SUPREME COURT OF FLORIDA

JOSEPH J. RUBANO, et al.

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO. 83,307

District Court of Appeal
4th District - No. 92-2695

INITIAL BRIEF OF PETITIONER JOSEPH J. RUBANO, ET AL.

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Prior to November 1987, the five properties involved in this cause had direct access to a well traveled arterial roadway, S.R. 84. Customers, and those making deliveries, most of whom drove large, heavy duty trucks, could safely and easily access the properties from both the east and west bound lanes of S.R. 84. Access to and from the general transportation system by these large truck vehicles could also be safely and easily accomplished. Over a period of nearly five years, however, activities conducted by the DOT destroyed the existing uses of the properties by denying the properties access that was suitable for those existing uses. These activities included, but were not limited to: (1) destroying pre-existing access from the eastbound lanes, except by use of a lengthy, potentially hazardous and circuitous route; (2) walling off the properties by the use of concrete barriers which separated the properties from the westbound lanes of S.R. 84, relegating the properties to the use of a frontage / service road where direct access once existed; and (3) closing ramps to and from a main thoroughfare, which eliminated the ability to reasonably connect to the general transportation system.

TABLE OF AUTHORITIES

Cases:

PRELIMINARY STATEMENT

This appeal involves five separate inverse condemnation proceedings, which were consolidated for trial. (R: 469; 473; 481). Petitioners were owners or tenants of certain properties which were identified as Parcels 1, 2, 3A, 3B, 4 and 5. The properties were also identified during the proceedings by the following common descriptions:

* Parcel 1 - Coastal Ford property.
* Parcel 2 - RPM property.
* Parcel 3 - (3A & 3B) "L" shaped property.
* Parcel 4 - Hillman property.
* Parcel 5 - Staff Marine property.

A separate order styled "Findings of Fact, Conclusions of Law and Final Judgment In Inverse Condemnation" was entered as to each parcel. (R: 836-848; 849-861; 862-874; 875-887; 888-901). (A: 10-23/Parcel 1)

For this Court's reference, a copy of Plaintiff's Exhibit 44, reflecting the location of the parcels, is included on the following page. The parcels are highlighted in yellow.

For purposes of this Initial Brief the following symbols will be utilized: "R" - refers to the Record on Appeal; "A" - refers to the Appendix accompanying the Initial Brief.

STATEMENT OF CASE AND FACTS

While before the District Court, the DOT conceded that the five final judgments "accurately reflected the basic facts adduced at trial." (Initial Brief of Appellant, p.15). With some variation, the factual findings of the trial court were basically the same as to all five parcels. DOT quoted from the judgment entered as to Parcel 1 in the presentation of it's

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Statement of Case and Facts. (Initial Brief, pp. 3 - 15). Given DOT's concession, the Petitioner will utilize the final judgments as the basis for the Statement of Case and Facts.

A. BEFORE CONDITIONS.

1. **LOCATION OF THE PROPERTIES** - The properties are all located generally between S.W. 26th Terrace and S.W. 23rd Terrace, on the north side of S.R. 84, which runs east and west. All of the properties abutted the northernmost westbound lane of the S.R. 84, allowing direct access to the roadway. Customers traveling westbound could enter the properties by merely making a right turn. Customers leaving the properties did so by making a right turn onto S.R. 84. Customers traveling east on S.R. 84 could reach the property by utilizing a protected u-turn at the intersection of Ravenswood Road and S.R. 84. Customers leaving the property, which desired to return to the eastbound lanes, could do so by turning right onto the westbound lanes and then utilize one of two U-turns located a short distance from the properties. (R: 613-615). (See Plaintiff's Exhibit 44, which accurately reflects the location of the parcels and the U-turns prior to November, 1987.)

2. **PRE-EXISTING USES OF THE PROPERTIES** - Parcel 1 (Coastal Ford property) was used as a heavy duty truck dealership, which sold, leased and serviced new and used heavy duty trucks and tractor trailer type vehicles. Parts and supplies for these types of vehicles were also sold at the location. (R: 889).

Parcel 2 (RPM property) was used as a Detroit Diesel Engine dealership, which sold, repaired, maintained and serviced new and used heavy duty diesel engines that were used in trucks, various marine applications and for stationary power uses. Parts and supplies for these engines were also sold at the site. (R: 863).

Parcel 3 (3A & 3B) was leased to Minotaur Corporation d/b/a Title Outlet, and was used as a parking and storage lot in connection with the sale of ceramic tile and other floor coverings, to contractors, suppliers, installers and to the general public. (R: 850)

Parcel 4 (the Hillman property) was used as an Onan Generator dealership which sold, repaired, maintained and serviced new and used diesel and gasoline powered generators, which were used in trucks, recreational vehicles, motor and mobile homes. Parts and supplies for these generators were also sold at the site. (R: 876).

Parcel 5 (the Staff Marine property) was used by the tenant (Anything On Wheels) as a location for the sale of used cars and light trucks. Numerous daily "test drives" were made by customers to and from the site. (R: 837).

With the exception of Parcel 5, used by Anything On Wheels, the majority of vehicles entering and leaving Parcels 1, 2, 3 and 4, including delivery vehicles, were large, heavy duty types of vehicles, including tractor trailers. (R:889; 863; 850; 876). With regard to all of the parcels, westbound vehicles could turn directly onto the properties, but eastbound vehicles depended upon the protected and highly visible U-turn located at Ravenswood Road. Vehicles traveling north or south on Interstate 95, which was located approximately one quarter mile to the east, could exit onto S.R. 84 (westbound) and proceed directly to the site. (R:613-615; 889; 863; 850; 876). (See copy of Plaintiff's Ex. 44)

B. **GOVERNMENTAL ACTIVITY IN THE ADJACENT ROADWAY.**

Three events occurred which gave rise to the petitioners' claims that their property rights of access had been substantially impaired.

1. **RELOCATION OF LANES TO THE NORTH.**

On or about **December 14 1987**, DOT began relocating all existing travel lanes of State Road 84 to the north of their former location in order to construct, as part of State Project No. 86095-3454 (the Project), a new southern bridge over I-95 on State Road 84. In connection therewith, DOT eliminated the Ravenswood U-turn, which provided eastbound access to all of the parcels. It also erected a continuous line of concrete barriers between the east and westbound lanes of newly relocated State Road 84. The existing manner of access for eastbound vehicles was eliminated by the closure of the U-turn and installation of the barriers. To gain access to the parcels, eastbound vehicles on S.R. 84 were now required to cross over I-95 and continue traveling until they reached the U-turn at S.W. 15th Avenue. After making the U-turn, the vehicles could then cross back over I-95 and return to the properties using westbound State Road 84. (R: 890; 864; 851; 877; 837-838). (See Plaintiff's Ex. 45, reproduced on the following page.)

The evidence established that this manner of access was not visible from the vicinity of the properties, and customers or delivery vehicles not familiar with the area east of I-95 would have to pass the properties and travel over I-95 in search of the U-turn at S.W. 15th Ave. In comparison to the access which existed prior to the closure of the Ravenswood U-turn and erection of the concrete barriers, customers and delivery vehicles were now required to travel an additional distance of almost one and one-half miles. (R: 890; 864; 851; 877; 837-839).

The circuitous route described above was considered by all of Petitioners' expert witnesses to be a substantial impairment of Petitioners' preexisting access. The route was described by DOT's expert witnesses as "unreasonable", if this condition were permanent,


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(Robert Alexander), and as a "significant impairment in quality of access" (Daniel Murray). (R: 890-891; 864-865: 851-852; 877-878: 838-839).

In all of the orders entered, the trial court noted, as significant to the issue of eastbound access to the properties, the stipulation announced during the trial. There the DOT agreed to restore a visible, protected U-turn to S.R. 84, in accordance with the plans prepared by DOT in November, 1991. (Plaintiffs Exhibit No. 49) The U-turn would be located just west of the intersection with Ravenswood Road. (R: 892; 866; 853; 878-879; 839-840).

2. **RELOCATION OF LANES TO THE SOUTH.**

In **January, 1989**, DOT completed construction of the new southern bridge over I-95 on S.R. 84. It then relocated all travel lanes of S.R. 84 to the extreme south of its right-of-way in order to construct a new northern bridge over I-95. When relocating these travel lanes, DOT also created a service road from the 'old' westbound lanes of S.R. 84 by using concrete barriers which separated the service road from the travel lanes of State Road 84. With the exception of the western driveway of Parcel 1, the properties no longer abutted S.R. 84, but instead, abutted the service road. Access to and from S.R. 84 was then available only by utilizing a narrow break in the concrete barrier wall. This opening was virtually hidden from the view of motorists approaching on westbound S.R. 84 due to its location on the downgrade of the new southern bridge over I-95. In late **May, 1989**, DOT implemented changes to the service road, as depicted on Plaintiffs' Exhibit No. 4. In an effort to improve the access, DOT signalized the service road at S.W. 26th Terrace, and removed the barrier wall at the western end of the service road. (R: 892-893: 866-867; 853-

854, 879-880, 840-841).

According to DOT's representative, Mr. Patrick McCann, and Plaintiffs' Composite Exhibit No. 34, these changes occurred because the service road did not "...provide for the safe and expeditious movement of traffic through the project in accordance with the intent of the original contract," nor was it "functionally operational" without modification (See Plaintiffs' Composite Exhibit No. 34).

3. **ELIMINATION OF PRE-EXISTING I-95 CONNECTIONS TO S.R. 84.**

At the same time that DOT created the service road described above, it also physically severed all S.R. 84 connections to and from I-95. All customers and delivery vehicles desiring to access the properties by the I-95 exits onto westbound State Road 84 were relegated to the use of a portion of I-595, which exited onto S.W. 26th Terrace, south of its intersection with State Road 84. The majority of all customers and delivery vehicles attempting to gain access to the properties were now required to pursue a tedious and circuitous route, consisting of additional distances of between 2.32 and 2.43 miles, when compared to the distances before the I-95 connections to State Road 84 were severed. (See Plaintiffs Exhibit No. 47; A:24) (R: 893-894; 867; 854; 880; 841).

C. **FINDINGS OF THE TRIAL COURT.**

1. With regard to Parcel 1, while the property never lost all access between S.R. 84 and the general system of transportation, and although, the western driveway of Parcel No. 1 continued to abut the westbound travel lanes of State Road 84, the trial court found that Coastal Ford was forced to close its eastern driveway, which was its main entrance. It did so in order to stop the use of the property as part of the service road. This occurred

when vehicles arriving at the concrete barrier, at the western end of the service road, frequently entered the property through the eastern driveway, drove across the property and then departed onto westbound S.R. 84 through the western driveway. The trial court also found that the DOT's signalization of the service road at S.W. 26th Terrace in late May, 1989, did not cure the problem. In fact, traffic entered Parcel 1 through its western driveway from S.W. 26th Terrace and continued using the property as part of the service road. The trial court concluded that the quality of Coastal Ford's access in terms of safety and visibility, as well as ease and facility of access, was substantially diminished. (R:894).

2. With regard to the other parcels, the trial court found that while the properties did not lose all access between S.R. 84 and the general system of transportation, they had suffered a substantial loss of eastbound access. The properties were also taken off a major arterial roadway and placed on a service road. During this time period, the quality of access in terms of safety and visibility, as well as ease and facility of access, was substantially diminished. (R: 867-868; 855; 880-881; 841-842).

3. The adverse impacts of the DOT project were not limited to that described above. Throughout the existence of the service road (January 1989 through May 1990), a lack of visible access and inadequate and unsafe turning radii, at both the break in the barrier wall, and later at the western end of the service road when signalized, so destroyed all safe and visible access onto the properties, even from westbound State Road 84, that Petitioners were deprived of the economically viable use of the properties.

The DOT activities described above impacted the properties in the following way:

* Coastal Ford (Parcel 1) lost its dealership, which had been highly successful prior

to the commencement of DOT's project. (R:895-896).

* R.P.M. Diesel Engine Co. (Parcel 2) was forced to relocate its parts and supply business to another location, resulting in renovation expenses, additional employee expenses and the cost required to virtually double its parts inventory in order to maintain its level of sales. During this time it also suffered a continuing decline in its repair and service business.(R:869).

* Tile Outlet, the long term tenant of Parcel 3 (3A & 3B), vacated the property and terminated a long standing (14 year) option to lease other improvements (a building) on contiguous property.(R: 856).

* Parcel 4 lost its long term tenant of fourteen years. A new tenant was secured approximately one year later, after $20,000 in renovations were made. In less than a year, this new tenant also vacated the property.(R:882).

* Parcel 5 also lost its tenant (Anything On Wheels) and was unable to secure another tenant after November 1987.(R:843).

4. While the trial court recognized that the I-95 connections to S.R. 84 were restored by July, 1990, and that a Texas U-turn was constructed as part of the project, based upon all of the evidence, including the video tape of the Texas U-turn (Defendant's Exhibit No. 41) and the expert testimony on this issue, the trial court found that the Texas U-turn did not restore suitable eastbound access to the properties. It also found that suitable access would only be restored when DOT, as stipulated during trial, constructed a visible and protected U-turn on S.R. 84. This was to be completed by Labor Day, 1992. (R: 896; 869-870; 857; 882-883; 843-844).

5. The trial court reached the following conclusions:

* DOT's activities had substantially diminished access to the abutting roadway and the general system of transportation from December 14, 1987 through the date the DOT completes the modifications to S.R. 84 as shown in Plaintiff's Exhibit 49.

* DOT's activities had taken access from the properties to the abutting roadway and the general system of transportation.

* The taking of access was "temporary," commencing on December 14, 1987, and continuing until the DOT completes the modifications (protected u-turn) stipulated to during the trial.

D. **OPINION OF THE DISTRICT COURT.**

On appeal the District Court of Appeal stated that the question before it was "... whether this is the 'substantial loss of access' which is compensable under Tessler or merely the 'loss of the most convenient access' or diminished 'flow of traffic' which is not compensable under Tessler." (A: 6) Although it agreed that trial judge provided a "scholarly and well-reasoned analysis of the case law," the District Court, "not without difficulty," concluded that the case law required reversal. (A: 8). Specifically, the District Court found it "... difficult to distinguish Capital Plaza since the median in Capital Plaza and the concrete barriers erected here were similar in that they affected the access of traffic in one direction only." (A: 8).

After acknowledging the property owners' constitutional right to compensation for the taking of their property, and that the "question was close," the District Court certified this cause as one involving a question of great public importance. (A: 9).

POINT AT ISSUE

Prior to November 1987, the five properties involved in this cause had direct access to a well traveled arterial roadway, S.R. 84. Customers, and those making deliveries, most of whom drove large, heavy duty trucks, could safely and easily access the properties from both the east and west bound lanes of S.R. 84. Access to and from the general transportation system by these large truck vehicles could also be safely and easily accomplished. Over a period of nearly five years, however, activities conducted by the DOT destroyed the existing uses of the properties by denying the properties access that was suitable for those existing uses. These activities included, but were not limited to: (1) destroying pre-existing access from the eastbound lanes, except by use of a lengthy, potentially hazardous and circuitous route; (2) walling off the properties by the use of concrete barriers which separated the properties from the westbound lanes of S.R. 84, relegating the properties to the use of a frontage / service road where direct access once existed; and (3) closing ramps to and from a main thoroughfare, which eliminated the ability to reasonably connect to the general transportation system.

DOT's activities did not effect all properties along this portion of S.R. 84 in the same devastating manner with which it impacted the subject parcels. With regard to these particular parcels, the question presented to this Court is "Considering the uses being made of these properties, along with the activities of the DOT, whether individually or combined, did the trial court properly conclude that a temporary 'taking' of access had occurred?

SUMMARY OF ARGUMENT

The trial court properly determined that a temporary taking of Petitioners' access to

the abutting roadway, and to the general system of transportation, occurred between December 1987 and Labor Day 1992. The findings of the trial court were based, in part, upon the occurrence of three events, which, in light of the commercial uses of the properties, resulted in the substantial impairment of Petitioners' access. Prior to the occurrence of these activities, the properties had direct access to S.R. 84, and the ease and facility of access to the properties allowed customers traveling both east and west bound on S.R. 84 safe access to the properties. Given the uses made of the subject properties, most of the vehicles entering and leaving the properties, including delivery vehicles, were large, heavy duty trucks, including tractor trailers.

The activities of the DOT in the adjacent roadway which led to the conclusion that access had been temporarily taken included: the construction of a concrete barrier between the existing east and west bound travel lanes of S.R. 84, which required customers to take a tedious and circuitous route of one and one half miles to reach the properties; the elimination of direct access to S.R. 84 and placement of the properties on a service road by erecting a concrete barriers between the properties and S.R. 84; and physically severing connections to a main thoroughfare located a short distance from the properties, which required the majority of customers to travel a circuitous route of over two miles in order to reach the properties.

The property right of access includes not only an abutter's easement to the adjacent roadway, but also the right to reasonably connect with the general system of roads. Whether governmental activities are determined to result in the taking of these access rights will depend upon the facts of each case. Of particular importance is the suitability of the access

in light of the use being made of the property. If the facts establish that these access rights have been substantially diminished by governmental activity, then a taking of access has occurred. Whether any damages have been incurred as a result of this taking is for the determination of a jury.

The activities of the DOT in this cause effectively destroyed, for a temporary period, the ease and facility of access to the properties which existed prior to the project, resulting in the demise of the business uses being made of those properties. Considering the facts of this case, including the uses being made of the subject properties, the trial court, as fact finder, properly concluded that a compensable taking of access occurred.

The District Court, in the determining that the orders of the trial court required reversal, incorrectly applied certain case precedent. The opinion of the District Court should be quashed and the orders as to all parcels reinstated.

ARGUMENT

The trial court, sitting as finder of fact, properly concluded that the DOT's activities in the roadway substantially diminished the owners' easement of access, leaving the owner with access that was unsuitable for the uses to which the properties were devoted.

While the District Court opinion mentions two of the three DOT "activities," which the trial court cited in support of the finding that access had been substantially diminished, only one of those activities (the placement of concrete barriers between the east and westbound lanes) was considered in determining that reversal was required. (A: 7-8).

There is no discussion of the "legal" implications of DOT's elimination of direct access to S.R. 84 by placing the properties upon a service road. By overlooking this significant aspect of the cause, the District Court erroneously determined that "the case law requires reversal" of the final judgments entered in this cause.

A. PLACEMENT OF THE PROPERTIES ON A SERVICE/ACCESS ROAD.

Placement of the subject properties on a service/access road had the same effect as converting the adjacent roadway to a limited access facility. In both situations physical barriers are constructed or erected, which deny the direct access that previously existed. In both situations the properties are relegated to use of a secondary road in order to access the main lanes that they once abutted. Case precedent addressing this access issue, where the conversion to a limited access facility has occurred, is directly applicable to the cause at hand.

In *Anhoco Corp. v. Dade County*, 144 So. 2d 793 (Fla. 1963), this Court announced a rule that has remained unchanged for nearly thirty years:

> There can now be little doubt that when an established land service road is converted into a limited access facility the abutting property owners are entitled to compensation for the destruction of their previously existing rights of access... Under limited access facilities statutes almost identical to ours, the courts have uniformly held that an abutting property owner is entitled to compensation for the destruction of a **pre-existing right of access** to a land service road upon which the limited access highway is constructed. (Citations omitted). The rule requiring compensation under such circumstances applies regardless of the specific requirements of a statute. *Id.* at 797.

The "rule" was applied in *State Road Department v. McCaffrey*, 229 So. 2d 668 (Fla. 2nd DCA 1969), where, as in this case, the property adjoined the right of way of a state road, to which the owner had direct access. The DOT converted S.R. 25 to a limited access facility, denying the owner direct access to that facility and relegating him to use of a service road. Affirming the finding that a taking of access had occurred, the court stated:

> Access for ingress and egress to one's property is a time honored right-a right which must be zealously protected and the loss of which should be compensated. It appears that the State Road Department has established a limited access facility and has constructed a service road which gives some access to plaintiffs' property. Plaintiffs are entitled to compensation for the property taken, together with damages to their remaining property caused by the establishment of said limited access facility. (Citations omitted).

The court in *McCaffrey* also reiterated the "rule" announced in *Anhoco*, 144 So. 2d at 797, stating:

> Where an established land service road is converted into a limited access facility, the abutting property owners are entitled to compensation for the destruction of their **previously existing right-of-access**. Id. at 669.

The "rule" announced in *Anhoco*, was affirmed again by the Florida Supreme Court in *State of Fla., Department of Transportation v. Stubbs*, 285 So. 2d 1, 3 (Fla. 1972), *Department of Transportation Div. of Admin v. Jirik*, 498 So. 2d 1253, 1255 (Fla. 1986) ("It is well established that government action which eliminates direct access to real property amounts to a taking for condemnation purposes), and most recently in *Palm Beach County v. Tessler*, 538 So. 2d 846, 848 (Fla. 1989).

Considering the fact that the commercial properties were separated from direct access to S.R. 84, and that the owners were relegated to the use of a service road, the "rule" announced in *Anhoco*, 144 So. 2d at 797, is clearly applicable and dispositive in this cause. The owners' pre-existing easement of access to S.R. 84 was destroyed and in its place, the Department provided a new easement of access. This easement, however, extended only to the newly created service road, and **not** to the main lanes of S.R. 84.

It must also be kept in mind that, during the existence of the service roads (January 1989 through May 1990), access to all of the parcels (except the westernmost driveway of Parcel 1) could only be gained by use of "a narrow break in the barrier wall, which was **virtually hidden from the view of motorists** approaching on westbound State Road 84." (R: 892-893; 866; 853; 879; 842). Based upon the evidence presented, the trial court concluded that throughout the existence of the service road "... the quality of Plaintiffs' access in terms of safety and visibility, as well as ease and facility of access, was substantially diminished." (R: 894; 868; 855; 881; 841-842). Further, sitting as fact-finder, the trial court concluded that "...a lack of visible access and inadequate and unsafe turning radii, at both the break in the barrier wall, and later at the western end of the service road when signalized ... destroyed all safe and visible access" into the parcels.(R: 895; 868-869; 855; 881; 842). These findings provided an additional basis for the conclusion that access had been temporarily taken during the 16 months the service road was in place in front of the subject properties.

Given the "rule" set forth in *Anhoco*, and affirmed by this Court in *Stubbs*, and *Tessler*, the finding of a taking of access is mandated. Whether any damages have been suffered by the owner as a result of the taking of access is for a jury to determine. *Stubbs*,

285 So. 2d at 3; *McCaffrey*, 229 So. 2d at 669.

Anhoco, 144 So. 2d at 793, is also significant from the standpoint that it recognizes that the owners right of access includes an abutter's easement to the existing road. *Id.* at 795; 796; 797; 798. On at least four occasions in that opinion, the court found that the governmental entity was liable for the impairment of the abutting owner's access rights to the "existing," "pre-existing," "original," or "previously existing" roadway. *Id.* at 795; 796; 797; 798. The DOT's position in the proceedings below was contrary to *Anhoco and Tessler* II, because it refused to recognize that the right of access included an easement to the "existing" road. When that easement is substantially impaired or destroyed by the reconstruction of the "pre-existing" roadway, then the owner has the right to seek compensation. *Anhoco*, 144 So. 2d 797; *Stubbs*, 285 So. 2d at 3; *McCaffrey*, 229 So. 2d at 669; *Tessler II*, 533 So. 2d at 848.

Based upon past experience, an expected knee-jerk reaction by the DOT to the owners' reliance upon *Anhoco, McCaffrey and Stubbs* is the argument that those decisions involved limited access facilities and, thus, their rational is not applicable. This Court rejected that argument in *Tessler*, 538 So. 2d at 846 (*Tessler II*). There the Court addressed the County's and the Department's contention that prior cases, such as *Anhoco Corp. v. State Road Department*, 116 So. 2d 8 (Fla. 1959) and *Stubbs*, were not authority for recovery in *Tessler*, because they involved takings for limited access facilities. *Tessler II*, 538 So. 2d at 848. This Court rejected the argument and specifically held that the rational *Stubbs II* was not restricted to takings for the limited access facilities. *Id.* at 848-849. Thus, as discussed later in this brief, the rational of *Stubbs* is applicable to this cause. See also

Department of Transportation v. Jirik, 498 So. 2d 1253 (Fla. 1986), where this Court, in a non-limited access taking case, cited *Stubbs* for proposition that:

> It is well-established that government action which eliminated direct access to real property amounts to a taking for condemnation purposed. *Id.* at 1255.

The central consideration that led this Court to the conclusion that a substantial loss of access had occurred in *Tessler*, was the finding that the remaining access was not "suitable" for the use to which the property was devoted. When sustaining the taking of access in *Tessler II,* 538 So. 2d at 850, this Court quoted the lower court's finding of unsuitable access:

> 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 reduce the quality of access to their property. The wall will also block visibility of the commercial storefront from Palmetto Park Road. *Tessler I,* 518 So. 2d 972. (Emphasis supplied).

Clearly, the "**suitability**" of the owners' access after the governmental activity occurs is the key point of inquiry in determining if the access has been substantially diminished. In this cause the trial court found, as trier of fact, that the "access" provided during the time the service road was in existence, was not only unsuitable, but "virtually" invisible and very unsafe. That finding, which is presumed to be correct, [1] was not even addressed by the District Court. The District Court erred in not giving consideration to that finding. It committed a greater error by reversing the orders entered by the trial court in light of those findings.

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[1] *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988).

B. ELIMINATION OF RAVENSWOOD U-TURN BY PLACEMENT OF CONCRETE BARRIERS BETWEEN THE EAST AND WEST BOUND LANES.

Access, in addition to the including an abutter's easement to the existing roadway [2], also encompasses the right to reasonably connect with general transportation system. *State of Florida, Department of Transportation v. Lakewood Travel Park*, 580 So. 2d 230, 233 (Fla. 4th DCA), *review denied*, 592 So. 2d 680 (Fla. 1991). In Stoebuck, *The Property Right of Access Versus The Power of Eminent Domain*, 47 Texas Law Rev. 733 (1969), cited with approval by this Court in *Stubbs* and *Tessler*, the author suggests several definitions of "access":

> 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 764 - 765. [3]

It was in *State of Florida, Department of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1973), that this Court first recognized that the property right of access included more than the ability to get on and off the adjacent roadway. The factual background of the case is

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[2] *Benerofe v. State Road Department*, 217 So. 2d 838, 839 (Fla. 1969).

[3] See also *Anthony v. Franklin County*, 799 F. 2d 681 (11th Cir. 1986), where the court, citing *Stoebuck* and *Stubbs*, defined property ownership in Florida as including two access-related rights: "the right to pass to or from the public way immediately adjacent to the land" and "the right to go somewhere once the owner is upon the abutting road - to have access to the system of public roads." Id. at 685.

found in *Stubbs v. State Department of Transportation*, 265 So. 2d 425 (Fla. 1st DCA 1972) (*Stubbs* I). *Stubbs* I involved a trailer park operated on a 15-acre parcel. *Id.* at 427. The property abutted Firestone Road, upon which traffic flowed both north and south. *Id.* at 426. Due to the construction of I-295, a portion of Firestone Road, near where it abutted the owners' property, was abandoned and relocated. The effect of the relocation was to cut off the owners' ability to utilize Firestone Road "as a north-south access to their property." (emphasis added) *Id.* at 426. In connection with the relocation, a small, triangular portion of a corner lot (.03 acres) owned by the *Stubbs* was taken. *Id.* at 427. Due to the abandonment of the part of Firestone Road abutting the owners' property, the trailer park could be reached only by traversing an overpass from the east side of the interstate to the west side thereof. *Id.* at 427. The relocation, in effect, placed the owners in a "cul-de-sac." *Id.* at 426. As a result of "this impairment of access to their property," the owners sought damages. *Id.* at 427. The trial court ruled that since the owners' land "still was accessible to Firestone Road by use of the overpass, no severance damages were allowable." *Id.* at 427. The *Stubbs* I court did not agree!

Reversing, *Stubbs I* first cited *Boney v. State Road Department*, 250 So. 2d 650 (Fla. 1st DCA 1971), where the court held that compensation was due for loss of access where the owners were deprived of the right to use one direction of an unopened, un-dedicated street bordering their property. The court in *Stubbs* I found that if there was a right to claim damages from the taking of access to an unopened street, "surely ... there is right to severance damages from the taking of access from an apparently well-traveled road." *Id.*

at 426.[4] The Department sought further review in *State Department of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1973) (*Stubbs* II).

In *Stubbs* II, which found that the *Stubbs* I court had "correctly applied the law," this Court reiterated that due to the construction of I-295, a portion of Firestone Road "fronting on [the owners'] land and carrying traffic north and south" was abandoned. While previously, the owners' land "... was accessible to automobile traffic moving both north and south on Firestone Road, in the future access will only be gained by traversing an overpass from the east side to the west side of a major interstate highway." (Emphasis supplied) *Id.* at 2. The *Stubbs* II court noted that the owners were denied the right to claim damages resulting from the "impairment of access" previously described. *Id.* at 2.

The Department once again took the position that no compensable interference with access had occurred because the owners "... still have access to Firestone Road by use of the overpass ... and therefore their right of access is not destroyed." *Id.* at 3. The court in *Stubbs* II rejected the Department's position as an "overly restrictive interpretation" of prior decisions[5] and "not in keeping with the spirit" of those decisions. *Id.* at 3.

The *Stubbs* II court went on to note that the:

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[4] *Stubbs* I also cited with approval *State Road Dep't v. McCaffrey*, 229 So. 2d at 668. Please note the position taken by the dissent in *Stubbs* I, 265 So. 2d at 426-428. The similarity between the dissent's summary of DOT's position in *Stubbs* I and DOT's position in this cause at hand is not accidental. The DOT has consistently argued, for the last 21 years, that so long as some access to "a" public road remains, no compensable taking access occurs. It is a position which has been consistently rejected by the courts. *McCaffrey*, 229 So. 2d at 668; *Stubbs* I, 265 So. 2d at 425.

[5] *Anhoco Corp. v. Dade County*, 144 So. 2d 793 (Fla. 1962).

> [owner's] commercial property has been adversely affected to some degree by the loss of access resulting from their property being placed in a cul-de-sac, which was part of the project to bring into existence Interstate 295. The availability of ingress and egress to their property that previously existed has been seriously disturbed if not destroyed. Ease and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated. (Emphasis supplied) *Id.* at 3.

In response to the contention that the Stubbs' were complaining about loss in "traffic flow," this Court distinguished the factual setting by noting that the "subject of the litigation" before the court was "... the right to introduce evidence at trial of severance damages resulting from **physical impairment of access** rather than and impairment in 'traffic flow'." Id. at 4.

When reviewing *Stubbs* I and II, several things are made apparent:

• the owners had the same ingress and egress to a public road that they had before the governmental activity occurred.

• the ability to get to and from the abutting road was not the basis of the owners' damages claim.

• the "loss of access" described by this Court, for which the owners were entitled to pursue compensation, was not their inability to ingress and egress the property from a public road.

• the loss of access described by this Court arose from the fact that before the governmental activity occurred, the owners had direct access to a roadway carrying northbound and southbound traffic, but, as part of the project, the public road in front of the property became a cul-de-sac leaving the owners a circuitous route to and from their

property.

This was the "physical impairment of access" addressed by the court in *Stubbs* II, 285 So. 2d at 3.

Stubbs clearly considered the right of access to be something more than the mere ability to get on and off "a" public road. It clearly compared the nature of the abutting roadway before and after the governmental activity had occurred. It was the change in the nature of the abutting roadway that generated the longer and more circuitous route required to get to and from the owners' property.

With the placement of the concrete barriers separating the eastbound and westbound lanes of S.R. 84, a "physical impairment of access" to two directional traffic occurred. Similar to *Stubbs*, eastbound traffic was required to "traverse" an overpass of a major interstate highway (I-95), travel until they reached the unprotected U-turn at S.W. 15th Ave, make the turn, proceed westbound, and then cross back over I-95 to reach the properties. Compared to the "access" that existed prior to the placement of the concrete barriers, the "physical impairment of access" required customers and delivery vehicles to travel an additional **one and one half miles** in order to reach the properties!

As in *Tessler*, 538 So. 2d at 846, the continuous concrete wall erected by the DOT in this cause required customers to take a "tedious and circuitous" route to reach the business premises. Unlike *Tessler*, where the circuitous route was 600 yards in length, customers attempting to reach the subject parcels were required to travel one and one half miles to reach the business premises.

If the governmental activities in *Stubbs* and *Tessler* were not placed in the category

of "traffic flow," then neither can the activities described in this cause be so categorized. As in *Stubbs* and *Tessler*, the placement of the physical barriers did not cause "the flow of traffic on an abutting road to be diminished." *Tessler II*, 538 So. 2d 849. The traffic remained the same, but it could no longer get to the property with the same "ease and facility of access" discussed in *Stubbs II*. A physical impairment of access took place, not diminution of traffic flow.

The District Court in this cause had difficulty in distinguishing the placement of the concrete barriers from the construction of the median in *Division of Administration, State of Florida Department of Transportation v. Capital Plaza*, 397 So. 2d 682 (Fla. 1981). The distinction is readily apparent once the facts of *Capital Plaza* are understood.

The service station in *Capital Plaza* was located in the southwest corner of the intersection of Thomasville Road and Glenview Drive.[6] When Thomasville Road was widened from two to six lanes, a raised median was constructed directly in front of the station. The median extended from the intersection to a point slightly beyond the southern boundary of the property. The effect of the median was to prevent northbound vehicles from turning directly into the driveway cuts on Thomasville Road. Instead, customers had to drive a few feet further to the intersection. They then had two options. Either make a U-turn into the southbound lanes and immediately enter the station through the Thomasville Road driveway cuts, or turn left at the intersection onto Glenview and

[6] While the members of this Court are likely to be personally familiar with the location of the property involved in Capital Plaza, the facts are recited in *Capital Plaza, Inc. v. Division of Administration, State of Florida, Department of Transportation*, 381 So. 2d 1090 (Fla. 1st DCA 1979).

immediately enter the station through the Glenview driveways.

Picking either option, *Capital Plaza* customers drove only a few additional feet to reach the property. By comparison, in this cause, eastbound customers had to drive **one and one half miles** to get to the properties, which were readily accessible prior to the project. It must also be remembered that, except for one parcel, the majority of customers attempting to reach the subject properties were driving large, heavy duty trucks, including tractor trailers, which magnified greatly the difficulty presented by the physical impairment of the pre-existing access.

The limitations imposed in *Capital Plaza* can be described as merely a minor impairment of access, which left customers with "reasonable" access. What occurred in this cause cannot be considered comparable to the setting in *Capital Plaza*. The access remaining after the physical impairment occurred can hardly be described as "reasonable." Indeed, DOT's engineering expert admitted that, except for the fact that the completed project included the construction of a Texas U-turn, having customers travel the distance to S.W. 15th Ave, make a U-turn and then return back to the properties would **not** be reasonable. (R/Transcript: 238). Since the project **did not** include the Texas U-turn until its completion in July 1990, the properties were forced to utilize this unreasonable access for over two and one half years after the concrete barriers were erected.

The physical impairment in this cause is, however, comparable to what occurred in *Stubbs and Tessler.* Given the extent of the limitation caused by the physical barriers, the matter cannot be dismissed as a simple case of "traffic flow" without violating the "spirit" and holding of *Stubbs* and *Tessler.*

Contrary to the conclusion of the District Court, the decision of *Capital Plaza* is strikingly "dissimilar" to this cause, and was incorrectly relied upon as a basis for reversing the orders entered by the trial court.

C. SEVERING OF I-95 CONNECTIONS TO S.R. 84.

At the same time the DOT placed the parcels on the service road, it also physically severed the connections between S.R. 84 and I-95. The District Court opinion contains no discussion of this aspect of the case even though it served, in part, as a basis for the trial court's orders. Considering the evidence presented, the trial court found that, as a result of the closure of the I-95 connections, "a majority of all customers and delivery vehicles" attempting to access the parcels were required to use a portion of I-595, which exited onto S.W. 26th Terrace at a point south of S.R. 84.[7] This route, which the trial court described as "tedious and circuitous," ended up at the eastbound lanes of S.R. 84. Trucks would then be required to travel on the eastbound lanes, cross over I-95, proceed to the unprotected U-turn at S.W. 15th Ave, make the turn onto the westbound lanes and then proceed back over I-95 to reach the properties. The evidence established that, compared to the pre-existing access from I-95, the new route required customers to travel an additional distance of between **2.32 and 2.43 miles** to reach the properties.(R: 893-894; 867; 854; 880; 841). This condition continued from January 1989 to July 1990.

Comparing the access which existed before and after the physical closure of the connections with I-95 leaves no doubt that customers trying to reach the subject properties

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[7] See Plaintiff's Exhibit 46, which is a graphic representation of the route vehicles coming from I-95 were required to take in order to gain access to the property. A reduced version of that exhibit is contained in the Appendix to this Initial Brief, page 24.

were provided an extremely poor and unsuitable substitute. The right to "reasonably" connect with the general system of roads was, to say the least, substantially diminished in comparison to the access that previously existed.[8] That such access was not "suitable" for the uses being made of the properties cannot be denied. The fact that large, heavy duty vehicles (including tractor trailers), which represented the majority of the customers frequenting these businesses, considered the route unreasonable and too tedious to travel is reflected in the demise of otherwise prosperous business uses of the parcels. (R: 895-896; 869; 856; 882; 843).

Clearly not every business located along S.R. 84 suffered the same impact as those involved in this cause. Indeed, it was the unique nature of the businesses - providing the sales, service, repair and maintenance of large, heavy duty trucks - that made them more susceptible to being damaged by the roadway changes. The nature of the businesses dictated what was required in order to maintain the "ease and facility" of access discussed in *Stubbs II*, 285 So. 2d at 3. As in *Stubbs II*, the "ease and facility of access" was "seriously disturbed, if not destroyed" by the changes made by the DOT. See also *State of Florida, Department of Transportation v. Lakewood Travel Park, Inc.*, 580 So. 2d 230 (Fla. 4th DCA), *review denied*, 592 So. 2d 680 (Fla. 1991), where consideration of the use of the property as a travel trailer park led to the conclusion that the circuitous route created by the DOT, caused by the construction of I-595, resulted in a taking of access.

The record in this cause amply supports the trial court's conclusion that the physical closure of the I-95 connections to S.R. 84 resulted in a substantial impairment of

[8] Compare *Department of Transportation v. Gefen*, 620 So. 2d 1087 (Fla. 1st DCA 1993).

access to the parcels. *Stubbs II*, 285 So. 2d at 4. The District Court clearly erred in failing to give consideration to this aspect of the trial court's orders, and in reversing those orders in light of the factual findings supporting the conclusion that a "taking" of access occurred.

CONCLUSION

The opinion of the District Court should be quashed and the final orders as to each parcel reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 5th day of May, 1994, to Gregory G. Costas, Esq., 605 Suwanee Street, MS 58, Tallahassee, Florida 32399-0458.

ALAN E. DeSERIO, ESQUIRE

INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

JOSEPH J. RUBANO, et al.,

Appellees.

CASE NO. 92-2695.

L.T. CASE NO. 89-14650-15.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed February 2, 1994

Appeal from the Circuit Court for Broward County; Arthur M. Birken, Judge.

Thornton J. Williams, General Counsel, Gregory G. Costas, Assistant General Counsel, Tallahassee, for appellant.

Allan M. Rubin of Shea & Gould, Miami, for appellees.

ON MOTION FOR REHEARING

KLEIN, J.

Appellees' motion for rehearing points out that our opinion filed December 8, 1993, contains the wrong date for completion of the I-95 bridges and omits the fact that westbound access was on old SR-84 while it was temporarily being used as a service road during some of the construction. While those facts do not affect the outcome, we deem it appropriate to correct them and therefore substitute this opinion for the opinion filed December 8, 1993. Appellees' motion for rehearing is denied.

This is an inverse condemnation case in which the trial court concluded that there was a temporary taking of access to appellees' property while new roads were being constructed by the State Department of Transportation (DOT). The DOT appeals, arguing that the rerouting of traffic required by the construction is not compensable. We reverse, but certify the issue as one of great public importance.

The five properties are on the north side of SR 84, a major arterial highway in Broward County west of I-95. The construction of I-595 and two new bridges on SR 84 over I-95 began in December, 1987. Prior to this time the properties abutted the westbound lanes of SR 84 and were accessible directly from it. Eastbound traffic on SR 84 had access by making a protected highly visible U-turn near the intersection of Ravenswood Road and SR 84 and returning on westbound SR 84. This U-turn was about 1000 to 1500 feet east of the properties.

When this construction began DOT temporarily relocated SR 84 to the north, destroyed the Ravenswood U-turn, and erected a continuous line of concrete barriers between the east and westbound lanes of relocated SR 84. Eastbound traffic on SR 84, in order to get to these properties, which included a truck dealership and a diesel engine dealership, then had to travel an additional one and one-half miles beyond the former Ravenswood U-turn, to Southwest 15th Avenue, make a more difficult, unprotected U-turn, and return on westbound SR 84, which continued to have access.

In January 1989 the DOT temporarily relocated all travel lanes of SR 84 to the south, in order to construct new bridges over I-95, and temporarily used the old westbound lanes of SR 84 as a service road with access to these properties from January 1989 through May 1990. The I-95 bridges were completed in July, 1990, and a maneuver known as a Texas U-turn, involving the use of the roads linking I-95 and SR 84, became available. This U-turn was farther from the property, and more difficult, than the original Ravenswood U-turn, but it was nearer the property than the Southwest 15th Avenue U-turn.

The property owners filed this inverse condemnation action claiming both a temporary and permanent loss of access for which compensation should be paid.

At trial plaintiffs' experts testified that the rerouting of eastbound SR 84 traffic both before and after completion of the I-95 bridges was a substantial permanent impairment of access. The DOT's experts admitted that if the conditions before completion of the I-95 bridges (Texas U-turn) had been permanent, there would have been an "unreasonable" and "significant impairment in quality of access." The DOT stipulated during trial to construct a protected U-turn on SR 84 west of Ravenswood to be completed by Labor Day, 1992.

The trial court found that the properties suffered a temporary "substantial impairment of access" which is compensable. He based these findings on the distance which eastbound traffic had to travel; the lack of visibility of access to the properties by eastbound traffic; the fact that these were

primarily large trucks which needed access; and the logistics, which included inadequate and unsafe turning radii, of the U-turns. One of the businesses had to relocate its parts business to a leased location on SR 84 where access was unimpaired, incurring renovation and additional employee expense. The court found that when the I-95 connections to SR 84 were restored by July of 1990, providing the nearer Texas U-turn, suitable access was still not restored, and that it would not be restored until the DOT completed the protected U-turn near Ravenswood, which it stipulated to provide during trial.

The DOT first argues that the property owners are not entitled to compensation for loss of access during construction. The DOT relies on language in Anhoco Corporation v. Dade County, 144 So. 2d 793, 799 (Fla. 1962), which says that property owners should not be compensated for loss of access:

> [o]ccasioned merely by the customary limitations on the flow of traffic over a highway which is being constructed under so-called "traffic conditions." Every business abutting an established highway which is being reconstructed suffers the same type of loss. To this extent any damage suffered is damnum absque injuria.

In Anhoco the owners of two outdoor movie theaters were deprived of all access to abutting SR 826 during a period of time while the Florida Turnpike Authority was doing construction, after which access to SR 826 was restored. Notwithstanding the above language relied on by the DOT, our supreme court held that there was such a destruction of access in Anhoco as to entitle the property owners to compensation. Anhoco does not, therefore, stand for the proposition that loss of access as a result of

construction is not compensable. What Anhoco does stand for, as the above quoted language reflects, is that in order to be compensable the loss of access has to be different than that suffered by all of the other abutting businesses. Since the trial court found that the property owners in this case were affected differently from all other abutting property owners, Anhoco does not preclude compensability.

DOT does not argue that a loss of access must be permanent in order to be compensable, presumably since the loss of access in Anhoco was temporary, and subsequently recognized as such in Palm Beach County v. Tessler, 538 So. 2d 846, 848-849 (Fla. 1989).

The DOT next argues that Anhoco and Tessler require that all access to the abutting road must be cut off in order for it to be compensable. Although those cases both involved loss of all access to the abutting road, neither of those opinions appear to make it a prerequisite for compensability.

In Tessler the property owner operated a beauty salon on Palmetto Park Road in Boca Raton, but permanently lost all access to that road resulting in customers having to access the property by winding 600 yards through a residential neighborhood. Our supreme court held that the property owner was entitled to compensation for a loss of access, stating:

> 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.

Because of this language in Tessler we reject the DOT's argument that all access to the abutting road must be eliminated for there to be a compensable taking. See also, DOT v. Lakewood Travel Park, 580 So. 2d 230 (Fla. 4th DCA), review denied, 592 So. 2d 680 (Fla. 1991).

Although the court concluded in Tessler that there was a compensable loss of access, it went on to state:

> 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 question we must determine is whether this is the "substantial loss of access" which is compensable under Tessler or merely the "loss of the most convenient access" or diminished "flow of traffic" which is not compensable under Tessler. Once the factual issues are resolved the question of whether the landowner has incurred a substantial loss of access is a question of law. Tessler at 850.

In addition to Anhoco and Tessler, there is one other significant supreme court decision involving loss of access, Division of Administration v. Capital Plaza, 397 So. 2d 682, 683 (Fla. 1981). In that case the DOT widened the Thomasville road in Tallahassee, formerly two lanes with no median, into six lanes divided by a raised four-foot-wide median. The issue was whether

the construction of this median resulted in a compensable loss of access to a service station since northbound drivers could no longer make a left turn directly into the service station. The supreme court held that the construction of a median would not constitute a compensable loss of access, because "a land owner has no property right in the continuation or maintenance of traffic flow past his property." In Tessler the supreme court discussed and distinguished Capital Plaza, and left no doubt that it is still good law.

Applying the principles set forth in Tessler and Capital Plaza to the facts in the present case is difficult because the facts in the present case differ significantly from the facts in Tessler and Capital Plaza. In Tessler the property owner owned a beauty salon on a busy commercial road, and the widening of the road and construction of a bridge permanently deprived the owner of all access to that or any other commercial road. The beauty salon was not even visible from the commercial thoroughfare. The customers were only able to reach the property by traveling 600 yards on a winding route in a residential neighborhood.

In the present case the access to the abutting road was not eliminated by the widening of it. Eastbound traffic was temporarily rerouted so that it had to go an additional one and one-half miles before making a U-turn to return in the westbound lane from which there always was access. It therefore appears to us that the loss of access in Tessler was far more egregious, forgetting for the moment that it was permanent there and temporary here.

Capital Plaza is strikingly similar to this case in that the concrete barriers installed in this case only affected the accessibility of traffic going in one direction, just as the median did in Capital Plaza, in which the supreme court pointed out that the service station still had "free, unimpeded access...albeit only by southbound traffic." On the other hand, the construction of the median in Capital Plaza had less of an affect on access to the service station, since it was located at an intersection,[1] than the rerouting of traffic did to these property owners.

The final judgment contains detailed findings of fact and a scholarly and well-reasoned analysis of the case law leading up to the conclusion that there was a taking, and it was not without difficulty that we have concluded that the case law requires reversal. Tessler does not persuade us, however, that there was a taking because in Tessler the loss of access to the abutting road was both total and permanent, while in the present case it was neither. While we realize that a loss of access does not have to be permanent in order to be compensable, we believe the duration of the loss is still one fact to be considered. We also find it difficult to distinguish Capital Plaza since the median in Capital Plaza and the concrete barriers erected here were similar in that they affected the access of traffic in one

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[1] The supreme court did not mention in its opinion that the service station was located at an intersection, however the first district did. Capital Plaza, Inc. v. Division of Administration, 381 So. 2d 1090 (Fla. 1st DCA 1979).

direction only. We therefore conclude that there was no taking of access.

In reversing, we are not unmindful of these property owners' constitutional rights to compensation for the taking of their property, or the ramifications of expanding those rights (as we see it) to allow compensability here. Because of these concerns, and because this question is close, we certify as an issue of great public importance whether this was a compensable taking of access.[2]

Reversed.

DELL, C.J., and STONE, J., concur.

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[2] In State Department of Transportation v. FMS Management Systems, Inc., 599 So. 1009 (Fla. 4th DCA 1992), in which this court affirmed without opinion, Judge Anstead, concurring specially, noted that Tessler was difficult to apply and that he would have certified the issue in that case as one of great public importance.

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 89-14650-15

JOSEPH J. RUBANO, et al,

Plaintiffs,

PARCEL NO. 1

vs.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Defendant.
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT IN INVERSE CONDEMNATION

THIS CAUSE having come on before this Court for non-jury trial on March 16, and March 17, 1992, and upon consideration of the testimony presented, the exhibits offered into evidence and the written memoranda of law submitted by counsel, the Court finds, determines and concludes that:

1. At all times prior to December 14, 1987, the Plaintiffs, JOSEPH J. RUBANO, Trustee, VINCENT J. RUBANO, Trustee, SPERO MULLIGAN and MARIA MULLIGAN, his wife, and COASTAL FORD TRUCK SALES, INC., A Delaware Corporation,were owners of that real property located at 2565 State Road 84, Fort Lauderdale, Broward County, Florida, legally described on Exhibit "A" attached hereto; said property being hereinafter referred to as Parcel No. 1.

2. At all times prior to December 14, 1987, the southerly boundary line of Parcel No. 1 and its two (2) driveways abutted

the westbound lanes of State Road 84, a major arterial highway, so that Parcel No. 1 had that access to and from State Road 84 and the general system of transportation as shown on Plaintiffs' Exhibits 2 and 44. Accordingly, Plaintiffs held a pre-existing abutter's easement which provided access to and from Parcel No. 1 to and from State Road 84. Benerofe v. State Road Department, 217 So.2d 838 (Fla, 1969), Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla, 1962) and State Department of Transportation v. Stubbs, 285 So.2d 1 (Fla, 1973).

3. That on and prior to December 14,. 1987, Parcel No. 1 was used as a heavy duty Ford Truck dealership engaged in the sale, leasing and service of both new and used extra heavy duty trucks and tractor-trailer type vehicles, as well as in the sale of parts and supplies for same; and that accordingly, the majority of those vehicles accessing Parcel No. 1, including delivery vehicles were large heavy duty type vehicles.

4. That as indicated by Plaintiffs' Exhibit Nos. 2, and 44, access to Parcel No. 1, prior to December 14, 1987, was by way of State Road 84. Eastbound access, however, depended solely upon a protected, permitted, and highly visible U-turn located upon State Road 84 at or near its intersection with Ravenswood Road (hereinafter, the Ravenswood U-turn). Access to Parcel No. 1 from the north or south was by way of I-95, located approximately one-quarter (1/4) mile to the east of Parcel No. 1, and westbound State Road 84.

5. On or about December 14, 1987, however, Defendant began relocating all travel lanes of State Road 84 within its own right-of-way to the north of their former location in order to construct, as part of State Project No. 86095-3454 (hereinafter, Defendant's Project) a new southern bridge over I-95 on State Road 84. In connection therewith, Defendant destroyed the Ravenswood U-turn, which provided eastbound access to Parcel No. 1, and erected a continuous line of concrete barriers between the east and westbound lanes of newly relocated State Road 84, the effect of which was to deny eastbound access to Parcel No. 1 except by means of a U-turn at S.W. 15th Avenue and a return to Parcel No. 1 on westbound State Road 84. The evidence clearly established that this means of access was not visible from the vicinity of Parcel No. 1, so that customers and delivery vehicles not familiar with the area east of I-95, would have to pass Parcel No. 1, travel over I-95 in search of a suitable U-turn location, and return to Parcel No. 1 on westbound State Road 84, an additional distance, when compared to access prior to December 14, 1987, of almost one and one-half (1-1/2) miles.

6. The circuitous route described in Paragraph 5 above was considered by all of Plaintiffs' expert witnesses to be a substantial impairment of Plaintiffs' previous access, and was described by Defendant's expert witnesses as "unreasonable", if this condition were permanent, (Robert Alexander), and as a "significant impairment in quality of access" (Daniel Murray). While virtually every witness called by Defendant conceded, in

effect, that, if permanent, the conditions described in Paragraph 5 above would, in their view, amount to a substantial impairment of access, the Defendant and its witnesses have urged the Court to apply a stricter, but ill-defined standard to a "temporary taking" of access, as opposed to a "permanent taking".

7. While the Court is mindful of the principles announced in Howard Johnson v. Division of Administration, State of Florida, D.O.T., 450 So.2d 328 (Fla. 4th DCA, 1984) and Division of Administration, State of Florida, D.O.T. v. Frenchman, Inc., 476 So.2d 224 (Fla. 4th DCA, 1985), the Court concludes that neither of these decisions, nor any other authority cited by Defendant, support the application of any standard or test for determining whether an impairment of, interference with, or encroachment upon, access amounts to a taking other than the "substantial diminution" standard recognized by the Florida Supreme Court in Palm Beach County v. Tessler, 538 So.2d 846 (Fla, 1989), and its progeny, as applied by the District Court of Appeal, Fourth District in State Department of Transportation v. Lakewood Travel Park, 580 So.2d 230 (Fla. 4th DCA, 1991), rev. denied, 592 so.2d 680 (Fla., Dec, 1991).

8. In fact, the opinions in Anhoco and Division of Administration, State of Florida, D.O.T. v. Mobile Gas Co., Inc., 427 So.2d 1024 (Fla. 1st DCA, 1983) both upheld "temporary takings" of access under construction conditions based upon the same test applied in Tessler and Lakewood, without finding that all access had been impaired.

9. The Court cannot help but note as significant to the issue of eastbound access that Stipulation announced on the record during the trial pursuant to which Defendant has agreed to restore a visible, protected U-turn to the surface of State Road 84 west of its intersection with Ravenswood Road, in accordance with the plans (Plaintiffs' Exhibit No. 49) prepared by Defendant as of November, 1991, both in terms of its impact upon eastbound access to Parcel No. 1, and in terms of the suitability of remaining access after completion of the Texas U-turn.

10. In January, 1989, the Defendant completed construction of its new southern bridge over I-95 on State Road 84, following which it relocated all travel lanes of State Road 84 to the extreme south of its right of way in order to construct a new northern bridge over I-95. In so relocating these travel lanes, Defendant created a service road from the "old" westbound lanes of State Road 84 using concrete barriers, which enclosed the eastern driveway of Parcel No. 1 inside of the service road, to separate the service road from the travel lanes of State Road 84. Thus, the eastern driveway of Parcel No. 1 no longer abutted State Road 84, but instead, abutted the service road. Access to and from the eastern driveway of Parcel No. 1 to and from State Road 84 was thereafter only obtained by either entering or

leaving a narrow break in the barrier wall which was virtually hidden from the view of motorists approaching it on westbound State Road 84 due to its location on the downgrade of the new southern bridge over I-95, until approximately May 31, 1989, at which time Defendant implemented those changes to the service road depicted on Plaintiffs' Exhibit No. 4, in an effort to restore access by signalizing the service road at S.W. 26th Terrace, and by removing the barrier wall at the western end of the service road.

11. According to the Defendant's representative, Mr. Patrick McCann, and Plaintiffs' Composite Exhibit No. 34, these changes to the service road were required because the service road did not "...provide for the safe and expeditious movement of traffic through the project in accordance with the intent of the original contract" nor was it "functionally operational" without modification (See Plaintiffs' Composite Exhibit No. 34).

12. At the same time during which Defendant created the service road described above, Defendant also severed all State Road 84 connections to and from I-95, so that all customers and delivery vehicles desiring to access Parcel No. 1 by I-95's exits onto westbound State Road 84 were relegated to the use of a portion of I-595 which exited onto S.W. 26th Terrace, south of its intersection with State Road 84. Thus, virtually all, or at least the majority of all customers and delivery vehicles attempting to gain access to Parcel No. 1 were required to pursue

a tedious and circuitous route, consisting of additional distances of between 2.32 and 2.43 miles, when compared to the distances before I-95's connections to State Road 84 were severed. These routes are depicted on Plaintiffs' Exhibit No. 46.

13. Although Plaintiffs never lost all access to and from Parcel No. 1 to and from State Road 84 and the general system of transportation, and although, as Defendant has repeatedly reminded the Court, at all times the western driveway of Parcel No. 1 continued to abut the westbound travel lanes of State Road 84, the Court finds that the Plaintiff, COASTAL FORD, was forced to close its eastern driveway, which was the main entrance into Parcel No. 1, in order to avoid suffering the use of its property as part of the service road when vehicles arriving at the concrete barrier at the western end of the service road frequently entered Parcel No. 1 through its eastern driveway, drove across Parcel No. 1 and departed onto westbound State Road 84 through its western driveway. The Court further finds that the Defendant's signalization of the service road at S.W. 26th Terrace in late May, 1989, did not prevent this use of Parcel No. 1. In fact, traffic entered Parcel No. 1 through its western driveway from S.W. 26th Terrace and continued using Parcel No. 1 as part of the service road. Thus, the quality of Plaintiffs' access in terms of safety and visibility, as well as ease and facility of access, was substantially diminished. Such changes in access have been held to amount to a substantial impairment of of access. (See State Road Department of Florida v. Mc Caffrey,

229 So.2d 668 (Fla. 2nd DCA, 1969), Boney v. State Department of Transportation, 250 So.2d 650 (Fla. 1st DCA, 1971) and State Department of Transportation v. Stubbs, 285 So.2d 1 (Fla, 1973))[1].

14. Nor were these impacts upon Parcel No. 1 the only adverse impacts caused by Defendant's Project. Throughout the existence of the service road (January, 1989, through May, 1990), a lack of visible access and inadequate and unsafe turning radii, at both the break in the barrier wall, and later at the western end of the service road when signalized, so destroyed all safe and visible access into Parcel No. 1, even from westbound State Road 84, such that Plaintiffs were deprived of the economically viable use of Parcel No. 1, or, at the very least, least, the market value thereof was diminished (See Tessler at p. 849 and Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d

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[1]The Court has taken judicial notice of the court files of this circuit in the case of Burger King Corp. v. State of Florida, D.O.T., Cir. Court Case No. 89-2918(06) and FMS Management Systems, Inc. v. State of Florida D.O.T., Cir. Court Case No. 89-14649 CG, both of which resulted in the entry of Final Judgments in inverse condemnation proceedings in favor of the property owner which were affirmed by the Fourth District Court of Appeal (State of Florida, D.O.T. v. Burger King Corp, 574 So.2d 1229 (Fla. 4th DCA, 1991), State of Florida, D.O.T. v. FMS Management Systems, Inc., _____So.2d _____, 17FLW D1036 (Fla. 4th DCA, April 22, 1992)). In each of these cases the Final Judgments entered held that a taking of access occurred based upon a substantial impairment of access found to exist after each property was taken off the main travel lanes of State Road 84 by Defendant's Project and placed on a ramp or service road which substantially impaired either ingress (Burger King) or egress (FMS), but not both, between the property and State Road 84, so that ingress or egress was thereafter only obtained by means of a tedious and circuitous route similar to, but less lengthy than, that route involved in the present case.

622, 624 (Fla, 1990)),[2] as evidenced by COASTAL FORD'S, loss of its dealership which had been highly successful prior to the commencement of Defendant's Project.

15. While the Court recognizes that the I-95 connections to State Road 84 were restored by July, 1990, and that the Texas U-turn was completed at this time, the Court, based upon all of the evidence, including the video tape of the Texas U-turn (Defendant's Exhibit No. 41) and the expert testimony on this issue, finds that the Texas U-turn did not restore suitable eastbound access to Parcel No. 1, and that such access will only be restored when Defendant, as it agreed to do on the record, restores a visible, protected U-turn to the surface of State Road 84 by Labor Day, 1992.

16. The Court accordingly finds and determines that access to and from Parcel No. 1 to and from State Road 84 and the general system of transportation was substantially impaired or diminished from and after December 14, 1987, through the date upon which Defendant implements those modifications to State Road 84 depicted upon Plaintiffs' Exhibit No. 49, or approximately Labor Day, 1992, a date which may be more precisely determined in the valuation proceedings referred to below.

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[2]In fact, Joint Ventures, at p. 624, footnote 6, notes that: "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value...is in fact and in law, a 'taking' in a constitutional sense" [Emphases Supplied by the Court].

17. The Court further finds that while Defendant made several attempts to improve "access" (Plaintiffs' Exhibits 4, 32 and 33) to and from Parcel No. 1, Plaintiffs' remaining access was simply never suitable for the use made of Parcel No. 1 prior to December 14, 1987. Moreover, having determined that access was substantially impaired, the extent of such remaining access may properly be considered in determining the amount of compensation in subsequent valuation proceedings. Tessler at p. 849.

18. In reaching its conclusions, the Court has considered all of Defendant's arguments but has determined that Plaintiffs have suffered more than a loss of their most convenient access, especially considering the lack of any cross streets or other roads abutting Parcel No. 1 which might have avoided dependence upon State Road 84. The Court has also considered but rejected Defendant's "traffic flow", "construction damage", "alignment of highway", and "overall design of the project" defenses as either legally insufficient or not supported by the evidence. Whether still required or not (See Stubbs at p. 3) Plaintiffs have adequately demonstrated that they suffered losses different in kind and degree from those losses suffered by the community at large.

19. Based upon the foregoing findings of fact and conclusions of law, as well as upon all of the evidence and argument of respective counsel, the Court declares that Plaintiffs' abutter's easement and access to and from Parcel No.

l to and from State Road 84 and the general system of transportation was taken by Defendant without payment of just compensation therefore as required by Article X Section 6(a) and Article I, Section 9 of the Constitution of the State of Florida. (See Tessler, Lakewood, Anhoco, and Stubbs).

20. The Court further declares that the "taking" described in Paragraph 19 above constituted a "temporary taking" (See Anhoco, Mobile Gas, and Joint Ventures), which commenced on December 14, 1987, and which will terminate on a date consistent with this Court's findings and rulings set forth in Paragraphs 16 and 21, respectively, hereof.

21. That consistent with the agreement between the parties announced on the record on March 16, 1992, the Defendant, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, be and the same is hereby Ordered and Directed to implement those modifications to the Texas U-turn, and restore a protected U-turn to the surface of State Road 84, in accordance with Defendant's working drawings, (Plaintiffs' Exhibit No. 49) as explained by Defendant's Traffic Engineer, Mr. Daniel Murray, on or before Labor Day, 1992, at Defendant's sole cost and expense. Should Defendant fail to comply with the terms of its agreement and this paragraph by Labor Day, 1992, Plaintiffs shall be permitted leave to file, and the Court hereby retains jurisdiction to adjudicate, a Supplemental Complaint in inverse condemnation in order to enable Plaintiffs to claim an additional taking of Plaintiffs' access.

22. That the State of Florida Department of Transportation is hereby directed to file, within thirty (30) days from the date hereof, formal condemnation proceedings, pursuant to Chapters 73 and 74, Fla. Stat., acknowledging that, pursuant to this Final Judgment, the Plaintiffs' right of access to and from State Road 84 and the general system of transportation was taken on December 14, 1987, and will not be restored until the occurrence of those events described in Paragraphs 16 and 21 hereof.

23. Further, by way of declaration of taking, per Sec. 74.031, Fla. Stat., the Defendant shall set forth a good faith estimate of compensation due to the Plaintiffs and all parties in interest according to Sec. 73.021(4), which shall also include interest, at the rate prescribed in Sec. 74.061, Fla. Stat., for the period of time between the date of the taking (December 14, 1987) and the date of deposit of the good faith estimate. Within twenty (20) days of the filing of the declaration of taking, the Defendant shall deposit into the Court Registry the good faith estimate contained in the declaration of taking.

24. That, at a date to be established, the Court shall conduct a jury trial, pursuant to Sec. 73.071, Fla. Stat., in order to determine the issues of just compensation and damages for the taking of Plaintiffs' abutter's easement and right of access to and from Parcel No. 1 to and from State Road 84 and the general system of transportation.

25. That Plaintiffs are hereby awarded the costs and disbursements of this action, including reasonable expert's fees

for the services of Plaintiffs' expert witnesses, and reasonable attorneys' fees for the services of Plaintiffs' counsel herein (See County of Volusia v. W.R. Pickens, 435 So. 2d 247, Fla. 5th DCA, 1983), the amount of which costs and fees shall be determined in the formal condemnation proceedings referred to in Paragraphs 22 through 24 hereof.

DONE AND ORDERED in Chambers, Fort Lauderdale, Broward County, Florida, this 18 day of ~~May~~ August, 1992.

ARTHUR M. BIRKEN
CIRCUIT COURT JUDGE

Copies furnished:
ALLAN M. RUBIN, P.A.
NANCY J. ALIFF, ESQ.

A TRUE COPY

That part of:

A portion of the West one-half (W1/2) of the Southwest one-Quarter (SW1/4) of the Northeast one-quarter (NE1/4) of Section 20, Township 50 South, Range 42, East, more fully described as follow:

Beginning at the intersection of the West line of the said West one-half (W1/2) of the Southwest one-quarter (SW1/4) of the Northeast one-quarter (NE1/4) and the North right-of-way line of State Road No. 84 (200-Feet right-of-way); thence Northeasterly, along said North right-of-way line, a distance of 110.73 Feet; thence Northerly, along a line 427 Feet East of (and parallel with) the said West line of the West one-half (W1/2) of the Southwest one-quarter (SW1/4) of the Northeast one-quarter (NE1/4) of Section 20, making an included angle of 101° 20' 13", a distance of 136.35 Feet; thence West, perpendicular a distance of 277.00 Feet; thence Northerly, making an excluded angle of 90° 00' 00", a distance of 139.68 Feet to a point on the North line of the said West one-half (W1/2) of the Southwest (SW1/4) of the Northeast one-quarter (NE1/4); thence Westerly, making an included angle of 91° 47' 11", along the said North line, a distance of 150.06 Feet to the Northwest corner of the said West one-half (W1/2) of the Southwest one-quarter (SW1/4) of the Northeast one-quarter (NE1/4); thence Southerly, along the West line of the said West one-half (W1/2) of the Southwest one-quarter (SW1/4) of the Northeast one-quarter (NE1/4), making an included angle of 88° 12' 49", a distance of 609.91 Feet to the Point of Beginning;

A/K/A 2565 State Road 84
Fort Lauderdale, Florida 33312