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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' REPLY BRIEF

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PREFACE

This brief replies to the answer briefs of both the State and DER.

The same abbreviations will be used as in Petitioners' initial brief. The brief filed by the State will be referred to as "S.Br." and the separate brief filed by DER will be referred to as "DER Br." Appendix references ("A ___") are to the appendix to Petitioners' initial brief. Emphasis is added.

DER citations to matters not in the record. DER references and quotes matters not in the record. On page ix of DER's brief, DER states that Volumes I through IX of the testimony from the DER permitting case "were proffered at trial." That is not true. There was no such proffer. The facts are set forth in the motion to strike served August 7, 1984. Also, DER quotes at length from the Petition for Certiorari in the 1976 administrative proceeding (DER Br. 8-9), which is likewise not in the record and is a subject of the motion to strike.

INTRODUCTION/SUMMARY OF ARGUMENT

Petitioners recognize that the function of this Court is not to reweigh evidence, and would have preferred to confine this reply brief to the legal issues, rather than factual issues, but the arguments in the answer briefs are largely factual and there seems to be no alternative but to respond to them as well. The arguments of the State and DBR fall into three main categories:

1. Efforts to change the facts and the record. Respondents attack the findings set forth in the Final Judgment, reargue evidence, attack the witnesses believed by the trial court, and attempt to supply additional evidence not in the record. This brief in Point I will demonstrate that the trial court's rulings were consistent and faithful to the law and that its factual findings are supported by substantial and competent evidence.

2. Procedural arguments designed to avoid the merits. Respondents seek to avoid the merits of this case by (a) a strained reading of the decisions of this Court in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So.2d 153 (Fla. 1982) and Albrecht v. State, 444 So.2d 8 (Fla. 1984), and (b) attempting to distinguish those cases by emphasizing that DER stipulated to grant Atlantic the permit after some seven years delay. Point II of this brief will show that it makes no difference that the final agency decision was by stipulation. It will also demonstrate that the procedure announced by the trial court in this case, affirmed on interlocutory appeal and followed at trial is perfectly consistent with the subsequent pronouncements of this Court in Key Haven and Albrecht. Key Haven and Albrecht merely define the proper role of the administrative process in permitting matters and the Circuit Court in deciding

constitutional taking claims. The trial court properly reached the merits and did not contravene the common sense teachings of Albrecht and Key Haven.

3. Arguments going to the merits. The State's arguments on the merits are largely factual arguments precluded by well supported findings of the Final Judgment. These, plus the State's efforts to convince the Court that the damage here can be undone simply by declaring DER's action void and the State's argument that "just compensation" for the property rendered worthless should be limited to the reduced value, will be dealt with in Points III, IV and V of this brief.

The State's repeated references to the amount of money at stake[1/] can only be viewed as either an attempt to frighten the Court or a plea to protect the State from its constitutional responsibility. This Court's protection of constitutional rights does not depend on the amount involved. See Osterndorf v. Turner, 426 So.2d 539, 545 (Fla. 1982). The function of the judiciary is to protect the citizens from the government by enforcing constitutional guarantees, not to protect the government from constitutional mandate. That the State destroyed the property of all 4,000 class members renders constitutional relief more, not less, compelling.

In addition, the State overlooks a fundamental fact. This is not a damages case, where the defendant pays but receives nothing. This is a just compensation

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1/ There has been no valuation trial yet, and, while the numbers may be large, particularly after adding interest, the State should not inject that here. To put the matter into better perspective, petitioners' valuation testimony on the diminution issue was $6,990 per lot. If such a figure is established at the valuation trial, Atlantic's 2,000 lots would be valued at approximately $14 million as of the date of taking, a figure close to its expected return. The 4,000 class members, of course, have a larger claim in the aggregate. There are approximately 11,000 1 1-4 acre lots in the subdivision, but not all lots are involved in this case because all purchasers did not join the class.

case where the State has taken plaintiff's property and must pay its value in exchange. Thereby the State acquires the land; once the fragmented ownership is unified in the State, it will own a valuable asset, and responsible State officials can decide the best use of the property.

I. RESPONSE TO ATTACKS ON THE FINAL JUDGMENT AND TO THE STATE'S EFFORTS TO CHANGE THE FACTS.

Introduction. The strident brief filed by the State accuses this law firm of misleading the Court on a number of matters, some of which are material. We have carefully reviewed all of the State's accusations and reaffirm that our description of the record and the evidence is fair and accurate. As an example, the State's brief (p. 3) says that we mislead the Court when we say that DER finally issued a permit in 1977, even though (1) that fact was admitted by the State [R.2599] and by DER [R.2612] in response to request for admission 79 [R.2196], (2) the pretrial stipulation so states [PSTIP III 30, A.62], (3) the Final Judgment so finds as a fact [FJ ¶ 53, A.27] and (4) DER, which actually granted the permit, itself argues that the stipulation constituted a permit. [DER Br. 14]. Other instances will be responded to where appropriate in this brief.

1. Arguments that the Final Judgment is not entitled to credence.

The State argues that the facts in the Final Judgment should not be considered established because Petitioners submitted a proposed Final Judgment to the court. [E.g., S.Br. 6, 41]. After the conclusion of the evidence, the trial court in fact requested both sides to submit their closing arguments in writing, together with proposed findings, conclusions, and judgment [R 4528]. Atlantic and the class, as plaintiffs, submitted first. The State responded by written argument contesting plaintiff's proposed findings and proposing its own version of the facts -- the

very same arguments they now advance! Plaintiffs replied. After consideration of all these submissions and the evidence he had heard, the trial court rejected the State's interpretation of the facts and adopted the Final Judgment proposed by Petitioners.

The idea that such a Final Judgment should not be given its traditional credence is absurd. Rule 1.080(h), Fla.R.Civ.P., under which perhaps 95% of all trial court orders are drafted says, "The court may require that orders or judgments be prepared by a party. . . ." Where the parties have had full opportunity to respond to a proposed findings before they are adopted, there can clearly be no quarrel with the efficacy of the Judgment.[2/]

2. Arguments that admitting evidence of the acts of Volusia County and St. John's was inconsistent with prior rulings. The State feigns surprise and indignation that the trial judge considered evidence of the acts of St. John's and Volusia County after they had been dismissed as parties. The State's brief (p.4) accuses Petitioners of misleading the Court in this regard and accuses the trial court of inconsistency with its earlier rulings on both the admissiblity of such evidence and the effect of the dismissal.[3/] Nothing could be more contrary to the

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2/ There is no comparable Federal rule. The State cites some federal decisions stating that a judgment drafted by a party may receive more scrutiny than one drafted by the court without assistance (In re Las Colinas, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970), cert. denied, 405 U.S. 1067 (1972)), but those cases are a minority. See Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981); Louis Dreyfus & Cie v. Panama Canal Co., 298 F.2d 733, 737 (5th Cir. 1962), and cases cited therein; Edward Valves, Inc. v. Cameron Iron Works, Inc., 289 F.2d 355 (5th Cir.), cert. denied, 368 U.S. 833 (1961). Moreover, even those cases emphasize that the order has a presumption of correctness and is to be reversed only if clearly erroneous. (Las Colinas, supra; Louis Dreyfus, supra).

3/ The State also mischaracterizes the holding. [FJ ¶11,A.10, 12].

record. The very order which dismissed Volusia County as a party to the taking claim, entered two years before trial, expressly held that the acts of non-party agencies, "including Volusia County and St. John's," would be admissible on the issue whether the cumulative actions of the several state agencies and subdivisions constituted a taking. [R. 1487; see also R. 1905]. Judge Cawthon stated prior to his ruling: "There's all kinds of agents, individuals. You can prove what they did; you don't have to make them a party," (R. 1524), and, after announcing his ruling "just to let counsel know how the Court feels about the case . . . if the sum of [State agencies'] action amount to a taking, then it's a taking." [R. 1527-28].

Most important, the pre-trial stipulation specifies that the issue to be tried is: "Whether the cumulative actions of the State of Florida, by and through its agencies, divisions, political subdivisions or agents, including the remaining defendants, and including Volusia County and St. John's, constituted . . . the unlawful taking . . . of plaintiff's property. . . ." [PSTIP at 23-24, A.73-74]. Significantly, the State preserved no issue of law in the pretrial stipulation concerning the propriety of considering those acts. The State should not be heard now to argue that admission of such evidence was either surprising or erroneous.

3. Arguments that the actions by St. John's, Volusia County and DBR should disappear from the case because they are not parties. The State argues that since St. John's, DBR and Volusia were dismissed as parties, their acts did not happen. [S.Br. 4-8, 24; DER Br. 41, 45]. Even if the trial court's rulings and the pre-trial stipulation did not dispose of this argument, the absurdity of the argument is shown by an analogy to an automobile case where the plaintiff driver, who was faced with two oncoming automobiles and a wall on his right, sues the two drivers and the owner of the wall. If the owner of the wall is dismissed, that does not

mean that the wall was not there, and does not mean that the oncoming drivers have proved that plaintiff could have avoided the accident by turning right. So here the fact that DBR was dismissed does not mean, as the State suggests, that Atlantic could have ignored the Land Sales Law and sold its unimproved and unimprovable lots after its registration became inoperative, and the dismissal of Volusia County does not alter the fact that the improvements were not installed as SCDD would have done if it had not been abolished. The facts are the facts regardless of the formal parties to the suit.[4/]

The State's "law of the case" argument (S. Br. 24-25, 42-43) based on the dismissal of St. John's, Volusia County and DBR is wrong because: (1) The trial court's actual ruling was that their acts were admissible on the taking issue despite the dismissal. [R. 1487, 1905]. (The State argues Atlantic should have appealed. Atlantic had no reason to appeal because the ruling was favorable). (2) The stipulated issue to be tried was whether the cumulative acts of the State agencies, "including Volusia County and St. Johns," amount to a taking. (3) The law of the case doctrine applies to decisions of appellate courts. 3 Fla. Jur. 2d "Appellate Review" § 413-428 (1978).

4. Arguments that acts of St. John's and Volusia County are not State action. [S.Br. 7, 24]. Deseret Ranches of Florida, Inc. v. St. John's Water Management District, 406 So.2d 1132 (Fla. 5th DCA 1981), aff'd in part, rev'd in part, 421 So.2d 1067 (Fla. 1982), does not hold that St. John's is not

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4/ The argument (e.g., S.Br. 7, 9) that this Court should treat the facts found by the trial court as non-existent because the First District court did not mention them in its opinion below is ridiculous and requires no reply. Indeed, it confirms that the District Court found no problems with those facts.

a State agency. It holds merely that St. John's tax power is not a prohibited State ad valorem tax but is a constitutionally permitted water management tax within Article VII, Section 9(b). St. John's was created by statute, given specific government functions [Fla. Stat. 373.069], the power to tax [Fla. Stat. 373.0697], the duty to administer specific statutes [Fla. Stat. 373.016(3), 373.103], grants of State monies [Fla. Stat. 373.590], the power of eminent domain [Fla. Stat. 373.130], and other State powers. Plainly, it is an agency of the State.

In arguing that Volusia County is not a State agency, the State overlooks the fundamental nature of a county as defined in Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916):

> [a] county is a political subdivision of a State. It is not a corporation. It may be created by the State without the solicitation, consent, or concurrence of the inhabitants of the territory thus set apart; it is created for administrative purposes; it is the representative of the sovereignty of the State , . . . an aid to the more convenient administration of the government. . . . [I]ts functions are of a public nature, constituting the machinery and essential agency by and through which many of the powers of the State are exercised. . . . [C]ounties are under the Constitution political divisions of the State, municipalities are not; the county, under our Constitution, being a mere governmental agency through which many of the functions and powers of the State are exercised. . . . [A] county acts only in a public capacity as an arm or agency of the State.

Plainly, Volusia County was exercising State functions here -- the State had explicitly declared reclaiming CAE to be State policy and had conferred that duty on Volusia County.[5/]

5/ The State cites Amos v. Mathews, 99 Fla. 1, 126 So. 308, 321 (1930). S.Br.26 In fact, Amos recognized that "it is true that a county is an agency of the State, having no inherent power, but deriving its powers wholly from the sovereign state . . . ."

The trial court correctly held that cumulative actions of State agencies created constitutional responsibility in the State. The State's contentions that it is not bound by the acts of its agents (S. Br. 7, 24-26) and that only the acts of the Legislature are to be considered State action are controverted by the Constitution itself which creates other branches and provides for agencies and subdivisions.[6/]

5. Evidence of St. John's acts after the date of taking. The trial court admitted evidence of some St. John's actions after the date of taking, but only as it bore on acts prior to the date of taking. [R. 4574-4580]. Some of those actions establish motives or clarify earlier actions. For instance, the letter of September 14, 1977 (Px 64) specifically but falsely asserts that St. John's had permitting jurisdiction in Volusia County, and disposes of the State's argument (S. Br. 15) that PX42, written before the date of taking should not be read as an assertion of jurisdiction. [Auth. April depo. at 14, 15]. Similarly, the Turnbull Hammock purchase was the culmination of a series of transactions between the Trust for Public Land ("TPL") and St. John's which began well before the date of taking.

Evidence of such conduct is relevant, not only to clarify St. John's earlier intentions, but also to dispose of the State's arguments that Atlantic should have

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6/ As was specifically recognized in Askew v. Gables-by-the Sea, Inc., 333 So.2d 56 (Fla. 1st DCA 1976), cert. denied, 345 So.2d 420 (Fla. 1977), "the issues are between the plaintiff on the one hand and the State of Florida, acting through its agencies, on the other." Accord, Fountain v. MARTA, 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. . ."); See Doyle v. Shands Teaching Hospital & Clinics, 369 So.2d 1020 (Fla. 1st DCA 1979). The State cannot avoid the constitutional requirement of compensation simply by arguing that the act of each individual level of government considered alone would not amount to a taking. [See Petitioners' Initial Brief pp. 51-52.]

gone through still other permitting proceedings with St. John's. [S. Br. 15]. The evidence shows that Atlantic correctly concluded that formal permit application to St. John's would involve substantial additional expenses and delays -- Atlantic was clearly caught in the "treadmill . . . of repeated denials" described by the District Court in Estuary Properties v. Askew, 381 So.2d 126 (Fla. 1st DCA 1979), rev'd on other grounds sub nom. Graham v. Estuary Properties, Inc., 388 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981). Fruitless acts are not required. [Trella at 63, R. 4175; PX 74, 77, 80; Auth April Depo. at 41, 42, 45, 46, 53, 54, 56; Auth Sept. Depo. at 15, 17-18, 21-23, 26-27].[7/][8/]

Finally, considering St. John's actions was harmless at worst since the trial court explicitly found that the acts of DER alone resulted in a taking. [FJ ¶ 11, A. 10-12].

6. State's argument that the trial court reviewed the order denying the permit. Contrary to the State's argument that the trial court usurped the appeal court's function, the Final Judgment specifically reflects that the lower court

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7/ Other acts of St. John's were relevant to the Estuary Properties factors even though they occurred after the date of taking. For example, the State's acquisition of land in this very area for preservation demonstrates that land preservation is a legitimate public benefit and that such benefit is to be obtained by purchase, not by delay, inconsistent proceedings, and an endless series of procedural hoops.

8/ An additional reason, not relied on by the trial court, would support consideration of State action after the date of taking. As of the date of taking, the delays and State actions were continuing and indeed continued well into 1980. A helpful analogy could be made to the airport noise cases where it is the trier of fact who determines where in the gradual increase in jet traffic from one to one hundred flights per day a taking has occurred. The fact that the flights continue after the alleged date of taking is relevant because, even though the plaintiff asserts a taking in 1970, the trial court may instead determine that it was in 1972. The point is that proper analysis requires a review of the entire continuum in order to intelligently identify the date upon which the accumulating insult to ownership rendered that ownership essentially meaningless.

did not review the District Court, the stipulated permit, or DER's order denying the permit to determine whether they were correct. [FJ, ¶ 51, A. 27; Concl. 16 A. 48]. Indeed, the trial court ruled throughout trial that he would not do so. For example, the trial judge ruled that he would not admit for any such purpose the sworn admissions of State employees as to their reasons for denying the permit [R. 3957, et seq. R. 4347, et seq.] but would consider such evidence only as it related to the "taking" cause of action, on "the issue of good faith or bad faith, justifiable delay or not justifiable delay. So my ruling was intended to [admit at the State's request] the transcript of the testimony [of those witnesses] not the whole proceedings before the examining officer." [R. 4347]. Continuing, the trial court emphasized to the State that "the District Court has jurisdiction to review an administrative order, I recognize that, I am not attempting to, not intending to . . ." Other trial rulings were similar. [E.g., R. 4650-4659]. Plainly, the trial court did not "review" the DER order, as Respondents suggest.

7. Motives of State employees. The State cites Direct Oil Corp. v. Brown, 178 So.2d 13 (Fla. 1965) and Manatee County v. Estech General Chemicals Corp., 402 So.2d 75 (Fla. 2d DCA 1981) which hold that motives of an agency in granting or denying a permit are not relevant in a permit case. However, they do not stand for the proposition that such motives are irrelevant in a taking case. To the contrary, Estuary Properties plainly teaches that arbitrary and capricious State conduct - abuse of power - is relevant, though not necessary, in a taking case. When the trial court admitted evidence that the four State employees decided to deny the permit, after approving it in workshop sessions, for non-statutory and unsupported grounds, he was following the dictate of Estuary Properties, not retrying the permit case. [FJ¶50, A.25-26].

8. Culpability. The State wishes to press the Court into treating this case as if it were a tort case. Once again, this is not an action for damages, this is an action to establish that the State has taken private property. If it has, the Constitution requires just compensation. This Court has repeatedly held that arbitrary action is not necessary for a taking and arguments that specific agencies should be absolved from blame have no effect on the result. The question is whether there was substantial competent evidence to justify the trial court's finding that under all the facts of this unusual case the plaintiffs' property has been destroyed.

9. Drainage Design. The State admits that the grid pattern was "common in the land sales industry at the time . . . ," but later argues that this design prevented development. [S.Br. 10, DER Br. 30]. Atlantic cannot be faulted for failing to anticipate advances in the "state of art" in land planning.[9/] Furthermore, the State's argument simply quarrels with the finding of the trier of fact that it was State action -- not a "bad" design -- that thwarted this project.

10. Atlantic's "bad planning." There is no basis for the argument that the Final Judgment puts a premium on improper planning. First, there was no evidence that this project failed because of poor planning or inadequate financing, and the trial court found to the contrary, holding that "unforseeable" State actions had

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9/ See, e.g., City of Miami Beach v. Wolfe, 83 So.2d 774 (Fla. 1955); Seaboard Coast Line Ry. Co. v. Parks, 89 Fla. 405, 104 So. 587 (1925); Ellis v. Golconda, 352 So.2d 1221, 1224 (Fla. 1st DCA 1977), cert. denied sub nom. Peterson v. McKenzie Tank Lines, Inc., 365 So.2d 714 (Fla. 1978).

taken the property. [FJ¶36, A.20]. Second, it is important to recognize that no permits were required by the State law until 1972 -- after the land had been subdivided and the vast majority of the lots had been sold, the economics frozen, the design locked in (as DER admits, p 30), and the main canal, representing almost one fourth of the improvements, was complete. Regarding the State's arguments about how Atlantic should have planned the project, it is obvious that neither Atlantic nor its purchasers could have guessed in 1967-70 all the series of State actions which coalesced to constitute the "taking" here (see initial brief at 44). The courts reject such government arguments based on "20/20 hindsight." Benenson v. United States, 212 Ct. Cl. 375, 548 F.2d 939 (1977). Significantly, in other taking cases, the development had not been started prior to the imposition of governmental regulation. For instance, in Estuary Properties, the permit law existed before any development was begun; when this Court required the State to tell Estuary Properties what it did need to do, the developer could "go back to the drawing board" and revise its plans - not only drainage plans, but also economic plans, sales prices, etc. Estuary Properties could do that only because it was still the owner of the entire parcel. Atlantic was not. CAE was caught half done in the dramatic shift of attitude of State agencies from development to preservation. Although the legal principles are well recognized, the peculiar facts of this case will probably never occur again in Florida.

11. Inaccuracies concerning financial and economic conditions. Respondents' briefs contain serious factual inaccuracies in connection with Atlantic's financial situation in 1977. [DER Br.28-31, S.Br.21 et seq.] Atlantic did not "profit immensely" or at all -- expenses wiped out the difference between what it paid for the land and what it sold the lots for. [Trella at 103-104, R. 4218-4219; Lipman

at 19-46, R. 4400-4427; PX 46]. Contrary to DER's unsupported assertion that the $6 million in selling expenses were commissions paid to Mondex Realty, a sister company, and therefore amount to "enormous profits" to the parent corporation as a whole, the record shows those expenditures were a straight allocation of salesmen commissions and other expenses, and they represented no profit whatever to Atlantic or any related company. The same is true as to administrative expenses. [Lipman Volume II at 33-35, R. 4284-85; FJ ¶55-56, A. 28-33].

DER inaccurately says that Atlantic's cash flow was non-existent because its accounts receivables had been pledged and argues Atlantic is to blame for the demise of the project. [DER Br. 30-31]. Pledging receivables does not eliminate cash flow, and there is no evidence or finding that Atlantic's cash flow was non-existent. The evidence shows receivables financing, which is a common method of doing business, was used to pay for the "up-front" development, sales and promotion costs. [R. 4218, 4239, 4241, 4424 et seq; PX 46, 53; FJ ¶ 64, A.33]. Atlantic's cash flow was, on the other hand, substantially affected by the cancellations which took place because State action prevented the improvements. DER's argument (p. 30) that there could be no damage because the lots were more than 95% "sold" in 1972 ignores the undeniable fact of the numerous cancellations.

12. State's reliance on ad valorem tax cases. During the ten year history of this project, Atlantic challenged ad valorem tax assessments on the CAE lots in view of the stalled improvements. Consistent with Respondents' efforts to induce this Court to ignore the record in this case, DER picks and chooses dicta primarily from the dissenting opinion in an ad valorem tax case to factually characterize the project [DER Br. 28-30, 52, 56]. Facts cannot properly be established by citing

dicta in other opinions on collateral issues, but if it were proper, the language in those cases supports Atlantic.[10/]

13. Quarrels with other evidence and the trial court's conclusions. Finally, after urging that the facts be ignored, the State urges in the alternative that this Court reweigh the evidence. For instance, the State urges this Court to reject the trial court's findings based on Mr. Garcia's testimony concerning DER's refusal to provide technical assistance. [S.Br. 16, 17; DER Br. 43-44]. The State contends that Mr. Garcia's fact testimony is self-serving and insubstantial and should not be believed - as it was believed by the trial court. But Garcia is an independent engineer [Trella at 87, R. 4204] and his testimony is clear and unrebutted. This Court should not reject uncontradicted testimony which the trial court accepted on this issue, particularly in view of the State's own admission in the pretrial stipulation that "DPC considered review and processing of a permit application inappropriate while the SCDD litigation was ongoing." [PSTIP III.19, 21, 22, 23; A. 58).[11/12/] The trial court properly rejected the argument urged

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10/ For example, in the First District's majority opinion in Atlantic International Investment Corp. v. Turner, 381 So.2d 719, 720-721 (Fla. 1st DCA), cert. denied, 388 So.2d 1119 (Fla. 1980), which Respondents ignore, the court indicated that "difficulties were encountered following the abolition of the South County Drainage District"; that "[i]n 1971 DPC was empowered by the Legislature to require permits"; that DPC "refused to take any action while litigation concerning [SCDD] was pending"; that CAE was "largely unusable" due to lack of drainage and access roads; that "there was no income from the property"; and that the improvements were "still awaiting governmental approval" as of January 1, 1976. Moreover, the court found that the tax assessor had improperly overvalued CAE because of the many problems with State regulation of CAE.

11/ There is no inconsistency between Mr. Garcia's testimony and the statement in the 1975 complaint that there were discussions with DPC for more than two years prior to filing the permit application in 1974 and that DPC made suggestions. The 1975 complaint did not say that the suggestions from DER took place throughout the two years. In fact, as the State stipulated and the trial court found, DPC refused

again here, that if Atlantic had formally requested the permit during the SCDD litigation, DER would have acted on it promptly. [DER Br. 44, S.Br. 56]. DER's position that the SCDD litigation had to be completed before it would become involved made the filing of any such application a futile act. DER told Atlantic that the permit application would be denied if it were filed without this input from DPC which DPC rules required. Fla. Admin. Code 17.4.07(2); compare 17.4.07(8) (1973). [Garcia at 93, R. 4002-4003]. Atlantic wanted permit approval, not denial.

II. RESPONSE TO PROCEDURAL ARGUMENTS-KEY HAVEN and ALBRECHT AS APPLIED TO THIS CASE - EFFECT OF STIPULATED PERMIT.

Key Haven and Albrecht stand for the common sense proposition that a permit vel non does not determine an inverse condemnation case, but that the ultimate fact of permit or no permit is determined through the administrative process and is taken as a given in a taking case. "Whether the party agrees to the propriety or it is judicially determined is irrelevant." Albrecht, 444 So.2d at 12. Key Haven and Albrecht are correctly analyzed in Petitioners' initial brief [p. 36-40]. The Circuit Court properly reached the merits, especially in light of the law of the case established by the First District's affirmance of the Circuit Court's reservation of jurisdiction to try the taking case after the permit process was concluded.

Continued from prev. page

to provide any input, make suggestions, give advance approval, or generally cooperate at all prior to the December 1973 agreement ending the SCDD dispute. Before that the discussion was all one way - requests and information on Atlantic's part. After the SCDD dispute was resolved, DPC did make suggestions, and Atlantic incorporated these suggestions to the extent possible. DER approved the revisions, but denied the permit anyway, based on personal philosophies and irrelevant considerations, resulting in more delay. [FJ ¶47-50, A. 24-26]

12/ DER's quotation from matters not in the record is responded to in the Motion to Strike served August 7, 1984.

Both the State and DER seek to avoid the controlling precedents of this Court in Key Haven, Estuary Properties, and Albrecht by emphasizing that the final DER action on this permit was by stipulation, a fact which makes no difference.

1. The purpose and effect of the stipulation was not to end the inverse condemnation suit. The State's argument is contrary to the express terms of the stipulation itself. The stipulation limits itself to the permitting case. It says on its face that it resolves or renders moot all of the issues then pending before the District Court of Appeal. It was not intended to resolve the pending inverse condemnation case: Not only does the stipulation make no mention of the taking issues, but the prior rulings of the Circuit Court in this case, affirmed on interlocutory appeal, the stipulation of the parties at the prehearing conference before the hearing officer (PX 35), the ruling of the hearing officer (PX 38, p.2) and the issues framed on certiorari had made it clear that no such taking issues were involved in the permitting case.[13/] Further, as the State concedes [S.Br. 40-41], the issues in a permitting case do not include delay or motives of the officials. The Estuary Properties factors of capriciousness, delay, diminution in value and the like are taking issues, not permitting questions and were therefore not involved in that proceeding. Such is the specific holding in Albrecht, 444 So.2d at 12.

13/ The argument was made on certiorari that the permitting statutes should not be retroactively applied because of potential constitutional consequences. This was purely a question of statutory construction addressed to DER's jurisdiction, which the stipulation resolved in DER's favor.

Additionally, of course, none of this could have any effect whatever on the members of the Simon class, who were parties to neither the permitting case nor the stipulation. The fact that the class intervened in the taking case does not bind it to a stipulation entered in a different case to which it was not a party. While it is true that an intervenor cannot interject new issues into a pending lawsuit, it is absurd to argue, as the State does, that an intervenor is bound to all possible affirmative defenses which could bar another party's claims. The State is incorrect when it indicates that the class used the fact that it was not a party to the permitting case to litigate the permitting issues in this case. To the contrary, the class maintains that the grant of the permit by DER pursuant to the stipulation evidenced that the project could have been timely permitted.

2. The stipulation supports the trial court's determination. By its stipulation, DER conceded that the permit could issue consistent with the public interest. It follows that the permit could have been issued promptly, and the State has in effect admitted that the delay was unreasonable.[14/] Without the delay, the improvements would have been built. [R. 4285-4292, FJ ¶63 A. 31-52]. Far from barring the taking suit, the stipulation in itself is evidence of some factors indicating a taking -- no public harm; reasonable expectations; arbitrary delay.

14/ See Zabel v. Pinellas County Water & Navigation Control Auth., 171 So.2d 376, 381 (Fla. 1965) (state's denial of a permit was a taking where "it was not established that the granting of the permit would materially and adversely affect the public interest"); Sixth Camden Corp. v. Township of Evesham County, 420 F.Supp. 709 (D.N.J. 1976 (determination to issue a permit indicates that the permit denials were arbitrary and capricious with no substantial relationship to the public welfare); City of Austin v. Teaque, 570 S.W.2d 389 (Tex. 1978) (city had taken the developer's land from time of denial of permit to reversal on appeal); Charles v. Diamond, 47 A.D.2d 426, 366 N.Y.S.2d 921 (1975) modified, 41 N.Y.2d 318, 360 N.E.2d 1295, 382 N.Y.S.2d 584 (1977); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (dissenting opinion).

3. The fact that this was a permit by stipulation makes no difference. Once again the posture of the permitting case and the issues before the District Court at the time of the stipulation must be remembered. The hearing officer had ordered that the permit should issue but that DER could impose protective conditions. [PX 38 at p. 28]. DER's final order denied any permit. On certiorari, after oral argument, DER finally informed Atlantic of the conditions under which it would grant a permit. At last, after seven years of requests, Atlantic had received from the agency, created only after the improvements were one-fourth completed, direction as to what its conditions and requirements were!

For purposes of Key Haven and Albrecht, the fact that those conditions came in a stipulation, approved by the Court, makes no difference. If the appeal had run its course, and if the District Court, as in Estuary Properties, had remanded the case with directions that the agency inform the developer of the conditions upon which the permit would issue, the result would be identical. The stipulation in essence furnished Atlantic with the relief it had sought initially -- directions from the agency regarding what conditions would attend a permit. Whether the agency vouchsafed that information voluntarily or had it pried loose by the court as in Estuary Properties clearly makes no conceptual difference whatsoever.[15/] "Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim for inverse condemnation comes into

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15/ The stipulation was clearly not a promise on Atlantic's part to improve the property according to DER's conditions. It was a resolution of a permitting proceeding, a primary thrust of which was that the agency had refused to inform Atlantic of the conditions under which it would issue a permit. In the stipulation, DER at long last quit refusing and gave the information.

being." Albrecht, supra at 12. The critical point is that the permit process was completed and the pending cause of action for inverse condemnation could go forward.[16/]

4. The "taking" court is not precluded from considering relevant facts merely because they occurred prior to the final permit determination. Key Haven and Albrecht in no way preclude Atlantic from complaining of those things that happened before the permit issued, such as delay or the preliminary decision of the staff. Plainly, those actions are relevant to the Estuary Properties factors and the taking cause of action, and the "taking court" should hear all such relevant evidence. The fact that some of it occurred prior to the permit makes no difference. Under the common sense rules of Key Haven and Albrecht, Atlantic is required to accept finally resolved permitting decisions as unchallengeable in a taking case. In this case, Petitioners and the Circuit Court accepted the stipulated permit with conditions as the final position of the agency. But Atlantic was not required to accept the preliminary permit denial which was (1) vacated by the District Court and (2) withdrawn by DER. Nor was Atlantic required to ignore the unreasonable delay in specifying the conditions for the permit.

Analyzed in terms of Key Haven, Atlantic has accepted the final administrative determination -- not the vacated denial but the decision of DER to grant the permit with additional conditions. Then, under Key Haven, the parties returned to the Circuit Court and tried the separate cause of action for inverse condemnation involving the issues whether the State-created delay and other actions

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16/ The State says that Atlantic should have requested relief from the permit conditions. Under Albrecht and Key Haven Atlantic cannot challenge the conditions in the permit. The State should not be able to challenge them either.

constituted a taking. Analyzed in terms of Albrecht, the District Court vacated the permit denial, and ordered the stipulated permit. Thereupon, the parties properly returned to Circuit Court and tried their separate cause of action for inverse condemnation. The procedure followed here was consistent with Albrecht and Key Haven and with the law of the case established when the District Court affirmed Judge Cawthorn's adoption of the procedure. The Circuit Court properly reached the merits.

5. "Defense" that the permit issued. The State asserts that the constitutional right to compensation for property taken is defeated if the State ultimately agrees that the project could be constructed -- the old "hip pocket" permit gambit. If the State can frustrate and delay by every device imaginable until the project is bankrupt, and then escape the constitutionally required consequences simply by issuing a now worthless permit, then the Constitution means nothing. Compare Askew v. Gables-by-the-Sea, Estuary Properties (Fla. 1st DCA), Lachney v. United States, 19 E.R.C. 1198 (Ct. Cl. 1983), and the San Diego Gas opinion, supra. Under the clear holdings of Estuary Properties, Albrecht and Key Haven, there can be a taking even if the State promptly denies a permit for bona fide reasons. The State cannot avoid paying for the same result when it delays for so many years that the well planned economics will not work and the property is absolutely destroyed for all practical purposes. Exactly the same constitutional harm is presented. Exactly the same result obtains.

III. RESPONSE TO ARGUMENTS CONCERNING FACTORS UNDER ESTUARY PROPERTIES.

All parties concede that "taking" cases are "fact" cases. The trial court found five of the Estuary Properties "factors" present, plus the elimination of practical access which is equivalent to physical invasion. Respondents argue other

inferences from the facts to conclude that those factors do not exist, but those arguments were made to and properly resolved by the trier of fact.

1. Diminished value. Several erroneous assumptions appear in Respondents' arguments concerning the value of the lots in CAE and their potential uses.

(a) Valuation as a Single Parcel, Ignoring the Facts. In discussing the highest and best use of the property, the State continues to ignore the fact of divided ownership and treats the property as a single parcel. The trial court refused to ignore the facts which create the problem, such as the fragmented ownership.[17/]

(b) Comparable sales. Respondents' arguments that 5,000 sales should be disregarded because the purchasers who viewed the land and read State-approved prospectuses were uninformed or "foolish" were properly rejected by the trier of fact. Contrary to Respondents' briefs (S.Br. 54-55, DER Br. 29), more than 80% of the purchasers saw the land either before purchase or during the six-month period when they could rescind with full refund. [Trella at 18-19, R. 4130-4131; Simon at 42, R. 3597, 4663; see Knight at 32-38, R. 3587-3593].

(c) Highest and best use. Petitioners' appraiser testified that the highest and best use of the improved lots at date of taking was for recreation and weekend

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17/ Incredibly, the Respondents suggest (S.Br. 46-47, DER Br. 26-27) that, after the State bankrupted CAE, all 4,000 remaining lot owners could get together and do the improvements themselves. As is perfectly obvious, and as Mr. Knight pointed out, that would be an insurmountable logistical problem. [Knight at 21-22, R. 3576-77].

use. [Knight at 21, R. 4552; see Trella at 62, 95-96, R. 4174, 4210-4211]. Respondents argue that unimproved lots could be pooled and leased to hunting clubs. There was no evidence that this or any other suggestion was economically viable.

Respondents, arguing that any lot owner can use his property in accordance with the applicable zoning code [DER Br. 26, 34, S.Br. 46-48], ignore the facts that the lots remain undrained and must be drained as a group, have no practical physical access, and can hardly be located without roads. Practical realities, not theoretical possibilities, determine a taking. [FJ, Concl. of Law 8, A. 44).

(d) Respondents' diminution cases distingushed. Respondents argue that 75% and 88% diminutions are not "necessarily" takings. [S. Br. 49, DER Br. 23]. Since each case turns on its facts, it is not surprising that a few such cases exist. However, some of those cases are basically nuisance cases. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 147, 60 L.Ed. 348 (1915). More important, in those cases, most of the other Estuary Properties factors are absent, and in all of them the government action was found necessary to protect the public health and welfare. Finally, takings have been found with much less significant decreases in value,[18/] and there is no case where a decrease to 1 1/2 - 2 1/2 percent of the property's value, as here, has been held insufficient to establish a taking.

DER (p. 27) misreads Farrugia v. Frederick, 344 So.2d 921 (Fla. 1st DCA 1977), and State Department of Environmental Regulation v. Oyster Bay Estates, Inc.,

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18/ E.g., Benitez v. Hillsborough County Aviation Authority, 26 Fla. Supp. 53 (Cir. Ct., Hillsborough County 1966), aff'd, 200 So.2d 194 (Fla. 2d DCA), cert. denied, 204 So. 2d 328 (Fla. 1967) (taking of aviation easement even though property could continue to be used as residences); Knight v. City of Billings, 642 P.2d 141, 145 (Mont. 1982) (20-30% diminution sufficient for taking); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46, 69 (1982) (40 - 60% diminution).

384 So.2d 891, 895 (Fla. 1st DCA 1980). Neither involved previously divided ownership. Farrugia simply sustained an environmental permit denial where the property owner only suffered the loss of "a higher price" for his lands. Oyster Bay simply held that the State could impose permit requirements where there was no evidence concerning the status of improvements and where denying the permit would not deprive the landowner of the right to use his property but only restrict his profits. Rather than merely having their profits restricted, Petitioners were left with land which was essentially valueless. Moreover, the other Estuary Properties factors were missing in Farrugia and Oyster Bay.

2. Destruction of access/the equivalent of physical invasion. That legal access remains does not mean the land is useable. As DBR's attorney early admitted, a lot at CAE "is absolutely valueless" without improvements. [Transcript of Hearing of March 11, 1975, at 7, 12, R. 142, 144]. Theoretical undrained legal easements, without roads, to undrained lots is illusory access. 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]. It is practical access, not theoretical possiblities, with which the courts are concerned.19/

3. Public benefit. The State argues that "no state enterprise" was furthered. (S.Br. 50). The issue is not whether the lands are now being used for

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19/ DER wrongly argues (p. 20, 22) that denial of access was not raised by the complaints or otherwise. Denial of access is simply evidence (not required to be pled) going to the ultimate allegation of "taking." Moreover, plaintiffs clearly complained that the State had prevented the installation of the roads (R. 679, R. 432 at ¶ 6, 11), and the Pretrial Stipulation refers to such issue. [PSTIP III. 5, 6, 8, 9, 15, 33, A.54, 55, 57, 63; PSTIP IV. 6, 7, 36, A.68, 72]. Atlantic's trial brief (at pages 3 & 4), filed five months prior to trial, noted that precluding the roads "render[ed] the lands incapable of any reasonable use." Finally, no objection was made at trial to evidence of the lack of access caused by State action.

a particular State project. It is the fact of the taking of property from the owner, rather than any specific use by the State, which is crucial in inverse condemnation. Lincoln Loan Co. v. State, 274 Ore. 49, 545 P.2d 105, 108 (1976).

Respondents cite Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), for the proposition that preserving the status quo does not confer a public benefit. [S. Br. 54; DER Br. 34-35]. But here the status quo -- before the State's delaying actions began -- was that the land was being developed by the State-created SCDD according to the State-approved registration, which made the improvements a State requirement, and the ownership had already "locked in" both the economics and the design. Precluding the improvements at CAE frustrated, rather than preserved, the status quo. In any event, as demonstrated in the footnote, Just provides no help to the State.20/

4. Reasonable investment-backed expectations. Respondents misunderstand Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2626 (1978). There, regulation prohibited Penn Central from destroying Grand Central Station, a historic landmark, to build a skyscraper. Penn Central had invested in the property for a train station and that expectation was not frustrated. The

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20/ Just, like Estuary Properties, was a case where a permit was denied. In finding no unconstitutional taking, the court in Just distinguished Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923), as a case where, as here, government action was "unnecessary for the public health, safety, or welfare and, thus, to constitute an unreasonable exercise of the police power." 201 N.W.2d at 769. Moreover, the court in Just recognized that even a valid exercise of police power becomes a taking if "the damage to the property owner is too great . . . . The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner . . . . [W]here the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense." 201 N.W.2d at 767.

fortuitous increase in demand for land in general, which Penn Central wanted to take advantage of, was not an expectation causing the investment. Thus, the factor of frustration of investment backed expectations was found missing. Significant also, the City had created transferable development rights which compensated Penn Central for the restrictions -- even though a building could not be erected on its property, Penn Central could sell its valuable density rights to others.

Unlike Penn Central, the State's actions have unquestionably frustrated Petitioners' investment-backed expectations. Atlantic invested in CAE to obtain a return from the sale of developed lots. [Lipman at 29-35, R. 4410; Trella at 92-94, R. 4207-4209].[21/] It cannot now realize that expectation. The class bought their lots with the expectation of using or selling them. Without improvements to provide access and drainage, an individual 1 1/4 acre lot among 15,000 acres is totally useless and the owner's expectations are thwarted.

Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982) [S.Br. 53; DER Br. 48], is substantially different from the present case. In Deltona, the court found no taking "in view of the many remaining economically viable uses for plaintiff's property. . . ." In contrast, the trier

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21/ 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."

of fact here found that Petitioners' lands have no value and no uses and found, unlike Deltona, that the State's delay has not advanced the public health, safety and welfare. Thus, in Deltona the trier of fact found no taking "under the specific facts and circumstances of [that] case." The exact opposite is true here. Other obvious differences are: (a) Deltona received transferable development rights from the county to offset any diminution in value; (b) Deltona acquired its lands knowing federal permits were required, whereas there were no State permitting requirements when Atlantic subdivided and sold most of CAE; (c) Deltona sold lands prior to obtaining required permits, whereas Atlantic had all required permits when it began construction and sales, only later to have the State impose permitting requirements; and (d) from the point of view of the class members, there is no similarity whatever.

5. Delay. It is well established that government delay may result in the factors which give rise to a constitutional taking. 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, supra, discussed in the initial brief, the township's appeal, to delay construction, was held to "provide a basis" for the subsequent taking claim in federal court. 420 F.Supp. at 725. Lachney v. United States, supra. The San Diego Gas opinion, is to the same effect, and contrary to the State's argument (S.Br. 46, 51), that opinion represents the law of the land according to the courts. See cases in initial brief p. 47 and Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402, 408 (6th Cir. 1984), and Barbian v. Panagis, 694 F.2d 476, 482, 485 n.7 (7th Cir. 1983).

The agrument [DER Br. 53, S.Br. 58] that delay might ruin a poor developer, but not a rich one, misses the point and ignores the facts. While the law can neither require unlimited resources nor reward bad financial planning, it does protect property acquired with "reasonable investment backed expectations." An investment is made and a project is undertaken after planning to establish sales prices, costs, expenses, overhead, and profits. Here, Atlantic accurately read the market [there were 5000 sales, FJ ¶ 31, A. 19], and Atlantic accurately estimated its expenses [the improvements were on time and within budget, FJ ¶ 22, 58; A. 15, 29]. But then State-created delays (after maximum income was fixed by sales at 1967 prices) caused reduced sales (cancellations and sales suspension) and increased expenses (fees and increased requirements) and overhead (excessive years of operation), and bankrupted the project. The trial court found these actions unforeseeable. [FJ ¶ 36, A. 20]. The State says that a different result might have occurred if inflation had not occurred. Of course, if the facts were different the results might be different! But State actions have consequences in the real world just as do other actions, and the facts of this case must control the decision.

IV. RESPONSE TO ARGUMENT THAT THE STATE MAY VALUE THE LAND "AS IS" FOR COMPENSATION PURPOSES.

The State argues that, if it has to pay for the lots it has taken, they should be valued "as is," i.e., worthless, without any consideration of the fact that the State's action made them worthless. [S.Br. 60] That is not the law. State action which diminishes the value of the property to the extent of a taking does not thereby decrease the amount of just compensation to the diminished value. See Dade County v. Still, 377 So.2d 689 (Fla. 1979) (county ordinance stating that county would take property for street widening cannot be considered in determining

fair value of those lands); State Road Department v. Chicone, 158 So.2d 753 (Fla. 1963) (condemning authority cannot benefit from reduction in property value caused by a prior announcement that it will be taken for a public project because compensation must constitutionally "be based on the value that the property would have had at the time of the taking had it not been subjected to the depreciating threat of condemnation . . . .").[22/]

In short, the State cannot be permitted to render property so worthless as to amount to a taking and then claim that the property is worthless for "just compensation" purposes. The old analogy to the criminal who murdered his parents, then begged for sympathy because he was an orphan, is obvious.

V. RESPONSE TO ARGUMENT THAT DER'S ACTIONS WERE MERELY VOID AND PROVIDE NO BASIS FOR COMPENSATION.

DER's Point IV (p. 59-63) argues that all DER's actions were void and that Petitioners' only remedy is to have them declared invalid, not to claim a taking. That suggestion is no defense to the constitutional claim that those acts deprived Petitioners of their property. The State is bound by the consequences of its acts,

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22/ Other case law is in accord. E.g., Amen v. City of Dearborn, 718 F.2d 789 (6th Cir. 1983); cert. denied, ___ U.S. ___, 104 S.Ct. 1596 (1984); Tibbs v. City of Sandpoint, 100 Idaho 667, 603 P.2d 1001, 1005 (1979); In re City of New York, 94 A.D.2d 724, 462 N.Y.S.2d 260 (1983), aff'd, 61 N.Y.2d 843, 473 N.Y.S.2d 963, 462 N.E.2d (1984). Dept. of Transportation v. Burnette, 384 So.2d 916, (Fla. 1st DCA 1980), cited at page 60 of the State's brief, involved a taking claim where the plaintiff acquired the property after the State action had taken it. The case held only that the cause of action for the taking belonged to the landowner at the time of the State action, but that it could be assigned. Here, the State action began after the improvements were begun.

and when those acts result in destruction of property which cannot be undone by declaration of invalidity, the Constitution requires compensation. Indeed, that was the very rule set forth in the San Diego Gas opinion: the remedy for delay caused by void government regulation is to declare at least a temporary taking for which compensation must be paid.[23/] Indeed, the San Diego Gas opinion declared unconstitutional the rule of a few jurisdictions that the only remedy for excessive regulation is to declare it void, and Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, appeal dismissed, 429 U.S. 990 (1976), from which DER quotes extensively [DER Br. 59-60] was expressly criticized and rejected in the San Diego Gas opinion. DER's suggestion that at this late date it simply say "sorry about that" cannot undo the destruction of the project. The taking has become permanent.[24/]

23/ Other case law is in accord. For example, in Ocean Acres Limited Partnership v. Dare County Board of Health, 514 F.Supp. 1117, 1122 (E.D.N.C. 1981), aff'd, 707 F.2d 103 (4th Cir. 1983), the court held that declartory or injunctive relief is not sufficient where, as here, "economic losses [were] suffered over a period of years" and where an injunction "will be inadequate to restore" the injured property owner.

24/ Other courts have agreed that compensation is constitutionally required where mere invalidation of an act will not cure the damage. E.g., In re Aircrash in Bali, Indonesia, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982); Fountain v. MARTA, supra; Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, __ U.S. __, 102 S.Ct. 1251 (1982); American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364, 372 (9th Cir. 1981); Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977); Kinzli v. City of Santa Cruz, 539 F.Supp. 887, 896 (N.D. Calif. 1982).

CONCLUSION

There can be no clearer case of a government taking. The District Court's opinion should be vacated and the Final Judgment should be reinstated and affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to Louis F. Hubener, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1502, Tallahassee, Florida 32301; Richard P. Lee, General Counsel, Department of Environmental Regulation, Twin Towers Office Building, 2600 Blairstone Road, Tallahassee, Florida 32301; Daniel D. Eckert, Post Office Box 429, Deland, Florida 32720, David Maloney, Department of Business Regulation, The Johns Building, 725 South Bronough Street, Tallahassee, Florida 32301, Hubert W. Williams, Robertson, Williams, Duane and Lewis, P.A., 538 East

Washington Street, Orlando, Florida 32801, and SJ. Fernandez, Oertel & Hoffman, P.A., 646 Lewis State Bank Building, Tallahassee, Florida 32301, this 17th day of August, 1984.