

# Florida Supreme Court Rules Median Damage Non-compensable

By Andrew H. Schuster

All things considered, it is not surprising that the regulation of access from public roads to private property is a frequent source of controversy and litigation. Without the right of access, a piece of property is virtually worthless; while, at the same time, a government which fails to control access simply invites the onslaught of vehicular accidents. It is thus no coincidence that an owner's right of ingress and egress is, at the same time, a right zealously protected by the owner and a condition scrupulously regulated by the government. More and more frequently the economic interest of the owner and the police power of the government have come into conflict.

The frequency and intensity of this conflict have heightened as the government's concern for safe and efficient access has coincided with a growing appreciation on the part of property owners for the economic benefits of free and easy access. The result has been that the issue of compensability for impairments of access has joined planning, zoning and building restrictions as another source of controversy in that inevitable and never-ending conflict between private property rights and legitimate governmental regulation. The Courts, as usual, have been asked to strike a judicial balance between these competing interests.

Florida, as other states, has struggled with many of the issues raised by the control of vehicular access. During the past two decades, the State's Department of Transportation and many of its 67 counties have constructed new limited access facilities and upgraded undivided two-lane roads into modern six-lane municipal sections. Raised medians, curbs, guardrails and frontage roads have sprung up where before only free, uninterrupted access existed. In many instances, property owners, especially businesses, have complained about impairments of their access.

One issue which has been of particular concern to members of the Florida right-of-way community has been the compensability in eminent domain proceedings of damages caused by the construction of a raised median strip. This issue has, for several reasons, been one of significance to engineers, appraisers and attorneys alike. To begin with, many of the roadway condemnation cases litigated during the last 10 years have arisen from highway projects which have included the construction of a raised median strip. Since, until recently, there had been no definitive Florida law on the issue, witnesses, attorneys and trial judges were left in doubt as to how to appraise, present and decide certain 'partial taking' cases. Trial Courts around the state differed in their rulings as to compensability, adding confusion to an already uncertain area of the law.

In April of this year, the Florida Supreme Court, in the case of *Division of Administration, State of Florida Department of Transportation v. Capital Plaza, Inc.*, 397 502d 682 (Fla. 1981) ruled that an owner is not entitled to compensation for damages to his property caused by the construction of a raised median strip within pre-existing right-of-way, even when a part of his property is condemned for the widening of the road upon which the newly constructed median strip is located.

The *Capital Plaza* case arose in Tallahassee as a result of the state's widening and improvement of Thomasville Road. Thomasville Road is a major north-south artery which links downtown Tallahassee with both its northern residential subdivisions and Thomasville, Georgia. Capital Plaza, Inc. owns a service station site on the west side on Thomasville Road.

Before the project, Thomasville Road was a two-lane undivided highway. Capital Plaza's property had unimpaired access from both north and southbound traffic. To widen the road, the state con-

demned 1000 square feet of the owner's property. It also constructed a raised median strip in the center of the newly widened six-lane municipal section. The median was thus constructed on pre-existing right-of-way. While the loss of the property actually taken did not affect the owner's access, the construction of the median precluded northbound traffic from turning directly into the property.

The owner, at trial, argued that damages caused by construction of the median strip were compensable, since in an earlier case, *State Department of Transportation v. Stubbs*, 285 So 2d 1 (Fla. 1973), the Supreme Court had ruled that ease and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated, and that it is for the jury to determine the nature and amount of those damages. The state, on the other hand, argued that damages caused by the median strip were not compensable, asserting that the construction of a median is an exercise of the state's police power, and therefore not compensable, even in the context of an eminent domain proceeding.

The Trial Court decided in the State's favor, ruling that no evidence would be received concerning the impairment of access to and from the service station by reason of the construction of the raised median.

The owner appealed to Florida's First District Court of Appeal, which, by a two-to-one vote, reversed the Trial Court's ruling. The District Court of Appeal held that it was error for the Trial Court to exclude such testimony and agreed with the property owner that a jury should have decided the issue.

Having won in the Trial Court, only to have that ruling reversed (*Capital Plaza, Inc. v. Division of Administration, State Department of Transportation*, 381 So 2d

1090 [Fla. 1st D.C.A. 1979]), the Department of Transportation immediately appealed the case to the Florida Supreme Court. In striking the balance in favor of the state, the Supreme Court ruled as follows:

... (T) he instant case concerns alleged damages resulting from a change in the flow of traffic not a deprivation of access. There is still free, unimpeded access to Capital's service station, albeit only by southbound traffic. Although the holding in *Stubbs* is not applicable here, that case does provide guidance. The *Stubbs*' Court also said that "'access' as a property interest does not presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of diminution in traffic." Thus, the state has joined the numerous other jurisdictions which have found that a landowner has no property right in the continuation of maintenance of traffic flow past his property.

When less than the entire property is taken, compensation for damages to the remainder can be awarded only if such damage is caused by the taking.

Here D.O.T. constructed the median within its previously owned right-of-way. Construction of the median, not the taking, caused the alleged damage. Severance damages are not available for a change in traffic flow.

The full impact of the Supreme Court's decision in *Capital Plaza* will not be known until later cases with similar factual situations are decided. For example, the *Capital Plaza* decision does not speak of compensability when the median is constructed on condemned, rather than previously public, property. Property-owner attorneys will no doubt seize upon the Supreme Court's statement that "Here D.O.T. constructed the median within its previously owned right-of-way," as support for the proposition that the *Capital Plaza* rule of noncompensability should only be applied when the access-impairing feature is constructed in the existing right-of-way.

Government attorneys, on the other hand, will no doubt argue that the only damages recoverable are those caused by the loss of the property itself and that damages caused by roadway features are always noncompensable, irrespective of the nature of the property on which they

are ultimately located. In support of this position, the government will cite that portion of the *Capital Plaza* decision which states that "... (D)amages to the remainder can be awarded only if such damage is caused by the *taking*." (Emphasis supplied).

Thus, while the *Capital Plaza* case brought some definitiveness to a long-standing area of uncertainty, it by no means disposed of all of the issues presented by the inevitable conflict between the state's power to regulate access and the owner's rights of ingress and egress. As surely as Rome was not built in a day, the law surrounding Florida's ambitious highway program will not be settled by a single case. In the *Capital Plaza* case, however, the Florida Supreme Court has laid down an important foundation.

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