SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
AUG 24 1994
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

JOSEPH J. RUBANO, et al.

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO. 83,307

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

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

ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
BRIGHAM, MOORE, GAYLORD,
SCHUSTER & MERLIN
777 South Harbour Island Blvd.
Suite 900
Tampa, Florida 33602
(813)229-8811

ALLAN M. RUBIN, ESQUIRE
Florida Bar No. 138915
SHUTTS & BOWEN
1500 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
(305) 379-9161
Attorneys for Petitioner

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STATEMENT OF CASE AND FACTS

The Department has provided a recitation of additional testimony provided by some of its witnesses. This only serves to establish that conflicting evidence was presented at the trial below. It was the prerogative of the finder of fact to weigh that evidence. Because this was an inverse condemnation claim, it was the trial judge that made findings of both fact and law. Since the Department conceded before the District Court that the final judgments entered by the trial court "accurately reflected the basic facts adduced at trial" (Initial Brief of Appellant [DOT]), those findings continue to carry a presumption of correctness in the proceedings before this Court.[1]

SUMMARY OF ARGUMENT

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

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

DOT does not refute the Petitioner's contention that the placement of the subject properties on a service / access road had the same effect as converting the abutting roadway to a limited

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

access facility. Instead, it attempts to fit the creation of the service road into the category of "construction activities," for which compensation has been denied in the past. The square peg simply will not fit the round hole. This is not a case where the property owners complain about "the manner in which the construction is performed." *Division of Administration, Department of Transportation v. Hillsboro Association, Inc.*, 286 So. 2d 578, 579 (Fla 4th DCA 1973)(damage claim for a seawall destroyed by erosion during construction). Nor, is it a claim for noise, fumes, vibration or dust generated by the construction project. *Howard Johnson Co. v. Division of Administration, State of Florida, Department of Transportation*, 450 So. 2d 328 (Fla. 4th DCA 1984); *Division of Administration, State of Florida, Department of Transportation v. Frenchman*, 476 So. 2d 224 (Fla. 4th DCA 1985). The factual setting is quite clear.

- All of the properties had direct access to the abutting S.R. 84.
- DOT destroyed that existing direct access by erecting a concrete barrier. It then created a totally inadequate substitute access - a frontage/service road - effectively converting the adjacent roadway into a limited access facility.[2]

"It is well established that government action which eliminates direct access to real property amounts to a taking for

[2] DOT's own documents admitted that the substitute access was unsafe and "functionally" inoperable. See Plaintiff's Composite Exhibit 34.

condemnation purposes." *Department of Transportation v. Jirik*, 498 So. 2d 1253, 1255 (Fla. 1986), citing *State of Florida, Department of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1986). It is equally well settled that "[w]here an established service road is converted into a limited access facility, the abutting property owners are entitled to compensation for the destruction of their previously existing right-of-access." *State Road Department v. McCaffrey*, 229 So. 2d 668, 669 (Fla. 2d DCA 1969), citing *Anhoco Corporation v. Dade County*, 144 So. 2d 793 (Fla. 1963) ("... the courts have uniformly held that an abutting property owner is entitled to compensation for the destruction of a pre-existing right of access to a land service road upon which the limited access highway is constructed." Id. at 797.) Cf. *Palm Beach County v. Tessler*, 538 So. 2d 846, 848 (Fla. 1989).

Contrary to the DOT's claim, this court's recent decision in *Department of Transportation v. Gefen*, 636 So. 2d 1345 (Fla. 1994) did not alter the principles cited above.[3] It is quite clear that the impairment complained of in *Gefen* was to a **non-abutting** roadway, and that "Gefen's access to all roads abutting her property [was] undiminished." *Id*. at 1346. Thus, when applying the general "traffic flow" principle - "[n]o person has a vested right in the maintenance of a highway in any particular place because the state owes no duty to send traffic past his door" - it was in the context of changes occurring to a non-abutting roadway.

[3] The owner abutting a roadway holds an easement of direct access to that abutting roadway. *Jirik*, 498 So. 2d at 1255; *Benerofe v. State Road Department*, 211 So. 2d 838 (Fla. 1919).

There were no changes in the <u>abutting</u> <u>roadway</u> that occurred in *Gefen*.

The decision cited for the "traffic flow" principle, *Jahoda v. State Road Department*, 106 So. 2d 870, 872 (Fla. 2d DCA 1958), was disapproved in part by this Court in *Department of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1973). *Jahoda* involved a claim involving the impact of a non-abutting roadway, which had the effect of reducing the volume of traffic flow at a point some distance from the complaining owner's property. No physical obstruction effecting the owners access occurred on the abutting roadway at or near that property. (See diagram on following page.) However, *Jahoda* was disapproved to the extent the DOT sought to apply the decision to the factual setting presented in *Stubbs*. Thus, Jahoda was approved in *Stubbs* only to the extent that a claim based upon a diminution of mere "traffic flow", which was a result of changes occurring on a non-abutting roadway would be denied. *Stubbs*, 285 So. 2d at 4. *Jahoda* would **not** be applicable to factual settings, such as that presented in *Stubbs*, and in this cause, which involved an actual "physical impairment of access" on the abutting roadway. *Stubbs*, 285 So. 2d at 4.

Gefen's citation of *Department of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1973), which reaffirmed the "spirit" of *Anhoco* and *McCaffrey*, and the very principles relied upon by the owners in this cause, confirms this limited application of *the Jahoda* decision. Otherwise *Stubbs* and *Jahoda* could not be reconciled. Compare the diagrams of *Jahoda* and that of *Stubbs* on the following

pages.[4] The only real difference between DOT's activity in *Jahoda* and what occurred in *Stubbs* was the actual physical impairment constructed on the abutting roadway.

Stubbs, although noting the same principles announced in *Gefen*, found those principles inapplicable and sustained the owners claim of a compensable taking of access. The loss of access described by this Court in *Stubbs* arose from the fact that before the governmental activity occurred, the owners had direct access to a roadway carrying north and south bound traffic, but as part of the project, the public road in front of the property became a cul-de-sac leaving the owners a circuitous route to and from their property. This was the "physical impairment of access" addressed by this Court in *Stubbs*, 285 So. 2d at 3.

If the factual setting in *Stubbs* did not fall within the non-compensable area of "traffic flow," then neither can the cause at hand. The "flow of traffic on an abutting roadway" was not diminished! *Tessler*, 538 So. 2d at 849. Rather, as in *Stubbs*, a "physical impairment" was constructed in the abutting roadway immediately adjacent to these properties - the erection of concrete barriers - which destroyed the pre-existing direct access and substituted an "indirect" means of access by way of a service road.

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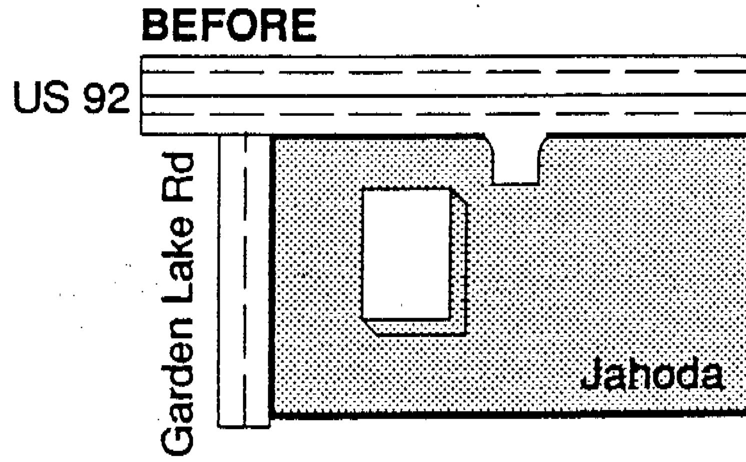
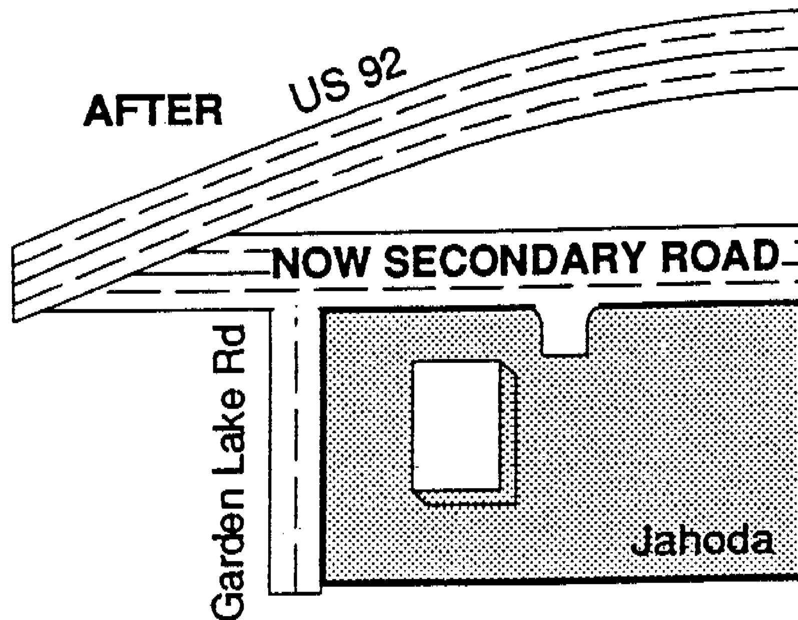
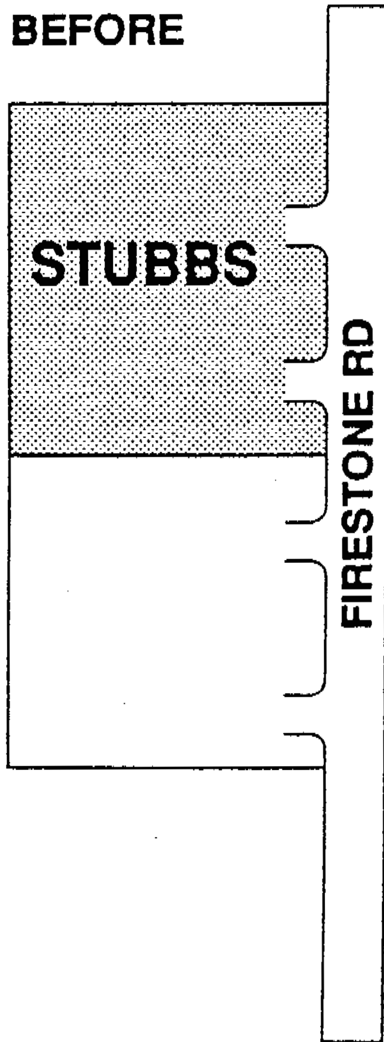
[4] These diagrams were excerpted from a DOT publication entitled "Access Management - An Important Traffic Management Strategy."

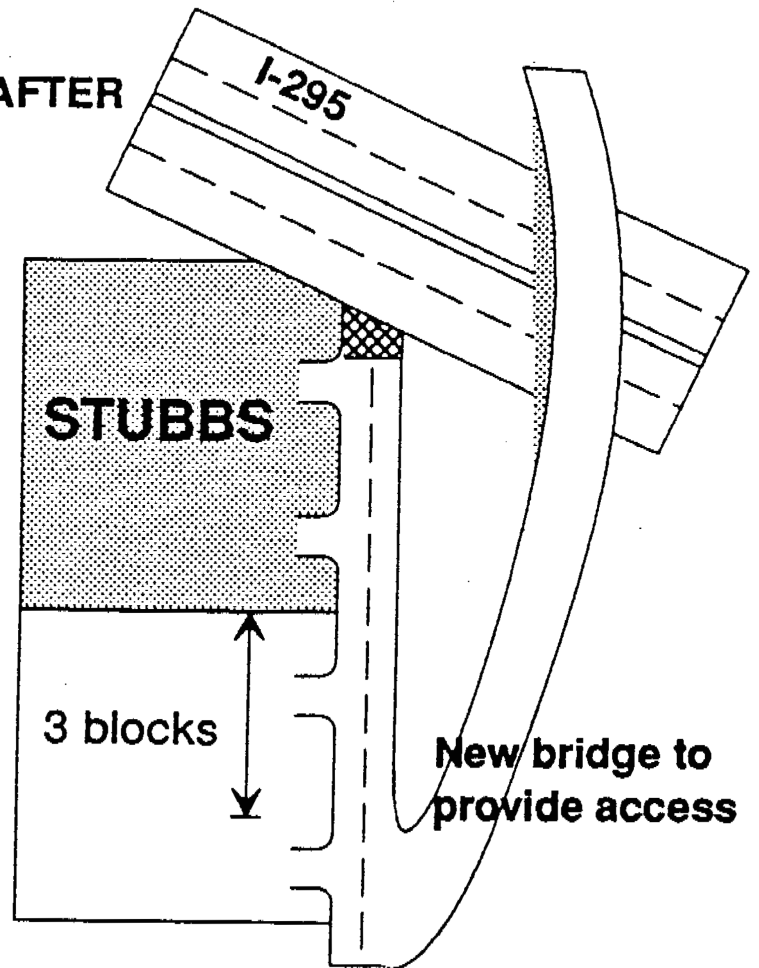
JAHODA





STUBBS





Neighbors still had access to Firestone Rd portion not vacated

Considering *Anhoco, McCaffrey* and *Stubbs,* the trial court correctly ruled that the "physical impairment" constructed by the DOT on the roadway immediately adjacent to the subject properties, which resulted in the placement of the properties on a service / access road, gave rise to a compensable taking. As determined in *Stubbs* and *Tessler,* the access remaining was totally unsuitable for the uses made of the properties at the time the pre-existing access was substantially impaired.

As predicted, the DOT denies the applicability of limited access decisions, such as *McCaffrey, Anhoco* and *Stubbs.* DOT attempts to limit their application because they did not address a "temporary" taking of access. While the argument might have held some significance a number of years ago, when the concept of a temporary taking of "property" was undergoing development in the law, such a distinction has no place in a scholarly discussion of the taking issue in light of current case precedent establishing that a "temporary" taking of private property requires compensation. See *In Re Forfeiture of 1976 Kenworth Tractor Trailer,* 576 So. 2d 261 (Fla. 1990); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation,* 19 Fla. L. Weekly S169 (Fla. April 7, 1994)("Moreover a temporary deprivation may constitute a taking." *Id.* at S171) As recognized by the district court below and this Court in *Tessler,* the decision of *Anhoco Corporation v. Dade County* did, in fact, deal with a **temporary** taking of access, and "that the owners were entitled to be paid for their **temporary loss of access."** *Tessler,* 538 So. 2d at 848.

Access, as property (*Tessler*, 538 So. 2d at 848), is entitled to no less protection under the constitution then any other form of property.

When an existing road is effectively converted to a limited access facility, by the elimination of direct access and the construction of service roads, the abutting land owner no longer has the direct access he once enjoyed. The original abutter's easement has effectively been destroyed and a new easement established. That is exactly what happened to the owners in this cause as a result of the DOT's activities. It was the finding of the trial court that the properties, which once abutted the main lanes of the roadway, were no longer "suitable" for the use to which they were devoted at the time the change of access occurred. Suitability of the remaining access was a key consideration in this Court's finding of a taking of access in *Palm Beach County v. Tessler*, 538 So. 2d at 850. Suitability of the owner's access after the governmental activity occurs ties directly into the issue of whether access has been substantially diminished.

In this cause the trial court found, as trier of fact, that the "access" provided during the time the service road was in existence, was not only unsuitable, but "virtually" invisible and very unsafe. (R: 867-868; 855; 880-881; 841-842). The ability to utilize the properties was effectively destroyed. (R: 895-896; 869; 356; 882; 843). The unsuitability of the substitute access, which was not considered by the district court, justified the conclusion that a compensable taking of access had occurred under

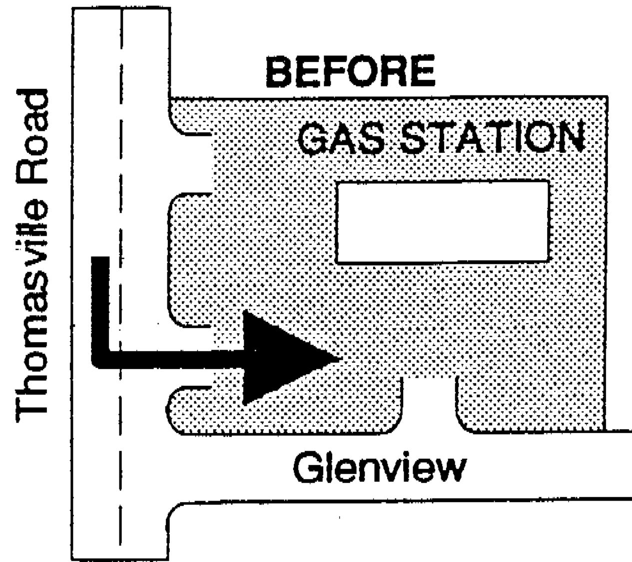
the law. The district court erred in reversing that portion of the judgments entered by the trial court.

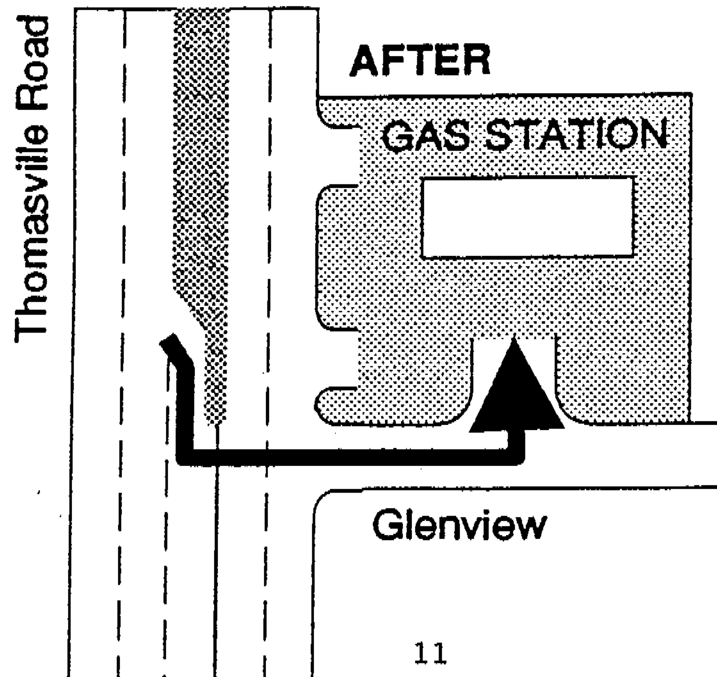
B. ELIMINATION OF THE RAVENSWOOD U-TURN BY PLACEMENT OF CONCRETE BARRIERS BETWEEN THE EAST AND WEST BOUND LANES.

Of particular significance in resolving this issue is the effect that the construction of the concrete barriers separating the east and westbound lanes of the abutting roadway had on the ability of customers and delivery trucks to access the properties. Unlike the setting in *Division of Administration, State of Florida, Department of Transportation v. Capital Plaza*, 397 So. 2d 682 (Fla. 1981), where the median forced customers to drive only a few additional feet to reach the property (see diagram of following page), customers in the cause at hand were forced to drive an additional one and one half miles to reach the property. Even the DOT's engineering expert admitted that, except for the fact that the **completed** project included the construction of a Texas U-turn west of I-95, having customers travel the distance to S.W. 15th Ave, make a U-turn and then return back to the properties would **not** be reasonable. (R/Transcript:238). Since the project did not include the Texas U-turn until its completion in July, 1990, the properties were forced to utilize this unreasonable access for over two and one half years after the concrete barriers were erected.

The setting presented in this cause cannot be summarily excused by merely citing *Capital Plaza*, or other out of state decisions which generally deny a claim based upon the impact of a median. The question is still one of "reasonableness." How long can a median extend without an opening before the impairment will

CAPITAL PLAZA





no longer be considered reasonable? The concept of "traffic flow," relied upon by this Court in *Capital Plaza* to deny a complaint based upon customers having to travel a few additional **feet** due to the median, cannot reasonably be extended to settings where the additional distances to be traveled are measured in **miles**.

The use to which the property is devoted at the time the impairment occurs is a prime consideration when determining if, "...in light of the remaining access to the property, it can be said that the property owner's right of access has been substantially diminished." *Tessler*, 538 So. 2d at 849. It was the finding of the trial court that the ability of customers and delivery vehicles, the majority of which were large, heavy-duty types of trucks, to reach the property was substantially diminished as a result of the long and circuitous route customers were required to follow in order to reach the property. That finding was supported by substantial competent evidence and should not have been disturbed by the district court. Because *Capital Plaza* is readily distinguishable from the cause at hand, the district court erroneously relied upon that decision as the basis for reversing the judgment of the trial court.

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

In Department of Transportation v. Gefen, 636 So. 2d 1345 (Fla. 1994), rendered subsequent to the preparation of the Initial Brief of Petitioner, this Court addressed the issue presented in this section, ruling that a claim for loss of access could not be based upon governmental activities on a non-abutting roadway. As

such, reversal of that portion of the trial court's judgments, based upon the closure of the I-95 connections, would be correct.

CONCLUSION

The decision of the District Court should be quashed and those portions of the trial court judgments based upon the placement of the properties on a frontage road and the construction of a concrete barrier separating eastbound and westbound traffic, should be reinstated.

Respectfully submitted,

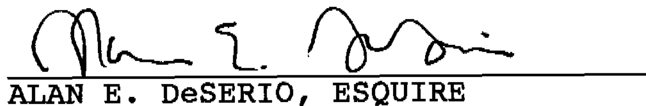
ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
BRIGHAM, MOORE, GAYLORD,
SCHUSTER & MERLIN
777 South Harbour Island Blvd.
Suite 900
Tampa, Florida 33602
(813)229-8811

ALLAN M. RUBIN, ESQUIRE
Florida Bar No. 138915
SHUTTS & BOWEN
1500 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
(305) 379-9161
Attorneys for Petitioner

By:
ALAN E. DeSERIO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 22nd day of August, 1994, to Gregory G. Costas, Esq., 605 Suwanee Street, MS 58, Tallahassee, Florida 32399-0458.



ALAN E. DeSERIO, ESQUIRE