097

SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO. 82,132

L. I. GEFEN,

Respondent.

_____/

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

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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). Citations to Gefen's answer brief will be indicated parenthetically as "AB" 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

Gefen, in her Statement of the Case and Facts, represents that "... there was no need to close McCoys Creek Boulevard because the limits of construction had stopped at the north boundary of McCoys Creek Boulevard." (AB 3) The Department objects to this representation because it is unsupported by the testimony adduced below.

The Department objects to the second full paragraph on page 3 of Gefen's answer brief on the grounds that it contains citations to authority and is argumentative, that the record does not support the assertion that McCoys Creek Boulevard was part of a limited access facility, and that the trial judge rejected a finding set out in the Second Amended Final Judgment prepared by Gefen which provided: "McCoys Creek Boulevard is a dedicated public road pursuant to [Section] 95.361, Florida Statutes (1989) and the Department of Transportation's barricading said public road at its intersection with I-95 effectively closed McCoys Creek Boulevard to the traveling public." (R 82; M2 3-5, 7-8)

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.

Gefen first contends that the trial judge properly found a taking because the Department intends to take her property at some point in the future and the Department's action in closing the ramps to southbound I-95 will produce a lower appraised value when the property is ultimately taken. (AB 5-6) In other words, Gefen claims she will not be awarded full compensation unless she is paid now. (AB 6, 7) Gefen's reasoning is flawed because the damages she allegedly incurred are not recognized as an element of full compensation.

Gefen ignores, and would have this Court ignore, that her claim to a denial of full compensation is based entirely upon damages resulting from a reduction in traffic flow. Gefen does not claim any damages arising from diminished or eliminated ingress and egress to and from her property to the abutting public roads. Instead, she boldly states that "[b]ecause of this fact, i.e., no I-95 ingress and egress, the subject location is no longer a

'passerby captive traffic' site (T-54) and it has very little value." (AB 6)

Gefen's claimed damages obviously result from a reduction in traffic flow, as the foregoing statement and evidence adduced below demonstrate, and are not an element of constitutionally mandated full compensation. Palm Beach County v. Tessler, 538 So.2d 846, 849 (Fla. 1989); 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) (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); 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).

Regarding the current value of the property, the record reflects that Gefen is receiving rental payments from an outdoor advertising company for a sign located on the property. (T 23)

Gefen next suggests that the Department's reliance upon Jahoda is misplaced in light of this Court's decision in Stubbs and an indication in Shepard's that the case had been overruled. (AB 7) Notwithstanding Shepard's reported treatment of the case, review of Stubbs and a more recent decision of this Court, cited by the Department in its initial brief, reveals that Jahoda remains valid authority for the proposition for which it was cited by the Department, to-wit: the genesis of the traffic flow rule.

Gefen evidently overlooked the fact that the Stubbs Court, speaking about Jahoda, said:

> 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. [Emphasis added]

State Department of Transportation v. Stubbs, supra at 3-4.

Any lingering doubt concerning Jahoda's continued viability as authority for the traffic flow rule is readily dispelled by this Court's recent decision in Palm Beach County v. Tessler, supra. The Court cited Jahoda as authority for the traffic flow rule stating:

> 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 Road Dep't, 106 So.2d 870 (Fla. 2d DCA 1958).

Tessler, at 538 So.2d 849.

Gefen relies upon Dade County v. Still, 377 So.2d 689 (Fla. 1979), for the proposition that any governmental action, such as the Department's action here, which may have the effect of depressing property values, gives rise to a compensable taking. (AB 7-9) Gefen is mistaken.

This Court in Dade County v. Still, supra, citing to City of Miami v. Romer, 73 So.2d 285 (Fla. 1954) and State Road Department v. Chicone, 158 So.2d 753 (Fla. 1963), reaffirmed the rule that a condemning authority cannot benefit from a depression in property value caused by a prior announcement that it will be taken for a public project. Id. at 377 So.2d 690. Applying this principle to the operative facts in Still, the Court held that the depreciating effect of county ordinances which indicated that a portion of a landowner's property would be taken for street widening was not a proper element to be used by the appraiser in determining the market value of the property taken.

Still is readily distinguishable from the case at bar. Here, there has been no governmental action indicating that Gefen's property or a portion thereof will be taken for a public project. Instead, the action Gefen complains of which will purportedly affect her property's value is the reduction in traffic flow to and from the property--a circumstance which has been repeatedly held not to give rise to compensable damages.

The Department's action, as opposed to Dade County's passing of ordinances in Still, does not amount to a deprivation of property without full compensation because constitutionally

mandated full compensation does not include damages resulting from a reduction in traffic flow. Palm Beach County v. Tessler, supra; Division of Administration v. Capital Plaza, supra; State Department of Transportation v. Stubbs, supra; Meltzer v. Hillsborough County, supra; Jahoda v. State Road Department, supra. It therefore makes no difference whether Gefen's property is taken now or at some point in the future. Any reduction in value attributable to the diminished traffic flow is not compensable.

Gefen contends that there has been a limited access taking and quotes language from Benerofe v. State Road Department, 210 So.2d 28, 30 (Fla. 1st DCA 1968) indicating that an aggrieved property owner who had no current evidence of a limited access taking, and who had not been permitted to put on evidence of severance damages resulting from such a taking, would have a remedy in inverse condemnation if his right to ingress and egress was later taken. (AB 9-10) Prior to the language quoted by Gefen, the Benerofe Court held:

> In essence, then, the trial court was simply confronted with a situation in which the appellant sought to introduce evidence of damages resulting from the taking of a right of ingress and egress when there was no showing that any such taking had or would occur. Under those circumstances the court properly held that such evidence was inadmissible.
>
> In so holding, we recognize the rule that, where a limited access is taken, the abutting property owners are entitled to compensation for the destruction of their previously-existing right of access. Anhoco Corporation v. Dade County, 144 So.2d 793 (Fla. 1962). We apply here the well-settled converse of this rule--that, where there is no

> limited access, such owners are not so entitled. See Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906).

Id. at 210 So.2d 30. As in Benerofe, there has been no taking of an identifiable property interest for limited access purposes in this case.

Unlike the situation in Anhoco Corporation v. Dade County, 144 So.2d 793 (Fla. 1962), where an abutting established land service road (State Road 826) was converted into a limited access facility, Gefen's pre-existing ingress and egress to the abutting public roads has not been disturbed and McCoys Creek Boulevard has not been turned into a limited access facility as was State Road 826 in Anhoco. Instead, entrance and exit ramps to I-95 from McCoys Creek Boulevard were closed at the Department's right-of-way line. Thus, rather than supporting Gefen's position, Benerofe acts as further confirmation that the trial judge reversibly erred in finding a compensable taking where there has been no impact upon pre-existing ingress and egress to and from the subject property.

Similarly, in Benerofe v. State Road Department, 217 So.2d 838 (Fla. 1969), this Court discharged certiorari holding, in part:

> In line with the holding of the District Court and the text from 26 Am.Jur.2d, Eminent Domain, [Section] 199, we agree that even when the fee of a street or highway is in a city or a public highway agency, the abutting owners have easements of access, light, and air from the street or highway appurtenant to their land, and unreasonable interference therewith may constitute a taking or damaging within constitutional provisions requiring compensation therefor. Such easements may be condemned originally, as in the case of a limited access highway; or they may be acquired later on, if need for their

> acquisition arises, by the municipal or highway authorities; or compensation may be required therefor in timely and proper cases by the abutting landowners where deprivation thereof actually occurs without prior acquisition. [Emphasis added]

Id. at 217 So.2d 839. Here, there has been no impact upon Gefen's abutter's easements and therefore no basis for finding a compensable taking.

Gefen states that she "considers the actions of the DOT in this case to constitute a 'regulatory taking'" and argues that she has suffered a compensable taking because she has demonstrated that the Department's action denied her economically viable use of her property as required by the First DCA's decision in Glisson v. Alachua County, 558 So.2d 1030 (Fla. 1st DCA 1990), Rev. denied, 570 So.2d 1304 (Fla. 1990). (AB 10) Gefen's argument is based upon a fallacious premise. The trial judge did not find, nor does the record support a finding, that the "taking" complained of in the case at bar was a regulatory taking.

The trial judge found, albeit erroneously, that the Department's action in closing the ramps was a compensable taking under Tessler. (R 83-84) Tessler did not involve a regulatory taking. There, a taking was found because the governmental action caused a substantial loss of access to the property even though there was no physical appropriation of the property itself. Moreover, the record contains no evidence of any regulation or restriction of the use of the subject property imposed by the Department. Gefen's perceived loss of viable economic use of the property is attributable solely to a reduction in traffic flow and

not to any regulatory activity of the Department directed to the specific parcel.

Gefen also looks to the First DCA's decision in Santa Rosa County v. Wicks, 535 So.2d 349 (Fla. 1st DCA 1989) for support of her contention that the Department's placing barricades on McCoys Creek Boulevard was a closure of a dedicated public road entitling her to compensation. (AB 10-11) The entirety of the court's opinion in Wicks was:

> Appellant County appeals a judgment of inverse condemnation which found that its closing of a portion of a road amounted to a taking for which appellees are entitled to recover compensation. Competent substantial evidence supports the trial court's determinations that the closed portion of the road had been dedicated to the public pursuant to section 95.361, Florida Statutes, and that the closing of the road resulted in damage to appellees Wickses' property, as well as to the property of appellees Sumlins. Therefore, we affirm.

Id. Obviously, there are insufficient facts set out in the Wicks opinion to discern what circumstances gave rise to a compensable taking in that case. Thus, by no means can Wicks be viewed as requiring, or supporting, a finding of a compensable taking based upon the Department's action in this case.

Furthermore, the barricades were placed along the Department's I-95 right-of-way line and did not work a closure of McCoys Creek Boulevard. Ever since Gefen owned the subject property, McCoys Creek Boulevard dead-ended into the entrance and exit ramps for I-95. (T 30-31) No traffic could proceed from the west side of I-95 to the east side or vice versa on McCoys Creek Boulevard. The

record (M2 3-5, 7-8) indicates that this was the basis for the trial judge deleting the following finding of fact from the Second Amended Final Judgment prepared by Gefen:

> (d) McCoys Creek Boulevard is a dedicated public road pursuant to [Section] 95.361, Florida Statutes (1989) and the Department of Transportation's barricading said public road at its intersection with I-95 effectively closed McCoys Creek Boulevard to the traveling public.

(R 82)

Gefen next urges affirmance of the cause on the authority of State, DOT v. Lakewood Travel Park, 580 So.2d 230 (Fla. 4th DCA 1991), Rev. denied, Case No. 78,440 (Fla. Dec. 10, 1991). (AB 11-12) Yet, Gefen's only response to the Department's three valid criticisms of the Lakewood decision (initial brief at pages 14-15), is to suggest that the Department completely glossed over the case, to note that this Court denied review, and to rely upon Lakewood's fundamentally flawed holding. (AB 11-12)

Suffice it to say, the Department adheres to its contention that Lakewood is precedentially unsound for the reasons set out in its initial brief--reasons which Gefen has chosen not to dispute with any appreciable particularity. Furthermore, and contrary to Gefen's contention, the fact that this Court denied review is not necessarily an indication that this Court approved of the Lakewood decision on the merits. However, if one is willing to read anything into the Court's action, Justice Grimes' dissent from the denial of review is rather substantial evidence that the author of Tessler was of the opinion that Lakewood collided with the

principles enunciated in Tessler. For the Court's convenience, a copy of the Lakewood order is attached as an appendix hereto.

Gefen states that "[a]t page 12 of its initial brief, the scrivener of the DOT's initial brief defines access and cites as authority for that definition Sec. 334.03(16), Florida Statutes (1991), which is the definition of 'Person'." (AB 13) Reference to the Department's initial brief, at page 12, reveals that the date for the version of the statute cited was omitted. The 1989 version of Section 334.03 sets out the definition of access in subsection (16). In the 1991 version of the statute, the same definition of access is set out in subsection (17).

Gefen looks to Sections 334.03(12), 334.03(21), and 335.181, Florida Statutes (1991), and contends that her property abuts I-95 and therefore abuts the State Highway System and that the Department's regulation of access to I-95 subjects it to a claim for full compensation under the Florida Constitution. (AB 13-14) Gefen's reliance upon these statutory provisions is misplaced.

First of all, Sections 335.18-335.189, Florida Statutes (1991), comprise the State Highway System Access Management Act. The Act regulates connections to roads on the State Highway System from abutting property. The Act has no bearing upon the case at bar because Gefen never had direct access to I-95 from her property. Second, Section 334.03(12), Florida Statutes (1991), conclusively eliminates any suggestion that Gefen had, or could have, a right of access to I-95 that would be subject to regulation under the Access Management Act and which, in turn, could form the

basis for a taking claim. Subsection (12) defines, in pertinent part, a limited access facility, such as I-95, as:

> A street or highway especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or easement of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility of for any other reason. [Emphasis added]

Finally, Gefen cites Gray v. South Carolina Department of Highways and Public Transportation, 427 S.E.2d 899 (S.C. App. 1992) and County of Anoka v. Esmailzadeh, 498 N.W.2d 58 (Minn. App. 1993) and suggests that other jurisdictions have disposed of issues similar to the issue before the Court in a manner favorable to her position. (AB 15-18) Gefen's reliance upon Gray and Anoka is misplaced.

Gefen has evidently overlooked the Second DCA's decision in Division of Administration, State Department of Transportation v. Baredian, 287 So. 2d 389 (Fla. 2d DCA 1973), Cert. denied, 294 So. 2d 660 (Fla. 1974), cited by the Department in its initial brief. Baredian is factually closer to Gray than the instant case and reached a contrary result. The Baredian court quashed the trial judge's order granting the landowner's motion for jury trial and inverse condemnation notwithstanding the fact that in the after situation, the road abutting the subject property could only be reached by a single entrance a considerable distance from the property. Id. at 398-399. Similarly, Anoka, which involved the installation of a median which prevented traffic from turning into the property form a given direction, collides with this Court's

decision in Division of Administration v. Capital Plaza, supra. In Capital Plaza, the Court found that the installation of a median produced a non-compensable reduction in traffic flow.

Briefly summarized, Gefen has failed to come forward with any rationale, grounded upon sound legal principles, for upholding the First DCA's opinion affirming the Second Amended Final Judgment entered below. The evidence adduced at trial, especially that of Gefen's experts, and a good deal of the argument Gefen has advanced on appeal, conclusively demonstrate that Gefen's claim, in its entirety, was predicated upon the impact a reduction in traffic to and from I-95 had upon the subject property. Since damages attributed to a reduction in traffic flow are not compensable, the trial judge and the lower court, as a matter of law, reversibly erred in concluding that Gefen suffered a compensable taking.

CONCLUSION

Based upon the authority cited and argument advanced herein and in the Department's initial brief, 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 a final judgment in favor of the Department.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 22nd day of October, 1993 to WILLIAM L. COALSON, ESQUIRE, 2700 University Blvd., West, Ste. A-4, Jacksonville, Florida 32217.

GREGORY G. COSTAS

APPENDIX

Supreme Court of Florida

TUESDAY, DECEMBER 10, 1991

DEPARTMENT OF TRANSPORTATION,	*	
	*	
Petitioner,	*	CASE NO. 78,440
	*	
v.	*	District Court of Appeal,
	*	4th District - No. 90-1477
LAKEWOOD TRAVEL PARK, INC.,	*	
	*	
Respondent.	*	
	*	
* * * * * * * * * * * * * * * * *		

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, C.J., OVERTON, KOGAN and HARDING, JJ., concur
GRIMES, J., dissents

A True Copy

TEST: SUPREME COURT OF FLORIDA

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. John T. Luzzo, Judge

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