IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC01-1014
(FOURTH DISTRICT COURT OF APPEAL CASE NO. 4D99-3275)

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

ARMADILLO PARTNERS, INC.,

Respondent.

_______________________________________/

RESPONDENT'S ANSWER BRIEF

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PREFACE

The appellant below and the respondent here is Armadillo Partners, Inc. (Armadillo); the appellee below and the petitioner here is the State of Florida Department of Transportation (Department). The references in the brief are to pages in the trial transcript ("T:__, line __"), Armadillo's appendix to this brief ("AA:__"), the Department's appendix ("DA:__"), and the record ("R:__"). Documents in Armadillo's appendix are designated by both their appendix page number and record page number ("AA:__/R:__"), except for exhibits, which bear both the appendix page number and the exhibit number (i.e. "Armadillo's Ex. __" or "Department's Ex. __") since the trial court directed that the court clerk release to the parties' counsel their respective exhibits.

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STATEMENT OF THE CASE AND OF THE FACTS

The statement of the case and of the facts requires the following additions and clarifications. Before the taking, Armadillo Square had one hundred forty parking spaces; after the taking, without a cure, the property would have only sixty-seven spaces, a loss of seventy-three parking spaces. AA:14; T:784, lines 14-20. The Department and Armadillo agreed that the taking would significantly damage the value of the property. The Department's appraiser, Robert Gallion, testified that the property would be worth only the value of the raw land, less the cost of demolition, if no cure were implemented. T:355, lines 8-10. Armadillo's appraiser, John Hagan, testified that the severance damages in the event no cure were implemented would be $1,396,000. T:942, line 7-T:943, line 8. Mr. Gallion testified that it would be unrealistic to believe that the property owner would not implement some type of cure to lessen the damage to the property caused by the condemnation. T:355, line 17-T:356, line 1.

Both the Department and Armadillo presented proposed cures, representing theoretical measures designed to lessen the damage that the remainder property would sustain. At trial, the major issue concerned which of the proposed cures that mitigated the severance damages caused by the taking was

legally proper and practically feasible.

The Department's cure involved reconfiguring Armadillo Square's parking lot. This required that the westernmost parking area be shifted approximately nine feet to the east towards the building running north-south on the property. AA:13; AA:15; T:264, line 14-T:265, line 1. In doing so, this cure required that the property lose approximately nine feet by one hundred eighty feet of area at the front of the building (the building's west side) that consisted of a sidewalk with simulated brick pavers, planted areas, irrigation system, grassy area, and two wooden arbor structures consisting of wood fences, posts, lattice work and trellises, and landscaping in the arbors (collectively, the "Arbor Area"). AA:12 (middle of photograph); AA:16 (graphic depicts layout of Arbor Area); AA:21; AA:30; AA:31; T:549, line 8-T:555, line 16. The Department's cure provided for ninety-seven parking spaces. AA:13.

Armadillo's cure involved removing the north end of the building running north-south on the property, in part so that the building did not abut the new roadway right-of-way. The purpose was to alleviate the need for as many parking spaces by reducing tenant space and to provide a sloped driveway and buffer area between the building and the widened and raised Griffin Road, additional parking where the building had been

removed, and a means of circulating from the west parking area to the east parking area. T:788, line 24-T:791, line 18; T:809, lines 6-15; T:823, line 12-T:824, line 15. Armadillo's cure incorporated a sloped driveway because the new roadway had to be raised two to three and one half feet higher than the property. T:110, line 1-12; T:125, lines 9-17. Armadillo's cure left the Arbor Area intact and provided ninety-nine parking spaces on the property. AA:18. At the time of trial, Armadillo had commenced implementation of its cure. T:1033, line 22-T:1034, line 19.

Mr. Gallion testified that damage to the remainder could be calculated by adding together the "cost to cure" to allow for the reconfiguration and construction of the parking areas by implementing the Department's cure and the amount of loss in the value of the property after implementation of the Department's cure. Mr. Gallion testified that the loss in value, after the taking and assuming implementation of the Department's cure, was a "hundred percent" a result of the loss of rental income attributable to reduced parking spaces. T:537, lines 1-16. He confirmed that rental loss alone accounted for his severance damage amount by testifying that if the rental income stayed the same after implementation of the Department's cure, no severance damages would occur. T:500, line 14-T:501, line 9. In response to a question as to

what percentage of his severance damage amount was attributable to reduced parking, Mr. Gallion testified that "the sole consequence is reduced parking." T:536, line 19-T:537, line 16:

> Q: Am I correct then that the severance damages that you have incorporated in your final opinion of compensation is as a result of a loss of rental income because of reduced parking; is that correct?
>
> A: Yes, sir.

T:537, line 11-16.

After testifying that the loss in value was one hundred per cent because of the loss of rental income brought about by reduced parking, he testified that the loss of the Arbor Area is compensated by the reduction in rent. T:544, line 19–T:546, line 7; T:549, line 8-T:550, line 8. He testified that he assigned no value to the Arbor Area and did not provide any compensation to the property owner for the loss of the Arbor Area assuming the Department's cure were implemented. He testified that the Arbor Area had "no added value, no added utility" in regard to his reduced rental evaluation. T: 545, lines 5-17. He did not provide any compensation to Armadillo for the pavers, planted areas, irrigation systems, and two arbor structures and landscaping within the arbors appropriated by the Department's cure, or for the fact that the property owner could use such areas in

another manner unassociated with the taking or for future expansion, other than to the extent that the appropriation would result in reduced rental income. T: 544, line 19–T:545, line 17; T:547, lines 2-11; T:548, lines 1-3.

In calculating Armadillo's damages for Parcel 122, the property taken by the Department on which part of the new roadway was being contructed, Mr. Gallion testified that Armadillo's damages would include $32,900 for improvements located within Parcel 122. AA:19-Department's Ex. 12. These improvements consisted of asphalt paving, landscaping, exterior lights and similar items. T:348, lines 11-19; T:508, line 20-T:510, line 3. The $32,900 amount was limited solely to those improvements within Parcel 122. T:502, line 17-T:503, line 1; AA:19-Department’s Ex. 12.

Prior to Mr. Gallion leaving the stand, Armadillo moved to strike his testimony because he based his opinion on a misconception of law, which the trial court denied. T:590, line 19–T:596, line 5; T:596, lines 3-5. Armadillo renewed the motion to strike but the trial court again denied the motion. T:1166, line 24-T:1167, line 8; T:1175, lines 13-17.

Mr. Hagan, Armadillo’s appraiser, testified that severance damages resulting from Armadillo’s cure were in the amount of $493,000. T:904, line 17-T:905, line 9. Mr. Gallion testified that severance damages resulting from the

Department's cure were in the amount of $308,400. T:424, line 13-T:425, line 15. The jury's itemized verdict awarded severance damages in the amount of $308,400. R:543. The Order of Taking provided as proposed total compensation to the property owner damages in the amount of $866,725. AA:8. The jury's verdict was in the total amount of $817,450. R:543.

In connection with the second issue in this appeal, the Department's engineer confirmed that the Department's cure could not be built to tie the new roadway into the driveway which was to be located within Parcel 715, the temporary construction easement. AA:6. The driveway and curb cuts in the Department's cure were nine feet further to the east than the driveway and curb cuts to be constructed in accordance with the Department's plans within Parcel 122 to tie the new roadway into the western driveway location on Griffin Road. AA:12; AA:13; AA:18; T:111, line 20-T:112, line 16; T:933, lines 8-18; T:934, lines 2-17; and T:109, lines 8-22. The Department's cure could not make use of the curb cuts, sidewalk, gravity walls, and driveway onto Griffin Road constructed as part of the road improvement project to "tie in and harmonize the existing driveways" into the property. *Id.*; AA:6; T:111, line 20-T:112, line 12. The trial court denied Armadillo's motion to strike the portion of the Department's cure that required the construction of a new entranceway in a

different location than where the temporary construction easement, curb cuts, and driveway established by the Department's plans were located. T:1197, line 25-T:1198, line 13.

Finally, the district court references in its decision "the decorative brick wall" in the Arbor Area. *Armadillo Partners, Inc. v. Department of Transportation*, 780 So. 2d 234, 236 (Fla. 4th DCA 2001); DA:3. That reference is apparently a typographical error since, although there were decorative simulated brick pavers (concrete sidewalks pressed with a brick design) in the Arbor Area, there was not a brick wall. Given the context, it is likely the reference should have been to the decorative brick pavers.

SUMMARY OF ARGUMENT

ISSUE I

THE DISTRICT COURT CORRECTLY APPLIED CONTROLLING PRECEDENT ESTABLISHED IN *BROWARD COUNTY V. PATEL, WILLIAMS V. DEPARTMENT OF TRANSPORTATION,* AND *DEPARTMENT OF TRANSPORATION V. BYRD*

The district court applied controlling Florida precedent that a condemnor is required to provide compensation for property and improvements appropriated assuming the condemnor's proposed cure to mitigate severance damages is implemented. The purpose of the Department's cure was to mitigate the acknowledged and uncontested damage to the remaining property that would otherwise result from the

taking. The Department’s cure required the appropriation of real property and improvements to replace parking spaces lost as a result of the taken real property, without incorporating any compensation to the property owner for the loss of that property or for the loss of the future use of that property. The *Patel, Williams,* and *Byrd* decisions each addressed and rejected the severance damage methodology employed by the Department’s appraiser.

The Department’s appraiser testified that his damages were one hundred per cent attributable to the loss of parking spaces, and not to the loss of property and improvements appropriated assuming the Department’s cure was implemented. Accordingly, his opinion was based on a misconception of law because he failed to provide compensation for the loss of the real property and improvements, the loss of use of those areas, and the loss of the potential future use of those areas for purposes unassociated with the taking. By failing to provide compensation for those losses as required by Florida law, his opinion on the amount of severance damages was necessarily lower and as such was improper as a matter of law.

ISSUE II

THE DISTRICT COURT CORRECTLY HELD THAT THE DEPARTMENT’S CURE PLAN WAS IMPROPER ABSENT ADDITIONAL PROOF

The Department’s proposed cure could not make use of the

driveway onto Griffin Road constructed as part of the road improvement project to tie in and harmonize the existing driveways into the property at the location of the temporary construction easement. The district court merely confirmed that such a cure is impermissible as a matter of law absent proof that would ensure such improvements would be modified to allow for the Department’s cure in the event that cure were implemented. This Court has held that damages caused by a condemnation are controlled by the construction plans in evidence and a condemnor is bound by that evidence, despite the condemnor’s inadequate promissory representations to the contrary. Accordingly, the Department’s cure, to the extent contrary to its own plans in evidence and without additional proof that would allow for its implementation if the property owner chose to do so, should not have been considered by the jury.

ARGUMENT

ISSUE I

THE DISTRICT COURT HELD, IN ACCORDANCE WITH CONTROLLING PRECEDENT, THAT THE DEPARTMENT'S APPRAISER'S TESTIMONY WAS IMPERMISSIBLY BASED ON REQUIRING THE ACQUISITION OF PROPERTY OUTSIDE THE AREA OF TAKING, WITHOUT COMPENSATING THE PROPERTY OWNER FOR THAT APPROPRIATION

A. Legal Background

Section 73.071(3)(b), Florida Statutes (1997), authorizes awards of severance damages for the taking of less than an

entire property. “The cost of effecting physical changes or modifications in the premises necessitated by a taking are in the nature of damages to the remainder or severance damages....” *LeSuer v. State Road Department*, 231 So. 2d 265, 268 (Fla. 1st DCA 1970). “Severance damages are a constitutional element of compensation in an eminent domain proceeding....“ *Blockbuster Video, Inc. v. Department of Transportation*, 714 So. 2d 1222, 1224 (Fla. 2d DCA 1998). Severance damages may be reduced through a cure to the property if the cost of the cure and any remaining unmitigated severance damages are part of the compensation paid to the property owner. *Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985).

B. The *Broward County v. Patel* Decision

The Department's argument has several components related to the decision in *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), that cannot withstand scrutiny. All but the concluding paragraphs in the *Patel* decision focus on its certified question concerning the availability of variances and the effect of the same on severance damages. Contrary to the Department’s argument, this Court did not abandon precedent and adopt a new approach that eliminates a constitutional element of compensation and disregards damages

resulting from property appropriated[1] assuming a cure is implemented.

In *Patel*, the condemnee owned property on which motels were located. As in this case, the condemnor proposed to mitigate severance damages by reconstructing a parking area lost as a result of the taking on another area of the motel property. This Court held that it was error to allow a jury to award property owners nothing for the lost property value and other costs associated with converting other areas of their property to replace lost parking. *Patel*, 641 So. 2d at 44. The district court observed in *Patel v. Broward County*, 613 So. 2d 582, 583 (Fla. 4th DCA 1993), *decision quashed on other grounds*, 641 So. 2d 40 (Fla. 1994), that "the government's experts failed to consider any loss to the condemnees by virtue of the appropriation of other areas of their property for parking." In addressing that issue, this Court stated

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[1] The verb "appropriate" is used in the same manner as the noun "appropriation" is used in *Patel*. 641 So. 2d at 44, n. 8. The *Patel* decision refers to appropriation when it references "converting other areas of their land to replace lost parking areas." *Id.* at 44. When property is used or eliminated in a cure, the property may be deemed "appropriated" as part of that cure. The theoretical appropriation of property is based on an assumption that the cure has been implemented, and the otherwise greater amount of severance damages thereby diminished, which is necessary to determine the property owner's compensation.

> We do agree with [the condemnees] that any loss to them by virtue of the appropriation of other areas of their property to provide for parking should be taken into account in determining fair market value on the day of taking, <u>along with associated reasonable costs</u>. . . . [I]t is obvious that the fact finder below . . . awarded the condemnees nothing for <u>the lost property value and other costs associated with converting other areas of their land to replace lost parking</u> and thereby reduce severance damages. This also was error.

Broward County v. Patel, 641 So. 2d at 44, n. 8, and 44 (emphasis supplied).

This Court in *Patel* stated "we disapprove the decisions in Williams and Byrd solely to the extent they may be viewed as inconsistent with this opinion." *Patel*, 641 So. 2d at 45. This Court disapproved the two decisions because the district court, in reliance on those decisions, had reversed the trial court for allowing evidence concerning the variances at issue in the *Patel* case. *See Patel*, 641 So. 2d at 42.

In *Department of Transportation v. Murray*, 670 So. 2d 977 (Fla. 1st DCA 1996), *decision quashed on other grounds*, 687 So. 2d 825 (Fla. 1997), a district court used the qualification "disapproved in part on other grounds" in discussing *Department of Transportation v. Byrd*, 254 So. 2d 836 (Fla. 1st DCA 1971), and *Williams v. Department of Transportation*, 579 So. 2d 226 (Fla. 1st DCA 1991), vis-à-vis *Patel*. In doing so, the district court cited the two decisions for the same reason cited by the district court in this case. In addressing the

Murray district court decision, this Court could have corrected the district court, if it had misinterpreted *Patel*, and this Court did not do so.

Furthermore, the *Patel* decision did not overrule *Byrd*, as the Department contends. Under the Department's theory, the condemnor in *Byrd* merely would need to provide evidence that the appropriation of the shuffleboard court at issue in *Byrd* had been considered as having no effect on either the before value or the after value to pass the *Patel* standard. The *Patel* decision cannot be read to support that analysis. The district court in this appeal did not "resurrect" *Byrd* as the Department argues; it merely applied valid precedent. For the propositions cited by the district court in this case, *Byrd* and *Williams* in conjunction with *Patel* demonstrate that Mr. Gallion’s testimony is based on a misconception of law.

The *Patel* decision relates primarily to the manner in which severance damages may be lessened by potential future actions such as rezonings and variances. The *Patel* decision does not address, in the context the Department argues, physical changes to property appropriated by a cure except to confirm that condemnees are entitled to damages for lost property value and other costs resulting from a cure. *Patel*, 641 So. 2d at 44.

In support of its argument, the Department cites to the *Patel* decision where this Court stated that the probability that lost value can be restored to the property by contingent future actions is relevant only as to its impact on the property's fair market value at the time of taking. *Patel*, 641 So. 2d at 44. This Court made that statement in addressing how fair market value is determined when considering the probability of rezoning or variance, a process that this Court identified as "the only issue <u>in this phase of the proceedings</u>." *Patel*, 641 So. 2d at 43 (emphasis supplied). The Department also misconstrues the *Patel* decision in confusing a discussion of contingent future action, such as a variance, with cost to cure. That section of the *Patel* decision again refers to an evaluation of future contingencies, and not to eliminating cost to cure as part of a property owner's damages. 641 So. 2d at 43.

The *Patel* decision actually holds that if the finder of fact determines a reasonable probability exists that future contingencies, such as a variance, will occur, "the finder then must separately determine the actual fair market value of the property on the day it was taken, <u>together with severance damages and other costs</u>." 641 So. 2d at 43 (emphasis supplied). Severance damages and other costs would include

precisely the compensation that Mr. Gallion failed to include in his testimony. The amount Mr. Gallion failed to include in his opinion was not the cost of the Department’s cure but rather compensation for property and improvements that would be appropriated as part of that cure.

The *Patel* decision did not hold that a property owner should not be compensated for property appropriated assuming a cure is implemented, the specific issue addressed by the district court in this case. To the contrary, the Court in *Patel* held that it was error if the condemnor’s evidence did not provide such compensation:

> [I]t is obvious that the fact finder below . . . awarded the condemnees nothing for the lost property value and other costs associated with converting other areas of their land to replace lost parking and thereby reduce severance damages. This also was error.

Id. at 44. The lost property value and other costs in this case include the loss of the Arbor Area and improvements. The *Patel* decision supports the decision by the district court below in holding that a failure to provide compensation for property appropriated by a cure is improper.

C. <u>The *Williams v. Department of Transportation* Decision</u>

The district court's decision is also based on *Williams v. Department of Transportation*, 579 So. 2d 226 (Fla. 1st DCA 1991), *disapproved in part on other grounds, Broward County v.*

Patel, 641 So. 2d 40 (Fla. 1994), which also rejected the Department's appraisal methodology. In *Williams*, the property owner used the area of the taking for employees' and customers' parking. In that case, the condemnor's appraiser testified that the lost parking could be replaced by constructing a new parking lot on the rear of the property. As in the Armadillo condemnation, the condemnor's appraiser testified concerning the cost of constructing a new parking area. Specifically, the *Williams* appraiser testified that the construction cost of a new rear parking lot would be $24,000 and added that amount to the property owner's proposed compensation.

The *Williams* appraiser, however, went further than Mr. Gallion. Since the proposed rear parking area required 8,000 square feet of the property remainder, the *Williams* appraiser appraised the 8,000 square feet and determined that the property owner was entitled to additional compensation of $48,000, based on a valuation of $6.00 per square foot. The *Williams* appraiser then opined that compensation to the property owner of the total of $24,000 and $48,000 would fully compensate the property owner and no severance damages would result because all damages and effects to the remainder would be cured by the $72,000 in compensation.

Mr. Gallion, however, did not opine as to <u>any</u> compensation to the property owner for the approximately one thousand six hundred twenty square foot Arbor Area and improvements that were to be appropriated by the Department's cure other than to the extent that the property owner would receive less rent if the cure was implemented. T:547, lines 4-11; T:550, lines 2-8. In doing so, however, he opined that his rent reduction calculation was a "hundred percent" as a result of the reduction in parking. T:536, line 19–537, line 10.

The Department's appraiser in *Williams* and Mr. Gallion both failed to consider the effect of appropriating another part of the property for a new parking area and, in the Armadillo condemnation, of destroying improvements constructed on that property and changing the use to which it could be put thereafter. In *Williams*, the district court stated:

> [The Department's appraiser's] opinion ignores the fact that the new parking area would not provide as much space for parking as Williams had before the taking, ignores the fact that the new parking area would intrude into Williams's service area, ignores the impact that rear parking for customers might have on the value of the property as a business site, and ignores the fact that the new parking area would prevent further expansion of the business on that site [note omitted]. All of these items were appropriate for consideration as severance damages under the Byrd decision and should have been considered in the formulation of [the appraiser's] opinion. <u>Where the testimony of an appraiser is based on a misconception of the law resulting in a lower valuation of damages than if he had correctly applied the law, such</u>

testimony should be excluded. [citations omitted].

Williams, 579 So. 2d at 229 (emphasis supplied).

Similarly, Mr. Gallion failed to provide any compensation for the loss of landscaping and a waiting area for restaurant tenants, the effect of the loss of the Arbor Area on the use and desirability of restaurant operations at the center, the loss of improvements within the Arbor Area, the loss of aesthetics, the loss of other uses that the property owner could have made of the area, the loss of the property owner's ability to reconfigure its parking lot in the future for a reason not associated with a condemnation or to expand its building to the west, and otherwise failed to compensate the property owner for the appropriation of the area required by the Department's cure. *See also Department of Transportation v. Murray*, 670 So. 2d 977 (Fla. 1st DCA 1996), *decision quashed on other grounds*, 687 So. 2d 825 (Fla. 1997)(part of cure inadmissible as matter of law and properly excluded because witness ignored reduction in value of property with smaller parking area or smaller area available for expansion).

Mr. Gallion testified that he considered the appropriation of the Arbor Area, that the Arbor Area had no additional utility and no use, and thus did not impact upon his determination of lost rental (T:545, line 24-T:546, line 7); that he incorporated consideration of the loss of the

Arbor Area in calculating lost rental, although the loss had no effect on that consideration (T:555, line 22-T:546, line 15); that the Arbor Area was merely "concrete sidewalk" and "extra pavement that has no use" (T:545, lines 1, 10) and that had "no added value, no added utility" because the loss was merely "seven [sic] feet less of concrete" (T:545, lines 14-15, 18-23). He testified that the loss of the Arbor Area "is compensated by the reduction in rent" and the only manner in which he factored the appropriation of the Arbor Area into his opinion of compensation was through the reduction in rent that the property would command if the Department's cure were implemented (T:545, lines 3-4; T:545, line 19-T:547, line 11).

Yet, earlier he testified that a "hundred percent" of his rent reduction calculation was because of the loss of parking assuming implementation of the Department's proposed cure. T:536, line 19-T:537, line 16. <u>If one hundred percent of his compensation was as a result of a loss of parking, then by virtue of mathematics alone, zero percent of Mr. Gallion's compensation is attributable to the loss of the Arbor Area real property and improvements.</u>

He also testified that if the rental income remained the same after the Department's cure were implemented, no severance damages would result. T:500, line 14-T:501, line 9. Thus, he employed the same methodology as that rejected in the

Byrd decision. He testified that no severance damages would result, despite the appropriation of the Arbor Area, if the rental income would remain the same after implementation of the Department's cure. In *Byrd* the Department's appraiser testified that the property owner suffered no severance damages since the cure provided that the lost parking spaces were to be replaced on another portion of the property. Such a methodology is based on a misconception of the law. *Byrd* at 837.

The Department's position requires a departure from thirty-one years of established precedent concerning severance damage compensation in eminent domain proceedings. Mr. Gallion failed to recognize the significance of the appropriation of the Arbor Area. Although the Department argues that compensation was provided as part of the rental reduction, Mr. Gallion's testimony confirms that the Department failed to provide any compensation for the Arbor Area real property and improvements or for the loss of the aesthetics or functional use that it provided.

D. The *Department of Transportation v. Byrd* Decision

In *Department of Transportation v. Byrd*, 254 So. 2d 836 (Fla. 1st DCA 1971), *disapproved in part on other grounds, Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994), the

Department sought to prove that a motel owner had not suffered severance damages to the remaining property because the parking spaces lost in the taking could be replaced in an area where a shuffleboard court was located. *Byrd*, 254 So. 2d at 836. The trial court properly excluded the testimony because it was based on a misconception of the law concerning severance damages. *Id.* at 837.

The district court stated:

> The expert's opinion ignores the reality of the missing shuffleboard court or if the same were to be rebuilt on yet another portion of appellees' property, the expert ignores the reduction in value of a motel with smaller grounds for its guests to enjoy or perhaps lesser areas for expansion.

Byrd, 254 So. 2d at 836-837.

In *Byrd*, the district court stated that "[i]n essence, the State contends that the value of appellees' remaining land is not diminished by the taking." *Id.* at 836. Similarly, Mr. Gallion testified that although the remaining land was damaged because of reduced rent caused by less parking at the shopping center, the loss of the Arbor Area and the improvements within that area did not diminish the value of the property in any way. Citing *LeSuer v. State Road Department*, 231 So. 2d 265, 268 (Fla. 1st DCA 1970), the *Byrd* court stated that the cost of making physical changes to the property necessitated by a

taking constitutes severance damages. *Byrd*, at 837. In both *Byrd* and this case, the Department wished to mitigate damages by proposing a cure that would involve the destruction of improvements on the remainder property. The cost of such changes constitutes severance damages and must be awarded to the property owner as a constitutional element of the property owner's compensation.

E. <u>The Department's Before and After Argument</u>

The Department also asserts that the district court decision conflicts with the *Patel* decision because the district court replaced a "before and after" severance damages analysis with a "cost-to-cure" analysis. The *Patel* decision did not overrule the decision in *Mulkey v. Department of Transportation*, 448 So. 2d 1062, 1065 (Fla. 2d DCA 1984), and, thus, no error may be claimed for the district court's reliance on that decision in referencing the general rule for calculating severance damages as the "before and after" rule.

The decision the Department cites concerning this rule, *Canney v. City of St. Petersburg*, 466 So. 2d 1193 (Fla. 2d DCA 1985), also supports the exception to the "before and after" rule. The *Canney* decision states that the "cost to cure rule" is an exception that may apply "in cases where the injury to the remainder can be 'cured' at a cost which is less than the

severance damage." *Id.* at 1195. The Department misinterprets both the *Patel* decision and the district court decision under review. In addressing severance damages, the district court stated that "[s]everance damages, as a general rule, 'are the difference between the value of the property before and after the taking'". *Armadillo*, 780 So. 2d at 235 (*citing Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985)); DA:2. The district court then stated that this general rule "may be replaced by a cost-to-cure approach where the cost is less than the decreased value of the remainder." *Armadillo,* 780 So. 2d at 235; DA: 2*; Mulkey v. Department of Transportation,* 448 So. 2d 1062 (Fla. 2d DCA 1984). The foregoing is established law and does not depart from precedent or conflict with the *Patel* decision. *See Department of Transportation v. Frenchman, Inc.*, 476 So. 2d 224, 227 (Fla. 4th DCA 1985), *review dismissed*, 495 So. 2d 750 (Fla. 1986)("We think this is a correct statement of the law of this state as in the majority of American jurisdictions.")

In addition, the alleged "substitution" of a before and after analysis with a cost-to-cure analysis is not the basis of the district court decision. The district court addressed these analyses in describing Mr. Gallion's testimony and his use of the before and after and cost-to-cure analyses.

Armadillo, 780 So. 2d at 235; DA: 2. The district court faulted the appraiser not for his use of a particular analysis but because "no provision in his valuation was made for the loss of the Arbor Area". *Armadillo,* 780 So. 2d at 236; DA: 3.

F. The Department's Cost to Cure Argument

The Department argues that *Patel* held that the cost of a cure, whether or not it included damages resulting from the cure such as compensation for the property and improvements appropriated in the Department's cure in this case, is not a separate item of damage. Petitioner's Initial Brief, page 21. The Department never raised this issue before and thus has waived the ability to pursue the issue.

The Department cites two decisions that support the award of cost to cure damages, does not argue they have been overruled by *Patel*, but then argues that *Patel* held that cost to cure damages should not be considered as a separate item of damage. *Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. 2d DCA 1985); *LeSuer v. State Road Department*, 231 So. 2d 265, 268 (Fla. 1st DCA 1970). Again, the Department misconstrues this Court's statements in *Patel.* This Court did not overrule *Canney* or *LeSuer* or eliminate cost to cure damages. In *Patel*, "costs associated with converting other areas of their land to replace lost parking" is synonymous

with cost to cure damages. *Patel*, at 44.

At trial the Department agreed to a verdict form in which the cost to cure is itemized as a separate item of damage. R:541-546. Both parties' appraiser witnesses assigned specific amounts to their respective cure's "cost to cure" damages, without objection. T:905, lines 3-9; T:348, lines 23-24; AA:19-Department's Ex. 12. Thus, the Department's position that the cost of a proposed cure should not be considered as a separate item of damage contradicts the methodology employed by its own witness. T:348, lines 23-24.

The Department's argument that the cost to cure represents an award for a theoretical cure that may never be implemented and thus should not be paid to a property owner is also contradicted by its proof at trial. The Department presented proof that their "cost to cure", i.e. the cost of the Department's cure, was $102,800 ($69,900 + $32,900). AA:19-Department Ex. 12. Beside the amount of damages for Parcels 122 and 715, the Department requested that the jury award their cure amount, $102,800, together with $308,400 in severance damages unmitigated by the cure that the Department argued the property would sustain assuming the Department's cure were implemented. AA:19-Department Ex. 12; R:541-546 (The record demonstrates that the title "Severance damage to remaining property" on the verdict form refers to unmitigated

severance damages incurred despite implementation of a cure.). Mr. Gallion confirmed that the Department's cure was meant to mitigate the more extreme damages the property would suffer in the absence of a cure. T:356, line 6-T:357, line 16. Thus, the damages proffered by the Department assumed both the implementation of the Department's cure and the appropriation of the Arbor Area, but did not include compensation for that appropriation.

The Department's position apparently is that both parties' appraisers testified based on a misconception of the law yet seeks validation of the resulting judgment. Even assuming *arguendo* that the Department's position is somehow correct, the Department cannot take one position at trial, such as request that a jury award a certain amount for cost to cure damages, yet seek an appellate court's blessing on the resulting judgment derived from testimony that it asserts was based on a misconception of law. A party inviting error is deemed to have waived the right to challenge the correctness of the action below, and similarly the Department should be barred from challenging the district court's decision. *See Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977)(party cannot complain on appeal of adoption of rule of damages in accordance with theory upon which party tried case, even if it was the wrong rule). At best, the Department's position on

this point is incongruous with its argument that the judgment in this case, that resulted from what the Department now argues were improper methodologies and damages, should be allowed to stand.

G. Summary of Precedent and the Department's Methodology

The methodology employed by Mr. Gallion in this action is contrary to established precedent. The Department's position, contrary to the holdings in the *Patel*, *Byrd*, *Williams*, and *Murray* decisions, is that a condemnor need not provide compensation for real property or improvements appropriated in a cure, the purpose of which is to minimize damages that would otherwise occur to remainder property. Taking the Department's methodology one step further, a property owner would not be entitled to any compensation for the taking of land required for a roadway project if the property owner would receive the same rent or the same sales price after a taking as before the taking. For example, assume that a property owner has $100,000 of improvements consisting of landscaping, an irrigation system, and similar improvements within an area being condemned and taken by the Department for a road widening project. Using the Department's methodology, if the Department can present evidence that the before and after value of the property remains the same, even though the property owner will sustain the loss of these improvements,

the property owner is not entitled to any compensation. Based on the Department's methodology, even though the property owner sustains the loss of these improvements and receives no compensation for that loss, the property owner has received constitutionally adequate full compensation.

The methodology is contrary to the Florida Constitution and the central policy of eminent domain law in Florida that "owners of property taken by a governmental entity must receive full and fair compensation." *Broward County v. Patel*, 641 So. 2d 40, 42 (Fla. 1994) (*citing* Article X, § 6, Florida Constitution). The constitutional provision that "no private property shall be taken except for a public purpose and with full compensation therefor paid each owner...." applies equally to real and personal property. *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261, 263 (Fla. 1990).

The following analysis demonstrates that the Department's argument in support of Mr. Gallion's methodology is without merit. The Department argues that the loss of real property and improvements that the property owner would sustain via the implementation of the Department's cure is compensated by Mr. Gallion's methodology. His methodology incorporated a diminished fair market value solely as a result of a loss in rental income assuming the cure is implemented. The area the

Department proposed to appropriate as part of its cure contained real property and improvements, including one thousand six hundred twenty square feet of land, an irrigation system, landscaping, and arbor structures. According to the Department's argument, assuming the Department's cure is implemented the fair market value of the appropriated real property and site improvements has no bearing on the property's owner's compensation.

The following examples demonstrate the Department's methodology and damages in this case but assume, *arguendo*, different fair market values for the appropriated property. If the appropriated real and personal property and improvements have a fair market value of $10,000, the property owner's damages are $308,400, which is equivalent to the alleged loss in rental brought about solely as a result of loss of parking. If the appropriated real property and improvements have a fair market value of $100,000, the property owner's damages remain $308,400, the alleged loss in rental income. If the appropriated real and personal property and improvements have a fair market value of $500,000, the property owner's damages are still $308,400. Thus, whether the property owner's fair market value damages are $318,400, $408,400, or $808,400, under the Department's methodology the damages remain $308,400.

Under the Department's methodology, if the property appropriated for the Department's cure has a fair market value of $50,000, or includes an irrigation system recently installed for $100,000, a garden area containing landscaping valued at $15,000, an ornamental wall and fountain valued at $50,000, or a shuffleboard court valued at $5,000, the appropriation of the fair market value of such real property and improvements would not be a part of the property owner's compensation because the property owner's compensation consists solely of a loss in rental income. The argument does not withstand analysis.

H. Mr. Gallion's Testimony Should Have Been Excluded

The Department contends that the district court decision erred in treating Mr. Gallion's testimony as based on a misconception of the law that precluded its admission and, as such, is in conflict with *State Road Department v. Falcon, Inc.*, 157 So. 2d 563 (Fla. 2d DCA 1963), and *Rochelle v. State Road Department*, 196 So. 2d 477 (Fla. 2d DCA 1967). The *Falcon* decision holds that an appraiser's failure to consider one transaction in arriving at a value opinion goes to weight as opposed to admissibility. The *Rochelle* decision holds that an appraiser's testimony should not be excluded because of the methodology employed unless the methodology is inadequate or improper.

The district court found that Mr. Gallion failed to provide compensation to the property owner for the appropriation of property required by the Department's cure. Accordingly, the *Falcon* decision is not analogous. The case under review is not one in which the appraiser did not consider a particular transaction in reaching his opinion on severance damages. Instead, Mr. Gallion failed to provide any compensation for the property appropriated by the Department's cure, as has been found improper in *Patel.* 641 So. 2d at 44 (awarding condemnees nothing for lost property value associated with converting other property to replace lost parking was error).

The jury in this case awarded $308,400 in severance damages, the amount supported by Mr. Gallion's testimony. R: 543. The jury's itemized verdict demonstrates that these damages were based on his testimony, even though it was the product of a misconception of the law and would have been a greater amount if he had correctly applied the law and provided compensation for the Department's cure's appropriation of the Arbor Area.

A failure to provide compensation for property appropriated in a cure is a misconception of the law that requires a court to exclude that testimony. *Williams v. Department of Transportation*, 579 So. 2d 226, 229 (Fla. 1st DCA

1991)("Where the testimony of an appraiser is based on a misconception of the law resulting in a lower valuation of damages than if he had correctly applied the law, such testimony should be excluded."); *Department of Transportation v. Byrd*, 254 So. 2d 836, 837 (Fla. 1st DCA 1971)("Where the testimony of an appraiser is based on a misconception of the law, the testimony should be excluded."). *See also Department of Transportation v. Murray*, 670 So. 2d 977, 979 (Fla. 1st DCA 1996), *decision quashed on other grounds*, 687 So. 2d 825 (Fla. 1997)(testimony inadmissible as matter of law and properly excluded because Department's witness ignored reduction in value of property resulting from Department's cure). The district court correctly held that Mr. Gallion's testimony should have been excluded as a matter of law because it was based on a misconception of law. *Armadillo,* 780 So. 2d at 236; DA: 3.

The district court decision is consistent with the *Rochelle* decision because the *Rochelle* decision also holds that exclusion is appropriate if the methodology is improper. As shown, Mr. Gallion's testimony was improper since it was based on a misconception of the law.

ISSUE II

THE DISTRICT COURT HELD THAT THE DEPARTMENT'S CURE FAILED TO COMPLY WITH ITS OWN PLANS AND, WITHOUT ADDITIONAL

PROOF, WAS IMPROPER AS A MATTER OF LAW

The Department's proof, including testimony by its own engineer, confirmed that the Department's cure could not be built to tie into the driveway located within Parcel 715, the area designated in the Order of Taking as the temporary construction easement. AA:6. The driveway and curb cuts in the Department's cure were nine feet further to the east than the driveway and curb cuts provided for in the Department's plans and that were to be constructed within Parcel 122 to tie the new roadway into the western driveway location on Griffin Road. *Compare* AA:12 (location of curb cuts, sidewalk, driveway and temporary construction easement (Parcel 715) in accordance with the Department's plans and specifications) with AA:13 (location of proposed curb cuts, sidewalk, and driveway in Department's cure) and AA:18 (location of curb cuts, sidewalk, driveway, gravity walls and temporary construction easement in accordance with the Department's plans and specifications shown in context of Armadillo's cure); T:111, line 20-T:112, line 16; T:933, lines 8-18; and T:934, lines 2-17; T:109, lines 8-22 (manner in which planned improvements will be constructed on Parcel 122). (The Department's plans were admitted into evidence as Department's Exhibit 2, however, the exhibit is too voluminous to include in the appendix to this brief and the salient points

concerning the construction and location of the referenced improvements are shown on the referenced exhibits, i.e. AA:18). In addition, constructing the westernmost driveway on Griffin Road at its existing location required that the temporary construction easement be increased fifteen feet to the east, west, and south to account for the sloped driveway associated with the increased roadway height on Griffin Road. T: 934, lines 2-12.

As seen in comparing the referenced exhibits which show the location of the Department's planned construction and improvements and the Department's cure, the Department's cure involved placing a sloped driveway on Armadillo's property nine feet to the east of the location of Parcel 715 that could not make use of the curb cuts, sidewalk, gravity walls, and driveway onto Griffin Road constructed as part of the road improvement project whose purpose was to "tie in and harmonize the existing driveways" to the Armadillo property at Parcel 715. AA:6; AA:12; AA:13; AA:18; T:111, line 20-T:112, line 12. The Department's cure's driveways could not be constructed within Parcel 715, without the use of additional property on Armadillo's property, and unless the curb cuts, retaining wall, sidewalks, and related improvements shown on the plans were relocated outside the temporary construction easement. The district court correctly held that such a cure

is impermissible as a matter of law and should not have been submitted to or considered by the jury.

At trial, the Department attempted to resolve the conflict between its plans and specifications and its cure through the testimony of its engineer, Douglas Green. The Department authorized Mr. Green, via resolution, to bind the Department "on those issues regarding design and construction of the Project." AA:32. Mr. Green's testimony, however, fell short of providing the proof necessary to overcome the differences between the Department's cure and the Department's plans and specifications. Mr. Green testified that the driveway entrances and related improvements to be constructed at the location of Parcel 715, the temporary construction easement, would be constructed as shown in the Department's plans. T: 109, lines 8-22; T:111, line 20-T:112, line 1. Mr. Green did not testify, however, that the Department would undertake the necessary construction improvements, including removing and reconstructing curb cuts, sidewalk, and gravity walls, to allow for a connection from Griffin Road into the Armadillo property outside of Parcel 715 that would be required if the owner implemented the Department's proposed cure. Mr. Green did not specifically testify that the Department would construct the driveways and associated improvements depicted in the cure, move the associated

improvements being constructed as part of the roadway project to allow for the Department’s cure plan to be implemented if the owner chose to do so, or compensate the owner a specific amount of damages for the additional property required to construct the Department’s cure. T:114-T:120.

In response to a question as to whether the Department would allow the owner to “utilize the driveways” shown in the Department’s cure, he testified “[t]hat would be granted by the Department”. T: 119, line 24-T:120, line 5. That testimony does not represent proof that the Department would construct the driveways depicted on the cure or move the associated improvements being constructed as part of the roadway project if the owner chose to proceed with the cure, as the Department argues. In addition, the Department’s authorization was not broad enough in scope to permit Mr. Green to make any representations concerning providing compensation to Armadillo for use of other property or expanding the size of the temporary construction easement. T:114, lines 3-17; AA:32.

This Court addressed a situation in which a condemnor sought to provide similar limited promissory representations concerning future contingencies and rejected such an approach. In *Belvedere Development Corp. v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), the property owner

objected to the Department's representations concerning future events. In addressing that issue, this Court stated as follows:

> The second point raised . . . is whether the state should have been permitted at trial to make certain promissory representations that they would or would not do certain things in the future which were not in the pleadings or construction plans offered in evidence. The [property owners] assert that the damages caused by a project as contemplated by the construction plans in existence on the date of valuation and the pleadings govern the evidence of valuation and that the representations of a purely promissory or speculative nature should not affect either the character or the extent of the damages the condemnor must pay as full compensation. We agree. When evidence in the form of plans and specifications is properly admitted for the purpose of providing a declaration of the manner in which the condemned property will be utilized the Department should be bound by this evidence.

Belvedere, 476 So. 2d at 653.

The decisions cited in the *Belvedere* decision, *Department of Transportation v. Decker*, 408 So. 2d 1056 (Fla. 2nd DCA 1982), and *Central and Southern Fla. Flood Control District v. Wye River Farms, Inc.*, 297 So. 2d 323 (Fla. 4th DCA 1974), also demonstrate that such a cure is improper. In *Decker*, a temporary construction easement was at issue and one of the Department's witnesses sought to testify concerning activities associated with that easement. In *Wye River Farms*, no plans had been filed prior to trial. The reviewing courts in both

decisions held that once plans were entered into evidence, the plans were controlling. Specifically, when plans and specifications are in evidence "the condemnor is bound thereby and the issues as to damages to the remainder are framed therein." *Wye River Farms*, 297 So. 2d at 327. *See also Trailer Ranch, Inc. v. City of Pompano Beach*, 500 So. 2d 503, 505 (Fla. 1986)(approving statement of applicable legal principles in *Wye River Farms*).

The Department's proof demonstrated that it would not be possible to construct the Department's cure utilizing the curb cuts, sidewalk, gravity walls and driveway to be constructed in accordance with the Department's plans adjacent to the driveway entrance at the location of Parcel 715, the temporary construction easement, but required the use of additional property nine feet to the east. The Department also did not provide evidence that the Department would undertake the necessary changes to the referenced improvements in the event the owner chose to implement the Department's cure. Accordingly, the Department's cure was improper as a matter of law and the district court decision was correct.

The Department argues, in part based on the *Patel* decision, that the district court decision will require the Department to change its construction plans to implement partially a cure before the cure plan may even be admitted

into evidence. This statement is inaccurate. The Court in *Patel* never mentioned, let alone discussed, construction plans. Nevertheless, the district court decision does not require the Department to change its construction plans as a prerequisite to introducing a cure involving driveway locations that differ from those locations shown in the Department's construction plans.

Instead, the district court decision requires either that the Department's cure is consistent with its construction plans <u>or</u>, assuming the cure is to be implemented, that the evidence show "a reasonable probability that the plan's changes [i.e. the change in driveway locations and movement of associated improvements] are feasible, meet all necessary statutes, ordinances, codes, and regulations, and that the Department intends to construct the driveways at those locations." *Armadillo,* 780 So. 2d at 237; DA:3 (bracketed language supplied). The Department would only need to demonstrate it intends to construct the changes in the event the cure was implemented, not that it intends to construct the driveways at these locations regardless of whether the cure is implemented.

The district court's decision does not require the Department to construct the changes or modify its plans on the possibility that the cure may be implemented. The decision

does require proof that if the property owner later proceeds with the cure, the Department will undertake the necessary changes. As the district court noted and as the Department argued, the Department's cure evidence "was only offered to show a potential cure, which does not have to be part of the plans . . . ." *Id.* (emphasis supplied). The district court decision simply provides that the Department cannot propose a cure, a component of which, i.e. the construction of driveway entrances and movement of associated improvements, has been provided for neither as part of the evidence related to the cure nor as part of the construction plans themselves.

In addition, the Department argues that the district court erred because Armadillo failed to preserve its objections to the Department's cure's driveway locations. At the conclusion of Mr. Gallion's testimony, however, in addition to the other grounds stated to strike Mr. Gallion's testimony, Armadillo moved to strike both Mr. Gallion's and Mr. Tinter's testimony because of the Department's cure's driveway locations. T:591, line 22-T:592, line 3; 594, lines 6-12. Later, during testimony by Armadillo's engineer, Armadillo moved to strike "all of [the Department's] witnesses' testimony" as it related to driveway locations that were outside the temporary construction easements. T:806, lines 11-23. At that time, the trial court denied the motion

and directed Armadillo's counsel to "raise it again later." T: 808, lines 4-6.

Accordingly, after presenting a written motion with authorities to the trial court, Armadillo's counsel again moved to strike the Department's cure plan, which the trial court denied. T: 1136, line 7-T:1137, line 18. The issue concerning the variance with the construction plans is not barred from appellate review since the objections and related motions, although admittedly not specifically contemporaneous, were nonetheless sufficient to apprise the trial judge of the alleged error and to preserve the issue for an intelligent review of the issue. *See Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984).

The district court decision merely enforces existing Florida precedent. As before under Florida law, the Department must either ensure that its cure is consistent with its construction plans or, if not, ensure that it introduces adequate evidentiary substantiation that any other required improvements will be made assuming the cure is implemented.

CONCLUSION

The decision of the Fourth District Court of Appeal should be affirmed. The award of attorneys' fees to Armadillo for the appeal to the Fourth District Court of Appeal should

be affirmed based on the reasons and authority set forth in Armadillo's motion for attorneys' fees incurred in the appeal to this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Marianne A. Trussell, Esq., Deputy General Counsel, Department of Transportation, Haydon Burns Building, M.S. 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458, and Robert I. Scanlan, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida 32399-1050, this ______ day of October, 2001.

____
Geoffrey L. Jones

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing respondent's answer brief contains Courier New 12-point font and complies with the font requirements contained within Rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

____
Geoffrey L. Jones