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SUPREME COURT OF FLORIDA

L. N. MURRAY, et ux,
et al,

Petitioner,

v. CASE NO. 87,378

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

CERTIFIED QUESTIONS FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT
CASE NO. 94-3068

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QUESTIONS CERTIFIED

In an eminent domain case in which an established business is not totally destroyed by a taking, does Section 73.071(3)(b), Florida Statutes, contemplate calculation of business damages by any means other than a lost profit analysis?

In the instant case is the expert's business damage calculation a lost profit analysis requiring the deduction of fixed expenses, such as salaries, interest, depreciation, and utilities, or an alternative analysis, cognizable under section 73.071(3)(b), based on deduction of certain variable expenses and the exclusion of fixed expenses from the analysis?

PRELIMINARY STATEMENT

For the purposes of this Answer Brief, Plaintiff/Respondent, the State of Florida, Department of Transportation, will be referred as the "DEPARTMENT". The Defendants/Petitioners, L. N. Murray and his wife, Carol S. Murray, who operate a sole proprietorship, a Western Sizzlin Restaurant, will be referred to as the "Murrays" and the business will be referred to as the "restaurant". Citations to the record on appeal will be in the form of (R.) followed by the appropriate page number(s). Citations to the five volume consecutively numbered trial transcript will be in the form of (Tr.) followed by the appropriate page number(s). Citations to the Appendix to the Initial Brief will be in the form of (A.) followed by the appropriate page number(s); Citations to the Appendix to this Brief will be in the form of (AA.) followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Although the Statement of the Case and Facts presented in the Murrays' Initial Brief is substantially accurate, it is incomplete. Consequently, the Department submits the following additional information.

This cause began on August 26, 1992, with the filing of a petition in eminent domain and the entry of an order of taking on October 29, 1992. (R. 939-976, 1043-1056) The taking provided for the expansion of the intersection of State Road 200 (U.S. 301) and U.S. 1 in Callahan, Duval County, Florida, and included approximately 5,000 square feet from the front of the property owned by the Murrays, on which there is a restaurant known as Western Sizzlin, owned and operated by the Murrays, and a multi-tenant rental building. (Tr. 221, 362, AA.1) Due to the taking of the strip from the front of the property, the restaurant lost 13 parking spaces fronting State Road 200. (AA. 1, Tr. 303, 464) In addition to severance damages, the Murrays claimed business damages under Section 73.071, Florida Statutes. (R. 1014-1016) The matter resulted in a mistrial on June 10, 1993, before Judge Adams and was subsequently tried on August 8-12, 1994, by Judge Oakley, resulting in a jury verdict and final judgment in favor of the Murrays in the amount of $21,000 for the land taken, $154,000 severance damages, and $80,000 business damages. (R. 1558-1560, 1563-1567) This timely appeal followed. (R. 1656)

During the first trial in June 1993, Judge Adams had ruled

that the Department could not introduce evidence of a proposed cure which utilized a side portion of the restaurant's paved property then described as excess land. (Tr. 28, A. 1, area identified as 8) On the second day off trial, he declared a mistrial. (Tr. 28) At the new trial in August 1994, Judge Oakley held that he was bound by Judge Adams's previous rulings as they had become law of the case and would not allow evidence of the proposed cure. (Tr. 300-301) In order to preserve the issue for appeal, the Department was allowed to proffer its evidence of the proposed cure. (Tr. 235-299)

For the proffer, the Department introduced the testimony of Stanley Reigger, Joseph Wallis, and Walter Lampe. (Tr. 239-299) Mr. Reigger, an expert in city planning, testified that the Callahan Code requires 1 parking space for every 2 restaurant seats. Pre-take the restaurant had 64 spaces and seating varied between 130-179 which made it nonconforming. (Tr. 240) Its nonconformance did not preclude the restaurant's ability to do business, it merely precluded expansion. (Tr. 240-241) Mr. Reigger visited the restaurant on several occasions and observed the parking patterns of the restaurant's customers. (Tr. 242) He and Mr. Wallis, an engineer, prepared a cure plan taking into consideration the Callahan Code, parking demands, and driveway configuration and travel. (Tr. 241-243) He relied on the plans and reports of Joseph Wallis providing for the replacement of all 13 spaces lost. (Tr. 242-243) In his opinion 5 of the spaces could be replaced by reducing some of the landscaping and concrete and

adding them at the end of the existing parking bays.[1] (Tr. 245-246; AA. 1, areas identified at ①) The other eight spaces could be regained by using an area on the east side of the restaurant which was not previously marked but utilized by customers during peak periods. (Tr. 242, 246-248) The plans depicting the additional eight parking spaces he submitted to the code administrator for Callahan were approved. (Tr. 248-253)

Joseph Wallis, a civil engineer, visited the property before construction began and with Mr. Reigger prepared a plan to replace the 13 spaces lost due to the take. (Tr. 242-243, 270-271) As stated by Mr. Reigger, 5 spaces would be replaced by reconfiguring the bays of the existing parking and 8 replaced on the northerly boundary.[2] The proposed area in which the eight spaces would be replaced did not appear to be presently utilized but was already paved. (Tr. 271) The new spaces would comply with the Callahan Code (although spaces in the existing parking did not) and did not interfere with the adjacent tire store; the plan specifically leaves the area in front of the tire store open; and the tire did not store utilize that portion of the property. (Tr. 271, 276) Mr. Reigger tested his plan and found it engineeringly workable. (Tr.

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[1]The trial court allowed testimony as to a proposed cure of 5 of the 13 lost spaces which were reclaimed by realignment of the existing spaces. This was a disputed issue of fact as to whether the entire remaining parking had to be reconfigured resulting, according to the Murrays in a net loss of not 13 spaces, but 26 spaces. (Tr. 242-246)

[2]Because north was at such an angle location of the area was often confusing. Mr. Wallis and Mr. Reigger are, however referring to the same portion for the proposed cure of 8 spaces identified as ⑧ on AA. 1.

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Walter Lampe, a real estate appraiser, utilized three approaches in valuing the property, the highest and best use of which he found to be commercial. (Tr. 280-282) If no cure of the 13 spaces were allowed, damages to the remainder would be $71,700. (Tr. 287) However, he testified that the area of the proposed cure was appropriate to relocate the parking, the cure was feasible, and the cure was less costly, i.e., $10,145. (Tr. 287-290)

At the conclusion of the proffer Judge Oaklely ruled that he had no alternative but to adopt what Judge Adams had previously ruled as he believed it was law of the case and disallowed any testimony as to the cure of the 8 parking spaces. (Tr. 301)

The trial proceeded and the Department presented evidence of its proposed cure of 5 spaces and the amount of damages suffered by the Murrays and the Murrays responded with their evidence. The Murrays then proceeded to present evidence of their claim for business damages. In attempting to prove business damages the Murrays relied, inter alia, on the opinion of Craig Fetherman, a certified public accountant. (Tr. 648-683) Fetherman testified that the restaurant was damaged by the taking and explained his methodology for arriving at the amount of those damages based upon a calculation of future lost profits calculated upon his "lost profit base." (Tr. 648-750, 672) Fetherman explained that he had visited the site, talked to Mr. Murray, and reviewed the Murrays' tax returns for the years 1986-1992, financial statements, detailed reviews of test periods of sales, and cash register readings. (Tr.

654) The Murrays' personal tax returns were considered because the restaurant is a sole proprietorship which is reported on Schedule C thereto. (Tr. 290)

Fetherman's review of the tax returns revealed that the restaurant, owned by the Murrays since 1985, was managed by their sons with some assistance from Mr. and Mrs. Murray. (Tr. 654-660) The restaurant reported fluctuating sales for the years 1989-1992 which he calculated at a "weighted average" of approximately of $700,000 annually. (Tr. 654-660) Fetherman also calculated that on a "weighted average" the restaurant's cost of sales was in excess of $400,000 annually. (Tr. 661) The restaurant, the underlying property, and the equipment were all financed. (Tr. 668)

Fetherman admitted that the tax returns reflect a loss every year but explained that the restaurant nevertheless made a profit because tax returns include all deductions that can be taken for "tax purposes" and in doing his analysis, he does not consider many of those tax deductible business expenses. (Tr. 662) In arriving at his opinion that the restaurant made a profit and, therefore, is entitled to business damages, Fetherman considered only those expenses he termed as "variable" and did not consider "fixed" expenses. (Tr. 669) According to Fetherman, variable expenses are those that fluctuate with sales. (Tr. 669) Among the fixed expenses Fetherman did not deduct in determining gross net profit were Mr. Murray's salary or the value of his services, interest on debt, depreciation, salary paid to the Murrays' sons, advertising, insurance, and utilities. (Tr. 665-670)

Mr. Fetherman also calculated what he termed a "loss percent" due to the loss of parking. (Tr. 673) Fetherman acknowledged that the restaurant was full only during three peak periods and, thus, would lose sales due to the reduction of parking only during those times. (Tr. 674) The only peak periods are Friday dinner, Saturday dinner, and Sunday lunch. (Tr. 674) The remainder of the time the restaurant is open, even without replacement of the lost 13 spaces, there was more that enough parking. (Tr. 674) Based upon 64 pre-take parking spaces, he determined the restaurant lost 25% of its spaces, multiplied 25% by 35.1% which he calculated to be the percentage of business occurring during the peak periods, arrived at 8.8% which he determined was a loss of business, multiplied that figure by his "lost profit base" and arrived at an annual lost profit of $20,946. (Tr. 674-680, 672) Projected for 20-25 years in the future, the loss would exceed $400,000-500,000. (Tr. 681) Applying a capitalization rate of 20% he calculated the total lost profit of the restaurant to be $104,730 or $105,000. (Tr. 681) On cross examination Fetherman admitted that the tax returns reflect the restaurant lost $63,406 in 1992, $15,766 in 1991, $48,988 in 1990, and $95,003 in 1989. (Tr. 689)

At the conclusion of his testimony the Department's motion to strike Fetherman's testimony as contrary to the law was denied. (Tr. 735)

The Department presented the testimony of Jack Meeks, CPA, who testified that the value of a business is equal to its future anticipated cash receipts discounted to present value and that

gross profit is the difference between sales and cost of sales. (Tr. 777) Mr. Meeks considered the impact of the taking in his analysis, performed a before and after valuation of the restaurant under the asset, income, and market approaches, and analyzed Fetherman's approach to determining lost profit. (Tr. 771, 780-783) Mr. Meeks stated that in approaching a business damage valuation the operating history as well as its future outlook must be analyzed. (Tr. 767) Therefore, he needed to determine the financial status of the business before and after the taking. (Tr. 768) He also testified that business damage cannot exceed the total value of the business. (Tr. 771)

Mr. Meeks testified that operating expenses, the expense of running the restaurant, including advertising, wages, supplies, interest, depreciation, etc., must be deducted from gross profit to determine net profit or loss. (Tr. 778) Although he took no salary, Mr. Murray admitted that he worked approximately 30% of his time at the restaurant. At minimum, his services would be worth at least $10,000 which, in addition to his sons salaries, must be deducted in determining net profit. (Tr. 785-786) Fetherman however, improperly removed the sons salaries as deductions from the tax returns and added them back in claiming they were a "benefit to the owner." (Tr. 665-666)

The Murrays' tax returns and certain financial statements reflect that the restaurant's cumulative net loss for 1986-1992 is $433,000. (Tr. 779) Since the restaurant had significant cumulative losses each and every year, it had no income stream,

and, thus, no value could be reached utilizing the income approach to valuation. (Tr. 783) Under the asset approach, Mr. Meeks considered the restaurant's inventory, food, equipment, and miscellaneous assets, all of which were purchased in 1986 at the inception of the business, which he valued at $26,000 exclusive of land and buildings. (Tr. 787) The market approach resulted in a similar $26,000 valuation. (Tr. 788)

Mr. Meeks also testified that in order to reach Fetherman's conclusion that the damage suffered by the restaurant was $105,000 annually calculated at 8.8% business loss, the business would have to be worth $1,193,000 (8.8 x $1,193,000 = $105,000). (Tr. 790) As evidenced by its tax returns and financial statements, the restaurant had no income stream, no profit, and little net worth.

Final judgment was entered on the jury's verdict of $80,000 and the Department timely appealed. (Tr. 252-256) The Department prevailed before the First District Court of Appeal on the issue of business damages and a divided court certified the questions herein to this Court. The District Court of Appeal affirmed the trial court's ruling on the Department's proposed cure utilizing an excess area of the restaurant's property stating that the Department had ignored its use as overflow parking and the reduction in the value of the business with a smaller parking area. (A. 1-4)

SUMMARY OF THE ARGUMENT

The majority opinion of the First District Court of Appeal in this case correctly recognized and held that the trial court erred in allowing the Murrays' expert to testify as to business damages where his opinion is inadequate as a matter of law. Business owners are entitled to prove damages to their businesses harmed by a partial taking not as a matter of right, but as a matter of legislative grace. Tampa-Hillsborough County Expressway Auth. v. K. E. Morris Alignment Serv. Inc., 444 So. 2d 926 (Fla. 1983). A condition precedent to the recovery of damages is proof by competent evidence that the business earned a profit for a reasonable time prior to the taking. State, Dep't of Transp. v. Manoli, 645 So. 2d 1093 (Fla. 4th DCA 1994); Forest's Mens Shop v. Schmidt, 536 So. 2d 334, 336 (Fla. 4th DCA 1988).

In this case, the Murrays claimed that the profit making ability of the restaurant, a sole proprietorship was reduced as a result of the taking which reduced the number of its parking spaces. However, the Murrays' tax returns revealed that gross profit after the proper deduction of operating expenses resulted in not a net profit, but, a net loss each year. Nevertheless, the Murrays' expert, Fetherman, was allowed to testify that the business had, in fact, made a profit which was then lost due to the Department's taking. Fetherman was able to manipulate the figures the Murrays' presented for seven years on their annual tax returns by failing to make deductions for fixed expenses, including Mr.

Murray's salary or the value thereof, his sons' salaries, interest, depreciation, utilities, and other expenses to arrive at a net profit when none existed. It is well established that in calculating net profit deductions must be made for fixed overhead expenses and salaries. Manoli, 536 So. 2d 334; Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc., 619 So. 2d 6 (Fla. 5th DCA 1993); Pahokee Housing Authority, Inc. v. S. Florida Sanitation Co., 478 So. 2d 1107 (Fla. 4th DCA 1985). Failure to allow for proper deductions such as payroll, depreciation, dues, advertising, and other expenses renders an expert's testimony of lost net profit inadequate as a matter of law. Manoli, 645 So. 2d 1093; Southern Bell Tel. & Tel. Co. v. Kaminester, 400 So. 2d 804 (Fla. 3d DCA 1981).

Such is the case here. Fetherman's opinion and calculations to arrive at a lost net profit for a business that never realized a profit were inadequate as a matter of law and should not have been allowed. The questions certified to this Court in this regard should be answered as follows:

In an eminent domain case in which an established business is not totally destroyed by a taking, Section 73.071(3)(b), Florida Statutes, comtemplates calculation of business damages by means other than a lost profit analysis. Under Section 73.071(3)(b), Florida Statutes, a business damage calculation based upon profit as a base for the analysis requires the deduction of fixed expenses, such as salaries, interest, depreciation, and utilities.

This Court should also reverse the decision below upholding

the trial court's exclusion of the evidence of the Department's cure. Lawrence v. Florida East Coast Ry. Co., 346 So. 2d 1012, 1014 (Fla. 1977) (where record properly before Supreme Court on certified questions, Court has prerogative to consider any error in record). Although the Department was allowed to present evidence of the proposed cure of 5 of the 13 lost parking spaces, the trial judge determined and the First District Court of Appeal erroneously upheld, the exclusion of the Department's evidence of a proposed cure of an additional 8 spaces. (Tr. 300-301)

Evidence of the cure was admissible where the experts testified that the cure utilized a portion of the restaurant's essentially unused property and that they gave full consideration to each of the factors required by Williams and Byrd. Williams v. State, Dep't of Transp., 579 So. 2d 226 (Fla. 1st DCA 1991); State, Dep't of Transp. v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971), disapproved on other grounds to the extent they conflict with Broward County v. Patel, 641 So. 2d 40, 45 (Fla. 1994). In the opinion below, the District Court of Appeal found fault with the Department's proposed cure due to its "failure to account for valuation factors compensable as severance damages." (A. 3) The court goes on to say that in this case the Department "ignores the fact that area it proposes to stripe as replacement for spaces already taken is used for overflow parking." (A. 3) Contrary to the court's opinion and its understanding of the facts, the cure did not result in a "smaller parking area available for customer use or a lesser area for parking expansion in the unstriped area" because

the parking lot was underutilized (i.e., the restaurant rarely had enough customers to fill its existing spaces) during at least 70% of the meals it served.

Evidence of the proposed cure should have been allowed to be presented to the jury. The factors identified by the District Court of Appeal did not preclude introduction and consideration by the jury that the Department's plan was a partial, if not a total, cure under the circumstances.

ARGUMENT

I. EXPERT TESTIMONY OF BUSINESS DAMAGES UNDER THE THEORY OF COMPENSATION FOR LOST PROFITS MUST INCLUDE DEDUCTIONS FOR FIXED EXPENSES AND SALARIES AND, UNDER ANY THEORY, BUSINESS DAMAGES CAN NEVER EXCEED THE FAIR MARKET VALUE OF THE BUSINESS

The business damages to which the Murrays are entitled are not founded on the "full compensation" provision of the Florida Constitution Article X, Section 6(a), nor is their claim predicated on the United States Constitution. Their entitlement to business damages is strictly statutory in origin and exists solely by legislative largess. Department of Transp. v. Fortune Federal Savings & Loan, Ass'n, 532 So. 2d 1267 (Fla. 1988); Matthews v. Div. of Admin., Dep't of Transp., 324 So. 2d 664, 665 (Fla. 4th DCA 1975). Noteworthy is the fact that Florida remains among a small minority of states that allow compensation for business damages as a separate component of damage in a eminent domain proceeding. See State Road Dep't v. Abel Investment Co., 165 So. 2d 832 (Fla. 2d DCA 1964); 7A Patrick J. Rohan and Melvin A. Reskin, Nichols on Eminent Domain § 9A.04[4][c][i] (3d ed. 1995).

In enacting Section 73.071(3)(b), Florida Statutes, the legislature has allowed, upon strict proof shown, for recovery of business damages by certain business owners harmed by a partial taking. Tampa-Hillsborough County Expressway Auth. v. K. E. Morris Alignment Serv., Inc., 444 So. 2d 926 (Fla. 1983); Jamesson v. Downtown Dev. Auth., 322 So. 2d 510 (Fla. 1975). Because the

payment of compensation for intangible losses and incidental or consequential damages, such as business damages, is granted or withheld as a matter of legislative grace, not as a matter of right, such provisions are to be strictly construed against such claims:

> The allowance of business damages in eminent domain proceedings, being a matter of legislative grace, is analogous to other forms of legislative largess, such as grants of franchise rights. The allowance of business damages can also be compared to a waiver of sovereign immunity. Legislative grants of property or franchise rights must, when construction is necessary, be strictly construed in favor of the state and against the grantee. A waiver of sovereign immunity, similarly, should be strictly construed in favor of the state and against the claimant. So, any ambiguity in **section 73.071(3)(b) should be construed against the claim of business damages**, and **such damages should be awarded only when such an award appears clearly consistent with legislative intent.**

K. E. Morris Alignment, 444 So. 2d at 928-929 (citations omitted).

"Business damages are 'in the nature of lost profits attributable to the reduced profit-making capacity of the business caused by the taking of a portion of the realty or the improvements thereon.'" Department of Transp. v. Manoli, 645 So. 2d 1093, 1094 (Fla. 4th DCA 1994) (quoting LeSuer v. State Road Dep't, 231 So. 2d 265, 268 (Fla. 1st DCA 1970)); accord Mulkey v. Div. of Admin. Dep't of Transp., 448 So. 2d 1062, 1066 (Fla. 2d DCA 1984) (citing LeSeur, 231 So. 2d 265). It is well recognized that business damage compensation is not limited to compensation for lost profits. See Matthews v. Div. of Admin., State, Dep't of Transp., 324 So. 2d 664, 666-667 (Fla. 4th DCA 1975)(business damages in

eminent domain not limited to compensation for loss of profits but may include losses related to moving or selling equipment and for loss of good will, particularly if business is totally destroyed).

However, lost profit is most likely to be the type of damage claimed in "the more usual situation of a taking which results merely in *reduced profit-making capacity*, rather than that which results in the *entire destruction* of the business. . . ." Id. at 667 (emphasis in original). The entire basis upon which business damages are contemplated is to compensate an owner for the **reduced profit-making capacity** of the business resulting from the taking. In this case, the Murrays chose to offer evidence of their business damages by way of attempted proof of profit to establish how the taking of some of its parking spaces reduced their ability to make a profit from the operation of the restaurant. The continued attempts of the Murrays' attorney and expert to call this analysis by any other name cannot disguise the fact that it is nothing more than a lost profit analysis.[3] As such, long established accounting principles and controlling case law require the deduction of certain expenses in such an analysis.

It is well established by the courts of this state that claims for damages for lost profits must be proved with reasonable certainty and must be established by a showing of lost net profits

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[3]This novel analysis is called by the Murrays' attorney and Fetherman variously as the "deprivation analysis," (IB. 12) the "depreciating effect of the taking on the sales," (IB. 9) and "an analysis of the gross income of the business." (IB. 10) At trial Fetherman began his analysis with a description of his "lost profit base." (Tr. 672)

by deducting costs and expenses. State, Dep't of Transp. v. Manoli, 645 So. 2d 1093 (Fla. 4th DCA 1994); Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc., 619 So. 2d 6, 7 (Fla. 5th DCA 1993); Forest's Mens Shop v. Schmidt, 536 So. 2d 334, 336 (Fla. 4th DCA 1988); Pahokee Housing Authority, Inc. v. S. Florida Sanitation Co., 478 So. 2d 1107, 1108 (Fla. 4th DCA 1985); Crain Automotive Group, Inc. v. J & M Graphics, Inc., 427 So. 2d 300 (Fla. 3d DCA 1983); Southern Bell Tel. & Tel. Co. v. Kaminester, 400 So. 2d 804, 807 (Fla. 3d DCA 1981); Myrick v. Miller, 256 So. 2d 255 (Fla. 3d DCA 1971). It goes without saying that, "a condition precedent to the recovery of such damages is proof, by competent evidence, that the business had earned profits for a reasonable time before the occurrence of the wrong complained of." In other words, '[i]n order to recover lost profits, there must be an on-going business with an established sales record and proven ability to realize profits at the established rate.'" Forest's Mens Shop, 536 So. 2d at 336(emphasis in original, quoting Daytona Migi of Jacksonville, Inc. v. Daytona Automotive Fiberglass, Inc., 388 So. 2d 228, 232 (Fla. 5th DCA 1980) (other citations omitted). The fact that these cases were not decided in the context of an eminent domain proceeding is of no consequence. In fact, the majority opinion below recognized the non-relevance of this distinction without a difference in citing to Forest Men's Shop, Schopke, and Pahokee Housing Auth.. (A. 5-6) There is nothing in the statute or in the nature of the proceeding itself that would allow, let alone require, a different methodology of calculating profit and loss in

an eminent domain case.

In this case, the Murrays' tax returns for the years 1989-1992 undisputedly reveal that the restaurant never realized a profit. (Tr. 778-779) In fact, the tax returns show the restaurant lost $433,000 during its 7-year existence. (Tr. 778-779) However, Fetherman managed to manipulate the very figures the Murrays relied upon to arrive at a "tax loss" to arrive at a "net profit" in order to recover business damages. He was able to do so by failing and refusing to deduct certain expenses and salaries. This failure rendered his testimony inadequate as a matter of law. Surely, the legislature did not intend and the law does not allow for an award of business damages to a business which never made a profit. The Department cannot be made to compensate the Murrays for something they never had, i.e., enough business to generate a profit. Since full compensation does not require payment of business damages but for the statute, the age old adage that condemnation is "one of the most harsh proceedings known to the law" has no place in this analysis. (IB. 14 - quoting Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947)).

In arriving at his opinion that not withstanding the evidence and the tax returns, the restaurant realized a profit, Fetherman, like the expert in Forest's Mens Shops, ignored the business's history of losses and its actual past expenses. Forest's Mens Shops, 536 So. 2d at 337 (cited with approval below). As in this case, the men's shop was not a viable business, it had no history of profitability, and there was no factual basis upon which lost

profits could be predicated. Id. Time after time, the courts of this state have recognized that business damages are usually calculated on net profit, i.e., deductions from gross profit must be made for expenses and costs. Manoli, 645 So. 2d 1093 (lost profits are established by proving income and expenses); Southern Bell, 400 So. 2d at 807(in arriving at net loss, deductions must be made of officers salaries); Schopke, 619 So. 2d at 7 (to determine lost profits deductions must be made for operating expenses and costs and salary paid); Crain Automotive, 427 So. 2d at 302 (expert testimony which made no allowance for salaries or overhead in calculating anticipated profit was too speculative to support the final judgment).

As in Manoli, also an eminent domain case, the owner worked in his business.[4] Manoli, 645 So. 2d 1093; (Tr. 261, 291-292) There, Mr. Thomas worked approximately 40 hours a week for over 20 years operating a Hess service station near the intersection of Dixie Highway and Commercial Boulevard in Broward County which was effected by a partial taking.[5] Id. Interestingly, Fetherman was also Mr. Thomas's expert and offered an analysis similar to the testimony in this case. Id. As noted by the Manoli court,

> shortly prior to trial, Fetherman changed his

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[4]Mr. Murray worked part-time and Mr. Thomas in Manoli worked full-time.

[5]Although the underlying property was subject to only a partial taking, the record in Manoli reveals that by agreement Mr. Thomas was allowed to present evidence based upon the "destroyed utility of the service station." Manoli, 645 So. 2d at 1094. However, the opinion in Manoli is not limited to business damages based upon the loss of profit of a totally destroyed business.

> opinion of business damages. He still calculated the lost profits by deducting from the gross income the cost of goods sold, wages, rent, and other expenses necessary to operate the business, but was allowed to testify, over the objection of the DOT, that no portion of what Thomas paid himself should be deducted.

Id.

Like the Murrays, Mr. Thomas relied on Matthews to support Fetherman's opinion. However, in Manoli, the court recognized that its own opinion in Matthews was not on point because the expert in Matthews "was not using lost profits . . . to come up with an opinion as to the business damages" and that no authority had been cited which "would support the computation of business damages based on lost profits without deducting [Thomas's] wages." Id. The court also noted that while in Matthews it acknowledged that lost profits is not the only way to prove business damages, Fetherman did, in fact, use lost profits to support his opinion of Mr. Thomas's business damages. Id. That is precisely what Fetherman did in this case. The Murrays cannot escape the limitations of Matthews and now Manoli by distinguishing the two versions of Fetherman's testimony by characterizing the same methodology used in Manoli as a calculation of "net profit loss" and as the "depreciating effect of the taking on only those sales of a going business" in this case.[6] (IB. 14) The differences in his opinions are a distinction without a difference in a feeble

[6]Below, Fetherman's analysis was described as the "depreciating effect of the taking on the going business' gross sales, as adjusted." (Answer Brief pg 16, Case no. 94-3068)

attempt to escape a similar and correct outcome.

A review of Fetherman's testimony reveals the fallacy of this contrived distinction; his methodology is the same in both cases. In Manoli he "calculated the lost profits by deducting from the gross income the cost of goods sold, some wages, rent, and other expenses necessary to operate the business. . . ." Id. In this case, Fetherman testified that he began his calculation by using gross sales, deducted the cost of goods sold, arrived at gross profit, deducted only some business expenses, including some wages, but not others, which he termed "variable" and arrived at his "lost profit base." (Tr. 300-302) He describes this theory of calculating business damages as the "depreciating effect of the taking on the going business' gross sales, as adjusted." (Tr. 300-302) This so-called "theory" is nothing less and nothing more than a calculation of the decrease in net profit based upon a decrease in sales allegedly resulting from the take. A decrease in sales without a corresponding decrease in net profit results in no damage.

The fact that neither Mr. Thomas, in Manoli, nor Mr. Murray actually paid himself a salary is of no consequence. Following a long line of precedents, the Manoli court held that since Mr. Thomas was "performing services in his business, wages for the services he was performing should have been deducted before calculating Thomas' lost profits." Id. at 1094. However, since an owner's salary is not necessarily commensurate with the value of his/her services, "the reasonable value of [the owner's] services,

i.e., what he would have had to pay in the marketplace to get someone else to perform those services is admissible." Id. Other courts have held similarly. In Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc., 619 So. 2d 6, 7 (Fla. 5th DCA 1993) the court held that in order to establish lost prospective profit Schopke's calculations had to include proper deductions for its home office expenses, overhead, and the actual supervisory salary paid or the reasonable value thereof. Id. at 8. If no salary was actually paid, the reasonable value of the services should have been deducted. Having failed to produce such evidence at trial, the judgment was reversed. Id. As in Manoli and Schopke, deduction of the reasonable value of Mr. Murray's services was necessary to a proper determination of net profit or loss.

Although Mr. Murray paid himself no salary, the reasonable value of his services was worth at least $10,000 per year which should have been deducted as should the actual salaries paid to his sons.[7] (Tr. 785) As in Schopke, those deductions were necessary to determine net profit and a showing of net profit is a condition precedent to recovery of business damages where a lost profit was the analysis chosen to prove up damages. Fetherman's testimony which failed to make such deductions in Manoli was based on a misconception of the law and was, therefore, not admissible.

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[7]In Manoli the owner "paid himself low wages." In reversing the award of business damages due to Fetherman's failure to deduct the owner's salary, the court recognized the ability of an owner to over or under pay himself in order to decrease or increase his "paper profits." Manoli, 645 So. 2d at 1094. Here, Mr. Murray took no salary and still was unable to show a "paper proift."

Manoli, 645 So. 2d at 1094 (citing Mulkey v. Div. of Admin., State, Dep't of Transp., 448 So. 2d 1062 (Fla. 2d DCA 1984)). Fetherman's similar methodology and opinion in this case are equally misconceived and inadmissible.

The Murrays advance the proposition that Mr. Murray's imputed salary and the salaries paid their sons and certain other expenses were properly excluded and, thus, properly included as an element of "profit" for which the Murrays could recover business damages because the statute does not define the constituent elements of business damages and because it refers to "probable damages" that the taking "may reasonably cause." § 73.071(3)(b), Fla. Stat. (1993). Therefore, according to the Murrays, the statute is sufficiently broad to calculate damages based on its theory of lost profit (i.e., "depreciating effect of the taking on the going business' gross sales, as adjusted") by excluding an owner's wages, the owner's sons' wages, and certain overhead as deductible expenses.[8] The language of the statute and existing case law do not support such an overly broad interpretation especially since it is universally acknowledged by every court of this state that because business damages are a creature of statute, it should be strictly construed against the claimant and in favor of the state. See K. E. Morris Alignment, 444 So. 2d at 928-929 (business damages

[8]Fetherman claims only some wages are deductible from gross profit under his analysis because they are "fixed" i.e., a cook's wages. (Tr. 700; 304, 314) But, the sons wages are variable and, therefore, not properly deductible as expenses under his theory. (Tr. 700) In Manoli, Fetherman deducted the wages paid to Mr. Thomas's helper, but not Mr. Thomas's own salary. Manoli, 645 So. 2d at 1094.

should be awarded only when such an award appears clearly consistent with legislative intent); Manoli, 645 So. 2d 1093.

In this case, the only evidence offered to establish business damages was Fetherman's testimony of a loss of sales due to a reduction in parking, resulting in an alleged loss of profits. (Tr. 300-302) As in Manoli, because Fetherman chose loss of profits as his methodology of calculating business damages, relief is limited to those damages. Moreover, there is no suggestion in Manoli that the opinion is limited to cases where the business was totally destroyed. In fact, Mr. Thomas's service station was not totally destroyed by the taking.(Trial transcript page 349, State, Dep't of Transportation v. Manoli, case no. 93-00777) This fact is also apparent from Fetherman's testimony and the Manoli opinion.[9]

Fetherman's treatment of expenses is improper. Citing with approval Black's Law Dictionary, the Manoli court recognized that the net return (profit) to the "capitalist" includes a deduction for "all expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself. . . ." Manoli, 645 So. 2d at 1094 (citing to Columbus Mining Co. v. Ross, 218 Ky. 98, 290 S.W. 1052, 1053, 50 A.L.R. 1934)(emphasis supplied). It is clear that upon deduction of the salaries of Mr. Murray and his sons, and other proper business expenses, the restaurant made no profit and was not entitled to an award of

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[9]If the business had been totally destroyed, Fetherman's calculations would have included losses related to moving or selling the equipment of the service station and for loss of good will as suggested in Matthews. Matthews, 324 So. 2d at 666.

business damages based upon unsupported claims of projected future loss thereof - whether called loss of profit or something else.

The Murrays profess that it is perfectly proper for a healthy, profitable business to show a "tax loss" on its tax returns when, in fact, it actually makes a "profit." (IB. 10) Does this mean that as long as it is advantageous to do so, a business may claim a "tax loss;" but when it is no longer advantageous, (e.g., a condemnation proceeding allows for an award of business damages if a business profit making ability can be shown to have been reduced due to the taking) the business can manipulate those same figures to come up with a "profit?"[10] At best, this is wishful thinking, at worst, it is improper tax reporting.

The Murrays' expert attempts to explain these obviously inconsistent positions because tax returns allow for deductions for fixed expenses such as "depreciation and interest . . . which [do] not involve any 'cash dollars.'" (IB. 10) Thus, Fetherman proclaims there is a difference between calculating a profit for Uncle Sam and calculating a profit for the purposes of the statute. There may, in fact, be a difference between a tax loss and a real

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[10]The Murrays claim that it may be profitable to operate a losing business if it keeps your sons employed, thus creating a benefit to them. (IB. 10) However, this is not a loss for which either the intent or the spirit of the statute was meant to compensate. Is Mr. Murray actually saying he did not need two managers (i.e., his sons) and, therefore, their salaries of $57,000 were actually profit which could have been shown as profit, but he chose to report it as salaries for tax purposes and allowing him to show a "loss?" Is the Department obligated to compensate him because he is able to show a "tax loss" while allegedly employing two sons, who he might otherwise be supporting from his "profit?" We think not.

loss, and, depreciation is, in one sense, a non-cash expense because you do not write a check for it. However, depreciation is a pay me now or pay me later expense. The "break" you get for depreciation now will result in cash outlays in a year or two in order to replace or repair the depreciated items. It cannot be ignored as an expense that has to be paid from the income generated by the business.

Likewise, it cannot be said with a straight face that mortgage payments and interest do not involve any "cash dollars." Every mortgage payment includes interest and your checkbook balance definitely decreases (in "cash dollars") every time a payment is made. Each month the Murrays send their mortgagor "cash dollars" for principal and "cash dollars" for interest. This cash had to be generated by net sales from the restaurant unless, of course, the Murrays make cash infusions to keep the struggling restaurant going.

In Pahokee the trial judge awarded damages for breach of a franchise agreement on the erroneous theory that the total overhead of the corporation was **fixed** and, therefore, should not be considered in calculating damages based on lost profits. Pahokee Housing Authority v. S. Florida Sanitation Co., 478 So. 2d 1107, 1108 (Fla. 4th DCA 1985). On appeal the court held it was error not to consider fixed expenses in calculating business damages. The judgment was reversed and remanded for entry of judgment in accordance with the district court's calculations based upon the franchise holder's **most recent tax return**. Id. Here, too, it was

error for Fetherman to ignore the Murrays' own tax returns and to exclude fixed costs such as rent, utilities, and some salaries from his calculation.

Similarly in Southern Bell, an accountant testified that in arriving at his opinion of lost net profit he deducted as expenses only laboratory fees and office and medical supplies. Like Fetherman, Dr. Kaminester's accountant did not deduct the compensation of the doctor,(who was incorporated as a professional association), payroll, depreciation, dues, advertising, or other expenses. Southern Bell, 400 So. 2d at 807. His failure to make these proper deductions rendered this testimony inadequate as a matter of law. Thus, Southern Bell's motion for new trial should have been granted; the matter was reversed and remanded for further proceedings. Id. Without a deduction for the salaries of Mr. Murray or his sons, Fetherman's calculation is, as in Southern Bell, inadequate as a matter of law. A similar result was reached in Crain Automotive, where, once again, no allowance was made for salaries or overhead in estimating anticipated profit. The judgment awarding damages for lost profit was reversed without a new trial. Crain Automotive, 427 So. 2d at 302.

In conclusion, in proving damages for loss of profits, overhead cannot be ignored. As stated in Pahokee Housing Auth., "[i]t is fundamental that a lost profit award must be commensurate with what is fair and just and limited to the actual damages sustained." Pahokee Housing Authority, 478 So. 2d 1107, 1108 (Fla. 4th DCA 1985). To calculate loss of profits without consideration

of proper deductions does, indeed, constitute an "unmerited windfall." Id. In this case the evidence is clear that the restaurant never made a profit prior to the taking and, thus, was unable to prove that as a result of the taking of a portion of 13 parking spaces, its profit making ability had been reduced. The Murrays are not entitled to an award of business damages based upon unsupported claims of projected future loss of a non-existent profit. Had there been no taking, the Murrays could not in five or even ten years, end up with $80,000 (the amount awarded by the jury) or any other amount in its the bank account as a result of the operation of the restaurant.

Even if the Murrays are correct and you can calculate a profit and, thus, lost profit due to a taking for a business that never generated any income to its owners, the amount awarded for damage to a business due to a taking can never exceed the value of the business. (Tr. 771) Clearly implicit in the proper application of Section 73.071(3)(b), Florida Statutes, is the obvious proviso that the amount recoverable for damages to the business can never exceed the value of the business as "probable damages." Full value of the business would be recoverable only when the business is damaged to such an extent that the mitigated damages are equal to or greater than the sum due if it is destroyed. Mulkey, 448 So. 2d 1062; Division of Admin, Dep't of Transp. v. Ness Trailer Park, Inc.,489 So. 2d 1172 (Fla. 4th DCA 1986).

The owner of a business claiming damages for lost profit must take reasonable steps to minimize his losses. Otherwise, the

amount of such loss could, over a period of time, exceed the value of the business. Mulkey, 448 So. 2d 1062. The Mulkey court held that if a business actually continues in operation after the taking, "a condemnee has a duty to mitigate his losses." Id. at 1062. One method of mitigation, to minimize future losses, is to cease business operations in which event the owner should receive full value of the business.

As the Department's expert stated:

> Whatever the business damage is or however its calculated, you can't damage a business more than the business is worth in its entirety, or business damages can't exceed the total value of the business. (Tr. 771)

In Fetherman's analysis, the Murrays must remain stuck in that location and must continue the business and lose money year after year. Thus, in Fetherman's opinion, the Murrays must be compensated by the Department for all the years they say they will continue to choose to lose money. This is not the law.

II. THE JURY SHOULD HAVE BEEN ALLOWED TO CONSIDER THE DEPARTMENT'S TESTIMONY OF A PROPOSED CURE

Section 73.071(3), Florida Statute, authorizes an award of severance and business damages for a taking of less than the whole of business property. Williams v. State, Dep't of Transp., 579 So. 2d 226, 229 (Fla. 1st DCA 1991). However, damage to the remainder must be caused by the taking to be compensable. Division of Admin., State, Dep't of Transp. v. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981). The measure of severance damages is the reduction in value of the remaining property, the award of which is to put the owner in as good a position financially as he/she would have occupied had the property not been taken. Department of Transp. v. Jirik, 498 So. 2d 1253, 1255, n. 3 (Fla. 1986); Mulkey, 448 So. 2d 1062. Severance damages and business damages may both be awardable, but care must be taken not to duplicate the award. Severance damage is damage to the realty while business damages are damage to the business conducted thereon and are subject to the statutory prerequisites. If the remaining property and improvements can be restored to their original utility and value, evidence of a cost to cure is admissible. Hill v. Marion County, 238 So. 2d 163 (Fla. 1st DCA 1970).

Determination of "the value of the property taken [requires that courts] tak[e] into account all facts and circumstances which bear a reasonable relationship to the loss occasioned . . . ." Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d

289 (Fla. 1958). In this case, by excluding evidence of a proposed cure of 8 of the lost parking spaces, the jury was allowed to determine compensation based on less than all of the pertinent facts. In that regard, the Department attempted to introduce evidence of a cure to replace 8 of the 13 lost parking spaces[11] which would utilize a previously paved but mostly unused portion of the restaurant parking lot (identified as ⑧ on AA. 1). As testified to by Mr. Reigger, this area was not striped for parking but was casually used by restaurant customers during its few peak periods (Friday and Saturday dinner and Sunday lunch). (Tr. 242-248) There was no evidence that it was even fully utilized or utilizable. However, there was testimony that a little concrete and striping would make it fully utilizable by the restaurant's customers. (Tr. 247) The Department's proposed cure provided additional spaces that conformed to the Callahan Code, was feasible, cost less than the damages incurred without the cure, and was workable. (Tr. 247-253, 271, 273, 287-291) To refuse to allow the Department to introduce evidence of this use of the restaurant's property resulted in an unmerited windfall to the Murrays.

Florida law does not preclude evidence of the cure proposed. Williams v. State, Dep't of Transp. 579 So. 2d 226 (Fla. 1st DCA 1991) or State, Dep't of Transp. v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971) disapproved on other grounds to the extent they are

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[11]Evidence of a cure of the other 5 spaces by reconfiguring the remaining parking was allowed.

inconsistent with Broward County v. Patel, 641 So. 2d 40 (Fla. 1994). In Williams, evidence of a proposed cure was held inadmissible because it ignored the facts that the new parking area would not provide as much space for parking as the business had before the taking, that the new parking area would intrude into the business's service area, the impact rear customer parking might have on the value of the property as a business site, and that the new parking area would prevent further expansion of the business. Williams, 579, So. 2d at 229.

In this case, the Department's experts gave due consideration to each of those factors. The Department's experts determined that the taking resulted in a loss of 13 parking spaces 5 of which would be recaptured within the remaining parking and 8 regained by use of the additional paved area. The Murrays' experts testified that the loss of the 13 spaces resulted in an actual loss of 26 spaces because total reconfiguration of the parking area was required. The conflict in testimony resulted in a disputed question of fact to be resolved by the jury, it did not render the Department's testimony inadmissible.

The Department's expert testified that there would be no negative impact on the business as a result of utilizing the proposed cure area for formal parking. (Tr. 242-248) The testimony also established that the proposed parking area would not interfere with any existing use of the property. (Tr. 247-248, 266, 277, 278) Use of the proposed area was also considered in the event the restaurant should consider expansion. This factor was said to be

important in Williams because there was evidence the business "had been growing at the rate of 15-20 percent a year." Id. at n. 4. There is no such evidence in this case and, in fact, the evidence showed that the restaurant lost money every year. (Tr. 689) Significantly, expansion would require the restaurant conform to the Callahan Code regarding its parking requirements and the construction of a retention pond to satisfy the requirements of the St. John's Water Management District. (Tr. 277-278) Expansion of a business that served a full complement of customers only three meals per week would not make good business sense and renders this factor irrelevant to the determination of whether the Department should have been allowed to present evidence of its proposed cure of the other 8 spaces.

Similarly, Byrd does not preclude introduction of evidence of the Department's proposed cure. In Byrd a portion of a motel's parking was taken during the widening of AIA in Daytona Beach. Byrd 245 So. 2d at 836. The trial judge precluded the Department from introducing evidence of a proposed cure that relocated the lost parking on a portion of the motel's property on which a shuffleboard court was located. Id. Because the expert's opinion ignored "the reality of the missing shuffleboard court or the reduction in the value of a motel with smaller grounds" the trial court's ruling was affirmed on appeal. Id. at 836-837. The Department's plan in this case suffers no such infirmity because nothing was eliminated from that excess portion of property to construct the additional spaces. Because there was no evidence

that the restaurant would ever serve customers to capacity seating, consideration of the value of the property with that portion dormant for future parking expansion was unnecessary.

As first blush the facts of this case appear similar to those in Mulkey. Mulkey v. Div. of Admin., State, Dep't of Transp., 448 So. 2d 1062 (Fla. 2d DCA 1984). There, the landowners leased the northerly 63 feet of their 75 x 130 foot parcel of property to Munford, Inc. Id. at 1064. Munford constructed a Majik Market convenience store on the leased property, a portion of which was later subject to condemnation. The southerly half of the parcel remained vacant except for a small area where a billboard was erected and leased to a third party. Id. The Department's experts proposed a cure that used the southerly half of the parcel to relocate the store's lost parking which would also require reorienting the store toward the vacant lot. Id. at 1064-1065. On appeal the district court held such testimony inadmissible because Munford did not own, lease, or otherwise have any legal right to the southerly portion of the parcel. Id. at 1067. That is not the case here.

Mulkey does not command the result reached in this case. The small portion of property utilized by the Department for its proposed cure of the remaining 8 spaces was owned by the Murrays, was part of the restaurant's property, and was not otherwise, for the most part, used or useable. Moreover, even if a portion of that area was casually used, the jury should have been able to consider the extent to which it was used (no more than three times

a week) and the utility afforded by that portion being fully paved and striped as the Department proposed. Evidence of the proposed cure should have been allowed to be presented to the jury.

CONCLUSION

For the foregoing reasons, the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, respectfully requests that the questions certified to this Court be answered as follows:

In an eminent domain case in which an established business is not totally destroyed by a taking, Section 73.071(3)(b), Florida Statutes, comtemplates calculation of business damages by means other than a lost profit analysis. Under Section 73.071(3)(b), Florida Statutes, a business damage calculation based upon profit as a basis for the analysis requires the deduction of fixed expenses, such as salaries, interest, depreciation, and utilities. The matter should be remanded for a new trial consistent with the Court's answers.

In addition, this Court should quash the opinion regarding the Department's cure and remand for a new trial allowing the jury to consider testimony of the proposed cure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 6th day of May, 1996, to **DAVID W. FOERSTER, ESQUIRE**, Foerster, Isaac and Yerkes, P.A., 2468 Atlantic Boulevard, Jacksonville, Florida 32207.

Marianne A. Trussell
MARIANNE A. TRUSSELL

SUPREME COURT OF FLORIDA

L. N. MURRAY, et ux,
et al,

Petitioner,

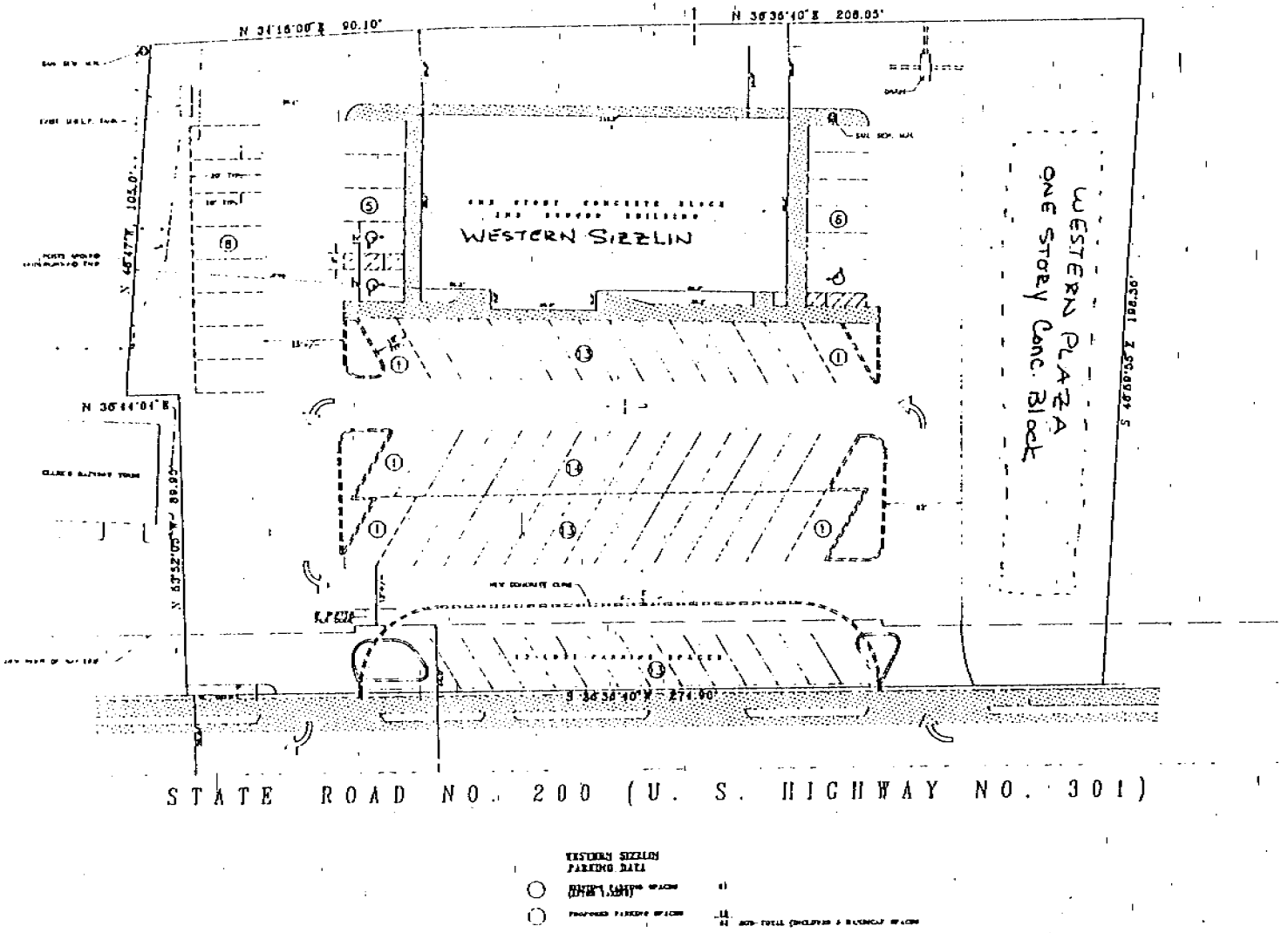
v. CASE NO. 87,378

STATE OF FLORIDA DEPARTMENT
OF TRANSPORTATION,

Respondent.
_____/

**APPENDIX TO ANSWER BRIEF OF RESPONDENT
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION**

INDEX TO APPENDIX



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