SUPREME COURT OF FLORIDA

WEAVER OIL COMPANY,

Petitioner,

vs. CASE NO. 81,917

CITY OF TALLAHASSEE,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT, CITY OF TALLAHASSEE

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PRELIMINARY STATEMENT

References shall be made as follows:

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Record on Appeal	(R., page number)
Initial Brief of Petitioner filed with the Supreme Court	(Petitioner's S.Ct. Brief, page number)
City's Amended Initial Brief filed with the First District Court of Appeal	(City's App.Ct. Initial Brief, page number)
City's Amended Reply Brief filed with the First District Court of Appeal	(City's App.Ct. Reply Brief, page number)
Petitioner's Amended Answer Brief filed with the First District of Appeal	(Weaver Oil's App.Ct. Brief, page number)
Appendix	(Appx.)

STATEMENT OF THE CASE AND FACTS

The City of Tallahassee (City) initially notes that the petitioner in its statement of case and facts has incorrectly rejected the facts set forth in the opinion of the appellate court. The petitioner makes the statement that "[o]n that strip taken by the City, including the fourteen feet of frontage on Tennessee Street, the grass curbed island was reconstructed and then included a 'bullnose.'" (Petitioner's S.Ct. Brief, p. 3). This statement is simply not correct. The record clearly shows that the construction which narrowed the westerly Tennessee Street driveway was done on existing public right-of-way. Prior to this project, the subject driveway also rested entirely on public right-of-way. (R. Defendant's Exhibits 1, 2, 3; Plaintiff's Exhibits 1, 2, 3; R. 1012, 1049).

The relevant facts have been accurately and succinctly stated in the majority opinion below and the City would adopt the same. City of Tallahassee v. Boyd, 616 So.2d 1000 (Fla. 1st DCA 1983). (Appx.).

The statements made hereafter are to supplement the facts contained in the opinion of the district court or to dispute those statements offered by the petitioner.

The construction which had the effect of narrowing the westerly Tennessee Street entrance, the part where the so-called "bullnose" was constructed, was done entirely on existing public right-of-way. This was amply supported by the evidence and is clearly evident by reviewing the drawings of the property before

and after the project and which are included in the brief following this statement of the case and facts. In fact, there were no improvements or paving on that portion of the property acquired by the City at the northwest corner of the Weaver Oil site. That portion of the property at the northwest corner of the Weaver Oil site before the taking was part of a grassy area which functioned as a traffic island in the same manner that it continues to after completion of the project. The use of that portion of the property at the northwest corner of the Weaver Oil site remains essentially unchanged.

The petitioner then offers the statement that it was using a portion of the property taken at the northwest corner of its site as a grass island which it said "served to accommodate entering and exiting vehicles by separating Weaver Oil's westerly Tennessee driveway and Ocala Road." (Petitioner's S.Ct. Brief, p. 4). This is an entirely new argument for which no evidence was presented. Even so, the former traffic island was mostly on public right-of-way and would have served to separate the Ocala Road entrance and the westerly Tennessee Street entrance even had Weaver Oil chosen to pave the small portion of the grassy area at the northwest corner of its property which was identified as part of the traffic island.

The petitioner then presents argument, not facts, claiming that "[t]he new island serves as a replacement for the island that existed prior to the taking. The pre-existing island was effectively moved to the east,. . .". (Petitioner's S.Ct. Brief,

p. 4). Again, besides there being no evidence in the record to this effect, the only construction performed easterly of the previous traffic island was done entirely on existing public right-of-way.

What is relevant, undisputed, but not acknowledged in the initial brief of the petitioner, is that all testimony and evidence presented by Weaver Oil regarding causation of business damages was that such damages were based entirely on a claimed loss of access resulting from the narrowed westerly Tennessee Street entrance. (R. 522, 535, 585, 885). Nowhere and at no time did the petitioner ever claim that business damages or a loss of access resulted from the denial of the use of that property described in the petition in eminent domain. The appellate court correctly recognized that the subject of this action was that property specifically described in the petition as required by Section 73.021(2), Florida Statutes, (parcel 142).

Throughout the trial and appellate proceedings, the City has maintained its position "that business damages were not recoverable for a loss of access unless such loss of access was attributable to the loss of use of the property condemned, parcel 142. . ." (City's App.Ct. Initial Brief, p.3; R. 984-988; 1167-1169; 1198-1217; 1326-1327; 356-363).

The petitioner's lengthy recitation to portions of the testimony and record which it contends supports its case is completely irrelevant to the issue before this court. Thus, even

though the City disagrees with much of this, it will not be addressed.

Finally, the only property (or property rights) over which the court has jurisdiction is that which is described in the petition in eminent domain. Sections 73.021(2) and (3), Florida Statutes, require the specific identification of the property and identification of the estate or interest which is to be acquired.

SUMMARY OF ARGUMENT

As the court below determined, the "appellees failed to allege a basis for an award of statutory business damages. . .". City of Tallahassee v. Boyd, 616 So.2d 1000, 1001 (Fla. 1st DCA 1993).

Specifically, the petitioner failed to allege and failed to elicit any evidence that alleged business damages resulted from "the denial of use of the property so taken" as required by Section 73.071(3)(b), Florida Statutes.

"The property so taken" is the property which was described in the petition in eminent domain and is the property which was the subject of this action. Section 73.021(2), Florida Statutes, requires that the petition include "a description identifying the property sought to be acquired." Section 73.021(3), Florida Statutes, requires a description of "the estate or interest in the property which the petitioner intends to acquire."

Weaver Oil based its entire claim for business damages on the theory that its gas station/convenience store located at the southeast corner of Ocala Road and Tennessee Street in Tallahassee, Florida, suffered business damages as a result of the narrowing of its westerly Tennessee Street entrance from 44 feet to 27 feet at its narrowest point. This was one of three entrances to the property, two of which fronted on Tennessee Street and one of which fronted on Ocala Road.

Although at trial Weaver Oil complained of the narrowing of the westerly Tennessee Street entrance and characterized this as its main entrance, this was not the property described in the petition and was not the property which was the subject of this

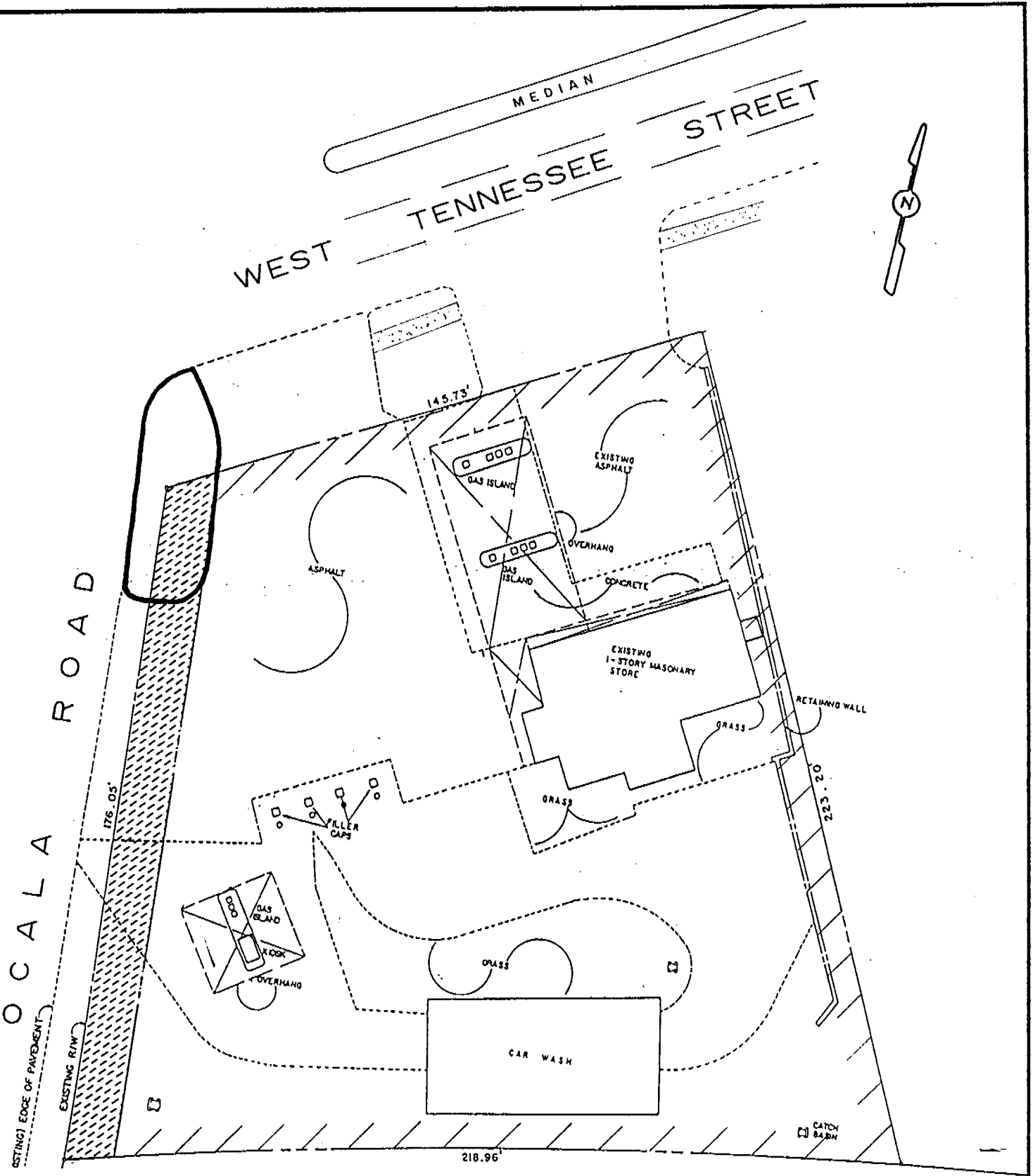
action. The property which was the subject of this suit was parcel 142, a 14 foot by 176 foot strip fronting on Ocala Road which was acquired by eminent domain for the Ocala Road widening project.

The westerly Tennessee Street entrance was narrowed as a result of the construction of a portion of a curbed grass traffic control island at the southeast corner of the intersection. The reconstructed portion of the island incidentally causing the narrowing of this so-called "main entrance" was built on existing public right-of-way, not on the property acquired by condemnation.

Prior to the trial, the parties entered into a stipulated final judgment which settled the issues of the compensation to be paid for the property acquired through condemnation and all damages except statutory business damage. (R. 309-315; Appx.).

The position of the City has remained consistent throughout these proceedings and is set forth in more detail in the main body of this brief. The essential matters before this court are that the construction which had the impact of narrowing the subject entrance was performed entirely on existing public right-of-way. This matter was never disputed. Weaver Oil never alleged that its claimed loss of access resulted from the denial of the use of the property which was acquired through eminent domain (parcel 142).

Weaver Oil never presented a claim for a loss of access unrelated to the City's acquisition of parcel 142. A claim for loss of access caused by the narrowing of the westerly Tennessee Street entrance would have to be brought as a separate claim or



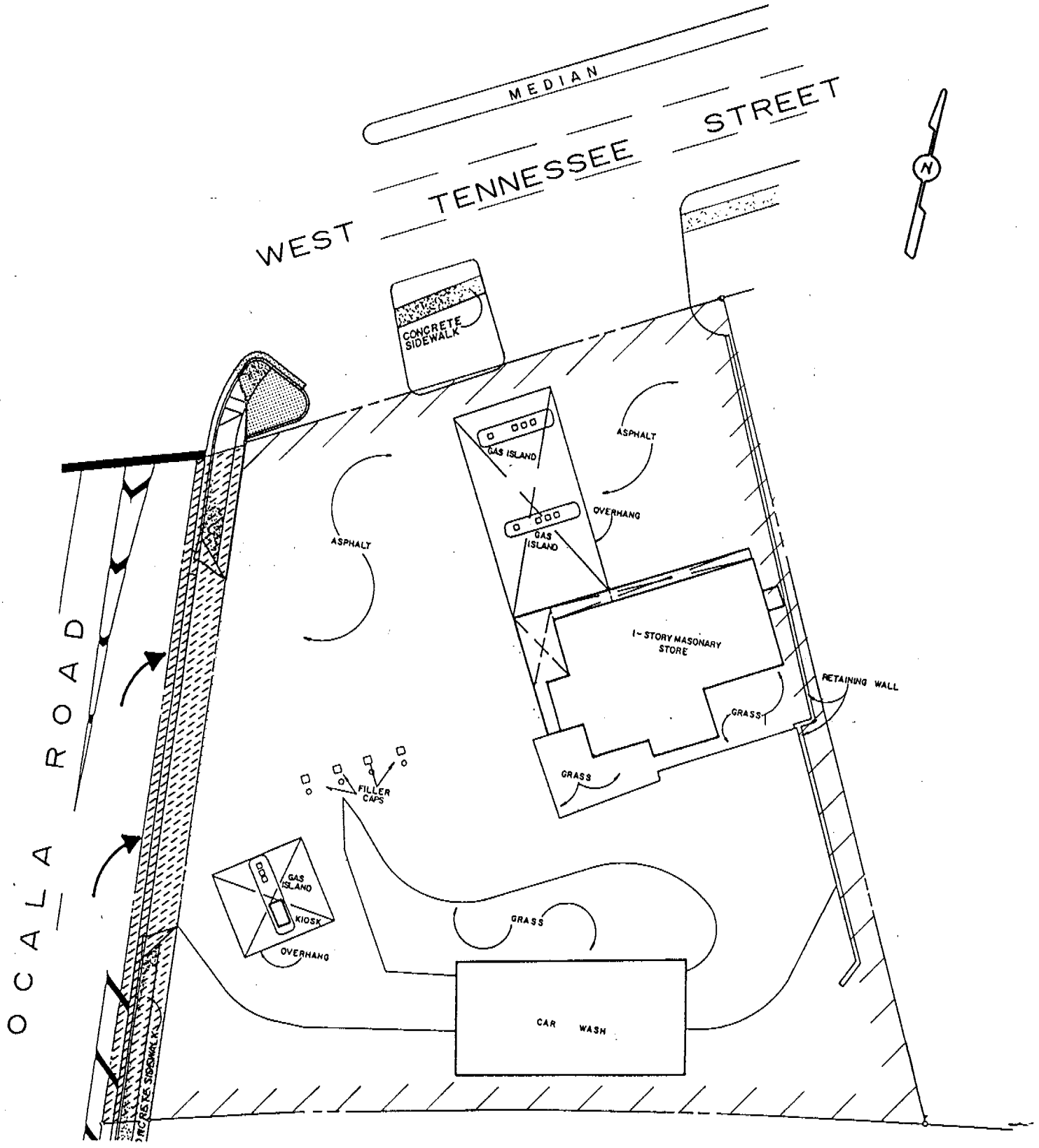
BEFORE PROJECT

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)

A R G U M E N T

I. PRELIMINARY ISSUES.

A. PROPRIETY OF PETITIONER'S RESTATEMENT OF THE CERTIFIED QUESTION.

The petitioner fails to cite any authority for the proposition that a party can rephrase a certified question. The City recognizes that this court has the authority to review the entire decision of the court below, Reed v. State, 470 So.2d 1382 (Fla. 1985), but the law is equally clear that the district court has the absolute discretion in determining whether to certify a question and the form of the certification, Rupp v. Jackson, 238 So.2d 86 (Fla. 1970). There is no authority which allows a party to unilaterally rephrase a certified question, thereby setting its own agenda. Additionally, this court has held that rephrasing a certified question in the alternative as suggested by the petitioner is undesirable and improper practice. See Kneale v. Kneale, 67 So.2d 233 (Fla. 1953).

The petitioner previously requested by motion for rehearing and clarification that the District Court of Appeal restate the certified question. (Appx.). The motion and request was denied. (Appx.). The City fully responded to the petitioner's argument at that time and, for the sake of brevity, the entire response will not be restated. (Appx.). Nonetheless, the underlying facts are inconsistent with the questions as rephrased by the petitioner.

Review of the record shows that it is undisputed that no business damages were ever alleged to have resulted from the denial of the use of the property described in the petition and acquired by eminent domain. It is indisputable that the construction which narrowed the subject driveway was done entirely within existing public right-of-way. There was never any showing or evidence presented that "the land was taken so as to enable the government to construct an island that continued into existing government right-of-way" as asserted by the petitioner. (See petitioner's restated question, Petitioner's S.Ct. Brief, p. 19). In fact, a modification of the traffic island which would have narrowed the westerly Tennessee Street entrance could have been accomplished without acquisition of parcel 142. (R. 1048). The westerly Tennessee Street entrance was never a subject matter of this action in eminent domain, Weaver Oil never made a claim or counterclaim in the nature of inverse condemnation for a destruction or limitation of access not related to parcel 142.

Jurisdictionally, the issue before the court was limited to claimed probable business damages resulting from the denial of use of the property taken, i.e., the specifically identified property which was the subject of this action (parcel 142). (R. 986).

The subject matter of this trial was limited to alleged business damages resulting from the loss of use of the property acquired by eminent domain in this suit and identified as parcel 142. The petitioner's restated questions do not reflect the underlying facts or issues of this case.

B. RESTATEMENT OF POSITIONS AND FACTS BY THE PETITIONER.

The petitioner has changed its position as presented to the lower courts and is perhaps being less than straightforward by arguing that the construction performed in the existing public right-of-way should somehow be considered part of that property acquired which is designated in the petition as parcel 142. This is completely contrary to the petitioner's stated position at trial and in the appellate proceedings below. In fact, counsel for Weaver Oil specifically disclaimed that the denial of the use of the property identified in the petition was the cause of alleged damage to its business.

"The real property taken is not the issue here. We haven't claimed any business damage caused by the physical property taken." (R. 985, L. 14).

"We don't have to have any physical taking." (R. 986, L. 5).

"Your Honor, it's when the property damage statute says the loss of use in the property taken, then the property taken here was the access." (R. 97, L. 6).

"The taking of the property was our property right to access." (R. 987, L. 13).

"[T]he little strip along here is one taking, and the denial of the use of that little strip that they took, that isn't the problem, the physical taking." (R. 1245, L. 21). (Emphasis added).

"In fact, we didn't even own it." (Referring to access.) (R. 1246, L. 9).

"They physically took that strip, but that didn't cause us a problem." (Statement during closing argument.) (R. 1248, L. 2). (Emphasis added).

Numerous statements in opening argument. (R. 394-400).

Statements throughout closing argument and rebuttal. (R. 1237-1282; 1298-1307).

In its case-in-chief, the petitioner presented no testimony or evidence, and the record is entirely devoid of any testimony or evidence, contending or showing that probable business damages allegedly suffered by Weaver Oil were a result of the denial of use of the property taken, parcel 142. Mr. Jimmy Weaver, who stated he was a "hands on" owner of the business, and who was qualified as an expert (R. 814), testified that the causation of the alleged business damages was the narrowing of the westerly Tennessee Street entrance, the so-called main entrance. (R. 885, L. 11; 890, L. 17). Mr. Scott Williams, the petitioner's marketing expert, testified that the narrowing of the westerly Tennessee Street entrance was the sole cause of Weaver Oil's alleged business damages. (R. 585, L. 16). Mr. James B. Davis, Jr., another expert for the petitioner, testified that the narrowing of the westerly Tennessee Street entrance was the only source of damage to Weaver Oil which he identified. (R. 522, L. 20; 535, L. 17).

Thereafter, the City of Tallahassee in its case-in-chief presented testimony that the construction complained of by the petitioner was not located on parcel 142, but rather on existing public right-of-way. The testimony of Bob Dunlop, a professional

engineer and expert witness, was that the right-of-way line was not changed and that the traffic island was on existing state right-of-way. (R. 1012, L. 2). Sal Arnaldo, the project engineer for the City of Tallahassee, testified that the objected to improvements were constructed on public right-of-way. (R. 1048, L. 14).

It is clear that the petitioner at trial and in the lower appellate proceedings never asserted business damages were caused by the loss of use of the property described in the petition and acquired by the City. Moreover, the City affirmatively proved that the construction which had the consequential effect of narrowing one of the Tennessee Street entrances was not performed on the property condemned (parcel 142), but rather on public right-of-way.

Next, in the amended answer brief filed by Weaver Oil, Weaver Oil stated that it believed the proper issue on appeal was whether "the fact that the impairment of access occurred within the existing right-of-way [precluded] the finding that the owner has suffered a compensable loss of access." (Weaver Oil's App.Ct. Answer Brief, p. 38).

It seems now that the petitioner is attempting to reject the position to which it clearly subscribed in the two lower courts. Indeed, as the City pointed out in the proceedings below, "there has been no testimony and no argument that the business damages claimed by the petitioner resulted from the loss of use of that property described in the petition in eminent domain." (City's App.Ct. Reply Brief, p. 11). (Emphasis in original).

The petitioner also mischaracterizes the City's position in the courts below. At one point, the petitioner claims "the only matter raised by the City before the lower appellate court was, given the facts of this cause, could the owner base a claim of business damages upon the taking of the property right of access." (Petitioner's S.Ct. Brief, p. 20). Elsewhere in its initial brief, Weaver Oil modifies this statement. (Petitioner's S.Ct. Brief, p. 22).

The City's position has been consistent and is, as excerpted from its initial brief filed with the First District Court of Appeal, as follows:

1. Section 73.071(3)(b), Florida Statutes, limits the recovery of business damages to those damages caused by the "denial of use of the property so taken. . .";

2. Damages for loss of access are limited to severance damages, i.e., the reduction in value of the property caused by the loss of access, and the stipulated final judgment entered into by Weaver Oil and the City of Tallahassee settled such claims; and

3. The use of existing public right-of-way for the construction or reconstruction of an island to control traffic flow and provide for public safety does not give the owner a claim for business damages. (City's App.Ct. Initial Brief, p. 8).

Additionally, the City presented evidence, argued, and Weaver Oil never disputed that the construction of the portion of the traffic control island at the southeast corner of Tennessee Street and Ocala Road which incidentally narrowed the westerly Tennessee

Street entrance was done entirely on existing public right-of-way. Weaver Oil never alleged that the claimed loss of access from this westerly Tennessee Street entrance resulted from its loss of use of the property which was acquired through eminent domain (parcel 142). Weaver Oil never alleged that its loss of use of the property so taken (parcel 142) was the cause of alleged business damages, but instead, Weaver Oil claimed the sole cause of business damages was the loss of access from the westerly Tennessee Street entrance.

Alleged damages resulting from the construction of the traffic control island are not recoverable because the construction which had the effect of narrowing the subject driveway was not done on property acquired by eminent domain, but rather on existing public right-of-way.

II. ISSUE BEFORE THE COURT.

The following question was certified:

> **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?**

Initially, the City would point out that this question was not certified to be one of great public importance as specified in Rule 9.030, Florida Rules of Appellate Procedure, and that the appellate court stated only that "because the disputed language in Tessler is arguably susceptible to other interpretations" did they certify the question. Boyd, 616 So.2d at 1004. (Emphasis added).

Additionally, the petitioner has rejected the certified question and restated it in two alternatives which it apparently prefers in light of its changing positions as to the facts. However, the restatements argued by the petitioner are inconsistent with the underlying facts as addressed previously herein.

A. ALLEGED BUSINESS DAMAGES MUST BE SHOWN TO RESULT FROM THE DENIAL OF THE USE OF THAT PROPERTY DESCRIBED IN THE PETITION IN EMINENT DOMAIN.

The petitioner, contrary to earlier assertions in its brief, states that the City had primarily two contentions, first that the City did not specifically condemn any of the owner's access rights and thus no claim for business damages could be made and second, that the term "property" as used in Section 73.071(3)(b), Florida Statutes, is limited to physical property or land but does not include easements of access. (Petitioner's S.Ct. Brief, p. 72).

The petitioner goes on to state that "the opinion of the lower court did not turn upon the first aspect of the City's contention" (i.e., that since the City did not specifically condemn any access rights in its condemnation petition, no business damages could be claimed). This statement is at conflict with the opinion itself wherein the court states:

> Appellee's [petitioner] reliance on Glessner v. Duval County, 203 So.2d 330 (Fla. 1st DCA 1967) is misplaced because of key factual differences. In that case, the owner had acquired a perpetual easement over another person's lands as part of the purchase of the adjoining property. The owner's claim for business damages was based solely on governmental interference with the owner's easement of access over another's lands, thereby cutting off the owner's right of

> access to the property on which the business was conducted. The property over which the easement had been acquired was specifically identified in the petition. In the instant case, however, the loss of access and business damages claimed by Weaver Oil did not result from the loss of use of the specific property described in the petition and acquired in the eminent domain proceedings. In fact, the obstruction that narrowed the driveway was constructed by the City on existing public right-of-way. Our holding in Glessner was based squarely on the well-established principle that the interest in the dominant tenement in an easement is a property interest. Thus, the governmental interference with the businessman's property fell within the plain meaning of Section 73.071(3)(b). See id. at 332 & 335; Walters v. State Road Dept., 239 So.2d 879 (Fla. 1st DCA 1970).

616 So.2d at 1004 (emphasis supplied). Clearly, the appellate court below considered this question. This is the precise issue on which the City briefed the lower court. This also forms a basis for the reversal of the trial court and the phraseology of the certified question. Curiously, the petitioner failed to cite to this analysis when it asserted that the lower court's decision did not turn upon this argument. Since this issue was squarely addressed in the court's opinion and since the claimed loss of access did not result from the petitioner's loss of use of property described in the petition in eminent domain (parcel 142), there is no basis or need to even address what the petitioner has asserted is the City's second position.

From the time the proceeding commenced at the trial level to the present, it has consistently and clearly been the City's position that since the claimed loss of access was not caused by the petitioner's loss of use of property described in the petition

in eminent domain, no claim of business damages could be maintained, and that any claimed restriction of access resulting from construction done on existing public right-of-way could only be addressed by a counterclaim or inverse condemnation proceeding brought by Weaver Oil.

The question certified by the District Court of Appeal concisely asks for confirmation of the clear requirements for business damages specified in Section 73.071(2)(b), Florida Statutes. The language of the statute requires that it be demonstrated that business damages arise from the loss of use of the property taken. The property taken, without question, refers to that property identified in the petition in eminent domain as required by Section 73.021, Florida Statutes. The statute requires "a description identifying the property sought to be acquired." The statute also requires the petition set forth "the estate or interest in the property which the petitioner intends to acquire."

Nowhere in this action or in the petition was there any property identified which was used by Weaver Oil as part of its westerly Tennessee Street entrance. Nowhere during the course of this action was there any reference whatsoever to an acquisition of any right of access relating to the westerly Tennessee Street entrance. The provisions of Chapter 73, Florida Statutes, particularly when read together, leave no dispute that all property or interests in property which are the subject of an eminent domain action must be specifically identified in the petition. See Section 73.021(2), (3), Florida Statutes; Florida Power Corp. v.

Griffin, 144 So.2d 104 (Fla. 2d DCA 1962); Clark v. Gulf Power Co., 198 So.2d 368 (Fla. 1st DCA 1967); Walker v. Florida Gas Transmission Co., 491 So.2d 1286 (Fla. 1st DCA 1986). The trial court obtains jurisdiction only over the property or estate or interest identified in the petition. Cf. Chalmers v. Florida Power and Light Co., 245 So.2d 285 (Fla. 1st DCA 1971) (circuit court lacks jurisdiction over eminent domain proceedings where the petition is silent as to the estate or interest to be taken in landowners' lands.); Gulf Power Co. v. Stack, 296 So.2d 572 (Fla. 1st DCA 1974); Florida Eastcoast R.R. Co. v. City of Miami, 346 So.2d 621 (Fla. 3d DCA 1971) (proceeding was properly dismissed where resolution failed to set forth the necessity, public purpose, the estate or interest to be taken and a legal description of the property); Salfi v. Dept. of Transportation, 312 So.2d 781 (Fla. 4th DCA 1975) (same).

Even if Chapter 73, Florida Statutes, did not contain these explicit pleading requirements, Florida law is clear that it is error for a court to grant relief on issues which were not framed by the pleadings nor tried by consent. Pond v. McKnight, 339 So.2d 1149 (Fla. 2d DCA 1976) (although evidence was sufficient, it was error to grant injunctive relief); Miceli v. Gilmac Dev., Inc., 467 So.2d 404 (Fla. 2d DCA 1985) (error to order sale of condominium); Brickell Station Towers, Inc. v. J.D.C. Corp., 549 So.2d 203 (Fla. 3d DCA 1989) (granting relief which was neither requested in appropriate pleadings, nor tried by consent, violates due process); Southern Indus. Tire, Inc. v. Chicago Indus. Tire, Inc., 541 So.2d

790 (Fla. 4th DCA 1989) (error to order a party to furnish an accounting).

In Dept. of Transportation v. Weggies Banana Boat, this precise issue was recognized in Judge Altenbrend's concurring opinion:

> Even if additional damages for loss of land value might have been available at the time of trial, Weggies never asked the trial judge to declare a taking of access as compared to the taking of land which was described in DOT's complaint. Thus, there was no legal predicate to permit the jury to award additional damages for a taking of access.

576 So.2d 722, 725-26 (Fla. 2d DCA 1990). (Emphasis supplied). Therefore, any damages claimed must be based upon the loss of use of the property which is, in fact, described in the petition in eminent domain.

This construction is consistent with the Supreme Court's dictates that business damages should be awarded only when such an award appears clearly consistent with the legislative intent of the governing statute and that the interpretation of such statute should be strictly construed in favor of the state and against the grantee. Tampa-Hillsborough Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So.2d 926 (Fla. 1983); Dept. of Agriculture and Consumer Servs. v. Mid-Florida Growers, Inc., 570 So.2d 892 (Fla. 1990).

The petitioner did argue at the district court level that the City consented to the trial of its claim for business damages. This argument was not accepted by the appellate court and has not been raised again by the petitioner.

In this case, the access claimed by the petitioner to have been taken was never identified or described in the petition in eminent domain, and it was never asserted as a counterclaim or otherwise brought as a claim in inverse condemnation. Thus, for the trial court to assume jurisdiction over claimed property rights not attributable to the property described in the petition and not otherwise made a part of this action by counterclaim or other action was clear error.

"An owner may plead inverse condemnation as a counterclaim in a direct eminent domain proceeding or to recover compensation for a taking that is different from, or greater than, the taking legally authorized and described in the condemnor's petition." Florida Eminent Domain Practice and Procedure, 4th Edition, Section 13.32, p. 349. The issues which must be determined by the court are whether there has been a taking, the nature and extent of the property rights taken, and the date of taking for valuation purposes. Id.

Weaver Oil is now suggesting that the claimed loss of access relating to the westerly Tennessee Street entrance was adequately raised in its answer and that this "issue was properly tried as part of the original condemnation action, essentially as a condemnation counterclaim." (Petitioner's S.Ct. Brief, p. 28). This assertion is patently absurd and should be rejected out of hand. Paragraph 6 of the petitioner's answer to the petition states "that this defendant claims damages for all restrictions of ingress and egress to and from the remaining leasehold property

which are occasioned by this taking." (R. 174-179). (Emphasis supplied). This response by its very terms claims damages for "restrictions of ingress and egress. . .occasioned by this taking." "This taking" can refer to nothing other than the property described in the petition in eminent domain. This response would also fail to comply with Section 73.071(3)(b), Florida Statutes, which requires that any person claiming business damages "set forth. . .the nature and extent of such damages."

At no time did the petitioner ever attempt to file a claim for damages due to a separate taking of access on Tennessee Street.

The City, beginning with its motion to strike the petitioner's claim for business damages (R. 247-252), continually asserted that this separate "taking" was not properly before the court. (R. 356-63; 985-988; 1167-69; 1198-1217; 1326-27). Since the petitioner presented no evidence that the claimed business damages resulted from the loss of use of the property taken by the City, as identified in the petition in eminent domain, the appellate court below properly held that the trial court should have directed a verdict in favor of the City on the issue of business damages.

Statements by Weaver Oil that "[i]n this cause the owner plead and proved. . .that governmental activities of the City of Tallahassee, conducted as part of the project for which parcel 142 was acquired, substantially impaired the owner's easement of access which resulted in a taking of that 'property,'" are irrelevant to the matters at issue and would result in standards so vague and

overbroad that a rational response is precluded. (Petitioner's S.Ct. Brief, p. 27). (Emphasis supplied).

This court previously held that no damages were recoverable for the Department of Transportation's construction of a median upon public right-of-way even though the median had the effect of limiting traffic flow or access to the business of a condemnee from which the DOT had acquired property for the road widening. Division of Admin. v. Capital Plaza, Inc., 397 So.2d 682 (Fla. 1981). This case is analogous to the case on appeal and the principles enunciated have not been changed by Palm Beach County v. Tessler, 538 So.2d 846 (Fla. 1989), other decisions, or statute.

Without any authority or supporting rationale, the petitioner continues with the suggestion that not only should this matter have been treated as an inverse condemnation counterclaim (without being so pled), but in addition, the denial of the City's motion for directed verdict should be considered an order of taking, and presumably, the jury instructions which called for the jury to decide the suitability of access should be ignored.[1] (Petitioner's S.Ct. Brief, p. 28; R. 1309, L. 5). Such absurd interpretations would result in virtual procedural and legal anarchy in trial practice.

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[1]Inverse condemnation is an equitable remedy and is tried by the court in a nonjury proceeding. Sarasota-Manatee Airport Auth. v. Alderman, 238 So.2d 678 (Fla. 2d DCA 1970). It is improper to have the jury decide the suitability of access or whether a limitation of access constitutes a taking.

B. THERE IS NO BASIS TO DISTINGUISH BETWEEN THE TERMS "LANDS" AND "PROPERTY" AS SET FORTH IN SECTION 73.071(3)(b), FLORIDA STATUTES.

The petitioner goes on to suggest that there should be considered to be a distinction between the terms "property" and "lands" as used in Section 73.071(3)(b), Florida Statutes.

The petitioner cites a number of cases in support of the proposition that words of common usage, when used in a statute, should be construed in their plain and ordinary sense. The plain meaning of "property" and "lands" as words of common usage and in the context of the subject statute is essentially the same. These terms must be read in pari materia to the pertinent related sections of Chapter 73, Florida Statutes.

> Legislative intent should be gathered from consideration of the statute as a whole rather than from any part thereof.
>
> . . .
>
> A law should be construed together with any other statute relating to the same subject matter or having the same purpose if they are compatible.

Florida Jai-Alai, Inc. v. Lake Howell Water and Reclamation Dist., 274 So.2d 522 (Fla. 1973). This clearly indicates that the "lands" or "property" referred to in Section 73.071(3)(b), Florida Statutes, are those identified in the petition as required by Section 73.021(2) and (3), Florida Statutes. The petitioner's argument that "a broader legislative intent is clearly reflected by use of the term 'property'" is circular and unsupported.

First, the petitioner has failed to point out that it has been the courts, not the Legislature, which has liberalized the concept of property. See Palm Beach County v. Tessler, 538 So.2d 846, 848 (Fla. 1989). Moreover, this judicial liberalization has been limited in context to the constitutional guarantee of full compensation for the taking of private property. It has not been applied in a context of what the Legislature meant by the term "property" as used in the business damage statute. As the court below recognized, business damages are considered a matter of legislative largesse and the applicable rules of construction require that "any ambiguity in Section 73.071(3)(b), Florida Statutes, should be construed against the claim of business damages and such damages should be awarded only when such an award appears clearly consistent with the legislative intent." Tampa-Hillsborough Expressway Auth. v. K.E. Morris Alignment Serv., 444 So.2d 926, 928, 929 (Fla. 1983).

The proper application of the plain meaning rule to the business damage statute requires the court to interpret the statute in light of the Legislature's understanding of the term "property" at the time the legislation was enacted. See State v. City of Jacksonville, 50 So.2d 532, 536 (Fla. 1951) ("[W]ords of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was enacted. . ."); see also 49 Fla.Jur.2d Statutes, Section 122 (1984). The one qualification to this rule is when a statute is expressed in general terms and in words of present tense, it may also apply to "new situations,

cases, conditions, things, subjects, methods, persons or entities" coming into existence subsequently to its enactment. City of Jacksonville, 50 So.2d at 536. However, this qualification does not apply to the facts in this case since there were surely occasions of impairments of access at the time this legislation was enacted.

The current form of the business damages statute was enacted in 1965. See Ch. 65-369, Section 1, 1965 Fla. Laws 1271, 1275 (codified at Section 73.071(3)(b), Florida Statutes (1965)). The current version of the business damages statute is identical to the 1965 version. Compare Section 73.071(3)(b), Florida Statutes (1991). Since the Supreme Court of Florida has not construed this aspect of the business damages statute which has been unaltered since its enactment, the judicial liberalization of the constitutional concept of property since the passage of this statute is irrelevant to this analysis. Therefore, the rules of statutory construction require this Court to interpret the business damages statute in light of the Legislature's understanding of what the term "property" encompassed upon its enactment in 1965.

Another rule of statutory construction to aid this Court in ascertaining the meaning of Section 73.071(3)(b), Florida Statutes, is that the Legislature is presumed to know existing law when it enacts a statute and is presumed to know judicial construction of former laws on the subject concerning the same or a similar matter when a later statute is enacted. Williams v. Jones, 326 So.2d 425 (Fla. 1975); State v. Quigley, 463 So.2d 224 (Fla. 1985); Collins

Inv. Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964). When re-enacting a statute, the Legislature is presumed to not only be aware of the constructions placed on it by the Supreme Court of Florida, but also to adopt these constructions unless there is a clear intent to the contrary. Delaney v. State, 190 So.2d 578 (Fla. 1966), appeal dism., 387 U.S. 426, 87 S.Ct. 1710, 18 L.Ed.2d 866 (1967).

Applying these rules of statutory construction to Section 73.071(3)(b), Florida Statutes, it is clear that the Legislature's intent could not have been to expand the interpretation of the business damage statute to allow for recovery of business damages for a loss of access which was not caused by the owner's loss of use of the property described in the petition in eminent domain. To hold otherwise would require the assumption that the Legislature could foresee the judicial liberalization of the constitutional concept of property.

Just prior to the Legislature's enactment of the current version of the business damages statute, this court in State Road Dept. v. Lewis, construed the predecessor of Section 73.071(3)(b), Florida Statutes, as follows:[2]

---

[2]The predecessor to the current form of the business damages statute was codified in Section 73.10(4), Florida Statutes, which states:

> Provided, however, that when the suit is by the state road department, county, municipality, 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 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 lands owned or held by such party, the

> We believe this contention of petitioner [that construction which affects or cuts off existing rights of access is consequential damage and not an element for award of compensation] is well taken. The statute, Section 73.10, 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 said business and award special damages.

170 So.2d 817, 819 (Fla. 1964) (emphasis supplied). It must be concluded that the Legislature was aware of the Lewis decision when it recodified the business damages statute in its current form in 1965. Collins, 164 So.2d at 809; Williams, 326 So.2d at 435; Quigley, 463 So.2d at 226. Furthermore, in the absence of a clear expression to the contrary, it is presumed that the Legislature adopted the Lewis rationale when it re-enacted the statute. Delaney, 190 So.2d at 581. Indeed, this Court holds that such a

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> jury shall consider the probable effect the denial of the use of the property so taken may have upon the said business, and assess in addition to the amount to be awarded for the taking, the probable damages to such business which the denial of the use of the property so taken may reasonably cause; any person claiming the right to recover such special damages shall set forth in his answer the nature and extent of such damages.

A comparison between Section 73.10(4) (1963) (emphasis supplied) and the current version of the business damages statute, Section 73.071(3)(b) (1991), demonstrates that the operative provisions are the same.

re-enactment of a statute bars the courts from subsequently changing its earlier construction. Id. at 582.

Had the Legislature meant to expand the scope of business damages to include damages which result from causes other than "the denial of the use of the property so taken," it should have clearly indicated such when it re-enacted the business damages statute. Since the operative language of both the statute which preceded Lewis, and the current version re-enacted soon after Lewis are the same, courts are barred from expanding the scope of the statutory allowance for business damages. This is a crucial distinction between the court's role in interpreting constitutional rights versus rights created by legislative grace. As this court stated in Florida Soc'y of Opthalmology v. Florida Optometric Assoc.,

> Constitutions are "living documents" not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes. Consequently, courts are far less circumscribed in construing language in the area of constitutional interpretation than in the realm of statutory construction. When adjudicating constitutional issues, the principles, rather than the direct operation or literal meaning of the words used, measure the purpose and scope of a provision.

489 So.2d 1118, 1119 (Fla. 1986) (citations omitted).

Contrary to the petitioner's assertion, the concurring opinion in Dept. of Transportation v. Weggies Banana Boat, 576 So.2d 722 (Fla. 2d DCA 1990), properly cites Lewis in support of its holding that business damages are not available for consequential damages caused by reconfiguration of a roadway. The petitioner failed to recognize the distinction between business damages recoverable

pursuant to statute and compensation recoverable for a loss of access pursuant to constitutional guarantees. In Tessler, this Court, quoting with approval from Benerofe v. State Road Dept., 217 So.2d 838, 839 (Fla. 1969), stated

> [E]ven when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easement of access, light, and air from the street or highway appurtenant to their land, and unreasonable interference therewith may constitute a taking or damaging within constitutional provisions requiring compensation therefor.

538 So.2d at 848 (emphasis supplied). This Court went on to hold that in an inverse condemnation case, a loss of access could be considered a loss of a property right in the constitutional sense, but,

> In any event, the damages which are recoverable are limited to the reduction in the value of the property which was caused by the loss of access. Business damages continue to be controlled by Section 73.071, Florida Statutes (1987).

Tessler, 576 So.2d at 849-50 (emphasis supplied).

This court clearly drew a distinction between business damages recoverable pursuant to statute and compensation guaranteed by the constitution which results from a taking. On several other occasions, this court has recognized the fundamental difference between constitutionally mandated compensation versus statutorily authorized business damages. See Texaco, Inc. v. Dept. of Transportation, 537 So.2d 92 (Fla. 1989); Dept. of Transportation v. Fortune Federal Savings and Loan Assoc., 532 So.2d 1267, 1270 (Fla. 1988) ("It is only by the will of the Legislature that

business damages may be awarded in certain situations which are properly limited by the Legislature."); Tampa-Hillsborough Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So.2d 926, 928-29 (Fla. 1983) (since business damages are a matter of legislative grace, any ambiguity should be construed against the claim of business damages and business damages should be awarded when it is clearly consistent with legislative intent). These presumptions, favorable to the condemning authority and which militate against a finding of a business damage claim, further supports the argument that this court did not intend to expand the scope of business damages by its decision in Tessler.

CONCLUSION

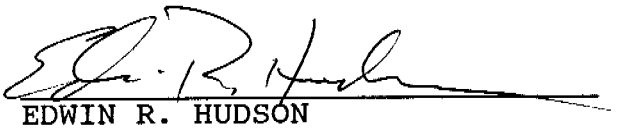
The certified question should be answered in the negative for reasons set forth herein.

However, even without considering the certified question, the decision of the lower court should be affirmed because the petitioner failed to plead and failed to prove that its alleged loss of access, and alleged resultant business damages, were caused by "the denial of the use of the property taken," i.e., parcel 142, which was that property which was identified in the petition in eminent domain and which was the sole subject of the proceeding below.

As set forth above, the decision of the appellate court determining that the trial court erred, as a matter of law, in failing to grant the City's motion for directed verdict allowing no business damages should be affirmed. Resolution of the certified question is not required or relevant to this determination.

Respectfully submitted,

HENRY, BUCHANAN, MICK
HUDSON & SUBER, P.A.



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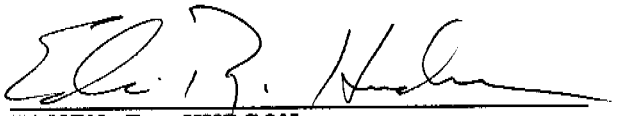
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOE W. FIXEL, 211 South Gadsden Street, Tallahassee, FL 32301, ALAN E. DeSERIO, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, 777 South Harbour Island Boulevard, Ste. 900, Tampa, FL 33602, and ROBERT SCANLON, Assistant Attorney General, Department of Legal Affairs, The Capitol PL-01, Tallahassee, FL 32399-1050, this 12th day of October, 1993.



EDWIN R. HUDSON

SUPREME COURT OF FLORIDA

WEAVER OIL COMPANY,

Petitioner,

vs. CASE NO. 81,917

CITY OF TALLAHASSEE,

Respondent.
_____/

APPENDIX TO THE ANSWER BRIEF OF RESPONDENT, CITY OF TALLAHASSEE

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teenth Judicial Circuit, Claudia R. Isom, J., from considering motion for attorney fees. The District Court of Appeal held that circuit court had jurisdiction to consider motion for attorney fees dealing with postjudgment proceedings, though amended final judgment did not reserve jurisdiction, since attorney fees motion was filed subsequent to hearing on rehearing motion, and could not have been ruled upon in order addressed to matters presented at rehearing.

Petition denied.

Costs ⇐197

Trial court had jurisdiction to consider motion for attorney fees dealing with postjudgment proceedings, though amended final judgment did not reserve jurisdiction; since attorney fees motion was filed subsequent to hearing on rehearing motion, it could not have been ruled upon in order addressed to matters presented at rehearing.

James R. Louth, pro se.

Roger V. Rigau of Rigau & Rigau, P.A., Tampa, for Mariellen Power Louth.

PER CURIAM.

The petitioner seeks the issuance of a writ of prohibition to prevent the trial court from considering a motion for attorney's fees. The petitioner contends that since the amended final judgment did not reserve jurisdiction for the consideration of the fees motion, the trial court lost jurisdiction to consider and rule upon the motion. *See Frisard v. Frisard*, 468 So.2d 399 (Fla. 4th DCA 1985); *Frumkes v. Frumkes*, 328 So.2d 34 (Fla. 3d DCA 1976).

This case is factually distinguishable from those relied upon by the petitioner. Here, the attorney's fees motion is strictly limited to payment for matters related to the rehearing. Since the attorney's fees motion was filed subsequent to the hearing on the rehearing motion, it could not have been ruled upon in the order addressed to the matters presented at the rehearing. Accordingly, the trial court has the jurisdiction to consider the motion for attorney's fees dealing with postjudgment proceedings. We deny the petition.

HALL, A.C.J., and THREADGILL and PATTERSON, JJ., concur.

CITY OF TALLAHASSEE, Appellant,

v.

William W. BOYD, Weaver Oil Company, et al.

No. 91-810.

District Court of Appeal of Florida, First District.

Feb. 17, 1993.

Rehearing Denied May 14, 1993.

City brought eminent domain action condemning landowner's property as part of widening of public road. The Circuit Court, Leon County, N. Sanders Sauls, J., entered judgment on jury verdict awarding business damages to landowner, and city appealed. The District Court of Appeal held that landowner could not recover statutory business damages for loss of access which was not due to taking of its property, but to construction of traffic control island on existing public right-of-way.

Reversed and remanded with instructions.

Shivers, Senior Judge, dissented and filed opinion.

1. Eminent Domain ⇐107

"Business damages," in eminent domain action, are lost profits attributable to reduced profit-making capacity of business caused by taking of portion of realty or improvements thereon and are considered

matter of statutory l
F.S.A. § 73.071(3)(b).

See publication Word for other judicial con definitions.

2. Eminent Domain ⇐9

"Severance damages measured by reduction in ing property and are cons of just compensation for private property pursuan stitution. West's F.S.A. § 6(a).

See publication Word for other judicial con definitions.

3. Eminent Domain ⇐1

No taking occurs wh action reduces flow of tr road as landowner has no continuation or maintenan past property.

4. Eminent Domain ⇐1

Landowner was not e ry business damages in city's taking of its propert public road, even though ness was reduced as resu ing; loss of access was no use of specific property petition and acquired in proceedings, but, rather, fic control island which way of business which w existing public right-of-wa § 73.071(3)(b).

Edwin R. Hudson of Mick & English, P.A., Ta pellant.

Alan E. DeSerio of Gaylord, Wilson, Ulmer, Tampa, Joe W. Fixel, and hassee, for appellees.

PER CURIAM.

The City of Tallahasse final judgment entered awarding business dam Weaver Oil Company (W ing determined that App

matter of statutory largesse. West's F.S.A. § 73.071(3)(b).

See publication Words and Phrases for other judicial constructions and definitions.

2. Eminent Domain ⇐95

"Severance damages" are generally measured by reduction in value of remaining property and are considered to be part of just compensation for public taking of private property pursuant to Florida Constitution. West's F.S.A. Const. Art. 10, § 6(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Eminent Domain ⇐106

No taking occurs where governmental action reduces flow of traffic on abutting road as landowner has no property right in continuation or maintenance of traffic flow past property.

4. Eminent Domain ⇐106

Landowner was not entitled to statutory business damages in connection with city's taking of its property for widening of public road, even though access to its business was reduced as result of that widening; loss of access was not result of loss of use of specific property described in city's petition and acquired in eminent domain proceedings, but, rather, was result of traffic control island which obstructed driveway of business which was constructed on existing public right-of-way. West's F.S.A. § 73.071(3)(b).

Edwin R. Hudson of Henry, Buchanan, Mick & English, P.A., Tallahassee, for appellant.

Alan E. DeSerio of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, Tampa, Joe W. Fixel, and A.J. Spalla, Tallahassee, for appellees.

PER CURIAM.

The City of Tallahassee (City) appealed a final judgment entered on a jury verdict awarding business damages to Appellee Weaver Oil Company (Weaver Oil). Having determined that Appellees failed to allege a basis for an award of statutory business damages, we reverse and remand with instructions for the trial court to enter a directed verdict and a judgment allowing no business damages. *See* Section 73.071(3), Florida Statutes (1989); *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla.1989).

This case originated as an eminent domain action wherein the City condemned certain real property as part of the widening of Ocala Road. Parcel 142 is a 14–foot wide, 176–foot long strip of land bordering the Ocala Road right-of-way. Weaver Oil leased the parent property, from which Parcel 142 was taken, and operated a gas station/convenience store doing business as Hogly Wogly. The property is located at the southeastern corner of Ocala Road and Tennessee Street. The City's Ocala Road project and related construction resulted in the following: 1) Parcel 142 was taken, allowing the widening of Ocala Road and the right-of-way. 2) The Ocala Road entrance to the Weaver Oil leasehold was widened from about 72 feet to 91 feet. 3) A utility pole was relocated and a portion of the curb and grass traffic control island at the southeastern corner of Ocala Road and Tennessee Street was reconstructed on existing public right-of-way, not on the land acquired by condemnation. 4) The reconstruction of the traffic control island caused that portion of public right-of-way available for Weaver Oil's use, as the westerly of two Tennessee Street entrances, to be reduced from 44 feet to 27 feet at its narrowest point, although greater width was maintained at the mouth of the entrance. The easterly entrance on Tennessee Street was undisturbed.

Prior to the trial, the City entered into a Stipulated Partial Final Judgment with the fee title owner and Weaver Oil, whereunder the City agreed to pay $77,300 "in full payment for the property (designated Parcel Nos. 142, 742 herein) taken and for all other damages of any nature, with the exception of statutory business damages and attorney's fees and costs." Parcel 742 was a temporary construction easement. That agreement was approved by the trial

court on February 1, 1991, and recognized that the sole unresolved issue was statutory business damages claimed by Weaver Oil pursuant to section 73.071(3)(b), Florida Statutes (1989).

Throughout the proceedings below, Weaver Oil asserted its entitlement to business damages as a result of an alleged loss of access caused by the narrowed westerly Tennessee Street entrance. There was testimony that the westerly entrance was the main entrance. The City contended that business damages were not recoverable for a loss of access unless that loss was attributable to the loss of use of the physical property condemned, Parcel 142, and that alleged damages resulting from the reconstruction of the traffic control island were not recoverable because the construction occurred on existing right-of-way.

The City objected to the requested jury instructions and proposed verdict of Weaver Oil and requested its own, based on the language in section 73.071(3)(b). Over the City's objections, the trial court used Weaver Oil's proposed verdict form and granted an instruction that Weaver Oil was entitled to be compensated for claimed business damages resulting from the alleged loss of access caused by the narrowing of the westerly Tennessee Street entrance, without the requirement that the loss result from the denial of the use of the physical property so taken.

At the conclusion of Weaver Oil's case-in-chief, the City moved for a directed verdict, which was denied. At the conclusion of the trial, the City renewed its motion for a directed verdict and alternatively moved for judgment non obstante veredicto, which motions were denied. The jury returned a verdict finding business damages of $94,000 and judgment was entered on that verdict.

Where appropriation of less than the entire property is sought, as occurred here, section 73.071(3)(b) requires the jury to determine the amount of compensation to be paid for "any damages to the remainder caused by the taking, including, ... the probable damages to such business which the denial of the use of the property so taken may reasonably cause; ..." In *Division of Admin., Dep't of Transp. v. Ness Trailer Park, Inc.*, 489 So.2d 1172, 1180–81 (4th DCA), *rev. den.*, 501 So.2d 1281 (Fla. 1986), the appellate court recognized that "[s]everance and business damages are both available in appropriate cases" pursuant to section 73.071(3)(b), so long as an award of both will not result in a duplicative recovery. The City seeks reversal of the trial court's decision, on the grounds that damages for loss of access are limited to severance damages, and that the parties' stipulation settled any such claim.

[1, 2] "Business damages" are "in the nature of lost profits attributable to the reduced profit-making capacity of the business caused by a taking of a portion of the realty or the improvements thereon," *LeSuer v. State Road Dep't*, 231 So.2d 265, 268 (Fla. 1st DCA 1970), and are considered a matter of statutory largesse. *Tampa–Hillsborough County Expressway Auth'ty v. K.E. Morris Alignment Service*, 444 So.2d 926, 928 (Fla.1983); *Ness Trailer Park*, 489 So.2d at 1180. "Severance damages," on the other hand, are generally measured by "the reduction in value of the remaining property." *Kendry v. Div. of Admin., Dep't of Transp.*, 366 So.2d 391, 393 (Fla.1978); *Mulkey v. Div. of Admin., Dep't of Transp.*, 448 So.2d 1062, 1065 (Fla. 2nd DCA 1984). Severance damages "are considered to be a part of the just compensation to be given for public taking of private property," pursuant to the Florida Constitution. *Ness Trailer Park*, 489 So.2d at 1180; *Daniels v. State Road Dep't*, 170 So.2d 846, 851 (Fla.1964). *See* Fla. Const. art. X, § 6(a).

We agree that severance damages are not an issue in the case sub judice because the parties stipulated to a partial final judgment resolving that question. The issue is whether the trial court erred in not granting the City's motions for a directed verdict or judgment n.o.v. on Weaver Oil's claim of statutory business damages resulting solely from the alleged taking of access rights on Tennessee Street. The broader legal question is whether the restriction of access along the northerly boundary of

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Weaver Oil's property constituted a taking through denial of the use of "property" pursuant to section 73.071, for which business damages are awardable.

The City argues the prevailing law precludes recovery of business damages for a loss of access unless the physical property that provided the access is taken. Parcel 142 was not used in the construction of the redesigned and narrowed entrance that fronted on Tennessee Street, and no testimony or evidence was presented suggesting otherwise. The driveway at the westerly entrance on Tennessee Street, and the construction that caused the driveway to be narrowed, do not lie on Parcel 142 or on any other real property leased by Weaver Oil, but on property that was and still is public right-of-way.

Weaver Oil relies on decisional law holding governmental action causing a substantial loss of access to one's property is compensable, even though the physical property is not appropriated. *See, e.g., Tessler,* 538 So.2d at 849; *State Dep't of Transp. v. Lakewood Travel Park, Inc.,* 580 So.2d 230, 233 (Fla. 4th DCA 1991) ("access" is a property right in Florida). In *Tessler,* the property owner claimed damages arising from construction of a retaining wall along the main thoroughfare providing access to the owner's business, a change that necessitated customers' traveling a circuitous route to get to the business.

[3] The Florida Supreme Court acknowledged the right to be compensated in an inverse condemnation proceeding where "governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself." *Id.* 538 So.2d at 849. No taking occurs where governmental action reduces the flow of traffic on an abutting road, because "a landowner has no property right in the continuation or maintenance of traffic flow past the property." *Division of Admin. v. Capital Plaza, Inc.,* 397 So.2d 682, 683 (Fla.1981); *State Dep't of Transp. v. Stubbs,* 285 So.2d 1, 4 (Fla.1973). The court in *Tessler* noted "[t]he extent of the access which remains after a taking is properly considered in determining the amount of the compensation. In any event, the damages which are recoverable are limited to the reduction in value of the property which was caused by the loss of access." 538 So.2d at 849. That language essentially articulates the test for severance damages. *Mulkey; Kendry.* Appellees did not pursue that avenue here, but instead sought statutory business damages in an eminent domain action.

The court in *Tessler* considered only the question of whether the restriction of access may constitute a taking sufficient to support an award of severance damages. Significantly, that court distinguished a claim for business damages, which "continue to be controlled by section 73.071." *Id.* 538 So.2d at 849–50. That is, the right to business damages is not constitutionally based, but instead depends on legislative authorization. *Department of Agric. & Consum. Serv. v. Mid-Florida Growers, Inc.,* 570 So.2d 892, 899 (Fla.1990); *Morris Alignment,* 444 So.2d at 928; *Jamesson v. Downtown Devel. Auth'ty,* 322 So.2d 510, 511 (Fla.1975); *City of Tampa v. Texas Co.,* 107 So.2d 216 (2d DCA 1958), *cert. dism.,* 109 So.2d 169 (Fla.1959).

[4] At the heart of the case sub judice, both at trial and on appeal, is disagreement over whether the alleged restriction in access meets the statutory standard for business damages resulting from "denial of the use of the property so taken." *Tessler* did not expressly resolve that question, but merely distinguished business damages as subject to the statute. From our reading of *Tessler,* we are convinced that "*Tessler* does not appear to create any right to business damages attributable to a loss of access as compared to a loss of physical property." *State Dep't of Transp. v. Weggies Banana Boat,* 576 So.2d 722, 725 (2d DCA 1990) (Altenbernd, J., concurring), *rev. den.,* 589 So.2d 294 (Fla.1991). In the context of argument on the City's motion for a directed verdict at trial, Appellees acknowledged that "[t]he real property taken is not the issue here." The City's position is strengthened even further by the rule of construction providing that "any

ambiguity in section 73.071(3)(b) should be construed against the claim of business damages, and such damages should be awarded only when such an award appears clearly consistent with legislative intent." *Morris Alignment*, 444 So.2d at 929.

Appellees' reliance on *Glessner v. Duval County*, 203 So.2d 330 (Fla. 1st DCA 1967) is misplaced because of key factual differences. In that case, the owner had acquired a perpetual easement over another person's lands as part of the purchase of the adjoining property. The owner's claim for business damages was based solely on governmental interference with the owner's easement of access over another's lands, thereby cutting off the owner's right of access to the property on which the business was conducted. The property over which the easement had been acquired was specifically identified in the petition. In the instant case, however, the loss of access and business damages claimed by Weaver Oil did not result from the loss of use of the specific property described in the petition and acquired in the eminent domain proceedings. In fact, the obstruction that narrowed the driveway was constructed by the City on existing public right-of-way. Our holding in *Glessner* was based squarely on the well-established principle that the interest in the dominant tenement in an easement is a property interest. Thus, the governmental interference with the businessman's property fell within the plain meaning of section 73.071(3)(b). *See id.* at 332 & 335; *Walters v. State Road Dep't*, 239 So.2d 878 (Fla. 1st DCA 1970).

Ness Trailer Park is distinguishable as well, for the business damages portion of that case dealt primarily with the issue of whether the award of business damages was duplicative of the trial court's award of severance damages. *Id.*, 489 So.2d at 1175. That is unlike the case here, because the restriction of the right of access in *Ness Trailer Park* was caused at least partly by an actual taking of a portion of the appellee's property. *Id.* at 1174.

Appellees relied on the language in *Stubbs*, 285 So.2d at 2, in which the Florida Supreme Court noted that the rationale for awarding compensation for loss of access in eminent domain proceedings is that " 'property' is something more than a physical interst [sic] in land." Through "a gradual process of judicial liberalization," the concept of "property" has embraced "an incorporeal interest such as the acquisition of access rights." *Id.* *See* Stoebuck, "The Property Right of Access Versus the Power of Eminent Domain," 47 *Tex.L.Rev.* 733 (1969).

We find the quoted language from *Stubbs* does not afford Appellees a basis of relief here, however, because of the subsequent language from the same court in *Tessler* acknowledging the right compensation through an inverse condemnation proceeding when governmental action substantially diminishes access to one's property, even absent any physical appropriation of the property itself. 538 So.2d at 849. As we recognized previously, the *Tessler* court expressly stated that section 73.071 still controls business damages in an eminent domain action. *Id.* at 849–50.

Nevertheless, because the disputed language in *Tessler* is arguably susceptible to other interpretations, we certify the following question to the Florida Supreme Court:

> 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?

The rules of statutory construction, and the supporting decisional law, compel us to hold that the trial court erred, as a matter of law, in failing to grant the City's motion for a directed verdict, and in subsequently sending to the jury the determination of business damages.

REVERSED and REMANDED, with instructions.

ERVIN and MINER, JJ., concur.

SHIVERS, DOUGLASS B., Senior Judge, dissents with written opinion.

SHIVERS, Senior Jud

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SHIVERS, Senior Judge, dissenting.

I would affirm the judgment of the trial court. The City appealed a final judgment entered on a jury verdict awarding statutory business damages to Appellee Weaver Oil. *See* section 73.071, Florida Statutes (1989); *Tessler*, 538 So.2d at 846.

In its Answer, Weaver Oil alleged and claimed business damages caused by the substantial impairment of its right of access across existing public right-of-way that served as a portion of one of its two Tennessee Street driveways. At trial and on appeal, Weaver Oil never asserted that business damages were caused by the loss of use of the physical property described in the petition and acquired by the City. The City argues that the alleged business damages must be demonstrated to have resulted from the loss of use of Parcel 142, the property along Ocala Road that is described in the First Amended Petition in Eminent Domain.

It follows that if the City is correct, then the trial court should have granted the motion for a directed verdict, and the majority opinion is correct in reversing and remanding. However, if Weaver Oil is correct in stating that section 73.071(3), Florida Statutes (1989), permits a party to recover business damages caused also by factors other than the denial of the use of the physical property described in the petition, then affirmance of the order denying the motion for a directed verdict would be proper, and a second issue would be raised as to whether competent substantial evidence supports the jury's verdict.

Section 73.071(3)(a) provides that in eminent domain trials, "[t]he jury shall determine solely the amount of compensation to be paid, which compensation shall include ... [t]he value of the property sought to be appropriated." Where less than the entire property is to be appropriated, as occurred here, the statute requires the jury to determine compensation for "any damages to the remainder caused by the taking, including, ... the probable damages to such business *which the denial of the use of the property so taken* may reasonably cause; ..." Section 73.071(3)(b) (emphasis added). In *Ness Trailer Park*, 489 So.2d at 1180–81 the Fourth District Court recognized that "[s]everance and business damages are both available in appropriate cases" pursuant to section 73.071(3)(b).

Weaver Oil maintains that the impairment of an owner's access to the abutting roadway may serve as the basis for both severance and business damages.[1] The City contends that the statutory language about "the property so taken" refers to the physical land only. However, in *Stubbs*, 285 So.2d at 1, the Florida Supreme Court recognized that property can be something more than just a physical interest in land.

Referring to *Stubbs*, the Supreme Court in *Tessler* acknowledged the "gradual process of judicial liberalization of the concept of property ... to include the 'taking' of an incorporeal interest such as the acquisition of access rights resulting from condemnation proceedings." 538 So.2d at 848. *Tessler* further indicates that "the right of access is a property right which appertains to the ownership of land." *Id.* Weaver Oil asserts that *Tessler* stands for the proposition that a claim for business damages is permitted under section 73.071(3)(b), when the statutory criteria are established and the damages to the business arise from the denial of the right of access so taken. It is argued that Appellees proved, by competent substantial evidence at trial, that the City's reconstruction activities within the existing right-of-way on Tennessee Street constituted a "taking" due to the substantial impairment of Weaver Oil's easement of access. That the remaining access is no longer fully suitable for the use for which the property was being utilized seems to inhere in the jury's verdict in favor of Weaver Oil.

It is a fundamental rule of statutory construction that a court must endeavor to avoid giving section 73.071 an interpretation that will lead to an absurd result.

1. Severance damages were eliminated as an issue here pursuant to the Stipulated Partial Final Judgment.

Morris Alignment Serv., Inc., 444 So.2d at 927. Weaver Oil contends that the City's interpretation of "property" only as physical land leads to such an absurd and unfair result. It is argued that a governmental body could erect, within the abutting roadway, a barrier effectively landlocking an owner's property and business. Although the owner could allege a taking of the "property" right of access to claim severance damages to the remaining land, the taking of the "property" in the form of an easement of access could not, under the City's interpretation, justify a claim of statutory business damages based on "denial of the use of the property so taken."

Weaver Oil asserts that this unintended result is avoidable if several of our decisions are followed, beginning with *Glessner*, 203 So.2d at 330, which the majority opinion attempts to distinguish on the facts. In that case, the owner's claim for damages was based solely on governmental interference with a portion of his perpetual easement of access over another person's lands, thereby cutting off the owner's right of access to the property on which he conducted business. As in the City's reconstruction activities on Tennessee Street in the case sub judice, no land was taken from the owner in *Glessner*. We reversed the trial court's denial of the opportunity for the owner to present his claims for severance damages to the lands on which the business was located, and statutory business damages for the damage to the business. *Id.* at 334–35. *Glessner*, which was decided pursuant to a predecessor statute, is consistent with the more recent Florida decisions enlarging the definition of property to include rights of access, and it supports the argument presented by Weaver Oil.

Weaver Oil relies also on *Walters*, 239 So.2d at 878, in which the condemnor took the front 51 feet of the owner's property for the construction of a drainage ditch. Prior to the taking, the owner operated a store, and vehicles could drive in to park from the street at any point along the frontal property line. The taking of the strip of land did not cause the problem of which the owners complained, and the trial court refused to permit the jury to consider and award business damages. We reversed, finding that the owner was entitled to recover both severance and business damages. *Id.* at 882. Arguably, however, *Walters* is distinguishable in that the owner's physical land was condemned in the action that led to claims for both kinds of damage. In *Bryant v. Dep't of Transp.*, 355 So.2d 841, 843 (Fla. 1st DCA 1978), we acknowledged by implication that the owner's claims for severance and business damages were predicated on the difficulty of getting on and off the remaining land. *See Fla. Eminent Domain Pract. & Proc.*, § 9.28 (4th ed. 1988).

The City relies in part on the concurring opinion in *Weggies Banana Boat*, 576 So.2d at 722, where a property owner alleged that the state's modification of the highway adjacent to the place of business had resulted in a 23-foot wall and roadway obliterating the visual and physical accessibility of motorists passing the premises. The jury determined that the owner was not entitled to compensation for claimed business damages, and the Second District Court held that the evidence supported the jury's decision. In dicta, the appellate court noted that "damages relating to access and visibility are more akin to severance damages than to business damages, ..." *Id.* at 724. The City asserts that if Appellees have any claim at all, it lies in the form of severance damages that should be presented in an inverse condemnation proceeding, with evidence of a reduction in value of the property resulting from the diminution of access. The City points to the following language from *Weggies Banana Boat*: "*Tessler* does not appear to create any right to business damages attributable to a loss of access as compared to a loss of physical property." *Id.* at 725. Weaver Oil responds that the concurring opinion interpreted the *Tessler* language out of context.

As the majority opinion notes, business damages are a matter of statutory largesse, *see Ness Trailer Park*, and arise from the lost profit-making capacity of the business caused by a taking of a portion of

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Tessler is the seminal decision addressing the issue presented here. In that case, the county planned to construct a retaining wall in existing public right-of-way directly in front of the owners' commercial property, resulting in the blocking of all access to, and visibility of, the business from one road, a major thoroughfare. The only remaining access would be an indirect winding route of about 600 yards through a predominantly residential neighborhood. The Fourth District Court affirmed the finding of the trial court that a case of inverse condemnation had been proved because the owners were denied "suitable access" to their property as a result of the retaining wall. *See* 538 So.2d at 847; *Palm Beach County v. Tessler,* 518 So.2d 970, 972 (1988). The question presented to the Florida Supreme Court was when is a property owner entitled to compensation for loss of access to the property caused by governmental intervention, when there has been no taking of the land itself. Substantial portions of the parties' briefs in the instant case attempt to interpret what the court meant in *Tessler.* The Supreme Court addressed the evidentiary and procedural requirements for presenting a claim for damages caused by loss of access:

> There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary that there 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 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. The loss of the most convenient access is not compensable where other suitable access continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. *The extent of the access which remains after a taking is properly considered in determining the amount of the compensation. In any event, 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, 538 So.2d at 849 (emphasis added). Thus, the right to be compensated through inverse condemnation for severance damages relates to instances where governmental action results in a substantial loss of access, although the property itself was not physically appropriated. Weaver Oil did not present evidence on reduction of value of the property to support a claim for severance damages. Rather, the present claim is based on the Supreme Court's point in *Tessler* distinguishing business damages, which "continue to be controlled by section 73.071, Florida Statutes." *Id.* at 849–50. I understand that language to mean that Weaver Oil's success in presenting a claim for business damages for alleged impairment of its property right of access depends on its ability to meet the statutory criteria. In *Williams v. Dep't of Transp.,* 579 So.2d 226, 229 (Fla. 1st DCA 1991), we held that section 73.071(3) "authorizes an award of severance and business damages for a taking of less than the whole of business property." I find no inconsistency between the *Tessler* holding and our statement in *Glessner,* 203 So.2d at 335, that so long as the two types of damages are present and are legally distinguishable in a given situation, a claim for both business and severance damages can be made. *Ness Trailer Park,* 489 So.2d at 1181. As to the statutory requirements, the real dispute below involved whether "property" was "taken," not whether Weaver Oil is "an established business of

more than 5 years' standing." Section 73.071(3)(b).

In affirming the holding that the walling off of the owners' property and the resulting circuitous alternative route amounted to a taking, the *Tessler* court distinguished an inverse condemnation proceeding from other condemnation proceedings:

> [I]n 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 the 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. Should it be determined that a taking has occurred, the question of compensation is then decided as in any other condemnation proceeding.

Id. 538 So.2d at 850; *see Department of Agric. & Consum. Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla.), *cert. den.*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). Whereas the governmental body institutes the ordinary condemnation proceeding, the aggrieved property owner or interest holder brings an inverse (or reverse) condemnation proceeding. Although an owner may plead inverse condemnation as a counterclaim in a direct eminent domain proceeding to recover compensation for a taking different from, or greater than, the taking legally authorized and described in the condemnor's petition, *see* Fla.R.Civ.P. 1.170; *Fla. Eminent Domain Pract. & Proc.*, § 13.32, Appellees did not pursue that option here. The issue to be determined here is whether *Tessler* forecloses Weaver Oil from presenting a claim for statutory business damages for alleged impairment of access, where the City's reconstruction of the traffic control island involved no taking of Appellees' land itself.

The City argues that because of the location of its reconstruction activities on existing public right-of-way on Tennessee Street, and the absence of evidence alleging that any loss of access affected Appellees' land named in the petition, the trial court erred in sending the business damages question to the jury and no basis exists for the award. We noted in *Williams*, 579 So.2d at 229, that "both types of damages may be based on overlapping considerations." That might explain why the present facts engendered such vigorous debate over Appellees' entitlement even to present a claim for business damages, as well as disagreement over whether the evidence presented by Weaver Oil could ever provide a basis for such an award.

Weaver Oil argues that the language from *Tessler* quoted in the *Weggies Banana Boat* concurrence must be considered in light of the fact that generally, the owner can claim damages for the value of the property taken as well as damages caused to the remaining property by the loss of the property taken. *See City of Fort Lauderdale v. Casino Realty, Inc.*, 313 So.2d 649, 652 (Fla.1975) (Overton, J., concurring). A relevant consideration in the instant case, however, is that Appellees' easement of access has no real value except to the extent that its presence, or lack thereof, affects the value and use of the land to which it is attached. Although access is property in a very real sense, it cannot be valued by the square foot, as can land. I are not convinced that Appellees could have foreseen the consequences of the City's Ocala Road widening project, especially the reconstruction of the curb and grass traffic control island, upon the accessibility of the westerly Tennessee Street entrance to the business.

Apparently in recognition of that fact, the *Tessler* court indicated that the value of access as property, when taken, is "limited to the reduction in value of the property" to which the access is attached. *See Anhoco Corp. v. Dade County*, 144 So.2d 793 (Fla.1962), wherein the Supreme Court stated: "Ordinarily the measure of damages for the taking of the right of access is the difference between the value of the property with the right attached and its value with the right destroyed." *See* 144 So.2d at 798. Business damages were not an issue in *Tessler*, which arose from an in-

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verse condemnation proceeding and involved severance damages.

Business damages are separate from the usual damages relating to the property itself. *Casino Realty*, 313 So.2d at 657. The statement in *Tessler* that "[b]usiness damages continue to be controlled by section 73.071, Florida Statutes" is not, in my opinion, an exclusion of business damages where the taking concerns a loss of access rather than land. Rather, it is merely the recognition that the owner, at a valuation trial, still has the burden of proving that the criteria set forth in section 73.071(3)(b) have been met. *Tuttle v. Dep't of Transp.*, 327 So.2d 841 (1st DCA), *aff'd*, 336 So.2d 583 (Fla.1976). That portion of *Tessler* on which the City here, and the concurrence in *Weggies Banana Boat*, rely, appears to mean that when access is taken, the constitutional "full compensation" requirement is met by the payment of the loss in value to the remaining land. The separate claim for business damages resulting from the impairment of access may be presented only when the owner establishes the statutory criteria, as I think Appellees did at trial. Appellees' interpretation of *Tessler* helps to elucidate the Supreme Court's comment that "[s]hould it be determined that a taking [of access] has occurred, the question of compensation is then decided as in any other condemnation proceeding." *Id.* at 850. In that regard, section 73.071(3)(b) specifically provides that the "compensation" to be awarded by the jury shall include the value of the property taken, damages to the remainder, and business damages.

As to the fact that the alleged impairment of access occurred within existing public right-of-way, Weaver Oil claims that fact does not preclude the finding that Appellees suffered a compensable loss of access. The *Tessler* court affirmed the holding that a taking of access had resulted from the county's activity occurring solely within existing right-of-way. *Id.* 538 So.2d at 849–50. Likewise, in *Department of Transp. v. Jirik*, 498 So.2d 1253 (Fla.1986), the taking of access occurred, and the project was entirely within, existing right-of-way. *See Lakewood Travel Park, Inc.*, 580 So.2d at 230. "[E]ven when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easements of access ... from the street or highway appurtenant to their land, and unreasonable interference therewith may constitute a taking ... requiring compensation." *Benerofe v. State Road Dep't*, 217 So.2d 838, 839 (Fla.1969); *see Hughes v. State Bd. of Highway Dirs.*, 80 Idaho 286, 328 P.2d 397 (1958); *Director of Highways v. Kramer*, 23 Ohio App.2d 219, 262 N.E.2d 561 (Ct.App.1970); 29A C.J.S., "Eminent Domain" § 105(2).

Ness Trailer Park arose from a condemnation proceeding. *See* 489 So.2d at 1173. The DOT determined that it was necessary to acquire a land parcel owned by the trailer park (Ness). Ness filed an answer claiming damages for all restrictions of "ingress and egress" as well as special damages for loss of convenient access to the remaining land, reserving the right to claim further damages and compensation. Ness claimed business damages as a result of the loss of the use of the property taken. *Id.* at 1174. The Fourth District Court noted that "any injury to Ness' access was not the result of a blockage occurring on the land taken from him, but of a blockage on the preexisting roadway." *Id.* at 1178. Severance damages were deemed to be unavailable. Counsel for the DOT contested any entitlement to business damages and, alternatively, stipulated to a certain amount if such damages were legally proper. The Fourth District Court answered, in the negative, the question of whether the trial court erred in awarding business damages, in addition to compensation for the land taken. An award for loss of rent was determined to be distinct from damages for reduced value of the remaining land, and the business damages award was affirmed. *Id.* at 1175, 1181. *Ness Trailer Park* supports the position of Weaver Oil that it could present a claim for statutory business damages for impairment of access even though the City's activities occurred beyond the physical property taken.

The City relies also on *Capital Plaza*, 397 So.2d at 682, in which a median sepa-

rating northbound and southbound traffic was constructed within the existing right-of-way. However, nothing was constructed between the property and the abutting roadway. The owner/abutter's easement was not altered and "free unimpeded access" to the property remained. *Id.* at 683; *Department of Transp. v. Palm Beach West, Inc.*, 409 So.2d 1130 (Fla. 4th DCA 1982) (erroneous instruction permitted jury to consider evidence of impairment of access to property due merely to construction of median strip).

Weaver Oil contrasts the instant facts, where the City constructed a raised barrier alleged to have significantly impaired the ability of Appellees' customers to enter the property. Under *Tessler*, impairment of access to an abutting road, where no land is taken, does not constitute a taking unless the property owner proves a substantial diminution of the right of access. *See id.* 538 So.2d at 849. Weaver Oil presented its case-in-chief on precisely that issue. That a taking occurred was, in effect, determined, as a matter of law, by the trial court when it denied the City's motion for a directed verdict. I find Appellees' distinguishing of *Capital Plaza* to be convincing. The evidence presented by Weaver Oil concerned more than inconvenience or a mere change in traffic flow. *Cf. Capital Plaza*, 397 So.2d at 683; *City of Port St. Lucie v. Parks*, 452 So.2d 1089 (4th DCA), *pet. for rev. den.*, 459 So.2d 1041 (Fla. 1984).

Further, Weaver Oil argued that the damage resulting from the configuration of the traffic control island was specific in nature rather than simply a general effect upon the public at large. *Anhoco Corp.* The Supreme Court of Colorado has defined the property right of access as "the right of a landowner who abuts on a street or highway to reasonable ingress and egress." *Department of Highways v. Davis*, 626 P.2d 661, 663 (Colo.1981). Typically, cases where impairment of access to a business is an issue should focus on whether the customers' ability to enter and exit the business property is substantially affected or impaired. Stoebuck, "The Property Right of Access Versus the Power of Eminent Domain," 47 *U.Tex.L.Rev.* 733, 760–61 (1969). Here, the evidence demonstrated that the impact of the government's regulatory activities on Appellees' economically viable use of the property was significant. *Joint Ventures, Inc. v. State Dep't of Transp.*, 563 So.2d 622, 624 (Fla.1990); *Department of Highways v. Interstate-Denver West*, 791 P.2d 1119, 1121 (Colo.1990) (whether land is actually taken is immaterial to question of whether there is substantial limitation of access). That was the guiding premise of the evidence presented by Appellees. *Cf. Florida Audubon Society v. Ratner*, 497 So.2d 672, 676 (3rd DCA 1986), *rev. den.*, 508 So.2d 15 (Fla.1987) (mere incidental impairment of access rights will not sustain a claim for damages).

The City's argument is akin to the position taken by the dissenting judge in the Fourth District Court's *Tessler* decision. Referring to the issue of compensability for alleged damages resulting from construction by Palm Beach County in front of the owner's property, on existing public right-of-way, the writer stated:

> While appellees may suffer a decline in their business as a result of the retaining wall, business damages are strictly a matter of legislative grace, not constitutional imperative. [citations omitted] There is currently no statute providing for business damages where, as in the present case, none of the business owner's property has been taken.

Tessler, 518 So.2d at 973 (Fla. 4th DCA 1988) (Dell, J., dissenting). The language of the Florida Supreme Court in the subsequent *Tessler* decision, affirming the majority opinion of the Fourth District Court, does not expressly preclude an owner from claiming statutory business damages for the denial of use of the property right of access, even where the owner's physical land has not been taken in that location.

I would submit that Appellees proved the City's activities on Ocala Road and Tennessee Street affected their property. Because access is defined under a standard of reasonableness, it was for the trier of fact to determine whether the impairment of access was substantial so as to constitute a

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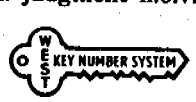
court was correct in de
motion for a judgment n

taking. Stoebuck, *supra*, at 765. I find that competent substantial evidence demonstrates the following: 1) The main entrance to the site was the westerly one on Tennessee Street impaired by the City's project. 2) A main entrance of 40 feet or more was essential for the successful operation of a high-volume fuel retailer like Weaver Oil at that site. 3) The City's construction project reduced the main entrance by approximately 40% to a width significantly less than 40 feet. 4) The decline in customers began with the construction of the project, but even after completion of the work, the customer count continued to decline, resulting in a substantial loss of business. 5) The customer decline was the result of the impairment of access occurring at the main entrance to the site. 6) The remaining access was no longer adequate for the owner's existing use of the site. If find no abuse of discretion and, on that basis, would affirm the order of the trial order denying the City's motion for a directed verdict.

The remaining issue would be whether competent substantial evidence supports the jury verdict awarding business damages to Weaver Oil. It is clear that disputed evidence was presented at trial on the issue of whether the remaining access was suitable for the existing use of the property. The conflict regarding damages was for the jury to resolve, including a determination as to the weight and credibility of the testimony of the expert witnesses. *County of Volusia v. Niles*, 445 So.2d 1043 (Fla. 5th DCA 1984); *Keith v. Amrep Corp.*, 312 So.2d 234 (Fla. 1st DCA 1975). It is not the prerogative of the reviewing court to decide which expert to believe.

Competent substantial evidence supports the jury's verdict in favor of Weaver Oil for statutory business damages, and the amount awarded is supported by the record. *See Tuttle*, 327 So.2d at 843. For the reasons stated above, I find that the trial court was correct in denying the City's motion for a judgment n.o.v.



STUDENT ALPHA ID NUMBER GUJA, Appellant,

v.

The SCHOOL BOARD OF VOLUSIA COUNTY, Florida, Appellee.

No. 92–84.

District Court of Appeal of Florida, Fifth District.

Feb. 26, 1993.

Rehearing Denied April 27, 1993.

High school student appealed from decision of the Volusia County School Board suspending her for possession of marijuana on campus. The District Court of Appeal, Harris, J., held that suspension for admitted possession of marijuana did not violate due process, even though student had been put on notice that administrative hearing would involve her alleged distribution of marijuana on campus rather than mere possession.

Affirmed.

Dauksch, J., filed dissenting opinion.

1. Constitutional Law ⇐318(1)

Due process requirement of administrative hearing is that proceeding must be essentially fair. U.S.C.A. Const.Amends. 5, 14.

2. Constitutional Law ⇐278.5(7)
Schools ⇐177

Suspension of high school student for admitted possession of marijuana did not violate due process, even though student had been put on notice that administrative hearing involved her alleged distribution of marijuana on campus rather than mere possession; student was on notice that disciplinary proceedings involved incident in which marijuana that she had admitted keeping on campus was delivered during

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2035

CITY OF TALLAHASSEE,

Petitioner,

vs.

PARCEL 142, 742

WILLIAM W. BOYD, et al.

Defendants,

_____/

STIPULATED PARTIAL FINAL JUDGMENT

THIS CAUSE having come before this Court upon joint motion for the entry of a Partial Final Judgment by the Plaintiff and the Defendants set forth hereinbelow, and it appearing to the Court that the parties are authorized to enter into such motion, and the Court finding that the compensation to be paid by the Plaintiff is full, just and reasonable for all parties concerned, and the Court being fully advised of the premises, it is therefore:

ORDERED AND ADJUDGED that the Defendants, WEAVER OIL COMPANY, INC., CAROLYN J. CHAPMAN individually, and CAROLYN J. CHAPMAN and JOHN W. CHAPMAN, JR. as Trustees do have and recover of and from the Plaintiff the sum of SEVENTY-SEVEN THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($77,300.00) in full payment for the property (designated Parcel Nos. 142, 742 herein) taken and for all other damages of any nature, with the exception of statutory business damages and attorney's fees and costs.

ORDERED that this Court reserves jurisdiction in this case as to apportionment of the above amounts if necessary.

ORDERED that this court reserves jurisdiction to try the issues of business damages regarding claims of Defendant WEAVER OIL, COMPANY, INC., d/b/a HOGLY WOGLY and to tax reasonable attorneys' fees and costs for all Defendants having an interest in the above parcels.

ORDERED that within 30 days of entry of this Order the Plaintiff shall pay the sum of $48,900 to the Trust Account of A. J. Spalla in payment of this Partial Final Judgment which sum represents the amount of the judgment ($77,300) minus those amounts previously deposited by the Plaintiff pursuant to this court's Order of Taking dated November 23, 1988 ($28,400).

ORDERED that said payment shall be held in the Trust Account of A. J. Spalla for distribution among said Defendants CHAPMANS and WEAVER OIL as agreed by them or placed in an interest bearing account for the benefit of said Defendants until this court apportions the same.

ORDERED that the title to the following described property, to-wit:

Parcel 142

Fee Simple

A portion of that parcel of property described in Official Record Book 1012, Page 1222, and Official Record Book 942, Page 855 of the Public Records of Leon County, Florida, said portion being more particularly described as follows:

Begin at a found one-inch iron pipe marking the intersection of the Southerly right-of-way boundary of State Road 10 (U.S. 90) with the Easterly right-of-way boundary of Ocala Road, said iron pipe also marking the Northwest corner of that parcel of property described in Official Record Book 1012, Page 1222, and Official Record Book 942, Page 855 of the Public Records of Leon County, Florida and lying on a non-tangential curve concave to the Southerly having a radius of 1,352.69 feet; thence Easterly along the arc of said curve, the Southerly right-of-way boundary of State Road 10 and the Northerly boundary of said parcel of property through a central angle of 00 degrees 37 minutes 47 seconds a distance of 14.87 feet (the chord of said curve bears North 61 degrees 47 minutes 43 seconds East a distance of 14.87 feet); thence, leaving said boundary, South 00 degrees 01 minute 24 seconds West a distance of 180.00 feet to a point on the Southerly boundary of said parcel of property and the Northerly boundary of the abandoned Seaboard Airline Railway right-of-way as described in Official Record Book 183, Page 242 of said Public Records, said point lying on a non-tangential curve concave to the Southerly having a radius of 1,482.69 feet; thence Westerly along said boundary and the arc of said curve through a central angle of 00 degrees 30 minutes 45 seconds a distance of 13.26 feet (the chord of said curve bears South 77 degrees 56 minutes 15 seconds West a distance of 13.26 feet) to a found concrete monument marking an intersection of said boundary with the East right-of-way boundary of Ocala Road; thence North 00 degrees 01 minute 10 seconds West North 00 degrees 04 minutes 09 seconds East Deed along said right-of-way boundary and the West boundary of said parcel of property described in Official Record Book 1012, Page 1222 and Official Record Book 942, Page 855 a distance of 175.75 feet (176.75 feet-Deed) to the POINT OF BEGINNING; containing 2,318.81 square feet (0.0532 of an acre), more or less.

The description bearings established by the City of Tallahassee are based on centerline bearings as depicted on Florida Department of Transportation right-of-way Map Number 55514-1601, Ocala Road Extension.

This property description based on the aforementioned deeds and partial field survey of property described in subject deed.

Parcel 742

Temporary Construction Easement

A temporary construction easement lying within that parcel of property described in Official Record Book 942, Page 855, and Official Record Book 1012, Page 1222 of the Public Records of Leon County, Florida, and being more particularly described as follows:

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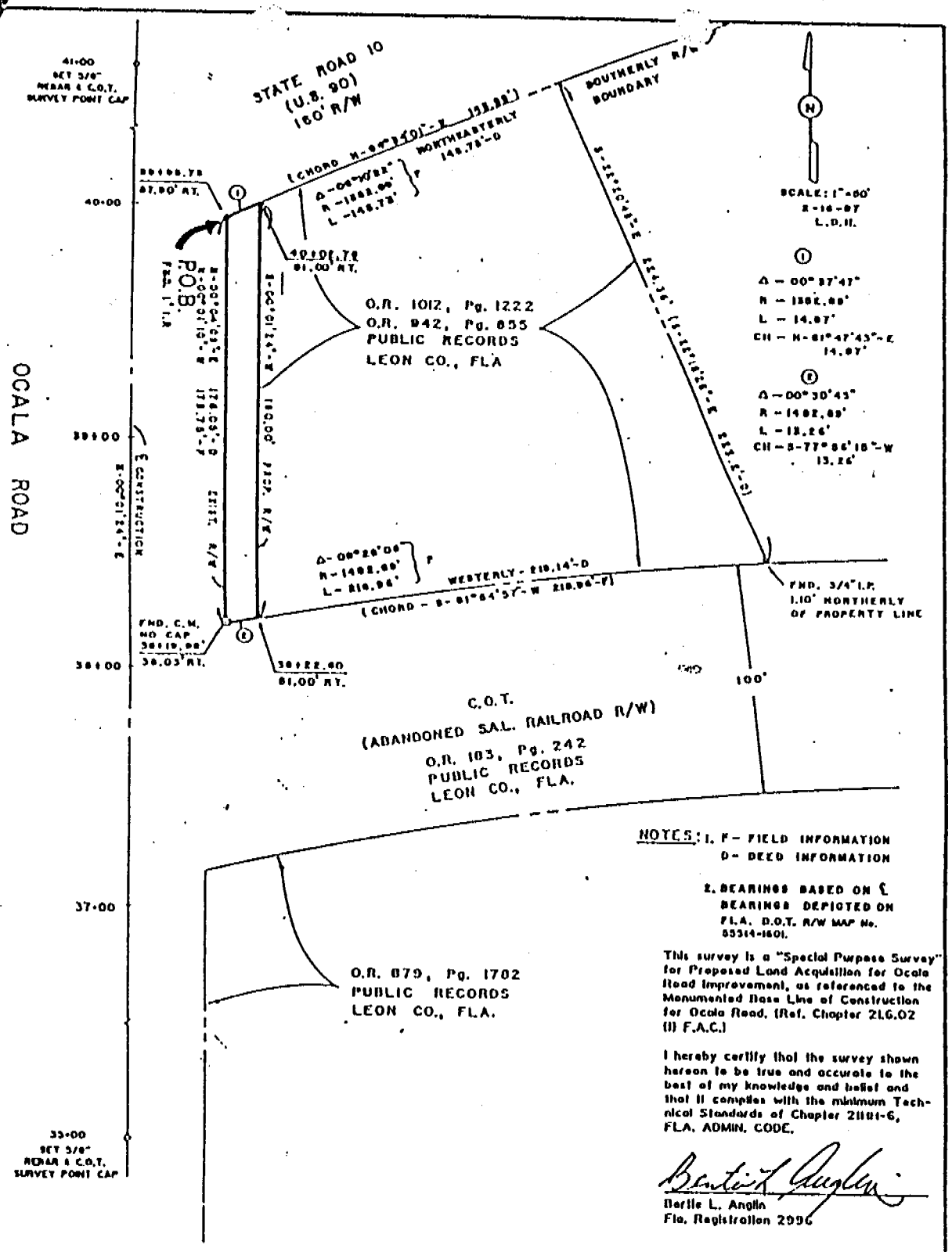
From said POINT OF BEGINNING continue Easterly along the arc of said curve through a central angle of 00 degrees 34 minutes 47 seconds a distance of 14.97 feet (the chord of said curve bears North 78 degrees 28 minutes 59 seconds East a distance of 14.97 feet); thence, leaving said curve, North 10 degrees 52 minutes 23 seconds West a distance of 24.69 feet; thence North 00 degrees 01 minute 24 seconds East a distance of 15.00 feet; thence North 47 degrees 59 minutes 22 seconds West a distance of 13.45 feet; thence South 00 degrees 01 minute 24 seconds West a distance of 51.24 feet to the POINT OF BEGINNING; containing 517.49 square feet (0.012 of an acre), more or less.

The description bearings established by the City of Tallahassee are based on centerline bearings as depicted on Florida Department of Transportation right-of-way Map Number 55514-1601, Ocala Road Extension.

This property description based on the aforementioned deeds and partial field survey of property described in subject deed.



NOTES: 1. F- FIELD INFORMATION
D- DEED INFORMATION

2. BEARINGS BASED ON ℄
BEARINGS DEPICTED ON
FLA. D.O.T. R/W MAP No.
55314-1601.

This survey is a "Special Purpose Survey" for Proposed Land Acquisition for Ocala Road Improvement, as referenced to the Monumented Base Line of Construction for Ocala Road. (Ref. Chapter 21G.02 (I) F.A.C.)

I hereby certify that the survey shown hereon to be true and accurate to the best of my knowledge and belief and that it complies with the minimum Technical Standards of Chapter 21HH-6, FLA. ADMIN. CODE.

Bertie L. Anglin
Fla. Registration 2996

'EXHIBIT A'

OCALA ROAD WIDENING
CHAPMAN PARCEL
ACQUISITION 142

CITY OF TALLAHASSEE
PUBLIC WORKS DEPARTMENT
ENGINEERING DIVISION

3/15/85

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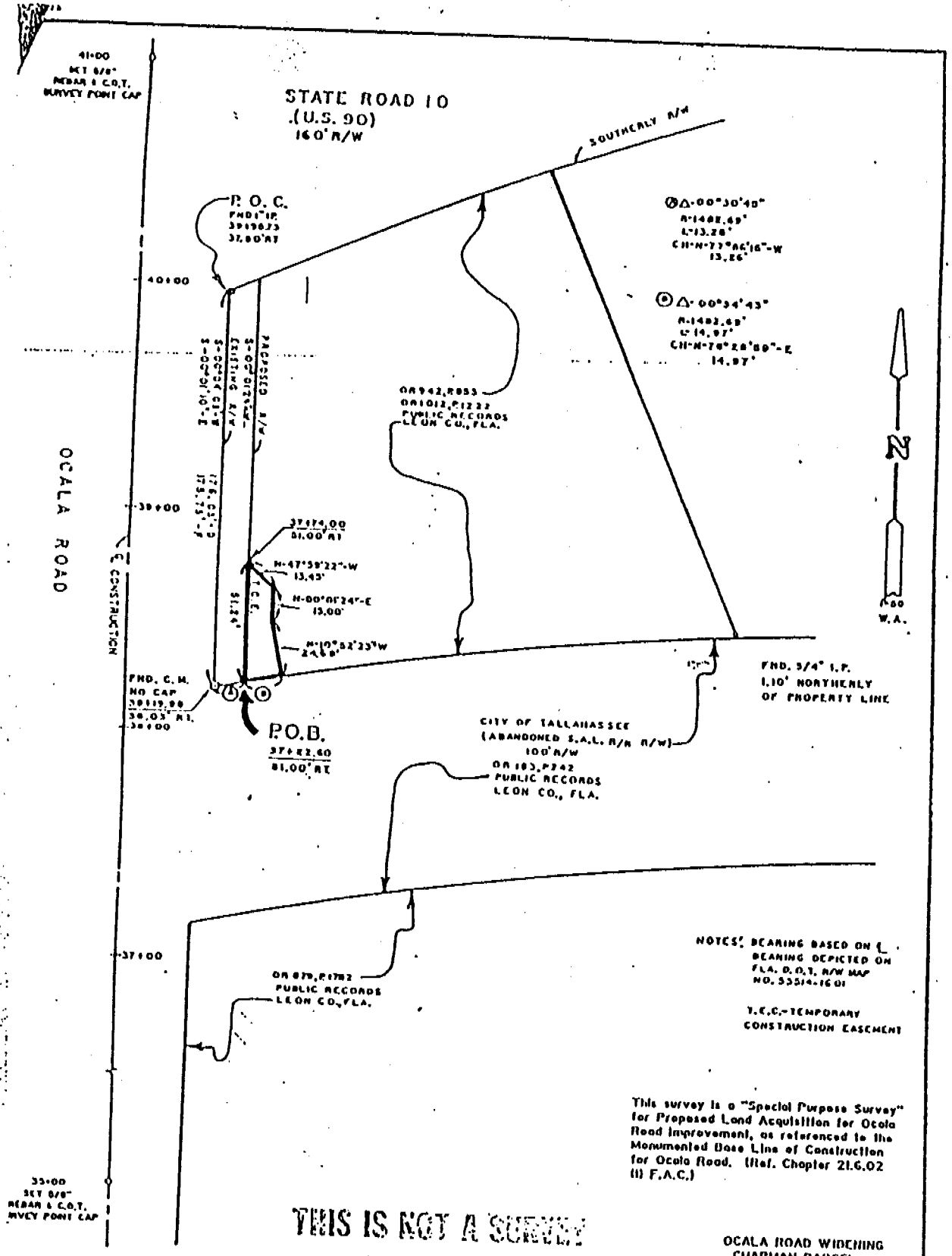

CITY OF TALLAHASSEE

PUBLIC WORKS DEPARTMENT

ENGINEERING DIVISION

BJ 3/23/88

FILE No. _____ O.R. Book _____ Pg. _____ DATE _____

which vested in the Plaintiff pursuant to the Order of Taking dated November 23, 1988, is approved, ratified and confirmed.

DONE AND ORDERED in Tallahassee, Leon County, Florida this 1st day of February, 1991.

W. Dudley Hall
Circuit Court

Copies furnished to:

MOTION

The parties, by and through their undersigned counsel, respectfully move this Court for the entry of the preceding Partial Final Judgment on this 31 day of January, 1991.

Robert A. Mick
ROBERT MICK, ESQUIRE

P.O. Drawer 1049
Tallahassee, Florida 32302

Counsel for Plaintiff
City of Tallahassee

A. J. SPALLA, ESQUIRE

1026 E. Park Avenue
Tallahassee, Florida 32301

Counsel for Defendants Chapman

JOE W. FIXEL, ESQUIRE

211 S. Gadsden Street
Tallahassee, Florida 32301

Counsel for Defendant Weaver Oil Company, Inc.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

CITY OF TALLAHASSEE,

Plaintiff,

CASE NO. 88-2835

PARCEL 142

WILLIAM W. BOYD, et al.,

Defendants.

_____/

FINAL JUDGMENT

THIS CAUSE came on for trial and the jury, having been empaneled and sworn to try what compensation shall be made to the defendant WEAVER OIL COMPANY as business damages and having heard the evidence and charges of this Court, and having retired to consider its verdict, returned the following verdict:

APPENDIX C

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2835

ITY OF TALLAHASSEE,

Petitioner,

PARCEL 142, 742

Vs.

ILLIAM W. BOYD, et al.

Defendants,

VERDICT

WE, the jury, find as follows:

FIRST, that an accurate description of the property taken herein is the following:

FILED IN OPEN COURT
2/7/91
PAUL F. HARTSFIELD
CLERK OF CIRCUIT COURT
BY: [signature]

Parcel 142

Fee Simple

A portion of that parcel of property described in Official Record Book 1012, Page 1222, and Official Record Book 942, Page 855 of the Public Records of Leon County, Florida, said portion being more particularly described as follows:

Begin at a found one-inch iron pipe marking the intersection of the Southerly right-of-way boundary of State Road 10 (U.S. 90) with the Easterly right-of-way boundary of Ocala Road, said iron pipe also marking the Northwest corner of that parcel of property described in Official Record Book 1012, Page 1222, and Official Record Book 942, Page 855 of the Public Records of Leon County, Florida and lying on a non-tangential curve concave to the Southerly having a radius of 1,352.69 feet; thence Easterly along the arc of said curve, the Southerly right-of-way boundary of State Road 10 and the Northerly boundary of said parcel of property through a central angle of 00 degrees 37 minutes 47 seconds a distance of 14.87 feet (the chord of said curve bears North 61 degrees 47 minutes 43 seconds East a distance of 14.87 feet); thence, leaving said boundary, South 00 degrees 01 minute 24 seconds West a distance of 180.00 feet to a point on the Southerly boundary of said parcel of property and the Northerly boundary of the abandoned Seaboard Airline Railway right-of-way as described in Official Record Book 183, Page 242 of said Public Records, said point lying on a non-tangential curve concave to the Southerly having a radius of 1,482.69 feet; thence Westerly along said boundary and the arc of said curve through a central angle of 00 degrees 30 minutes 45 seconds a distance of 13.26 feet (the chord of said curve bears South 77 degrees 56 minutes 15 seconds West a distance of 13.26 feet) to a found concrete monument marking an intersection of said boundary with the East right-of-way boundary of Ocala Road; thence North 00 degrees 01 minute 10 seconds West North 00 degrees 04 minutes 09 seconds East Deed along said right-of-way boundary and the West boundary of said parcel of property described in Official Record Book 1012, Page 1222 and Official Record Book 942, Page 855 a distance of 175.75 feet (176.75 feet-Deed) to the POINT OF BEGINNING; containing 2,318.81 square feet (0.0532 of an acre), more or less.

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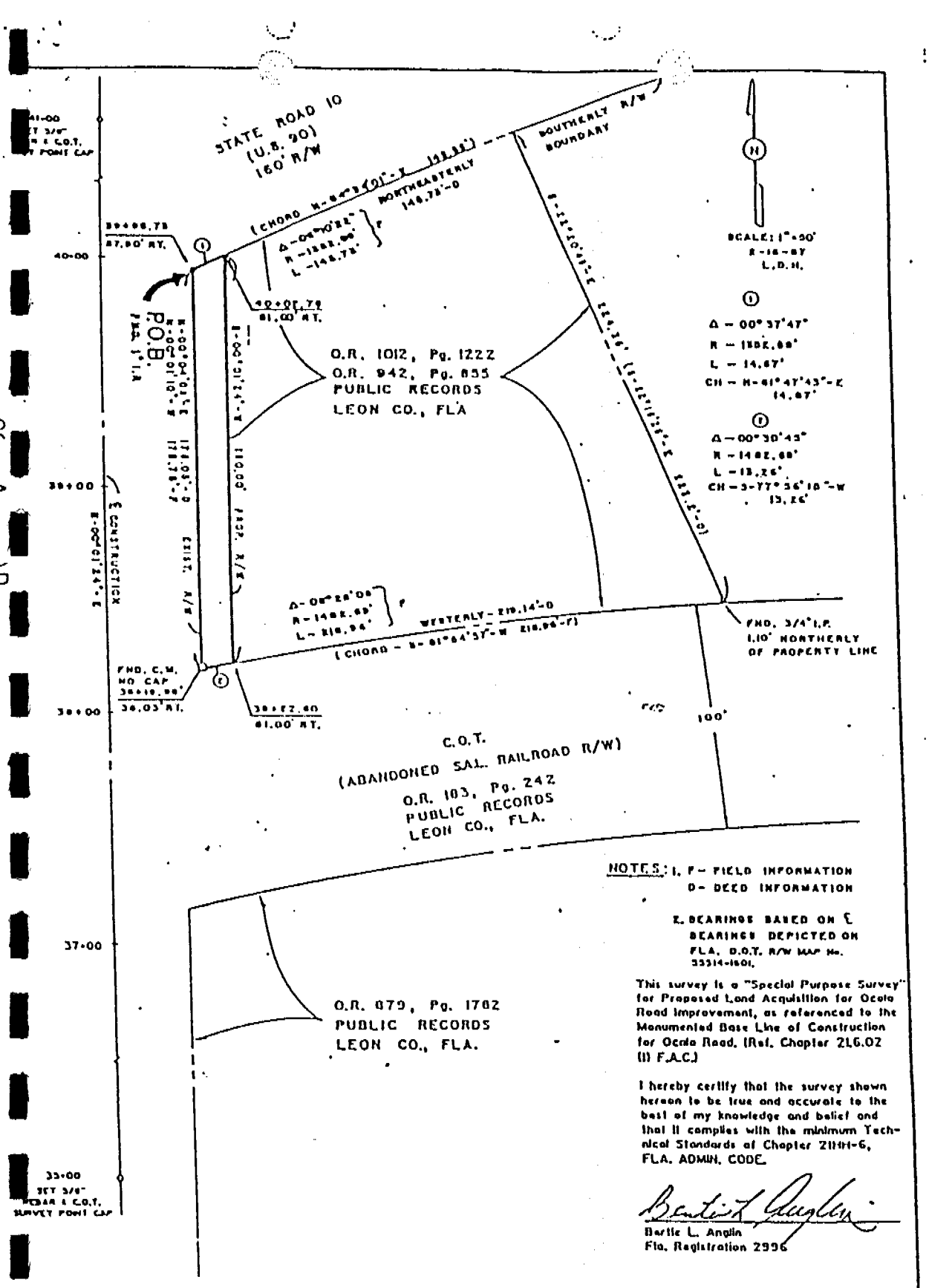

'EXHIBIT A'

OCALA ROAD WIDENING
CHAPMAN PARCEL
ACQUISITION 142

CITY OF TALLAHASSEE

PUBLIC WORKS DEPARTMENT

ENGINEERING DIVISION

3/16/84

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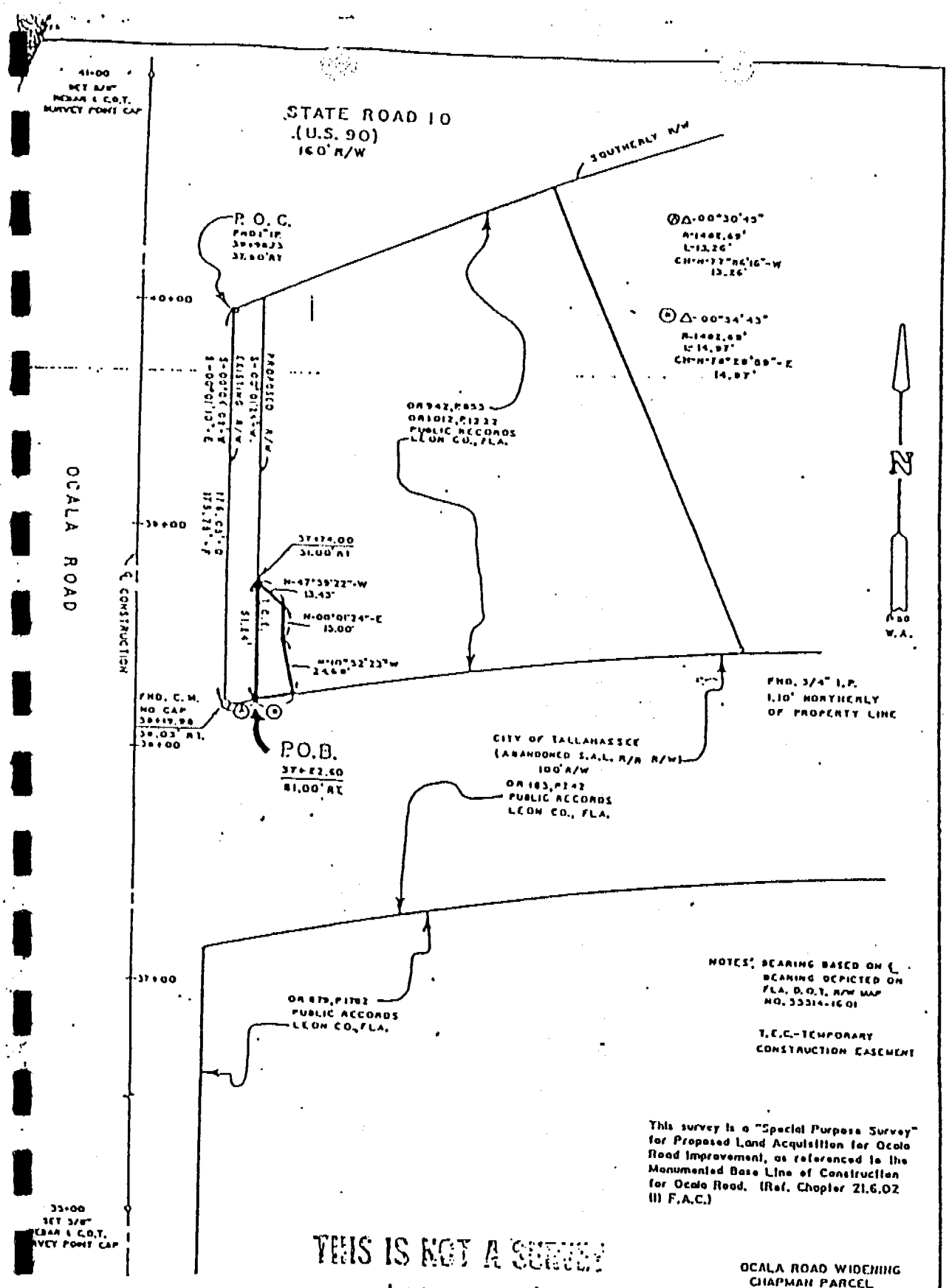


CITY OF TALLAHASSEE

PUBLIC WORKS DEPARTMENT

ENGINEERING DIVISION

RW 3/3/08

FILE No. _____ O.R. Book _____ Pg. _____ DATE _____

SECOND, business damages, if any, for the business owned by Weaver Oil Company, Inc., doing business as Hogly Wogly:

usiness damages $ 94,000

So say we all this 7 day of FEBRUARY, 1991, at Tallahassee, Leon County, Florida.

FORMAN

A true copy
Attest:
Paul F. Hartsfield
Clerk Circuit Court
Leon County, Florida
By Kim S. Tucker
D. C.

IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED that within thirty days of entry to this Final Judgment, the Petitioner, CITY OF TALLAHASSEE, shall deposit the sum of $94,000.00, plus statutory interest, into the Registry of this Court.

CONSIDERED, ORDERED AND ADJUDGED that the Clerk of the above-styled Court is hereby ordered and directed to pay from funds deposited into the Registry of this Court by the Petitioner the sums so stated above to the Trust Account of Joe W. Fixel, P.A.

DONE AND ORDERED Nunc Pro Tunc February 7, 1991, at Leon County, Florida this 28th day of February, 1991.

N. Sanders Sauls
Circuit Judge

Copies furnished to:

Mr. Joe W. Fixel
Mr. A.J. Spalla
Mr. Edwin R. Hudson

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CITY OF TALLAHASSEE, filed 3-4-93

Appellant,

vs. **DOCKET NO.: 91-00810**

WILLIAM W. BOYD, et al.,

Appellee.

MOTION FOR REHEARING AND CLARIFICATION

The Appellee, WEAVER OIL COMPANY, pursuant to Fla.R.App.Pro. 9.330 and 9.331, submits the following motion for the consideration of the Court, and in support of this motion would state the following:

1. In its decision rendered on February 17, 1993, this Court, in describing the reconstruction occuring as part of the Ocala Road Project, incorrectly states that the "curb and grass traffic control island at the southeastern corner of Ocala Road and Tennessee Street was reconstructed on existing public right of way, not on the land acquired by condemnation." (Opinion,p.2). The City acquired a fourteen foot wide strip of land along Ocala Road extending from the south property line up to Tennessee Street. This effectively took fourteen feet of Tennessee Street frontage. On that fourteen foot strip taken, including the fourteen feet of frontage on Tennessee Street, the curb and grass device was reconstructed and now included a "bullnose." The "bullnose" was constructed, in large part, in the area of the fourteen feet of Tennessee Street frontage lost as a result of the taking, and encroached into owner's pre-existing driveway. (See reproduced diagram A-1, attached

to this motion.) In other words, the improvement which diminished the owner's Tennessee Street access - the curb and grass "bullnose" - was partially constructed on the land taken. But for the taking and use of fourteen feet of land along Tennessee Street, the "bullnose" would not have encroached into the owner's pre-existing driveway. In fact, most of the aforementioned fourteen feet of land which fronted Tennessee Street that was taken was used to build the "bullnose." This was confirmed during the trial through cross-examination of the City's own witnesses. (R: 1036; testimony of A.R. Dunlop; engineer/expert) (R: 1070-1071; testimony of Sal Arnaldo, Assisant City Engineer). Thus, a clear nexus exists between the land taken and the resulting impairment of access that served as a basis for the business damages claim.

2. The correction of the factual scenario under which the owner's claim was presented is essential in order to properly frame the certified question to be considered by the Supreme Court. This is **not** a case of business damages based upon substantial impairment of access, where no land is taken. Rather, land was in fact taken. The project constructed upon the land taken directly impacted and negatively effected the owner's remaining access along Tennessee Street. Stated differently, the physical land was taken by direct condemnation, but the "property" (the owners easement of access) was taken by inverse condemnation, as a result of what was constructed upon the land taken. The fact that trial counsel argued at trial that the real property taken was not at issue, but rather, that the direct effect of the taking had manifested itself in the narrowing of the main driveway, does not diminish the uncontested fact that the use of the **land taken** along Ocala Road and Tennessee Street resulted in the business damages claimed and proven.

3. The rephrasing of the certified question is also necessary in order to reflect the actual ruling of the majority opinion: that the term "property" as used in the Section 73.071, Fla.Stat. is limited solely to physical land and does not include an owners easement of access. (Opinion, p.8).

4. As currently stated the certified question does not require the Supreme Court to consider that issue in the context of the factual setting presented in this cause. The Appellee would request that the certified question be restated as follows:

> MAY AN OWNER OF AN ESTABLISHED BUSINESS OF MORE THAN FIVE YEARS STANDING CLAIM BUSINESS DAMAGES BASED UPON THE LOSS OF ACCESS, ASSUMING THAT (1) THE GOVERNMENT HAS TAKEN A PORTION OF THE OWNERS LAND, (2) THE LAND WAS TAKEN SO AS TO ENABLE THE GOVERNMENT TO CONSTRUCT AN ISLAND THAT CONTINUED INTO EXISTING GOVERNMENT RIGHT OF WAY, AND (3) THE IMPACT OF THE ISLAND CONTINUING INTO THE EXISTING RIGHT OF WAY SUBSTANTIALLY IMPAIRED THE OWNERS EASEMENT OF ACCESS TO THE ABUTTING ROADWAY, RESULTING IN A "TAKING" OF ACCESS?
>
> RESTATED, IF AN OWNER MEETS ALL OF THE CRITERIA SET FORTH IN SECTION 73.071(3)(B), DOES THE TERM "PROPERTY," AS USED IN THE STATUTE INCLUDE AN OWNERS EASEMENT OF ACCESS TO THE ABUTTING ROADWAY, AND MAY BUSINESS DAMAGES BE BASED UPON THE LOSS OR SUBSTANTIAL IMPAIRMENT OF THAT EASEMENT OF ACCESS?

It is respectfully suggested that the above question more accurately reflects the actual factual setting of this cause and focuses the attention of the Florida Supreme Court on the narrower issue presented herein. The Appellee respectfully requests that rehearing be granted and that the certified question be amended.

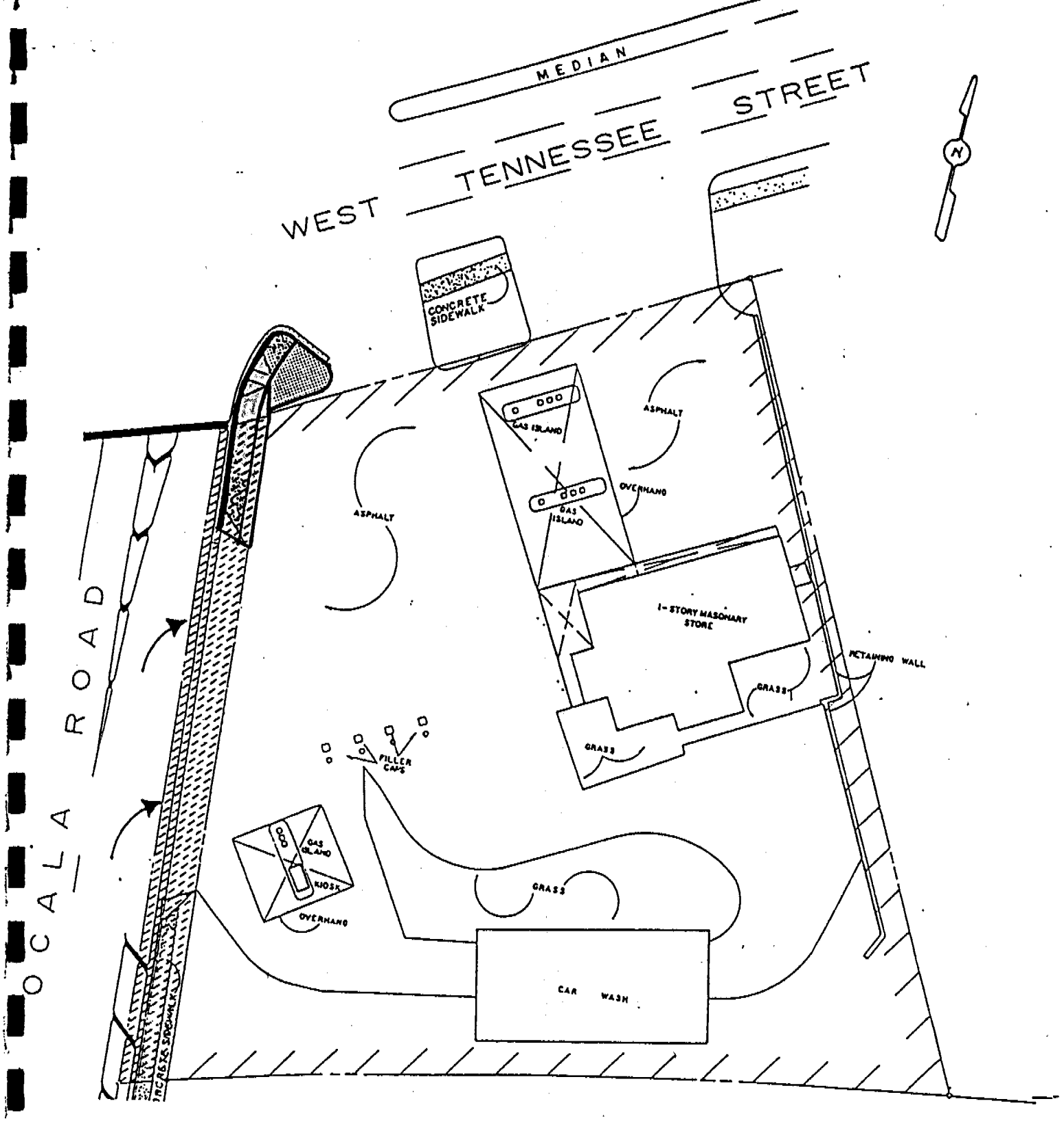
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 3rd day of March, 1993, to: **EDWIN R. HUDSON, ESQUIRE**, Henry, Buchanan, Mick & English, P.A., Post Office Drawer 1049, Tallahassee, Florida 32302.

Respectfully submitted,

Joe W. Fixel, Esquire
211 South Gadsden Street
Tallahassee, Florida 32301
(904)681-1800

BRIGHAM, MOORE, GAYLORD, WILSON,
ULMER, SCHUSTER AND SACHS
777 South Harbour Island Blvd.
Suite 900
Tampa, Florida 33602
(813)229-8811

By: _____
ALAN E. DeSERIO, ESQUIRE
Fla. Bar No. 155394



AFTER PROJECT

LEGEND

REDUCTION OF ACCESS CLAIMED

PROPERTY CONDEMNED (PARCEL 142)

PROPERTY LINE (CROSS-HATCHED)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CITY OF TALLAHASSEE,

Appellant,

v. CASE NO. 91-00810

WILLIAM W. BOYD; WEAVER OIL COMPANY; et al.,

Appellees.
_____/

APPELLANT'S REPLY TO APPELLEE, WEAVER OIL COMPANY'S MOTION FOR REHEARING AND CLARIFICATION

The Appellant, CITY OF TALLAHASSEE (City), files this reply to the appellee's motion for rehearing and clarification pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and states:

1. In its first statement, the appellee takes part of one sentence of this court's opinion out of context and then characterizes it as an incorrect statement. The full statement of this court is a correct statement. That statement is:

> The City's Ocala Road project and related construction resulted in the following: . . .3) A utility pole was relocated and a portion of the curb and grass traffic control island at the southeastern corner of Ocala Road and Tennessee Street was reconstructed on existing public right-of-way, not on the land acquired by condemnation.

No portion of the property acquired by condemnation was ever used by Weaver Oil for any portion of its West Tennessee Street access. This point was repeatedly acknowledged throughout the trial. (R 985, L 14; R 986, L 5; R 987, L 6, 13; R 1248, L 2; and others.)

2. The appellee's suggestion that it should somehow be considered relevant that a sidewalk and curb were constructed by the City on that portion of the right-of-way acquired from the appellee and that that construction eventually connects up with the traffic control island which was constructed on existing public right-of-way is not shown to have any legal or factual significance; nor under the language of the statute can that construction which was performed on existing public right-of-way provide the basis for a business damage claim because claimed business damages must result from the "denial of the use of the property so taken." The appellee incorrectly characterizes the testimony of Mr. Dunlop and Mr. Arnaldo. Mr. Dunlop did not testify that a portion of the property which was taken was used to construct a "bullnose" and Mr. Arnaldo simply acknowledged that there was curbing constructed on a portion of the property taken. What the appellee has highlighted and characterized as a "bullnose" in the exhibit attached to its motion for rehearing is an area which includes a sidewalk and curbing constructed to the south of the corner and constructed to the south of the existing public right-of-way. This sidewalk, curbing, and drop curbing connects and extends past the appellee's property and substantially to the south. In this case, no business damages were ever alleged to have resulted from the appellee's loss of use of the property acquired by eminent domain, and there was never any showing that the property acquired by eminent domain was ever used as part of the subject entrance.

3. The appellee recharacterizes its position in suggesting there is a nexus between the property taken and the alleged impaired access which it claims should support a claim for business damages and presents an argument not presented in its brief. Nonetheless, this argument was equally unsupported at trial and there is no legal basis for such a claim. It is undisputed that none of the property which was acquired by eminent domain was ever used for any portion of the subject driveway, and it is undisputed that the construction which narrowed the subject driveway was done entirely on existing public right-of-way. The City had the right and ability to perform the construction done on the existing public right-of-way regardless of this action or project.

4. The appellant agrees with this court's determination that "the rules of statutory construction, and the supporting decisional law, compel" (Opinion, p. 11) the interpretation set forth by the majority and the appellant believes that certification of the indicated question is not necessary. However, if the question is to be certified, the appellant believes that the question as set forth by this court is most appropriate under the applicable facts and law.

5. The appellee's requests that the certified question be restated should be denied. The appellee's proposed question includes unsupported and unestablished facts and matters extraneous to this case, e.g., there was no testimony that the land acquired from the appellee was to enable the construction of the traffic control island, nor was there a ruling or finding that the owner

had an easement of access which was substantially impaired. The questions proposed by the appellee completely disregard the fact that the construction which narrowed the appellee's driveway was accomplished entirely on existing public right-of-way, that such construction could have been performed on that existing public right-of-way regardless of whether any property was acquired from the appellee.

6. The appellee also cites Rule 9.331, Florida Rules of Appellate Procedure, in its motion. Said rule relates to hearings or rehearings en banc. The appellee has provided no support or basis for such rehearing as required by the rule.

7. In summary, the appellee has attempted to reargue its case and has shown no points of fact or law which this court has misapprehended and the appellant respectfully requests that the appellee's motion for rehearing and clarification be denied.

HENRY & BUCHANAN, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOE W. FIXEL, 211 South Gadsden Street, Tallahassee, FL 32301, and ALAN E. DeSERIO, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, 777 South Harbour Island Boulevard, Ste. 900, Tampa, FL 33602, this 17th day of March, 1993.

EDWIN R. HUDSON