IN THE SUPREME COURT OF FLORIDA

WEAVER OIL COMPANY,

Petitioner,

vs. CASE NO. 81,917

CITY OF TALLAHASSEE,

Respondent.

_____/

ANSWER BRIEF OF ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AS AMICUS CURIAE

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PRELIMINARY STATEMENT

References to the Record on Appeal will be made by use of the symbol "R" followed by the appropriate page reference. Weaver Oil Company, Inc., will be referred to as "Weaver" or Petitioner and the City of Tallahassee will be referred to as "City" or Respondent.

STATEMENT OF CASE AND FACTS

This amicus curiae brief will rely on the facts set forth in the majority opinion of the District Court of Appeal, First District, in City of Tallahassee v. Boyd, 616 So.2d 1000 (Fla. 1st DCA 1993) as briefly supplemented herein.

Diagrams depicting before and after conditions at the property are included at the end of this brief to help illustrate the legal issues presented. These diagrams were presented at page 5 and page 6 of the Amended Initial Brief of Appellant, City of Tallahassee, in the court below.

In Paragraph 6 of its Answer to the Petition, Weaver claimed "damages for all restrictions of ingress and egress to and from said remaining leasehold property which are occasioned by this taking." (R: 175). No inverse condemnation counterclaim was included in the Answer.

Paragraph 9 of Weaver's Answer set out its business damage

claim. Weaver alleged:

> This Defendant has, for in excess of five (5) years, operated a business on the leasehold and lands being taken and adjoining lands that are leased, and the taking has already damaged and will in the future severely damage and/or destroy the business located on the adjoining lands ... (R: 175-176) (emphasis added)

In response to Respondent's motion for directed verdict at the close of Weaver's case, counsel for Weaver stated: "The real property taken is not the issue here. We have not claimed any damage caused by the physical property taken." (R: 1188) This argument was consistent with the testimony presented by Weaver's experts.

Weaver's engineer witness testified the narrowing of the western entrance on Tennessee Street made a substandard entrance, which was an unacceptable entrance for a fuel marketer, and resulted in a substantial loss of access. (R: 439-440).

The business analyst presented by Weaver testified that narrowing of the one entrance resulted in an unacceptably narrow entrance with unsuitable access for the business on the site. (R: 582-584). Picking up on this engineering and marketing testimony, the accountant for Weaver testified that the change in access caused the loss of customers and the narrowing of the entrance caused the business damages. (R: 637, 719).

During discussions at the jury instruction charge conference, the trial court acknowledged that he was ruling there could be substantial loss of access "even though there is no physical appropriation of the property." (R: 1211) Despite this

statement by the trial court, the issue of taking of access was submitted to the jury for determination (R: 1308-1312).

In light of the court's ruling, the court instructed the jury that Weaver was entitled to be paid for the business loss to its business located on the remaining land, "if there was a substantial loss of access to Weaver's business." (R: 1308).

Over the City's objection, the court then instructed the jury as follows:

> Florida recognizes that the destruction of the right of access is compensable when a governmental action causes a substantial loss of access to one's property. It is not necessary that it be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not give rise to the right to be compensated for business damages unless, when considered in the light of the remaining access to the property, it can be said that Weaver Oil Company, doing business as Hogly Wogly's right of access has been substantially diminished.
>
> If you find that access has been reduced by the denial of the use of the physical property taken or that there has been a loss of access and that the remaining access is unsuitable for the business premises located on the remaining property, then the business owner, Weaver Oil Company, doing business as Hogly Wogly, is entitled to be compensated for the resulting loss. (R: 1308-1309).

No interrogatory verdicts were provided to the jury on the taking of access issue. The jury returned a verdict of $94,000.00 for business damages.

ISSUE ON APPEAL

DOES SECTION 73.071, FLORIDA STATUTES, PERMIT A CLAIM FOR STATUTORY BUSINESS DAMAGES FOR AN ALLEGED SUBSTANTIAL IMPAIRMENT OF ACCESS RESULTING FROM GOVERNMENTAL CONSTRUCTION ON EXISTING RIGHT OF WAY ABUTTING THE OWNER'S PROPERTY, WHERE NO LAND IS TAKEN?

Though Weaver has attempted to rephrase and redirect the basic issue in this appeal away from the issue decided and certified by the First District Court of Appeal, the record does not support the Petitioner's restatement.

Weaver's counsel admitted that no damages were being claimed for damage caused by the physical property taken. (R: 1188) So the issue to be decided is whether the business damage statute allows recovery of business damages for a 17 foot reduction of the width of one of several driveways, when the reduction of width resulted from construction of a corner traffic control island on existing right of way, when the other driveways have either been widened or left intact, and the reduction of the driveway width is not caused by construction on the property described in the eminent domain petition.

SUMMARY OF ARGUMENT

Section 73.071(3)(b), Florida Statutes (1991) limits the recovery of damages by an established business to those damages resulting from denial of the use of the physical property described in the condemnation petition. At the condemnation trial, the petitioner admitted that the business suffered no damages from the loss of the physical property taken.

Since the statutory business damages are predicated on the effect of the taking of the owner's land on the business, there can be no recovery for a loss of access which involves no physical appropriation of land. The statute says that the business must be owned by a party whose "lands" are being taken. The clear meaning of this term in the statute is that ground or dirt must be taken.

Since no counterclaim was asserted by Weaver, the recovery of business damages were limited to the damages alleged in Weaver's answer which were alleged to have been caused by the land taken by the petition. Since no damages were proven to have been caused by the loss of the physical property taken, the trial court erred by denying the City's motion for directed verdict.

The trial court committed fundamental error by submitting the inverse condemnation issue to the jury for determination. The trial judge is required to make both findings of fact and findings of law. Based upon these findings, the judge decides as a matter of law whether there has been a substantial loss of access.

The certified question should be answered in the negative, the decision of the lower court should be affirmed, and the case should be remanded to the trial court for an entry of judgment for $0 in business damages.

ARGUMENT

A. BUSINESS DAMAGES MAY ONLY BE RECOVERED FOR DAMAGES CAUSED BY DENIAL OF THE USE OF PROPERTY TAKEN AS DESCRIBED IN THE PETITION.

Business damages are incidental and consequential damages which are allowed as a matter of legislative grace, based strictly on the statutory right granted by Section 73.071(3)(b), Florida Statutes (1991) and are not required by the provisions of either the Florida or United States Constitutions. Texaco, Inc., v. Department of Transportation, 537 So.2d 92, 93 (Fla. 1989). Since business damages are statutory damages, this Court has held that business damages should only be awarded when the award is clearly consistent with legislative intent and held that the statute should be strictly construed in favor of the State and against the claim for damages. Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926, 928-929 (Fla. 1983).

A brief historical analysis of the business damage statute shows that when the statute was first passed, emphasis was placed on the business damage caused by the government's use of the property taken. In 1957 the statute was amended to shift the analysis to the damages caused by the denial of the owner's use of the part taken. This distinction is important in this case, since Weaver has attempted to redirect interpretation of the statute to include not only damages caused by the nature of the government's use of the part taken, but also damages caused by the government's use of its existing right of way.

In 1933, the Florida Legislature passed the first statutory provision allowing business damages:

> ... when the suit is by a board, district or other public body for the condemnation of a right-of way, and the effect of the taking of the property involved may injure, damage or destroy an established business of more than five years standing owned by the party whose lands are being so taken, located upon adjoining, adjacent or contiguous lands owned or held by such party, and within two miles of the lands so sought to be taken, the jury shall consider the probable effect the use of the property so taken may have upon the said business, and assess in addition to the amount awarded for the taking, the probable damages to such business which the use of the property so taken may reasonably cause. (emphasis added)

Chapter 15927, Laws of Florida (1933). So the emphasis of the statute originally was on damages caused by the government's use of the property taken, not on the effect of the denial of the use of the part taken had on the business.

In 1957 the statute was amended to allow the jury to award "the probable damages to such business which the denial of the use of the property so taken may reasonably cause." Chapter 57-165, Laws of Florida (1957). This shifted emphasis to the loss the business suffers by not having the use of the property taken as described in the petition. In this case, that is a strip of land 14 feet by 176 feet along the Ocala Road frontage of the property. Weaver is not claiming any damages for the denial of the use of the 14 foot strip of property taken to widen Ocala Road. In light of the widening of the driveway entrance on Ocala Road from 72 feet to 91 feet, this is understandable.

Instead, Weaver is arguing that its damages are caused by denial of use of a portion of existing right of way used by the government for construction of the traffic control island at the corner. Weaver claims that the island construction within existing right of way denies the use of 17 feet of right of way for a driveway. This denial of use of state right of way for driveway purposes is the cause of the damages alleged.

Scott McWilliams, the marketing analyst, concluded that after analyzing potential changes in competition, changes in pricing strategy, and all other factors, the only cause for loss of customers to the business was narrowing of the western entrance. (R: 580-583) Fred Thomson, the CPA, was presented to calculate damages. He testified that the number of customers is the factor that generates profits, and the reconfiguration of the site by narrowing one driveway was the sole cause of the loss of customers and profits, resulting in business damages. (R: 636-637, 702, 719).

The business damages described by Weaver's witnesses fall outside the statutory purview. In State Road Department v. Lewis, 170 So.2d 817 (Fla. 1964), this Court gave a good explanation of the damages allowed by the statute:

> The statute, §73.10 (prior statute), does not, in our view, change or enlarge the judicial rule against allowing consequential damage because of change of grade of an authorized roadway affecting access, light or view. It only operates in the condemnation of a right of way where the effect of the taking of the property itself may damage or destroy an established business of more than five years standing, in

> which event the jury shall only consider what effect the denial of the use of the specific property taken has upon the said business and award special damages. These special business damages authorized by the statute are predicated upon the effect the taking of an owner's land for a right of way has upon such a business and not upon the effect the construction of an overpass or other change of grade of a roadway has upon such business.

Id. at 819.

The effect the taking of the owner's land described in the Petition in this case had on Weaver's business was zero, as acknowledged by Weaver's counsel. Within this statutory framework, under the facts presented by the Petition filed by the City pursuant to Chapter 73 and the Answer filed by Weaver, the trial court erred in denying the City's motion for directed verdict. The proof presented by Weaver did not meet the compensability requirements laid out in the statute.

The language in Section 73.071, Florida Statutes, cannot be read in a vacuum. The language must be considered in relation to Section 73.021, which sets out the requirements for an eminent domain petition. The "property" referenced in Section 73.071(3)(a), when it says the jury shall determine the compensation for "the value of the 'property' sought to be appropriated," is the same "property" referenced in Section 73.021(2), when it says the petition shall set forth a "description identifying the `property' sought to be acquired." In this case, the "property" is the 14 by 17 foot strip along the Ocala Road frontage.

The "property" described in the petition is the same "property" referenced in Section 73.071(3)(b) which requires the jury to assess business damages, which the denial of the use of the "property so taken" may reasonably cause. Under the business damage statute, Weaver was limited to recovery of the damages caused by denial of the use of the property described in the petition. Weaver's counsel admitted there were no such damages.

B. BUSINESS DAMAGES MAY NOT BE RECOVERED WHEN NO LAND IS TAKEN.

Section 73.071(3)(b), Florida Statutes (1991) sets forth a number of statutory prerequisites for an award of business damages:

1. The taking must be a partial taking of property from a larger tract;

2. The action must be by a public body for the condemnation of a right-of-way;

3. The effect of the taking of the property involved may damage or destroy an established business of more than five years' standing;

4. The business must be owned by the party whose lands are being so taken;

5. The business must be located upon adjoining lands owned or held by such party whose lands are being taken; and

6. The damages to the business must be reasonably caused by the denial of the use of the property so taken.

Each of these conditions must be satisfied for a business owner to recover business damages.

The certified question presupposes that no land is being taken. If no land is being taken, then a plain reading of the statute leads to the conclusion that the statutory prerequisites have not been met.

The first condition is that less than the entire property is sought to be appropriated. This is the property described in the condemnation petition. This involves a determination of "parent tract" and has consistently involved an analysis of physical contiguity of the land, unity of ownership of the land, and unity of use of the land. See Department of Transportation v. Jirik, 498 So.2d 1253, 1255 (Fla. 1986). All cases interpreting the requirement of a partial taking from a larger parcel, have discussed the partial taking in terms of tracts of land or lots. There is no case which interprets the taking of access as being the taking of land or physical property from a larger piece of property.

This concept of property, meaning physical property or "lands", is followed through under the 4th condition, which requires the business be owned by the party "whose `lands' are being so taken." If the only thing taken is a "substantial impairment of access," then it cannot be said that the business owner's "lands" are being taken.

According to Black's Law Dictionary, the term "land" "may include any estate or interest in lands..., as well as easements

and incorporeal hereditaments." However, the term "lands" is "said, at common law, to be a word of less extensive signification than either "tenements" or hereditaments". Black's Law Dictionary, Fifth Edition (1979) p. 789, 791. So it is clear that the plain meaning which should be placed on the word "lands" in this section of the statute is that it means the ground or dirt and not just one of the ethereal bundle of sticks constituting property.

This definition of "lands" is reinforced by condition 5, which requires the business to be located on adjoining "lands". Once again, this can only mean the ground or dirt on which the business has a physical presence.

When the words of a statute are plain and unambiguous, the courts must give to them their plain meaning. Vocelle v. Knight Brothers Paper Company, 118 So.2d 664 (Fla. 1st DCA 1960). Giving plain meaning to the terms used in the statue leads to only one conclusion. If no "land" or "lands", meaning ground or dirt, is taken, there can be no award of business damages for substantial diminution of access from construction by the government on public right of way. So the answer to the certified question is No.

C. THE TRIAL COURT ERRED IN DENYING THE CITY'S MOTION FOR DIRECTED VERDICT AND ERRED BY SUBMITTING THE ACCESS TAKING ISSUE TO THE JURY FOR DETERMINATION.

As discussed earlier, the trial court erred by denying the motion for directed verdict because the statutory prerequisite

for recovery of business damages had not been met. This error was compounded by the trial court's submission of the taking of access issue to the jury.

Petitioner asserts that the "taking" of access issue was properly tried as part of the eminent domain case, "essentially as an inverse condemnation counterclaim." (Petitioner's Initial Brief, Page 28.) A proper counterclaim had not been plead by Weaver in its Answer. In Paragraph 5 of its Answer, Weaver admitted that it was unaware of what construction would occur on the property taken. Weaver only claimed damages for any remodeling or restoration on the remaining property caused by construction of the new road. (R: 174-179). These damages for physical changes to the site are cost to cure or severance damages, not business damages. Leseur v. State Road Department, 231 So.2d 265, 268 (Fla. 1st DCA 1970).

In Paragraph 6, Weaver claims damages for restrictions of ingress and egress "occasioned by the taking." There was no claim presented in the Answer for business damages for construction of the project outside of the property taken. The only business damage allegation is set out in Paragraph 9, which asserts a business is operated on "lands being taken and adjoining lands that are leased." (R: 174-179). This is a direct reference to the property described in the petition. Here again, there is no claim for business damages for the narrowing of one of the driveways off the owner's property.

Under the pleadings set forth in the Petition and Answer, no counterclaim for inverse condemnation was at issue. The pleadings limited the business damage claim to a claim of damages for loss of the land taken. Under Section 73.071(3)(b), Weaver could only recover for damages caused by the denial of the use of the 14 foot strip along Ocala Road. Weaver's attorney waived any claim to these damages, so the trial court erred in denying the City's motion for directed verdict.

Petitioner asserts that the trial judge ruled a taking of access had been proved and left the jury with only the one issue of determining damages. (Petitioner's Initial Brief, page 28). The record also does not support this assertion. The jury was instructed to decide whether a taking had occurred. (R: 1308-1309). The trial court compounded the error committed by denying the motion for directed verdict by submitting the taking issue to the jury for determination.

The key instruction, given over the City's objection, told the jury that Florida recognizes that the destruction of the right of access is compensable when a governmental action causes a substantial loss of access to one's property. They were told that Weaver Oil Company, doing business as Hogly Wogly, could recover business damages if its right of access had been substantially diminished and the remaining access was unsuitable for the business premises located on the remaining property. (R: 1308-1312). No definition or further enlightenment was given the jury as to what constitutes substantial diminishment of access.

This instruction should not have been given for two reasons: 1) the trial judge was responsible for resolving the conflicts in the evidence and making findings of fact and findings of law, and 2) the instruction equates the loss of access to business damages.

In Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989), this Court set out the framework for an inverse condemnation claim resulting from alleged impairment of access when no taking of the land itself has occurred. Impairment of access does not constitute a taking "unless when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished." Id. at 849.

Within the framework of the facts of this case, this question becomes: Has there been a taking of access when the Ocala Road entrance has been widened from about 72 feet to 91 feet; the westerly driveway on Tennessee Street has been reduced from 44 feet to 27 feet at its narrowest point because of reconstruction of the grass traffic control island on government right of way; and the eastern driveway on Tennessee Street was undisturbed? There was conflicting engineering testimony concerning whether there was a change in vehicle turning paths or a change in turning radius and whether access was as easy as before. (R: 1014-1039)

Without question, the trial court had the responsibility to decide this issue. In Tessler, this Court rejected the holding

of the district court of appeal that it was an issue of fact. This Court held:

> Actually, in an inverse condemnation proceeding of this nature, the trial judge makes both findings of fact and findings of law. As a fact finder, the judge resolves all conflicts in the evidence. Based upon facts as so determined, the judge then decides as a matter of law whether the landowner has incurred a substantial loss of access by reason of the governmental activity. (emphasis added)

Id. at 850.

Submittal of this issue to the jury was fundamental error on the trial judge's part.

The jury instructions given by the trial judge contain a more subtle flaw, because the trial judge instructed the jury that the compensation for loss of access was business damages in the form of lost profits. Analysis of the value of the right of access has always been in terms of the contributory value of the right of access to the market value of the property, not in terms of loss of business conducted on the land.

In Anhoco Corporation v. Dade County, 144 So.2d 793 (Fla. 1962), this Court held that the measure of damages for the right of access is "the difference between the value of the property with the right attached and its value with the right destroyed." Id. at 798. This Court followed that precedent in Tessler by saying, "the damages which are recoverable are limited to the reduction in the value of the property which was caused by the loss of access." Tessler, supra at 849.

The testimony presented by Weaver and followed upon by the court's instruction took emphasis away from market value and concentrated on the effect of the narrowing of one driveway on the business currently located on the property. Each of the business damage witnesses presented by Weaver equated loss of customers to the narrowing of this one driveway. The test is not whether the most convenient driveway for one current business use of the property has been substantially affected, but whether there has been a substantial diminution of access to the property.

This analysis should be done in light of the property's highest and best use, which may or may not be the current use of the property. The danger of the narrow analysis presented by these instructions is that considerations of highest and best use and alternative uses are cast aside. Yet the determination of the highest and best use of the proerty is the keystone on which any appraisal of market value must be based. See Robbins v. Adlee Developers, 556 So.2d 503 (Fla. 3d DCA 1990). The market value of the property at its highest and best use before and after the diminution of access will determine the dollar value of the right of access lost.

For example, a property could have a use which is inconsistent with its highest and best use. If a governmental entity were to construct a new curb and inlet which narrows one of the driveways to the property, should the taking of access analysis be based on its current use or on its highest and best

use? Based on standard appraisal practice, this analysis should be done based on the property's highest and best use.

A good example of the problem raised by the posture of this case is illustrated by Bryant v. Division of Administration, Dept. of Transportation, 355 So.2d 841 (Fla. 1st DCA 1978). In Bryant, the DOT put on testimony concerning the configuration of the drop curbs for providing access to the site after the taking. The appellate court affirmed the trial court's decision to instruct the jury that severance damages must be found before an award of business damages could be made. The Court said that since severance and business damages were both predicated on difficulty getting onto and off the remainder, if the jury found the value of the land was not damaged by the difficulty, " then logically no business damage could result from the same alleged difficulty." Id. at 843.

Finally, Petitioner argues that the precedent relied upon by the lower court has been overruled by Tessler. The case of State Road Department v. Lewis, supra, which Petitioner argues is no longer good law, is not even mentioned in the Tessler decision. In Lewis, the construction of an overpass on existing right of way reduced the width of the owner's driveway from 18 feet to 16½ feet. This Court found that the elevation of the grade of the roadway within existing right of way which cut off this minimal one and one-half foot of access was a consequential damage and not compensable as a taking. Id. at 819. Under application of the substantial diminution test of Tessler, this

could hardly be deemed a taking of access.

In Jirik, supra, this Court upheld the trial court's finding that there was a taking of lot no. 1 because of the construction of a retaining wall across the entire road frontage of the lot, but upheld a finding of no taking caused by the construction of a retaining wall along approximately one-third of the frontage of lot no. 2. Essentially the trial court had applied the substantial diminution test, even before the Tessler decision. The loss of 14 feet of frontage across Weaver's Tennessee Street frontage is somewhat less than a loss of one-third of pre-take frontage.

The Lewis case has been followed in Partyka v. Florida Department of Transportation, 606 So.2d 495 (Fla. 4th DCA 1992), upon the recognition that a change in grade in existing right of way cannot be a basis for severance damages. It follows that no similar business damage claim can be made for the same change in grade on existing right-of-way.

This Court's decision in Tessler also did not overrule some of the basic principles set out in Anhoco, concerning the exercise of police power to regulate flow of traffic or control the operation of traffic. In Anhoco, this Court said:

> We are not here confronted by the exercise of the police power to regulate the flow of traffic or to control the operation of traffic or to prescribe reasonable limitations on the number of driveways or access facilities that might be allowed an abutting owner adjoining a land service highway. Admittedly, such regulations as prohibiting U turns or left turns, or establishing one-way traffic or specifying the location of driveways in and out of

> abutting property are all the subject of police regulations which require no compensation to abutting owners.

Id. at 798.

So, State Department of Transportation v. Weggie's Banana Boat, 576 So.2d 722 (Fla. 2d DCA 1990), rev. denied, 589 So.2d 294 (Fla. 1991), which was relied upon by the lower appellate court, still has a sound precedential basis.

CONCLUSION

The certified question should be answered in the negative. The decision of the lower appellate court should be affirmed and the case should be remanded to the lower court for entry of a judgment of $0 on the issue of business damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail this 13th day of October, 1993, to Alan E. DeSerio, Esquire, Brigham, Moore, Gaylord, Ulmer & Schuster, 777 South Harbour Island Blvd., Suite 900, Tampa, Florida 33602 and Edwin R. Hudson, Esquire, 117 South Gadsden Street, Post Office Box 1049, Tallahassee, Florida 32302.

Respectfully submitted,

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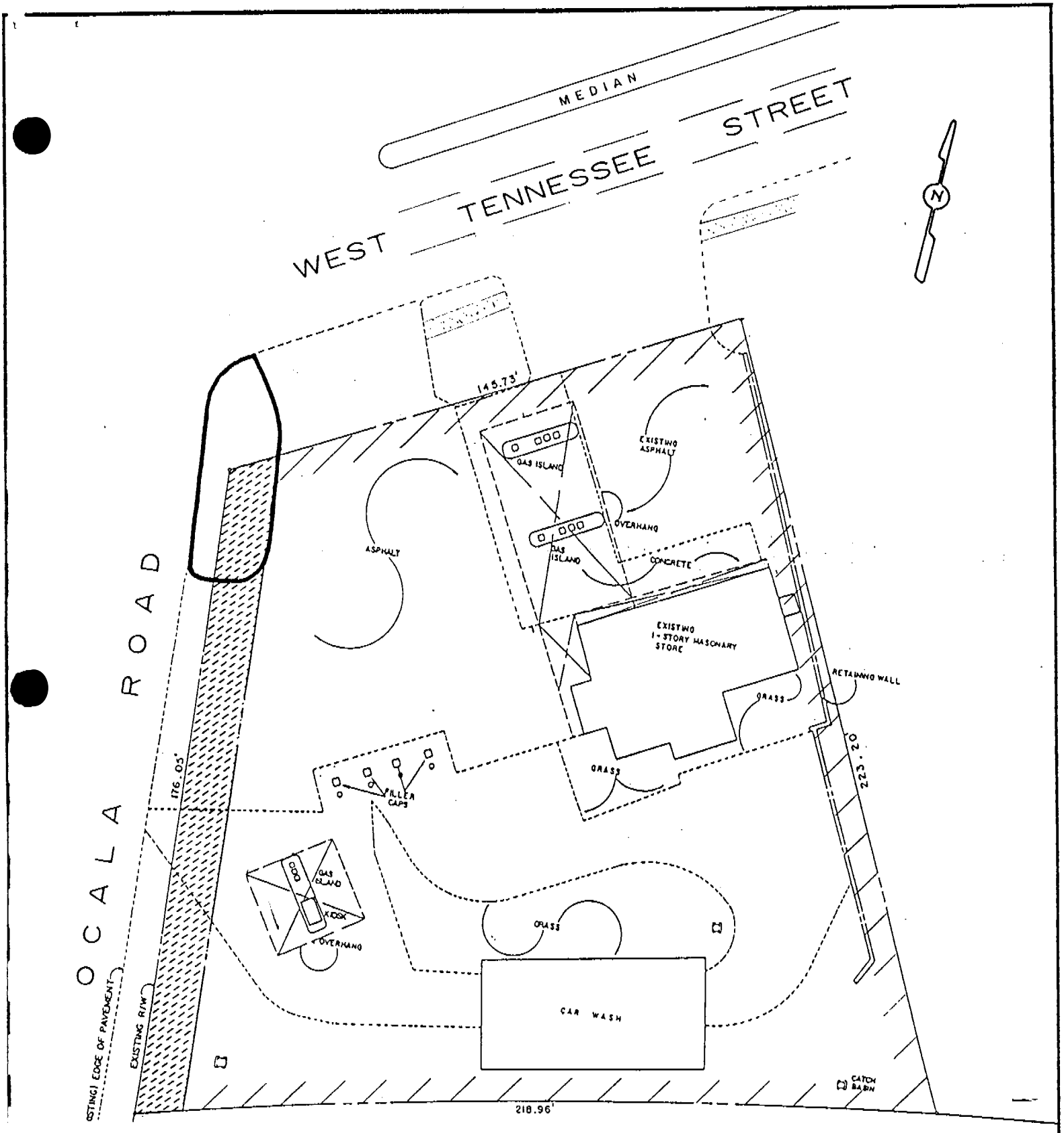
APPENDIX



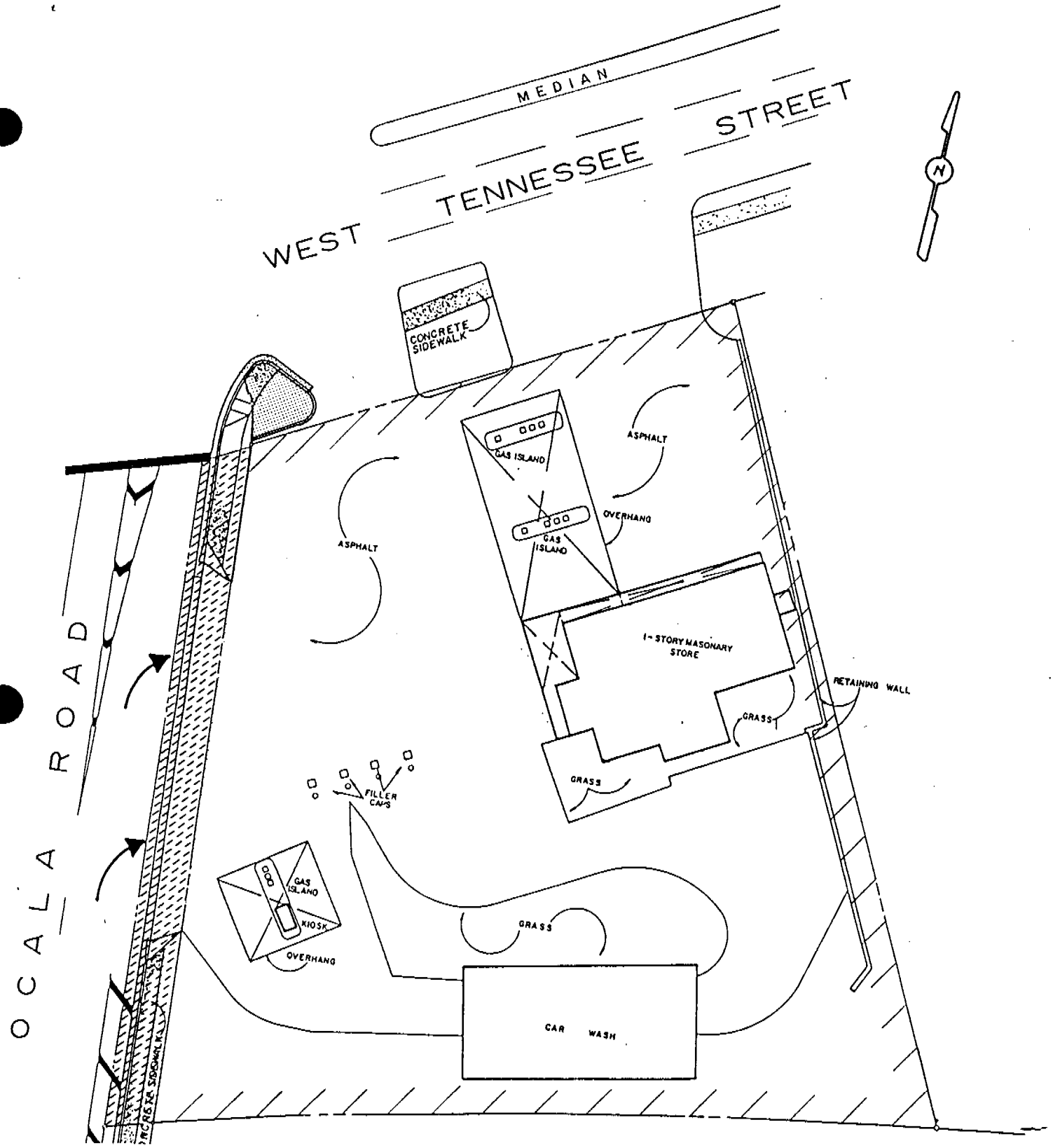
BEFORE PROJECT

LEGEND

PROPERTY CONDEMNED (PARCEL 142)

PROPERTY LINE (CROSS-HATCHED)

TRAFFIC ISLAND



AFTER PROJECT

LEGEND

REDUCTION OF ACCESS CLAIMED

PROPERTY CONDEMNED (PARCEL 142)

PROPERTY LINE (CROSS-HATCHED)