SUPREME COURT OF FLORIDA

WEAVER OIL COMPANY,

Petitioner,

vs.

CASE NO: 81,917

CITY OF TALLAHASSEE,

Respondent.

* *

REPLY BRIEF OF PETITIONER WEAVER OIL COMPANY

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

STATEMENT OF CASE AND FACTS

Given certain procedural allegations raised by the City and the amicus brief, the petitioner has prepared the following supplement to the Statement of Case and Facts provided in the Initial Brief. The facts set forth relate to both procedural and evidentiary matters occurring in the proceedings below. It is offered to rebut the contention of the City and amicus that the Petitioner's "inverse" condemnation claim, alleging that additional property" (access) had been taken by the City, was not pled or properly tried in the proceedings below.

PLEADINGS AND PRE-TRIAL MOTIONS

In response to the City's petition in eminent domain, the Defendant/Petitioner Weaver Oil Company filed its Answer on September 28, 1988. (R:174-179). In that Answer the Petitioner made a broad claim for "damages for all restrictions of ingress and egress" to and from the property. (Answer, paragraph 6). The Answer also alleged that the Defendant did not know whether there would be access to the remaining property, requested to be informed concerning same, and "claims special damages for all loss to said leasehold property by reason of said improvement for failure to allow convenient access to its remaining leasehold." (Answer, paragraph 7). The Answer then alleged entitlement to business damages to a business operated on the adjoining land (Answer, paragraph 9) and reserved the right to claim "any other damages and full compensation for any loss not ascertainable at this time." (Answer, paragraph 10). No reply or motion to dismiss, directed to the sufficiency of the Petitioner's claim for loss of access or

business damages, was filed by the City.

More than a year later, and after substantial discovery was completed by the parties, the City moved to strike Weaver Oil's claim of business damages. (SR:9-10). The motion acknowledged that the owner's claim of business damages was based upon the narrowing of its main entrance way on Tennessee Street. The motion also made a factual allegation that the entrance on Tennessee Street was only "nominally affected" and that "no colorable claim of a taking by substantial diminution of access can be made." (Motion, paragraphs 3-6). The motion continued by stating that since the business damages claim resulted from "the alleged limitation of access", rather than the land taken, the claim is not allowable under the business damage statute. (Motion, paragraph 7). In its prayer the City requested that the claim based upon "the alleged diminished Tennessee Street access" be precluded. While it was apparent from the City's motion that it knew the Petitioner was making such a claim, the motion contained no allegation of a defect in the Petitioner's pleadings with regard to the owner's claim of a substantial diminution in access.

PRE-TRIAL HEARINGS

At the hearing on the City's motion to strike, the City reiterated that "factually," after construction, the owner had ample access, and that there had not been a substantial diminution in access. (R:258-259; 262). In response to the Petitioner's position that whether a substantial loss of access occurred was a question of fact for the jury to resolve, and that the owner

intended to present expert testimony establishing that the remaining access was no longer suitable (R:266-267), the City, utilizing an aerial photo of the site, responded again that the access had not been substantially diminished. (R:280-281). Considering the case precedent cited, the trial court stated that upon receiving proper instructions, the issue was a question of fact to be resolved by the jury. (R:283; 285; 287). The City did not dispute this ruling by the Court. The motion to strike was denied, with leave to renew the motion at trial. (R:287).

TRIAL PROCEEDINGS TO DETERMINE BUSINESS DAMAGES

At the outset of the trial the court, without objection from the City, gave certain preliminary instructions which were agreed upon by the parties. (R:388-392). The jury was instructed: "The sole question remaining to be determined is the amount of money to be paid to Weaver Oil Company doing business as Hogly Wogly as business damages, if any." (R:388). They were also advised that because they would be hearing witnesses that would testify concerning "business damages", the jurors would be allowed to take notes. (R:391).

JURY CHARGE CONFERENCE

During the jury charge conference the City again agreed to an instruction which stated that the "sole question" to be determined by the jury is the amount of money to be paid as business damages to Weaver Oil Co. (R:1185).

The City agreed that the jury would just be required to find that the City's activity constituted a substantial deprivation of

access. (R:1191). At the suggestion of the City, an instruction was developed which informed the jury that in determining business damages they were to consider what was presently constructed by the City. (R:1196-1197).

An extensive discussion occurred with regard to the proper instruction to be given on the access issue. During that discussion the trial court reiterated that the owner's claim was based upon changes in the roadway which caused a taking of access. (R:1201-1202). During the discussion about the form of the verdict, the City stated on three occasions that the "appropriate question" to be answered first by the jury was whether there had been a substantial diminution of access. (R:1228; 1229-1230; 1232). As stated by counsel for the City:

> "I think that question has to be answered first and they have to evaluate that question without looking at the business question. Then the business question is secondary; okay if it has been, how much." (R:1229-1230).

When shown the corrected verdict form counsel for the City stated that it looked "fine" to him. (R:1237).

CLOSING ARGUMENTS

It is true that, during closing argument, counsel for the Petitioner stated that the owner was not claiming damages caused by the physical property taken. This comment, which was taken out of context, was not inconsistent with the owner's contention that the City's use of the physical property taken, including the 14 feet of frontage on Tennessee, which enabled the City to construct an island that substantially impaired the owner's access, contributed

to the business damages suffered. (R:433-439;1069-1071; 1242). (A:1; 2). The issue to be resolved, as counsel stated, was whether the remaining access was suitable after the island was reconstructed (R:1247). The City agreed, stating that the "operative phrase" was whether there had been a substantial diminution of access in light of the remaining access. (R:1282;1294-1295).

Both sides emphasized the testimony of their experts, with the owner contending that they had established that the narrowing of the Tennessee Street entrance resulted in a substantial diminution of access, leaving access that was unsuitable for the use of the property. The City contended that the narrowing of the entranceway had no affect on the business and that substantial diminution in access had not been established.

POST TRIAL MOTIONS

The City submitted a Renewed Motion for Directed Verdict (R:356-359), which was based solely upon the contention that the business damage claim was not based upon the loss of the physical property taken (Parcel 142), but upon the loss of access to Tennessee Street resulting from the construction of a raised barrier across the driveway. The motion made no allegation challenging the sufficiency of the evidence presented to establish that the governmental activity of the City along the owner's Tennessee Street frontage resulted in a substantial diminution of access and that the remaining access was unsuitable for the use for which the property was being utilized. The City's motion was

denied by the trial court. (R:364).

ARGUMENT

I. THE CITY'S CONTENTION THAT THE CLAIM OF BUSINESS DAMAGES BASED UPON A SUBSTANTIAL IMPAIRMENT OF ACCESS WAS NOT PROPERLY PLED OR TRIED IN THE PROCEEDINGS BELOW HAS BEEN WAIVED AND CANNOT BE RAISED FOR THE FIRST TIME IN THIS APPELLATE PROCEEDING.

A substantial portion of the City's Answer Brief, and the brief of the amicus, is devoted to the contention that the Petitioner did not properly plead his claim that, in addition to the property described in the condemnation petition, an "inverse" condemnation of property, for a related purpose, had occurred at the same time and at the same site. Not only has the City waived the right to make this argument from a procedural standpoint, but, the City acquiesced in the trial of this issue as part of the proceedings below.

A. THE OWNER'S INVERSE CONDEMNATION CLAIM FOR IMPAIRMENT OF ACCESS WAS SUFFICIENTLY PLED IN THE OWNER'S ANSWER AND ACKNOWLEDGED BY THE CITY.

The owner's Answer specifically claimed "special damages for all loss to said leasehold property by reason of said improvement for failure to allow convenient access to its remaining leasehold." (R:174-179; Answer, paragraph 7). That the pleading, as presented, was more than sufficient to put the City on notice of the basis for the owner's loss of access claim, is reflected in the City's motion to strike. (SR:9-10). There the City acknowledged that the claim of business damages was based upon the narrowing of the owner's main entrance on Tennessee Street.(Motion, paragraphs 3-6).

At the hearing on the motion to strike, the City again acknowledged the basis of the owner's claim, but contended that

"factually" there had been no substantial diminution in access. (R:258-259; 262). Thus, the City was clearly on notice of the nature of the Petitioner's claim and it cannot now state otherwise. The City also did not take issue with the trial Court's ruling that whether a taking occurred was a question of fact to be resolved by the jury, rather than the trial court. As discussed below, the City acquiesced in this procedure. (R:283;285;287).

B. THE CITY STIPULATED THAT THE TRIAL COURT HAD JURISDICTION TO TRY WEAVER OIL'S CLAIM OF BUSINESS DAMAGES.

Subsequently, in a "Stipulated Partial Final Judgment" (R:309-315), entered by the parties settling compensation for "the property (designated Parcels Nos. 142 & 742 herein) taken and for all other damages of any nature, **with the exception of statutory business damages,**" the City specifically agreed that the trial court would reserve jurisdiction to try the issue of business damages claimed by Weaver Oil Company. (R:309-311). Thus, knowing full well the basis of the owner's business damage claim, the City stipulated that the Court had jurisdiction to try the matter.

C. THE CITY AGREED TO A SPECIFIC INSTRUCTION SUBMITTING THE ISSUE OF BUSINESS DAMAGES FOR THE JURY'S DETERMINATION.

At the outset of the trial the Court gave a preliminary jury instruction agreed upon by the parties. Therein, the jury was specifically instructed that the sole issue to be determined was the amount of business damages to be paid to Weaver Oil Co. (R:388-392). This instruction was repeated again, **without objection** from the City, at the close of the case. (R:1185). During the jury charge conference counsel for the City stated, on at least four

separate occasions, that the jury was required to first determine if a substantial diminution of access had occurred, before considering the business damages incurred. (R:1191; 1228; 1229-1230; 1232). Having acquiesced in the jury's determination of that issue as a matter of "fact", the suggestion by the City and amicus that the trial court, and not the jury, should have considered the issue in a separate proceeding must be disregarded as an untimely afterthought. Having agreed to the procedure, the City cannot now complain.

D. THE CITY'S FAILURE TO OBJECT TO THE ADMISSION OF EXPERT TESTIMONY REGARDING THE IMPACT OF THE IMPAIRMENT OF ACCESS TO TENNESSEE STREET AND THE BUSINESS DAMAGES WHICH RESULTED FROM THE IMPAIRMENT OF ACCESS CONSTITUTES A FURTHER WAIVER OF THE ARGUMENT THAT THE BUSINESS DAMAGE CLAIM WAS NOT PROPERLY BEFORE THE TRIAL COURT.

It is "black letter" law that a motion in limine made prior to the presentation of testimony and other evidence is not sufficient to preserve the error for review. Parry v. Nationwide Mutual Fire Insurance Co., 407 So.2d 936 (Fla. 5th DCA 1982). The specific testimony must be objected to when presented at trial or the error is waived. Id. at 937, citing Swan v. Florida Farm Bureau Insurance Co., 404 So.2d 802, 803-804 (Fla. 5th DCA 1981); See also, Rindfleisch v. Carnival Cruise Lines, Inc., 498 So.2d 488, 491-492 (Fla. 3rd DCA 1986).

While the City presented a pre-trial motion to dismiss relating to the owners claim of business damages (SR:9-10), when the testimony and other evidence was presented to the jury the City voiced no contemporaneous or specific objection. The expert testimony of Nevins Smith, James Davis, Jr., and Scott McWilliams

regarding the change in the owners previous access and its impact on the type of business conducted on the property by the owner, was presented without objection. Each of these witnesses expressed their expert opinion (that the remaining access was no longer suitable for the business use of the premises) without specific or contemporaneous objection from the City. (R:440;440-441; 518-519; 583; 584). Likewise, Fred Thompson, a certified public accountant, testified, without objection, to his opinion of business damages, based upon the impairment of access, which occurred as a result of the narrowing of the owner's main entrance on Tennessee Street. (R:688-689). Given the City's failure to voice specific and contemporaneous objections to the testimony and evidence presented on the issue of business damages, the arguments contending that the Petitioner's claim for business damages, based upon the "inverse" condemnation of additional property, was not properly before the trial court, should fall upon deaf ears. Rindfleisch, 498 So.2d at 491-492; Parry, 407 So.2d at 937.

Any defect in the pleadings regarding the taking of access was cured by the City's consenting to the trial of the issue of business based upon the loss of access. Florida Rules Civil Procedure, 1.190(b). Any contention that the trial court erred in submitting the issue as a question of fact to be resolved by the jury (rather than the court) has been waived by the City's failure to object on that basis, **Premer v. State of Florida, Department of Transportation**, 346 So. 2d 1219 (Fla. 3d DCA 1977), and by its acquiescence in the procedure. **Holmes v. School Board of Orange**

County, 301 So. 2d 145 (Fla. 4th DCA 1974); Karl v. David Ritter Sportservice, Inc., 164 So. 2d 23 (Fla. 3d DCA 1964). Cf. State ex rel Pettengill v. Copelan, 466 So. 2d 1133, 1136 (Fla. 1st DCA 1985).

II. STATUTORY CONSTRUCTION SHOULD NOT LEAD TO AN ABSURD RESULT.

It is absurd to contend that Section 73.071, Florida Statutes, permits only the consideration of "property" formally condemned by the government, where, as in this cause, it was pled and proven that the government had taken more "property" as a direct result of the use by the City of the property described in the pleadings. The Rules of Civil Procedure, which are specifically applicable to eminent domain proceedings [1], clearly contemplate the consideration of "counterclaims" arising from the factual circumstances present in the formal eminent domain proceeding. By directing that eminent domain actions **shall** be governed by the Rules of Civil Procedure, the legislature clearly contemplated the possibility that an "inverse" condemnation claim would be joined to a condemnation proceeding initiated by the government. Thus, it would be an entirely unreasonable construction of Section 73.071, Florida Statutes, to limit a claim of compensation solely to the property which the condemnor seeks to formally condemn, while denying the right to claim compensation for other "property" simultaneously taken from the same condemnee, at the same time, from the same site and for the same project, merely because the condemnor inadvertently or deliberately failed to identify all the "property"

[1] Section 73.012, Florida Statutes.

it was taking. Such a construction would invite abuse and would permit the condemnor to benefit from the deliberate failure to identify all of the "property" taken.

This Court properly recognized in **Palm Beach County v. Tessler**, 538 So. 2d 846 (Fla. 1989), 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. Accord **Department of Transportation v. Jirik**, 498 So. 2d 1253, n. 2 (Fla. 1986). In this cause, the City was well aware of the Petitioner's intent to present an inverse condemnation claim, and the basis for that claim,even though the claim was not specifically designated as a counterclaim. The City stipulated to and acquiesced in the trial and submission of the issue for resolution by the jury. Clearly, the inverse condemnation claim was properly tried as part of the original condemnation action. Any objections to the manner in which the "inverse" claim was presented in the trial proceedings below should have been raised at that time. They are clearly inappropriate for consideration at this stage of the proceedings.

It is important for this Court to understand that, on appeal to the District Court, the City did **not** challenge the sufficiency of the evidence supporting the determination that a "taking" of access had occurred. The question of whether a "taking" of access occurred is closed, and when resolving the issue presented in this appeal, this Court must view the "taking" issue as settled. Since that issue went unchallenged, the attempt by amicus to present

factual and legal arguments as to whether access was taken, must be rejected as untimely and unpreserved for review at this stage of the proceedings. [2]

III. THE CERTIFIED QUESTION - RESTATEMENT WAS PROPER TO FIT THE FACTS.

The City complains of the fact that the Petitioner has restated the certified question, but cites no precedent which prohibits this practice. This Court can take judicial notice of the fact that on many occasions it has restated a question posed by the lower court.[3] The action certainly seems appropriate where the question certified by the lower court is, **on its face**, factually inaccurate. It is not the practice of this Court to resolve legal issues that have no bearing on the outcome of the cause under consideration. Thus, to consider the question of whether business damages may be claimed where no "land" is taken is inappropriate, to say the least. Undeniably, "land" was taken in this cause. The

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[2] In any event, the Petitioner's claim was not, as suggested by amicus, based upon "the denial of use of a portion of existing right of way." (Amicus Brief, p. 8). This was the same type of argument the government unsuccessfully raised as a defense to the "taking" of access claimed in Tessler, 538 So. 2d at 846. In Tessler all of the governmental activity complained of by the landowner, and which gave rise to the taking of access, occurred within the existing right of way. Yet, that did not preclude the finding access had been taken. The "factual" question to be determined was whether the owner's access has been substantially impaired by the "governmental action" within the existing roadway. Id. at 849. This cause was also not a case of damages based upon a change in "traffic flow" on the adjacent roadway. Id. at 849. The Petitioner's complaint was the fact that his customers no longer had the "ease and facility" of access (Stubbs, 285 So. 2d at 3) to the property as a result of the new barrier (bullnose) erected on the Tennessee Street property line.

[3] See Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 623 (Fla. 1990).

opinion entered below clearly recognizes this fact.

> 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. **City of Tallahassee v. Boyd**, 616 So. 2d 1000,1001 (Fla. 1st DCA 1993).(Emphasis Supplied).

A restatement of the question was needed in order to properly frame the important issue to be resolved.

IV. CONSIDERATION OF THE "PROPERTY" TAKEN IS THE KEY TO BUSINESS DAMAGES.

As pointed out in the brief of amicus, from the time the business damage provision was first enacted in 1933, the legislature has consistently utilized the two separate and distinct terms of "property" and "lands." Chapter 15927, Laws of Florida (1933). Thus, for 60 years the legislature has knowingly used terms that convey distinct and separate meanings. No attempt has been made to delete or alter the use of these two distinct terms over the years. If it is assumed that the legislature knows the plain and ordinary meaning of the words utilized in the statutory provisions it enacts, **Thayer v. State of Florida**, 335 So. 2d 815 (Fla. 1976), then it must also be assumed that the legislature was fully aware of the fact that the term "property" has a much more expansive definition than that of "lands." As pointed out by the amicus, the term "lands," used at common law, is "a word of **less** extensive signification than either `tenements' or `heriditaments.'" (Amicus Brief, p.11-12). By comparison, the term "property," in the "**strict** legal sense," is defined as "an aggregate of rights" and "is said to extend to **every** species of

valuable right and interest." Black's Law Dictionary, Abridged 5th Ed. (1983), p. 635. As noted by this Court on several occasions, the term "property" includes an owner's easement of access. Department of Transportation v. Stubbs, 285 So. 2d 1, 2 (Fla. 1973); Tessler, 538 So. 2d at 848.

Thus, even if the term "property" as used in Section 73.071, Florida Statutes is given a "strict" legal definition, it continues to reflect a legislative intent to utilize a term that is much more expansive in meaning than the word "lands." Contrary to position of the City and amicus, the term "property" as used in Section 73.071, Florida Statutes cannot be construed to mean the "dirt" taken from an owner. Rather, it must be construed in a plain and ordinary way, attributing to the term all of its plain and ordinary meaning. Since that is what the legislature is presumed to have done, this Court should do no less. As such, the term "property," as used in Section 73.071, Florida Statutes, must be assumed to include an owner's easement of access.

Applying the statutory language to the facts at hand, leaves no doubt that the Petitioner met each of the required criteria and was properly entitled to present a claim for business damages. The record clearly establishes that the facts reflect a partial taking and that the claim involved an established business of five years standing, located upon the remainder, which was owned by the party whose lands were partially taken. The term "lands" as used in the statute merely qualifies which parties are entitled to bring a business damage claim, that is, those whose lands are partially

taken, leaving their business on the remainder. The statute does not state that the "lands" taken must be the basis for the business damages. Rather, in plain language, the provision states that it is "the effect of the taking of the **property**" - which, under the facts, was the owner's access easement - and "the denial of the use of the **property** so taken," that is to be the basis and focus of a business damage claim.

Once the criteria were met, the business damage claim was clearly permitted. The claim cannot be defeated by imposing a construction upon the word "property" that is contrary to its plain and common meaning. 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 awarding business damages reinstated.

Respectfully submitted,

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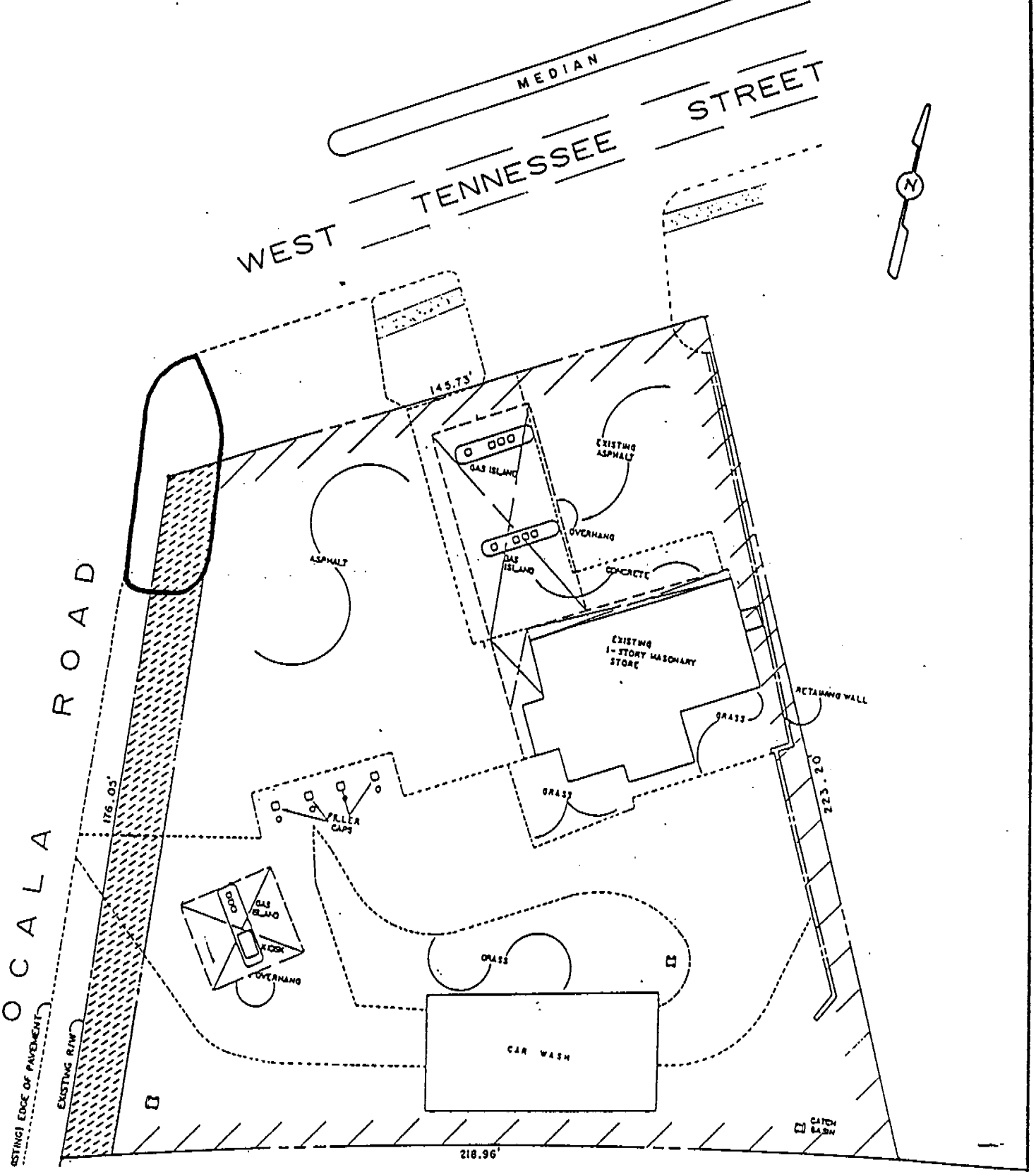
ALAN E. DeSERIO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this the 8th day of December, 1993, to **EDWIN R. HUDSON, ESQUIRE**, 117 South Gadsden Street, Post Office Box 1049, Tallahassee, FL 32302.

ALAN E. DeSERIO, ESQUIRE

APPENDIX



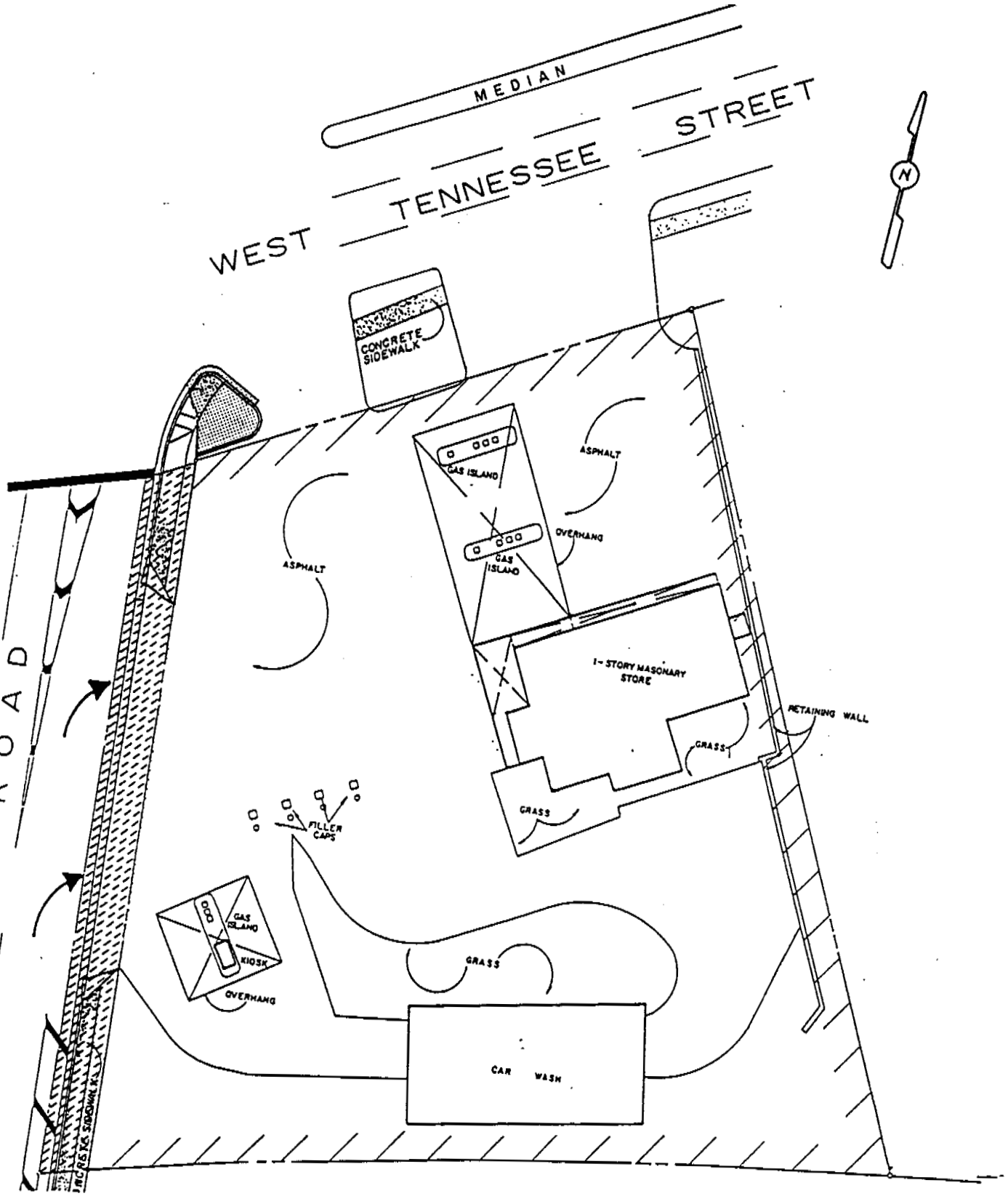
BEFORE PROJECT

LEGEND

PROPERTY CONDEMNED (PARCEL 142)

PROPERTY LINE (CROSS-HATCHED)

TRAFFIC ISLAND



AFTER PROJECT

LEGEND

REDUCTION OF ACCESS CLAIMED

PROPERTY CONDEMNED (PARCEL 142)

PROPERTY LINE (CROSS-HATCHED)