mr. Olah (the prior owner of PATEL's property) mentioned to me that had been there since the time that he put them there. And that would include parking at the southern end of the property in front of the two-story apartment building (emphasis added).

[6] *At ROA 794, Mr. Sutte testified as follows:*

Q. Mr. Sutte, when you say that I'm still only entitled to thirteen, you're consistently referring back to this plot plan from 1959 as your only basis for making that statement; is that not right?

A. That's correct, yes, sir.

Q. And your theory is that since Mr. Alexandrowicz couldn't find any documents of a more recent vintage than 1959, therefore, it follows that there's never been an approved document in the City's records for the additional spaces that are obviously being used out there on the ground?

PATEL's Exhibits 12 and 13, together with Mr. Vance's testimony and the testimony of Mr. John Olah, the prior owner of PATEL's property and the adjacent parcel (ROA 1316) established that the extra parking spaces were constructed at the time of the 1959 construction of the motel, and after approval by the City have been continuously in use through the date of taking in this case. For the COUNTY to now assert in its statement of facts that PATEL "was lawfully authorized to use just thirteen parking spaces" based on the "records search" conducted by Mr. Alexandrowicz, when it was conclusively established that he overlooked (or simply was never asked about) exhibits 12 and 13 whereby the City approved all twenty spaces on the PATEL portion of the property, is preposterous. The ingenuousness of the COUNTY's position is apparent from a reading of the trial transcript at Pages 1292 through 1296. At this juncture in the trial, PATEL had called John Olah as a witness. Prior to his taking the stand, the documents which were ultimately admitted into evidence as Defendant, PATEL's exhibits 11[7] through 13, were shown to the COUNTY's attorney. The COUNTY's attorney immediately recognized that the documents totally destroyed the testimony of Mr. Alexandrowicz that in his search of the city's records, he "could not find" any further site plans or plot plans subsequent to the 1959 site plan whereby the City approved any parking spaces in addition to the thirteen shown on the 1959 site plan. The COUNTY's argument to the Court in an

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A. I assume that to be an accurate record.

Q. Right. And you're also assuming that there was nothing further because nothing further was found; is that right?

A. Basically correct.

[7] *Exhibit 11 was comprised of photographs showing that the area in the Southwest corner of the parking lot in front of the motel building was paved and used for parking cars from the date the area was approved for parking in 1959 through the date of taking.*

attempt to prevent PATEL from putting in this evidence reveals that the COUNTY was just as ready to mislead the jury during the trial as it is to mislead this court now.[8]

While the jurisdiction of this court is sought to be invoked by the COUNTY for the sole purpose of answering the certified question, if this court, in its discretion, chooses to accept jurisdiction, all of the issues raised by PATEL in the district court of appeal will be properly before it for review.[9] Since the court is empowered to consider all of the errors of the trial court cited by PATEL in his appeal, (any one of which would have amounted to a sufficient basis for reversing the judgment of the trial court and ordering a new trial), this court may decide that the issue certified was not essential to a determination of the case and is of such a nature that no useful purpose would be served by rendering a decision.[10] On the other hand, the court may exercise its discretion in favor of answering the question, and if it does, regardless of the answer, the court should address and rule upon all of the other issues which were before the Fourth District Court of Appeal, including those which the appellate court failed to decide. That is because, as this court has often held in the past, once a case is properly lodged in the Supreme

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[8] *In an attempt to keep out the proof that all twenty spaces had in fact been approved by the City, Mr. Bosch, in desperation, argued, "Judge, the problem I see with that is I feel that we have been prejudiced in that had I known of the existence of these documents and this witness and his testimony, I -- Mr. Alexandrowicz would not have been up there testifying, apparently incorrectly, regarding the existence or lack of existence of these records. I would have known that and I certainly wouldn't have presented testimony of something that wasn't true. I've already presented Mr. Alexandrowicz and now there is nothing I can do to cure that... It goes beyond just simply negating his testimony, your honor. It goes towards the credibility of my case (emphasis added)." (ROA 1292)*

[9] *Art. V, § 3(b)(4), Fla. Const. (1968). The COUNTY's suggestion, at page 5 of its brief, that the scope of review by this court is limited to the certified question itself is erroneous, as there are numerous decisions of this court establishing that once review is accepted, jurisdiction extends to a consideration of the entire **decision** of the appellate court, not just the question certified. Zirin v. Charles Pfizer & Co., Inc., 128 So 2d 594 (Fla. 1961); Rupp v. Jackson, 238 So 2d 86 (Fla. 1970); Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union, Local 415, 142 So 2d 290 (Fla. 1962); Confederation of Canada Life Insurance Company v. Vega Y Arminan, 144 So 2d 805 (Fla. 1962).*

[10] *Zirin v. Charles Pfizer & Co., Inc., Id, at 597 (Fla. 1961)*

Court, it should be finally decided by it on all issues, to prevent needless steps in litigation and to avoid a piecemeal determination of the case. [11]

At page 14 of the COUNTY's brief, footnote 6, the COUNTY makes the statement that the Fourth District Court of Appeal had also relied on Williams v. State Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991) "in concluding that the COUNTY's experts failed to consider any loss to the condemnees by virtue of the appropriation of other areas of their property for parking."[12] Then with regard to PATEL's parcel only, the COUNTY stated:

> ...it should initially be noted that the appellate court incorrectly dealt with this matter as one pertaining to both Respondents. In fact, the site plan for PATEL's property involved only the remodeling of the existing parking lot and not the relocation of any parking spaces onto other parts of the property (T 562-568). This factor is therefore of no relevance to consideration of the damages suffered by PATEL. (Petitioner's Brief, page 14, footnote 6).

Again, the COUNTY is inaccurate and has misstated the undisputed record evidence in this case. While it is true that the "cure" to the lost parking spaces on PATEL's property proposed by Sheila Rose amounted to a "remodeling" of the existing parking area, it was also undisputed that the remodeling involved the appropriation for new parking spaces of a portion of the motel parking area need for a refuse "dumpster" in the before condition. Ms. Rose planned to move the dumpster to the rear of the motel property adjacent to the swimming pool, thus, in turn appropriating an area of the remainder lands utilized by motel guests for recreational enjoyment, turning it into a waste disposal area. (ROA 585-587; 1191-1196). The "remodeling" of the parking lot

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[11] Zirin v. Charles Pfizer & Co., Inc., Id, at 596 (Fla. 1961)

[12] This is the rule in State Department of Transportation v. Byrd, 254 So. 2d 836)Fla. 1st DCA 1971), about which the COUNTY had this to say in its brief: "(Byrd) stands for the proposition that a condemnee suffers severance damage when parking spaces lost by virtue of a taking are relocated on the remaining portion of the property. The COUNTY does not dispute the principle of law set forth in Byrd..." (Petitioner's Brief, page 13, footnote 5) (Emphasis added).

also involved eliminating a handicapped parking spot required under federal law, changing the size of the accessway to State Road A-1-A so that it no longer met Department of Transportation regulations, decreasing the size of parking spaces and aisles to dimensions which would no longer comply with the Pompano Beach Zoning Code, and thereby reducing the safety and convenience of the parking lot. (ROA 1164-1171; 1191-1196) Thus the "cure" proposed by Ms. Rose does involve the relocation of improvements to portions of the remainder lands previously devoted to other uses, and therefore, violates the rule in Byrd.[13] Furthermore, the "cure" does not restore the property to its original utility, (and therefore its original value) in that the "remodeled" parking lot as proposed includes parking spaces and accessways which will be smaller, less convenient to use, and more hazardous than the improvements which they replace, thus contributing less to the market value of the remainder lands than the original improvements contributed. If the COUNTY's position were to be accepted, it would have the effect of forcing the property owner to accept a sub-standard parking facility with no compensation for the resultant diminution in value (severance damages) to the remaining lands.

The inaccuracies in the statement of the case and of the facts in the COUNTY's Brief and its failure to inform the court of matters relevant to the issues involved in the appeal in addition to the narrow issue implicated by the certified question itself, makes it necessary for PATEL to offer the following supplementary statement of the case and of the facts for the court's consideration.

This condemnation case involved a 30 unit motel purchased by PATEL in December, 1986, and continuously operated through the date of trial (ROA 1236). The

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[13] The COUNTY, while conceding the validity of the Byrd case, states that the rule in Byrd has no relevance in this review because only the narrow issue posed by the Fourth District's certified question is properly before this Court for consideration. Based on the authorities set forth in Footnote 12 above, the COUNTY is wrong again, and, if for no other reason than the rule in Byrd, the Fourth District's reversal of the trial court must stand.

two-story main building and an additional building which comprised the motel were served by a paved parking lot with frontage along State Road A-1-A. The condemnation involved the taking of a strip of land along State Road A-1-A, running from the South lot line to the North lot line approximately seven to eight feet in width. As a result of the taking, PATEL lost four parking spaces (ROA 1153).

The COUNTY's appraiser, Donald Sutte, testified that the value of the part taken was $18,760.00 (ROA 709); the value of the temporary construction easement (Parcel 47 TCE) was $2,400.00 (ROA 717); and the amount of severance damages to the remainder was $270,618.00 if uncured.[14] (ROA 736-737, and 750). However, Mr. Sutte testified that the damages to the remainder resulting from the loss of parking could be cured by the construction of a parking lot designed by the COUNTY's land planning expert, Sheila Rose, and that because the cost of building the new parking lot was, according to Ms. Rose, $31,775.00, the severance damages should be reduced from $270,618.00 to the cost to "cure" of $31,775.00 (ROA 709).[15]

Sheila Rose testified that she prepared a plan for the reconstruction of PATEL'S parking lot which would replace the parking spaces lost by reason of the taking. The plan was not completed until the Saturday or Sunday before trial and was never submitted to the City of Pompano Beach for review or comment[16] (ROA 564). The parking plan for

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[14] *Donald Sutte's calculations and analysis of PATEL's severance damages due to loss of parking are detailed at ROA 729-736.*

[15] *Mr. Sutte conceded on cross-examination that he first appraised this property in 1986 and had issued several updates to his initial report since 1986 without mentioning the cure proposed by Sheila Rose. In fact he admitted, after considerable urging, that he had not seen Sheila Rose's parking plan and had not made these calculations until the day before the trial of this case (ROA 721-722).*

[16] *In contrast, Ms. Rose had submitted three alternative plans to replace lost parking on the PICILLO motel property to the City nearly a year before trial. Mr. Yarbrough, as Director of Zoning for the City had found two of her alternatives "unacceptable," but one, he testified, would receive the "support and approval" of the Zoning Department if it were submitted to the Zoning Board of Appeals (ROA 467-468; 362-*

PATEL involved numerous violations of the Pompano Beach Zoning Code[17] (ROA 565-566). Furthermore, the parking plan was not designed in accordance with the parking layout diagrams on file in the planning department of the City of Pompano Beach as of the date of taking as required by Zoning Code (ROA 582-583). In fact, Ms. Rose conceded that she was not even familiar with the parking layout diagrams (ROA 583). Ms. Rose testified that the estimated cost for reconstructing the parking lot pursuant to her plan was $31,775.50 (ROA 568).

Although her plan admittedly contained several violations of the Pompano Beach Zoning Code, state and federal law, and had never been reviewed by the City, she nevertheless testified that there was "reasonable probability" that the Pompano Beach Zoning Board of Appeals would, if petitioned to do so, grant variances to allow the construction of a new parking lot according to her plan, thereby replacing the lost parking (ROA 569).

Ms. Rose's opinion that there was a "reasonable probability" of variances being granted to PATEL was based primarily upon a search of the records of the decisions of the Pompano Beach Zoning Board of Appeals on variance requests ruled upon between 1987 and 1990[18] (ROA 476; 493-494). The research was done in October, 1990, in

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364).

[17] *There was also uncontradicted testimony that the construction of Ms. Rose's proposed parking lot would require approval of the Florida Department of Transportation, but that the driveway design she proposed did not meet the Florida Department of Transportation's standards in several respects. The testimony also established beyond dispute that Ms. Rose's parking plan did not comply with Federal law concerning provisions for handicapped parking spaces (ROA 1165-1166). The Pompano Beach Zoning Board of Appeals has no authority to grant variances which would violate State or Federal Law (ROA 1191).*

[18] *Ms. Rose also considered conversations she had with city employees Regan Yarbrough and Fred Kleingartner, although those conversations related only to the PICILLO parcel, not PATEL's property (ROA 476).*

connection with her work on the PICILLO parcel[19] (ROA 475). According to Ms. Rose's testimony on direct examination, out of the twenty-seven variance requests which she claimed were of a similar nature, only three were denied[20] (ROA 494).

Prior to the testimony of both Sheila Rose and Donald Sutte, PATEL moved ***in limine*** to prohibit them from testifying on the grounds that Ms. Rose's testimony concerning the "reasonable probability" that variances would be granted was speculative and conjectural, and Mr. Sutte's opinion on severance damages was based upon a misconception of the law of severance damages since it was founded upon the erroneous premise that variances to construct the parking lot could be obtained (ROA 458-460; ROA 1931-1935; APP. 14 through 18). The motions were denied (ROA 460). Objections to the testimony of both these witnesses were made and renewed on several occasions during the presentation of the COUNTY's case (ROA 479-490; 492; 561-562; 570-572).

In general, the objections reiterated the grounds for the ***Motion in Limine*** earlier made, i. e., that Ms. Rose's opinion was speculative and conjectural, and that her proposed parking plan was prepared in accordance with a zoning code that was not in effect until nine months after the date of taking. However, other grounds were added when it became evident that the COUNTY had failed to lay a proper predicate for the admission of her opinion testimony. Thus a report of research she had done into decisions on prior variance petitions was objected to on the grounds that there had been no showing that the variances granted were made under similar circumstances, seeking

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[19] *It should be noted that Ms. Rose admitted that she had already concluded that there was a reasonable probability that variances would be granted allowing construction of her proposed parking lot for the PICILLO parcel before she did this research, and that the research was done at the behest of the County Attorney in order to provide the basis for the opinion she had already formulated (ROA 529-530).*

[20] *On cross examination, however, Ms. Rose corrected her testimony and admitted that indeed six of the twenty-seven petitions had been denied (ROA 575-578).*

similar variance relief for similar reasons as those involved in her proposed parking plan for the PATEL property (ROA 479-490).

On the contrary, it would appear from her testimony and the report she prepared that several of the petitions which were granted involved substantially ***dissimilar*** circumstances, e. g., variance to allow ***ground floor elevation*** of eight feet above main sea level instead of 10 feet (ROA 550); variance to allow four ***single family homes*** (ROA 547); variance to permit five foot landscape strip to be eliminated in industrial area characterized by ***industrial buildings and junkyards*** (ROA 541); variance to permit reduction in number of parking spaces in ***15 acre parking lot for Winn Dixie Store*** (ROA 539); variance to permit construction of a "***Chickee Bar***" at a residence (ROA 532; 538-539).

Furthermore, it was pointed out that in contrast to the facts and data which Ms. Rose had developed over the course of a year to support her opinion in regard to the three alternative parking lot plans prepared for the PICILLO property, her opinion in PATEL's case was formulated only a few days before trial, based on a single proposed plan which admittedly contained numerous code violations and which she had never discussed with Mr. Yarbrough, Mr. Kleingartner or any member of the City's staff (ROA 570-572; 598-599).

Prior to calling Ms. Rose and Mr. Sutte to the witness stand, the COUNTY called two City of Pompano Beach employees as witnesses. Over defense objections, Elmer F. Kleingartner, the City's Planning and Growth Management Director, and Regan Yarbrough, the Zoning Director for the City, were both asked to recite and/or explain various provisions of the City's Charter and Zoning ordinances (ROA 275-300; 306; 342-344; 351; 375-376). Mr. Kleingartner was unable to remember the criteria which the

Zoning Board of Appeals must consider in ruling on variance requests despite considerable prompting from the COUNTY and the trial judge himself (ROA 286-297).

However, Regan Yarbrough explained several provisions of the ordinances to the jury, including the criteria for the granting of a variance (ROA 342-344); the meaning of "hardship" as that term is employed in the Pompano Beach Zoning Code (ROA 344-346); whether the February, 1991 Landscape Code is more restrictive than the one in effect as of the date of taking (ROA 351); whether the Zoning Code or City policy permits the maintenance of non-conforming parking spaces resulting from condemnation without the necessity of a variance (ROA 375-376); the meaning and distinction between "use" and "dimensional" variances (ROA 365-366); the requirement of one parking space for every unit in a motel (ROA 366); and that it was, in general, possible to obtain a variance from parking requirements to provide less parking than the Code required (ROA 366).

A major portion of Mr. Yarbrough's testimony concerned Sheila Rose's submission of three alternative parking plans to replace lost parking on the PICILLO property. He testified that her alternative number 3 was unacceptable because of poor traffic circulation, her alternative number 1 failed to meet certain code requirements and would require a variance by the Zoning Board of Appeals, and her alternative number 2, which was in "substantial conformance to the Code requirements," could, subject to submission of a more detailed plan, receive the support and approval of his department (ROA 363-364). If, upon submission of a more detailed plan, variances from the Zoning Code would be required, it would not affect the fact that the Zoning Department would support that plan over the other two plans, according to Mr. Yarbrough (ROA 365).

No similar comments were made about the PATEL parking plan, which had been prepared two days before trial, because, as Mr. Yarbrough testified, ***he had never seen it*** (ROA 400).

Mr. Yarbrough was also permitted to testify, over objection, that in a situation similar to that which existed at the Santa Rosa (the PICILLO parcel), the Balkan House Hotel was granted a variance to retain parking spaces with direct access to Eighth Street[21] (ROA 374-375).

Although very little was said by Mr. Yarbrough concerning the PATEL parcel, his general testimony concerning his legal interpretation of the Zoning Code, the policies of his office, his testimony concerning his willingness to recommend to the Zoning Board of Appeals one of Sheila Rose's proposed parking plans for the PICILLO parcel and his statement that a variance had been granted to the Balkan House for "back-out" parking were intended by the COUNTY to create the impression that the variances required for Sheila Rose's parking plan for PATEL were of a similar nature and equally as likely to be granted[22].

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[21] *No showing of similarity between the "Balkan House" variance petition and the variances required for the proposed parking plan prepared by Sheila Rose for the PATEL parcel was made. The ordinance from which a variance was sought in the Balkan House petition prohibited parking spaces with direct access to the street (otherwise known as "back-out" parking). There was no issue of "back-out" parking with regard to the PATEL parcel.*

[22] *Assistant County Attorney, William Bosch, in his closing argument, urged the jury to accept the testimony and evidence concerning the reasonable probability that variances would be granted for the PICILLO parcel as evidence that they would be granted for the PATEL parcel. After asking the jury not to allow his client, Broward County to suffer because he waited until the weekend before trial to have Ms. Rose prepare a parking plan to mitigate the severance damages on the Patel parcel, he said, "Basically, the same type variances that are required for the Santa Rosa are similar type variances required for the Budget Inn. While she did not run this by Mr. Yarbrough, I think based on her experience, her dealings with Mr. Yarbrough and the City and the whole thing I told you about before, her experience, she is able to render an opinion that there is a reasonable probability that the City is going to allow them to put these 19 parking spaces on here" (ROA 1620-1621).*

Prior to the testimony of either of these City Officials, PATEL filed Motions in Limine to prohibit their testimony on several grounds (ROA 242-269; 1924-1930; APP. 19 through 25). The Motions in Limine were denied on all grounds (ROA 267).[23]

Objections to the testimony of both Mr. Kleingartner and Mr. Yarbrough were made and renewed several times throughout their testimony (ROA 275; 276; 277; 286-287; 289; 293; 298-299; 306; 342; 344; 348-349; 351; 369; 375; 412). All objections were denied.

Jesse Vance, PATEL's real estate appraiser, testified during PATEL's case that in his opinion the value of the land taken was $23,800.00; improvements taken, consisting of pavement, landscaping, etc. were valued at $2,200.00; and severance damages to the remainder due to the loss of four parking spaces were valued at $244,000.00. Mr. Vance concluded that full compensation for the taking of Parcel 47 was $270,000.00 (ROA 1360).

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[23] *Interestingly, the trial judge initially agreed that the City officials should not be permitted to testify as to their interpretation of the Zoning Code or their individual policy regarding enforcement or nonenforcement of its provisions. Thus, at ROA 253 the court stated, "As far as one statement is concerned about his personal opinion, I tend to agree with you;" at ROA 254, the court stated, "And I agree with the statement, the blanket statement that you can't put a person on, this is my legal opinion, it conforms with the law." Then after announcing that the Motion in Limine was denied, the following colloquy took place (ROA 267):*

"Mr. Welch: Your honor were the first two portions of my Motion in Limine denied?

The Court: Yes sir.

Mr. Welch: Both? I thought the Court indicated favorable ruling earlier?

The Court: In regard to what?

Mr. Welch: As to whether or not they could tell the jury what their interpretation of the Pompano Beach Zoning Code is.

The Court: Well, they can't give a legal opinion if that's what you want the Court to rule, that's true. But I think he can get up and say that I am the Chief of Code Enforcement, whatever the heck the guy does, the Code provides for this, and here's what we do in circumstances of this. Here's the parameters within the Code. And if he does that, they can make - they can draw their own conclusion....

Mr. Welch: Well, Judge, what's the difference between his saying, 'it's my legal opinion' and 'the Code says such and such?'

The Court: Artful language, artful way of asking questions."

The temporary construction easement was valued by Mr. Vance at $3,300.00 (ROA 1361) and Mr. PATEL testified that an electrified sign was destroyed in the course of the taking and had to be replaced at a cost of approximately $8,460.00 (ROA 1272).

PATEL did not claim nor did he put on any testimony or evidence to support a claim for ***business damages*** pursuant to Section 73.171(3)(b), Florida Statutes. However, in ***rebuttal***, the COUNTY proposed to call ***business damage*** expert, Gary Gerson, as a witness. When counsel for PATEL attempted to move ***in limine*** to disallow Mr. Gerson's testimony, the Court ***summarily denied*** the motion ***without permitting argument*** (ROA 1414-1415). When counsel for PATEL pointed out that it was on "***different grounds***" than had been urged by the attorney for PICILLO, the court ***still refused to permit argument*** (ROA 1415).

Following a brief recess, the Court observed that counsel for PATEL had filed a written Motion in Limine[24] to prohibit the testimony of Mr. Gerson, and without reading it, stated:

> "I see you have a written motion to exclude. We do have a record. The motion is denied. We are letting the testimony come in. We can handle it by interrogatory verdict form or the like. I know you need to make a record, but it's coming in." (ROA 1415)

Following this exchange, Mr. Gerson took the stand and testified as to his qualifications as a certified public accountant and expert on ***business damage*** claims in eminent domain proceedings (ROA 1424-1427). Upon the completion of questioning as to Mr. Gerson's qualifications, Assistant COUNTY Attorney William Bosch announced:

> "Mr. Bosch: Your honor, at this time I'd offer Mr. Gerson as an expert in ***business damages***." (ROA 1427)

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[24] *(ROA 1974-1976; APP. 26-28)*

After inquiry was made by the attorney for PICILLO, the Court inquired of the attorney for PATEL if he wished to ***voir dire*** the witness. The response given was:

> "Welch: Your honor, I have no ***voir dire*** of this witness on the submission made by Mr. Bosch. I think his statement was, '***we tender Mr. Gerson as an expert on business damages.***'" (ROA 1433)

The Court thereupon announced:

> "We'll so certify the gentleman ***as submitted.***" (ROA 1433)

After eliciting testimony from Mr. Gerson that ***business damage*** experts ***are not real estate appraisers*** and only "***assist*** in the valuation of severance damages" (ROA 1441), Mr. Bosch began to question Mr. Gerson concerning the ***severance damages*** sustained by PATEL. Prior to the commencement of this questioning, PATEL objected on various grounds including those which were earlier set forth in the ***Motion in Limine*** (ROA 1450-1456) (APP. 26 - 28).

Generally, the objections made to Mr. Gerson's testimony were that PATEL ***did not claim business damages*** and ***did not put on any evidence to support a claim for business damages*** so that Gerson's testimony ***was not in rebuttal of anything offered by PATEL***; the COUNTY ***offered*** and the Court ***accepted*** Gerson as an expert on ***business damages*** only and ***not as a real estate appraiser*** and although Mr. Gerson ***admitted*** that he ***was not qualified to render an expert opinion on real estate severance damages***, his testimony amounted to an ***opinion on severance damages*** which was ***improper as outside his field of expertise***;[25] the effect of Mr. Gerson's testimony was to ***impeach*** the testimony of the COUNTY's ***own real estate appraiser*** who had testified that PATEL had sustained

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[25] *In his testimony at trial and at a pretrial deposition, Mr. Gerson admitted that, "I don't do motel business damages for the reason I told you and I don't appraise them because I am not a real estate appraiser" (ROA 1427-1428). Although he supported his opinion of the severance damages sustained by Patel by using a "capitalization rate," he stated in testimony at trial and during his pretrial deposition that, "I'm really not an expert on capitalization rates for motel income. That's a real estate appraiser function" (ROA 1430).*

$270,000.00 in severance damages (uncured) by offering a contradictory opinion; Mr. Gerson's opinion on severance damages was ***speculative*** and based upon ***hearsay*** evidence not shown to be of the type reasonably relied on by experts in the subject to support the opinions expressed; Mr. Gerson relied upon information developed by a private investigative firm as to the number of cars parked in PATEL's parking lot in January and February, 1991, more than 18 months after the date of taking, whereas valuation opinions in eminent domain cases must relate to the date of taking; Mr. Gerson relied upon a report which was not disclosed to counsel for PATEL until 4:30 p.m. the day before trial which drastically changed his earlier opinion given in deposition 10 days prior to trial, the report was not disclosed in the COUNTY's Pretrial Exhibit List[26] and was not given to the defense until just before Mr. Gerson took the stand. All objections were denied (ROA 1456) and Mr. Gerson was permitted to testify that the severance damages sustained by PATEL according to his calculations were $60,045.00 (ROA 1478).

At the conclusion of the case, the Court, over objection by PATEL, gave the COUNTY's requested instruction on the ***reasonable probability that a variance would be granted.*** The instruction was a modified version of the "***reasonable probability of rezoning***" standard instruction contained in § 11.13, Fla. Eminent Domain Pract. and Proced. The text of which is set forth in the Appendix to this brief as APP. 29.

During closing arguments, the COUNTY's attorney, William Bosch, argued to the jury that the COUNTY's evidence had shown that the award which should be made to PATEL included $18,760.00 for the value of the part taken; $2,400.00 for the temporary construction easement; and $31,775.00 for the cost to cure the severance damages to PATEL's remainder parcel "bringing the total compensation to $52,935.00" (ROA 1623). Mr. Bosch also argued to the jury that if they believed the severance damages to PATEL's

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[26] *With regard to the Pretrial Exhibit List mandated by the Court's Pretrial Order of October 25, 1990, the trial judge had this to say: "Well, the pretrial order doesn't mean anything. I mean, that's - that's probably the most worthless piece of paper that ever floats around this building."*

property could not be cured, they should accept Mr. Gerson's opinion of severance damages rather than that of Mr. Sutte. Thus he stated:

> ...now, this is reality, ladies and gentlemen; this is not what Mr. Sutte did... Mr. Gerson took the actual numbers by doing this count..., that's the actual figure that if Mr. Sutte had done the actual calculations, rather than accepted Mr. PATEL's figures, he would have come out with. That's why they said, well, we put on one witness, he's never seen it done, where our witness impeached our own witness or whatever. The reason is because Mr. Sutte made the mistake of accepting Mr. PATEL's figures. Mr. Gerson, an accountant, didn't do that. (ROA 1626)

The jury returned a verdict for parcel 47 as follows: Value of the part taken, $18,760.00; severance damages $9,360.00; construction easement (47 TCE) $3,300.00; full compensation, $31,420.00 (ROA 1984-1985). Thus, the ***upper*** and ***lower*** limits of the evidence, and the ***jury's ultimate verdict*** were as follows:

	JURY VERDICT	COUNTY'S	PATEL'S
VALUE OF PART TAKEN	$18,760.00	$ 23,800.00	$18,760.00
IMPROVEMENTS TAKEN	.00	2,200.00	.00
SEVERANCE DAMAGES	31,775.00	244,000.00	9,360.00
TEMP. CONSTR. EASEMENT	2,400.00	244,000.00	3,300.00
FULL COMPENSATION:	$52,935.00	$270,000.00*	$31,420.00

(*) Plus $8,460.00 for damaged sign.

PATEL filed a Motion for an Order setting aside the verdict and granting a new trial (ROA 1912-1923). Among other things, PATEL asserted that the jury had failed to follow the Court's instruction that the verdict "may not be less than the lowest value, nor more than the highest value testified to by any witness in the proceeding."[27]

Furthermore, the jury misconceived the facts or the law or both by awarding total damages to PATEL which were less than the amount testified to by the COUNTY's appraiser and where severance damages awarded were less than the amount testified to by the COUNTY's appraiser for severance damages uncured ($270,000.00) and were

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[27] *§ 11.18, Fla. Eminent Domain Pract. and Proced. 4th Ed. (Instr. No. 9 - Concluding Instruction) given by the trial court at ROA 1665.*

also less than the amount testified to by the COUNTY's appraiser and land planner for the cost to cure ($31,775.00).

The Court denied the motion and entered Final Judgment on the Verdict (APP. 36-44). PATEL timely filed an appeal to the Fourth District Court of Appeal on the grounds set forth in the Appendix to this Brief as APP. 30 through 31.

The Fourth District Court of Appeal rendered its decision on the appeal on February 10, 1993, reversing the trial court and remanding the case for a new trial, holding that it was reversible error for the trial judge to have permitted the COUNTY to introduce evidence of the "reasonable probability" of variances being granted over objection by PATEL, but certifying to this Court the question set forth in the Petitioner's Brief on the merits at Page 6 as an issue of great public importance (APP. 32 through 35). The court failed to address any of the other errors cited by PATEL, thus providing the trial court with no further guidance on these issues after remand for new trial.

A petition for discretionary review of the decision of the Fourth District Court of Appeal was timely filed by the COUNTY.

SUMMARY OF THE ARGUMENT

1. The court erred in permitting Donald Sutte to testify: The COUNTY's real estate appraiser, Donald Sutte, calculated PATEL's severance damages on the "before and after" basis to be $270,000.00. Relying on Sheila Rose's estimate of the cost to construct a new parking lot, Mr. Sutte then reduced the severance damages from $270,000.00 to $31,775.00. Mr. Sutte was aware that the parking plan violated the zoning code, but assumed Ms. Rose's opinion that variances were obtainable was valid, and concluded that damages should be reduced to the "cost to cure." Mr. Sutte's opinion that the reasonable probability of a variance justifies mitigating severance damages to the cost of an otherwise impermissible cure, represents a misconception of the law of severance damages, and should have been stricken.

2. The court erred in permitting Sheila Rose to testify: Ms. Rose testified that there was a reasonable probability that variances would be granted to permit her proposed parking lot to be built. The proposed parking lot contained numerous violations of municipal, state and federal regulations. Her testimony was speculative and conjectural and should not have been admitted in mitigation of severance damages.

3. The court erred in permitting City Officials to testify: Two employees of the City of Pompano Beach were permitted to testify as to their interpretation of the Zoning Code. As an "expert opinion" on the law, the testimony was inadmissible. Their personal views should have been excluded because "a municipal corporation speaks only through its records, not through the opinions of its individual officers." Prognostication as to future discretionary action by the city was speculative and should have been excluded because variances are granted as a matter of grace.

4. The court erred in permitting Gary Gerson to testify: Gary Gerson, a business damage expert, testified as a "rebuttal witness." PATEL did not claim business damages. Gerson's testimony was not in rebuttal of anything put on by the PATEL. Gerson

admitted he was not qualified to give an opinion on the value of real estate, but was permitted to render an opinion on real estate severance damages anyway. It was error to permit Gerson to testify beyond his field. The court should also have prohibited Gerson's testimony as improper impeachment of the COUNTY'S own valuation witness, and because it was speculative, based on hearsay not shown to be of the type reasonably relied on by other experts in the field, and on the further grounds of unfair surprise.

5. The court erred in instructing the jury on the COUNTY'S theory of the "reasonable probability of variances:" The trial court instructed the jury as to the COUNTY's theory of "reasonable probability of variances" based upon a modification to § 11.13, Fla. Eminent Domain Prac. and Proced. (Manual Standard Instruction) on "reasonable probability of rezoning." This was error, leading the jury to believe that PATEL would be able to build a new parking lot which would replace parking spaces lost by condemnation for the mere cost of construction. Adequate, safe, and convenient parking is essential to the economic viability of the motel business. The challenged instruction, coupled with the expert testimony erroneously admitted into evidence led the jury to overlook significant and substantial factors in the proper assessment of severance damages.

6. The court erred in denying PATEL'S motion for a new trial based on the jury's failure to follow the court's instructions: The court properly charged the jury that their verdict may not be less than the lowest value nor more than the highest value testified to by any witness in the proceeding. The jury failed to follow this instruction. Since the compensation awarded by the jury was less than the lowest value fixed by the evidence, the verdict should have been set aside and a new trial ordered.

POINT I:

THE TRIAL COURT ERRED IN DENYING PATEL'S MOTION IN LIMINE TO DISALLOW THE TESTIMONY OF THE COUNTY'S REAL ESTATE APPRAISER, DONALD SUTTE, AND BY PERMITTING SUTTE TO TESTIFY OVER PATEL'S OBJECTION THAT SEVERANCE DAMAGES FOR LOST PARKING OF $270,000.00 SHOULD BE MITIGATED TO A "COST TO CURE" OF $31,775.00 IN RELIANCE UPON ANOTHER EXPERT'S ASSUMPTION THAT VARIANCES WOULD BE GRANTED TO PERMIT THE CONSTRUCTION OF AN OTHERWISE ILLEGAL PARKING LOT.

It is axiomatic that when the State takes private property for public use, the landowner is entitled to receive full compensation for his loss. Art. X, § 6, Fla. Const. (1968). In addition to the value of the property taken, the landowner is entitled to be compensated for damages to his remaining property. § 73.071(3)(b), Fla. Stat. (1981); Kendry v. Division of Administration, State Department of Transportation, 366 So.2d 391, 393 (Fla. 1978); Lee County v. Exchange National Bank of Tampa, 417 So.2d 268, 269 (Fla. 2d DCA 1982) rev. den. 426 So.2d 25 (Fla. 1983).

The general rule for calculating severance damages is the "before and after" approach under which the damages are equal to the reduction in the value of the remainder property as a result of the taking. The usual method of determining the reduction is to compare the pre-condemnation and post-condemnation fair market value of the property. Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., 476 So.2d 224 (Fla. 4th DCA 1985). However, this method of determining severance damages may be replaced by the "cost-to-cure" approach where the injury to the remainder can be "cured" at a cost which is less than the severance damages calculated on the "before and after" basis. Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., id., at Page 227; Mulkey v. Division of Administration, State of Florida, 448 So.2d 1062 (Fla. 2d DCA 1984); Canney v. City of St. Petersburg, 466 So.2d 1193 (Fla. 2d DCA 1985); Hill v. Marion County, 238 So.2d 163 (Fla. 1st DCA 1970).

In this case, both the COUNTY's real estate appraiser and PATEL's appraiser agreed that PATEL's severance damages, uncured, were substantial (ROA 736-737; 750; 1360). The COUNTY's expert, Donald Sutte, calculated the severance damages on the "before and after" basis to be $270,000.00 (ROA 736-737). PATEL's appraiser was more conservative, concluding that the severance damages uncured were $244,000.00 (ROA 1360). The point of departure between the experts was on the issue of whether the damages to PATEL's remainder property could be cured. Mr. Sutte assumed that a new parking lot designed by land planner Sheila Rose could be constructed on PATEL's remaining property with the result that the four parking spaces lost as a consequence of the taking would be replaced, thereby "curing" the damages (ROA 709). Relying on Sheila Rose's estimate of the cost of construction of the new parking lot, Mr. Sutte then reduced the severance damages from $270,000.00 to $31,775.00 (ROA 709). While Mr. Sutte was aware that Ms. Rose's parking plan violated several zoning ordinances, he assumed that her opinion that variances could be obtained was reliable. Mr. Vance did not consider the "cost-to-cure" approach to be applicable since Ms. Rose's proposed parking lot violated numerous provisions of the Pompano Beach Zoning Code as well as Florida Department of Transportation and Federal regulations and to assume a variance would be "speculative" (ROA 1383).

Although it was conceded that Ms. Rose's parking lot plan did not meet the requirements of the law, the COUNTY took the position that the "cost-to-cure" approach was proper because there was a "reasonable probability" that variances could be obtained to permit the construction of a parking lot in accordance with Ms. Rose's design. Both Ms. Rose's testimony on the issue of "reasonable probability" and Mr. Sutte's opinion testimony which assumed the efficacy of the proposed cure were permitted, despite vigorous objections, motions in limine and to strike by the defense.

In the recent case of Williams v. State Department of Transportation, 579 So.2d 226 (Fla. 1st DCA 1991), a similar issue was presented to the First District Court of Appeal. In that case, the property owners' motions to strike the opinion testimony of the condemnor's civil and site plan engineering expert were denied by the trial court. The testimony concerned ***four cost-to-cure site plan proposals*** submitted by the Department ***in mitigation of the property owners' severance damages***. The witness had testified that in his opinion the proposed cures complied with all applicable codes, ordinances and laws. However, the property owner introduced evidence that the proposed cures did not meet certain code requirements of the City and County Zoning Codes and moved to strike the testimony.

The similarity between the case at bar and the Williams case is amply demonstrated by the following passage from the appellate court's opinion:

> "In overruling Williams' motion to strike this testimony, the court volunteered that the strict requirements of the ordinances and codes ***would be subject to variance and that the parties could argue to the jury the applicability of the ordinances and the probabilities of a variance being granted.***" Williams, id., at 230. (Emphasis Added.)

The appellate court found reversible error in the trial court's refusal to strike the testimony, and reversed and remanded for a new trial. The appellate court explained its ruling as follows:

> "...***the trial judge in this case should have reviewed the applicable codes and ordinances, interpreted the legal requirements thereof, and determined whether the Department's proposed cures met the minimum requirements of these laws.*** If the proposals so complied, the court could then have properly allowed evidence of the proposed cures to go to the jury. If the proposals did not so comply, the evidence should have been ***excluded... 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 (the witness) to testify, over objection, on these ***questions of law*** and in ***submitting these questions to the jury.***" Williams, id., at 230. (Emphasis Added.)

In the case at bar, the trial judge, in denying defense's ***Motions in Limine*** and overruling objections to the opinion testimony of the COUNTY's witnesses, ***likewise*** reasoned that the ***probability of obtaining variances*** to permit the proposed cure which served as the basis of Mr. Sutte's opinion on severance damages, was an issue ***within the province of the jury.*** As in Williams, the trial judge below opined that the ***parties could argue to the jury the applicability of the ordinances and the probabilities of a variance being granted.*** Thus, at ROA 238-239, the trial judge stated:

> "You put the guy up on the witness stand and he says through my experience and what - we've had this occur right around the corner. And then ***it's a jury issue whether or not there's reasonable probability... And what I think I'm saying is that would be in the province of the jury. Why not let them hear both sides.*** They get up and argue there's a real probability here. You get up and say folks that's hog wash; they are asking you to speculate, disregard it. There's no reasonable probability. They make up their minds." (ROA238-239) (Emphasis Added.)

As will be more fully discussed under Point II below, it was improper for the Court to permit speculative and conjectural testimony from Ms. Rose as to the probability of variances to be heard by the jury, and having done so, to then allow the jury to weigh the sufficiency of that testimony against the legal requirements of the Pompano Beach Zoning Code for the granting of variances. Moreover, because Donald Sutte's opinion on severance damages was based entirely on the presumed validity of Ms. Rose's proposed cure, he should not have been permitted to testify over PATEL's objection, or his testimony should have been stricken on PATEL's motion as a misconception of the law of severance damages. As stated in Peebles v. Canal Authority, 254 So. 2d 232, 233 (Fla. 1st DCA 1971), "***If an underlying premise upon which a conclusion is based fails, the conclusion itself must necessarily fail.***" Mr. Sutte's opinion of valuation, being based on a "cost-to-cure" approach, ***must necessarily fail because it is based on erroneous premise.***

However, during the trial of this case, the COUNTY argued that Mr. Sutte's "cost-to-cure" approach was sustainable on the theory that Florida Law recognizes the "***reasonable probability of a variance***" as a proper consideration in valuing property in eminent domain cases. Thus, Assistant County Attorney, William Bosch argued as follows:

> "Mr. Bosch: Judge, I can't say much more than you have, other than to say the issue in the case is the value of the property. ***And one of the considerations in valuing property and valuing damage is the reasonable probability of a variance. There's Florida case law to the effect. The City of Miami Beach v. Buckley, which is 363 So.2d 360, in which the Court specifically finds, and I will just provide your honor with a copy of that... That's our whole case.*** *In evaluating this property, in determining the damages, reasonable probability of the variance is certainly relevant." (Emphasis added.) (ROA 255)*

The problem with the COUNTY's argument is that the City of Miami Beach v. Buckley, 363 So.2d 360 (Fla. 3d DCA 1978) case did ***NOT*** involve the "reasonable probability of a ***variance***." The opinion stands for the proposition that the introduction of evidence by the ***property owner*** of the "reasonable probability of ***rezoning***" the ***condemned parcel*** of land, as a ***factor*** in determining the ***valuation of said land***, is not error. Buckley, id., at 361. The Buckley case is only one of a long line of cases recognizing the so-called "Texas rule" that in arriving at ***market value***, consideration may be given to all uses to which the condemned property is reasonably adaptable and for which it either is or in all reasonable probability would, within the near future become available. Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Company, 116 So. 2d 762 (Fla. 1959); C. F. Swift & Company v. Housing Authority of Plant City, 106 So. 2d 616 (Fla. 2d DCA 1958); Carvel Corporation v. Division of Business Administration, Department of Transportation, 473 So. 2d 48 (Fla. 4th DCA 1985); J.E. Stack v. State Road Department, 237 So. 2d 240 (Fla. 1st DCA 1970).

The theory underlying the "reasonable probability of rezoning" cases is related to the determination of the ***fair market value of the land taken***, not the calculation of ***severance damages to the remainder***. The rule recognizes that the highest and best use is not necessarily limited to a use permitted by existing zoning regulations. § 9.33 4th Ed. Fla. Eminent Domain Pract. & Proced. The reason that the jury is permitted to consider evidence as to the reasonable probability of a ***rezoning*** is based upon the theory that the adaptability of property to more profitable uses in the near future would likely be considered in negotiations between a willing seller, not compelled to sell, and a willing purchaser, not compelled to purchase, in arriving at an agreed price in an arms length transaction. In other words, it may be a factor which would ***enhance the fair market value*** of the property. As was stated in State Road Department v. Stack, 231 So. 2d 859 (Fla. 1st DCA 1969):

> "***Value, as used in eminent domain statute ordinarily means the amount which would be paid for the property on the assessing date to a willing seller not compelled to sell, by a willing purchaser not compelled to purchase taking into consideration all uses to which the property is adapted and might reasonably be applied.*** The uses to which the property is adapted and might reasonably be applied must be so reasonably probable as to have an effect on the market value at the time of taking... ***The proffered evidence (of the probability of rezoning) should have been admitted, not as controlling or as the measure of value, but as a factor affecting the market value.***" (Emphasis Added.)

In applying the "reasonable probability of ***rezoning***" rule, the property should ***NOT*** be valued as though the rezoning had already occurred. The property should be appraised as presently zoned, taking into account the ***impact*** on the value of a probability of rezoning. Some courts have spoken in terms of a "***premium***" to be added to the value of the property under existing zoning because of the likelihood of a rezoning. Papavich v. State, 235 N.Y. Suppl. 2d 97 (Ctp. Cl. 1972). Other courts refer to a "***discount***" from the value that the property would have if rezoned. State ex rel Highway Commission v.

Carlson, 463 So. W. 2d 74 (Mo. App. 1971); Mastrojeni v. State, 266 N.Y. Suppl. 2d 178 (App. Div. 1966); IV Nichols § 12.322(1); § 9.33, Fla. Eminent Domain Pract. & Proced.

The rule in Florida that the "probability of ***rezoning***" should be considered as a ***factor*** and not as ***controlling*** or as the ***measure of value*** referred to in State Road Department v. Stack, Id., at 861, is the same rule discussed in more detail in Masheter v. Ohio Holding Company, 313 N.E. 2d 413 (Ohio App. 1973) cert.den. 419 U.S. 835:

> "It is not unreasonable that a prospective buyer or seller would consider the value of the property as rezoned, in determining to purchase property in hopes of obtaining a rezoning to that usage. He might also consider the value of the property for uses permitted by existing zoning, and then be willing to pay ***some amount between the two depending upon the degree of risk he believes is involved. An expert witness may express his opinion as to the degree of risk involved...***"

From the above analysis of the "***reasonable probability of rezoning***" cases, a number of weaknesses the COUNTY's position in this case is at once apparent. First, ***contrary*** to the assertion of the COUNTY's attorney, the City of Miami Beach v. Buckley, did not deal with the "reasonable probability of a ***variance***." It dealt with the "reasonable probability of ***rezoning***." There is ***NO*** Florida case standing for the proposition that it is proper to mitigate severance damages by making repairs or improvements which violate municipal ordinances on the assumption that there is a "***reasonable probability***" of a ***variance*** being granted.

Secondly, the concepts of a "reasonable probability of ***rezoning***" and a "reasonable probability of a ***variance***" are not analogous. The rule of "reasonable probability of ***rezoning***" is founded on the proposition that the adaptability of property to more profitable use in the near future ***enhances market value*** and is entirely ***consistent with Florida's constitutional guarantee of full compensation***. On the other hand, the COUNTY's "***reasonable probability of a variance***" rule has no relationship to ***valuation of condemned property*** but is rather a supposed justification for ***mitigating severance damages to***

remainder lands based on speculation and conjecture in derogation of the constitutional right of full compensation.

Even if this court were to fashion a ***new rule***, never before recognized in Florida, to the effect that an eminent domain valuation expert may consider the ***reasonable probability of a variance*** to give effect an otherwise ***impermissible*** cure in ***mitigation of severance damages***, such a rule could ***not*** support or justify Donald Sutte's opinion in this case. That is because he did not consider the probability of a variance as a "***factor***" affecting his "***valuation***" of severance damages but rather, he viewed it as ***controlling the measure of damages*** by assessing them ***as if the variance had already been granted***. If there is a sufficient ***correlation*** between the ***reasonable probability of a variance*** being granted and the ***reasonable probability of rezoning*** to warrant the adoption of a ***new rule*** in Florida, then at a minimum, the same methodology for adjusting ***severance damages*** as is used for adjusting ***market value*** must be employed. Thus, if adjusting market value to account for the probability of ***rezoning***, a ***premium*** is properly added to the market value of property under ***existing zoning***, or a discount from the ***market value*** of the property as rezoned is made, then the ***impact*** of the ***reasonable probability of a variance*** being granted should similarly be ***factored*** into the ***severance damage*** calculation. ***Mr. Sutte obviously did not do that***. In fact, his opinion of severance damages accounts for nothing more than the cost of ***constructing*** the new parking lot. It does not take into account the ***risk*** that the variance might not be granted (***reasonable probability*** presumes the risk of an ***improbable*** result) nor does it take into account the ***cost*** of obtaining the variance. All of the witnesses at trial agreed that the process of applying for a variance normally involves the employment of professionals, such as land planning experts, engineers, architects, and certainly attorneys (ROA 514-517). Obviously both the risks of an "***improbable result***" and the ***cost of relief*** are factors which would be taken into account by a "willing seller" and a "willing purchaser," and ***must*** be taken into account by

this Court should it choose to fashion a ***new rule*** as the COUNTY apparently believes it should.

While no appellate decision has been found which has dealt with the validity of an appraiser's opinion that the ***reasonable probability of a variance justifies mitigating severance damages to the cost of the otherwise impermissible cure***, several Florida cases suggest that Mr. Sutte's opinion of severance damages is indeed based on a misconception of the law and should have been stricken. In Mulkey v. Division of Administration, State of Florida, Department of Transportation, 448 So.2d 1062 (Fla. 2d DCA 1984), the appellate court was also concerned with an issue involving a claim of mitigation of severance damages by the condemning authority. There, the condemnor's expert proposed three options to mitigate the property owner's severance damages. Two of the three were based on relocation of parking onto an adjacent vacant lot. The appellate court held:

> "While we agree that a condemnee has a duty to mitigate his losses, we find that the expert's valuations involved a misconception of the law, as the two valuations were based on the ability of Munford to use a specific parcel of land outside the property over which it held a leasehold interest. See generally Nichols, § 14.04 (cost of restoration to original condition not appropriate as mitigating factor of severance damages where restoration necessitates going outside the remaining portion of the tract)."

While we are not dealing here with an off site cure,[28] we have an analogous situation. Mr. Sutte's calculation of severance damages depends upon the granting of permissive relief upon petition to a governmental agency exercising ***discretionary powers*** with no consideration given to the ***risk*** of denial or the ***cost*** of obtaining relief.

In the case of Yoder v. Sarasota County, 81 So.2d 219 (Fla. 1955), the Florida Supreme Court ruled that a trial judge had properly excluded opinion testimony as to what

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[28] *It should be noted that Donald Sutte is the same appraiser whose testimony was stricken at the Order of Taking Hearing, based on a misconception of the law of severance damages. His opinion was stricken because he attempted to mitigate PATEL's severance damages through an off site cure by relocating the lost parking spaces onto a vacant lot owned by PATEL's brother-in-law.*

property would be worth in the future "if properly filled" for a particular use stated to be its most profitable use. The lower court had ruled the evidence "***too speculative***." In announcing its ruling, the Supreme Court stated:

> "It is appropriate to show the uses to which the property was or might reasonably applied and the damages if any to adjacent lands.... ***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 the solicit evidence on what it might be worth with such speculative improvements*** at some unannounced future date. To permit such evidence would open a ***flood gate of speculation and conjecture*** that would convert an eminent domain proceeding into a ***guessing contest*** (emphasis added)."

It is evident that Donald Sutte's opinion was based on the ***speculative*** testimony of Sheila Rose as to what ***might be done to the property to make it more valuable***. The COUNTY solicited from Mr. Sutte and he obligingly provided evidence as to what the severance damages would be with such speculative improvements in place.

It is well established in Florida that an expert's opinion in an eminent domain case that is based on a misconception of the law should be stricken. Mulkey, id., at 1067; Stubbs v. State Department of Transportation, 332 So. 2d 155, 157 (Fla. 1st DCA 1976); State Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971). Clearly, Donald Sutte's opinion was based on ***speculation and conjecture*** and turned the jury deliberations in this case into a ***"guessing contest."***

There is yet another reason why the concepts of the "reasonable probability of ***rezoning***" and the "reasonable probability of a ***variance***" are not analogous. While rezoning is a legislative function and an exercise of the ***police power*** of the State, the general execution and enforcement of zoning laws is an administrative matter and may be, and normally is, delegated to the executive branch of government. § 95, 7 Fla. Jur. 2d (Bldg, Zoning & Land Contr.); § 102, 7 Fla. Jur. 2d (Bldg, Zoning & Land Contr.)

There is a fundamental difference between the power of the legislative arm of municipal government to ***enact*** zoning laws (including rezoning ordinances) and the

discretionary power of appointed members of the administration to see that the laws are observed or grant relief from adherence to the law if they deem it appropriate to do so. In enacting laws which amount to restrictions on the use of private property, ***law makers*** are ***constrained by the Federal and Florida Constitutions*** to exercise their general ***police power*** in the public interest. To be ***valid***, a zoning ordinance must bear a substantial relation to the public health, safety, morals, or general welfare. Miami Beach v. 8701 Collins Avenue, Inc., 77 So. 2d 428 (Fla. 1954). A zoning regulation which has no relationship to the general welfare of the community will be declared ***unconstitutional***. Lippow v. Miami Beach, 68 So. 2d 827 (Fla. 1953).

To be constitutional under the due process clause of the Federal and Florida Constitutions, zoning ordinances must be passed in aid of some plan that is ***general and comprehensive*** in character and ***may not impose unreasonable restrictions*** on use of property, or be ***arbitrary or unreasonable*** in the exercise of the government's ***police power***. Neither may a zoning ordinance ***permit*** designated uses of property in a given area while ***excluding*** uses not significantly different. §102, 7 Fla. Jur. 2d; Trachsel v. Tamarac, 311 So. 2d 137 (Fla. 4th DCA 1975).

Rezoning is a matter within the ***power*** of ***duly elected legislators*** who operate at the will and by the ***consent of those that they govern***. That power may not be delegated to those who serve in the ***executive branch***. O'D. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978); Art. X, § 6, Fla. Const. (1968).

Under certain circumstances, the property owner may have a "***right***" to have his property ***rezoned*** because present zoning regulations may ***no longer be consistent with the constitutional justification which permitted their enactment as a lawful exercise of police power***. On the other hand, there is no "***right***" to a ***variance*** from validly enacted zoning regulations. The granting or denying of ***variances*** is a matter of ***discretion*** exercised by an ***administrative official or body*** whose only duty is to impartially consider

petitions for relief and decide them in accordance with ***intelligible principles*** established by the ***legislative branch*** of the government.

The reason that there is no "reasonable probability of ***variance***" rule in Florida, and why there ***should not be one***, is that ***rezoning*** is a matter of ***constitutional proportions*** and involves issues of ***private property rights*** which are ***entrusted to elected officials who are answerable to the people***. On the other hand, relief from zoning ordinances by way of ***variance*** is not a matter of right, but more in the manner of a privilege, granted or denied by appointed officials, whose duties are simply to ***see that the laws are observed, or, in their discretion, grant relief therefrom in individual cases, based upon uniform standards***.

The important conceptual differences between ***rezoning*** as a ***legislative function*** and the granting of ***variances*** as a ***discretionary activity of the executive branch*** underscores the fallacy of the COUNTY's position that the "reasonable probability of ***rezoning***" and the "reasonable probability of a ***variance***" are the ***functional and logical equivalent*** of one another. This court should not accept such ***faulty*** reasoning nor should it change the course of law in Florida by adopting such an illogical and ***fundamentally flawed rule***. Instead, this Court should decide that the trial court committed reversible error when it denied PATEL's ***Motions in Limine***, overruled his objections, and denied the Motions to Strike Donald Sutte's testimony because it, like his testimony at the Order of Taking Hearing, was ***most assuredly*** based on a misconception of Florida Law.

POINT II:

THE TRIAL COURT ERRED IN DENYING PATEL'S MOTION IN LIMINE TO DISALLOW THE TESTIMONY OF LAND PLANNER SHEILA ROSE AND BY PERMITTING ROSE TO TESTIFY OVER PATEL'S OBJECTION TO A PROPOSED "CURE" OF SEVERANCE DAMAGES INVOLVING THE CONSTRUCTION OF A NEW PARKING LOT IN VIOLATION OF MUNICIPAL, STATE AND FEDERAL REGULATIONS, BASED UPON HER OPINION THAT THERE WAS A REASONABLE PROBABILITY THAT VARIANCES WOULD BE GRANTED.

Sheila Rose's testimony as to a proposed cure of PATEL's severance damages and the reasonable probability of variances being granted to allow its construction was

the "***backbone***" of the COUNTY's case. In fact, when Assistant County Attorney William Bosch was asked by the court to respond to PATEL's objection to the speculative and conjectural nature of such testimony, he stated: "***That's our whole case.***" (ROA 255).

Interestingly enough, the COUNTY's "***whole case***" was virtually "thrown together" on the day before trial. Although the COUNTY's real estate appraiser, Donald Sutte, had issued an initial appraisal report and several updates during the ***five years*** prior to trial that he worked on this appraisal assignment, he admitted on cross-examination that neither his initial report nor any of his updates prepared prior to the week of trial ever mentioned Sheila Rose or her proposed plan for curing severance damages to PATEL's parcel (ROA 721-722).

In a transparent attempt to "cover for" the COUNTY's lack of preparation for trial, Mr. Sutte initially testified that he had seen Sheila Rose's report "probably a week or so ago, maybe two weeks" (ROA 721). When it was pointed out to him that Sheila Rose's sworn trial testimony had established that she had not even prepared the plan until three days before trial, he somewhat sheepishly admitted that he had not seen the plan until Monday, the very ***day*** before trial (ROA 722).

Thus, with the benefit of less than 24 hours preparation, Mr. Sutte altered his opinion of severance damages, no less than five years in the making, obligingly reducing it to the exact amount Sheila Rose estimated as the cost to construct her proposed parking lot. His hasty acceptance of her "cost-to-cure" as a means of mitigating the $270,000.00, in severance damages which he found that PATEL had sustained, was done in spite of his knowledge that Ms. Rose's plan could not be implemented without variances for numerous violations of the Pompano Beach Zoning Code.

The flurry of last minute activity to prepare for the PATEL case stands in stark contrast to the year's worth of preparation Ms. Rose went through in the case of the PICILLO property. While she discussed the PICILLO parcel with Zoning Department staff

members, she had no such discussions concerning the PATEL parcel; although in the case of PICILLO, she prepared three separate alternative site plans and submitted them to Ragen Yarbrough for comments and recommendations, she prepared only one plan, without alternatives for the PATEL parcel; and never submitted it to City staff for review or recommendations; although in PICILLO's case, she received correspondence from City officials commenting unfavorably on some of her ideas and favorably on others, no such correspondence was exchanged on PATEL; and while she researched prior variance petitions in the PICILLO case, no such research was done with regard to her proposed parking lot for PATEL (ROA 570-572; 598-599).

Despite the paucity of data to support her conclusion, she was asked to give her opinion on the reasonable probability that variances would be granted. Over PATEL's objection, she answered, without hesitation, "Absolutely" (ROA 573).

In fairness, Ms. Rose did claim that in reaching her opinion, she relied upon research into prior decisions of the Zoning Board of Appeals which she had done for the PICILLO parcel. However, when she was cross-examined on the types of variances which had been granted in the past, she was initially mistaken about the number of denials,[29] and as to the approved variances, many, if not all, were markedly dissimilar to the variances that would be required to construct the parking lot she proposed for PATEL's property.[30]

There being no facts or data of any substance to support her ultimate opinion, Ms. Rose's testimony that there was a reasonable probability of the granting variances to permit the construction of the proposed parking lot was nothing more than speculation and conjecture, and should have been stricken on motion by PATEL.

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[29] She later admitted to twice as many denials.

[30] *See Page 14 of Statement of Facts.*

The whole concept of permitting a so-called "expert" to testify as to the probability of future governmental action is fraught with uncertainty. In the words of the Florida Supreme Court in Yoder, id., at 220, "***to permit such evidence would open a floodgate of speculation and conjecture and convert an eminent domain proceeding into a guessing contest.***"

There is considerable authority in Florida requiring reversal for the failure of the trial court to exclude Ms. Rose's testimony. In Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970), the appellate court held that expert testimony in an eminent domain case which is, "***essentially speculative and conjectural is inadmissible to prove the value of property.***" The court went on to hold that, "a jury verdict, based on whole or in part upon such testimony, is ***necessarily in derogation of the constitutional guarantee of full compensation.***"

Ms. Rose's testimony was speculative because variances are granted as ***a matter of grace*** by the applicable governing body. See Peebles v. Canal Authority, Id., at 232, in which the Canal Authority's appraisal was based in part upon the assumption that there would be access to a body of water because the appraiser's belief that such ***permissive*** access would be granted by the condemning authority. In reversing the verdict and remanding for a new trial, the appellate 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 the appellee.***"

Likewise, in Houston Texas Gas & Oil Corporation v. Hoeffner, 132 So.2d 38 (Fla. 2d DCA 1961), also an eminent domain case, the appellate court refused to permit evidence of value based on the ***non-obligatory*** policy of the condemnor to permit the defendants to make use of the land after condemnation. Furthermore, in Smith v. City of Tallahassee, 191 So.2d 446 (Fla. 1st DCA 1966), the appellate court reversed the judgment of the trial court because the trial judge denied motions to strike testimony

based on the assumption that the owners could bridge over a ditch which the condemning authority was going to put on the part taken, holding at Page 448:

> "An easement over, above and under the 30 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 and with such restrictions or limitations as it wished.***"

The appellate court in Smith stated in its opinion that such testimony had the effect of leading the jury to believe that the owner would be able to bridge the ditch and thereby suffer no severance damages to the remainder. It is evident that the jury in the instant case was convinced that the severance damages, which both the COUNTY's and PATEL's appraisers agreed were severe, were substantially mitigated by the prospect of the granting of variances to construct the parking lot Ms. Rose proposed.[31] The prejudice of this testimony, is therefore obvious.

The effect of allowing Sheila Rose to testify as to her opinion of the reasonable probability of variances being granted coupled with the Judge's decision to "let them hear both sides" was to transfer from the trial judge to the members of the jury, his duty to rule on matters of law. This amounted to an abdication of the Court's judicial responsibility and requires a reversal.

Prior to the commencement of the trial, PATEL filed a Notice of Request for Compulsory Judicial Notice in accordance with § 90.203, Fla. Stat. (1989), requesting that the Court take judicial notice of the ordinances and resolutions of the City of Pompano Beach, more particularly described as various sections of the Pompano Beach Zoning Code and City Charter. If the reasonable probability of a ***variance*** being granted was to be considered for any purpose in this litigation (which PATEL strenuously argues it should not), it was for the trial court, not the jury, to decide whether Sheila Rose's proposed cure

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[31] *The testimony made such an impression on the jury members that they didn't even award the "cost-to-cure" despite the fact that the Assistant County Attorney William Bosch specifically and expressly asked them to do so in his closing argument (ROA 1623).*

met the requirements of the Code for the granting of variances. Williams v. Department of Transportation, Id., at 231. See, also City of Miami Beach v. Buckley, Id., at 362, and C.F. Swift & Company v. Housing Authority of Plant City, 106 So.2d 616 (Fla. 2d DCA 1958).

Instead, as will be more fully discussed under Point III below, the trial court permitted several witnesses to testify as to the "criteria" which must be met before the Zoning Board of Appeals may grant variances under the Pompano Beach Zoning Code. At the conclusion of the case, the trial court instructed the jury as to the requirements of the Zoning Code for the granting of variances by the Zoning Board of Appeals, and left it to them to decide the legal issue of whether the cure proposed by Sheila Rose met the requirements of the Code. This was precisely the same error that was made by the trial judge in the Williams case, cited, Supra, which resulted in a reversal and remand for a new trial. The same result was required here and accordingly the Fourth District Court of Appeal's decision reversing the trial court was proper.

If this Court accepts jurisdiction and renders a decision on the merits, then upon remand, the trial court should be instructed that testimony suggesting speculative future uses must not be admitted. See Jacksonville Transportation Authority v. ASC Associates, 559 So.2d 330 (Fla. 1st DCA 1990). See, also Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963); Williams v. Simpson, 209 So.2d 262 (Fla. 1st DCA 1968).

POINT III:

THE TRIAL COURT ERRED IN DENYING PATEL'S MOTION IN LIMINE TO DISALLOW THE TESTIMONY OF POMPANO BEACH MUNICIPAL EMPLOYEES, FRED KLEINGARTNER AND REGAN YARBROUGH, AND BY PERMITTING TESTIMONY, OVER OBJECTION, THAT INVOLVED LEGAL INTERPRETATIONS OF ZONING ORDINANCES, SUGGESTED ORDINANCES WOULD NOT BE ENFORCED IF VIOLATIONS WERE BROUGHT ABOUT BY CONDEMNATION, AND SPECULATED AS TO THE PROBABILITY THAT VARIANCES WOULD BE GRANTED TO PERMIT CONSTRUCTION OF A PARKING LOT WHICH DID NOT COMPLY WITH THE ZONING CODE.

The COUNTY called Regan Yarbrough, the Zoning Director for the City of Pompano Beach, and Fred Kleingartner, the City's Planning and Growth Management

Director, as its witnesses. Despite ***Motions in Limine*** and repeated objections by the defense, both of these witnesses were permitted to testify as to their legal interpretation and policies regarding the enforcement or non-enforcement of various provisions of the City's Charter and Zoning Ordinances. In effect, the trial judge permitted these witnesses to ***tell the jury what the law of Pompano Beach was***, and in so doing, he committed reversible error. Edward J. Seibert v. Bayport B. & T. Club Association, Inc., 573 So.2d 889 (Fla. 2d DCA 1990); Palm Beach County v. Town of Palm Beach, 426 So.2d 1063 (Fla. 4th DCA 1983); Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976).

In Town of Palm Beach, Id., at 1070, the court held:

> "Regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to this specific field of expertise, ***it is not the function of the expert witness to draw legal conclusions. That determination is reserved to the trial court*** (emphasis added)."

In Edward J. Seibert v. Bayport B. & T. Club Association, Inc., id., at 891, the appellate court reiterated the well established Florida rule that ***an expert should not be allowed to testify concerning questions of law***, and then held:

> "The trial court not only erred in 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*** (emphasis added)."

In addition to expressing his opinion as to the meaning and interpretation of various provisions of the Pompano Beach Zoning Code, Mr. Yarbrough also testified as to his individual policies involving enforcement or nonenforcement of the zoning codes where violations had been brought about by condemnation. The admission of this testimony over objection was also improper, inasmuch as the personal policy of a municipal official is irrelevant and immaterial, because a City employee can in no way bind the municipality for whom he works. A municipal corporation speaks only through it records and ***not through the opinions of its individual officers***. Beck v. Littlefield, 68 So.2d

889 (Fla. 1953). See, also North Beach Yellow Cab Co. v. Village of Bal Harbour, 135 So.2d 4 (Fla. 3d DCA 1961), holding that the "minutes of Village council meetings were the ***best evidence*** of action of Village at such meetings and the statements of administrative officials of the Village were properly excluded." Village of Bal Harbour, Id., at 5. See, also State ex rel Cordrey v. Holter, 283 So.2d 139 (Fla. 2d DCA 1973), holding that the testimony of City officers as to what is intended to be done is ***inadmissible*** as against records of official actions of the City.

In Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986), the court reaffirmed what in Florida is deemed to be a fundamental requirement by a party seeking to introduce expert testimony. There the court stated:

> We view to be a ***fundamental requirement*** that the party seeking to introduce expert testimony first establish that the subject can support an expert opinion with a ***reasonable degree of reliability***. Expert testimony in areas that are not sufficiently developed to support an expert opinion can present the kind of danger that Section 90.403 was designed to prevent. While there is no requirement to demonstrate general acceptance, we believe that without some ***indicia of reliability***, opinion evidence on a particular subject could hardly be ***helpful*** to a jury as required by § 90.702. Kruse, Id., at 1386. (Emphasis Added.)

It is questionable whether or not Mr. Kleingartner or Mr. Yarbrough could have been properly accepted as experts on ***any*** subject relevant or material to the issues in this case. The primary purpose of the COUNTY in calling these witnesses was to have them testify as to their legal opinions, their personal policies concerning the applicability and/or enforceability of the Code, and in Mr. Yarbrough's case, his prognostication of the future discretionary action of an administrative board of the City. These matters can hardly be defined as subjects which can ***support an expert opinion with a reasonable degree of reliability***. As Kruse reaffirmed:

> Section 90.702 contains ***three*** requirements: (1) that the opinion evidence be ***helpful*** to the trier of facts; (2) that the witness be ***qualified*** as an expert; and (3) that the opinion evidence can be ***applied to evidence*** offered at trial.... Section 90.403 adds a ***fourth*** test barring evidence that although

technically relevant, presents a substantial ***danger of unfair prejudice that outweighs its probative value***. Kruse, Id., at 1384. (Emphasis Added.)

Measuring the testimony of these witnesses against the requirements of § 90.702, Fla. Stat. (1989), it becomes clear that, (1) speculative and conjectural testimony cannot, by definition, be ***helpful*** to the trier of fact nor can testimony concerning ***irrelevant and immaterial matters*** involving the personal policies of these employees; (2) these witnesses were under the law of Florida, ***not qualified*** to render legal opinions to the jury nor were they qualified to prognosticate future discretionary action; (3) their opinion evidence could not be properly ***applied to any evidence*** offered at trial; and finally, (4) any possible ***probative value*** that one might argue their testimony had, was ***outweighed by its unfair prejudice***, in that, the jury was invited to, and no doubt did, incorrectly infer that as departmental directors, these witnesses could effectively speak for and bind the City of Pompano Beach.

Accordingly, the testimony of Mr. Yarbrough and Mr. Kleingartner should have been excluded on motion of the defendants and the trial court's rulings denying the ***Motions in Limine*** and to strike, and overruling defense objections constituted reversible error, requiring a new trial.

POINT IV:

THE TRIAL COURT ERRED IN DENYING PATEL'S MOTION IN LIMINE TO DISALLOW THE TESTIMONY OF THE COUNTY'S BUSINESS DAMAGE EXPERT, GARY GERSON, AND PERMITTING GERSON TO TESTIFY, OVER PATEL'S OBJECTION, (1) AS A REBUTTAL WITNESS WHEN HIS TESTIMONY WAS NOT IN REBUTTAL OF ANY EVIDENCE PUT ON BY PATEL; (2) AS AN EXPERT ON REAL ESTATE SEVERANCE DAMAGE WHICH WAS BEYOND HIS FIELD OF EXPERTISE; (3) FOR THE IMPROPER PURPOSE OF IMPEACHING THE OPINION TESTIMONY OF THE COUNTY'S OWN REAL ESTATE APPRAISER; (4) AS TO SPECULATIVE CONCLUSIONS BASED ON HEARSAY EVIDENCE NOT SHOWN TO BE OF THE TYPE REASONABLY RELIED ON BY BONA FIDE EXPERTS IN THE SUBJECT; (5) AS TO A VALUATION OPINION WHICH DID NOT RELATE TO THE DATE OF TAKING; AND (6) AS TO A REPORT OF A PRIVATE INVESTIGATOR ON WHICH HIS OPINION WAS BASED, THE EXISTENCE OF WHICH WAS NOT DISCLOSED TO THE DEFENSE UNTIL 4:30 P.M. THE DAY BEFORE TRIAL.

Over objection by PATEL on numerous grounds,[32] the COUNTY called Mr. Gerson as a "rebuttal witness." Mr. Gerson is a Certified Public Accountant who was ***tendered*** by the COUNTY and ***accepted*** by the court as an ***expert witness*** qualified to give an opinion as to ***business damages.*** Mr. Gerson testified that he was retained by the COUNTY to evaluate the opinion of a ***business damage expert*** retained by PATEL, Mr. Leroy Korass, and to value ***business damages***, if any, sustained by PATEL. At trial, Mr. Gerson admitted that he had testified in a pre-trial deposition that:

> ...in my opinion, the motel is a rental project which would not qualify for business damages. ***I believe that opinion is shared by Mr. Korass.***[33] ***That is my major opinion***. (Page 7, line 9, of Gary Gerson Deposition, taken February 1, 1991).

PATEL ***did not take issue*** with Mr. Gerson's opinion that there were ***no business damages*** sustained by him, and ***in contrast*** to Defendant, PICILLO, ***did not claim any business damages*** in the trial of this case, nor did he introduce any testimony or evidence on the subject of ***business damages.***

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32 *See, Statement of the Facts, Pages 19 through 20.*

33 *Indeed it was. That is why he never testified.*

Accordingly, the testimony of Mr. Gerson on the subject of ***business damages*** was not in ***rebuttal*** of anything put into evidence by PATEL.

The Courts of Florida have uniformly held that:

> "***Rebuttal evidence*** that is offered by the plaintiff is directed to ***new matter*** brought out by evidence of the defendant, and ***does not consist of evidence which should have properly been submitted by the plaintiff in his case-in-chief***. It is ***not*** the purpose of rebuttal evidence to ***add additional facts*** to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant." 55 Fla. Jur 2d (Trial) § 46 (Rebuttal); Driscoll v. Morris, 114 So.2d 314 (Fla. 3d DCA 1959); Buchanan v. State, 95 Fla. 301, 116 So. 275 (1928); Jacksonville T&K.W. Ry Co. v. Peninsular Land Transp. & Mfg. Co., 27 Fla. 157, 9 So. 661, 688, 17 L.R.A. 33 65; Johnson v. Rhodes, 62 Fla. 220, 56 So. 439, 443. (Emphasis Added.)

The admission of this testimony under the guise that it was "rebuttal" constituted ***harmful error*** which greatly prejudiced PATEL. First, the COUNTY recognized the vulnerability of its real estate appraiser because it was brought out that he altered his opinion as a result of information received from Sheila Rose the day before trial, and on the strength of the "probability of variance" theory, he had adopted the "cost-to-cure" approach rather than the "before and after" approach, thereby mitigating severance damages from his "before and after" figure of $270,000.00 to Sheila Rose's "cost-to-cure" figure of $31,775.00. On top of that, he was caught in a lie on cross-examination when he was forced to admit he had seen Ms. Rose's parking lot plan only one day before trial rather than two weeks before as he had earlier testified. Mr. Sutte, to coin a phrase, had been reduced from a "sitting duck" to a "dead" one.

The COUNTY recognized that Mr. Sutte had been embarrassed by his unfortunate "lapse of memory" on the witness stand. In what can only be characterized as a desperate attempt to "shore up" their weakened position, the COUNTY put Mr. Gerson on the stand, not as a ***rebuttal*** witness to PATEL's case, but as an ***impeachment*** witness to testify ***against*** their ***own real estate appraiser***. Allowing this testimony over objection,

was, among other things, a violation of § 90.608(1), Fla. Stat. (1989). While that specific objection, among many others was made at trial, it was denied by the trial judge, to PATEL's great prejudice.

The prejudice is shown, as well, by the fact that Mr. Gerson, by his own admission, is ***not a qualified expert witness on real estate valuation***. In his ***Motion in Limine***, and again by objection, argued ***ore tenus*** after Mr. Gerson assumed the stand, PATEL objected on the grounds that Mr. Gerson should not be permitted to render an opinion on real estate severance damages to the jury when he had ***admitted*** that he was ***not qualified*** to do so.

Florida law on this matter is absolutely clear. In Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977), cert. den. 353 So.2d 679 (Fla. 1977), the appellate court held that: "***fundamental error*** was committed when an expert testified ***beyond his qualifications*** (emphasis added)."

In Prohaska v. Bison & Company, 365 So.2d 794, 797 (Fla. 1st DCA 1978), the appellate court was again called upon to review a lower court's ruling permitting an expert to testify beyond his field of expertise. Finding error, the appellate court observed that the "***error cannot be considered harmless*** when the testimony of the expert relied upon is the only testimony in the record which supports the finding of the trial court." See, also Urling v. Helms Exterminators, Inc., 468 So.2d 451, 456 (Fla. 1st DCA 1985), holding, on rehearing, that, "where there is an incompetent predicate for an expert's opinion, ***a new trial is required*** (emphasis added)."

The First District Court of Appeal, in the case of Harrison v. Savers Federal Savings & Loan Assn., 549 So.2d 712 (Fla. 1st DCA 1989), reversed and remanded an eminent domain case for a new trial where the trial court had erroneously permitted a real estate appraiser, who was not himself an architect or design engineer, to give an expert opinion as to whether a shopping center had been properly designed for the purpose of

establishing the Center's market value. The court stated that allowing a real estate appraiser to testify beyond his qualifications, ***constituted reversible error***.

In Porter v. Columbia County, 75 So.2d 699 (Fla. 1954), this Court held that:

> "***In eminent domain proceedings, the testimony of a witness who was not an appraiser or real estate expert and who had not been qualified was not admissible to show value of damage to property.***"

The issue in that case, as in the instant case, involved a non-qualified witness on ***severance damages***.

Finally, in the very recent case of Williams v. State of Florida, Department of Transportation, Id., at 229-230, another eminent domain case, the appellate court considered the question of the trial court's denial of a property owner's objections to the qualifications of one Biddle, to testify as an expert in the evaluation of proposed cures to the loss of parking as a result of a taking. As in the case at bar, Williams did not challenge Biddle's expertise in the field in which he had demonstrated experience, but objected to his qualifications to testify outside that field. The trial court overruled the objection and allowed Biddle to testify that the proposed site plan would provide ample parking for Williams' customers. In reversing the trial court's ruling permitting Biddle to testify, the appellate court said:

> "The Department did ***not lay a proper predicate for Biddle*** to given opinion testimony with regard to the ***property needs*** of the Williams' communication business. Biddle's testimony on ***voir doir*** shows that his expertise lies in the technical aspects of the electronics field, not in determining property needs for electronic businesses... We hold that it was ***error*** to allow Biddle to testify, over objection, to the adequacy of the parking under the Department's proposed cures because it was ***outside his area of expertise***. Citing Harrison v. Savers Federal Savings and Loan Assn, Supra. (Emphasis Added.)

Clearly, to allow Mr. Gerson to testify to opinions which were admittedly beyond his field of expertise, was ***prejudicial error*** in and of itself. But there were several other

grounds for the objections to his testimony at trial, the denial of which likewise was prejudicial error.

First, like Mr. Sutte's opinion on severance damages, Mr. Gerson's opinion was formulated at the "last minute." When his pretrial deposition was taken by PATEL's counsel on February 1, 1991, his opinion of damages, based on a review of PATEL's books and records, was more than ***double*** the amount he testified to at trial. This was because within days before trial, Mr. Gerson hired a private investigator to ***count*** the automobiles in PATEL's parking lot at 2:00 a.m. on various dates in January and February, 1991. Based on this information, Mr. Gerson altered his opinion of "severance damages," reducing it by over ***fifty per cent***. The existence of this report was not disclosed to PATEL's counsel until 4:30 p.m., the day before trial. The means of disclosure was by a telephone call made to the law office of PATEL's attorney after it was too late to schedule a further deposition or otherwise make any reasonable inquiry into the basis for Mr. Gerson's radically altered opinion.

PATEL objected to Mr. Gerson's opinion testimony as being speculative and based on hearsay evidence not shown to be of the type reasonably relied upon by other bonifide experts in the same subject matter. While § 90.704, Fla. Stat. (1989) provides, "if the facts or data are of a type reasonably relied upon by experts in the subject matter to support the opinion expressed, the facts or data need not be admissible in evidence," no attempt was made by the COUNTY to ***lay the predicate*** necessary to permit the hearsay evidence of the private investigator's "car count" to qualify as a proper basis of opinion testimony under § 90.704, Fla. Stat. (1989).

A thoroughly entrenched legal doctrine in the law of eminent domain in Florida is that valuation testimony of experts, to be admissible, must be related to the time of lawful appropriation (the date of taking). Thus, in Yoder v. Sarasota County, Id., at 221, the

Supreme Court laid down the rule that: "***value must be established as of the time of lawful appropriation.***"

In Stubbs v. State Department of Transportation, Id., at 157, the First District Court of Appeal stated:

> "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 appraiser must be related to that time.***" (Emphasis Added.)

Furthermore, in Jacksonville Transportation Authority v. ASC Associates, Inc., Id., at 333, the court again reiterated:

> "...the evidence presented on that issue ***must be restricted to the value of the land taken at the time of the lawful appropriation...*** the value must be established in light of these elements ***as of the time of lawful appropriation.***" (Emphasis Added.)

Mr. Gerson's "car count" report, being the ***sole basis*** for his trial testimony was comprised of data accumulated more than ***18 months after the date of taking.*** His opinion was, therefore, not related to the time of lawful appropriation and should have been excluded on those grounds as well.

Finally, PATEL objected to the ***surprise*** nature of Mr. Gerson's testimony and the ***extreme prejudice*** of permitting it to be heard by the jury. That the trial judge's error in allowing this testimony to be presented to the jury as ***rebuttal*** evidence was ***prejudicial*** is obvious from the result in this case. The COUNTY was allowed to ***impeach its own real estate appraiser***[34] in order to ***discredit*** Mr. Sutte's ***remarkably candid*** opinion that PATEL's severance damages, without cure, amounted to $270,000.00.

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[34] *In closing argument, Assistant County Attorney William Bosch told the jury Mr. Sutte made a **mistake** and they should rely on Mr. Gerson (ROA 1627).*

For all of these reasons, PATEL's ***Motions in Limine*** and objections to the testimony of Gary Gerson, should have been sustained and his testimony excluded. Failure of the trial court to do so, constituted reversible error.

POINT V:

THE TRIAL COURT ERRED BY GIVING THE COUNTY'S REQUESTED INSTRUCTION ON THE "REASONABLE PROBABILITY OF VARIANCES" BEING GRANTED OVER OBJECTION OF PATEL.

For the reasons stated under Points I, II and III above, which are incorporated herein by reference, it was prejudicial error for the trial court to instruct the jury as to the COUNTY's theory of "***reasonable probability of variances***" based upon an unprecedented modification to § 11.13, Fla. Eminent Domain Pract. and Proc. (Manual Standard Instruction) on "***reasonable probability of rezoning.***"

The erroneous instruction had the effect of leading the jury to believe that PATEL would be able to build a new parking lot which would replace parking spaces lost by condemnation for the mere cost of construction. It is indisputable that adequate, safe, and convenient parking is essential to the economic viability of the motel business.

The challenged instruction, coupled with the expert testimony erroneously admitted into evidence led the jury to overlook significant and substantial factors in the proper assessment of severance damages. Thus, while Sheila Rose's proposed parking plan numerically increased parking spaces by reducing their size, the benefit achieved was at the expense of creating parking spaces and access aisles of substandard dimensions, unsafe ingress to and egress from a State highway in violation of Department of Transportation Regulations, and substandard handicap parking, in violation of Federal law.

These are factors which should have been considered by the COUNTY's property appraiser in assessing severance damages because they have an effect on value which goes beyond mere ***code compliance.*** Instead, Mr. Sutte, in "knee-jerk" response to the COUNTY's last minute effort to avoid paying PATEL full compensation, readily accepted

Sheila Rose's plan, reduced his opinion of severance damages to her estimated cost of construction, and ignored the impact, the cost, and the risk of the potential denial of a petition for variances, and the effect her parking plan would have on the safety and convenience of PATEL's future customers, and the resultant diminution of market value of PATEL's property.

By its instruction on "reasonable probability of variances," the trial court, in effect, told the jury that that was the "***whole case***." It should ***not*** have been the "***whole case***" and to make it so deprived PATEL of his constitutional guarantee of full compensation for his loss.

POINT VI:

THE COURT ERRED BY FAILING TO GRANT PATEL'S MOTION TO SET ASIDE THE VERDICT AND TO GRANT A NEW TRIAL FOR THE REASONS STATED IN POINTS I THROUGH V AND FOR THE FURTHER REASON THAT THE JURY FAILED TO COMPLY WITH THE COURT'S INSTRUCTIONS BY AWARDING DAMAGES TO PATEL WHICH WERE LESS THAN THE LOWEST AMOUNT TESTIFIED TO BY ANY WITNESS, WHERE THE COUNTY'S APPRAISER AND DEMAND IN THE COUNTY'S CLOSING ARGUMENT ESTABLISHED THE LOWEST AMOUNT.

The trial court properly charged the jury that:

> "***Your verdict...may not be less than the lowest value nor more than the highest value testified to by any witness in this proceeding.***" (Jury Instruction No. 13).

The jury failed to follow this instruction by returning a verdict for an amount ***less*** than the lowest value testified to by ***all*** of the expert witnesses and ***less*** than the amount Assistant County Attorney William Bosch ***asked them to award*** in his closing argument.

According to the COUNTY's real estate appraiser, Donald Sutte, full compensation would include $270,000 in severance damages if the damages to the remainder were left "uncured." He also testified that, assuming variances would be granted by the City of Pompano Beach, the damages could be cured for $31,775.00, by constructing a parking lot in accordance with the plan submitted by Sheila Rose.

The jury awarded $18,760.00 for the value of the part taken, which was the figure testified to by Mr. Sutte; $9,360.00 in severance damages, which was ***less than*** the severance damages testified to by ***any*** witness and ***less than*** the amount established to be the ***lowest amount*** of damages by the Assistant County Attorney himself; and $3,300.00 for the value of the temporary construction easement, which was the amount testified to by PATEL's appraiser.

The jury was also instructed that PATEL was entitled to be reimbursed for the reasonable value of the sign which had to be torn down to make way for the construction. The only evidence admitted by either party on the issue of the value of the sign was PATEL's bills and cancelled checks, in the approximate amount of $19,000.00, and his testimony that approximately one-half of this amount represented the cost of replacing the sign in question.

Since the amount of severance damages is approximately one half of the bills for the sign replacement, it is evident that the jury either awarded $9,300.00 for the sign and failed to award any money to cure the severance damages, or awarded less than the lowest amount testified to by any witness for the cost of curing the damages to the remainder, and nothing for the reasonable value of the sign.

In either case it is clear that there is no rational basis for the verdict, and that the verdict could only have been reached upon a misapplication of the law as given to the jury in the court's instructions.

Since the compensation awarded by the jury was less than the lowest value fixed by the evidence, the verdict should have been set aside and a new trial granted.

In Meyers v. City of Daytona Beach, 30 So.2d 354 (Fla. 1947), this Court, in a condemnation case, held:

> "Where the lowest value fixed by the evidence in a condemnation proceeding for a certain parcel was $400.00, a verdict for $360.00 fell short of 'full compensation' guaranteed by the Constitution ***and was required to be reversed***. FSA Const. Declaration of Rights § 12; FSA Const. Art. XVI, § 29. In a condemnation proceeding, the jurors may view the property to be condemned and use their judgment in evaluating the evidence, but, ***they are not at liberty to disregard the evidence***." (Emphasis Added.)

In Garvin v. State Road Department, 149 So.2d 869 (Fla. 1st DCA 1963), the appellate court, in an eminent domain case, held:

> "The rule is settled in this State that, when the compensation awarded in a verdict is below the lowest value fixed by the evidence, ***the award cannot be upheld.***" (Emphasis Added.)

See, also State Road Department v. Winters, 214 So.2d 500 (Fla. 1st DCA 1968), holding that granting a new trial on the grounds that the verdict is contrary to the evidence and that compensation awarded in the verdict was below the lowest value fixed by the evidence did not constitute an abuse of discretion.

CONCLUSION

The Trial court committed multiple errors which were prejudicial to the substantial rights of PATEL. If review of the Fourth District Court of Appeal's decision is accepted, the certified question should be answered in the negative and the appellate court's decision reversing the final judgment should be affirmed. Upon remand, the trial court should be instructed that:

(1) valuation testimony must be related to the date of taking;

(2) only the laws and ordinances in effect on the date of taking should be considered;

(3) it is the role of the trial court and not the trial jury to interpret the laws and ordinances applicable to the case;

(4) the probability of obtaining a variance cannot be used in mitigation of severance damages, and in any event, it is improper to limit severance damages to the cost to cure on the assumption that a variance will be granted;

(5) any proposed cure to severance damages caused to the property owners must meet minimum code requirements of the ordinances in effect as of the date of taking; and,

(6) expert witnesses must not be allowed to express legal opinions to the jury or to testify outside of their field of expertise.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to: ANOTHONY C. MUSTO, Assistant County Attorney, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida, 33301, and ROBERT A. WARE, ESQUIRE, P.O. Box 14098, Fort Lauderdale, Florida, 33302, this 17th day of January, 1994.

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