O/a 10-3-84

IN THE SUPREME COURT OF FLORIDA

ATLANTIC INTERNATIONAL INVESTMENT CORPORATION, Petitioner, vs. STATE OF FLORIDA, et al., Respondents.	)	Case No. 64,551
MAX SIMON, individually and as class representative, Petitioner, vs. STATE OF FLORIDA, et al., Respondents.	)	Case No. 64,552 (Consolidated)

PETITIONERS' INITIAL BRIEF ON THE MERITS

Cynthia S. Tunnicliff
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Max Simon, individually and as class representative

Peter J. Winders
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
(813) 223-5366

Attorneys for Atlantic International Investment Corporation

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PREFACE - DEFINITIONS AND ABBREVIATIONS

Plaintiff Atlantic International Investment Corporation ("Atlantic") is a Florida corporation and was the developer of the "Cape Atlantic Estates" ("CAE") subdivision. Plaintiff-intervenor Max Simon is the representative of the class of purchasers at CAE ("Simon class").

The various government actors are the State of Florida ("State"); the Department of Pollution Control ("DPC") which later became the Department of Environmental Regulation ("DER") and will be referred to as DER; the Department of Business Regulation ("DBR") and its Division of Florida Land Sales and Condominiums ("Division") (collectively "DBR"); St. John's River Water Management District ("St. John's"); and Volusia County. South County Drainage District ("SCDD") was a drainage district created by the 1967 Florida legislature, but administered under the provisions of Chapter 298, Florida Statutes, under Circuit Court supervision.

References to the Appendix to this brief are indicated by "A," the record by "R," the parties' pretrial stipulation (A. 51-90) by "PSTIP," the 50 page Final Judgment (A. 1-50) by "FJ." The Final Judgment contains many citations to the evidence, and the copy of the Final Judgment in the Appendix has been annotated to show the page of the Record on Appeal where Plaintiff's Exhibits are indicated by "PX." The lower court clerk did not assign a record page number to the pages of exhibits so individual page numbers of the exhibits are given where appropriate. All emphasis has been added.

INTRODUCTION

This case involves factually complex circumstances which, as the trial court found, are unique. In 1967, with the specific blessing of the Florida Legislature, the project involved here was commenced; the project contemplated the drainage, reclamation, and development of approximately 14,000 acres in Volusia and Brevard Counties through the legislatively created SCDD. Relying on that State policy, Atlantic sold and the individual members of the Simon class bought hundreds of lots in CAE with the promise that drainage and access roads would be built. After the property was sold with those representations, so that there was no opportunity for Atlantic to "go back to the drawing board" and design the project differently, new State agencies were created, which, either with or without legislative authority, felt that the preservation of CAE like the surrounding state-controlled ecologically sensitive areas was more important than the vested rights of Atlantic and its purchasers. A series of State actions resulted in the pattern of delay which continued even past the 1977 date found by the trial court to be the date of taking - when the project had become economically impossible.

The trial judge, hearing all of the evidence, found that the cumulative result of State actions and delays had resulted in a taking of the property including both those lots still owned by Atlantic scattered around the subdivision and the lots of the individual purchasers who are members of the Simon class. As a result, the property had indeed been preserved in its natural state, achieving the same result as if the State had purchased the property as it has much of the surrounding area. Indeed, some of the surrounding area was purchased with the justification

that the purchase of adjoining property would give the State control over CAE. Here the trial court ordered the State to commence condemnation proceedings so that compensation could be paid as required by the State and Federal Constitutions.

STATEMENT OF THE CASE

In 1975, Atlantic brought suit in Leon County Circuit Court against the Division, Volusia County, and DER. Atlantic alleged that DER, without explanation, had denied a permit for improvements at CAE, and that although administrative proceedings were pending in an effort to obtain the permit, DBR had begun action to revoke Atlantic's registration under the Land Sales Law because the planned improvements had not been installed at CAE by December 1973. It also was alleged that Volusia County had breached its contract with Atlantic to use its best efforts to secure all necessary permits. The complaint sought compensation from the State for inverse condemnation of Atlantic's property as well as other relief not material here. [R. 3].

Interlocutory rulings. On motions to dismiss for failure to exhaust administrative remedies and for failure to state a cause of action, Judge Cawthon recognized the potential tension between the Circuit Court's jurisdiction to decide constitutional "taking" questions and the pending DER permitting process. He accordingly denied the motion to dismiss but required Atlantic to complete the administrative permitting process before any determination of the "taking" issues. [R. 88, 362]. He specifically retained jurisdiction over the constitutional "taking" claims for determination after the permitting process was complete.

Interlocutory appeal and law of the case. An interlocutory appeal was filed [R. 366] in which it was asserted that the case should have been dismissed because the Circuit Court lacked jurisdiction in that any inverse condemnation questions should be decided not in Circuit Court, but on District Court review in the pending permitting proceedings (R 90, 335). The First District rejected those arguments and affirmed. Volusia County v. Department of Business Regulation, 325 So.2d 454 (Fla. 1st DCA 1976) [R. 404]. This decision of the First District established the law of the case that the taking issues were reserved to this case and were not at all involved in the permitting proceedings. [FJ ¶ 8, A.9]. (See Argument Point IB at. p.39, below).

Meanwhile, the permitting proceedings (including the review process) lasted until June 1977, when DER finally issued a permit with certain additional conditions and the parties dismissed the permit review in the District Court as moot. However, when St. John's then asserted permitting jurisdiction over the project, Atlantic faced the prospect of more delay and expense. Atlantic thereafter determined that the improvements could no longer be installed because of financial considerations resulting from the increased costs of the improvements and the effect of the State's seven year delay in issuing the permit, together with the ongoing prospect of additional delays from other State agencies.

1979 suit, consolidation, resolution of certain issues. Although most of the issues in the 1979 suit were resolved before trial, a brief explanation is appropriate. After the project had been rendered economically impossible, Atlantic sued DBR demanding that an improvement trust fund under the DBR's control be released for distribution to CAE purchasers. Simultaneously, the Division issued an

administrative order to show cause why Atlantic should not turn over all assets (including its remaining lots) to the Division for distribution to the purchasers. Atlantic amended its complaint to seek to enjoin the Division's action as another attempted "taking" of its property. That case and the pending 1975 action were consolidated.

Amended and supplemented complaints were filed, setting out the transactions and occurrences since the 1975 complaint and adding St. John's as a defendant. The Simon class of purchasers of lots in CAE intervened as plaintiffs. Many issues were settled and, by time of trial, the only issues were the inverse condemnation or "taking" claims under the Amended and Supplemented Complaint.

Pretrial rulings and issues for trial and trial. The Circuit Court ultimately dismissed certain defendants including Volusia County and St. John's, but expressly held their acts relevant in determining if there had been a taking. [R 1487] [FJ ¶ 11, A. 10, 11]. Although Judge Rudd permitted complete reargument of all previous motions when he replaced Judge Cawthon,[1/] he ultimately agreed with Judge Cawthon's rulings. [R. 1905].

A lengthy pretrial stipulation framed the issue to be tried as "whether the cumulative actions of the State of Florida, by and through its agencies,

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1/ The State claimed Judge Cawthon demonstrated predetermination of the case by ruling that Atlantic had stated a cause of action and later citing that ruling in another case. [R. 1531-1592, 1614, 1628]. Judge Cawthon ruled that he was required to recuse himself automatically once a motion was made, although he was not aware of any prejudice. [R. 1844; see also R. 1680, 1704].

divisions, political subdivisions, or agents, including the remaining defendants, and including Volusia County and St. John's constituted on or before September 1, 1977 . . . unlawful taking of . . . plaintiff's property . . . ." [PSTIP at 23-24, A. 73-74]. After trial, the trial court entered a 50-page Final Judgment (A. I-50) finding that the actions of the State, with or without considering the actions of Volusia County and St. John's, had "taken" the land in CAE, and accordingly ordering the State to institute condemnation proceedings. [FJ ¶ 83, A. 41, 49].

Decision on review. In the decision on review, the First District Court of Appeal reversed, holding that the Circuit Court erred in reaching the merits of the case at all! Directly contrary to the First District's previous decision in the interlocutory appeal -- where it affirmed the Circuit Court's reserving jurisdiction over the inverse condemnation claims while the administrative process was completed -- the District Court held on appeal from the Final Judgment that Atlantic was foreclosed from prosecuting its constitutional claim in Circuit Court. The Court held that Atlantic should have had its inverse condemnation claim determined in the District Court on review of the permit denial. This holding was made despite the fact that the parties had stipulated in the permitting case that only permit issues and not taking issues were involved, and despite the fact that the permit review had not been decided by the District Court but had been declared moot by both the parties and the court when DER finally agreed to grant the permit. Although the members of the Simon class had not even been parties to the permitting proceedings, the District Court reversed to them as well. In addition, the District Court reweighed the evidence establishing the 40 pages of facts found by the trial judge and disagreed with the trial judge with respect to two such factual findings.

Motions for rehearing were denied and petitioners timely filed notices invoking this Court's jurisdiction to review. The Court accepted jurisdiction by its order of May 23, 1984.

STATEMENT OF THE FACTS

I. CHRONOLOGICAL REVIEW OF THE FACTS

A. Summary of the facts. At the time Atlantic began selling lots at its registered CAE subdivision in 1967, the only State requirements were those of DBR's Division of Land Sales that the promised improvements of graded dirt access roads and surface water drainage be timely installed. (FJ ¶28-30 A, PSTIP ¶ 8 A. 55). In 1967, the Legislature created a drainage district covering the property, finding specifically as public policy that the CAE lands should be drained and reclaimed. Between 1967 and mid-1972, Atlantic sold lots in CAE pursuant to the registrations approved under the Florida Land Sales Law. [Trella at 121, R. 4238]. By the time the State-created delays began in 1970, a 12 mile main canal had been constructed and the promised improvements were on time and within budget. [FJ ¶22, A.15]. By the time the DER first asserted jurisdiction in 1971, most of the land had already been sold to the members of the Simon class. [FJ ¶31, A.19].

Thus, it was only after the majority of lots had been sold -- so that redesign of the project was impossible as a practical matter -- that the State established new agencies, which imposed new and conflicting regulations and requirements for the improvements, causing a delay of almost ten years until it was economically impossible to install the improvements. As a result, all of the lot owners, including Atlantic, are left with landlocked, undrained and inaccessible lots which are incapable of any reasonable use. [FJ p. 49]

The trial court heard and evaluated the testimony of the witnesses in a week long trial and considered the facts established by a 25 page pretrial stipulation, more than 100 exhibits, and depositions. He found as a fact that the State's actions had deprived Atlantic and the Simon class of all reasonable use of their lots and that, therefore, there had been a "taking."

B. Acquisition, Description and Registration of CAE. In 1967 and 1968, Atlantic acquired some 12,000 acres in Volusia County and 2,000 acres in Brevard County for more than $7 million. Atlantic planned to sell two and one-half and one and one-quarter acre lots. [PSTIP III, A. 53; Trella at 15-16, 73, R. 4127-4128, 4188; Lipman at 27, R. 4277; Intervenors' Exhibit 118 PX 2; FJ ¶ 12, A. 12]. The 7,400 acres of CAE located west of Interstate 95 were generally high but needed drainage during rains because they are very flat (insufficient runoff) and because shallow "hardpan" areas underlie the surface soils (preventing percolation). [Garcia at 15, 18-20 R. 3912, 3915-3917; PX 11, 12, 27, 28 at page I-3]. Drainage of the property could be accomplished because the surface wetness is "ponded surface waters" or a "perched water table" over the hardpan areas and does not represent the true groundwater table which is generally between four/and eight feet below the surface. [Garcia at 21-23, R. 3918-3920; PX 27 at page 48; PX 28 at page II-6]. The CAE lands east of Interstate 95 slope to the Turnbull Hammock, the "reserved" area on the maps of CAE and are drier than the higher lands west of Interstate 95. [Garcia at 15, 23, R. 3912, 3920; PX 1, 2; FJ ¶ 13, A. 12]

The CAE lands were registered for sale with the Division in 1967 and 1968 under the Land Sales Law (Chapter 478, now 498, Florida Statutes). [P STIP III.4, A. 54; PX 7]. It is undisputed that, "upon approval of the registration statements, it was a requirement of the Division that the lands offered for sale be drained of surface water and that graded dirt roads be provided before December 31, 1973." [P STIP III.8, A. 55; FJ ¶ 29, A. 18].

The registered public offering statements and agreements for deed disclosed that the lots needed drainage, were not physically accessible, and would not be useable until the improvements were installed. They further represented that SCDD would improve them with graded dirt roads and drainage by December 31, 1973. [PX 8; Trella at 17, 23, R. 4129, 4135]. Atlantic was to finance the improvements in exchange for SCDD bonds, which SCDD was to retire from taxes or assessments against CAE lots beginning in 1980. [PSTIP III.5, 9, A. 54-55; Trella at 23, R. 4135; PX 8, 9, 10; FJ ¶ 30, A. 18].

Between the initial registration in 1967 and mid-1972, over 95 percent of the lots were sold to some 5,000 purchasers in 1-1/4 acre and 2-1/2 acre parcels under agreements for deed.

C. Creation of SCDD - Legislative Policy to Drain CAE. In 1967, the Florida Legislature found the drainage of CAE to be a matter of public policy. The Legislature created SCDD by special act "[f]or the purpose of draining and conserving the lands [at CAE] . . . [and for making] the lands [within CAE] available . . . for agricultural, settlement, urban and subdivision purposes by drainage, reclamation, and improvement. . . ." [PX 6, Chapter 67-1022, Laws of Florida].

The statute declared water within CAE a "common enemy" and granted SCDD the power to levy taxes. [PSTIP III.7, A. 55; PX 6, 91; FJ ¶ 15, A. 13].[2/]

D. Improvement Plans and Improvements. A CAE Plan of Reclamation was prepared for SCDD in 1967, and was supplemented once in 1968. [PX 71]. In June, 1968, Atlantic and SCDD signed an agreement documenting Atlantic's undertaking to advance the costs in exchange for SCDD bonds. [PSTIP III.9, A. 56; FJ ¶ 18, A. 14; Trella at 25, R. 4137; PX 10; Lipman at 8-9, R. 4389-4390].

The J. J. Garcia engineering firm supplemented the reclamation plan in May 1969 to include all of CAE by adding areas K-2, K-3 and K-4. Total costs were at that time estimated to be $1.7 million, or approximately $110 per acre. [Lipman at 8, R. 4389; Trella at 25, R. 4137; PX 9, 12; FJ ¶ 20, A. 14]. SCDD issued a revised plan of reclamation in June 1971 which would preserve certain ecological elements. [PX 12; FJ ¶ 21, A. 14-15]. In each plan, the access roads and drainage followed the lot lines in a gridwork fashion, a common and acceptable design in the late 1960s. [Trella at 42, 76, R. 4127, 4191; McLouth at 78, R. 4328]. Once the majority of lots were sold, it would have been an "insurmountable problem" to redesign the project to change the grid design which followed the borders of the lots. [Trella at 42, R. 4157. See also Trella at 77, R. 4182].

2/ The special act provided that the general drainage district statute (Chapter 298, Fla. Stat.), providing for circuit court supervision and control, would otherwise apply to SCDD [PX 6], and accordingly, on May 2, 1967, a petition to form the SCDD was filed in Volusia County [PX 14 at pages 1-2], resulting in an order to that effect in September 1967. [PX 14 at pages 24-26]. Thereafter the SCDD boundaries were occasionally extended to conform with CAE boundaries. [PX 14].

Work on the improvements commenced in 1967. By 1970, Atlantic had advanced substantial sums for the improvements, the 12-mile main outfall canal which parallels Interstate 95 was completed, and SCDD was engaged in detailed engineering for follow-on construction. [PSTIP III.15, III.16, A. 57; Trella at 10, 27-29, 31, R. 4122, 4139-4141, 4143; Garcia at 24, R. 3921; Lipman at 10, R. 4391; Intervenor's Exhibit 118]. At that time, the improvements were on time and within budget. [Trella at 28-29, R. 4140-4141; Garcia at 24, R. 3921; FJ ¶ 22, A. 15].

State-Created Delays Begin

Between 1970 and 1977, a series of acts by the State of Florida occurred which prevented the completion of the improvements required by the State. Since most lots were already sold, thus eliminating any alternative use of the land as a whole, this foreclosed any reasonable use of Atlantic's remaining checkerboarded lands and of the lots of the individual purchasers.

E. Volusia Home Rule Charter abolishing SCDD. In 1970, the Legislature adopted and Volusia County voters approved a home rule charter, effective January 1, 1971. Although no notice was given to Atlantic or SCDD, the charter specifically abolished SCDD and transferred its powers to Volusia County. [PSTIP III.17, A. 57; PX 24, Section 1409; Trella at 27-28, 31, R. 4139-4140, 4143; FJ ¶ 37, A. 20-21]. Volusia County apparently had not realized when the charter was drafted that SCDD was an active drainage district and it did not wish to take up the project where SCDD left off, saw no urgency to complete the improvements on time, and wished to avoid spending general funds. [Dakan depo. at 13, 16, 17, 19, 22, 30-31; Trella at 33-36, R. 4145-4148].

Negotiations and litigation concerning the effect of the charter on SCDD and its obligations eventually resulted in a December, 1973 agreement between Volusia County, the County on behalf of SCDD, and Atlantic. [PSTIP III.17, III.18, A. 57; PX 26]. Under that agreement, the County formed a special tax district with the same name as SCDD to do the CAE improvements, and, in return for Atlantic financing construction, Volusia County agreed to levy taxes to repay Atlantic and to cooperate in seeking all permits. Nevertheless, when coupled with other State actions, the practical effect of the abolition of SCDD was to delay progress on the improvements nearly three years.

F. DER Delay in Discussing or Processing Permit. During and after that three year period, DER imposed significant and unwarranted delays on the CAE permitting process. No DER permits had been required when the improvements were begun.

(1) DER's (DPC's) first assertion of jurisdiction in late 1971. As of 1971, DER had not adopted dredge and fill regulations. [PSTIP III.20, A. 58; FJ ¶ 45, A. 23]. In late October 1971 (with almost all CAE lots sold, the improvements designed, the main outfall canal dug, and much money spent on the improvements), DER first asserted permitting jurisdiction over the improvements at CAE. [PSTIP III.21, A. 58; Trella at 126-127, R. 4243-4244; FJ ¶ 45, A. 23]. At that time, DER intervened in the SCDD Volusia County Circuit Court supervisory case and specifically asserted its permitting jurisdiction pursuant to Fla. Stat. §403.087 and §403.088, which statutes would not become effective until January 1, 1972. [PX 14].

(2) DER's refusal to discuss permit requirements - 1971-73. While the problem caused by the abolishment of SCDD was pending, DER refused to process or

even discuss a permit application with Atlantic. [Trella at 43, 83, R. 4155, 4198; Garcia at 36-37, R. 3933-3934; P STIP III.22, A. 58; FJ ¶ 47, A. 24]. DER took this position even though the State Attorney General, who handled DER's intervention in the SCDD matter, acknowledged that DER should provide technical advice while the problem was being resolved because DER would "require a permit for excavation whether the district continues to exist as a legal entity or whether it is incorporated within the Charter Government of Volusia County." [PX 95 (letter dated June 9, 1972)].

DER refused to provide such technical assistance, however. [Trella at 43, 83, 85, R. 4155, 4198, 4200]. Despite continuous delivery of information on the project and repeated requests by Atlantic and SCDD for such help, DER refused to discuss technical requirements or modifications until SCDD's status was resolved. [Garcia at 37-38, R. 3934-3935; FJ ¶ 47, A. 24]. Trying to anticipate possible concerns, Atlantic commissioned an expensive and detailed environmental study [PX 27] by an independent environmental engineer and filed it with DER and other agencies [McLouth at 56 et seq., R. 4306 et seq.; Garcia at 29, 36-37, R. 3926, 3933-3934; PX 110, 111]. Still, DER would provide no guidance.3/

(3) DER processing permit and denial - 1974. It was only upon the conclusion of the SCDD litigation in December 1973, that DER's Tallahassee office sent Atlantic to DER's regional office in Orlando to "start fresh." [Garcia at 38, R. 3935]. At that point, permitting proposals were discussed with DER, and modifications to the improvement plans were made to the extent possible in accordance

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3/ DPC's unreasonable conduct sharply contrasts with that of other State agencies. See facts at p. 16 (Section H) below.

with DER's suggestions. The formal permit application was filed in September 1974. [PX 29]. Although it had been preliminarily approved [Garcia at 40-42, R. 3937-3939; Trella at 42, R. 4154; PX 36], it was denied in November 1974 with no elaboraton as to defects or additional requirements. [PX 30; PSTIP III.25, A. 59; FJ ¶ 49, A. 25]. The permit denial was not for statutory reasons but, as the trial court found, was for individual reasons of the four state employees charged with the decision. [PX 36; PSTIP III.26, A. 59-61; FJ ¶ 49, A. 25]. Additional delay was the result.

(4) Denial of permit on private or non-statutory grounds - delay - 1974-77. Four DER employees participated in the decision to deny the permit. [PSTIP III.26, A. 59; FJ ¶ 50, A. 25]. The trial judge specifically found that those individuals were acting for private reasons rather than on the basis of proper statutory grounds.[4/] Three months after the initial permit denial, the same Volusia County environmental control officer who had opposed the project wrote a letter to DER changing his position [DX 4] and, in the 1975 administrative hearing, Volusia County supported the permit. [PSTIP III.27, A.61]. Even when it was made absolutely clear that Volusia County actually supported the permit, and that, in addition, that the State hydrologist

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4/ Medley adamantly opposed any grid design and any draining of wetlands; Hulbert's personal philosophy was to "pass the buck" to a hearing officer when any local opposition surfaced, even unsupported opposition as occurred here; Hunnicutt (an engineer who replaced the one who had conducted the pre-application review) was under the misimpression that a state hydrologist had disapproved the project. Senkevich, the District Manager who had the final authority, had been of the impression that the matter had been worked out, as Garcia testified, but voted to deny the permit because the other three members of his staff opposed it. (PSTIP III. 26 (a)(b)(c)(d)(e), A 59-61; PX 36, 37; FJ ¶50, A 25-26.)

agreed with Atlantic, DER continued its delay. Thus, the permit was initially denied in part because of Volusia County opposition and erroneous facts, but even when those were withdrawn or corrected, DER and the State delayed more years in the face of Judge Cawthon's earlier warning that such conduct could affect the taking issues "vastly."[5/] These facts are part of the factual basis for the trial court's finding that State and DER actions ultimately deprived Atlantic and the purchasers of all reasonable use, even without considering Volusia County's actions. [FJ ¶ 11, A. 11]

(5) Division's 1974 Order to Show Cause - Origination of 1975 Suit and Administrative Permit Proceeding. The Division was kept fully aware of the governmental problems Atlantic had encountered. [PX 97, 101, 102, 106, 107, 109, 112, 114-117; PSTIP III.28, A. 61; FJ ¶ 23, A. 15]. Nevertheless, in August, 1974, the Division issued an order to show cause why the registration for CAE should not be revoked for failure to install the improvements by December 1973 [PX 32]. When DER denied the permit in November, 1974, Atlantic commenced an administrative challenge and, in early 1975, Atlantic instituted this suit, resulting in the Circuit Court's order, approved by the First District on interlocutory appeal, that the taking issues were reserved for this case while Atlantic completed the administrative permitting process.

Atlantic's administrative challenge of the permit denial was held under the "old" administrative procedures act, and evidence was limited by rule to the

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5/ "The agencies can increase the ultimate liability of the State vastly by a mishandling of the administrative proceedings. That is going to be the damages and the value of the compensation of the taking, if it turns out to be that. It is going to depend a great deal on the way that the administrative agencies handle their jobs." [Transcript of Hearing of March 11, 1975, R. 217]

situation at the time of the 1974 denial of the permit. Relying on the Circuit Court ruling that the taking issues were reserved to the Circuit Court case, the parties stipulated before the hearing officer in the permitting proceeding that he should consider none of the constitutional "taking" issues raised in the 1975 complaint. [PX 35, 38]. Although the hearing officer recommended the permit be issued with conditions [PX 38], on May 4, 1976, DER issued a final order denying the permit, ignoring the hearing officer's findings and imposing the impossible burden of proof that Atlantic predict and plan for whatever use its purchasers might make of the property in the future. [PSTIP III.29, A. 61; PX 39; FJ ¶ 51, A. 27].

(6) Administrative appeals - 1976-77; Permit issued. Atlantic simultaneously sought review of the DER final order in the First District Court of Appeal (under "old" section 120.31's certiorari review) and in the Environmental Regulation Commission. DER moved to dismiss both review proceedings on the clearly inconsistent grounds that the other had exclusive jurisdiction. [PSTIP III.30, A. 61-62; FJ ¶ 52, A. 27]. On June 27, 1977, after oral argument before the District Court on the permitting case but prior to decision, DER and Atlantic entered into a stipulation, approved by the court, which finally gave Atlantic its permit. [PSTIP III.30, A. 61-62; FJ ¶ 53, A. 27]. The permit review proceedings were then dismissed as moot.

G. St. John's asserts jurisdiction - August 1977 - additional delay and expense obvious. CAE's permitting problems were not yet over, however. Approximately one month after finally obtaining approval from DER, Atlantic received notice for the first time from St. John's that it was now asserting permitting jurisdiction over CAE. [PSTIP III.31; A. 62]. St. John's, which only had permitting

jurisdiction in Brevard County, asserted jurisdiction over the entire 14,000 acres of CAE even though it acknowledged internally that its jurisdiction did not include the 12,000 acres in Volusia County. (See further discussion of St. John's infra at 26). [FJ ¶ 54, A. 27-28]

H. Other State Agency Determinations Compared. Between January 1971 and September 1974, Atlantic kept a wide variety of State agencies informed concerning the drainage plan and improvements. [Garcia at 25-26, 34-35, R. 3922-3923, 3931-3932; PX 15-23, 97, 101, 102, 106, 107, 109, 112, 114-117]. With the sole exception of DER, none of these agencies asserted jurisdiction or had any problems with the improvements. The Central and Southern Florida Flood Control District (a predecessor of St. John's) indicated that it had no problems with the improvements, but asked Atlantic to "continue to keep us advised as your work progresses." [PX 16-b]. The Department of Natural Resources indicated that, while it "would prefer to see subdivisions of meandering streets which protect water detention areas, we realize that much of the work in this area has been completed." Thus, DNR recommended only "that every reasonable effort be made to preserve natural patterns and wetlands." [PX 18-d]. Also, the Department of Administration determined that Atlantic's rights were "vested," and that accordingly it was exempt from DRI requirements under Chapter 380, Florida Statutes. [PX 40].

I. Economic impossibility. Faced with the prospect of still further delays by yet another round of permitting with St. John's (which had been consistently hostile to the project even before it asserted jurisdiction), Atlantic was forced to re-evaluate the economic feasibility of this project. Atlantic obtained updated estimates, determined that the improvements could no longer be

feasibly installed, and so notified the Division and Atlantic's purchasers. [See PSTIP III.33, 63; FJ ¶ 55, A. 28; Trella at 57, R. 4169]. As the trial court found, the lengthy delays in determining and informing Atlantic of the additional requirements necessary to obtain the permits for the improvements and in granting the permits had a number of effects which ultimately rendered it economically impossible to install those improvements.

(1) Increased Costs of Improvements

(a) Costs relating to increased complexity of the improvements. Two engineer witnesses established the cost comparison between the original improvements and the 1977 permitted improvements - J.J. Garcia, who had been engineer for SCDD since the 1960's, and Malcomb McLouth, of Brevard Engineering, who had become involved in environmental studies for Atlantic in the early 1970's and who had prepared updated cost estimates in 1977 and for trial. Both are highly qualified (FJ ¶3, 2-5) and are very familiar with the property. Garcia testified, without contradiction, that, apart from inflation, the major portion of the increased costs of the improvements under the 1977 permit was not the result of modifying the improvement plan itself, but in DER's required methods of doing the work and in changes which required extras including stabilized roads throughout CAE. [Garcia at 49-56, R. 3965; accord, Trella at 63, R. 4175]. If extras and inflation were eliminated from McLouth's estimate of the 1977 permitted improvements, the estimates compared very closely with SCDD's estimates beginning in the late 1960s through January, 1973. [PX 25; Garcia at 51, 53, R. 3948-50]. If the project had been permitted in 1969-70 with the more complex conditions that were imposed finally

in 1977, the work would have cost $7 million. [PX 44, 45; McLouth at 74, R. 4324]. It is without contradiction that the more complex improvements at $7 million were well within Atlantic's capabilities if they had been timely imposed. [Lipman, Volume I at 35-42, R. 4416-4423; FJ ¶57, A. 29], [Lipman at 35, R. 4416; FJ ¶58, A. 29].

In short, it was uncontradicted at trial that although either the more complex improvements or the inflation alone were well within Atlantic's capabilities, the combined effects of the State's seven-year delay were not.

(b) Inflation. The effects of delay alone on the cost of improvements are demonstrated by the construction industry inflation table [PX 45] and McLouth's expert testimony, both of which are uncontradicted. Exhibit 45 shows the relatively low inflation rates through the early 1970's to the rapid rise beginning in 1973. Even through 1973, when the prime interest rate was between 5 and 6%, the project, as ultimately permitted, would have been feasible. [Lipman at 46, R. 4427]. However, by the date of taking in mid-1977, the cost of doing any project was 240% of the cost of the same work in 1967 when this project began. When coupled with the devastating effect of delay on the income side of Atlantic's picture discussed below, the rise in inflation during that delay made the project economically impossible.

(2) Decreased Income

(a) Cessation of Sales and Cancellations. One devastating effect of the state-caused delays and resulting uncertainties was the cessation of sales. As owner of a registered subdivision, Atlantic was required to make accurate disclosures in order to make sales. Chapter 478, Florida Statutes (1971). By mid-1972, the uncertain situation made accurate disclosure impossible, so Atlantic ceased sales.

[Trella at 26-27, R. 4138-4139; Lipman, Volume I at 29, R. 4410]. The agreements for deed permitted purchasers to cancel without further obligation, and cancellations rose sharply when the delays continued. [Lipman Vol. I, 20-22, R. 4401-4403]. As a result, Atlantic ended up with 2,079 lots which it was unable to resell. The lots had been selling at $5,990, and they were a significant portion of the economic viability of the project.[6/]

The State argued below, without evidentiary support, that sales could have been recommenced if Atlantic had merely applied to DBR for permission to do so. Significantly, DBR made no such argument, and, as the Circuit Court specifically found [FJ ¶ 60, A. 30-31], obviously that was not the case.

In 1972 the Division had requested no further sales be made, and had refused to extend the 1973 improvement completion date despite knowledge of the SCDD situation. [PX 96-99]. In mid-1974, DBR instituted a proceeding to revoke Atlantic's registration for failure to install the improvements. Caught between the State's attempt on the one hand to revoke its license for failure to install the improvements and the State's refusal on the other hand to permit the installation of those improvements, Atlantic filed this suit - where the Division expressly contended not only that sales should be stopped and the registration revoked, but also that even existing contracts be cancelled! [Transcript of March 11, 1975, R. 137-229]. All of this, plus the Land Sales Law itself, supports the testimony and the trial court's finding that sales could not realistically be recommenced. [FJ ¶ 33, 68, A. 19, 30]. Indeed, the State's suggestion that Atlantic make such

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6/ A normal land sales project would have had approximately 100 unsold lots. [Lipman, Vol. I at 22, R. 4403; see Trella at 60, R. 4172; FJ ¶ 59, A. 30].

sales without knowing whether its lots would be usable is a striking example of its cavalier attitude toward Atlantic and its purchasers throughout this period.

b) Improvement trust monies unavailable. An additional $1.7 million (plus interest) was lost to Atlantic because its money in the improvement trust account controlled by DBR was unavailable to reimburse improvement expenditures or advances. [Lipman Vol. I at 28-31, R. 4409-4412; FJ ¶ 61, A. 31].7/

(3) Increased Expenses. General and administrative expenses, which would normally be 10% of sales value, in fact amounted to some 28% of sales value in CAE as a result of cancellations (decreased income), the increased costs involved in dealing with the problems, customer inquiries, and the delay in accomplishing the improvements. There were also increased legal expenses and engineering fees in handling the SCDD litigation, the permitting appeals, and other matters attendant to the delay. [Lipman Volume I at 44-46, R. 4425-4427; FJ ¶ 62, A. 31].

(4) Combined Result of Increased Expenses/Decreased Income. The net result on Atlantic's financial picture is uncontradicted. If the more costly requirements ultimately set forth in the 1977 permit had been timely imposed, the improvements would have been installed and Atlantic (and its purchasers) would then have had accessible, usable, saleable property. On the other hand, the effect of delaying the improvements, so that (a) inflation more than doubled the already increased expenses, with income contractually limited at 1967-72 prices, (b) sales were forced to cease, and (c) cancellations multiplied, simply bankrupted the project. The

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7/ Although the disposition of the improvement trust in no longer a part of this case, that those monies would ordinarily have been available to Atlantic is relevant to the financial realities and economic effect of the delays and other State actions. [FJ ¶ 61, A. 31].

large "up-front" expenses (such as salesmen's commissions and land costs) had already been paid. The predictable consequence of the delay was disastrous. (Refer to details under "investment-backed expectations," infra p. 28). The unrebutted testimony and the trial court's findings show that the increased CAE costs simply exceeded the reduced income. [Trella at 103-104, R. 4218-4219; Lipman at 19-46, R. 4400-4427; PX 46].[8/]

(5) Inability To Borrow To Secure Improvements After Date Of Taking. It is uncontroverted that Atlantic could not borrow the money in 1977 to install the improvements. [Trella at 101-102, R. 4216-4217; Lipman at 16-18, R. 4397-4399; FJ ¶ 65, A. 3772]. By that time, for the reasons set forth above, Atlantic did not have assets exceeding the $17 million cost of improvements, and it was unable to provide acceptable collateral to any potential lender. Further, the accounts receivable [PX 53] were substantially lower than they normally would have been because of the sales cancellations and suspended sales.

(6) Practical Effect. The combination of decreased income and increased costs made it clear that the improvements simply could not be completed. At the same time, however, Atlantic could not use the property for another purpose because the ownership of most of the lots had already changed. As a result, each of

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8/ The agreements for deed do not obligate the purchaser to pay. The only consequence of default is cancellation. The effect of the cancellations and sales suspension resulting from the delay is apparent. [Lipman at 22, 31, 33-36, 43, R. 4405, 4412, 4414-4417, 4424; FJ ¶ 65, A. 33]. If Atlantic had been able to resell the 2,000 lots which were either unsold or returned to inventory because of cancellations at $5,990 each (its sales price at the time sales were suspended), receivables would have increased by approximately $12 million. The State's argument that there could be no damage to Atlantic because the lots were 95% "sold" in 1972 ignores the undeniable fact as found by the trial judge of the numerous cancellations.

Atlantic's 2,079 scattered, landlocked lots, like those of the purchasers in the Simon class, is inaccessible and unsellable. [Trella at 92, R. 4207]. Each lot is surrounded by undrained lots owned by others. Drainage can be accomplished only for the land as a whole, not for individual lots. Because the changed ownership has "locked in" the development to a plan which has been rendered infeasible, the property is unusable and valueless to Atlantic and its purchasers. [Trella at 61, R. 4173].

In short, as a result of State actions, neither Atlantic nor its purchasers can use their lots or sell them because there is no practical access and the lots are not usable without drainage. Therefore, under the law as established in Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied sub nom. Taylor v. Graham, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981), there has been a taking of that property by the State. [FJ ¶ 66, A. 33]

II. FACTS AS APPLIED TO THE "ESTUARY PROPERTIES" TESTS

In Estuary Properties, supra, this Court listed at least six factors or approaches which may be considered in determining whether in fact there has been a taking of property. The trial court analyzed the facts both on an overall basis and under each approach, and it found a taking under each. [FJ ¶67, A. 33]. The evidence supported the trial court's findings in every respect.

A. Diminution in Value. If the roads and the drainage had been installed, the one and one-quarter acre lots would have a realistic "but probably conservative" average market value of $6,990 as of September 1, 1977. [Knight at

11-12, R. 3567-3568; Trella at 61, 93-94, R. 4173, 4208-4209]. Mr. Knight's expert testimony was based on a number of factors, including the more than 5,000 sales by mid-1972 when lots were selling at $5,990. [Knight at 11-22, 28-29, R. 3657-3577, 3583-3584; Lipman at 48, R. 4298]. This testimony of average market value was unrebutted.

The State's appraiser was not instructed to value the individual lots as if the improvements had not been frustrated, and he would not state whether he agreed with Mr. Knight's use of the 5,000 actual sales in determining fair market value of individual lots. [Anderson at 76-77, R. 4512-4513; FJ ¶ 68, 69 A. 34]. Even more egregiously, the State instructed its appraiser to assume, contrary to actual fact, that the CAE was not divided into individually owned lots, but was instead all in one ownership -- in short, the State's witness simply assumed that the very facts making the lots unusable did not exist! [See Anderson at 57-58, 60, 63-66, R. 4193-4194, 4496, 4499-4502].

The trial court found that, as a result of the State's delay and inconsistent actions which prevented the installation of the roads and drainage, the average value of the lots would be "nominal" ($100 - $200 per lot). As the offering statements disclosed, without improvements the lots have no access, no drainage, and cannot even be readily located on the ground. (Knight, R. 3566, 3571, 3572, 3573). As DBR's attorney admitted early in this case, without the improvements, a lot at CAE "is absolutely valueless". (Transcript of hearing of March 11, 1975 at 7, 12, R. 142-144). Indeed, it was exactly on that basis that the State (through DBR) instituted proceedings in 1974 to revoke Atlantic's registration (See FJ ¶

70, A. 34-35) Mr. Knight's unrebutted expert testimony was properly accepted by the trier of fact.

B. Physical Invasion. There has been no physical invasion of CAE by the State. However, the practical and natural effect of governmental action has been to eliminate physical access to the individual lots. As discussed infra, at page 55, the authorities equate this to physical invasion. [FJ ¶ 71, A. 35].

C. Public Harm/Public Benefit and D. Public Health, Safety and Welfare. The delays and conflicting demands of the State have not prevented a public harm. To the contrary, DER agreed at last to grant a permit to Atlantic, thereby acknowledging that the improvements could be made consistently with the public health, safety, and welfare. Thus, this is not a case in which a specific use of the property is justifiably denied in order to prevent environmental harm and protect the public interest. [FJ ¶ 74, A. 37]. As DER's attorney admitted, Atlantic has

> a permit. They can take graders and draglines out there tomorrow as far as our Department is concerned and in due time be in the position of saying that the purchasers of these lots will, in fact, have what they bargained for, a piece of property that is suitably drained. . . . [I]t's very important in our view to distinguish this case from those in which -- for a variety of valid purposes the Department may have found the basis for denying the permit of this nature. That is -- that is essentially our position, Your Honor. [Transcript of Hearing of February 3, 1981, at 55-57, R. 1961-1963].

On the other hand, the taking has created a public benefit. The State may and has legitimately spent public money to preserve such undeveloped land in its natural state. CAE surrounds Turnbull Hammock which St. John's, using public monies, acquired for preservation to benefit the public. CAE also borders the Farmton Wildlife Management Area which the State controls, borders and is included in the Brevard County Game Refuge [PX 27 at page 46], and is approximately 12 miles from

the 28,000 acre Seminole Ranch which St. John's also purchased for preservation.[9] Preservation of such undeveloped lands is obviously a public benefit. Indeed, Atlantic's difficulties arose in large part from the concern of at least some agencies of the State to preserve CAE in its natural state.[10]

E. Arbitrary/Capricious Conduct. Although "fault" is not essential to a finding of taking since legitimate exercises of police power can result in a taking, the trial court's findings of arbitrary and capricious conduct in this case are amply supported. There have been highhanded abuses of power, blatant conflicts of interest and plainly arbitrary actions by various state agencies, including: (1) DER's three year refusal to provide pre-filing input to the permit application, despite its own rules and the advice of its attorney, (2) DER's initial denial of the permit for individual philosophical reasons of certain DER employees rather than statutory standards, (3) DER's failure to specify conditions which would result in a permit, (4) DER's unique position on Final Order (PX 39 rejecting the hearing officer's recommendation) that the permit should be denied because the drainage might not be sufficient for full scale urban development that might occur many years in the future, ignoring the fact that no substantial immediate development was likely, and that future development, out of Atlantic's control, would require new permits. [FJ ¶ 75, A. 37].[11]

9/ Auth September depo. at 27-29.

10/ One of the justifications given by St. John's for its purchase of Turnbull Hammock was to prevent or control development at CAE. See discussion infra at p. 27.

11/ Although the trial court ruled that he would not review the permit denial itself, the impossible burden of proof imposed by the DER appears on the face of the Final Order. Nevertheless, arbitrariness on the part of state officials abounds in the record even without considering that on the face of the Final Order.

In addition, as the trial court found [FJ ¶ 11, A. 11], Volusia County's actions were in some cases unauthorized (such as opposition to the permit)[12/] and in others accidental (charter abolition of SCDD on the erroneous assumption that it was inactive). They nevertheless had severe consequences to Atlantic and its purchasers. Also, although Volusia County had indicated in May, 1970 that "no action will be required" concerning the improvements [PX 15], thereafter in 1974 a Volusia County employee opposed the DER permit, even after the county agreed in December 1973 to use its best efforts to obtain necessary permits. [FJ ¶ 76, A. 37-38].

St. John's directors and employees substituted their private views for their public responsibilities, expended funds to buy land adjacent to CAE but outside St. John's permitting jurisdiction to obtain control of CAE that it did not have under the police power, misrepresented the scope of its rules, and attempted to apply its rules ex post facto. Dr. Knapp, one of the officers of the private "Volusia County Environmental Task Force" which opposed the permitting at CAE, was a member of the Board of Governors of St. John's. [Auth. April depo. at 29, Exhibit 11 thereto; PX. 66]. As an officer of the Task Force, he wrote a letter to St. John's - in effect to himself as a Board member - demanding that St. John's oppose the project. St. John's employee Merriam was also a member of the Task Force who participated in opposing CAE's developments. Yet, at the permitting hearing, he testified in opposition to the project as a St. John's employee [PX 36 at 68 et

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12/ That actions may be unauthorized do not preclude them from effecting a taking. See Fountain v. Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1043 (11th Cir. 1982) ("if official authorities act on behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments and are subject to an inverse condemnation suit").

seq.], even though St. John's exercised no jurisdiction whatever over the project at that time. [Auth April depo. at 20].

On August 3, 1977, a law firm (of which one member of the Board of St. John's was a partner) demanded on behalf of the private Trust for Public Land, which opposed the project, that St. John's require Atlantic to apply for a construction permit under Chapter 373, Florida Statutes. [Auth April depo. at 14; Exhibit 9 thereto; PX 64]. St. John's recognized that it had permitting jurisdiction only over that small portion of CAE which was in Brevard County. [Auth April depo. at 12, 13].[13/] Nevertheless, St. John's September 14, 1977 letter (PX 64) clearly misrepresented that, under its rules, "the entire project would be treated in the . . . review." [Auth April depo. at 14, 15 and PX 64 (Ex 9 to Auth depo); PX 41, 42]. No rule was adopted implementing that ad hoc decision until after October 19, 1977, if at all.[14/] [Auth April depo. at 24 and PX 68 (Ex 13 to Auth depo); Auth Sept. depo. at 7, 8]. As the trial court found, St. John's representations that it had such jurisdiction pursuant to existing rule were simply not true. [FJ ¶ 77, R. 38).

St. John's also expended public funds to acquire the portion of Turnbull Hammock lying in Volusia County between the east and west portions of CAE as "a management tool not otherwise available" to control the development of CAE. [Auth April depo. at 41, 42, 45, 46, 53, 54, 56; PX. 74, 77, 80 (Ex 19, 24, 25 to Auth

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13/ PX 58 (Ex 3 to Auth depo.) July 29, 1977 memo: "One difficulty with issuance of a permit would be that so much of Cape Atlantic Estates falls outside our permittable area"); PX. 61 (Ex 6 to Auth depo. August 9, 1977 memo). Nevertheless, on August 7, 1977, and again on September 14, 1977, St. John's notified Atlantic that the entire CAE area would be reviewed and subject to permitting. (PX 42, 64)

14/ DER's brief below at page 18 acknowledges that "the evidence does not reveal whether this rule was in fact adopted."

depo) Auth Sept. depo., at 15, 17-18, 21-23, 26-27]. In purchasing property in order to regulate what it could not regulate directly under its police power, St. John's improperly singled out CAE for special treatment,[15/] and, like the other State actions, evidenced "an [understandable but unconstitutional] intent to preserve [CAE] for the benefit of the public while avoiding payment of compensation."[16/]

F. Reasonable Investment-Backed Expectations. Atlantic acquired the property specifically in order to divide it into lots, improve the lots with drainage and access, and sell them at a profit. [Lipman, Volume I, at 30, R. 441]. Its expectations have been totally frustrated. It has been left with lots which are landlocked, undrained, and checkerboarded throughout CAE. [Trella at 61, R. 4173]. Those lots are unusable and unsaleable without the improvements which will never be installed as a result of State action. [FJ ¶ 80, A. 40]. If improvements had not been unreasonably delayed, Atlantic could have sold the unsold and returned lots, and would have made its contemplated profit of approximately $12 million. This projected profit, which had remained on target until the State's delays began, has now been reduced to much less than zero. [Lipman, Volume I, at 35, 40-41, R. 4416, 4421-4422; FJ ¶ 81, A. 40.] Instead, the entire project has been destroyed. Similarly the Simon class members invested in order to have either a sellable or a useable asset. [Simon at R. 4664] Their expectations likewise have been completely frustrated.

15/ See Knight v. City of Billings, 642 P.2d 141 (Mont. 1982); Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (1979).

16/ Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46, 50 (1982).

III. DISTRICT COURT REWEIGHING EVIDENCE AND QUARRELLING WITH SPECIFIC FACTS.

Of the some 40 pages of factual findings made by the trial judge, the District Court disagreed with only two findings. First, it rejected the trial court's factual finding that the State caused delays from 1971 through 1974. Second, the District Court disagreed with the trial court's conclusion that the cost item of stabilization of roads was required as a result of the 1977 permit which was finally issued. In fact, ample competent evidence supports each of these findings by the trial court. More important, even if these particular facts were not supported, the evidence as a whole requires that the Final Judgment be affirmed.

A. State caused delays, 1971-1974. In rejecting the trial court's factual findings concerning State-created delays between 1971 and 1974, the District Court stated that the delay between 1971 - when DER first asserted permitting authority here - and 1974 should not be "attributed to DER" because Atlantic did not file a formal permit application until September 1974. That observation by the District Court is inappropriate for two reasons.

First, it is beside the point. The trial judge made no finding that the delay during that period was "attributable to DER." The trial judge found that the State was responsible for the delay, and that DER's unreasonable conduct during the delay aggravated the situation. There is ample record support for those finding and the District Court erred in reweighing the evidence.

As shown below, the trial judge's characterization of DER's delaying tactics is well-founded. Moreover, quite apart from DER's conduct during that period, the

facts are uncontroverted that the State was responsible in other ways for the original delay of the project during this period. In fact, the original cause of the delays that occurred from 1971-1974 was the act of the State in abolishing SCDD. But for that, those delays would never have occurred and there would have been no opportunity for DER to delay the project as it did.

It is undisputed that, at the end of 1970, (i) the project was on time and within budget (FJ ¶ 22, A. 15); (ii) SCDD was a State-created public body designed to implement the drainage project and able to finance the improvements through taxation; (iii) most lots were sold; and (iv) it was a State requirement that improvements be completed by December 1973. Then the State abolished SCDD without notice and without providing any adequate and timely substitute (Volusia County having been unaware that it had been saddled with the obligations of an active drainage district). Plainly the State created the circumstances which resulted in the delay which actually occurred between 1971 and 1974. [FJ ¶ 11, 36-49, A. 11, 20-25]. Whether or not DER should have done something different during that delay, the State created the delay in the first place.

Second, the District Court ignored the uncontroverted reasons no "formal" permit application was filed until September 1974. It should be remembered that the application filed was a joint application by Atlantic and Volusia County. Prior to the State's abolishing SCDD, SCDD was the public entity doing the improvements and Atlantic was simply funding the project. When the State abolished SCDD, there was some doubt as to whether Atlantic could file the formal permit application since, by that time, most of the land was no longer under the ownership of Atlantic. A

public body was essential to levy taxes and to condemn necessary easements if modifications to existing reserved easements became necessary. Since the property had been sold to others, Atlantic was not in a position to accomplish the improvements alone. Thus, until December, 1973, when Volusia County acknowledged its responsibility as successor to SCDD, there was doubt - created by the State's own actions - as to who would be authorized to make the application. The "formal" permit application ultimately filed was in the joint names of Volusia County and Atlantic, in line with the December 1973 settlement beteen the county and Atlantic.

Moreover, the critical point, which the District Court simply ignored, is that during the entire period of resolving the problems created by the State's aboliton of SCDD, DER refused to accept any permit application or respond in any way to Atlantic's requests as to the requirements and conditions for obtaining a permit. Thus, although DPC intervened in the SCDD litigation in 1971, insisting that DPC would require a permit, DPC took the position that further review and processing of a permit application during the pendency of that litigation would be inappropriate. [PSTIP III.22, A. 58]. Atlantic was precluded by DER's actions during this time period from minimizing the effect of the delay because DER refused to provide Atlantic any pre-submission review or input. Although DPC was insisting that a permit was necessary, it had adopted no rules or regulations which Atlantic could follow in order to obtain such a permit. While DER's lawyer, the State Attorney General, was representing that DER technical personnel would assist Atlantic, SCDD or Volusia County in this interim period so that the effect of the delay would be minimized (PX 95), DER itself adamantly refused to take any action whatsoever, advisory or otherwise, or to provide any input or assistance with respect

to its requirements under the brand new statutes. Indeed, DER specifically advised that it would deny any permit application filed during the pendency in 1971-1973 of the SCDD litigation. Thus, it would have been a completely futile act for Atlantic to have formally filed a permit application during that time. The State created this situation, and DER's failure to provide any such pre-submission review during the 1971-1974 period precluded Atlantic from either proceeding with the permitting process or from minimizing the delay until DER would accept the permit. [FJ ¶ 47, A. 24]

The District Court sought to excuse DER's failure to act during this period by holding that the DER's regulation did not require DER to provide pre-submission review. That holding is directly contrary to the recent holding by another panel of the First District on this very issue. In Dehoney v. Grove Isle, Ltd., 442 So.2d 966, 975, 977 (Fla. 1st DCA 1983), the same regulation was held to require specific notification by DER of what conditions would be required for the granting of a permit.[17/] Id. at 975. As the Court put it there, DER was required by that rule to require notification of any specific deficiencies and to allow time for their corrections.

The District Court's holding below to the contrary ignores the specific terms of the regulation, as well as DER's own interpretation of the regulation. The regulation provides that, if the "required information has not been submitted

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17/ Although this holding was originally contained in Judge Nimmons' dissenting opinion, that dissent was adopted on rehearing as the opinion of the Court.

to the Department, the application shall not be accepted . . . ." Not only does that regulatory language expressly contemplate pre-submission review, but Mr. Garcia testified, without contradiction, that DER advised Atlantic that without pre-submission review, the application would not even be considered. [R. 4002-4003]. Further, once the SCDD problem was resolved, DER actually did engage in substantial pre-submission review. Further still, the District Court's opinion is contrary to the pre-trial stipulation [PSTIP III.22, A. 58] and the fact that DER's district engineer frankly admitted that he was under the impression that, prior to the submission of the application, all problems with the permit had been worked out with DER [part of PX 36, p. 65]. Under the evidence, as the trial judge found, Atlantic was justified in relying on what it was told by DER: that pre-submission review was required and that the application would not be considered by DER or talked about until the SCDD problem was resolved.

B. Stabilized Roads. Once again reevaluating the evidence, the District Court disagreed with the trial court as to the extent the increased cost of the improvements was caused by DER requirements, pointing out that stabilized roads were not required "by the terms of the 1977 stipulation" constituting the permit. Petitioners have never contended that the words "stabilized roads" appear in the permit. However, it is very clear from the record, and was clear to the trial judge who heard the evidence, that road stabilization was required from an engineering standpoint if (1) the reduced run-off and silting criteria imposed by DER were to be met, and (2) the roads were still to work in view of the slower run-off which meant that roads would be wet longer. The absence of a specific reference to "road stabilization" in the permit itself is meaningless, since it was required as a practical matter from the permit requirement.

There was no dispute among the expert witnesses that stabilized roads must be included to comply with DER's 1977 permit requirements, and since there is no dispute that the stabilization of roads would not have been necessary earlier, the factual finding of the trial court as to that item is supported and is indeed uncontroverted in the record. For the District Court to impose upon the trial judge a requirement to elicit further explanatory testimony about a matter not in dispute among the expert witnesses, and not raised by the State on cross-examination, is improper, and patently violates the rule that appellate courts do not reweigh evidence (See FJ ¶ 58, A. 29).

Moreover, if the single cost item for stabilizing the roads is eliminated from consideration, the outcome would not be changed by that 23% difference. As of September 1977 delays were still ongoing, and St. John's had just instituted a new round of permitting. Whether the State had bankrupted the project by 1977 or 1978 would be of little moment.

The District Court wrongly focused on but a single item in increased costs of the improvements resulting from the State's delays. A review of the evidence heard by the trial judge demonstrates that his conclusion was correct.

At trial, to illustrate the separate economic effects of (1) inflation and (2) the more complex improvements which DER finally permitted in 1977, Atlantic proved three things: (a) what the improvements as permitted would cost as of the date of taking, September 1, 1977, (b) what the original, less complex improvements would have cost at that time, and (c) what the more complex improvements as finally

permitted would have cost if the permit had been granted in a timely fashion. By comparing these figures, the trial court could determine the separate and combined effects of both the delay and the increased complexities of the improvements.

It was established at trial, without substantial dispute, that the more complex improvements, if work had commenced on the date of taking, would have cost approximately $17 million. [PX 44; McLouth at 73-74, R. 4323-4324.] The State's expert engineering witness, Smith, was asked by the State to estimate the cost of the work as described in the 1977 permit in 1977 dollars. His estimate in 1977 dollars was $14.5 million (R. 4073) or 15% less than the $17 million figure. The detailed estimate of Atlantic's expert (Exhibit 44, Table 1, Page 30) shows that he assumed a final design date of September, 1977, but actual payment of money to contractors beginning July, 1978, conforming to the permit itself which required a 13 month study before actual construction. Thus inflation for that 10 month period accounts for most of the 15% difference between the state's expert and Atlantic's expert. Since 1978 dollars were properly used by Atlantic's experts, both experts testified to almost identical estimates as to what the improvement would have cost if final design had begun in 1977. Significantly, the State's expert did not dispute McLouth's conclusion that stabilized roads (approximately 23% of the overall cost) would be required from an engineering standpoint.

The cost of doing the original improvements if they had been commenced in 1977 was established by Garcia and McLouth. McLouth testified the original improvements would cost less than half of the more complex improvements actually permitted, but that Garcia would be the best witness as to the original cost since

he designed the original improvements. [R. 4325-26]. This testimony alone necessarily implies that from an engineering standpoint such extras as stabilized roads were necessary under the 1977 permit. Mr. Garcia in turn testified that to do the work as originally contemplated would cost $6 million if begun in 1977, because the original work did not contemplate or require several items included in the engineers' estimates as necessary, including, specifically, the stabilization roads (Garcia R 3949, 3951-52, 4008). The testimony further showed the costs, both of the more elaborate improvements at pre-delay prices, before significant inflation began and the original improvements, were all within the financial capabilities of Atlantic. Ample evidence supports the Final Judgment.

ARGUMENT

POINT I: THE DISTRICT COURT ERRED IN HOLDING THAT DISTRICT COURT REVIEW OF THE PERMIT DENIAL FORECLOSED THE INVERSE CONDEMNATION ACTION

The District Court ruled that the inverse condemnation claim could only be presented on District Court review of the permit denial and that the Circuit Court was foreclosed from considering the claim. The decision is wrong and must be reversed because:

(a) It is directly contrary to Albrecht v. State, 444 So.2d 8 (Fla. 1984) and Key Haven Associated Enterprises Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So.2d 153 (Fla. 1982).

(b) It is directly contrary to the law of the case as established in the interlocutory appeal, which was subsequently relied on by the parties.

(c) It ignores the rights of the Simon class, none of whom were parties to any permitting proceeding, and it misapplies other principles of res judicata, collateral estoppel, and election of remedies.

A. Reversal is required under Albrecht and Key Haven. After the District Court's decision below, this Court rendered its decision in Albrecht v. State, 444 So.2d 8 (Fla. 1984), which conclusively settled the question of Circuit Court jurisdiction to hear inverse condemnation claims arising from permit problems. Albrecht makes it very clear that a permit denial review is a separate case, involving separate issues, separate facts, and a separate cause of action from an inverse condemnation proceeding. This Court in Albrecht specifically ruled that there is no requirement to raise inverse condemnation issues on an appeal from a permit denial:

> "[P]etitioners' claim of uncompensated taking constitutes a separate and distinct cause of action from that litigated previously. In the first action the petitioners were challenging the propriety of the agency's actions. The determination, judicially or otherwise, that the action was proper under the applicable statute does not necessarily also determine that there is no taking, nor does it necessarily bar the valid exercise of police power. It is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, (1922); Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.) cert. denied, 454 U.S. 1083 (1981). In addition, the facts necessary to maintain the taking action are different. There must be a diminution in value of the property as well as a lack of alterative uses. See Pennsylvania Coal Co. and Estuary Properties. Under a constitutionally valid statute providing for protection of the public welfare, those facts are irrelevant to the determination of propriety of the agency action. Id. at 12.

Contrary to the First District's decision here, the Court expressly held that a Circuit Court inverse condemnation case is proper after a permitting review is completed.

> Permitting the petitioners to bring their claim in circuit court does not conflict with our decision in Key Haven. In that case we provided alternative methods of bringing a claim of inverse condemnation once all executive branch review of the action has been completed. Direct review in the district court of the agency action may be eliminated and proceedings properly commenced in circuit court if the aggrieved party accepts the agency action as proper. Key Haven, 427 So.2d at 159. The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. In Key Haven we merely provided an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper. Id. at 160. This is not to say that once a party chooses to litigate the propriety of the action through the district court that it is estopped from bringing a claim of inverse condemnation in circuit court. Id. at 12.

As the Albrecht decision makes clear, the First District in the opinion below misapplied this Court's decision in Key Haven to bar the Circuit Court's consideration of Atlantic's taking claim. Key Haven dealt with the question whether "exhaustion of administrative remedies" required an appeal of permitting action to the courts prior to a circuit court action for inverse condemnation. This Court held that only the administrative remedies through the highest level of the executive branch need be exhausted, and the circuit court could then determine the separate

question of whether State action, including the action on the permit, created a "taking." The District Court in this case erroneously assumed that, if there was an appeal to the District Court, any inverse condemnation question must be decided there. That had also been the holding of the Second District in Albrecht, which was reversed by this Court.

Atlantic followed exactly the procedure approved by this Court in Albrecht of pursuing its administrative and judicial remedies relating to the permit until that process became final, and then prosecuting its independent inverse condemnation claims. As Albrecht instructs, once the permitting matters were resolved, the Circuit Court properly considered the reasonableness of the delays, the practical consequences of the delays, the general issue of whether the State in all the circumstances met the standards of fair dealing that a citizen may expect from his government, and the ultimate fact issue of whether the practical consequences of all State actions resulted in a taking.

B. Reversal is Required by the Doctrine of the Law of the Case. Quite apart from this Court's controlling decision in Albrecht the procedure established as the law of the case by the previous interlocutory appeal would control in any event and would require reversal. Judge Cawthon's decision that he would not dismiss the case but would postpone trial of the taking claim until the administrative permitting process was completed was affirmed by the First District on interlocutory appeal, as against the specific argument that the inverse condemnation issues should instead be determined in District Court review of the permitting action. The parties justifiably acted upon that procedural determination by stipulating in the permitting case that the inverse condemnation issues were not involved there. [PX 35, PX 38].

It is well settled that a point of law adjudicated once in the case at the appellate level becomes the law of the case, and is no longer open for discussion or consideration in subsequent proceedings in the case. Greene v. Massey, 384 So.2d 24, 28 (Fla. 1980); Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467, 469 (Fla. 1976); Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965). In direct contravention of that principle, the decision on review negates the interlocutory ruling on which the parties relied and the parties' stipulation. The entire purpose of interlocutory appeals is to set the course of the proceedings. The parties here were bound by the interlocutory decision as the law of the case and they followed that decision by trying the inverse condemnation case in Circuit Court after the permitting process was finished. The trial court properly reached the merits and decided the case on its merits. The District Court erred in ruling on appeal from the Final Judgment that the trial court had improperly done so. For the First District to reverse at this late date a procedural ruling it previously approved, so as to relegate Atlantic to remedies no longer available and to render ineffective seven years of litigation conducted according to the previously approved procedure is not only contrary to law, it is also unfair in the extreme.

C. The District Court Improperly Applied Res Judicata and Election of Remedies. The decision below must be reversed for yet another reason. Not only did the District Court misapply this Court's decision in Key Haven and fail to properly apply law of the case doctrine, but also the District Court completely misapplied res judicata and election of remedies principles in holding the permit proceeding barred the independent Circuit Court inverse condemnation action.

(1) Res Judicata Cannot Apply to the Simon Class. No member of the Simon class, which represents perhaps 80 percent of the land involved in this case, was party to the permitting proceeding at either the administrative or appellate level. Accordingly, the Simon class members cannot be bound by any res judicata, collateral estoppel, or election of remedies theory. The constitutional or other rights of persons who have an interest in the subject matter of litigation obviously cannot be adjudicated or affected by a judgment rendered in a suit to which they were not parties. McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323 (1935); Coral Realty Co. v. Peacock Holding Co., 103 Fla. 916, 138 So. 622 (1931). The District Court erred in applying such principles to bar the unlitigated and unresolved rights of the class.

(2) Res Judicata and Estoppel by Judgment do not Apply as to Either the Simon Class or Atlantic. Res judicata does not bar litigation of questions which could not be adjudicated in the prior action. In view of the limited certiorari standards of review under the applicable old APA (§ 120.31 Fla. Stat. (1973)), no inverse condemnation claims could properly have been decided in the permit proceedings. Since the administrative hearing involved no inverse condemnation issues, no facts past 1974, no evidence of value and other factors in a taking case, and since certiorari review simply determines sufficiency of evidence, new inverse condemnation issues not involved at the agency level could not have been decided by the reviewing court.

Further, the doctrine of estoppel by judgment is inapplicable because the doctrine precludes (a) identical parties from re-litigating matters, (b) actually

litigated and determined by the court. No inverse condemnation issues were decided by the Court in the permit review because it was dismissed as moot when the permit was granted on different terms. Gordon v. Gordon, 59 So.2d 40, 43-44 (Fla.), cert. denied, 344 U.S. 878, 73 S.Ct. 165, 97 L.Ed. 680 (1952); Hughes v. Town of Davenport. 141 Fla. 382, 193 So. 291 (1940); Mabson v. Christ, 104 Fla. 606, 140 So. 671 (1932); Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926).

The stipulated permit had several effects. It "rendered moot" (in the language of the stipulation) the challenge to DER's jurisdiction. It "resolved" the issues of whether conditions could be imposed to get the permit and what those conditions were. It "resolved," in Atlantic's favor, Atlantic's right to be informed of such conditions. Finally, the granting of the permit "resolved" the question whether the drainage could be accomplished consistently with the public health, safety and welfare and without creating a public harm. The permit did not resolve or purport to resolve the inverse condemnation issue.

(3) "Election of Remedies" does not apply. The State's "election of remedies" argument is disposed of by the same facts. Election of remedies applies only where (1) more than one remedy was then available, Perry v. Benson, 94 So.2d 819 (Fla. 1957), Rolf's Marina, Inc. v. Rescue Service & Repair, Inc., 398 So.2d 842 (Fla. 3d DCA 1981), and (2) where the remedies are inconsistent. E.g., Lutheran Brotherhood v. Hooten, 237 So.2d 23 (Fla. 2d DCA), cert. denied, 240 So.2d 641 (Fla. 1970). The taking issues could be decided only after the permitting process was completed. That was a condition precedent, not a satisfactory alternative, particularly in view of the additional delays, since delay alone can create a taking.

(See discussion, page 49). Thus, the remedies here were neither available at the same time nor inconsistent.

POINT II: THE DISTRICT COURT ERRED IN REWEIGHING THE EVIDENCE -- THE TRIAL COURT'S FINDING OF A TAKING IS SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE

One of the most plainly estabilshed principles of Florida law is that a district court of appeal may not substitute its judgment for that of the fact finder by reevaluating the evidence. Marshall v. Johnson, 392 So.2d 249 (Fla. 1980); Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

Here, the District Court erroneously reweighed the evidence and reversed two of the many factual findings of the trial court. First, the District Court held that the delay from 1971 to 1974 should not be "attributed to DER," ignoring portions of the evidence and the fact the State created the delay in any event. Second, the District Court stated that the additional expense of stabilized roads was not required "by the terms" of the DER permit as it finally issued in 1977, and accordingly that that portion of the increased expenses should not be considered. In this statement, the District Court rejected expert engineering evidence from both sides stating or implying that stabilized roads were necessary from an engineering standpoint under the 1977 permit. As discussed in detail in the Statement of Facts, page 28, supra, the District Court has rejected evidence about which there was no dispute and has in effect wished that the record had contained some cross-examination questions and more explanation, but the evidence supporting the trial judge is substantial, competent, and unrebutted. The trial court's

findings are supported not only by the evidence that the trial judge specifically cited in the Final Judgment, but also the additional supporting evidence discussed in detail in the Statement of Facts (page 6, supra).

Equally important, the District Court disagreed with only two items of evidence of the 40 pages of factual findings made by the trier of fact, and the Final Judgment is supported by ample evidence even if those items are removed. The evidence as a whole supports the Final Judgment. Many facts distinguish this case and support the trial court's ultimate finding of a taking here:

1. The improvements were a requirement of the State (the Division).

2. The permitting authority under which the delays occurred did not even exist when the improvements were promised and became a State requirement.

3. The statute under which permits were required did not come into effect until 1972, less than two years before construction was scheduled to be complete.

4. The ownership of the land had changed (by State-approved sales) prior to the enactment of the permitting authority; any change in design would have encompassed lands sold to purchasers and was therefore impossible.

5. There were substantial expenditures, including the large amounts of "up-front" sales expenses and the construction costs of the 12 mile main canal, by the time the permitting requirements came into effect.

6. The State legislature had specifically adopted the drainage of the land as a public policy of the State by creating SCDD five years before the permitting authority was enacted.

7. In abolishing SCDD (through the Volusia County Charter) the State legislature created a situation that inevitably led to delay.

8. After DER acquired and asserted permitting authority, it refused to recognize the problems inherent in any delay of the project or to provide reasonable assistance. Instead, DER waited three years and even then required Atlantic to "start fresh" with a new division of the agency.

9. The persons denying the permit refused to recognize the effect of the changed ownership, operated on personal philosophies and inaccurate facts, and did not change their position once they discovered the error of those facts.

10. Eventually, the permit actually issued, thereby confirming that the development could be done without public harm.

11. The State failed to specify conditions for permitting.

12. The length of the delay was unconscionable.

13. As other State agencies recognized, Atlantic had vested rights in the project and it could not, in view of the changed ownership, make substantial changes.

14. New agencies with other new permit requirements appeared during the delay.

15. The result of all of these extreme circumstances. Atlantic does not own 2,500 acres on which it can impose a more refined development (as was the case in Estuary Properties). Instead, Atlantic owns land-locked, inaccessible, unimprovable, undrainable, and unusable lots. It is obviously impossible to use a one acre lot that requires not only the building of a three-mile road to it but the drainage of several thousand other acres in order to use it. Atlantic and its purchasers are in identical situations.

As the trial court expressly found, the cumulative effect of these circumstances has been a "taking." [FJ p. 49 ¶ 1, A. 49].

POINT III: THE TRIAL COURT'S DECISION WAS CORRECT AS A MATTER OF FACT AND LAW

Points I and II of this brief demonstrate the error of the District Court. This point demonstrates the correctness of the trial court's decision. It is very clear that the trial court in the Final Judgment did exactly what a trial court is supposed to do under our system: The trial court followed this Court's restatement of the law in Estuary Properties and other cases and applied that law to the facts of the case before him after hearing the evidence. A more conscientious and accurate effort could hardly be imagined.

A. Fundamental Principles and Decisions in Taking Cases. The Florida Constitution [Article X Section 6(a)] and the Federal Constitution[18] both prohibit government takings of property without compensation, and the cases under both the Federal and State Constitutions recognize that government actions or failure to act, valid or invalid, singly or in their cumulative practical effect, can result in a taking depending on the circumstances. Thus, "taking" cases are "fact" cases. As this Court has declared, "There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case." Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380 (Fla.), cert. denied sub nom. Taylor v. Graham 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981).[19]

1. San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981), a landmark opinion from the United States Supreme Court, also supports the trial court's finding of a taking. That case is procedurally unusual because the Supreme Court dismissed the appeal for lack of jurisdiction. However, the four justices who would have found jurisdiction went on to address the merits. Justice Rehnquist

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18/ The Fifth Amendment provision prohibiting uncompensated government takings applies to the states through the due process clause of the 14th Amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 100 S.Ct. 310, 63 L.Ed.2d 757 (1980).

19/ Accord, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 439 U.S. 883, 98 S.Ct. 2646, 57 L.Ed.2d 631, (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922); South Dade Farms, Inc. v. B&L Farms Co., 62 So.2d 350, 357 (Fla. 1952).

agreed that no jurisdiction existed but wrote that he "would have little difficulty in agreeing" with the dissenting opinion on the merits. Thus, the dissenting opinion reflects the views of at least a majority of the United States Supreme Court.[20/] The references in this brief to the "San Diego Gas opinion" are to that dissenting opinion, which spoke to the merits of the case.

The specific issue in San Diego Gas was whether there was a constitutional requirement for compensation for governmental delay which did not result in a permanent taking. The case involved a California rule that a landowner's only remedy for excessive or illegal regulation was to have the regulation declared invalid. Declaring such a rule unconstitutional, the San Diego Gas opinion adopted the proposition that where excessive regulation resulted in delay, the delay should be treated as a temporary taking for which compensation must be paid. The opinion is extremely significant because it shows that, even where there is no destruction of all reasonable use, the State must still pay compensation for the consequences of its delay.

2. Fundamental Principles in Taking Cases. In addition to those specific decisions, fundamental concepts established by many cases confirm the correctness of the trial court's finding of a taking here.

20/ That the dissent in San Diego Gas should be treated as the majority view of the Supreme Court has been recognized in a number of cases. In re Aircrash in Bali, Indonesia, 684 F.2d 1301 1311 n.7 (9th Cir. 1982); Devines v. Maier, 665 F.2d 138, 142 (7th Cir. 1981); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46, 54 (1982). All jurisdictions which have considered the matter since the San Diego Gas opinion, except one, recognize it as the law of the land.

(a) In determining whether there has been a taking, courts are concerned with practical effects of government actions, including delays and including the cumulative effect of the actions.

(1) Practical Effects. As stated in the San Diego Gas opinion, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does."[21/] Justice Holmes declared in Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 414, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), a decision relied on by this Court in Estuary Properties, Key Haven and Albrecht, that courts must consider physical and economic realities in determining whether there has been a taking:

> What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.

Accordingly, numerous courts have considered physical and economic realities in finding takings. For instance, in Sixth Camden Corp. v. Township of Evesham, 420 F.Supp. 709 (D.N.J. 1976), the planning board refused to act on a 21 acre site plan until a zoning variance was obtained for the two acres zoned residential. The variance was denied, but the denial was overturned by a state court. Rather

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21/ Accord, Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring); Devines v. Maier, 665 F.2d 138 (7th Cir. 1981); Pete v. United States, 209 Ct.Cl. 270, 531 F.2d 1018, 1032 (1976); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46, 67 (1982) (rejecting township's argument that it did not intend to take "plaintiff's property by regulation and did not expect to acquire it by condemnation" and that it "did not think [it] could afford [its] purchase" because "[t]heir words bear little resemblance to their actions"); Lincoln Loan Co. v. State, 274 Ore. 49, 545 P.2d 105 (1976) ("[i]t is the fact of taking, rather than the manner of the taking, that is important") (emphasis in original); Harris, Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action, 25 Fla. L. Rev. 635, 682-685 (1973).

than suffer further delays pending the township's appeal, the landowner relocated all construction to the 19 acres appropriately zoned. In a subsequent federal suit, the district court found that the two acres were "landlocked" because access to the residential area was prohibitively expensive and the land therefore "could not be used for residential purposes, . . . thus robbing [them] of all value." 420 F.Supp. at 722. Those economic realities - the identical economic realities facing Atlantic and the class here - formed the basis for a claim for taking.

Similarly, in Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962, 980-981 (N.D. Calif. 1975), vacated pursuant to stipulation, 417 F.Supp. 1125 (N.D. Calif. 1976), the court found a taking through a combination of zoning and other actions which made the project economically infeasible. The court observed that the city purported to permit a use of the property but then surrounded it with limitations assuring that it could not be used.

The Court of Claims likewise found a taking in Benenson v. United States, 212 Ct. Cl. 375, 548 F.2d 939, 947 (1977), where a series of delays and inconsistent actions of several government agencies precluded owners from tearing down their hotel and using the land for another purpose and where it was "not economically feasible to maintain and operate the existing building as a hotel or other business property."

The principles applied in those cases are well accepted and establish that the trial court correctly considered the economic and physical realities of CAE,

such as the landlocked nature of the lots, in finding a taking even though Atlantic is not technically prohibited from developing the lands.[22/]

(2) Delay. It is well established that government inaction and delay may give rise to a taking under the constitutions. As this Court noted in another context, "[w]hile a [government] certainly possesses the prerogative of deciding to defer action . . . over a long period of time, it must assume the attendant responsibility for the adverse effects it knows or should know its deliberate inaction will have upon the parties with whom it is dealing . . . ." Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10, 18 (Fla. 1976). Among the clearly foreseeable effects of delay is inflation. Florida courts often have taken judicial notice of inflation as a "fact of life." E.g., Citizens of the State of Florida v. Florida Public Service Commission, 440 So.2d 371 (Fla. 1st DCA 1983). Accord, Bould v. Touchette, 349 So.2d 1181, 1185-1186 (Fla. 1977); Desilets v. Desilets, 377 So.2d 761, 765 (Fla. 2d DCA 1979).

In Askew v. Gables-by-the-Sea, Inc., 333 So.2d 56, 61 (Fla. 1st DCA 1976), cert. denied, 345 So.2d 420 (Fla. 1977), (cited with approval by this Court in Estuary Properties) the court found that "[t]he long delay due to the Defendant's determination to deny the Plaintiff the use of its land by utilizing every court

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22/ Some of the many cases supporting this proposition are collected in supplemental footnote 22 at the end of this brief.

process to delay the granting of a permit . . . ." effected a taking. The essence of the San Diego Gas opinion is that delay may effect a taking. Thus, where government delay has "inflicted virtually irreversible damage", such as the State inflicted upon CAE, compensation for a taking is constitutionally required.[23/] These cases absolutely refute the State's position, argued strenuously below, that it can escape paying constitutionally required compensation simply by eventually granting permits. The State cannot hold a permit in its back pocket while it delays seven, eight, nine or ten years until the project is financially ruined and then avoid the constitutional consequences by granting the permit.

(3) Cumulative Effects. It is clear that the cumulative effects of the various State actions must be considered in determining whether there has been a taking. Benenson v. United States, supra. As recognized in Askew v. Gables-by-the-Sea, supra:

> In the last analysis the issues involved are between the plaintiff on the one hand and the State of Florida, acting through its agencies, on the other. Though the Trustees of the Internal Improvement Fund and the Board of Air and Water Pollution Control and the Department of Air and Water Pollution Control are separate and distinct agencies of the State, they are nevertheless mere agencies of the State . . . . Id. at 59.

23/ Accord, City of Shreveport v. Bernstein, 391 So.2d 1331 (La. App. 1980), and Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (Fla. 1977). Even delay attributable to administrative or judicial proceedings may give rise to a taking. Askew v. Gables-by-the-Sea, supra. For example, in Gordon v. City of Warren, 579 F.2d 386, 391 (6th Cir. 1978), the court explicitly recognized that "legal actions, such as appealing [a] court decision" may effect a taking. Similarly, in Sixth Camden Corp. v. Township of Evesham, discussed above, the township's appeal, allegedly to delay construction, was held to "provide a basis" for the subsequent taking claim. 420 F.Supp. at 725.

In Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla. 1st DCA 1958), cert. quashed, 116 So.2d 762 (Fla. 1959), the court held that city actions should be considered in conjunction with state actions. The Court of Claims held in Benenson v. United States, supra, that a series of actions by a number of United States departments and officials, "when considered in their totality," had taken plaintiff's property.[24/] Accord, Fountain v. Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1043 (11th Cir. 1982) ("the concept of an unconstitutional taking does not turn on which public agency deprived a private party of the use of his property, but rather, turns on the fact of deprivation for public use. . .")[25/]

B. The Controlling Decision of this Court in Estuary Properties.

1. The Holdings. In Estuary Properties, a development of regional impact application was denied because of doubts as to adequacy of the drainage project. The First District held that there was no substantial competent evidence to support the permit denial. Estuary Properties, Inc. v. Askew, 381 So.2d 1126 (Fla. 1st

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24/ Other cases supporting this fundamental proposition are cited in supplemental footnote 24 at the end of this brief.

25/ As one commentator has noted, the State should not be able to avoid responsibility for a taking merely because the action of each individual level of government considered alone would not amount to a taking. "[Constitutional] prohibitions against uncompensated takings of property are not phrased in terms of separate levels of government. Rather, as the Florida constitution demonstrates, the broad concern is that 'no private property' be taken for a 'public' purpose without compensation . . . . [T]he key criterion under this approach is the effect of the government actions. . . [A] claimant's right to relief should not be destroyed merely because a taking results from the actions of two or more government entities." Harris, Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action, 25 Fla. L. Rev. 635, 682-685 (1973).

DCA 1979). Further, of specific significance in this case, it held that the permitting agency had violated the DRI statute by failing to indicate what changes in the development proposal would make it eligible for a permit. Id. at 1137. The District Court held the failure to comply with that requirement resulted in a taking, pointing out that otherwise, a landowner would be exposed

> to the treadmill effect of repeated denials without any indication from governmental agencies of changes in his proposal that would permit an economically beneficial use of his property . . . [state agencies] could entrap a developer in a virtual bureaucratic revolving door, until he finally collapses from financial exhaustion, or withdraws his application from simple frustration. 381 So.2d at 1137.

This, of course, is exactly what happened here!

On review, this Court agreed that the denying authority was required to specify those conditions that would result in a permit, but concluded that the State's failure to do so there could be cured by directions on remand in that particular case, where, unlike this case, the property remained in one ownership. This Court specifically held that there may be a "taking" even by valid government action, a principle it has reaffirmed in Albrect and Key Haven, and went on to restate the law on compensable taking by government acts and regulations, listing the six factors applied by the trial court here in determining that a taking had in fact occurred. Finally, this Court specifically approved the findings of takings in Zabel v. Pinellas County Water & Navigation Control Auth., 171 So.2d 376 (Fla. 1965), and Askew v. Gables-by-the-Sea, Inc., 333 So.2d 56 (Fla. 1st DCA 1976), cert. denied, 345 So.2d 420 (Fla. 1977), where, as here, government action denied the landowner any reasonable use of its property.

2. Consideration of Factors under Graham v. Estuary Properties. The six factors to be considered under Estuary Properties are not "elements of a cause of action" each of which must be present. Instead, they are factors which evidence takings. Very clearly, "taking" cases are "fact" cases, and depending on the facts, there may be a taking even in the absence of four or five "factors." Here, five of those factors are undeniably present; in addition, the elimination of practical access is equivalent to the final factor of physical invasion and is certainly established here.

(a) Diminished Value. In a "taking" case, the court should consider the diminution in market value caused by State action. Albrecht, supra. Diminution is a "before and after" State action inquiry. Thus, the trial court determined "fair market value" as of the date of taking, both (1) "as if" the improvements had not been prevented and (2) "as is" without the improvements. Because diminution is the issue, that is what the appraisers are to testify about. Yet the State's appraiser was not even asked what would be the value of the property if the improvements had not been prevented! The unrebutted testimony, accepted by the trier of fact, showed a diminution from $6990 to $100 - $200 as a result of State action. Petitioners cannot "use [their] property for any income-producing purpose [and] cannot sell it." Benenson v. United States, supra, at 947. The lots were sold with the State-approved disclosure that they were currently unusable but would be accessible and drained by the improvements. It should come as no surprise that preventing the improvements after the ownership is divided destroys the value of

the property.[26] The State admitted early in this case (through DBR, the agency responsible for assuring that purchasers received the improvements) that the lots at CAE are "absolutely valueless without the improvements." [Transcript of March 11, 1975 Hearing at 7, 12; R 142, 147].[27] Atlantic's situation and that of the class members is analogous to that of barge owners located in a newly designated wilderness area, where the court recognized that "the right to drift aimlessly in a landlocked lake is the equivalent of no right at all." Pete v. United States, 209 Ct. Cl. 270, 531 F.2d 1018, 1025 (1976).

Without improvements, the lots remain undrained, have no physical access, can be located only with a survey and are accordingly valueless. Practical realities, not theoretical possibilities, determine a taking. [FJ Concl. of Law 8, A. 44).

(b) Physical Invasion. Estuary Properties recognized that a physical invasion is only one factor in determining whether there has been a taking. Numerous cases in Florida and elsewhere have found a taking without physical invasion because property includes more than "the physical thing . . . [but] the right to possess, use and dispose of it," United States v. General Motors Corp., 323 U.S. 373, 377-378, 65 S.Ct. 357, 89 L.Ed. 311 (1945).[28] Moreover, as the lower court found,

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26/ That Atlantic could sell its properties "for whatever the market will bear" does not preclude a taking. Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656, 659 (1979).

27/ By stipulation dated December 11, 1981 [R. 3383-3389], DBR acknowledged the improvements will never be installed.

28/ Benitez v. Hillsborough County Aviation Authority, 26 Fla. Supp. 53 (Circuit Court, Hillsborough County, 1966), aff'd, 200 So.2d 194 (Fla. 2d DCA), cert. denied, 204 So. 2d 328 (Fla. 1967) (taking of an aviational easement even though jets did not fly directly over property). Some of the many additional cases are collected at supplemental footnote 28 at the end of this brief.

"the practical effect of governmental acts has been to eliminate physical access to the individual lots, a factor many courts virtually equate with physical invasion." [FJ ¶ 71, A. 35]. Many cases hold that eliminating either practical or legal access deprives an owner of any reasonable use of his land. A compensable taking was found in Bydlon v. United States, 128 Ct. Cl. 764, 175 F. Supp. 891 (1959), where an executive order deprived plaintiffs of reasonable practical access to their resorts.[29/] In State of Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979), the court held the Bureau of Land Management could not constitutionally preclude or make access across a federal wilderness area so restricted as to render state lands incapable of economic development. 486 F.Supp. at 1010.

Florida law is certainly in accord. State Department of Transportation v. Stubbs, 285 So.2d 1, 3 (Fla. 1973) ("[e]ase and facility of access constitute valuable property rights for which an owner is entitled to be adequately compensated. . . ."); City of Orlando v. Cullom, 400 So.2d 513, 516 (Fla. 5th DCA), petition denied, 411 So.2d 381 (Fla. 1981) ("the right of access to one's property

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29/ The Court of Claims has noted that denying access is one of "two well recognized situations where the government will be held to take without any formal expropriation or physical invasion." Armijo v. United States, 229 Ct. Cl. 34, 663 F.2d 90, 93 (1981). The second "well recognized situation," which also applies here, is "when the government regulation is practically so burdensome and pervasive that the landowner is denied all use of his land." Armijo, supra at 93 (1981), citing Pennsylvania Coal Co. v. Mahon, supra, and Benenson v. United States, supra. See also Ed Zaagman, Inc. v. City of Kentwood, 406 Mich. 137, 277 N.W.2d 475 (1979) (single family zoning confiscatory because it was economically infeasible to install roads to landlocked property); San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266, 273 (Tex. Civ. App. 1975) ("an unreasonable interference with the right of access to one's property is recognized as a compensable taking . . . .").

is a valuable right which cannot be taken without compensation. Even a serious diminishment is a taking and must be paid for").[30]

(c) Public Benefit/Public Harm. In Estuary Properties, this Court (although holding that even valid police power regulations may constitute a taking under the facts) held that denial of a permit to avoid unreasonable harm to the public might be reasonable, whereas if it "simply created a public benefit by providing a source of recreation . . . for the public, the regulation might be a taking." The frustration of development at CAE has not prevented a public harm. To the contrary, DER acknowledged that the improvements would not produce public harm when it at long last agreed to grant the permit.

Although it is the fact of the taking of property from Atlantic, rather than any resulting benefit to the State, which is crucial in inverse condemnation, as the trial court specifically recognized, the State interest was furthered in exactly the same manner as its purchase of adjoining or nearby lands such as Turnbull Hammock and Seminole Ranch and other adjoining state projects such as the Farmton Wildlife Management Area. [FJ ¶ 72, 73, A. 35, 36].[31] The allocation of specific tax funds in 1979 and 1981 for such land and water management acquistion purposes likewise acknowledges this State goal. [Section 201.15, Florida Statutes]. As the San Diego Gas opinion states, "the benefits flowing to the public from

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30/ Among other cases, the court cited Pinellas County v. Austin, 323 So.2d 6, 8 (Fla. 2d DCA 1975), which holds that "[t]he right to access one's land is a property right" and that the landowner may be entitled to compensation even where the government "properly exercised its discretion" in extinguishing the access.

31/ In fact, Chapter 81-33, Florida Statutes, specifically authorized St. John's to acquire Seminole Ranch because acquiring lands to conserve and protect water and water-related assets is "a public purpose for which public funds may be expended." Fla. Stat. 373.139 (1981).

preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation . . . ."[32/]

(d) Public Health, Safety, and Welfare. As the trial court found and as the State admits,[33/] this is a case where the improvements could be made consistently with the public health, safety, and welfare, and the permit was accordingly ultimately granted. Thus, this case falls within the class of cases such as Zabel v. Pinellas County Water & Navigation Control Auth., 171 So.2d 376, 381 (Fla. 1965), which found that the State's denial of a permit was a taking when "it was not established that the granting of the permit would materially and adversely affect the public interest."[34/] Indeed, when the project was begun, the State policy was to drain CAE, since the statute creating SCDD declared that to be State policy and declared water the "common enemy" within CAE borders. The subsequent change of policy on the part of State agencies to one of preserving CAE

32/ See also Sheerr v. Township of Evesham, 184 N.J. 11, 445 A.2d 46, 68 (1982) (finding that restrictive township actions "preserve plaintiff's property in its natural condition as open space, thus conferring a public benefit"); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305 (1974) (finding a taking of an historic building by denial of a demolition permit because "it could . . . be well argued that the commission has added the Morgan house to the resources of the city . . . ."); Spears v. Berle, 63 A.D. 2d 372, 407 N.Y.S. 2d 590, 593, 397 N.E.2d 1304 (1978), rev'd and remanded for an evidentiary hearing, 48 N.Y.2d 254, 422 N.Y.S.2d 636, 397 N.E.2d 1304 (1979) (certain wetlands restrictions effected taking, in part, because they were "an effort to preserve a particular piece of private property for the benefit of the community at large . . . .").

33/ DER Brief at 28, 57-59, in the District Court.

34/ Accord, City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); Charles v. Diamond, 47 A.D.2d 426, 366 N.Y.S.2d 971 (1975), modified, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977).

after rights had vested makes this case factually stronger than most other cases finding takings through regulation.

Moreover, the valid exercise of police power may effect a taking, as this Court specifically noted in Estuary Properties, Albrecht and Key Haven. These opinions rely on Pennsylvania Coal v. Mahon, supra, where Justice Holmes wrote "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not grounds to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . ." Thus, there is a taking even if preserving the lands at CAE may have been in the public interest.35/

(e) Arbitrary and Capricious Government Action. Since even valid actions may effect a taking, the State's protestations of good faith and reasonableness will not change the result. Arbitrary and capricious action need not be proved to establish a taking. Pennsylvania Coal Company v. Mahon, supra; Bartlett v. Zoning Commission of Town of Old Lyme, 161 Conn. 24, 282 A.2d 907 (1971); Albrecht, supra. On the other hand, arbitrary and capricious action is one of the relevant factors showing a taking. Estuary Properties, supra. Indeed, one specific aim of the taking clause is "to prevent . . . the arbitrary use of governmental power." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 100 S.Ct. 310, 316, 63 L.Ed.2d 757 (1980). DER admitted that there could be a taking if the government acted arbitrarily or unreasonably. [Transcript of Hearing of March 11, 1975, at 43, R. 178].

35/ Some of the many cases so holding are cited in supplemental footnote 35.

The evidence discussed in the Statement of Facts amply supports the trial court's finding that various State actors acted arbitrarily and capriciously toward Atlantic.[36/] Significantly, the District Court did not disagree.

As Florida courts have long recognized, "in dealing with its citizenry, the Government is required to adhere to the same strict rule of rectitude of conduct and the turning of the same square corners as the Government requires of its citizens." Okaloosa Island Leaseholders' Ass'n v. Hayes, 362 So.2d 101, 103 (Fla. 1st DCA 1978). Accord, Kirk v. Smith, 253 So.2d 492, 494 (Fla. 1st DCA 1971) ("If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens"); State Road Department v. Lewis, 156 So.2d 862, 868 (Fla. 1st DCA 1963), aff'd in part and reversed in part, 170 So.2d 817 (Fla. 1964). The state has failed to approach that standard in dealing with Atlantic and its purchasers.

(f) Investment-Backed Expectations. Like the Florida Supreme Court in Estuary Properties, the United States Supreme Court recognizes the frustration of reasonable investment-backed expectations as a factor in determining whether there has been a taking. Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979), citing Penn Central Transportation Co. v. City

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36/ Indeed, the hearing officer, in his order recommending that the permit be granted, noted the conflicts of interest and that "some [of various county and state employees] appeared to be voicing private, rather than official objections." [PX 38 at 27].

of New York, 438 U.S. 104, 439 U.S. 883, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).[37/]

The State's actions have unquestionably frustrated the investment-backed expectations of both Atlantic and the Simon class. Atlantic invested in Cape Atlantic Estates in order to obtain a return from the sale of lots. [Lipman at 29-35, R. 4410; Trella at 92-94, R. 4001-4003].[38/] The class members likewise expected such a return or the ability to make use of the property. None of petitioners can now realize their expectations. There can be no clearer interference with investment-backed expectations. Indeed, the interference with investment expectations which effected the taking in Kaiser Aetna was far less severe since the developer there could still sell lots around the marina and purchasers could still use the marina waters although not exclusively. What has been denied in CAE is all reasonable use of the property.

37/ The New York Court of Appeals recently analyzed interference with reasonable investment expectations in light of Kaiser Aetna and Pruneyard Shopping, noting that "[I]t is fair to conclude that the phrase 'reasonable investment-backed expectations' refers not to the overall investment in the property, but to the investment made with a now frustrated particular purpose or 'expectation' in mind." Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y. 2d 124, 440 N.Y.S. 2d 843, 856, 423 N.E.2d 320 (1981), rev'd, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

38/ See Osborn v. City of Cedar Rapids, 324 N.W.2d 471, 472 (Iowa 1982), where the Iowa Supreme Court, in finding a taking, rejected the City's defense that the landowners could continue to use the land: "In a sense this is true but this is not conclusive. The principal, almost exclusive, value of the property to plaintiffs did not lie in the use plaintiffs then made of it. They held the property mainly for its development potential. . . . The loss of such potential investment-backed expectations is a factor to be considered in determining whether there has been a taking."

In sum, the trial court's Final Judgment herein is, under time honored appellate standards, factually unassailable. Legally it is in complete and faithful accord with the teachings of the decisions of this Court, the demands of the Constitutions, and all other applicable jurisprudence.

CONCLUSION

In this case the government has "taken" private property. That "taking" has been established in the crucible of an adversary process conducted in complete compliance with all those procedural, substantive and constitutional principles applicable to it.

In view of all the foregoing, it is submitted that this Court should (1) determine and declare that the First District decision herein is in direct conflict with controlling decisions of this Court which should prevail, (2) determine and declare that the Final Judgment of the trial court is correct, and (3) order and mandate that the Final Judgment of the trial court be reinstated and enforced.

Respectfully submitted,

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
Post Office Box 3239
Tampa, Florida 33601
(813) 223-5366

ATTORNEYS FOR PETITIONERS

By: _____
Peter J. Winders

for Cynthia S. Tunnicliff

and

Donald E. Henke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Initial Brief on the Merits and Appendix has been furnished by mail, this 7th day of June, 1984, to the following:

Louis F. Hubener, III, Esq.
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

Daniel D. Eckert, Esq.
Post Office Box 429
Deland, Florida 32720

Hubert W. Williams, Esquire
Robertson, Williams, Duane
& Lewis, P.A.
538 East Washington Street
Orlando, Florida 32801

David Maloney, Esq.
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301

Gordon D. Cherr, Esq.
Richard Lee, Esq.
State of Florida Department
of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32301

Attorney