SUPREME COURT OF FLORIDA

JOSEPH J. RUBANO,

Petitioner,

v. CASE NO. 83,307

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Joseph J. Rubano, Trustee, Vincent J. Rubano, Trustee, Spero Mulligan, Maria Mulligan, Coastal Ford Truck Sales, Inc., RPM Diesel Engine Co., Inc., and Staff Marine Corporation, the plaintiffs and appellees below, and petitioners here, will be referred to collectively as Petitioners. The Florida Department of Transportation, the defendant and appellant below, and respondent here, will be referred to as the Department.

Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s). Citations to Petitioners' brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s).

The decision of the lower court is currently reported as State of Florida Department of Transportation v. Rubano, 19 Fla. L. Weekly D240 (Fla. 4th DCA February 2, 1994). A copy of the opinion is contained in the appendix hereto. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner's represent that "[w]hile before the District Court, the DOT conceded that the five final judgments 'accurately reflected the basic facts adduced at trial.'" (PB 1) The full text of the Department's statement was "[w]hile the foregoing material quoted from the Final Judgments accurately reflects the basic facts adduced at trial, the Department, in its legal argument will dispute ultimate findings of fact and/or legal conclusions contained in the Final Judgments." (Initial Brief of Appellant, p.15)

Although the remainder of Petitioners' Statement of the Case and Facts is substantially accurate, it is incomplete. Consequently, the Department submits the following additional information.

This case arises from an inverse condemnation proceeding. Petitioners (plaintiffs/appellees below) had various ownership or possessory interests in five parcels (referred to as Parcels 1, 2, 3A & 3B, 4, and 5) abutting the westbound lanes of State Road 84 in the vicinity of S.W. 26th Terrace to S.W. 23rd Terrace, in Broward County, Florida. (R 609, 836, 849, 862, 875, 888) On or about July 6, 1987, the Department began construction of a roadway project that was part of the overall development of I-595 in Broward County. (R 613) This $120,000,000 project (R 244) included the construction of two new bridges on State Road 84 over I-95, demolition of the old bridges, the creation of Texas U-turns under I-95, the creation of service roads, and other improvements. (R

613) The scope of construction for the project included the portion of State Road 84 abutted by Petitioners' properties. (R 613)

Petitioners brought five inverse condemnation actions against the Department seeking a final judgment finding a compensable taking, either temporarily or permanently, of their rights of access as a result of the construction of the project undertaken by the Department. (R 609) The complaints were consolidated for trial. (R 469, 473, 481)

Prior to trial, the Department filed an unsuccessful Motion for Partial Summary Judgment or Alternatively Motion in Limine where it took the position that a compensable taking had not occurred on the facts of this case. (R 529-538, 539) The cause proceeded to a non-jury trial on March 16, 1992. (R 836) The trial judge, sitting as the trier fact, found against the Department and five Final Judgments were entered on August 18, 1992. (R 847, 860, 873, 886, 900)

The record reflects that witnesses for Petitioners confirmed that during all phases of construction vehicles had ingress and egress to and from each parcel. (R 113-114, 162-163, 181) In fact, during construction Parcel 1 always had access through its west driveway and the driveway always had access to State Road 84. (R 204) Moreover, Petitioners' traffic engineer, Don Moore, admitted that hypothetically, if 50 cars were entering the property on an hourly basis prior to construction, 50 cars could still enter the property hourly if they knew how to get there. (R 116)

Jessie Vance, Petitioners' appraiser, never testified that

Petitioners were deprived of the economically viable use of their property. (R 126-139) On the other hand, the Department's appraiser, John Hagan, agreed that the parcels were negatively impacted during the project (R 348), but testified that he did not believe the temporary access changes would have a significant impact on the highest and best use of the properties. (R 349) Previously, Hagan had expressed the opinion that there was not a substantial reduction in access during the construction phases. (R 346)

The record further reflects that three of Petitioners' witnesses attributed the negative impacts upon the parcels to the road construction project (R 142, 144, 146, 155, 159-160, 189-190, 197-203), and one witness testified that a tenant quit the premises as a result of anticipation of problems construction of the project might entail. (R 175)

Daniel Murray, the Department's traffic engineering expert witness, gave testimony indicating that under construction conditions, access to the parcels was reasonable for all phases of construction. (R 261, 266, 269, 288) For example, concerning phase B of the project, Murray testified that:

> A From an access standpoint, there were the normal construction constraints. There weren't ideal turning patterns. There weren't ideal definitions of access. There were the normal interferences. So when you look at quality of access, there were definitely certain things that did exist. It's quite -- Honestly, it's standard. That does occur during construction, because construction is so dynamic and difficult to maintain traffic to a permanency level.
>
> This is a temporary condition. And

> recognizing it from those perspectives, in my opinion there was a reasonable standard of care in implementing a traffic maintenance plan. And once you do implement a traffic maintenance plan, of course, it's going to need to be fine tuned, because construction is so dynamic.

(R 263-264)

On cross examination, Petitioners elicited testimony from Murray to the effect that construction projects are temporary conditions (R 290); that during any construction project there is a certain amount of impairment of the quality of access on a temporary basis (R 295); and that the creation of frontage roads is not an unusual circumstance for a major project -- it happens all the time. (R 296) Similarly, in their cross examination of the Department's appraiser, John Hagan, Petitioners secured testimony indicating that the changes affecting the parcels would not have occurred but for the construction. (R 355)

Finally, regarding Petitioners' suggestion that Parcel 1's problem with people using the driveways as part of the frontage road system was not normally encountered in general construction problems, Murray responded:

> A No. I think you have that all the time in construction, where you have people turning around in driveways and doing -- And I'm not comparing this to a minor construction project. You have to put this in the ball park of a major construction project. And major construction projects have major disruptions to accomplish that project. And people will do various maneuvers, and they will go in driveways they normally wouldn't go into. It's a fact of life that it occurs.

(R 306)

SUMMARY OF ARGUMENT

Petitioners contend that the lower court's decision should be quashed and that the final orders pertaining to each parcel should be reinstated because the lower court overlooked the legal implications of the Department's elimination of direct access to State Road 84 by placing the properties upon a service road; because the elimination of the Ravenswood U-turn by placement of concrete barriers between the eastbound and westbound lanes of State Road 84 produced a physical impairment of access to two directional traffic rather than a modification of traffic flow; and, because a substantial impairment of access resulted from the physical closure of the I-95 connections to State Road 84.

The Department first argues that Petitioners abandoned any claim that the operating characteristics of State Road 84 subsequent to the completion of construction resulted in a compensable temporary taking of access by virtue of their failure to advance any argument on the issue.

The Department next argues that Petitioners did not suffer a compensable temporary taking of access because all of the impacts to accessibility they complain of occurred during construction of the project.

Regarding Petitioners' claim concerning the temporary placement of the properties on a service road, in addition to the fact that the use of the service road occurred during construction, the Department argues that a compensable taking did not result because there was no impact to Petitioners' pre-existing ability to

ingress and egress their properties to and from the abutting public road. Petitioners had no vested right to direct access to the westbound main travel lanes of State Road 84.

While the elimination of the Ravenswood U-turn by the placement of concrete barriers between the eastbound and westbound lanes of State Road 84 is not compensable because it occurred during construction, the Department also argues that compensability is barred because Petitioners' claim is grounded upon a modification of traffic flow and attendant economic ramifications.

Finally, the Department argues that the temporary closure of the I-95 connections to State Road 84 did not result in a compensable taking because Petitioners did not have a vested right to convenient access to and from I-95.

ARGUMENT

ISSUE

THE LOWER COURT PROPERLY CONCLUDED THAT, AS A MATTER OF LAW, THE TRIAL JUDGE REVERSIBLY ERRED IN FINDING A COMPENSABLE TEMPORARY TAKING OF ACCESS TO PETITIONERS' PROPERTIES WHERE THE RECORD REFLECTS THAT THE IMPACTS TO ACCESSIBILITY COMPLAINED OF WERE ATTRIBUTABLE TO THE DEPARTMENT'S ROAD CONSTRUCTION ACTIVITIES OCCURRING ON THE ABUTTING STATE ROAD AND A MODIFICATION OF TRAFFIC FLOW ON THE ABUTTING STATE ROAD, AND WHERE THE PROPERTIES' PRE-EXISTING ACCESS TO AND FROM THE ABUTTING STATE ROAD WAS NOT AFFECTED BY THE DEPARTMENT'S ACTIVITIES.

[Restated by Respondent]

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

Proof of taking by the governmental body is an essential element in an action for inverse condemnation. Pinellas County v. Brown, 450 So. 2d 240, 241 (Fla. 2d DCA 1984); State, Department of

Health, Etc. v. Scott, 418 So. 2d 1032, 1034 (Fla. 2d DCA 1982). This requisite taking usually consists of an actual physical invasion and an appropriation. Pinellas County v. Brown, supra at 420 So. 2d 310; City of Clearwater v. Earle, 418 So. 2d 344, 345 (Fla. 2d DCA 1982). Additionally, Florida courts have recognized that overly restrictive regulations and actions, such as permit denials, can result in a compensable taking. Pinellas County v. Brown, supra at 420 So. 2d 310. But, to constitute a taking there must be a deprivation of substantially all economically beneficial or productive use of the property. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 19 Fla. L. Weekly S169, S171 (Fla. April 7, 1994).

A compensable taking can also occur when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989). But, 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 owner's right of access was substantially diminished. Id. The loss of the most convenient access is not compensable where other suitable access continues to exist. Id. However, a taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. Department of Transportation v. Gefen, 19 Fla. L. Weekly S275, S276 (Fla. May 26, 1994); Palm Beach County v. Tessler, supra; Division of

Administration v. Capital Plaza, Inc., 397 So. 2d 682, 683 (Fla. 1981). State Department of Transportation v. Stubbs, 285 So. 2d 1, 4 (Fla. 1973).

Here, the trial judge concluded that Appellees had suffered a compensable temporary taking of access to their properties commencing on December 14, 1987 and concluding upon whatever date the Department completed stipulated modifications to the operating characteristics of State Road 84 -- approximately on or before Labor Day 1992. (R 898, 871, 858, 884, 845) The record reflects that the Department's construction activities were concluded at a point between May and July 1990. (R 613, 896) Thus, for the period running from the completion of construction until Labor Day 1992, the trial judge's finding of a compensable taking necessarily had to be predicated solely upon the subsequent operating characteristics of State Road 84 -- specifically the Texas U-turn and the elimination of a U-turn near the properties.

Below, the Department argued that the trial judge reversibly erred in determining that a compensable temporary taking occurred because his conclusion was grounded upon impacts to accessibility attributable to the Department's road construction activities on abutting State Road 84 for the period running from December 14, 1987 to May - July 1990, and a modification of traffic flow on State Road 84 thereafter. The Department further argued that there was no basis to find a compensable temporary take had occurred for the entire term because the properties' pre-existing access to and from State Road 84 was never affected by the Department's

construction activities or the subsequent operating characteristics of State Road 84.

The lower court reversed holding:

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

State of Florida Department of Transportation v. Rubano, 19 Fla. L. Weekly D240, D242 (Fla. 4th DCA February 2, 1994).

Petitioners argue that the lower court's decision should be quashed and that the final orders pertaining to each parcel should be reinstated. As grounds for relief, the Petitioners claim that the lower court overlooked "the 'legal' implications of DOT's elimination of direct access to S.R. 84 by placing the properties upon a service road" (PB 13-17); that the elimination of the Ravenswood U-turn by placement of concrete barriers between the eastbound and westbound lanes of State Road 84 produced a physical impairment of access to "two directional traffic" rather than a modification of traffic flow (PB 18-25); and that a substantial

impairment of access resulted from the physical closure of the I-95 connections to State Road 84. (PB 25-27)

Petitioners have not advanced any argument that a compensable taking of access, attributable to the operating characteristics of the completed project, occurred during the period running from the completion of construction until approximately Labor Day, 1992. Accordingly, Petitioners have abandoned that claim. See Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (Upon Motion for Rehearing), pet. for review dis., 451 So. 2d 848 (Fla. 1984) (When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy).

A. Impairment Of Accessibility Attributable To Road Construction On State Road 84 Is Not Compensable.

In light of Petitioners' abandonment of the facet of their claim concerning the operating characteristics of the completed project, their basis for alleging a compensable temporary taking of access is grounded solely upon impacts to accessibility occurring during construction. It is well settled that losses resulting from construction activities, including impaired accessibility, are not compensable. Anhoco Corporation v. Dade County, 144 So. 2d 793 (Fla. 1962); Division of Administration, State of Florida v. Frenchman, 476 So. 2d 224 (Fla. 4th DCA 1985); Howard Johnson Co. v. Division of Administration, State, 450 So. 2d 328 (Fla. 4th DCA

1984); Division of Administration, Department of Transportation v. Hillsboro Association, Inc., 286 So. 2d 578 (Fla. 4th DCA 1973).

Relying upon the foregoing authority, the Department argued below that any impairment of accessibility attributable to road construction on State Road 84 was not compensable. The lower court disagreed holding:

> 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 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 in 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.

State of Florida Department of Transportation v. Rubano, supra at D241.

Both the trial court and the lower court missed the point on this issue.[1] The impacts to accessibility Petitioners complained of were not any different than those suffered by any business whose property abuts a road that is undergoing extensive improvements. Anhoco stands for the proposition that, as a matter of law, losses occasioned by limitations on the flow of traffic over a highway being constructed under "traffic conditions," like the losses at issue here, are the same type of losses suffered by every business abutting an established highway which is being reconstructed and are not compensable.

Review of Petitioners' experts' testimony and the trial judge's findings of fact reveals that the "impaired access" complained of during the construction period was the result of the Department's construction activities and particularly its efforts to maintain traffic on State Road 84 while the project was being built. Three of Petitioners' witnesses attributed the negative impacts upon the properties to the road construction project (R 142, 144, 146, 155, 159-160, 189-190, 197-203), and one witness testified that a tenant quit the premises as a result of anticipation of problems construction of the project might entail. (R 175)

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[1] Although the Department prevailed below and did not invoke this Court's jurisdiction to address this question, review thereof is not barred. Once a case is properly before the Court, it has the prerogative to consider any error in the record. See Lawrence v. Florida East Coast Railway Company, 346 So. 2d 1012, 1014 n. 2 (Fla. 1977).

Moreover, the testimony adduced below also established that the losses complained of are those normally associated with a major construction project. Daniel Murray, the Department's traffic engineering expert witness, gave testimony indicating that under construction conditions, access to the parcels was reasonable for all phases of construction. (R 261, 266, 269, 288) For example, concerning phase B of the project, Murray testified that:

> A From an access standpoint, there were the normal construction constraints. There weren't ideal turning patterns. There weren't ideal definitions of access. There were the normal interferences. So when you look at quality of access, there were definitely certain things that did exist. It's quite -- Honestly, it's standard. That does occur during construction, because construction is so dynamic and difficult to maintain traffic to a permanency level.
>
> This is a temporary condition. And recognizing it from those perspectives, in my opinion there was a reasonable standard of care in implementing a traffic maintenance plan. And once you do implement a traffic maintenance plan, of course, it's going to need to be fine tuned, because construction is so dynamic.

(R 263-264)

On cross examination, Petitioners elicited testimony from Murray to the effect that construction projects are temporary conditions (R 290); that during any construction project there is a certain amount of impairment of the quality of access on a temporary basis (R 295); and that the creation of frontage roads is not an unusual circumstance for a major project -- it happens all the time. (R 296) Similarly, in their cross examination of the Department's appraiser, John Hagan, Petitioners secured testimony

indicating that the changes affecting the parcels would not have occurred but for the construction. (R 355)

Regarding Petitioners' suggestion that Parcel 1's problem with people using the driveways as part of the frontage road system was not normally encountered in general construction problems, Murray responded:

> A No. I think you have that all the time in construction, where you have people turning around in driveways and doing -- And I'm not comparing this to a minor construction project. You have to put this in the ball park of a major construction project. And major construction projects have major disruptions to accomplish that project. And people will do various maneuvers, and they will go in driveways they normally wouldn't go into. It's a fact of life that it occurs.

(R 306) The trial judge, and concomitantly, the lower court, had no basis in fact or law to conclude that Petitioners' losses were different from those suffered by any business abutting those portions of State Road 84 involved in the construction project at issue. Petitioners did not suffer a compensable temporary taking during the construction of the State Road 84 project. Anhoco Corporation v. Dade County, supra; Division of Administration, State of Florida v. Frenchman, supra; Howard Johnson Co. v. Division of Administration, State, supra; Division of Administration, Department of Transportation v. Hillsboro Association, Inc., supra. See also Lewis v. Globe Construction Co., Inc., 630 P.2d 179, 183-184 (Kan. App. 1981) (The temporary closing of a street or highway for repair falls within the police power of the state, not the exercise of the right of eminent

domain; and so long as the repair is lawful, and is pursued with reasonable diligence, liability for damages to those whose access is temporarily restricted does not attach); State Through Department of Transportation v. Baken Park, 257 N.W.2d 448, 449 (South Dakota 1977); Berman Corporation v. State ex rel. State Highway Commission, 547 P.2d 192, 194 (Ore. App. 1976) (Highway and street construction and repair necessarily disturb traffic flows and access to businesses located in the area and to make the state or a local public agency liable for lost profits would place an impossible burden upon the taxpayers); Hill v. State Highway Commission, 516 P.2d 199, 201 (New Mexico 1973) (Generally, damages caused by temporary obstruction of streets during the period of construction of a public project are not compensable).

While Petitioners' claims are clearly not compensable because they are grounded on construction related activities, they also are not compensable because there was no impact to Petitioners' pre-existing rights of access and because the actions merely produced a modification of traffic flow.

B. The Placement Of The Subject Properties Upon A Service Road During Construction Of The Project Did Not Result In A Compensable Temporary Taking Of Access.

Initially, review of the lower court's opinion belies Petitioners' suggestion that the court overlooked a significant aspect of the case because there was no discussion of the legal

implications of the placement of the properties on a service road. (PB 13) The court stated:

> 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. [Emphasis added]
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> * * *
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> 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.
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> * * *
>
> 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 and 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. [Emphasis added]

State of Florida Department of Transportation v. Rubano, supra at D241-D242. The foregoing language demonstrates that rather than overlooking the legal implication of the temporary placement of the properties on a service road, the lower court concluded that the action did not amount to a compensable taking of access to the properties.

Below, the Department took the position that there had not been a Tessler type taking at any point in time because there was never any impairment of the Petitioners' pre-existing right of ingress and egress to and from the abutting public road. Although the lower court relied upon its opinion in State, Dot v. Lakewood Travel Park, 580 So. 2d 230 (Fla. 4th DCA 1991), Rev. denied, 592 So. 2d 680 (Fla. 1991), disapproved, Department of Transportation v. Gefen, 19 Fla. L. Weekly S275 (Fla. May 26, 1994), to reject the Department's "abutting road" argument, Rubano at D241, the lower court's conclusion nevertheless comports with this Court's decisions in Department of Transportation v. Gefen, supra, and Palm Beach County v. Tessler, supra.

As the Court will recall, unlike the instant case, the governmental action in Tessler destroyed the landowner's access to an abutting road. The legal issue decided in Tessler was "[a]re the owners of commercial property located on a major public roadway entitled to a judgment of inverse condemnation when the county government blocks off any access to the property from the roadway and leaves access thereto only through a circuitous alternative route through residential streets?" Palm Beach County v. Tessler, supra at 538 So. 2d 847. The relevant facts were:

> The subject real estate, which is zoned commercial, is located at the intersection of Spanish Trail and the main east-west thoroughfare in Boca Raton, Palmetto Park Road. As part of a bridge construction and road-widening project, the county planned to construct a retaining wall directly in front of the respondents' property, which would block all access to and visibility of the respondents' place of business from Palmetto

> Park Road. While the property will continue to have access to Spanish Trail, that street is intended to pass underneath the newly constructed bridge on Palmetto Park Road. The wall will extend to a point approximately twenty feet east of the property. Consequently, the respondents and their customers will only be able to reach the property from Palmetto Park Road by an indirect winding route of some 600 yards through a primarily residential neighborhood. [Emphasis added]

Id.

Given the legal issue resolved and the factual underpinnings of the case, it is evident that Tessler does not stand for the proposition that a landowner can suffer a compensable taking of access where, as here, there has been no impairment of access to and from the public road abutting the property. Examination of the legal principles restated by the Tessler Court establishes that compensable loss or destruction of access where there has been no physical appropriation of the property is loss or destruction of access to an abutting road and not impairment of accessibility to and from the subject property and the general transportation system. The Court observed:

> There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access

> continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. [Emphasis added]

Id. at 849.

In addition to the factual background of Tessler, the legal test set out by the Court clearly establishes that there must be some interference with the abutter's easement before there can be a compensable loss of access. For a compensable taking of access to have occurred, the property owner's right of access must be substantially diminished. Id. The term "right of access" has been specifically defined by the Legislature in the Florida Transportation Code, which authorizes the Department to exercise the power of eminent domain, as "[t]he right of ingress to a highway from abutting land and egress from a highway to abutting land." Section 334.03(17), Florida Statutes (1991). Thus, neither Tessler nor the Legislature have construed a landowner's right of access to include a vested right of access to a particular abutting road or the right to get to the general system of public roads by a particular route.

The Department's view of Tessler was confirmed by this Court's opinion in Gefen holding that:

> In Tessler, this Court recognized that an inverse condemnation action can lie when government activity causes substantial loss of access to property even though there is no physical appropriation of the property itself. When access from abutting roads is denied to the point that it can be deemed "substantially diminished," property rights which appertain to ownership of the land are disturbed. Id.

> at 849. However, the facts of this case are significantly different from those in Tessler. Gefen's access to all roads abutting her property is undiminished. [Emphasis added].

Department of Transportation v. Gefen, supra at 19 Fla. L. Weekly S275-S276. Moreover, Petitioners' claim to a vested right of access to the main travel lanes of State Road 84 is clearly refuted by the Gefen Court's reiteration of the principle that "[n]o person has a vested right in the maintenance of a public highway in any particular place because the state owes no person a duty to send traffic past his door." Id. at S276.

Inasmuch as Petitioners have no vested right to access to a particular public road, and inasmuch as Petitioners' pre-existing ability to ingress and egress their properties to and from the abutting public road was not impacted by the substitution of a service road for the main travel lanes of westbound State Road 84, the lower court was correct in rejecting the placement of the properties on a service road as an action giving rise to a compensable temporary taking of access.

Advocating the contrary, Petitioners rely primarily upon Anhoco Corporation v. Dade County, supra, and State Road Department of Florida v. McCaffrey, 229 So. 2d 668 (Fla. 2d DCA 1969). Petitioners' reliance is misplaced. Neither case addresses circumstances where, as here, **the lanes of the existing highway abutting the property** were temporarily changed into a service road which still abutted the property and did not modify ingress and egress to and from the property and the abutting road. Other jurisdictions speaking to situations where such a change was

permanent have not found the action to give rise to a compensable taking.

In State v. Thelberg, 350 P.2d 988, 992 (Ariz. 1960), the court noted that:

> It seems to be the law, however, that where land is condemned or purchased for the construction of a controlled-access highway upon a new right of way alongside the old road that an abutting owner of land on the old highway, which is retained as a service road, cannot recover damages for destruction or impairment or loss of access for the reason that his access to the old highway has not been disturbed in the slightest degree....This does not mean however that the abutting owner may not recover severance damages. It simply means that destruction or impairment of access to the new highway is not compensable. [Citations omitted].

Along the same line, the Missouri Supreme Court rejected a claim that an abutting property owner had a vested right to a pre-existing highway holding:

> "...But they [the landowners] do contend that they had an easement of access to pre-existing U.S. 40 and that it was a property right which could not be taken from them by condemnation without just compensation." This really amounts to a claim that the state cannot impose traffic regulations on any lanes of existing highways which change direction of travel and places of entry on such lanes, regardless of means of access provided for abutting landowners, without payment of compensation to them for change in the kind of access they had. This claim is unsound. [Emphasis original].
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> * * *
>
> Of course, a complete blocking of an abutter's access takes from him a property right in the nature of an easement and this requires resort to eminent domain. However, ingress and egress to a particular lane of a highway and direction of travel thereon can be

> regulated under the police power of the state for public safety and general welfare without compensation to an abutter who is furnished unrestricted right of access to a lane of the highway upon which his property abuts and which connects with the restricted lanes at designated points....In this case, respondents have been furnished unrestricted access to a lane of the highway, an outer road on its right of way, along the entire front of their property. Therefore, any compensation resulting from this situation would have to be for circuity of travel rather than for loss of access to the highway. [Citations omitted]
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> * * *
>
> We can see no difference of legal significance in leaving an old pavement as an outer road and building new pavement for limited access thoroughfares or in building a new outer road pavement and using the old pavement (or new pavement on its location) for the limited access thoroughfares. In either situation the abutting owner would have the same access to his property and the same circuity of travel to reach the throughway lanes on which he desired to travel. The real basis for complaint of an abutting owner, which makes a difference to him if he operates a commercial enterprise, is diversion of traffic. However, it is generally well settled...that such an owner has no right to a continuation of traffic flow directly in front of his property (which could be affected just as much by building a new road a block or a mile away as by limiting access to the old road and giving him access by an outer road); and that diminution in the value of land because of such diversion of traffic is the result of an exercise of the police power and is noncompensable....Therefore, it was error to admit evidence of damages based on loss of direct access to previously existing U.S. Highway 40 lanes and to instruct the jury to consider this in determining compensation to be paid to respondents. [Citations omitted].

State v. Brockfeld, 388 S.W.2d 862, 863-865 (Mo. 1965).

Similarly, the Idaho Supreme Court held:

> The facts of the instant case, concerning which there is no controversy, show appellants' access from their business property to the frontage road, formerly U.S. Highway 10, is the same as it was prior to construction of the new Interstate highway. The facts also show this frontage road is connected with both east bound traffic and west bound traffic. East bound traffic, to reach appellants' property from the Interstate and again continue easterly, must retrace its path. This alone, does not constitute a taking of property. At most it can only be considered as constituting a more inconvenient, or circuitous route. Appellants' complaint and affidavit, as a practical matter, is directed to the asserted lack of access to and from the main stream of traffic which no longer flows directly in front of their place of business, and not to mere lack of access to the state highway system. Diversion of traffic occasioned by the relocation of the highway does not cause a compensable injury, for appellants have no property right in any flow of traffic over a particular highway.

James v. State, 397 P.2d 766, 769-770 (Idaho 1964). See also Hill v. State Highway Commission, supra.

Additionally, Anhoco Corporation v. Dade County, supra, offers Petitioners no support for their position. Anhoco unequivocally establishes the principle that the placement of a property on a frontage road where the property formerly abutted the main travel lanes of a public road does not give rise to a compensable taking of access. In that case, the Court noted that the landowner's property had been subjected to various deprivations of its pre-existing direct access to State Road 826 in Dade County during the construction of a project which transformed 826 into a limited access highway, to-wit:

> Reference to earlier decisions will reveal that the petitioners here, Anhoco et

> al., owned a large parcel of land on the north side of the previously existing land service highway. On this land they had constructed two large outdoor theaters designated as a Western Theater and an Eastern Theater. It is claimed by the petitioners that in August 1957, the Road Department in carrying out the project plan, dug a ditch across an exit road theretofore existing between the Eastern Theater and the former land service road, SR 826. It being impossible for patrons to drive out of this theater, it remained closed until October 1958, when the Road Department apparently completed a service road from N.W. 32nd Ave. westwardly and dead ending at Anhoco's east property line. It also completed a similar service road from N.W. 37th Ave. eastwardly, dead ending at Anhoco's west property line. However, during the same month the State Road Department dug a ditch across the road which had previously provided direct access to both theaters from former SR 826. At this point Anhoco reopened it Eastern Theater but was compelled to close the Western Theater because no motor vehicle could enter or leave the property.

Anhoco Corporation v. Dade County, supra at 794.

While this state of affairs clearly constituted a compensable taking, the noteworthy aspect of this Court's decision is that the taking was found to be a "temporary encroachment" on Anhoco's right of access. Id. at 797. The incident that rendered the taking temporary was the completion of a frontage road across the entire front of the subject property that restored access to 826 at N.W. 32nd and N.W. 37th Avenues. Id. at 795, 798. The Court held:

> Although the record is not sufficiently clear to specify the exact periods involved, it is apparent that Anhoco suffered substantial damages as a result of destruction of two or more of its rights of access prior to the establishment of the new frontage service road. It is entitled to compensation for this damage. [Emphasis added]

Id. at 798.

Similarly, State Road Department of Florida v. McCaffrey, supra, affords Petitioners little aid here because its holding is couched in terms of the landowners' right of access to the abutting public road. At the time McCaffrey was decided, as is the case now, a landowner's right of access was defined as the right of ingress to a highway from abutting land and egress from a highway to abutting land. See Section 334.03(14), Florida Statutes (1967). Nothing in McCaffrey indicates that a compensable taking can occur absent impact to the right of access. Here, there has been no impact upon Petitioners' right of access.

On the other hand, when the McCaffreys' right of access to State Road 25 was eliminated, they were provided with a service road that gave "some access" to the property. Id. at 229 So. 2d 669. Obviously, the pre-existing ability to ingress and egress the property to and from the abutting public road had not been entirely restored by the service road in that case.

Petitioners did not suffer a compensable temporary taking of access by virtue of their properties being placed upon a service road during construction of the State Road 84 improvements.

C. The Elimination Of The Ravenswood U-Turn By The Placement Of Concrete Barriers Between The Eastbound And Westbound Lanes Of State Road 84 Produced A Non-Compensable Modification Of Traffic Flow.

Petitioners take the position that the elimination of the Ravenswood U-turn by the placement of concrete barriers between the

eastbound and westbound lanes of State Road 84 resulted in a compensable taking of access. (PB 18-25) Petitioners claim that the erection of the barriers produced "a 'physical impairment of access' to two directional traffic" and required eastbound customers to take a tedious and circuitous route of an additional one and one half miles to reach the properties. In addition to the fact that the elimination of the Ravenswood U-turn did not impact Petitioners' right of access, claims of this nature are predicated upon a redirection of traffic or modification of traffic flow and are not compensable. Department of Transportation v. Gefen, supra; Palm Beach County v. Tessler, supra at 849; Division of Administration v. Capital Plaza, supra; State Department of Transportation v. Stubbs, supra; Meltzer v. Hillsborough County, 167 So. 2d 54, 55 (Fla. 2d DCA 1964); Jahoda v. State Road Department, 106 So. 2d 870, 872 (Fla. 2d DCA 1958).

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

> Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public highway in any particular place. That exception is

> based upon the consideration that the State owes no duty to any person to send public traffic past his door.

Id. at 872.

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

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

The court affirmed holding that:

> The regulation of the east bound flow of traffic on Hillsborough Avenue does not constitute legal impairment of appellants' access to Hillsborough Avenue, Dale Mabry Highway or the ramp road. The State owes no duty to any person to send public traffic past his door, and inconvenience from diversion of traffic due to changes in street patterns is

> normally not compensable. See e. g. Jahoda v. State Road Department, Fla.App.1958, 106 So.2d 871. Appellants have not demonstrated that this case provides any exception to the general rule. The right of access to the thoroughfares was neither condemned nor destroyed, and other points of ingress and egress have not been impaired in any manner whatsoever.

Id. Nor did the regulation of the eastbound flow of traffic on State Road 84 during construction in this case constitute a legal impairment of Petitioners' access.

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

> The District Court of Appeal, Second District, relied heavily upon a dissenting opinion in an Alabama decision, which in turn rested upon a result reached by the Supreme Court of New Mexico. Language cited therein and relied upon for conflict purposes, reads:
>
> > "Specifically, with reference to this case, the rule is that ordinarily no person has a vested right in the maintenance of a public highway in any particular place. That exception is based upon the consideration that the State owes no duty to any person to send public traffic past his door." Id. 106 So.2d at 872.
>
> We are in agreement with the above statements insofar as they hold that "access" as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic.

State Department of Transportation v. Stubbs, supra at 3-4. Inasmuch as Petitioners' claim is based upon the adverse economic impact the erection of the concrete barriers between the eastbound

and westbound lanes of State Road 84 and elimination of the Ravenswood U-turn allegedly caused, it is particularly noteworthy that the Stubbs Court indicated that adverse economic impact to commercial property is not a valid consideration under these circumstances.

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

The trial court denied Capital's request to introduce evidence of damages to the remainder of the property caused by decreased access. Id. The First DCA reversed concluding that the jury should have been allowed to consider evidence relating to free access by northbound traffic. Id. This Court quashed the First DCA's decision holding, inter alia:

> Instead the instant case concerns alleged damages resulting from a change in the flow of traffic, not a deprivation of access. There is still free, unimpeded access to Capital's service station albeit only by the southbound traffic. Although the holding in Stubbs is not applicable here, that case does provide guidance. The Stubbs Court also said that "'access' as a property interest does not presently include a right to traffic flow even though commercial property might suffer adverse economic effects as a result of a diminution in traffic." 285 So.2d at 4. Thus, this state has joined the numerous other

> jurisdictions which have found that a land owner has no property right in the continuation or maintenance of traffic flow past his property.

Id.

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

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

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

Finally, this Court reaffirmed the viability of the traffic flow rule in Gefen holding:

> Here, the question is simply whether landowners who enjoy convenient access to and from limited access state highways such as I-95 have a compensable vested right to that access. This Court has ruled that they do not. No person has a vested right in the maintenance of a public highway in any particular place because the state owes no person a duty to send traffic past his door. Jahoda v. State Road Dep't, 106 So. 2d 870, 872 (Fla. 2d DCA 1958), disapproved on other grounds, Department of Transportation v. Stubbs, 285 So. 2d 1. Access, as a property interest, does not include a right to traffic flow even though commercial property might

> very well suffer adverse economic effects as a result of reduced traffic. Stubbs, 285 So. 2d at 4. The commercial impact of traffic changes was more recently addressed in Department of Transportation v. Capital Plaza, 397 So. 2d 682 (Fla. 1981), in which a median, installed as part of a road widening project, channelled traffic away from and limited turns into a service station. The court ruled that there was no deprivation of access but rather a redirection of traffic, for which no recovery was available. Id. at 683.

Department of Transportation v. Gefen, supra at S276.

The foregoing line of cases not only establishes the continued applicability of the traffic flow rule, it conclusively demonstrates that the lower court correctly concluded that a compensable temporary taking of access had not resulted from the erection of the concrete barriers and the elimination of the Ravenswood U-turn. That action served only to redirect traffic and did not impact Petitioners' ingress and egress to and from their properties and State Road 84.

Yet, Petitioners contend that their claim is distinguishable and hence, compensable, because this is not a traffic flow case. They say that the Department's action impaired their access to two way traffic and produced a lengthy (1.5 miles) circuitous alternate route with attendant adverse economic ramifications. While there is no Florida authority squarely on point, other jurisdictions addressing the issue have rejected such distinctions and found no right to compensation under circumstances very similar to those present during the term of construction here. Hayes v. City of Maryville, 747 S.W.2d 346 (Tenn. App. 1987); Merit Oil of New Hampshire, Inc. v. State, 461 A.2d 96 (New Hampshire 1983); B & G

Meats, Inc. v. State, 601 P.2d 252 (Alaska 1979); In Re Condemnation of 1315 to 1391 Washington Boulevard, Etc., 383 A. 2d 1289 (Pa. Cmwlth 1978); Department of Public Works and Buildings v. Mabee, 174 N.E.2d 801 (Ill. 1961); Langley Shopping Center v. State Roads Commission, 131 A.2d 690 (Md. App. 1957); Walker v. State, 295 P.2d 328 (Wash. 1956); Holman v. State, (Cal. App. 1950).

Hayes v. City of Maryville, supra, arose from a project involving major road and traffic improvements, including improvements to Highway 411 in front of Hayes's property and the intersection immediately to the south. Id. at 747 S.W.2d 347. The highway in front of Hayes's property was widened from two lanes to four and a median was installed which terminated 55 feet south of the property. Id. No land was taken from Hayes and all improvements were accomplished within the State's previously existing right-of-way. Id. Prior to construction, Hayes had two driveways that provided access to Highway 411 in both directions, north and south. Id. The driveways were entirely upon Hayes's property, were not within the right-of-way, and were not affected by the improvements. Id. Construction of the median strip created one-way lanes of traffic in front of the property. Id. Hayes's property then had immediate access form the northbound lanes of the highway and access from the southbound lanes was blocked by the median. Id. The court concluded that there was no taking holding, in part:

> The prevailing view noted in Vol. 2A, Nichols, The Law of Eminent Domain, Section 6.37[4], at 6-306 (3d. Rev. Ed. 1987), is that

> [i]nterference with passage along a public way under an exercise of the police power is, of course, not compensable. Thus, the damage to an abutter is damnum absque injuria where traffic is diverted by ... the installation of a median strip ...
>
> Accordingly, the majority rule is that any damages which result from the governing authorities' valid exercise of their police power in constructing or altering median strips which results in a change or diversion of traffic flow is non-compensable.
>
> * * *
>
> We do not believe that impairment of access resulting from changing the traffic flow from two-way to one-way traffic by construction of a median strip in front of abutting property amounts to a taking.

Id. at 348-349.

The New Hampshire Supreme Court, in Merit Oil of New Hampshire, Inc. v. State, supra, affirmed dismissal of a claim for damages arising out of construction of a median strip along a road in front of a service station, which prevented eastbound traffic from turning directly into the station, opining:

> A landowner's vested right of access "consists only of access to the system of public highways not of a particular means of access."....While a landowner has a right to have his premises accessible to others,...he has no right in the continuation of the flow of traffic past his land.... [Citations omitted]
>
> In this case, it is readily apparent that the construction of the median strip neither deprived the plaintiff of access to the general system of highways nor physically changed the actual entranceways to the property....The construction merely altered the flow of traffic on Queen City Avenue. Consequently, because the plaintiff's claim

> involved only a change in traffic patterns, rather than a deprivation of access, we hold that the trial court correctly dismissed the case. [Citations omitted]

Id. at 461 A.2d 97.

In B & G Meats, Inc. v. State, 601 P.2d 252 (Alaska 1979), the property at issue was accessed via a two-way frontage road. Id. at 253. As part of a limited access project, the frontage road was changed into a one-way road and B & G Meats' business was severely affected by the change. Id. The change imposed an additional travel distance upon southbound traffic of 2.3 miles. Id.

Regarding a taking claim based upon a loss of access, the Alaska Supreme Court quoted with approval the following general principles:

> No hard and fast rule can be stated, but courts must weigh the relative interests of the public and the individual and strike a balance so that government will not be unduly restricted in its function for the public safety, while at the same time, give due effect to the policy of eminent domain to insure the individual against an unreasonable loss occasioned by the exercise of the police power. The question depends upon the particular facts of the case. Obviously, if there is a total blocking of access, the restriction would be unreasonable and the abutter entitled to compensation. Where, however, the restriction does not substantially interfere with the abutter's ingress and egress or where "frontage" or "outer roadways" reasonably provide access the abutter is not entitled to compensation. While an abutter has the right of access to the public highway system, it does not follow that he has a direct-access right to the main traveled portion thereof; circuity of travel, so long as it is not unreasonable, is non-compensable. Likewise, loss of business occasioned by diversion of traffic is non-compensable. [Emphasis original]

Id. at 254. Ultimately, the court found that there was no taking holding, in part:

> A distinction must be made between loss of access and loss of traffic flow. The latter is not a part of the owner's interest in his property. Restrictions which merely result in a diversion of traffic away from the property are thus not compensable. [Footnote omitted] As one commentator aptly states:
>
> > [M]aking a street one-way is apt to divert traffic from a businessman abutter. Harm from diversion of traffic may be difficult to separate from loss of access, but it must be, for, as several decisions properly note, it is not compensable.
>
> W. Stoebuck, Nontrespassory Takings in Eminent Domain 61 (1977) (footnote omitted).
>
> The claimed deprivation of access in this case arises essentially because the state changed the frontage road from a two-way street to a one-way street. Although we have recognized that such a change may, in extreme cases, result in a compensable taking of access rights, the general rule is clear that such a change is not by itself a taking. [Footnotes omitted]
>
> > [I]t seems clear that nonphysical regulatory measures, stop signs, one-way streets, no left-turn regulations, and the like will hardly ever amount to takings of access. In the nature of things this must be so, for these regulations impede not at all the abutter in reaching the street and normally will not seriously interfere with his access to the street system.
>
> W. Stoebuck, Nontrespassory Takings in Eminent Domain 57-58 (1977) (footnote omitted).
>
> The result of the change in this case is that some traffic must now travel and additional 2.3 miles to reach the property.

> Under the circumstances of this case, the superior court concluded, and we agree, that the additional distance was not so unreasonable as to constitute a taking. To the extent that B&G Meats claims a taking because travelers on the New Seward Highway are unwilling to make the switchback now required by the one-way road arrangement, we conclude that this constitutes a diversion of traffic flow which is not compensable.

Id. at 254-255.

The landowner in In Re Condemnation of 1315 to 1391 Washington Boulevard, Etc., supra, operated a truck terminal located in the Pittsburgh Metropolitan Area. Id. at 383 A.2d 1290. Construction of a medial strip along the center line of the road providing access to the terminal restricted ingress and egress to vehicles traveling in a southerly direction. Id. Northbound access was available through two alternative routes involving circuitous travel amounting to 2.35 and 2.80 miles, respectively. Id. The Pennsylvania DOT acquired no land to effectuate the medial barrier construction. Id. The court found no taking reasoning that:

> Appellant's access is merely restricted, not totally precluded, and the circuitous travel necessitated by the restriction is not so unreasonable as to constitute a taking within the meaning of Code, 26 P.S. [Section] 1-101 et seq.
>
> * * *
>
> The reasonableness of the interference to access must be viewed in light of the Commonwealth's police powers. In Hession, supra, 430 Pa. at 279-80, 242 A.2d at 435-36, our Supreme Court wrote:
>
> > "'[T]he right of ingress or egress to or from one's property [does not] include any right in and to the existing public traffic on the

> highway, or any right to have such traffic pass by one's abutting property. The reason is that all traffic on public highways is controlled by the police power of the State, and what the police power may give an abutting property owner in the way of traffic on the highway it may take away, and by any such diversion of traffic the State and any of its agencies are not liable for any decrease of property values by reason of such diversion of traffic, because such damages are "damnum absque injuria', or damage without legal injury. . .'"
>
> * * *
>
> The record reveals that Appellant's terminal was utilized by both local and inter-city/inter-state haulers, that the local haulers could adjust their routes to avoid the inconvenience and circuity necessitated by PennDOT's construction, and that the inter-city/inter-state haulers were required to travel a maximum distance of 2.8 miles, which consumed a maximum of 20 minutes, to gain northbound access to or from Appellant's property. In our judgment, this inconvenience is not so unreasonable as to constitute a taking within the meaning of Section 612 of the Code, 26 P.S. [Section] 1-612.

Id. at 1290-1291.

Department of Public Works and Buildings v. Mabee, supra, presented the Illinois Supreme Court with the issue of whether an abutting property owner may recover damages to property not taken allegedly caused by a traffic regulation restricting access to his property to one direction. Id. at 174 N.E.2d 801. The landowner's claim was based upon the fact that an insurmountable median had been constructed on the portion of the highway abutting the north side of his property which limited access on the north to the eastbound traffic lane of the highway. Id. at 801-802. Finding

the landowner's claim to be non-compensable, the court stated:

> It must be remembered, however, that our highways are built and maintained to meet public necessity, safety and convenience and not for the enhancement or maintenance of occasional property owners' businesses along the route.
>
> A number of States have considered this problem and concluded that an abutting property owner is not entitled to compensation for the diminished property value or loss of business caused by a one-way traffic control device or the complete relocation of the highway....This conclusion is premised on the fact that an abutting owner has no property right in the continuation or maintenance of the flow of traffic past his property. We agree with the conclusion reached by these courts. The diminution in the value of the land or the loss of business occasioned by a one-way traffic regulation that diverts a portion of the flow of traffic from in front of one's premises is the result of the exercise of the police power; it is not the taking or damaging of property within the meaning of our constitution; and it is not therefore compensable....[Citations omitted].
>
> The defendants also argue that their right of access has been damaged and that such damage is compensable. It is a well-established rule in this State that the right of access to an existing public street or highway is a valuable property right which cannot be taken away or materially impaired without just compensation....The rule cannot be applied, however, where the property owner's free and direct access to the lane of traffic abutting on his property has not been taken or impaired. Once on the highway he is in the same position and subject to the same police-power regulations as every other member of the traveling public....The inconvenience of a one-way traffic regulation may be greater in degree as to a person whose premises abut on the highway where such a regulation has been invoked, but this cannot be the basis for damages....[Citations omitted].

Id. at 802-803.

In Langley Shopping Center v. State Roads Commission, supra, the owners of two large shopping centers complained that the construction of a median strip would prevent direct access to the far sides of the roads bordering on their properties, amounting to a substantial denial of their rights of ingress and egress and to a taking of their properties without compensation. Id. at 131 A.2d 691. Automobiles traveling on the far sides of the highways would still be able to reach the properties, but would be required to make a left turn at a signalized intersection near the properties or to make a "U" turn at one of the cuts in the median strip or beyond the end of such a strip. Id. The landowners contended that the median strips would cause them loss because of the inconvenience caused by the fact that traffic must either turn at a traffic control or take a more circuitous route to reach their shopping centers. Id. The court concluded that the alleged damages were not compensable observing that:

> It seems to us entirely reasonable that if the State could divert traffic entirely away from the plaintiffs' corners without being liable for damages for doing so, it may, in the interest of safety, and without incurring liability for damages, interpose an obstacle which may render access to the plaintiffs' properties less easy but which does not actually or virtually destroy the plaintiffs' access to the highway. **An opposite view would require the State to pay through the nose for the privilege of further improving and adding to the safety of highways which it has built and which have evidently brought customers to the doors of the owners of land fronting on such highways.** [Emphasis added].

Id. at 693.

The Washington Supreme Court, in Walker v. State, supra, was confronted with the issue of whether an abutting property owner was entitled to compensation under the state constitution because an alleged diminution of the right of ingress and egress arises out of the installation, by the highway authorities, of a curb or dividing section in the center of a four-lane highway. Id. at 295 P.2d 330. The landowners operated a motel on property abutting the south side of a four-lane highway. Id. Tourists who traveled in a westerly direction made up the bulk of the landowners' patronage. Id. These westbound travelers entered the property by making a left-hand turn across the highway, against oncoming traffic. Id. The proposed construction of a center-line curb evidently would prevent the westbound traffic left turn movement. Id. The court found no taking holding:

> The facts alleged in the amended complaint indicate that the real basis of plaintiffs' claim for damages is the diversion of westbound traffic from their motel business. Since there is eastbound traffic in front of plaintiffs' property, it is permissible for us to infer that westbound traffic may turn, at some point west of plaintiffs' property, and become eastbound, and thus approach plaintiffs' property.
>
> Plaintiffs have no property right in the continuation or maintenance of the flow of traffic past their property. They still have free and unhampered ingress and egress to their property. Once on the highway, to which they have free access, they are in the same position and subject to the same police power regulations as every other member of the traveling public. Plaintiffs, and every member of the traveling public subject to traffic regulations, have the same right of free access to the property from the highway. Re-routing and diversion of traffic are police

> power regulations. Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right. [Emphasis original].

Id. at 331.

Holman v. State, supra, was an inverse condemnation action arising form the construction of a dividing strip in the state highway adjoining the plaintiffs' property. Id. at 217 P.2d 448-449. Like some of the property owners in the case at bar, the plaintiffs alleged that the building located on the premises was especially designed for carrying on the business of servicing and repairing heavy highway trucks and equipment. Id. at 449. Also with striking similarity to the instant case, the plaintiffs further alleged that prior to the erection of the dividing strip, the property was easily accessible by heavy truck traffic proceeding northerly on said highway but as a proximate result of the construction of such dividing strip, all reasonable access to the property by northbound traffic was prevented. Id. Additionally, vehicles leaving the property could not cross the southbound lane and immediately make a left turn and proceed in a northerly direction. Id. The plaintiffs claimed that these circumstances resulted in the depreciation of the reasonable market value of the property. Id.

On appeal, the plaintiffs contended that as abutting owners, they had the right to the use of the highway in either direction and that they were entitled to compensation for any damage occasioned by the construction of a public work or improvement in

the highway interfering with their access to the next intersecting street in either direction from their property. Id. The court noted that the facts alleged by the plaintiffs indicated that the real basis of their claim was the diversion of traffic from their business. Id. at 451. The court rejected the plaintiffs' claim holding, in part:

> The facts pleaded herein show that the highway upon which plaintiffs' property abuts is not closed and that plaintiffs, once on the highway to which they have free access, are in the same position and subject to the same police power regulations as every other member of the traveling public. Because of a police power regulation for the safety of traffic, they are, like all other travelers, subject to traffic regulations. They are liable to some circuity of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right....[Citations omitted].
>
> If the contention of the plaintiffs herein is sustained, the right of the State to control the traffic as a safety regulation would be definitely curtailed and traffic islands or double lines in the highway to separate through traffic would be prohibited. The damage of which plaintiffs complain would be the same if no division strip had been constructed on the highway in question but that double white lines had been painted on the highway and a "no left turn" sign had been erected, or if the entire highway had been designated as a one-way street.

Id. at 452.

Rather than a compensable temporary, Petitioners suffered a non-compensable modification of traffic flow by virtue of the

elimination of the Ravenswood U-turn through the placement of concrete barriers between the eastbound and westbound lanes of State Road 84.

D. The Severing Of The I-95 Connections To State Road 84 During The Construction Of The I-95 Bridges Did Not Give Rise To A Compensable Taking Of Access.

Essentially, Petitioners argue that the record amply supported the trial judge's conclusion that the physical closure of the I-95 connections to State Road 84 caused a substantial impairment of access to their properties and that the lower court erred in failing to consider this factor. (PB 25-27) They complain that the temporary closure of the I-95 connections to State Road 84 required their customers to use a tedious and lengthy alternate route to the properties. This in turn, Petitioners claim, resulted in the demise of prosperous business uses of the properties because customers were unwilling to use the route. (PB 25-26) Petitioners look to State, Dot v. Lakewood Travel Park, 580 So. 2d 230 (Fla. 4th DCA 1991), Rev. denied, 592 So. 2d 680 (Fla. 1991) and Department of Transportation v. Gefen, 620 So. 2d 1087 (Fla. 1st DCA 1993) in support of their position.

Recently, this Court addressed this issue in Department of Transportation v. Gefen, supra. There, the landowner:

> brought an inverse condemnation suit against the Department of Transportation (DOT) alleging that the closure of the Interstate 95 (I-95) entrance and exit ramps at McCoy Creek Boulevard destroyed her property's access to I-95, thereby rendering the property valueless

> and resulting in a taking without compensation. Gefen presented evidence that the property was prime commercial real estate and the closure of the I-95 ramps destroyed it as a profitable business site. The trial judge held that the closure of the ramps constituted a taking without compensation and entered a final judgment requiring DOT to institute an eminent domain proceeding so that damages could be determined. The district court of appeal affirmed on the authority of Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989).

Id. at 19 Fla. L. Weekly S275.

Finding that the First DCA had misconstrued Tessler, this Court rejected Gefen's line of argument, quashed the First DCA's decision, disapproved the Fourth DCA's decision in Lakewood, and held that landowners who enjoy convenient access to and from limited access state highways such as I-95 do not have a compensable vested right to that access. Id. at S276. Like Gefen, Petitioners did not suffer a compensable taking of access by virtue of the temporary closure of the I-95 connections to State Road 84.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, the Fourth DCA's decision should be modified to reflect that impaired accessibility attributable to actions occurring during construction of a road improvement project is not compensable and that a Tessler type taking cannot arise in the absence of impact upon the landowner's pre-existing ability to ingress and egress his property to and from the abutting public road. The lower court's decision, in all other respects, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail this 30th day of June, 1994 to ALAN E. DESERIO, ESQUIRE, 777 South Harbour Island Blvd., Suite 900, Tampa, Florida 33602 and ALLAN M. RUBIN, ESQUIRE, Shutts & Bowen, 1500 Miami Center, 201 S. Biscayne Blvd., Miami, Florida 33131.

GREGORY G. COSTAS

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As to the second point on appeal, we find no error with regard to the determination of the weight of the contraband. *See Ross v. State*, 528 So. 2d 1237, 1240 (Fla. 3d DCA), *review denied*, 537 So. 2d 569 (Fla. 1988).

Affirmed. (HUBBART and COPE, JJ., concur.)

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[1]Judge Hubbart did not hear oral argument.

[2]In addition, the defendant elected to testify in the case. Given the overwhelming evidence against him, that choice was quite understandable. During his testimony, he conceded that he had five prior felony convictions. Assuming arguendo that the officer's statement was susceptible of being interpreted as a reference to defendant's prior record—and viewed in context, we do not think it was susceptible of that interpretation—it was insignificant in view of the defendant's own specific testimony regarding his prior record.

(GODERICH, Judge, dissenting.) I respectfully dissent. I do not believe that this court should condone this flagrant and seemingly intentional violation of an *in limine* order.

This is the second time the defendant, John Dixon, is on trial for the same offense. At the first trial, the trial court granted the defendant's motion for mistrial because the State's witness, Officer Kevin Knowles, told the jury that he had previously arrested the defendant.

At the second trial, before a different judge, the defendant's request for a motion in limine was granted. The trial court ruled that "[t]here will be no reference to prior arrests of the defendant by the police officers." The trial court, however, stated that the police officers could "testify that they had prior contact with Mr. Dixon and were acquainted with him."

The State once again called Officer Knowles as its first witness. Officer Knowles testified that he is assigned to a drug interdiction unit working the area where the defendant was arrested, and that he had been on that job for two years when Mr. Dixon was arrested for the offense for which he was on trial.

Officer Knowles further testified that on the day of the defendant's arrest, he saw the defendant and another male conduct a "transaction," but he did not arrest the defendant at that time because he was due in court. Officer Knowles had no further contact with the defendant that morning.

Officer Knowles stated that later that same day he observed the defendant at the same location. According to Officer Knowles, he observed a man walk up to the defendant and give the defendant money. Thereafter, he saw the defendant reach into a brown bag and give the man an item which he could not identify. Officer Knowles then advised two other officers what he observed. He told the two officers that the man had just made a "buy" and that they should arrest the defendant. There were no other arrests made at the scene or later on.

The next contact that Officer Knowles had with the defendant, according to his testimony, was back at the police station. Next, in the presence of the jury, the following transpired during the State's case-in-chief:

> Q. When was the next time, Officer, that you made any kind of contact with Mr. Dixon?
>
> A. Back at the station.
>
> Q. And what was the nature of the contact back at the station?
>
> A. I went in and I read his rights. *Mr. Dixon, you're at it again.*
>
> Q. Let me stop you—

The defendant objected and requested a mistrial. The trial court denied the request.

First, the officer's statement violated the spirit of the unambiguous *in limine* order. Further, the statement, "you're at it again," coupled with the jury's knowledge that Officer Knowles was assigned to apprehend drug pushers, clearly conveyed to the jury that the defendant had committed the same offense in the past. The reference to similar crimes perpetrated by the defendant was presumptively harmful error. *Castro v. State*, 547 So. 2d 111 (Fla. 1989); *see also Peek v. State*, 488 So. 2d 52 (Fla. 1986); *Paul v. State*, 340 So. 2d 1249 (Fla. 3d DCA 1976), *cert. denied*, 348 So. 2d 953 (Fla. 1977). There is no showing that the evidence of other crimes had any relevance, other than to prove bad character or propensity. *See* § 90.404(2)(a), Fla. Stat. (1989). We cannot say beyond a reasonable doubt that the error did not affect the verdict. *State v. Lee*, 531 So. 2d 133 (Fla. 1988).

The majority argues that the comment on the defendant's character and past crimes was not prejudicial because the defendant testified that he had five prior felony convictions. The defendant only testified to felony convictions, not felony convictions for trafficking in heroin. The clear import of the officer's statement was that the defendant was at "it" again meaning that he was "trafficking in heroin" again.

Moreover, character evidence is only admissible when the defendant first puts his own character at issue. § 90.404(1)(a), Fla. Stat. (1989). At the time of Officer Knowles' prejudicial comment, which clearly violated the *in limine* order, the defendant had not put his character at issue since the prejudicial comment was made during the State's case-in-chief. Therefore, at that time, reversible error occurred and the trial court should have granted the defendant's request for a mistrial.

Accordingly, in light of the State's flagrant violation of the trial court's order excluding past crimes evidence, the prior mistrial, and the fact that Officer Knowles made the comment seemingly intentionally and gratuitously, it is not appropriate to consider the error harmless because the defendant later acknowledged prior felony convictions.

* * *

HAPAG-LLOYD, A.G. v. MARINE INDEMNITY INSURANCE COMPANY OF AMERICA. 3rd District. #93-2084. February 1, 1994. Appeal from the Circuit Court of Dade County. We reverse based on the authority of *Rubin v. Dade County*, 413 So. 2d 137 (Fla. 3d DCA 1982).

ANDREWS v. STATE. 3rd District. #93-1485. February 1, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Thomas v. State*, 367 So. 2d 260 (Fla. 3d DCA), *cert. denied*, 378 So. 2d 350 (Fla. 1979).

PEREZ v. STATE. 3rd District. #93-1276. February 1, 1994. Appeal from the Circuit Court of Dade County. Affirmed. *State v. Johans*, 613 So. 2d 1319, 1321 (Fla. 1993); *Files v. State*, 613 So. 2d 1301 (Fla. 1992); *Floyd v. State*, 569 So. 2d 1225, 1229-30 (Fla. 1990), *cert. denied*, 111 S.Ct. 2912 (1991).

KRANZ v. LEWIS. 3rd District. #93-1263. February 1, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Anheuser-Busch, Inc. v. Campbell*, 306 So. 2d 198 (Fla. 1st DCA 1975), *cert. dismissed*, 328 So. 2d 840 (Fla. 1975); *Flagship Bank v. Bryan*, 384 So. 2d 1323 (Fla. 5th DCA 1980); *Atlantic Coast Line R.R. v. Cone*, 53 Fla. 1017, 43 So. 514 (1907).

VIDAL v. STATE. 3rd District. #93-1211. February 1, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Trotter v. State*, 576 So. 2d 691 (Fla. 1990); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2912, 115 L. Ed. 2d 1075 (1991); *Brown v. State*, 206 So. 2d 377 (Fla. 1968); *Street v. State*, 592 So. 2d 369 (Fla. 4th DCA), *review denied*, 599 So. 2d 658 (Fla. 1992).

FERRO v. DOLPHIN ICE MANUFACTURING, INC. 3rd District. #93-1205. February 1, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Miller v. Stavros*, 174 So. 2d 48, 49 (Fla. 3d DCA 1965).

* * *

Eminent domain—Inverse condemnation—Trial court's conclusion that there was temporary taking of access to parties' property while new roads were being constructed by Department of Transportation reversed where loss of access was neither total nor permanent, and concrete barriers erected during construction affected access of traffic in one direction only—Question certified whether loss of access in this case constituted compensable taking

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION, Appellant, v. JOSEPH J. RUBANO, et al., Appellees. 4th District. Case No. 92-2695. L.T. Case No. 89-14650-15. 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

[Original Opinion at 18 Fla. L. Weekly D2586]

A-1

(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 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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[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).

[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.

* * *

Administrative law—Division of Pari-Mutuel Wagering—Licensing—Emergency order suspending pari-mutuel wagering license of veterinarian was facially inadequate regarding charge that licensee failed to report gratuities where order did not refer to administrative code provision, and failed to allege that petitioner was either offered a gratuity or accepted one, or that he failed to promptly report the gratuity—Emergency order was facially inadequate regarding charge that licensee conspired to alter outcome of horserace through administration of drugs where order alleged only that licensee conspired with certain horse owner to obtain and administer Clenbutoral to "the horse"—Order failed to identify horse as race horse or owner as being involved in horse racing, failed to allege that licensee lacked license or permit that would allow him to lawfully dispense Clenbutoral, failed to allege existence of agreement to commit the violation, and failed to demonstrate that immediate suspension was necessary to protect public interest

JOHN R. WITMER, Petitioner, v. DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING, Respondent. 4th District. Case No. 93-3232. L.T. Case No. 93-50359. Opinion filed February 2, 1994. Petition for review to the State of Florida, Department of Business and Professional Regulation. Gary R. Rutledge and Harold F.X. Purnell of Rutledge, Ecenia, Underwood & Purnell, P.A., Tallahassee, for petitioner. Joseph M. Helton, Jr., Senior Attorney, Department of Business and Professional Regulation, Tallahassee, for respondent.

(PER CURIAM.) This is an appeal from an emergency order of the Department of Business and Professional Regulation suspending the pari-mutuel wagering license of John R. Witmer, a veterinarian. The issue for review is the sufficiency of that emergency order. We find the order facially inadequate, grant the petition and quash the order. We do not reach nor determine the merits of the disciplinary action which remains to be resolved at a formal hearing on the Department's complaint.

Petitioner's pari-mutuel wagering license was suspended by emergency administrative order on October 19, 1993 (hereinafter "complaint/order"). The suspension order is appended to and incorporates the allegations contained in the Department's administrative complaint.

The emergency order of suspension charges that the petitioner failed to report gratuities and conspired to commit a fraudulent act in connection with racing, in violation of Florida Administrative Code Rule 61D-1.002(18) and section 550.235(2), Florida Statutes (1993).

Witmer is a veterinarian whose practice includes the treatment of race horses. Veterinarians who treat animals involved in pari-mutuel racing are licensed under section 550.10(1)(b), Florida Statutes. It appears that the November 1992 conversation occurred during the window period between the repeal of various provisions of the Pari-Mutual Wagering Act by 1992 Fla. Laws ch. 197 and the effective date of the new provisions added by 1992 Fla. Laws ch. 348. This issue is not material to our decision. The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering is authorized to suspend or revoke these licenses for violations of Florida Statutes chapters 550 or 551 or the administrative rules of the Department. § 550.10(1)(b), Fla. Stat. (1993).

The complaint/emergency order of suspension alleges that on November 11, 1992, Witmer met with a horse owner named Berger and an undercover detective (not identified in the complaint/order) and discussed the use of Clenbutoral, which is alleged to be an illegal substance used to improve the performance of race horses. Witmer is alleged to have provided the men with