IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v. CASE NO. SC01 - 1014

ARMADILLO PARTNERS, INC.,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT ARMADILLO PARTNERS, INC.

SUBMITTED ON BEHALF OF
MANHEIM REMARKETING LIMITED PARTNERSHIP,
D/B/A FLORIDA AUTO AUCTION OF ORLANDO AND
FLORIDA AUTO AUCTION OF ORLANDO, INC.

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ARGUMENT

This Court has for consideration an eminent domain issue that has often been the topic of hot debate: the curing of severance and/or business damages arising from the "taking" of private property for a public purpose and use. In this cause, the public purpose for acquiring a portion of a neighborhood shopping center, known as Armadillo Square, was the widening and improvement of two roadways in Broward County. Both sides agreed that as a result of the "taking," the center could not continue to operate and the improvements would lose all value, if no remedial "cure" is applied to the property. As described by the Petitioner, "[t]he trial became a battle of 'cure plans'." (IB: 2). The problem, however, is that the approach taken by the Department's expert did not comply with the most basic principles regarding a private property owner's constitutional right to receive "full compensation" for the taking of private property. As such the district court correctly reversed the judgment awarding the property owner the condemnor's opinion of damages.

BASIC CONSTITUTIONAL CONSIDERATIONS

As a foundational precept, no matter what method of valuation the litigants use, this Court must "bear in mind that the objective is ***full compensation***." Dade County v. General Waterworks Corp. 267 So. 2d 633, 641 (Fla. 1972). The payment of "*fair market value"* may be sufficient, if it indeed results in "full compensation." Department of Transp. v. Nalven, 455 So. 2d 301, 307 (Fla. 1984). "The constitutional requirement of full compensation means that the landowner must be completely paid for that which is taken, and compensated for the ***whole loss occasioned by the taking***." *Id*. For over forty years the

"spirit" of this constitutional guarantee has required that a practical attempt be made to make the owner "whole." Jacksonville Expressway Auth. v. Henry G. Dupree Co., 108 So. 2d 289 (Fla. 1959). The underlying rationale is that the constitutional guarantee of "full compensation" requires that the owner be put in a position financially as good as if the property had not been taken. Department of Transp. v. Jirik, 498 So. 2d 1253 (Fla. 1986).

It is respectfully suggested by Amicus that the methodology utilized by the Department's appraisal expert did not comport with these foundation principles because, by omitting certain considerations, it did not compensate the owner for the "***whole loss occasioned by the taking***." Nalven at 307.

DAMAGES TO THE REMAINDER - SEVERANCE DAMAGES

Where less than the entire property is "taken" by the condemnor, the constitutional guarantee that the owner be paid "full compensation," requires that the owner be paid "any damages to the remainder caused by the taking." *See* Florida Statutes, §73.071(3)(b); Orange Belt Railway Co. v. Craver, 32 Fla. 28, 13 So. 444 (1893); Kendry v. Division of Admin., 366 So. 2d 391, 393 (Fla. 1978); 4A Nichols, The Law of Eminent Domain, § 14.02[1][a], at 14-30 (rev. 3d ed. 1994). These damages, so-called severance damages, are generally measured by the reduction in value of the remainder property. Mulkey v. Division of Admin., 448 So. 2d 1062, 1065 (Fla. 2d DCA 1984).

COST TO CURE - A REPLACEMENT FOR SEVERANCE DAMAGES

It is recognized that the general measure of severance damages may be ***"replaced*** by a cost-to-cure approach in instances where such cost is less than the decreased value of the remainder." Mulkey at 1065; 4A Nichols, The Law Of Eminent Domain, § 14A.02[2], at 14A-101. It has also been described as a "recognized ***substitute*** for severance damages." CLE, Florida Eminent Domain Practice and Procedure, § 9.24, at 9-38a (5th ed. 2000). Consistent with the foundation principles discussed above, a proposed "cure" should place the landowner in as good a position as he enjoyed prior to the taking. *See also* Hill v. Marion County, 238 So. 2d 163, 165 (Fla. 1st DCA 1970); Canney v. City of St. Petersburg, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985); Division of Admin. v. Frenchman, Inc., 476 So. 2d 224, 227 (Fla. 4th DCA 1985). A "cure" is a proper measure of severance damages only when it makes the owner "whole." The owner is made "whole" only when the sum total of the part taken, incurable severance damages, and mitigating "cost to cure" places him in as good a financial position as he enjoyed prior to the partial "taking." 4A Nichols, The Law of Eminent Domain, § 14A.02[2], at 14A-101. Contrary to the Department's position, the verdict should reflect an award for **each** item of damage.

To avoid injecting pure speculation into the process, when severance damages are ***replaced*** by a cost to cure, it is firmly established that the "cure" cannot necessitate going outside the owner's remaining property. Mulkey, at 1067; 4A Nichols, The Law of Eminent Domain, §14.02[3], at 14-36, 37. *See also* Sarasota County v. Burdette, 479 So.2d 763, 766

(Fla. 2nd DCA 1985)(holding that an evaluation of business damages was invalid when

based on the assumption that customers could park outside of the defendant's remaining property.)

CURING THE DAMAGES - A CLEAR PUBLIC PURPOSE

Applying the above rule, in almost every instance, as in this case, the "cure" proposed by the condemnor will require the property owner to give up a portion of the remaining property, so that it can be put to a new *use* or *uses*, which, theoretically, will lessen, or eliminate, the severance damages caused by the "taking." In the same manner that the Department can force an owner to part with private property for a public purpose and use, it can also dictate the owner use of a portion of his remaining property for the "public purpose" of reducing the amount of damages caused by that "taking."[1] If a jury agrees that the Department's proposed "cure" basically ***fixes*** what it has ***broken*** due to the "taking," then the owner will receive that sum as compensation for the damages caused by that "taking."

IMPLEMENTING THE CURE - MAKING THE OWNER WHOLE

In the implementation of a "cure" consistent with the rule cited above, the concept that a "cure" must make an owner whole has been preserved, in part, by the presence of precedent that forbids the condemnor from ignoring, or failing to take into consideration, the forced use of the remainder property. For thirty years the decision of State Dept. of Transp. v. Byrd, 254

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[1] The statutory scheme of "taking" more property than was actually necessary for the project, in order to lessen the cost of acquisition, was upheld in Department of Transp. v. Fortune Federal Savings & Loan Ass'n, 532 So. 2d 1267 (Fla. 1988). There it was held that the term "public purpose" was broader than "public use," and that "the purpose of cutting acquisition costs to expand the financial base for further public projects constitutes a valid public purpose." *Id*. at 1270.

So. 2d 836 (Fla. 1st DCA 1971) has served as the defense against what the Department proposes to do in this cause. Byrd requires that when a "cure" is suggested, dictating that the owner use a portion of the remainder property, or change the use of that property, the condemnor cannot ignore the ***reality*** that a portion of the remainder property has been lost in order to implement the "cure." Byrd found the failure to consider the ***reality*** of the remainder property lost to implement the cure, a clear misconception of the law. *See also* Department of Transp. v. Murray, 670 So. 2d 977 (Fla. 1st DCA 1996), quashed on other grounds 687 So. 2d 825 (Fla. 1997)(the Department's proposal to cure the loss of thirteen parking spaces by replacing eight of the spaces on a paved portion of the remainder that was used for overflow parking during peak hours was excluded by the trial court. By ignoring the fact that the area to be used as replacement for the spaces taken was already used for overflow parking, the Department's expert opinion "ignores the reduction in value of the restaurant business with a smaller parking area available for customer use or a lesser area for parking expansion in the unstriped area.").

The Department's suggestion that the principles set forth in Byrd were cast aside by this Court in Broward County Patel, 641 So.2d 40 (Fla. 1994) is wrong. In the first instance, the issue in Patel [the consideration of the reasonable probability that a variance need to implement a proposed "cure," could be obtained from local authorities] did not deal with the same matters addressed in Byrd. If it was this Court's intent to do away with the sound principles set forth in Byrd, and which have been consistently applied over the last thirty years, it would have done so in a clear fashion. Finally, if Byrd has been done away with, as suggested by the Department,

why was that not mentioned in Murray, 687 So. 2d 825 (Fla. 1997), where the district court opinion, although quashed on other grounds, was affirmed with regard to the finding that the Department's expert had violated Byrd? Amicus would suggest to this Court that Byrd was properly applied by the district court in this cause. To do otherwise, would not have made the owner "whole," as required by constitutional guarantee of "full compensation."

COST TO CURE - MAKING THE OWNER WHOLE

Amicus would suggest that in order to meet the constitutional requirement that the owner be made **whole,** and be put back in as good a position as he was prior to the "taking" of his property by the government, the following valuation approach is the proper way to proceed. Assuming that the "taking" causes severance damages that can be totally "cured" by implementing certain physical changes on the remaining property, the owner's compensation under the "cure" should include **all** costs that would be incurred to accomplish the "cure." All construction related "costs," including demolition, necessary materials and labor to reconstruct, and needed permit and approval costs, should be factored into cost of curing the damages caused by the government. These would include the "costs" incurred in obtaining a variance or other local government approval need to bring about the proposed "cure." In addition, the owner must be paid, as a "cost" of the proposed "cure," the value of that portion of the remainder property that the "cure" requires the owner to give up in order to accomplish that "cure." Such would make the owner ***whole***, covering all out of pocket expenses required by the "cure," as well as what the owner has essentially been forced to dedicate to the "public purpose" of reducing the amount of damages caused by the government's own actions.

Assuming that the government plan only partially "cures" the severance damages caused by the "taking," then, in addition to the items of compensation mentioned above, the owner must be paid the "incurable" damages to that portion of the remainder not dedicated to the "cure." In this way the owner is compensated for ***the whole loss occasioned by the taking.*** Nalven at 307.

The Department will surely complain that the approach suggested is a windfall to the owner because he retains ownership of the remainder property used as part of the "cure." This concern is dealt with when the "cure" property is properly valued. In that regard, the value that should be placed on the remainder property the owner is forced to dedicate in order to bring about the "cure," should be something less than full fee value. The forced dedication is more in the nature of an easement, with the Department effectively securing the right to dictate the use the owner must make of a portion of the remaining property, in order that the "public purpose" of paying less than what the owner would otherwise be entitled to receive, might be accomplished. It is somewhat like the construction easements the Department secures in order that the new project may be "harmonized" to the adjacent property.

It must be kept in mind that the owner is not a willing participant in these condemnation proceedings. He is forced to participate and relinquish ownership to private property so that the "public purpose" of roadway improvement might be accomplished. When the government proposes a "cure" plan to lessen the damages it has caused, the owner is once again forced to participate by providing more of his property so that the "public purpose" of paying less damages might be accomplished. To deny compensation for the property dedicated to the

"cure," ignores the reality of what the owner has lost as a result of the "taking." The approach the Amicus suggests is nothing new, but has been consistently utilized for many years. The Department's request to depart from that established approach and the precedent supporting that approach, should be denied.

ON-SITE CURE APPROPRIATES THE USE OF REMAINDER PROPERTY

Any time that a condemnor seeks to reduce severance damages by implementing a cure, that condemnor admits that the highest and best use of the property can only be achieved by effectively requiring that the property owner commit some portion of its remaining property to a specific use as dictated by the condemnor. Such a requirement denies the owner the use of that property for any other purpose.

The Department seeks to avoid paying for that portion of the remainder property that is set aside for the cure by arguing that the cure property contributes no value to the remainder. Yet the Department recognizes that it must pay the value of non-contributory property that it acquires by a taking initiated by a governmental resolution. Since both the taking that is set forth in such a resolution and the taking that is required by the cure are necessary, both uses of private property should be paid for as part of full compensation.

Page 11 sets forth a further example of the inconsistencies of the Department's position: Panel 1 depicts a retail, income producing building with landscaped setback areas. Panel 2 depicts the same property where a condemnor has placed a retention pond on vacant land behind the retail building. Here, the condemnor has acquired a maintenance easement along one of the landscaped setback areas. In most circumstances, the condemnor will only use

this maintenance easement twice a year to clean the retention pond. The property owner will continue to hold all remaining interest not set forth in the easement. Condemnors often pay 90% of fee value for such easements.

In Panel 3 a similar sized taking along the street wipes out a large portion of the retail building's parking. The condemnor pays for this taking, and in the condemnor's cure plan, the condemnor dictates that the setback area will hereinafter be used solely for the purposes of replacement parking. The number of parking spaces after the cure remains the same due to the condemnor's ability to effectively appropriate a portion of the remainder land to facilitate the cure. The condemnor in this instance argues that the property owner is whole since the setback area did not provide a contributory value to the retail building's income stream.

Panel 2 on Page 11 pays the property owner 90% of fee value for the condemnor's twice-a-year use of its setback property; while, in comparison, Panel 3 uses the exact same property and dictates that it be used every business day of the year with the condemnor indicating that no compensation need be paid for the financially **required** use of the setback area.

In both Panel 2 and Panel 3 the condemnor is using the owner's property for a public purpose. In both Panel 2 and Panel 3, the condemnor seeks to convert private property uses to benefit the entire community. In Panel 2 this benefit is to provide a maintenance easement, while in Panel 3 this benefit is to save the community money by not having to pay for extensive severance damages related to a change of highest and best use that would "wipe-out" the building's value without the cure.

An underlying principle behind the obligation to pay full compensation when the condemnor uses or harms private property that is used for a public purpose is to spread this cost throughout the entire community that benefits from that public use of the land. The Department's proposed change to thirty years of case law would deny the owner's full use of the remainder property and fail to spread the cost of that denial to the entire community.

CONCLUSION

The decision of the 4th District Court of Appeals should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail in this 26th day of October, 2001, to Robert I. Scanlan, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399-1050, and Geoffrey L. Jones, Jeck, Harris & Jones, LLP, 1061 East Indiantown Rd., Suite 400, Jupiter, Florida 33477.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief of amicus curiae was computer generated with justified margins and complies with the requirements of the Florida Rules of Appellate Procedure, Rule 9.210 (a) (2).

Respectfully submitted,

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