SUPREME COURT OF FLORIDA

L. N. MURRAY,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Respondent.

CASE NO.: 87,378

District Court of Appeal,
1st District - No. 94-3068

AMENDED
REPLY BRIEF OF PETITIONER

Certified Question
of the
District Court of Appeal
First District

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L. N. MURRAY.

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DESIGNATION OF THE PARTIES AND REFERENCES TO THE RECORD

The Petitioner, L. N. MURRAY, the Defendant-owner of the property acquired, will be referred to herein as MURRAY and/or PETITIONER.

The Respondent, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, will be referred to herein as DEPARTMENT.

References to the Record on Appeal will be (R. ___ ___). References to the transcript of the trial court proceedings will be (Tr. _____). References to Appendix to MURRAY'S Reply Brief will be (A. _____). References to DEPARTMENT'S Answer Brief will be (AA. ___ ____).

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Statutes:

STATEMENT OF THE CASE AND FACTS

As to Question I, dealing with the issue of business damages, the PETITIONER relies on the Statement of the Case and Facts, as set forth in the PETITIONER'S initial Brief; however, because the Respondent has requested the Court to consider a further issue, not certified by the District Court of Appeal, it is necessary to supplement the Statement of the Case and Facts on the following issue, designated herein as Question II:

> Whether the trial court and the District Court of Appeal were correct in disallowing testimony of a proposed cure for lost restaurant parking caused by the taking, being replaced on property of the owner which was outside the area of the taking.

The entire ownership of MURRAY included three separate and distinct contiguous parcels, with an aggregate frontage of 275 feet on State Road 200 (U.S. 301).

The three parcels consisted of a commercial office building (9,766 S.F.), a restaurant (47,097 S.F.) and a vacant parcel, designated on the exhibit as "excess property" (6,130 S.F.) (A. 1). Prior to the taking, the commercial office building had 16 marked parking spaces. The restaurant facility had 64 marked parking spaces (T. 466). The vacant area was paved, but was not striped for parking (A. 4; Def's Exhs. 1 and 3 on Proffer; T. 255). The restaurant parking, prior to the taking, was sufficient to handle the restaurant's 180 seating capacity (T. 596) being "grandfathered in" as non-conforming under the Building Code of the City of Callahan (T. 240).

The taking across the front was 4,958 square feet, 17 feet in

depth impacting the front two tiers of striped restaurant parking totalling 26 spaces (Def's Exh. 4; T. 462). The DEPARTMENT proffered evidence in an attempt to show that the loss of parking, after the taking could be "cured" by using the 6,130 square feet of vacant and/or "excess property" for parking (T. 244, 258, 264, 267, AA. 1). The proffer of the DEPARTMENT, on cross examination of the DEPARTMENT'S witness, as well as the MURRAY exhibits on proffer, demonstrated that, before the taking, the following was pertinent to the issue of whether said area could or should, as a matter of law, be considered for a parking cure:

1. The area, consisting of 6,130 square feet, was not striped or otherwise designated as a part of the restaurant parking (T. 242, 255, 293; Def's Exh. 1 on proffer). A current survey of the subject property showed that this area was outside the area of the taking and not a part of the restaurant operation (Def's Exh. 1 on proffer).
2. The existing striped parking for the restaurant, exclusive of the "excess property" with 64 spaces prior to the taking, was sufficient to service the seating capacity of the restaurant under the Building Code of the City of Callahan (T. 263) and was consistent with the parking requirements of the franchisor, Western Sizzlin (T. 596).
3. The net loss of 16 parking spaces could in no event be totally remedied by utilizing the "excess property" for substitute parking (T. 257; AA. 1).
4. In the event of a restaurant expansion, the "excess property"

area would, of necessity, be used for additional parking (T. 261-262, 293). In fact, there was a site plan showing a proposed expansion of the restaurant and that the "excess property" would be used for this purpose (T. 277-278).

5. As an alternative, the area could be used and/or sold for a use totally independent from that of the restaurant operation; to wit, access to adjacent landlocked property to the side and rear of the subject property as demonstrated, in part, by an existing gate to said adjacent property (T. 260, 296; Def's Exh. 2 on proffer) as well as a retention pond (T. 278).

6. A portion of the area was, in fact, being used for access to an existing automobile tire service and repair building on adjacent property (T. 258-259, 294; Def's Exh. 2 on proffer).

The taking impacted the front two (2) tiers of restaurant parking, consisting of 26 spaces (Def's Exh. 4; T. 461-462). Totally eliminated by the taking were 13 spaces in the first tier of parking fronting State Road 200.

In addition to the loss of the front tier of parking, the City of Callahan Code required a further set-back from the new right of way line of the DEPARTMENT, making it impossible to effectively utilize the second tier of parking (T. 468) also consisting of 13 spaces. This set-back caused a narrowed travel lane providing access into the second tier of parking and the resulting inability to utilize angle parking which existed prior to the taking. The result was a total loss of 26 spaces (Def's Exh. 4; T. 462).

Ward Koutnik, with extensive experience in parking engineering and planning, qualified as an expert witness in the field of parking and transportation (T. 453-454), testified on behalf of MURRAY that while 26 of the 64 existing angle spaces were impacted by the taking, it was possible to re-design for 48 vertical spaces, resulting in a net loss of 16 spaces. (T. 467)

ARGUMENT

I. Expert testimony of business damages, where the business is not totally destroyed, may be predicated upon the depreciating effect of the taking on the sales of the business.

The language of Matthews v. State of Florida, Department of Transportation, 324 So. 2d 664 (Fla. 4th DCA 1975), makes it clear that:

> "The legislature did not define or otherwise elaborate upon what constitutes "business damages", but there is absolutely no indication that it intended this statute to be construed as allowing business damages for lost profits only. The statutory language . . . simply does not warrant this restrictive interpretation." LeSuer v. State Road Department of Florida, 231 So. 2d 265 (Fla. 1st DCA 1970).

With reasonable certainty, MURRAY presented evidence of its business loss which he would not have suffered had there not been a taking of a part of his property.

As pointed out, in considerable detail, in the dissenting opinion of the District Court of Appeal, from which the certified question arose, the calculation was based on facts which are not tainted by speculation.

The loss of sixteen (16) spaces during peak operating hours resulted in a loss in sales of 8.8%.[1] Based on historical costs related specifically and only to this loss in sales, the annual lost business is $20,946, which was capitalized out to a total damage of $105,000 (T. 681).

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[1] This peak hour analysis was based on detailed car counts and cash register sales for a period of two years (T. 654, 659, 672 - 681; Def's. Exhs. 20 and 22).

The DEPARTMENT relies primarily on State of Florida, Department of Transportation v. Manoli, 645 So. 2d 1093 (Fla. 4th DCA 1994) in support of its contentions that the witness Featherman used an improper method in determining business damages. As pointed out in Manoli, "[b]usiness damages are "in the nature of lost profits attributable to the reduced profit-making capacity of the business caused by a taking of a portion of the realty or the improvements thereon."

If, therefore, the "reduced profit making capacity" has been damaged or impaired, then it follows that the methodology utilized by Featherman in the subject proceeding is not only accurate but is required, especially where the business is only partially damaged, not totally destroyed, as was the situation in Manoli.

Again, it is significant that the Manoli court was dealing with a complete destruction of the business,[2] where the total business must be valued in order to determine business damages. This would require a "net lost profit" analysis; "net" meaning a bottom line value. The DEPARTMENT'S argument is fallacious in contending that "net profit loss" is the same as a "profit loss". This is not just a matter of semantics, but is a distinction with a substantial difference.

As pointed out in Matthews, supra, §73.071(3)(b), F.S. does not require one standard and isolated formula in determining business damages. The DEPARTMENT'S argument is that once the

[2] The opinion of the Court stated that "the Department of Transportation agreed that the taking destroyed the utility of the service station." Id at 1093.

business damage expert uses the magic words "lost profit", it is essential that the expert determine a "lost net profit" by deducting, in a partial damage case, all fixed expenses most of which will remain such as insurance, managerial salaries, advertising, depreciation and utilities (T. 670 - 671).

Thus, the facts in Southern Bell Telephone and Telegraph Company v. Kaminester, 400 So. 2d 804 (Fla. 3rd DCA 1981), cited by the DEPARTMENT, is a "net profit loss" case, and not applicable where the alleged loss was claimed for the entire corporate medical operation, as opposed to partial loss to the subject restaurant. Similarly, in Indian River Colony Club v. Schopke Construction & Engineering Co., 619 So. 2d 6 (Fla. 5th DCA 1993), the contractor sought damages for breach of a single construction contract.

Also, in Myrick v. Miller, 256 So. 2d 255 (Fla. 3rd DCA 1971), the court drew a distinction between a new business (which lacked a history of profits) and an old business where the business owner "makes it reasonably certain by competent proof as to the amount of the actual loss." As stated above, the facts in the subject proceeding do not suffer this problem.

As pointed out in the non-jury case of Pahokee Housing Authority, Inc. v. South Florida Sanitation Company, 478 So. 2d 1107 (Fla. 4th DCA 1985), "[i]t is fundamental that a lost profit award be commensurate with what is fair and just and limited to the actual damages sustained."

The DEPARTMENT relies on business damage decisions which were not decided in the context of a partial taking in an eminent domain

proceeding, but which hold that "lost profits" must be proved with reasonable certainty. Whether characterized as lost profits or "damages to the business" as set forth in §73.071(3)(b), F.S., the computation of damages by the expert for MURRAY was absent speculation and based on historical year end financial records showing that the business was viable and was supporting members of the MURRAY family who operate the restaurant (T. 654). In addition, there is a detail analysis of how the lost sales would occur, supra.

In Forest's Mens Shop v. Schmidt, 536 So. 2d 334 (Fla. 4th DCA 1988), on which the DEPARTMENT placed substantial reliance, the facts reflect that claimant failed to offer financial records showing that the business had earned profits for a reasonable time before the occurrence of the wrong complained of. The Court stated that the evidence of profitability was set forth in conclusory terms, about anticipated gross profits, ignoring expenses entirely and that, therefore, the "evidence was simply too speculative a foundation upon which to base an award of lost future profits." In Crain Automotive Group v. J&M Graphics, 427 So. 2d 300 (Fla. 3rd DCA 1983), the Court affirmed the denial of a claim for advertising agency damages where the claimant's hopes, expectations and guesses were too speculative a foundation for an award. Neither Forest's Mens Shop or Crain, are therefore applicable to the facts in the subject proceeding.

The tax returns used, in part, by Featherman, were utilized only as a source of statistical financial information. In

addition, Def's. Exh. 20 demonstrated that Featherman also relied upon year end financial statements of the restaurant operation for the years 1989, 1990, 1991 and 1992 to obtain historical averages of sales, costs and profits (T. 658-661).

A review of the following testimony of Featherman concerning the loss shown in the tax returns demonstrates the fallacy of the DEPARTMENT'S argument that because the returns showed a tax loss, then it follows that there can be no damage to the business.

"Q Explain what is the significance of a tax return loss as opposed to a real loss.

A A tax return, of course, includes all deductions the business can take for tax purposes, So in most cases, small businesses will show little or no profit; and in some cases, losses.

Q Is that legitimately done under IRS rules and regulations?

A Yes, it is.

And what's significant about this business is that it owns its own building and equipment and land. That doesn't happen all the time with small businesses.

What that means is that that allows this business to depreciate its building, the value of its building.

Q For tax purposes?

A Yes. I'll point that line out right now. Depreciation, which is the third expense line here, you can see on a four-year average is almost $32,000 (T. 662-663).

- - - -

"Let me point out that other items that's related to owning property in the business, and that is interest. That's the fifth item on the schedule (T. 663).

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"And the interest portion of that is deductible for tax purposes. We can see, on a four-year average, that is $79,000 annually.

Those are two large numbers there, depreciation and interest, that total over $110,000 on an annual basis and that is part of the reason that this business is showing a tax return loss. And that tax return loss on a four-year weighted average is slightly more than $49,000." (T. 663)

Thus, in utilizing proper accounting procedures, there was a cash flow of $62,000 before debt which is in addition to MURRAY salaries and other benefits to MURRAY'S sons in excess of $57,000 (T. 666).

Clearly, there was no "manipulation" of the figures by Featherman to realize a profit, as suggested by the DEPARTMENT. In addition, the Department ignores the fact that MURRAY'S sons, who operate the business, receive salaries and other benefits all of which points up the viability of the operation. For the DEPARTMENT to further suggest that MURRAY should "cease business operations", in order to avoid business damages, is another example of an overbearing government, improperly and without justification, attempting to dictate to the citizen how he should operate his

private affairs.

For the DEPARTMENT to now assert that Featherman engaged in figure manipulation or that MURRAY is guilty of improper tax reporting is an effort to paint an illusion which the facts do not warrant.

The dissent of the District Court of Appeal should be adopted by this Court. The methodologies used by the business damage experts for both sides went to the jury including the opinion of the expert for the DEPARTMENT that MURRAY'S business had no value and should simply close its doors and go out of business. In rendering their verdict, they accepted the facts which to them were the most credible in light of all the evidence.

II. The trial court and District Court of Appeal was correct in disallowing testimony of a proposed cure for lost restaurant parking, caused by the taking, being replaced on property of the owner which was outside the area of the taking.

§73.071(3)(b), F.S. also provides that the owner is entitled, in "partial taking" cases, not only to the value of land and improvements taken, but severance damages to the remainder property by reason of the taking and use put to the part taken by the condemnor. State of Florida, Department of Transportation v. Jirik, 498 So. 2d 1253 (Fla. 1986). As a partial or total substitute for severance damages, the "cost to cure" may be utilized by determining the cost of effecting physical changes or modifications in the remainder property in order to mitigate severance damages. Hill v. Marion County, 238 So. 2d 163 (Fla. 1st

DCA 1970).

There are legal limitations on how the "cure" can be effected. The contention of the DEPARTMENT is that lost restaurant parking, as a result of the taking, can be substituted or cured by using property of the owner which is outside of the taken area or on land characterized as "excess land".

The evidence presented by MURRAY showed that of the lost 26 spaces, with revamping there is a net loss of 16 spaces (A. 5). The cure proposed by the DEPARTMENT could not, in any event, replace the net loss of 16 spaces claimed by MURRAY (AA. 1).

In State of Florida, Department of Transportation v. Byrd, 254 So. 2d 836 (Fla. 1st DCA 1971), the Court set forth the basic principle that a "cure", in lieu of severance damages, due to a taking of a motel parking area could not be accomplished on lands held by the same owner as a possible area for expansion of the motel. As further pointed out by the Court:

> - - - the state appraiser's estimate of damages sustained by appellees is impermissibly based on a premise which would require destruction by the property owners of property which is outside the area of taking as a means of theoretical mitigation of damages.

This same basic principle was adopted in Mulkey v. State of Florida, Department of Transportation, 448 So. 2d 1062 (Fla. 2nd DCA 1984), where the condemnor, having taken a portion of a lessee's convenience store parking, attempted to cure on a contiguous vacant area, held by the same owner but not included in the lease to the convenience store. Notwithstanding that the contiguous land was occasionally used for parking for the conve-

nience store, the Court held that the excess land was a distinct parcel of land and there was no indication that the adjacent land was intended to be used as a parking lot for the store. Therefore, a parking cure could not, as a matter of law, be placed on the excess land.

Again, in Williams v. State of Florida, Department of Transportation, 579 So. 2d 226 (Fla. 1st DCA 1991), the taking was a 20 foot strip used for parking across the front of a paging and radio telecommunications business. At trial, the DEPARTMENT proposed replacing the lost parking with new spaces on excess property to the rear of the business. The Appellate Court rejected this method for curing the lost parking.

Applying the same principles and strikingly similar facts of Williams to the subject proceeding, the proffer submitted by the DEPARTMENT for curing the parking within the other lands of MURRAY.

1. Ignores the fact that new parking would not provide as much space for parking as MURRAY had before the taking. (T. 257; AA. 1)
2. Ignores the fact that the new parking area on these other lands was not and never had been striped parking for restaurant use. (T. 242, 255, 293; Def's. Exh. 1 on proffer)
3. Ignores the fact that before the taking, there was sufficient parking to meet the needs of the restaurant without the need to use the excess land area. (T. 263, 596)
4. Ignores the fact that the new parking would eliminate the owner's ability to enlarge the restaurant and/or utilize or

sell the area for a different use. (T. 261-262, 277-278, 293)

5. Ignores the fact that the new parking would interfere with an existing use for access to adjacent facilities which is separate and apart from restaurant use. (T. 258-259, 294; Def's Exh. 2 on proffer)

Thus, the cure for lost parking, as shown by the DEPARTMENT'S proffer was based, as in Williams, on a misconception of the law. The ruling in Williams was in no way interfered with by Patel v. Broward County, 641 So. 2d 40 (Fla. 1994), which dealt only with the reasonable probability of obtaining a zoning variance.

The ruling of the trial court and the District Court on this issue is correct. It is further suggested that the PETITIONER'S Motion to Strike the Brief of the Respondent on this issue should, therefore, be granted.

CONCLUSION

Point I As pointed out in LeSuer, Matthews and Mulkey, supra, the methodology used by the business damage expert for MURRAY is consistent with the strict interpretation of §73.071(3)(b), F.S. which includes the "probable damages" - - - which the denial of the use of the property so taken may reasonably cause. As pointed out in these decisions, the "reduced profit making capacity of the business caused by the taking" is supported by the "deprivation of sales" method used by the expert witness where appropriate expenses are deducted to show the loss in business.

The certified question should be answered accordingly.

Point II The facts in the subject proceeding in connection with the right to "cure" severance damages within an area clearly defined as "excess land" fall squarly, both factually and legally, within the decisions of Byrd, Mulkey and Williams, supra.

The PETITIONER'S (MURRAY) Motion to Strike the DEPARTMENT'S Brief should, therefore, be granted.

Dated this 31st day of May, 1996.

Respectfully submitted,

FOERSTER, ISAAC AND YERKES, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to MARIANNE A. TRUSSELL, ESQUIRE, 605 Suwannee Street, MS-58, Tallahassee, Florida 32399-0485, by U.S. Mail this 31st day of May, 1996.

Attorney

SUPREME COURT OF FLORIDA

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APPENDIX TO

AMENDED REPLY BRIEF OF PETITIONER

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LEGEND

EXISTING RIGHT-OF-WAY

EXISTING TRAFFIC LANES

	AREA IN SQUARE FEET
TOTAL AREA:	56,863 ±
EXISTING EXCESS PROPERTY	6,130±
TOTAL AREA	50,733±

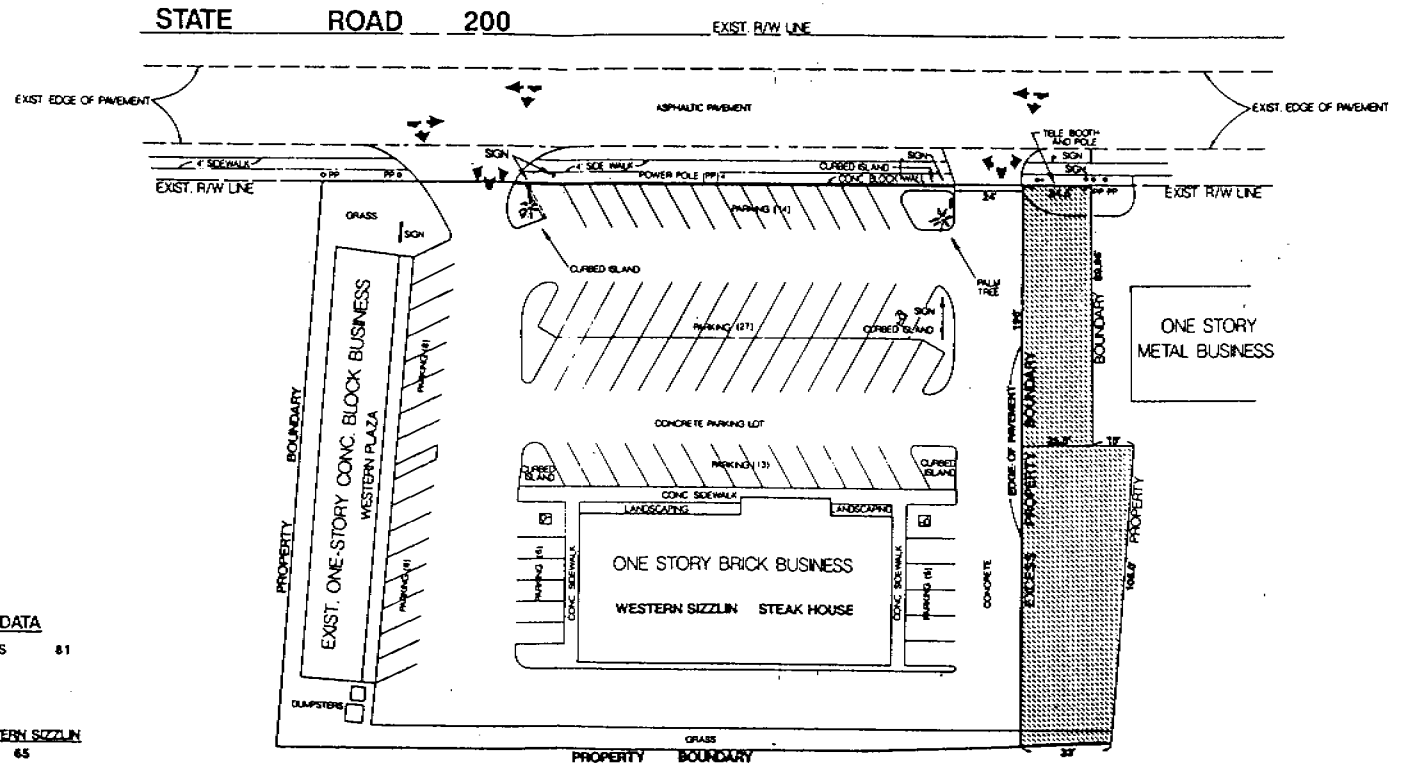
PROPERTY OWNER

WESTERN SIZZLIN

PARCEL 102

LARRY N. MURRAY

CAROL S. MURRAY



PARKING DATA

TOTAL EXISTING SPACES 81

WESTERN PLAZA	WESTERN SIZZLIN
16	65

EXISTING CONDITIONS

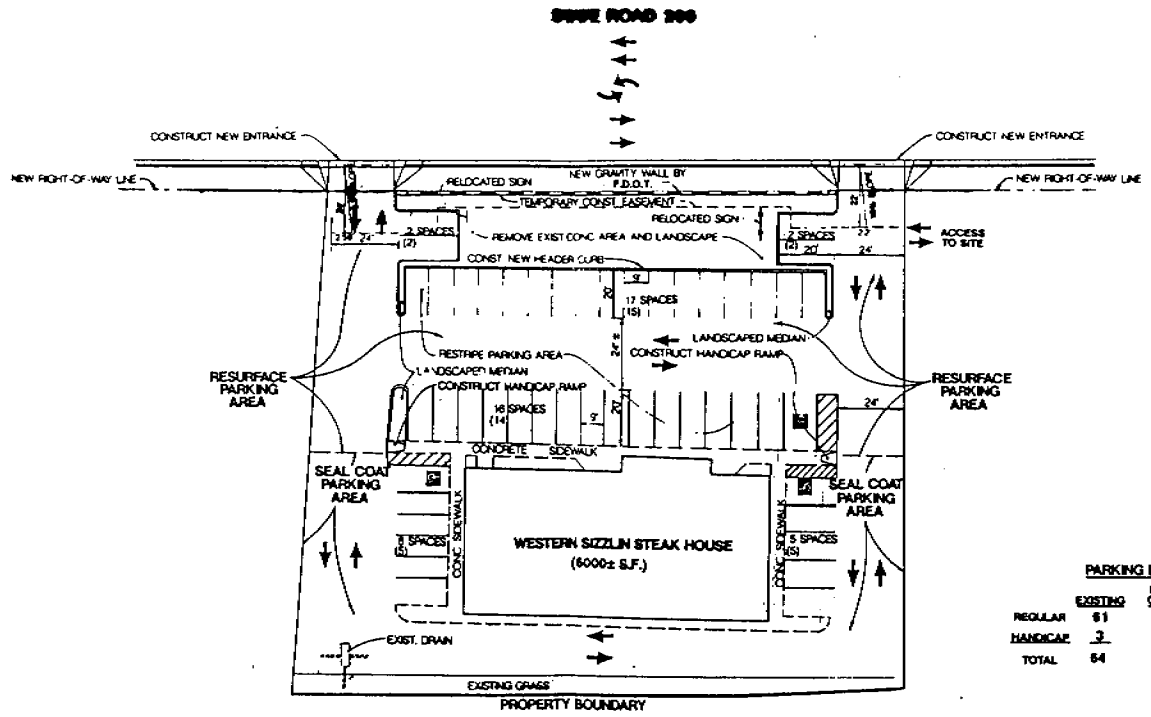
SCALE: 1" = 20'-0"

FIGURE 1C

TPE TRANSPORTATION PLANNERS-ENGINEERS, INC.

A.1

PROPERTY OWNER
WESTERN SIZZLIN
LARRY N. MURRAY



PARKING DATA

	EXISTING	PROPOSED CURE PLAN	PROPOSED CURE PLAN
REGULAR	61	45 (9' WIDE STALLS)	(40) 10' WIDE STALLS
HANDICAP	3	3	(3)
TOTAL	64	48	43

SCALE: 1" = 20'-0

0 10' 20' 40' 60'

CURE PLAN
RECONSTRUCT PARKING LOT

FIGURE 3

TPE TRANSPORTATION PLANNING ENGINEERING, INC.

A.2

PROJECT NO. 91-452