DP

FILED
SID J. WHITE
AUG 23 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA

WEAVER OIL COMPANY,

Petitioner,

vs. CASE NO: 81,917

CITY OF TALLAHASSEE,

Respondent.

* *

INITIAL BRIEF OF PETITIONER WEAVER OIL COMPANY

JOE W. FIXEL, ESQUIRE
Florida Bar No. 192026
211 S. Gadsden Street
Tallahassee, Florida 32301
(904) 681-1800
Counsel for Petitioner

ALAN E. DESERIO, ESQUIRE
Florida Bar No. 155394
BRIGHAM, MOORE, GAYLORD,
ULMER & SCHUSTER
777 S. Harbour Island Boulevard
Suite 900
Tampa, Florida 33602
(813) 229-8811
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PRELIMINARY STATEMENT

References to the Record on Appeal shall be made by use of the symbol "R". The Appendix accompanying this brief shall be made by use of the symbol "A".

STATEMENT OF CASE AND FACTS

A complete understanding of the factual setting of this cause is absolutely essential to framing the proper question to be considered and answered by this Court. The "facts," as they appear in the opinion of the lower court[1] are set forth below. The petitioner does not accept the facts as presented by the lower court as entirely accurate and areas of disagreement are specifically noted. In addition, a recitation of the evidence proving business damages, omitted by the majority opinion, has been included in order to insure this Court that substantial, competent evidence supporting the verdict is contained in the record below.

---

[1]City of Tallahassee v. Boyd, 616 So. 2d 1000 (Fla. 1st DCA 1993) (A: 1-12)

EXCERPTS OF COURT OPINION

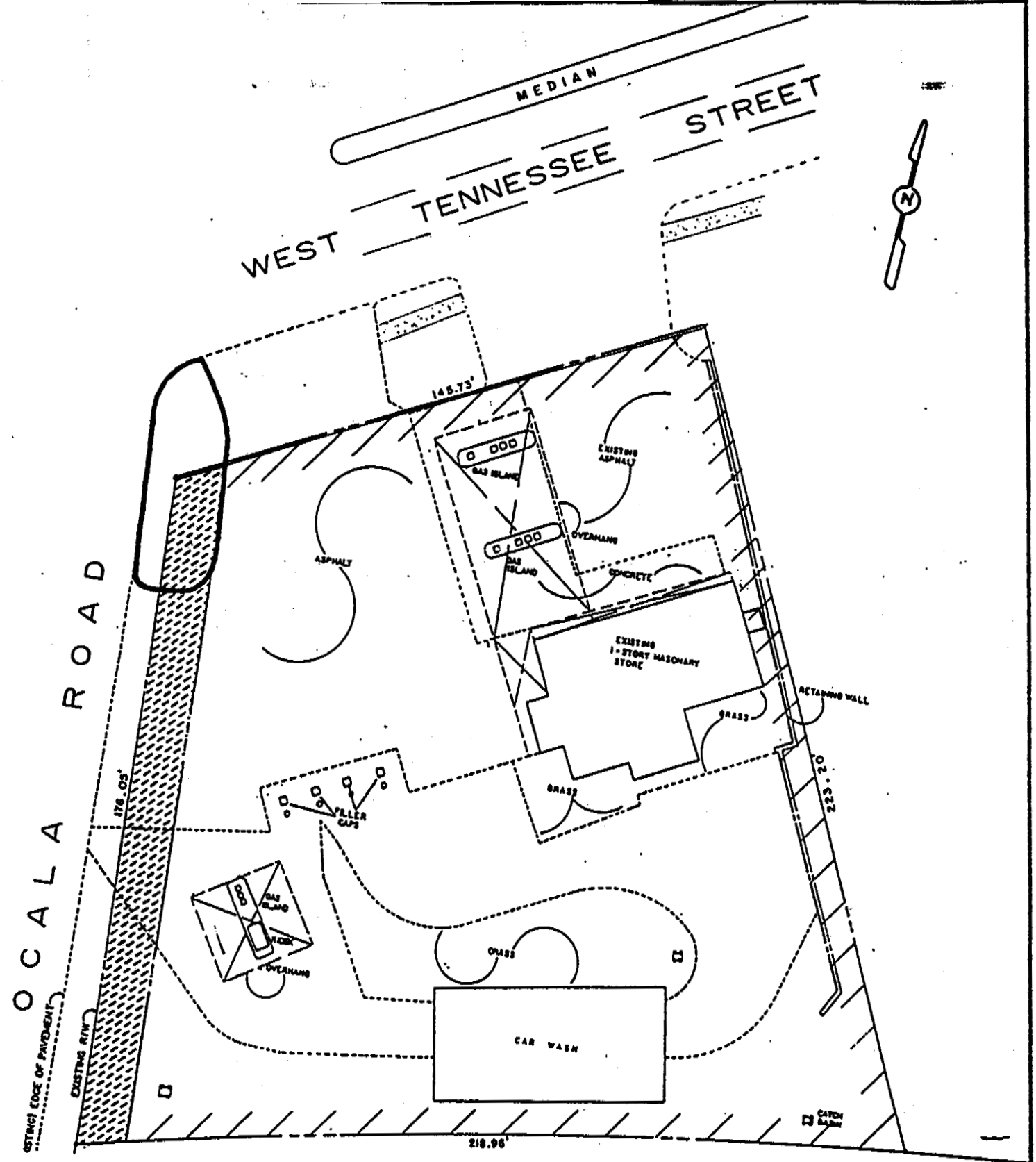
This case originated as an eminent domain action wherein the City condemned certain real property as part of the widening of Ocala Road. Parcel 142 is a 14-foot wide, 176-foot long strip of land bordering the Ocala Road right-of-way. Weaver Oil leased the parent property, from which Parcel 142 was taken, 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 a the mouth of the entrance. The easterly

entrance on Tennessee Street was undisturbed. (Emphasis Supplied)

The lower court incompletely describes the reconstruction occurring as part of the Ocala Road Project, when it states that "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 land acquired by condemnation." The record clearly establishes that the fourteen foot strip of land acquired along Ocala Road extended from the southern property line up to Tennessee Street. This effectively took fourteen feet of Tennessee Street frontage. (R:309-315)(Stipulated Partial Final Judgment, Exhibit A reflecting area taken); (R:1036) On 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." The island was constructed, in large part, in the area of the fourteen feet of Tennessee Street frontage lost as a result of the taking of Parcel 142, encroaching also into the opening of the pre-existing driveway. This fact is graphically demonstrated by two diagrams included in the brief submitted by the City in the lower court. (See Initial Brief of Appellant, City of Tallahassee, pp.5 & 6). These diagrams are included on the following pages for the Court's convenience. The diagram labeled "Before Project" reflects the strip taken in yellow. The property line abutting Tennessee Street is shown in red. The grass island existing at the time of taking is outlined by a heavy black line and that portion previously owned

and used by Weaver Oil is highlighted in pink. As is apparent from the "Before Project" diagram and Defendants Exhibit 1, the west fourteen feet of its Tennessee Street frontage was being used by Weaver Oil, prior to the taking, as a grass island, which served to accommodate entering and existing vehicles, by separating Weaver Oil's western Tennessee Street driveway and Ocala Road. The diagram labeled "After Project" reflects some of the strip taken in yellow. The new curb and grass island, as reconstructed on the part taken, is highlighted in pink. As reflected in the diagrams, the new curb and grass island is indeed constructed on the part taken. The structure then continues around the corner encroaching into the westerly driveway. (R: 438-439; 1069-1071).

As is apparent from the "After Project" diagram, the Tennessee Street frontage taken by the City is being used by the City for new paved roadway (see area highlighted in yellow) as well as for a portion of the new curbed and grassed island. The new island serves as a replacement for the island that existed prior to the taking. The preexisting island was effectively moved to the east, using the 14 feet of Tennessee Street frontage taken by the City as part of the widening of Ocala Road (R: 1070).



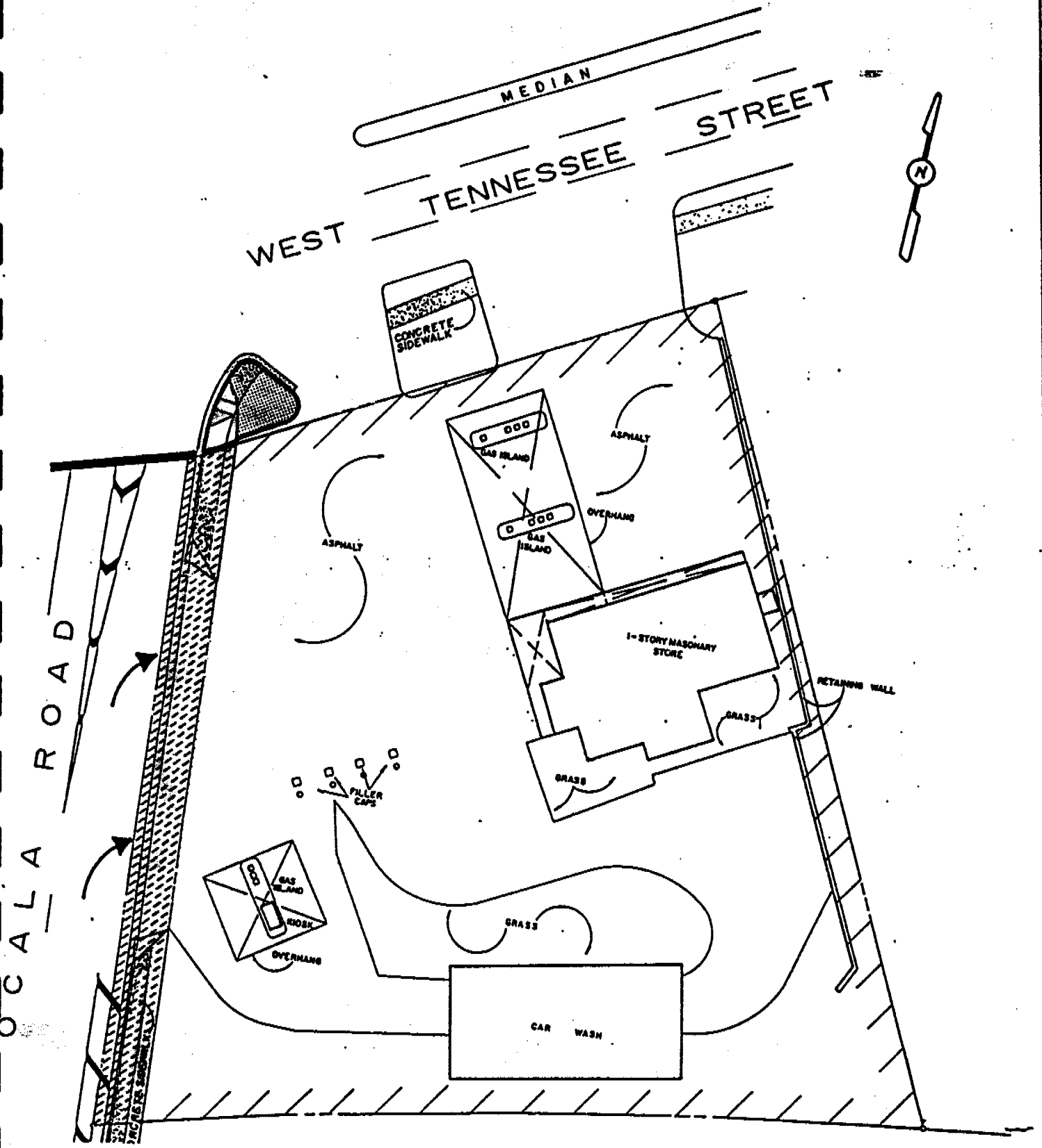
BEFORE PROJECT

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)

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. (Emphasis Supplied)

It was undisputed that the westerly driveway, into which the reconstructed curb and grass area protruded, was the main entrance

to the property and that almost everyone entered the property through that driveway. (R:429-430; 551; 1035)

EXCERPT CONTINUED

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. (Emphasis Supplied)

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.

TESTIMONY AND EVIDENCE PRESENTED BY THE OWNER ON BUSINESS DAMAGES

As its first witness the owner called a professional engineer, Nevins Smith, Jr. (R:412). The witness stated that the western entrance on Tennessee Street was the most important entrance to the property and almost everyone entered the property through that entrance. (R:429-430). With regard to the business site, the witness described the business as a high volume fuel dispensing store, as compared to a neighborhood food or convenience store. (R:428). It was stated further that the location and design of the store and the design of the entrances were all oriented to the sale of gasoline. (R:429).

A wide access point as its main entrance was critical to the operation of a high volume fuel store, according to Mr. Smith. (R:439). He stated that he was familiar with the 15 other fuel dispensing stores along Tennessee Street, all of which had a main entrance driveway which was greater than 40 feet in width. (R:433-434). It is generally recognized that such fuel stores require an entrance of 40 to 45 feet and under the current City Code driveways up to 45 feet are permitted for fuel oriented stores. (R:436).

Mr. Smith testified that prior to the City's activities the main driveway entrance on Tennessee Street was 44 feet in width. (R:438). However, as part of the project for the widening of Ocala Road, a 14 foot wide strip of land was taken along the western and northern most boundaries of the property. The widening and reconstruction of Ocala Road also resulted in the construction of a "bull nose" which extended into the area immediately adjacent to

the owner's main driveway on Tennessee Street. This narrowed the width of the driveway from 44 feet to 27 feet, making the entrance way substandard for a high volume fuel oriented business. (R:439).

The expert testified that based upon his experience as a site planner and designer, it was his opinion that there had been a substantial loss of access to the property, considering its use as a high volume fuel retailing store (R:440), and that the remaining access was no longer suitable for this use. (R:440-441).

The next witness called was James Davis, Jr. (R:485), who was an owner/operator of twenty (20) high volume petroleum marketing locations. (R:486). Mr. Davis managed these businesses on a day to day basis and as part of the business operation was involved in site selection, land purchases, and the design of the driveways, pump islands and the store to be constructed at a particular location. (R:486). The witness also expressed an expertise with regard to neighborhood convenience stores. (R:488).

Mr. Davis was familiar with the subject location, and at one time hoped to purchase the site. (R:493-494). One thing in particular that made him interested in the site was the main entrance off of Tennessee Street. (R:495). However, after being made aware of the changes to the driveway caused by the reconstruction of the road, he was glad that he did not purchase the location. (R:513; 517).

With regard to a high volume fuel marketing site, it is very important to have a wide driveway entrance. (R:503). Of the 20

high volume sites he owned, the witness testified that all have driveways ranging from 40 to 60 feet in width. (R:499).

Due to the difficulty the customers would experience getting into the main entrance, the witness stated that, in his opinion, customers would begin going to other locations. (R:515-516; 535). The witness stated that there were no new stores competing with the subject site that would have drawn customers away (R:515-516), and he could identify no other cause for the losses suffered by the site other than the change in access. (R:535). Based upon his experience as an owner/operator of this type of business, it was the witness' expert opinion that the access remaining was no longer suitable for the operation of the business. (R:518-519).

Scott McWilliams, a business analyst and market researcher was the next witness called by the owner. (R:537) The witness stated that he was retained to analyze potential business damages (R:542), and in doing so he looked at customer counts, did a neighborhood analysis, and an industry review. (R:545-546). The witness also considered his experience in a similar case in which he was retained by the Department of Transportation to analyze the impact of reducing a driveway to 20 feet in width. (R:547).

McWilliams stated that the site had a "classic" high volume gasoline design which allowed easy access to the adjacent roadways (R:548), with the primary entrance, for 3 out of 4 cars, being the western driveway off of Tennessee Street. (R:551). The primary driveway was similar to other high volume gasoline marketing stores

which, in almost all cases, would have an entrance of at least 40 feet in width. (R:552).

McWilliams distinguished this type of operation from a local convenience food store. The witness noted that not only is there a difference in the design of such stores (R:550-551), but the source of their customers was distinct. The neighborhood convenience store drew its customers locally, with the emphasis on food sales and walk-in customers. (R:549-550; 552-554). The high volume gasoline retailers focus on drive-in customers, placing emphasis on the sale of gasoline. (R:549-550). With gasoline retailers the design was oriented to providing easy access to the pump islands and a greater capacity to deliver fuel to the automobiles. (R:550-551). The presence, at this location, of 20 pump hoses available for the delivery of gasoline was indicative of a high volume gasoline sales operation. (R:548).

After defining the primary service area for the store, which was approximately a mile in diameter (Defendant's Exhibit 5; R:559), the witness discussed a customer count study he conducted for fiscal years 1988 through 1990. (R:574). The customer comparison count was performed on a month to month basis to eliminate any seasonal variations. (R:576). The study compared the average customer counts before road construction began and after the roadway reconstruction (R:576), and indicated an annual loss of 73,945 customers for the year after completion of the construction. (R:576; 579).

McWilliams stated that he began to look for the cause that resulted in the loss of customers. The witness found no change in competition, no change in pricing strategy used by the business, and no end to a promotional campaign by the business or the beginning of such a campaign by a competitor. (R:580-581). After examining the "market variables" that could bring about such a customer loss, the only factor that coincided with the decline in customers was the reconstruction of the road and the changes to the site resulting from the project. (R:580-581).

The decline in customers began with the construction of the project. (R:580). While they expected the customer counts to go back up after construction was completed, that did not occur. (R:581). The analysis revealed that the customer level and trend for the "after situation" had stabilized at the lower levels and had shown no indication that it would increase. (R:582-583). With the stabilization of the pattern of customers after construction has been completed, and finding nothing to indicate that the damaging influence would be removed, it was reasonable to expect that the damage (a loss of 200 customers per day) would continue. (R:604-605).

McWilliams concluded that, based upon his experience and evaluation in cases similar to this, the causative factor that remained after construction was completed was the fact that the main entrance, by which 3 out of 4 customers entered the property, had been narrowed to an unacceptable width. This narrowing

affected the impulse customers that previously had access to the property at that entrance. (R:581-582).

Based upon his marketing experience, and other work for the Department of Transportation in similar situations, it was the witness' expert opinion that the access remaining to this location was no longer suitable. (R:583-584).

The next witness called by the owners was Fred Thompson, a certified public accountant. (R:616). The expert was retained to prepare an analysis and appraisal of business damages and was requested to conduct the analysis in the same manner as he had for the Department of Transportation in other similar cases. (R:624).

Mr. Thompson first accumulated financial data from the location, including tax returns. He considered data regarding customer counts and the number of gallons of gasoline sold at the site. He also interviewed a number of people with expertise regarding the operation of this type of business (R:625-626), and consulted various experts when preparing an analysis of causation. (R:627).

Thompson's study revealed that in 1989, when the road reconstruction began, several things occurred: a decline in sales, in the number of gallons sold, and in the number of customers visiting the site. (R:647-648). After construction was completed in 1990 it was expected that things would return to the same operating level as existed in the "before" situation. However, that did not occur and customer counts and the number of gallons sold continued to decline. (R:648-649).

Using Defendant's Exhibit 12 (Weaver Oil Co. Analysis) the expert explained the history of the business, including what happened to the business as a result of the roadway reconstruction. (R:632-650; 655). The expert also prepared a business model in order to demonstrate what the owner could have reasonably expected to occur if things had remained unchanged. (R:655). This was a standard technique used for both business valuation and for assessing damages to a business. (R:650-652). This model was reflected on Defendant's Exhibit 13. (R:652).

After testifying to the analysis that went into the preparation of the business model (R:656-666), the witness noted that the business was still growing prior to the road reconstruction (R:666), and was consistent with the general trends relating to this type of business. (R:666-667).

Mr. Thompson stated the change in the customers visiting the site was the key to the decline in sales. (R:674-675). In 1989, the year in which the reconstruction began, the customer count dropped 58,000 customers compared to 1988. In 1990, when construction was completed and things were expected to return to normal, the customer count dropped an additional 19,000 customers. (R:676).

With regard to the cause of the customer decline, Thompson indicted that he looked at all of the factors that would normally result in a loss of customers. The witness found no significant change with regard to competition and there was no decline in the customer base for that area. (R:676). Furthermore, the decline

could not be tied to a poor economy. (R:677). No change in management or problems relating thereto were discerned. (R:677-678). Another store operated by this same owner continued to grow in customers during this same time period. (R:678-679). An examination of all the factors that could have affected the customer count at this location revealed things were as good, and in some cases better, than the time period prior to the roadway reconstruction. The only notable change was in the access configuration at the site **after** construction was completed. (R:677).

Regarding the business damages incurred, Thompson testified that the data examined (after completion of the road) revealed a loss in sales (relating to fuel, store items, etc.) from which he determine the net annual loss. (R:688-689). These were damages suffered as a result of the change in access to the site. (R:689).

With regard to how long the damages were going to continue, Thompson testified that he found nothing to indicate that the damages would not continue over the remaining term of the lease. (R:690). Projecting the loss over the term of the lease, and reducing that amount to present value, the expert arrived at an opinion of business damages suffered by the owner. (R:690-692).

The next witness called was the owner, Jimmy Weaver. (R:799). Mr. Weaver testified that he and his father started Weaver Oil Company in 1964. (R:800). When self-serve gasoline stations became legal he entered into an agreement with a friend who owned a chain of convenience stores with the idea of selling gasoline at these

stores. At that time such stores did not exist. (R:802-803). He and his partner pioneered this new concept, establishing 80 such stores in a five state area. (R:803).

Weaver Oil Co. currently has six locations, including the site on the corner of Tennessee Street and Ocala Road. (R:810-811). The witness stated he played the lead role in converting all of the Weaver Oil sites to include the elements of a convenience store. (R:812). Over the years he was personally involved in the site selection for over 100 such stores (R:812-813), as well as the remodeling of sites and building the stores from the ground up. (R:813).

With regard to the records of customers visiting the site, Mr. Weaver testified that the information was gathered from cash register receipts which indicated each time a customer made a purchase. At the end of each shift the register tape data was broken down into several categories of information for their financial statements. (R:829-830). At the end of the day all of the data was sent to the accounting office to verify the information. (R:830-831). The accountant then put the data into the computer, and these records served as the basis for the information used during the trial. (R:831-832).

After Mr. Weaver became aware of the planned reconstruction of the roadway, he took steps to minimize his losses during the construction, including running specials to draw in customers, closing down the car wash and closing the store deli. (R:835-837). When the construction was completed he again took steps to restore

the customers lost during construction. Weaver lowered the prices of gas, started specials on beer, soft-drinks and cigarettes and gave the store a "face-lift" including repainting the building and a new sign. (R:837-838). Although the owner sought to implement management techniques that worked at other stores, nothing worked to restore lost customers. (R:838; 908).

With the reduction in width of his main entrance, the owner noticed the difficulty customers had getting on and off the property. (R:838-839). Based upon his experience in planning sites for this type of high volume gasoline business, he knew a main entrance of 27 feet would not work. (R:840-841).

After applying all of the business principles that brought success at other locations, nothing he did restored the business to where it was when the main entrance way was 44 feet in width. (R:908-910). The witness did not say that customers could not enter the property through the narrowed entrance. (R:929-930). What had been observed, however, was the fact that previously the wider driveway drew customers into the site due to the ease of entry. But now the entrance was too narrow and customers were driving by the location. (R:930-931). As summed up by Mr. Weaver: "All I know is that it did work here the way it was before, and it's not working now." (R:935).

ISSUE TO BE CONSIDERED

The majority opinion certified the following question to this 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 question, however, does not accurately reflect the facts of this cause or correctly state the issue to be considered and resolved. As discussed previously, "land" was taken in this cause and the use of that land was an integral part of the road project, which resulted in the substantial impairment of access proven by the petitioner at trial. A more appropriate statement of the issue to be resolved, in light of the factual setting of this cause, is 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?

With regard to the matters to be resolved, it should be understood that the sufficiency of the evidence establishing that the petitioner's easement of access was substantially diminished, resulting in a "taking" of that property, is not at issue in this appeal. Although conflicting evidence was presented at the trial on the issue of whether the remaining access was suitable for the existing use of the property, 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. The opinion of the lower court did not address or comment upon the sufficiency of the evidence establishing that access had been taken. As such, that issue is not before this Court.

SUMMARY OF ARGUMENT

In the condemnation proceedings below the petitioner/business owner established, by substantial competent evidence, that it met each of the requirements of Section 73.071, Fla.Statutes, and was entitled to claim business damages. In accordance with the requirements of the statutory provision, the petitioner established that the City had taken more "property" than that originally described in the condemnation petition, that is the owners easement of access to the abutting roadway. The sufficiency of the evidence establishing the taking of that "property" is not at issue in this cause. The petitioner further proved that the denial of the use of

the "property" taken by the City (the access easement) had substantially damaged an established business located upon adjoining lands held by the business owner. On appeal, the lower court reversed the award of business damages, construing the term "property" to mean land only. This construction is contrary to the legislative intent reflected in the statute, wherein the legislature has utilized two separate and distinct terms: "lands" and "property." The provision does not limit the claim of business damages to the loss of "lands" taken, but rather clearly states that the business damages are to be based upon the loss of "property" taken. The construction given to the statutory provision by the lower court is likewise contrary to the plain and unambiguous meaning of the language utilized by the legislature. The term "property" includes much more than the mere physical land. The precedent of this Court has undeniably established that an owner's easement of access to the abutting roadway falls within the definition of "property." As such, it was clearly error for the lower court to reverse the business damage award by construing the term "property" in a manner contrary to common usage and the plain and ordinary meaning of the word. This goes well beyond giving the provision a strict construction and is tantamount to rewriting the statute, contrary to the plain language used by the legislature.

The certified question, as restated should be answered in the affirmative. The decision of the lower appellate court should be quashed and the judgment of the trial court awarding business damages reinstated.

POSITION OF THE CITY

As noted in the opinion of the lower court, "[T]he 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." Id. at 1002. There were two separate aspects to this argument. First, the City contends that since it did not specifically condemn any of the owners access rights in its condemnation petition, no business damage claim could be made. Second, the term "property" as used in Section 73.071 (3)(b), Florida Statutes, includes physical property or land only, but does not include the easement of access to the abutting roadway. While the opinion of the lower court did not turn upon the first aspect of the City's contention, it did adopt the premise that business damages could be claimed only for the taking of physical property or land, but not for a loss of an easement of access.

THE STATUTORY PROVISION

Section 73.071 (3)(b), Florida Statutes, provides:

> Where less than the entire **property** is sought to be appropriated, any damages to the remainder caused by the taking, including, when the action is by the Department of Transportation, 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 5 years' standing, owned by the party whose

lands are being so taken, located upon adjoining lands owned or held by such party, 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 written defenses the nature and extent of such damages. (Emphasis Supplied)

As noted by this Court in *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So. 2d 926 (Fla. 1984), the statutory provision provides "three criteria" for business damages: "the business must be established for more than five years, the business must be owned by the party whose lands are being taken, and the business must be located upon adjoining land owned or held by such party." Id. at 928. A significant feature of the statute is the fact that the provision utilizes two distinct and different terms when laying out the criteria that must be established in order to present a claim of business damages. Specifically, the statute distinguishes between "property" and "lands." The statute clearly states that it is the effect of the taking of "property," which may damage or destroy a business located on the remainder, that is the key consideration in a business damage claim. Indeed, it is the meaning of the term "property" that is at the core of the dispute in this cause.

CONSTRUING THE STATUTORY PROVISION

Business damages have been described by this Court on several occasions as compensation which has been provided as "a matter of

legislative grace." *Morris Alignment, Inc.*, 444 So. 2d at 928; *Texaco, Inc. v. Department of Transportation*, 537 So. 2d 92, 93 (Fla.1989). As such, if an ambiguity exists, the provision will be "...construed against the claim of business damages, and such damages should be awarded only when such award appears clearly consistent with legislative intent." *Morris Alignment, Inc.*, 444 So. 2d at 929. This Court stated further that the statute "should be construed in light of the manifest purpose to be achieved by the legislation," and that "[W]hen a statute is susceptible of and in need of interpretation or construction, it is axiomatic that courts should endeavor to avoid giving it an interpretation that will lead to an absurd result." Id. at 929. Indeed, in *Morris Alignment, Inc.*, this Court rejected the construction imposed upon the statutory provision by the lower court because it resulted in "an irrational distinction upon which to justify such differential treatment." Id. at 929-930. Other decisions considering the issue of business damages have likewise refused to construe the provision in a manner contrary to the plain words utilized, or to impose a restrictive interpretation not reflected in the statutory language. *Hooper v. State Road Department*, 105 So. 2d 515 (Fla. 2nd DCA 1958); *Matthews v. Div. of Admin., State of Florida, Dept. of Transportation*, 324 So. 2d 664 (Fla. 4th DCA 1976). It is the petitioner's position that the lower court in this cause has committed error by construing the provision contrary to the unambiguous language contained therein, resulting in a totally irrational and absurd result.

ARGUMENT

The foundational underpinning of the City's position and that of the lower court is the insistence that the word "property", as used in Section 73.071(3)(b), Fla. Statutes, means something less than the traditional meaning attached to that term. Specifically, the City and lower court maintain that the term "property", as used in the cited provision, is limited to the physical land only.

A. THE POSITION OF THE LOWER COURT IS CONTRARY TO THE BASIC RULES OF STATUTORY CONSTRUCTION.

Words of common usage, when used in a statute, should be construed in their plain and ordinary sense. *American Bankers Life Casual Co. v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968); *State, Dep't of Admin. v. Moore*, 524 So.2d 704 (Fla. 1st DCA 1988); *Certain Lands v. City of Alachua*, 518 So.2d 386 (Fla. 1st DCA 1987); *Citizens of State v. Public Service Comm'n*, 425 So.2d 534, 541-542 (Fla. 1982). It must be assumed that the legislature knows the plain and ordinary meaning of words used in statutes. *Brooks v. Anastasia Mosquito Control Dist.*, 148 So.2d 64 (Fla. 1st DCA 1963); *Thayer v. State of Fla.*, 335 So.2d 815 (Fla. 1976); *Sheffield v. Davis*, 562 So.2d 384 (Fla. 2d DCA 1990).

With regard to the subject matter of this appeal, it has long been established that an owner's easement of access to the abutting roadway is "**property**". In *Palm Beach County v. Tessler*, 538 So.2d 846, 848 (Fla. 1989), this Court, quoting with approval from *D.O.T. v. Stubbs*, 285 So.2d 1,2 (Fla. 1973) noted:

> The rationale for granting compensation, although not always expressed in judicial pronouncements, is that "**property" is something more than a physical interest in land**; it also includes certain legal rights and privileges constituting appurtenants to the land and its enjoyment. This part of a gradual process of judicial **liberalization of the concept of property** so as to include the "taking" of an incorporeal interest such as the acquisition of access rights resulting from condemnation proceedings. (Emphasis supplied).

The *Tessler* decision, in rejecting the government's attempt to limit the application or consideration of decisions such as *Stubbs* to limited access takings only, continued by stating:

> This would seem to follow once it is recognized as Florida does, that **the right of access is a property right** which appertains to the ownership of land. Tessler, 538 So.2d at 848.

Undeniably, an owner's easement of access is "property" as defined under the law in Florida. It is equally clear that Sec. 73.071(3)(b), Fla. Stat. permits a claim for business damages when certain criteria are established and the damages to such business arise from "the denial of the use of the property so taken."

Contrary to the decision of the lower court, the business damage statute does not state that the damages must arise out of the denial of the use of "lands" taken. Rather, a broader legislative intent is clearly reflected by the use of the term "property." The legislative provision is clearly consistent with the fact that public bodies are authorized to condemn more than just "land." For example, the Department of Transportation has been given broad authority to condemn "all necessary lands and property,

including rights of access, air view and light." Section 337.27 (1), Fla.Stat. The same is true of municipalities. Sec. 166.401, Fla.Stat. See also *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992). In light of the broad authorization to condemn more than just "lands," it would be irrational to impose a restrictive interpretation upon the term "property" to mean lands only. Such a construction, which is clearly contrary to the plain and unambiguous meaning of that term, simply cannot be adopted without violating legislative intent.

In this cause the owner pled and proved, by substantial competent evidence, that the 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". It was the denial of the use of the "property" taken (access) upon which the owner based his claim of business damages.

In *Tessler*, 537 So. 2d at 850, this court stated quite clearly 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." Accord *Dept. of Transportation v. Jirik*, 498 So. 2d 1253, n.2 (Fla. 1986). That is exactly what took place in the cause at hand. The access issue was raised in the petitioner's answer in response to the City's petition in eminent domain. (R:174 -179). Although the parties were able to settle the issues of the value of the land taken and severance damages, the issue of business damages was reserved for trial. (R:309-315) The

"taking" issue was properly tried as part of the original condemnation action, essentially as an inverse condemnation counterclaim, with the owner carrying the burden of proving that the City had taken more than just the land described as Parcel 142. The denial of the City's motion for directed verdict at the close of the evidence, effectively resulted in a ruling by the trial court that the evidence was sufficient to establish that a "taking" of access (property) had occurred. The jury was left only with the issue of determining the damages incurred. Because the owner had proven the taking of additional "property" (access) - the loss of which caused damage to an established business of more than five years standing owned by the party whose lands had been taken - the requirements of the business damage statute had been met.

Under the City's interpretation, the plain and common meaning of the term "property", as defined under Florida law,[2] would be unnecessarily and improperly limited to the taking of land only. Such a construction leads to the absurd result against which this Court cautioned in *Morris Alignment, Inc*.

B. THE LOWER COURT'S RELIANCE UPON THE CONCURRING OPINION IN STATE OF FLA., D.O.T. V. WEGGIES BANANA BOAT, 576 SO.2d 722 (FLA. 2d DCA 1991) IS MISPLACED SINCE THE CONCURRING OPINION (1) HAS NO PRECEDENTIAL VALUE; (2) IS INCORRECT IN THAT IT FAILS TO RECOGNIZE THAT ACCESS IS "PROPERTY" UNDER FLORIDA LAW; AND (3) MISCONSTRUES TESSLER.

(1) The lower court cites to the concurring opinion of in *State of Fla., D.O.T. v. Weggies Banana Boat*, 576 So.2d at 722.

[2]Stubbs, 285 So.2d at 2; Tessler, 538 So.2d at 848.

Because it is a concurring opinion and discusses matters that were unnecessary to the resolution of the issue in that cause, any pronouncement contained in the concurrence is obiter dictum. *Dobson v. Crews*, 164 So.2d 252, 255 (Fla. 1st DCA 1964), aff'd, 177 So.2d 202 (Fla. 1965); *Continental Assurance Co. v. Carroll*, 485 So.2d 406, 408 (Fla. 1986). Indeed, it was prophetically noted by the court in *Dobson v. Crews*, 164 So.2d at 255: "Judicial pronouncements which are obiter dicta in character more often serve to confound than to clarify the jurisprudence of the State."

(2) The concurring opinion in *Weggies Banana Boat*, 576 So.2d at 725, states that it is "well established" that an owner may not recover business damages "caused by a change in the adjacent highway, but is limited to damages attributable to the loss of the taken property," construing the term "property" to mean land only. In support of this premise the concurring opinion cites *State Road Dep't. v. Lewis*, 170 So.2d 817 (Fla. 1964). The error in the dicta quoted above arises from the failure to realize that early decisions, such as *Lewis*, which did not recognize access as "property," are of limited precedential value in light of *Stubbs* and *Tessler*.

In the discussion regarding the evolution of the law relating to access rights, this Court in *Tessler*, 538 So.2d at 847, noted that "...several early Florida cases announced the principle that the rights of abutting landowners were subordinate to the needs of government to improve the roads and that any loss of access was damnum absque injuria." Id. at 847. The decisions mentioned by

the Court in *Tessler* as the "early Florida cases" [3] were all cited by the Court in *Lewis*, 170 So.2d at 819, as the basis for denying the owner's access impairment claim.

"However", the Court in *Tessler* continued, in *Benerofe v. State Road Dept.*, 217 So.2d 838, 839 (Fla. 1969) the Supreme Court recognized that abutting owners have "easements of access, light, and air" to the adjacent roadway. For the first time "access" was clearly recognized as a property interest, i.e. an easement.

The decision in *Tessler*, 538 So.2d at 848, continued by citing to *D.O.T. v. Stubbs*, 285 So.2d at 1, wherein it was recognized that "property" was something more than a physical interest in land and included interests such as access rights.

Considering *Stubbs* and *Tessler*, both of which clearly recognize "access" as property, the reliance upon *State Road Dept. v. Lewis*, 170 So.2d at 817, by the concurring opinion in *Weggies Banana Boat*, was clearly a inappropriate.[4] Decisions such as *Lewis* no longer provide a proper foundation for construing the term "property" as used in Sec. 73.071(3)(b), Fla. Stat., and certainly cannot be utilized as the basis for blanket statements regarding the compensability of business damage claims based upon the impairment or loss of access.

---

[3] Weir v. Palm Beach Co., 85 So.2d 865 (Fla. 1956); Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891).

[4] The concurring opinion's reliance upon Howard Johnson Co. v. D.O.T., 450 So.2d 328 (Fla. 4th DCA 1984), is also misplaced. That cause dealt with a claim of damages during construction. There was no interference with the owner's easement of access to the abutting existing road.

(3) The lower court also cites the concurring opinion in *Weggies* for the statement 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." *Boyd*, 616 So.2d at 1003; *Weggies Banana Boat*, 576 So.2d at 725. The concurring opinion arrived at this conclusion after quoting, out of context, a portion of the *Tessler* opinion where this Court stated, "[I]n 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)." The Petitioner respectfully contends that the concurring opinion and the lower court in this cause, have misconstrued this portion of the *Tessler* decision.

To contend that *Tessler* denies business damages for the substantial impairment of access is to ignore the tenor of the entire decision. From the very outset of opinion, this Court in *Tessler* addressed the impact of the project in terms of its effect on the owner's **business**. The decision first recognizes that as part of the project, the County constructed a retaining wall within the existing right of way "which would block all access to and visibility of the respondent's **place of business** from Palmetto Park Road." Id. at 847. It then goes on to note that "the respondent and **their customers** will only be able to reach the property ...by an indirect winding route of some 600 yards through a primarily residential neighborhood." Id. at 847. The decision then refers

to the sketch appended to the District Court opinion as illustrating the impact of the proposed construction. Id. at 847.

This Court in *Tessler* continued by noting that the trial court found that owners had been denied "suitable access" to their property (Id. at 847), and went on to quote from the District Court decision affirming the trial court as follows:

> They have shown that the retaining wall will require their **customers** to take a tedious and circuitous route to reach their **business premises** which is **patently unsuitable** and sharply reduces the quality of access to their property. The wall will also block visibility of **the commercial storefront** from Palmetto Park Road. (Emphasis supplied) Id. at 850.

Considering the above, it is undeniable that the "suitability" of the remaining access was determined in light of the impact the impairment of access had on the owner's business. A taking of access occurred because of the impact the loss of access had on the use for which the property was being utilized - that is, **the business operation.**

Given the tenor of the decision, it would be totally improper to conclude that the portion of the *Tessler* opinion quoted by concurring opinion was intended to deny business damages caused by the impairment of access.

Further, that portion of the *Tessler* decision quoted by the concurring opinion must be considered in light of the fact that where "property" is taken, the owner can claim as damages both the value of that property taken and the damages caused to the

remaining property by the loss of the property taken.[5] See, *City of Ft. Lauderdale v. Casino Realty, Inc.*, 313 So.2d 649, 652 (Fla. 1975). However, an easement of access literally has no value except to the extent its presence, or lack thereof, effects the value of the land to which it is attached. Access, while "property" in a very real sense, cannot be valued by the "square foot", as the land itself can. Recognizing this, all the court in *Tessler* was indicating is that the value of access, as property, when taken, is "limited to the reduction in the value of the property" to which the access is attached. See *Anhoco Corp. v. Dade County*, 144 So.2d 793, 798 (Fla. 1962), wherein the court recognized, "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." Id. at 798.

Business damages, on the other hand, have been referred to as a "unique" item of damage, separate and apart from the "usual" damages relating to the property itself. *Casino Realty*, 313 So.2d at 657. They are a creature of statute. *Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service*, 444 So.2d at 928.

This Court's statement in *Tessler* that "[B]usiness damages continue to be controlled by Sec. 73.071 Fla. Stat.", was not an exclusion of business damages based upon the loss of access.

---

[5]These are some of the "usual" damages claimed under the "full compensation" guarantee of Article X, Sec. 6(a), Fla. Constitution. See, Fla. Eminent Domain Practice and Procedure, 4th Ed., Sec. 9.1.

Rather, it was nothing more than a recognition that the owners, at the valuation trial, would still have the burden of proving that they met the remaining statutory criteria set forth in Sec. 73.071(3)(b), Fla. Stat. That portion of *Tessler* relied upon by the concurring opinion in *Weggies* and the lower court in this cause was nothing more than a declaration that when access is taken the "full compensation" requirement is met by the payment of the loss in value to the remaining land. The separate claim of business damages, resulting from the loss of access, may be presented when the statutory criteria are established by the owner.

Indeed, this Court in *Tessler* stated quite clearly 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, Sec. 73.071(3), Fla. Stat. 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.

It was undisputed that the owner met each of the statutory criteria of the business damage provision: the cause involved a partial taking of "property;" the business was located on the remainder; the business was owned by the party from whom the land was being taken; and the damages incurred were a result of the denial of the use of the "property" taken. Once these criteria were established the claim of business damages was clearly permitted. That claim should not be defeated by imposing a construction upon the word "property" which is contrary to the

plain and common meaning of that word. The lower appellate court erred in doing so, and the owner respectfully requests that this Court correct that error.

CONCLUSION

The certified question, as restated, should be answered in the affirmative. The decision of the lower appellate court should be quashed and the judgment of the trial court awarding business damages should be reinstated.

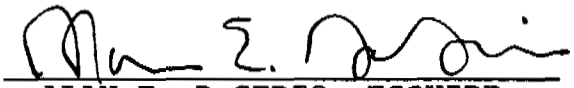
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 19th day of August, 1993, to EDWIN R. HUDSON, ESQ., 117 South Gadsden Street, Post Office Box 1049, Tallahassee, Florida 32302.

Respectfully submitted,

JOE W. FIXEL, ESQUIRE
Florida Bar No. 192026
211 South Gadsden St.
Tallahassee, FL 32301

ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
BRIGHAM, MOORE, GAYLORD,
ULMER & SCHUSTER
777 South Harbour Island Blvd.
Suite 900
Tampa, Florida 33602
(813) 229-8811
Attorneys for the Petitioner

By: 
ALAN E. DeSERIO, ESQUIRE

APPENDIX

INDEX TO APPENDIX

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 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

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 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

the property or the improvements. *See LeSuer. Kendry* and *Mulkey* provide that severance damages are generally measured by the reduction in value of whatever property remains. The *Mulkey* court acknowledged that in those instances where business damages are identical to severance damages, the condemnee may not receive a double recovery. 448 So.2d at 1066; *Glessner.*

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-

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

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