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SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO.: 82,132

L. I. GEFEN,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER
FLORIDA DEPARTMENT OF TRANSPORTATION
(ON REVIEW OF A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE FIRST DISTRICT COURT OF APPEAL)

Thornton J. Williams
General Counsel
GREGORY G. COSTAS
Assistant General Counsel
FLORIDA BAR NO.: 210285
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458
(904) 488-9425

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PRELIMINARY STATEMENT

The Florida Department of Transportation, the defendant/appellant below and petitioner here, will be referred to as the Department. L. I. Gefen, the plaintiff/appellee below and respondent here, will be referred to as Gefen.

Record citations will be based upon the index prepared by the clerk of the circuit court. Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record on appeal will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to the trial transcript dated December 10, 1990, will be indicated parenthetically as "T" with the appropriate page number(s). Citations to the transcript of the hearing on the parties' motions for rehearing dated January 17, 1990 [sic 1991], will be indicated parenthetically as "M" with the appropriate page number(s). Citations to the transcript of proceedings dated February 13, 1991 will be indicated parenthetically as "M2" with the appropriate page number(s).

The opinion of the lower court is currently reported as Department of Transportation v. L. I. Gefen, 18 Fla. L. Weekly D1522 (Fla. 1st DCA June 28, 1993).

STATEMENT OF THE CASE AND FACTS

This case arises from an appeal of a final judgment entered against the Department in an inverse condemnation action.

The subject property is situated in Jacksonville, Florida and is bounded by I-95, Ernest Street, and McCoys Creek Boulevard. (T 24) Gefen purchased the property from Exxon Corporation on April 27, 1976. (T 12) Exxon had been operating a service station on the property and Gefen subsequently rented the property to an automotive business. (T 13)

The property had been continuously rented since 1976 (T 13), but the last tenant quit the premises on September 30, 1989 (T 18), after the Department had closed the McCoys Creek Boulevard entrance and exit ramps to southbound I-95 on September 11, 1989. (T 14) The property has been vacant since September 30, 1989. (T 18)

On or about January 31, 1990, Gefen brought an inverse condemnation action against the Department alleging, essentially, that the Department's action in closing the McCoys Creek Boulevard southbound I-95 entrance and exit ramps destroyed the property's access to I-95, rendered the property practically valueless, and amounted to a taking without compensation. (R 1-3) The cause proceeded to a non-jury trial on December 10, 1990. (T 1)

At trial, the evidence established that the subject property never had direct access to I-95 (T 24) and that closure of McCoys Creek Boulevard southbound I-95 entrance and exit ramps had no impact upon Gefen's pre-existing access to the public roads abutting the property--McCoys Creek Boulevard and Ernest Street. (T

29, 45-46, 79, 84) While the closure did prevent southbound I-95 traffic from entering or exiting I-95 at McCoys Creek Boulevard (T 26-27), northbound I-95 traffic was not affected. (T 27-28) After closure of the ramps, access to and from the site and southbound I-95 involved a circuitous route. (T 17)

Gefen's consulting engineer, Robert Young, gave testimony indicating that the property was a PIN location prior to the ramps' closure--that is, a prime piece of property that has very good access as far as traffic is concerned. (T 43) Young testified that oil companies and commercial enterprises seek out such locations. (T 43-44)

Ward Koutnik, Gefen's traffic engineer, testified that the highest and best use of the property would have been a convenience store with gas pumps in view of the previous access to and from I-95. (T 54) Koutnik then gave detailed testimony concerning the commercial impact upon the property resulting from the closure of the ramps. (T 56-57, 65-66) Briefly summarized, the testimony indicated that people patronizing the site would be impulse purchasers and that prior to the closure, 62 percent of such patrons would be coming from I-95. After closure, the 62 percent figure would drop to one percent which would virtually kill the site for being a profitable business.

The trial judge found that the Department's closure of the ramps amounted to a taking of the subject property and by Second Amended Final Judgment entered against the Department on August 21, 1991, ordered the Department to institute an eminent domain

proceeding against the subject property so that damages due Gefen could be determined. (R 81-85)

On September 20, 1991, the Department's Notice of Appeal was timely filed. (R 86-87) After briefing and oral argument of the cause, the First District Court of Appeal, in an opinion filed June 28, 1993, affirmed and certified the following question as one of great public importance:

> WHETHER AN OWNER OF COMMERCIAL PROPERTY HAS SUFFERED A COMPENSABLE TAKING WHERE ACCESS TO AN INTERSTATE HIGHWAY BY MEANS OF A STREET FRONTING ON APPELLEE'S PROPERTY IS CLOSED, AND SAID CLOSING RESULTS IN SUBSTANTIALLY DIMINISHED ACCESS TO THE SUBJECT PROPERTY, ALTHOUGH NO ACCESS FROM ABUTTING STREETS HAS BEEN CLOSED.

The Department timely filed its notice to invoke jurisdiction on July 23, 1993. By Order dated July 28, 1993, this Court postponed its decision on jurisdiction and ordered the Department to serve its brief on the merits on or before August 23, 1993. The Department's brief on the merits follows.

SUMMARY OF ARGUMENT

The Department takes the position that the certified question should be answered in the negative, that the Fourth DCA's decision in State, DOT v. Lakewood Travel Park, infra, should be disapproved, and that the lower court's decision should be quashed and the cause remanded to the trial court for entry of final judgment in favor of the Department.

The Department first argues that this Court's decision in Palm Beach County v. Tessler, infra, does not mandate the finding of a compensable taking in this case because the Department's closure of the I-95 southbound entrance and exit ramps did not adversely impact the subject property's pre-existing access to the abutting public roads. Additionally, the Department contends that the Fourth DCA's decision in Lakewood which supports Gefen's position, is precedentially unsound because it did not take into consideration the legislative definition of access, because it misapprehended this Court's decision in Tessler, and because it found a claim grounded on a reduction in traffic flow to be compensable.

The Department next argues that Gefen's claim is based upon a reduction in traffic flow which, pursuant to established authority, is non-compensable.

Finally, the Department argues that the First DCA's decision should not be allowed to stand because of the severe fiscal impact the court's erroneous reading of Tessler and disregard of the traffic flow rule would have upon governmental agencies vested with

the authority to open and close entrance and exit ramps on limited access highways.

ARGUMENT

ISSUE

AN OWNER OF COMMERCIAL PROPERTY HAS NOT SUFFERED A COMPENSABLE TAKING WHEN A GOVERNMENTAL ENTITY HAS CLOSED ENTRANCE AND EXIT RAMPS TO AND FROM ONE SIDE OF AN INTERSTATE HIGHWAY AND A PUBLIC STREET FRONTING THE PROPERTY, WHERE THE PROPERTY'S PRE-EXISTING ACCESS TO AND FROM THE ABUTTING PUBLIC ROADS WAS NOT IMPACTED BY THE GOVERNMENT'S ACTION AND WHERE THE BASIS OF THE OWNER'S COMPLAINT WAS THE ADVERSE ECONOMIC RAMIFICATIONS ASSOCIATED WITH THE RESULTING REDUCTION IN TRAFFIC FLOW.

Article X, Section 6 of the Florida Constitution bars the taking of private property except for public use, and then only after payment of full compensation. Schick v. Florida Dept. of Agriculture, 504 So. 2d 1318, 1319 (Fla. 1st DCA 1987). Ordinarily, a public body seeking to take private land for the public good will exercise its power to condemn through formal proceedings. Pinellas County v. Brown, 420 So. 2d 308, 309 (Fla. 2d DCA 1982). However, where a government agency, by its conduct or activities, has taken private property without a formal exercise of the power of eminent domain, a cause of action for inverse condemnation will lie. Schick v. Florida Dept. of Agriculture, supra.

Proof of taking by the governmental body is an essential element in an action for inverse condemnation. Pinellas County v. Brown, 450 So. 2d 240, 241 (Fla. 2d DCA 1984); State, Dept. of Health, Etc. v. Scott, 418 So. 2d 1032, 1034 (Fla. 2d DCA 1982).

This requisite taking usually consists of an actual physical invasion and an appropriation. Pinellas County v. Brown, supra at 420 So. 2d 310; City of Clearwater v. Earle, 418 So. 2d 344, 345 (Fla. 2d DCA 1982). Additionally, Florida courts have recognized that overly restrictive regulations and actions, such as permit denials, can result in a compensable taking. Pinellas County v. Brown, supra at 420 So. 2d 310. But, to constitute a taking there must be more than an impairment of use, there must be a deprivation of all beneficial or all economically reasonable use of the property. Graham v. Estuary Properties, 399 So. 2d 1374 (Fla. 1981); Village of Tequesta v. Jupiter Inlet Corporation, 371 So. 2d 663 (Fla. 1979).

A compensable taking can also occur when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989). Looking to the principles confirmed in Tessler, the trial judge and the First District Court of Appeal erroneously concluded that this latter form of taking resulted from the Department's closure of the McCoys Creek Boulevard southbound I-95 entrance and exit ramps. (R 83-84); Department of Transportation v. L. I. Gefen, supra.

A. Gefen Did Not Suffer A Compensable Taking Because The Property's Pre-existing Access To Abutting Public Roads Was Not Impacted By The Department's Action.

It is undisputed that the closure of the McCoys Creek Boulevard southbound I-95 entrance and exit ramps had no impact upon Gefen's pre-existing access to the public roads abutting the subject property--McCoys Creek Boulevard and Ernest Street. (T 29, 45-46, 79, 84) Gefen has no complaint concerning her ability to get on or off her property to or from the abutting public roads. Rather, her complaint lies in the fact that potential patrons can no longer get onto McCoys Creek Boulevard from southbound I-95, nor can they get onto southbound I-95 from McCoys Creek Boulevard. (R 2-3; T 89) While the closure did prevent southbound I-95 traffic from entering or exiting I-95 at McCoys Creek Boulevard (T 26-27), northbound I-95 traffic was not affected. (T 27-28)

In the face of these facts, the trial judge and the lower court concluded that a compensable taking had occurred under the this Court's decision in Tessler. The trial judge's reasoning leading to this result and the First DCA's affirmance demonstrate that both courts were laboring under a misapprehension of the factual background in Tessler. At the hearing on the parties' motions for rehearing the trial judge stated:

> I would agree with both of you that the two most closely on point cases are Capital Plaza and Tessler but I don't see those two as representing different or contrary propositions. I see them at two ends of a continuum. And while the state is arguing that this is, that the instant case is closer to the Capital Plaza end of the continuum, I find that it is closer to the Tessler end of the continuum in terms of access to abutting streets. So it is my intent to follow the findings in Tessler. [Emphasis added]

* * *

> I will make exactly the finding that was made by the court in Tessler. I'll find for purposes of this case and that case that they are squarely on point. If Tessler says you have to find that you took the dirt, then I'll find that you took the dirt. If Tessler says you have to find that you flew around the North Pole, I'll find that you flew around the North Pole. [Emphasis added]

(M 16-17) Contrary to the trial judge's position, Tessler is not squarely on point and does not support the conclusion that a compensable taking occurred in this case.

Similarly, the First DCA cited Tessler holding that:

> Under Tessler, supra, the test is whether the right of access was "substantially diminished" so that a taking occurred. This is a matter of fact and law to be determined by the trial court. Tessler, supra at 850. In the instant case, the trial court found, based on the evidence previously described, that "[t]here can be no question but that the closing of the ramp effectively denied suitable access to plaintiff's property," and that the subject property can only be reached by an "indirect, winding route through several blocks of residential neighborhood." These findings, based on evidence previously described and photographs of record, are sufficient under the law of Tessler, supra.

Department of Transportation v. L. I. Gefen, supra. The lower court's reliance upon Tessler to affirm was misplaced and ignores the factual foundation upon which the decision was grounded. Tessler was not decided in a factual vacuum.

Unlike the instant case, the governmental action in Tessler destroyed the landowner's access to an abutting road. The legal issue in Tessler was "[a]re the owners of commercial property located on a major public roadway entitled to a judgment of inverse condemnation when the county government blocks off any access to

the property from the roadway and leaves access thereto only through a circuitous alternative route through residential streets?" Palm Beach County v. Tessler, supra at 538 So. 2d 847. The operative facts were:

> The subject real estate, which is zoned commercial, is located at the intersection of Spanish Trail and the main east-west thoroughfare in Boca Raton, Palmetto Park Road. The respondents own and operate a beauty salon that fronts on Palmetto Park Road. As part of a bridge construction and road-widening project, the county planned to construct a retaining wall directly in front of the respondents' property, which would block all access to and visibility of the respondents' place of business from Palmetto Park Road. While the property will continue to have access to Spanish Trail, that street is intended to pass underneath the newly constructed bridge on Palmetto Park Road. The wall will extend to a point approximately twenty feet east of the property. Consequently, the respondents and their customers will only be able to reach the property from Palmetto Park Road by an indirect winding route of some 600 yards through a primarily residential neighborhood. [Emphasis added]

Id.

Given the legal issue resolved and the factual underpinnings of the case, it is evident that Tessler does not stand for the proposition that a landowner can suffer a compensable taking of access where, as here, there has been no impact upon access to and from the public roads abutting the property. Examination of the legal principles restated by the Tessler Court establishes that compensable loss or destruction of access where there has been no physical appropriation of the property is loss or destruction of

access to an abutting road and not access to a road that an abutting road leads to. The Court observed:

> 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. [Emphasis added]

Id. at 849.

Consistent with these principles, the Florida Transportation Code, which authorizes the Department to exercise the power of eminent domain, defines "right of access" as "[t]he right of ingress to a highway from abutting land and egress from a highway to abutting land." Section 334.03(16), Florida Statutes. Neither Tessler nor the Legislature have construed a landowner's right of access to include access to another road from an abutting road.

This is not a novel concept. Division of Administration, State Department of Transportation v. Baredian, 287 So. 2d 398 (Fla. 2d DCA 1973), Cert. denied, 294 So. 2d 660 (Fla. 1974), an inverse condemnation case, involved a factual background similar to the situation before the Court in this case. The landowner

operated a bar on Gandy Boulevard just west of I-75 in St. Petersburg. Id. Unlike the destruction of all access to the abutting road which occurred in Tessler, the Department left the street in front of the bar exactly as it was but built a four-lane limited access facility immediately to the north. Id. The existing abutting road was terminated a short distance east of the bar and access to the abutting road was provided by a single entrance a considerable distance west of the property. Id. Notwithstanding the fact that it was clearly less convenient to reach the property in the after situation, the court quashed the trial judge's order granting the landowner's motion for jury trial and inverse condemnation. Id. at 398-399.

At this point there is no doubt that Gefen has not suffered a compensable taking. However, the Fourth DCA's decision in State, DOT v. Lakewood Travel Park, 580 So. 2d 230 (Fla. 4th DCA 1991), Rev. denied, Case No. 78,440 (Fla. December 10, 1991), facially supports Gefen's position and was cited by the lower court for the Fourth DCA's rejection of the Department's argument that there cannot be a taking under Tessler absent impact upon access to and from the subject property and an abutting road. Department of Transportation v. L. I. Gefen, supra.

In Lakewood, an inverse condemnation action, the court upheld the trial court's finding of a compensable taking where the landowner's pre-existing access to an abutting road had not been impacted, but the Department's relocation or elimination of certain other roads in the area during the construction of I-595 was

alleged to have adversely affected the access to and from Lakewood's property and the highway system thereabouts. The basis for this result was the court's observation that "[t]he term access...in the context of a landowner's right of access has as yet no fixed official definition in Florida[,]" and the court's adoption of the following definitions from a 1969 Texas Law Review article:

> It is credible and serviceable in our time and place to define access as an owner's capacity to reach the abutting street and the general street system.
>
> ....
>
> ... The property right of access should be defined as the reasonable capacity of a landowner to reach the abutting public way by customary means of locomotion and then to reach the general system of public ways.

Id. at 580 So. 2d 233. The court then deferred to the trial judge's legal analysis which contained the conclusion that the changes in Lakewood's access were strikingly similar to the changes imposed upon the Tessler landowner except that the changes created in Lakewood were uniformly more egregious. Id.

Lakewood is precedentially unsound and should be disapproved for three reasons. First of all, there is a fixed official definition of the term "right of access" in Florida. As noted above, the Legislature defined the term as the right of ingress to a highway from abutting land and egress from a highway to abutting land. Section 334.03(16), Florida Statutes. The definition does not include the right to get to a particular system of roads by a particular route from the abutting highway.

Second, the trial judge, and concomitantly the Fourth DCA through its deference to the trial judge's legal analysis, subscribed to the same misapprehension of the Tessler decision that plagued the trial judge and the First DCA in this case. There was no similarity between the compensable loss of access in Tessler and the alleged loss of "access" in Lakewood. Tessler's compensable loss of access was the destruction of access to an abutting road, not the ability to reach a certain road system from the abutting road.

Third, Lakewood, like Gefen, did not suffer a compensable loss of access. What Lakewood and Gefen unquestionably did suffer were the affects of a reduction in traffic flow which is not compensable. See Palm Beach County v. Tessler, supra at 849.

B. The Trial Judge And The Lower Court Improperly Concluded That A Compensable Taking Resulted From A Reduction In Traffic Flow.

While couched in terms of a loss of access, the evidence adduced at trial shows that the basis of Gefen's complaint and the trial judge's ruling is a reduction in traffic flow resulting from the closure of the McCoys Creek Boulevard southbound I-95 entrance and exit ramps. The record reflects that Gefen's consulting engineer, Robert Young, testified that the term "PIN location" refers to a prime piece of property that has very good access as far as traffic is concerned (T 43); that the subject property prior to September 11, 1989 [the date of the ramp closure], qualified as a PIN location (T 43); and that commercial enterprises seek out and

acquire such locations. (T 43) Young also testified that oil companies which desire high traffic capacity have looked for such locations. (T 44)

Gefen's traffic engineer, Ward Koutnik, testified that the highest and best use of the property would have a been a convenience store with gas pumps in view of the previous access to and from I-95. (T 54) Concerning impulse purchasers and convenience store/gas pump facilities, Koutnik stated that:

> The term that is used right now, at least in this decade for traffic engineering, is "passerby command". In this case, there have been numerous studies that have indicated the vast majority of people that go to these facilities are people that are on the road and see something and will use the facility if it's convenient.
>
> In the case of these studies done in Florida with the similar kind of facility, convenience store/gas pump, approximately 70 percent of the people that used that facility were passerby capture. And, in my opinion, if it wasn't easy to get to that site, that percentage would drop dramatically.
>
> And to have a successful or 'quote' "profitable business" to run, continuing if you don't get your fair share of passerby traffic, you won't have a business.
>
> This particular case we feel that getting to that site approximately 62 percent of the potential average demand going to this facility would be coming off of 95 and getting into the site and then, of course, coming back.
>
> Now, sure, there are other roads leading to the site. Some of the people who know about it certainly use it. People living in this area here or know about it can easily find their way over here if they know about it but that won't be part of their demand here coming in the side roads or minor roads,

> particularly some of the conditions those roads are in.
>
> And some of the environment that it's in, you won't have -- hardly any of those people will be passerby capture. Those will be people who know about it and how to work their way around to the site and use it.
>
> This I-95 is the key to the success of that activity, in my opinion.

(T 56-57)

Koutnik further testified that there was no question in his mind that the highest and best use of the property is null and void (T 57); that nobody will ever locate in this location without access to and from I-95 (T 57); and that in his opinion, at least 60 percent of the potential traffic going to and from it [assumedly the subject property] has been eliminated. (T 57) Koutnik again indicated that if the site were used as a convenience store/gas pump facility, 62 percent of the people going to the site would come from I-95. (T 65) He also indicated that closure of the ramps would drop the 62 percent patronage to one percent (T 65), and concluded that "[v]irtually kills that site for being a profitable business." (T 66)

Rather than a compensable loss of access to an abutting road, the foregoing testimony from Gefen's witnesses conclusively demonstrates that Gefen's claim is predicated entirely upon a reduction in traffic flow to and from I-95 and its attendant commercial consequences. It well settled that such a claim is not compensable. Palm Beach County v. Tessler, supra at 849; Division of Administration v. Capital Plaza, 397 So. 2d 682, 683 (Fla.

1981); State Department of Transportation v. Stubbs, 285 So. 2d 1, 4 (Fla. 1973); Meltzer v. Hillsborough County, 167 So. 2d 54, 55 (Fla. 2d DCA 1964); Jahoda v. State Road Department, 106 So. 2d 870, 872 (Fla. 2d DCA 1958).

The Jahoda court was confronted with the issue of whether the lower court erred in disallowing testimony regarding the reduction of value of the landowner's remainder by reason of the rerouting of traffic over a new highway. Jahoda v. State Road Department, supra at 871. In effect, the landowner's frontage on a major highway in the before situation became frontage on a secondary road in the after situation. Id. The court affirmed the trial court quoting with approval the following language:

> Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public highway in any particular place. That exception is based upon the consideration that the State owes no duty to any person to send public traffic past his door.

Id. at 872.

In Meltzer, the condemning authority took a portion of the landowner's property for construction of an overpass and cloverleaf at the intersection of Dale Mabry Highway and Hillsborough Avenue in the city of Tampa. Meltzer v. Hillsborough County, supra at 54. The land taken was to be used for construction of a one-way traffic service road or ramp facilitating east bound traffic on Hillsborough Avenue turning right or south onto Dale Mabry Highway. Id. at 55. A jury found severance damages of $31,000. The landowners appealed contending that the damages to the remainder were in excess of $76,000. Id.

The condemning authority denied that the remainder had been damaged to an extent above which the landowners had been compensated and asserted that the construction merely changed the area traffic pattern. Id. The condemnor also contended that the inconvenience due to a change in traffic pattern is not compensable; that the landowners had not lost their right to ingress and egress inasmuch as "access" had not been condemned; and that the corner was more accessible in the after situation. Id.

The court affirmed holding that:

> The regulation of the east bound flow of traffic on Hillsborough Avenue does not constitute legal impairment of appellants' access to Hillsborough Avenue, Dale Mabry Highway or the ramp road. The State owes no duty to any person to send public traffic past his door, and inconvenience from diversion of traffic due to changes in street patterns is normally not compensable. See e. g. Jahoda v. State Road Department, Fla.App.1958, 106 So. 2d 871. Appellants have not demonstrated that this case provides any exception to the general rule. The right of access to the thoroughfares was neither condemned nor destroyed, and other points of ingress and egress have not been impaired in any manner whatsoever.

Id.

This Court, in Stubbs, approved the traffic flow rule set down in Jahoda and subsequently followed in Meltzer, holding that:

> The District Court of Appeal, Second District, relied heavily upon a dissenting opinion in an Alabama decision, which in turn rested upon a result reached by the Supreme Court of New Mexico. Language cited therein and relied upon for conflict purposes, reads:
>
> > "Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public

> highway in any particular place. That exception is based upon the consideration that the State owes no duty to any person to send public traffic past his door." Id. 106 So. 2d at 872.
>
> We are in agreement with the above statements insofar as they hold that "access" as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic.

State Department of Transportation v. Stubbs, supra at 3-4. Since the evidence adduced in this case reveals that the basis for Gefen's claim is the adverse economic impact of the reduction in traffic flow from I-95, it is particularly noteworthy that the Stubbs Court indicated that adverse economic impact to commercial property is not a valid consideration.

Subsequently, this Court applied the traffic flow rule in Division of Administration v. Capital Plaza, supra. In that case the Department had acquired a strip of land owned by Capital Plaza for use in widening a road. Id. at 683. Following reconstruction, the road, formerly two lanes with no median, had six lanes divided by a raised four-foot-wide median. Id. Due to the median, northbound drivers could no longer turn across traffic directly into Capital's service station. Id.

The trial court denied Capital's request to introduce evidence of damages to the remainder of the property caused by decreased access. Id. The First DCA reversed, holding that the jury should have been allowed to consider evidence relating to free access by

northbound traffic. Id. This Court quashed the decision and held, inter alia:

> Instead the instant case concerns alleged damages resulting from a change in the flow of traffic, not a deprivation of access. There is still free, unimpeded access to Capital's service station albeit only by southbound traffic. Although the holding in Stubbs is not applicable here, that case does provide guidance. The Stubbs Court also said that "'access' as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic." 285 So. 2d at 4. Thus, this state has joined the numerous other jurisdictions which have found that a land owner has no property right in the continuation or maintenance of traffic flow past his property.

Id.

When setting out various principles applicable to inverse condemnation actions in the Tessler opinion, this Court clarified its decision in Capital Plaza and confirmed the viability of the traffic flow rule. The Court stated:

> We did not intend that Division of Administration v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981), be read as limiting the rationale of Stubbs to takings under section 338.04. The Capital Plaza case involved a reduction in the flow of traffic. In the course of the widening of a road, a median was installed so that northbound drivers could no longer turn across traffic directly into the landowner's service station. We ruled that this did not involve a deprivation of access but rather an impairment of traffic flow for which no recovery was available. Accord Jahoda v. State Rd. Dep't, 106 So. 2d 870 (Fla. 2d DCA 1958).

Palm Beach County v. Tessler, supra at 848-849.

The foregoing line of cases not only establishes the continued applicability of the traffic flow rule, it conclusively demonstrates that the First DCA erroneously affirmed the trial judge's finding of a compensable taking in this case.

If the Court will recall, the testimony of Gefen's witnesses revealed that the foundation of her claim was the adverse commercial impact visited upon her property as a result of closure of the I-95 ramps. Specifically, the closure diminished the flow of traffic to and from southbound I-95 from McCoys Creek Boulevard which abutted the subject property. As this Court succinctly stated in Tessler, "[a] taking has not occurred when [as in the case at bar] governmental action causes the flow of traffic on an abutting road to be diminished." Palm Beach County v. Tessler, supra at 849.

C. Policy Considerations.

Any time the Court grapples with inverse condemnation issues requiring a determination of whether governmental action has resulted in a compensable taking of private property, it necessarily is confronted with competing interests of the citizenry at large and the individual landowner who claims that his property has been taken. The Court has the unenviable task of balancing those interests and producing a result that is not only consistent with the public good, but also is in harmony with the constitutional protection afforded the individual landowner's property interests. Here, the lower court failed to strike to the proper balance as a result of its misapprehension of Tessler and

apparent disregard of controlling authority concerning the non-compensability of traffic flow claims.

If allowed to stand, the First DCA's opinion will have a substantial adverse fiscal impact upon every governmental agency in the state that is vested with the authority to regulate the opening and closing of entrance and exit ramps on limited access highways. If Gefen has a compensable claim, then there is no sound legal basis for holding that the landowner immediately next to Gefen does not have a compensable claim, or for that matter, each successive landowner ad infinitum. Indeed, any landowner would have a compensable claim if he could show that, as a result of the closure of entrance and exit ramps at a particular interchange, his route to and from the limited access facility had become more circuitous.

Consider next the operation of the Gefen decision in situations where entrance and exit ramps are closed in a rural location where available alternative routes are minimal. Would the claim of the landowner thirty miles from the interchange be any less compelling than the claim of the landowner immediately adjacent to the interchange? Both no doubt would have to travel a more circuitous route to reach the limited access facility.

Where then should the line be drawn and upon what criteria should it be based? Geographic proximity to the interchange would certainly be workable and easily applied. However, it would ignore the circuity of travel argument and would, at best, be arbitrary. A distinction between commercial and residential claims might also be a solution but for the fact that such a distinction, while giving lip service to the circuity of travel requirement, would in

effect be denying compensation to a class of landowners because they were not in a position to suffer an adverse economic impact from what heretofore would have been a non-compensable reduction in traffic flow.

Other than Lakewood and Gefen with their attendant precedential deficiencies, the Department is unaware of any authority indicating that the right of access in Florida includes the right to reach a given system of roads by a particular route from public roads abutting the subject property. Consequently, the best solution lies in refusing to expand the judicial definition of a compensable loss of access to include situations where the ability to ingress and egress the subject property from the abutting roads has not been affected. Such an approach would be consistent with the landowner's right of access contemplated in Tessler, as well as the legislative definition set out in Section 334.03(16), Florida Statutes. It would also recognize the continued viability of the traffic flow rule in cases where, as here, the landowner's claim is grounded upon the adverse economic impact resulting from a reduction in traffic flow.

CONCLUSION

The record before the Court demonstrates that Gefen's ability to ingress and egress her property to and from the abutting public roads was not impacted by the closure of the southbound I-95 entrance and exit ramps. The record further reflects that Gefen's claim, in its entirety, is predicated upon the adverse economic impact resulting from a reduction in traffic flow past her property to and from southbound I-95. Established precedent leads inescapably to the conclusion that the trial court and the First DCA erroneously found that Gefen had suffered a compensable taking.

Accordingly, the certified question should be answered in the negative, Lakewood should be disapproved, and the First DCA's decision herein should be quashed with directions to reverse the final judgment and remand the cause to the circuit court for entry of final judgment in favor of the Department.

Respectfully submitted,

GREGORY G. COSTAS
Assistant General Counsel
FLORIDA BAR NO.: 210285
Thornton J. Williams
General Counsel
Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458
(904) 488-9425

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 23rd day of August, 1993 to WILLIAM L. COALSON, ESQUIRE, 2700 University Blvd., West, Ste. A-4, Jacksonville, Florida 32217.

GREGORY G. COSTAS