O/A 11-6-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOYCE G. MAINER, etc., et al.,

Petitioners,

v.

THE CANAL AUTHORITY OF THE STATE OF FLORIDA, a body corporate under the laws of the State of Florida.

Respondent.

Case Nos. 64,689 through 64,697

ANSWER BRIEF OF THE CANAL AUTHORITY OF THE STATE OF FLORIDA

On Review from the District Court of Appeal
Fifth District, State of Florida

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PRELIMINARY STATEMENT

The respondent, Canal Authority of the State of Florida, was the defendant in the trial court and is referred to in this brief as the "Canal Authority" or "Authority." The petitioners were plaintiffs in the trial court and are referred to collectively as "petitioners" or individually by name, e.g., Mainer, Hodges, Ocala Manufacturing, Astor West.

The following reference symbols are used:

[R] -- refers to the trial court record.

[TR] -- refers to the transcript of the trial held on December 17 and 18, 1981.

[Pl. Ex.] -- refers to an exhibit of the plaintiffs.

[Def. Ex.] -- refers to an exhibit of the defendant.

STATEMENT OF THE CASE

The Canal Authority does not take issue with petitioners' Statement of the Case found on page 1 of its brief.

STATEMENT OF THE FACTS

The Canal Authority believes petitioners' Statement of the Facts is inaccurate or incomplete as it relates to three issues. These are: 1) whether, as petitioners contend, the canal project has been **abandoned**; 2) whether any petitioner proved his remaining lands suffered severance damage as a result of the original taking; 3) the present fair market value of the property sought to be reacquired in comparison to the trial court ordered reacquisition price. (The evidence on fair market value is omitted from petitioners' Statement of the Facts. It becomes relevant only if this court should decide petitioners have a right to reacquire the lands in question.)

A. Background of the Cross-Florida Barge Canal Project and Facts of Record on Abandonment.

The parties agreed to many background facts in a pretrial stipulation in each case.[1] As stated in each stipulation, the Canal Authority was created in 1933 by Chapter 16176, Laws of Florida, now codified as Chapter 374, Florida Statutes. Its

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[1] Mainer R-25; Berman R-18; Gay R-37; Hodges R-25; Hasty Greene R-31; Silver Springs R-159; Couse R-27; Astor West R-33; Griffitts R-34.

purpose was to act as local sponsor for the federal government's project to construct a canal across the peninsula of Florida. Construction began in 1935 but was halted on June 20, 1936, when federal funds were depleted. In 1942, Congress reauthorized the project by Public Law 675, 77th Congress, approved July 23, 1942. Public Law 86-645, enacted July 14, 1960, continued to require local interests to provide the following assurances:

> . . .to furnish lands and rights-of-way required for the Canal; to take over and maintain and operate all highway bridges and roadways after completion, and to protect the United States from damages incident to the construction of the Canal.

As further stipulated, the Canal Authority, as local sponsoring agency, extended the requisite assurances to the United States and these were formally accepted in November, 1963. The federal government then appropriated funds for construction, and the U.S. Army Corps of Engineers began work in February, 1964, and proceeded continuously thereafter.

On January 19, 1971, President Richard M. Nixon ordered the suspension of further work on the canal and construction came to a halt. In the case of The Canal Authority of the State of Florida, et al. v. Howard H. Callaway, Secretary of the Army, et al., Case No. 71-92-Civ-J, (unreported), the United States District Court for the Middle District of Florida held, among other things, that the President's order of intended termination of the canal project was invalid. [See Def.Ex. 6.] The court

found, however, that the order could be allowed to have the effect of halting further construction of the canal pending completion of a study and an Environmental Impact Statement under the National Environmental Policy Act.

In the pre-trial stipulations the parties also agreed that at all times material hereto the intent of the Canal Authority has been to comply with the provisions, terms and conditions of Chapter 374, Florida Statutes, and to fulfill its contractual obligations to the federal government as local sponsoring agency for the Canal Project.

In their complaints, as amended, nearly every plaintiff alleged that

> . . .the construction of the Cross-Florida Barge Canal Project has been **abandoned** for a period in excess of eight years and there are no present plans or intent to make any future use of the land. . .for the construction, operation and maintenance of the Cross-Florida Barge Canal Project.
>
> * * *
>
> That the public purposes for which the lands described. . .were obtained have been **frustrated** and plaintiff desires to reacquire said land.[2]

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[2] A copy of each complaint is included in the appendix to this brief. The Griffitts and Astor West, Inc. complaints, as amended, contain no allegation of abandonment, only "frustration of the public purpose." [R 22 and R 22.]

In either an amended complaint or an "amendment to the amended complaint" each plaintiff alleged that he (or it)

> was and is the owner of land adjoining, adjacent and contiguous to those the Canal Authority acquired from the plaintiff, which lands would have benefitted and increased in value by the construction of the canal [or the completion of the particular aspect of the project for which the land was taken.]

In summary, the plaintiffs' purported grounds for rescission were limited to frustration of purpose, abandonment of the project, and the failure of their remaining lands to benefit by an increase in value attendant to completion of the project. **No plaintiff alleged he had been improperly or inadequately compensated for severance damage to remaining lands in the original proceedings.** (See discussion, infra, p. 21 et. seq.) In each case the Canal Authority filed a motion to dismiss or defenses contending, inter alia, that the complaints failed to state a cause of action, failed to allege the final judgments in condemnation entered years earlier were void or voidable, and failed to allege that the Canal Authority had engaged in any form of fraud at any time.

There is nothing in the record which would support the finding that the canal project has been terminated or abandoned in any sense and much evidence to the contrary. Colonel Giles Evans, manager of the Canal Authority from February 1962 until September 30, 1981, testified that Congress has not directed

termination of the project [TR 145], but has in fact appropriated operation and maintenance money every year since 1971, including 1982. He also testified that 3 of 5 locks have been completed in addition to 3 dams and 2 reservoirs (Lake Ocklawaha and Lake Rousseau); 4 bridges have been constructed as well as 25 out of 107 miles of the canal prism [TR 155]. None of the completed improvements have been destroyed, dismantled or abandoned [TR 156]. James E. Reeder, appointed to the Canal Authority Board of Directors in 1978, and chairman from 1979-1981 [TR 225], testified that the Authority always stood ready to carry out its responsibilities under Chapter 374, Florida Statutes; that it defended all attacks on its lands; and that on numerous occasions it requested appropriations for construction [TR 230, 231, 232]. Raymond George, assistant director of the Canal Authority, and successor to Colonel Evans, testified that the Canal Authority's posture as to the lawsuits remained unchanged since October 1, 1981[3]; that its policy was to manage, protect and conserve its lands; and that it was ready, willing and able to perform its duties under its contract with the United States relating to construction [TR 259, 260, 261]. Defendant's Exhibit 2, a document entitled "Interim Management Plan" demonstrates

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[3] The date the Governor and Cabinet became head of the Canal Authority pursuant to Chapter 81-252, Laws of Florida. See Section 374.031, Florida Statutes (1981).

that the Canal Authority is actively studying management strategies and alternatives for use of its lands until the future of the canal project is decided.

Congressman William B. Chappell, a member of the Energy and Water Resources Subcommittee of the House Appropriations Committee, and a witness for the plaintiffs, testified that the canal is still "an **authorized** project insofar as Congress is concerned" [TR 218]. Congressman Chappell chaired a subcommittee hearing on the canal in April, 1977, a transcript of which is in the record (Def. Ex. 1). That transcript reflects the subcommittee's continued interest in the canal project, the efforts of the Corps of Engineers to ameliorate adverse environmental impacts, and the need for a revised cost benefit analysis before proceeding with further construction.

This Court should also take judicial notice of the fact that on June 28, 1984, the House of Representatives of the United States Congress voted against a bill sponsored by Florida Congressman Kenneth "Buddy" McKay that would have terminated the federal authorization of the canal project. Congressional Record, Vol. 130, Nos. 91, 92, pps. H-7412 through 7424, June 29, 1984.

As district engineer for the U.S. Army Corps of Engineers, Colonel Alfred Devereaux testified by deposition that the Corps has continued to maintain, preserve and operate the completed portions of the canal and would resume construction if so directed. [Pl. Ex. 5, p.10, 12].

The testimony of Evans, Reeder, George, Chappell and Devereaux is uncontradicted. Indeed, Evans, Chappell and Devereaux were called as witnesses for the plaintiffs. Despite the clear preponderance of the evidence to the contrary, the trial court found the canal project had been abandoned. The Fifth District Court of Appeal affirmed that finding:

> Work began again on the project in February 1964, and proceeded continuously thereafter until stopped by President Nixon's order on January 19, 1971. Only about 25 miles were actually excavated and none of the parcels in this case were involved in the construction. Nothing has been constructed since 1971 except for the completion of the State Road 40 bridge, the restoration work in connection with what was to have been the railroad bridge relocation at Dunnellon, and the construction of a fishing ramp platform for the handicapped at the spillway of Rodman Dam. Since 1971, no funds have been appropriated by the United States Congress for land acquisition, expansion, or construction of the canal project. **In light of the above evidence, we affirm the trial court's finding that the plans of the Canal Authority to construct the canal project have been abandoned,** but we disagree as to the court's application of this finding to the law in these cases. [A 154] (E.S.)

The finding completely ignores most of the evidence of record, including the fact that the canal project is a **federal project;** that it is still authorized under **federal law;** and that Congress has appropriated operation and maintenance money every year since 1971. The Fifth District's finding that the "Canal Authority's

plans to construct the canal have been abandoned" is a disingenuous twisting of the facts. The Corps of Engineers was to plan and construct the canal project; the Canal Authority, as local sponsor, merely acquired the land. [TR 153]

The Canal Authority acknowledges that if the project is completed a portion of the authorized route **may** be changed. In 1977 the Corps of Engineers, Jacksonville District, completed a Restudy Report containing a selected completion plan and a selected non-completion plan [Pl. Ex. 1].[4] The completion alternative is depicted in Figure 10E of the report and is known as the "Upland Alignment". The Upland Alignment will retain the R.N. Bert Dosh Lock and the Eureka Lock and Dam but will avoid the construction of Eureka Pool by relocating the canal prism a mile west to an "upland alignment." The Corps' Chief of Engineers submitted the Restudy Report to the Secretary of the Army by letter dated 24 February 1977 for further transmittal to Congress [Pl. Ex. 1A]. Giles Evans testified that realignment of the canal was within the discretion of the Secretary of the Army and the Chief of Engineers [TR 164]. There is no evidence of record that either the Secretary of the Army or the Congress has formally or officially approved any of the Restudy alternatives,

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[4] As stated on page 1 (a transmittal letter) of the Summary Report (Pl. Ex. 1) the report was prepared pursuant to the ruling of Judge Harvey M. Johnson in Canal Authority of the State of Florida v. Callaway, Secretary of the Army, et al., Case No. 71-92-Civ.-J, Middle District of Florida.

and, in fact, Giles Evans testified no official action has been taken to establish the realignment of the canal [TR 143]. Nor has Congress given its de facto approval by funding any of the alternatives. Although Congressman Chappell indicated he believed future construction would follow the upland alignment [TR 218], he also characterized that alignment, correctly, as "proposed" [TR 215].

The trial court found that the property in question in Berman, Gay, Mainer, Hodges and Silver Springs Shores would not be needed because of the elimination of Eureka Pool. But the elimination is still only a **proposal.** Although, in depositions entered into evidence, Giles Evans conceded that the Gay (Pl. Ex. 6D, pps. 23, 24), Mainer (Pl. Ex. 6B, p. 22) and Silver Springs Shores land in part (Pl. Ex. 6A, p. 23) would not be needed if Eureka Pool is eliminated, there is no evidence to support such a finding with respect to the Hodges and Berman parcels. At trial the Canal Authority specifically pointed out that it was impossible to determine whether the upland realignment proposal would eliminate the need for the Hodges parcel [TR 12, 34, 36], and three of the smaller Silver Springs Shores parcels [TR 23].

The elimination of the Eureka pool would not affect the need for the property at issue in Griffitts, Astor West, Couse and the two Hasty-Greene cases. There is no evidence to show that these lands will not be needed if the canal is

constructed. In fact, the Couse and Hasty-Greene parcels form part of Rodman Pool (Lake Ocklawaha) which has been constructed and flooded.

B. Facts as to severance damages and enhancement in value to plaintiffs' remainder lands.

The trial court found in each final judgment that completion of the canal project as originally planned would have "enhanced" the value of each plaintiff's **remaining** lands and concluded, as a matter of law, that without such enhancement there was a failure of consideration. This is an egregious distortion of the law of eminent domain that the Fifth District did not even deign to discuss; nevertheless, petitioners reassert it here. As discussed infra, enhancement to remaining lands can be asserted by the **condemnor** at the condemnation trial only to offset severance damages asserted by the **condemnee.** There is **no** evidence that any landowner herein ever asserted severance damage to his remaining lands in the original condemnation proceedings. **None** of their answers and defenses from those proceedings were put in evidence. The landowners' expert appraisers from those proceedings were **not** called as witnesses.

Some of the plaintiffs testified in the trial below that the Canal Authority represented at the condemnation trial that their remaining lands would be "enhanced" by waterfront. In the absence of a predicate showing severance damages, the Canal Authority objected to such testimony; its objection was denied but recognized as continuing [TR 52, 55, 59, 66, 67, 68, 80, 82,

85, 87]. Mr. Levie Smith, the Canal Authority's appraiser at the original condemnation trials, testified below that his testimony at those trials was based strictly on his appraisal reports [TR 194]. These reports are all in the record [PL. Ex. 3A-30]. As set out at p. 24, infra, Levie Smith did **not** find any severance damage to **any parcel in question** which he offset by enhancement.

C. Facts as to the fair market value of the subject lands.

The trial court ruled that the plaintiffs were entitled to reacquire their former lands for the prices the Canal Authority paid fifteen years ago or more. In most instances, those prices are significantly less than current fair market value.

The fair market value at the time of the trial (1981) for each subject parcel is indicated below. The value is based on a stipulation between the parties or on evidence the Canal Authority introduced. The "amount paid" is the price paid by the Canal Authority in the late 1960's.

1. Silver Springs Shores, Inc. v. Canal Authority

Amount paid:	$411,878.00
Repurchase price:	$411,878.00
Fair market value as of December 18, 1981:	$1,330.000 [Stipulation, R 179]

2. Couse v. Canal Authority

Amount paid:	$15,000.00
Repurchase price:	$3,930.00
Fair market value as of December 18, 1981:	$16,000.00 [Stipulation, R 48.]

In the Couse case, the trial court deducted from the original acquisition price the value of a barbecue pit and timber removed from the land.

3. Berman v. Canal Authority

Amount paid:	$2,475.00
Repurchase price:	$828.00
Fair market value as of December 18, 1981:	$43,600.00 [TR 243.]

4. Gay v. Canal Authority

Amount paid:	$127,000.00
Repurchase price:	$122,313.70
Fair market value as of December 18, 1981:	$131,500.00 [Stipulation, R 57.]

5. Mainer v. Canal Authority

Amount paid:	$75,900.00
Repurchase price:	$73,380.12
Fair market value as of December 18, 1981:	$89,300.00 [Stipulation, R 73.]

6. Griffitts v. Canal Authority

Amount paid:	$39,987.60
Repurchase price:	$39,987.60
Fair market value as of December 18, 1981:	$31,000.00 [Stipulation, R 50.]

7. Astor West, Inc. v. Canal Authority

Amount paid:	$8,339.00
Repurchase price:	$9,300.00
Fair market value as of December 18, 1981:	$9,300.00 [Stipulation, R 54.]

8. Hodges v. Canal Authority

Amount paid:	$1,600.00
Repurchase price:	$1,600.00
Fair market value as of December 18, 1981:	$25,000.00 [TR 244]

9. Hasty-Greene, Inc. v. Canal Authority

Amount paid:	donation
Repurchase price:	- 0 -
Fair market value as of December 18, 1981:	$6,600.00 [Stipulation, R 47.]

ARGUMENT

POINT I. THE DISTRICT COURT OF APPEAL CORRECTLY HELD THAT THE TITLE TO LAND TAKEN IN FEE SIMPLE DOES NOT REVERT IN THE EVENT OF ABANDONMENT.

A. Fee simple title does not revert under any circumstances when a project for which lands are condemned is not completed.

The decision of the District Court of Appeal should be affirmed because the law in Florida, among other states, and in the federal courts, is that where the condemning authority has acquired property in fee simple it may **wholly** abandon the purpose for which the property was acquired and devote that property to another use, or no use, as it chooses.

The leading Florida case is Carlor Co., Inc., v. City of Miami, 62 So.2d 897 (Fla. 1953), which the district court relied upon in its decision. In Carlor, a former landowner whose property had been taken for airport purposes brought suit to set aside the judgment in condemnation some seven years after its rendition. The airport had not been constructed, nor had the city devoted the property to another use. The landowner therefore sought to reacquire the land. This Court, in affirming the trial court's dismissal of the action, ruled that only two grounds would support an action to set aside a final judgment in condemnation: fraud or lack of jurisdiction. In the cases now before the Court, the petitioners neither alleged nor proved these grounds.

Petitioners acknowledge their cases are not based on fraud or want of jurisdiction but argue they are not collateral attacks

because they are based on events occurring **after** the eminent domain proceedings - i.e., the present failure to complete the canal project, or, as the district court found, its "abandonment." Carlor spoke directly to this issue:

> It is likewise established law that there is no reversion where the fee simple title is taken and there is a failure to use or a discontinuance of the use which impelled the taking. 62 So.2d 900

Understandably, petitioners cite no authority for the contention that their suits are not collateral attacks. The proceedings they initiated fall foursquare within the definition of a collateral attack: ". . .any attempt to overturn or overhaul . . .[a judgment] by evidence dehors in a proceeding not provided by law for that particular purpose, is a collateral attack." Bemis v. Lofton, 127 Fla. 515, 173 So. 683, 687 (Fla. 1937). Petitioners have obviously attempted to invalidate final judgments in condemnation by evidence dehors those proceedings.

The decision below is clearly in accord with Carlor and other Florida cases which followed Carlor. For example, the district court cited and relied upon Langston v. City of Miami Beach, 242 So.2d 481 (Fla. 3d DCA 1971), holding that "upon a completion of the condemnation, the condemning authority occupies the same status as a bona fide purchaser for value." A bona fide purchaser, of course, may use or not use the land purchased without regard to his original purpose. City of Miami v. Coconut Grove Marine Properties, Inc., 358 So.2d 1151 (Fla. 3d DCA 1978),

is even more apposite. There, the court considered whether the former owner was entitled to damages when property taken from him for public park purposes was later devoted to a wholly different and arguably private use - the creation of a shopping mall. Overruling the trial court, the Third District held that the consent final judgment of condemnation entered into pursuant to a settlement agreement between the parties was not subject to a subsequent collateral attack absent a clear demonstration of **extrinsic** fraud. Noting that the plaintiff had received the full consideration described in the final judgment, the court found and held that the issues of the necessity for the taking, the amount of compensation, the right of the city to condemn, and whether or not the taking was for a valid public purpose, had all been conclusively determined at the time of settlement and entry of the consent final judgment. 358 So.2d at 1154.

The Fifth District's decision is also clearly consistent with its earlier decision in Canal Authority v. Harbond, Inc., 433 So.2d 1345 (Fla. 5th DCA 1983), also involving a claim to Canal Authority land. All of these cases are in accord with prevailing authority in the United States among both the state and federal courts.[5,6]

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[5] As to other state court decisions, see: Gilbert v. Franklin County Water District, 520 S.W.2d 503 (Tex App. 1975): ". . . once land has been acquired for public use in fee simple unconditional, either by exercise of the power of eminent domain or by purchase, the former owners retain no rights in the land, (Cont'd on next page)

and the public use may be abandoned or the land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners." Nearhos v. City of Mobile, 57 So.2d 819 (Ala. 1952): "In the absence of fraud, a parol condition subsequent cannot be engrafted on a deed conveying fee simple title." Bottillo v. State, 386 N.Y.S.2d 475 (App. Div. 1976): "As long as the original condemnation was in good faith for a public purpose, the condemnor 'may subsequently convert it to other uses, or even abandon it entirely, without any impairment of the validity of the estate originally acquired or [any] reversion to the former owners'."

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[6] As to federal cases, see: Reicheldorfer v. Quinn, 287 U.S. 315, 77 L.Ed 331 53 S.Ct. 177 (1944): "It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use." United States v. Three Parcels of Land, 224 F.Supp. 873 (D. Alaska 1963): "Property acquired in fee simple by a public body for a particular purpose may be diverted to another use;" United States v. 10.47 Acres of Land, etc., 218 F.Supp. 730 (D. New Hampshire 1962): ". . . abandonment by the United States of the purpose for which the lands were taken cannot affect the validity of the original condemnation. Title to the premises having vested in the United States by a valid taking, the Court is without authority to order the revesting of title in the original owners;" Higginson v. United States, 384 F.2d 504 (6th Cir. 1967): "The government's [fee simple] title to the land acquired by negotiated purchase vested some 20-30 years ago. This title cannot now be disputed under any accepted property theory;" O'Hara v. District of Columbia, 147 F.2d (D.C. Cir. 1944): "Where a fee simple estate is acquired in the condemnation proceeding the doctrine of abandonment does not apply;" Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958): "Because a sovereign body plans to acquire private property for a lawful purpose (here an airport), does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish taking for private use, nor fraud, nor any fraudulent or false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking." (E.S.)

See also, 3 Nichols, Eminent Domain §9.36(4), (3d ed. 1981).

B. Petitioners purported "equitable rights" have no basis in fact and no support in law or equity.

Having virtually no authority to counter the compelling weight of contemporary case law, petitioners offer a rambling and episodic argument which seems to advance the following theory. They call it, for lack of any precedential term, "equitable reacquisition":

> 1. The Canal Authority only has legal authority to acquire and hold land for purposes of the Cross-Florida Barge Canal.
>
> 2. The Canal Authority paid less than fair value for the lands it acquired because the petitioners **remaining** lands have not been enhanced in value by completion of the canal project.
>
> 3. Petitioners' equitable rights "emanating" from their remaining "estates and interests", when viewed in light of later events (i.e., the failure to complete the canal project), entitle them to void the original fee acquisitions and reacquire the lands taken.

As will be shown, there is no law or logic in support of this theory. The Fifth District, which had essentially the same argument to consider, did not give it enough credence to even discuss it. The court treated the argument for what it obviously is: a semantic variation on the theme of abandonment. The clear and compelling weight of authority is that even if abandonment of the purpose for the taking occurs, fee simple title does not revert. See authorities, ante. In any event, the Canal

Authority will show that the theory is legally and factually without merit or precedent.

1. The authority of the State and the Canal Authority to acquire, use and dispose of real property.

The petitioners' assertion that the Canal Authority has legal power to acquire land only for purposes of the canal project is false. Section 374.051(2), Florida Statutes, effective law when the subject lands were acquired, gave the Authority the power to acquire and use land for more general water management and flood control purposes. Furthermore, if petitioners' conjecture as to legislative intent were true, that the Canal Authority is limited in its use of the land, it would follow that any land acquired and not used for the canal project could only be disposed of by return to the original owner. The legislature clearly did not intend that result because it gave the Authority unrestricted power to sell any land it did not need, requiring only that the Authority repay counties in the Cross-Florida Canal Navigation District in proportion to their tax contributions. Section 374.501(4), Florida Statutes.

Petitioners' theory also ignores the fact that the Canal Authority's condemnation power derives from the authority of the state, and even though land may have been acquired for a particular purpose, its subsequent use is subject to ultimate control by the legislature. Reicheldorfer v. Quinn, 287 U.S.

315, 77 L.Ed 331, 53 S.Ct. 177 (1944); City of St. Louis v. Bedal, 394 S.W. 2d 391 (Mo. 1965). The Florida Legislature has enacted Chapter 79-167, Laws of Florida, now set forth in Section 253.781 through 253.785 and Chapter 374, Florida Statutes. This law authorizes the State (through the Department of Natural Resources) to retain title to the environmentally fragile land in the Oklawaha River Valley and to sell other lands deemed "surplus" according to certain priorities. Most of the law is technically not effective until Congress deauthorizes the canal project. Clearly, however, the act is within the authority of the legislature and reflects the legislature's recognition that the canal project is not legally abandoned until Congress says it is. See pps. 34 et seq., infra. Petitioners' contention that the lands can not be legally used for other than canal purposes was not true when the lands were acquired and is even less true now.

2. Landowner's entitlement to enhancement in value of remaining adjoining lands.

The petitioners adduce no legal authority for the quite novel proposition that the value of the enhancement to their **remaining lands** expected from the completion of the canal was a part of the consideration legally due them for the property **actually taken.** In fact, condemnation law in Florida is squarely against the petitioners.

The statute applicable to the original condemnation proceedings in all of these cases read in pertinent part:

* * *

> (4) When the action is by the state department, county, municipality, board, district or other public body for the condemnation of a road, canal, levee or water control facility right-of-way, the enhancement, if any, in value of the remaining adjoining property of the defendant property owner by reason of the construction or improvement made or contemplated by the petitioner, shall be offset against the damage, if any, resulting to such remaining adjoining property of the defendant property owner by reason of the construction or improvement, but such enhancement in the value shall not be offset against the value of the property appropriated, and if such enhancement in value shall exceed the damage, if any, to the remaining adjoining property there shall be no recovery over against such property owner for such excess. Section 73.071(4), Florida Statutes (1967). (E.S.)

This statute, which is still substantially the same today, provided that **if** a landowner asserted severance damage to his adjoining remainder lands, the enhancement in value to those lands attributable to the planned construction or improvement could be asserted by the condemnor to offset those severance damages. Neither this statute nor any other, past or present, gives a right to compensation for anticipated enhancement in value to remainder lands - i.e. those lands **not** taken in the condemnation proceeding. A landowner has only the right to be

compensated for what is taken from him. He has no right to the value the proposed improvements might add to remainder lands. Thus, petitioners' claim that they have been deprived of benefits due them because of the failure to complete the canal project is utterly without basis in the law.

Petitioners seem to suggest in their brief that they originally suffered severance damage, although this is mentioned only as to **one** of the nine cases before the Court - the Gay case. [Petitioners' Brief, p. 5, 6] As noted, p. 4, ante, not one petitioner pleaded that his remaining lands had suffered severance damage for which he had not been compensated. The only evidence cited on this point as to Gay is an ambiguous portion of a Canal Authority appraisal report on Gay's land. Gay did not prove that he had raised the issue of severance damages at the condemnation trial; he did not prove the appraisal report was put in evidence at the condemnation trial; he adduced no independent evidence at the trial below that **any** of the lands, his own included, suffered severance damage at all. In fact, petitioners' contention seems to be they are entitled to the value of enhancement wholly apart from the issue of severance damage, and without that enhancement they are entitled to reclaim what the Canal Authority took in fee simple because of a "failure of consideration." [Petitioners' Brief, p. 5] Not being entitled

to such consideration, it is clear there can be no "failure of consideration."[7]

The **only** testimony at the trial below that related to severance damage came from appraiser Levie Smith. Levie Smith appraised the various parcels in question at the time of the 1960s condemnation proceedings and gave testimony relating to the lands at those trials. In the trial of this case, Smith clearly testified he had found **no** severance damage to any parcel which he offset by an estimate of enhancement. [TR 182-210] Petitioners offered **no** evidence from any other appraiser or competent witness on the question of severance damages. **The trial court below did not find severance damage had occurred to any remaining lands.** Hence, it cannot be assumed or even argued that the compensation to which petitioners were entitled for lands taken was in any way diminished by consideration of enhancement to remaining lands. It was petitioners' burden to prove the contrary, and clearly

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[7] The district court's opinion noted the ample authority to the effect that failure of consideration, if it occurred, is no basis for rescission of a fully executed and recorded deed. [A 155, fn. 7] Petitioners have studiously ignored throughout these proceedings authority suggesting their remedy, if any, is for additional compensation. Central & S. Fla. Fl. Con. Dist. v. Wye River Farms, Inc., 297 So.2d 323 (Fla. 4th DCA 1974), 27 Am.Jur. 2nd Eminent Domain §451. Courts sitting in equity have the power to award monetary relief or damages. Cook v. Cent. & So. Fla. Fl. Con. Disc., 114 So.2d 691 (Fla. 2d DCA 1959); Baylin Street Wharf Co. v. City of Pensacola, 39 So.2d 66 (Fla. 1949); Superior Uniforms Inc. v. Neway Uniform & Towel Supply, 166 So.2d 464 (Fla. 3d DCA 1964); Winn v. Lovett Grocery Co. v. Saffold Bros. Produce, 121 Fla. 833, 164 So. 681 (Fla. 1936).

they failed to meet that burden. City of Miami v. Osborne, 55 So.2d 120 (Fla. 1951).

3. Petitioners have no rights "emanating" from their "remaining estates and interests."

Petitioners argue their "emanating" rights come from two sources: 1) an expected enhancement to remaining lands which has not materialized; 2) rights of access to Eureka Pool (which has not been constructed). As shown above, however, there is no legal or equitable right to compensation for enhancement in value to remaining lands. And petitioners' claim based on a "right of access" is equally without merit.

As the record reflects, of the nine cases before the Court, only two - Gay and Mainer - had any right of access. The other seven had no comparable right. The Canal Authority gratuitously granted both Gay and Mainer a right of access from their remaining lands over the lands taken to the proposed Eureka Pool. However, both Gay and Mainer were paid the full **fee value** for the fee interest actually taken - pursuant to a jury verdict and final judgment in condemnation. There is no claim, nor could there be, that Gay and Mainer were paid **less** than fair value for the interest taken.

Petitioners' brief acknowledges this precise point in arguing that, "[t]he consideration vested in their **remainder** has failed." [Petitioners' Br. p. 19] This is, as shown above, a gross distortion of the law of eminent domain. A landowner is

entitled to be compensated for that which the state takes - not for benefits it may or may not subsequently create. Fla.Const.Art. 10 §6 ; Section 73.071, Florida Statutes. There is absolutely nothing in the law, nor anything in the record, to support the contention that the right of access could have been part of the consideration for the land taken. Therefore, whether the right of access fails is immaterial. In any event, Gay and Mainer do not contend that the right does not allow **present** access to the Oklawaha River, nor has the Canal Authority ever so contended.

It is thus seen that Gay and Mainer claim what the other seven petitioners claim - legal entitlement to compensation for **benefits** to remaining lands in the absence of which they have an "equitable right" to void the condemnation proceedings and reacquire title to the property taken in fee simple. There is simply no authority for such a claim.

Petitioners first seek to distinguish Carlor Co., Inc. v. City of Miami, supra, by arguing that Carlor was a total taking and thus has no application where the taking is partial. In fact, Carlor simply does not state whether the taking was total or partial - a fact which had no bearing on the rationale of that decision:[8]

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[8] Petitioners' jurisdictional argument also hinged on this purported factual distinction between Carlor and the cases at bar. Since the assertion is false, they have not shown a conflict of any kind, much less one that is clear and direct, and hence no basis for jurisdiction.

> It is elementary that a condemnation judgment or award cannot be collaterally attacked except in cases of fraud or where it is void as for want of jurisdiction. As to such matters, res adjudicata applies. 62 So. 2d 900

And the Court quoted with approval from 29 C.J.S. Eminent Domain:

> In accordance with the rules governing the application of the doctrine of res judicata . . . parties and their privies are concluded as to all matters which were put in issue, or might have been put in issue, or were necessarily implied in the decision, in the condemnation proceedings, such as the right to condemn, and the legality of the improvement, the necessity and the quantity of land required and taken, compliance with the various steps required to be taken in the proceedings, the ownership and condition of the title, the benefits to land not taken, and the amount and items of compensation. 62 So.2d 901 (E.S.)

Thus all questions as to the just compensation for the lands taken, severance damage (if any), benefits to the land not taken, etc., were concluded in the original proceedings. The failure to complete a project confers no additional rights on a condemnee.

Petitioners' heavy reliance on The People v. Hugh White, 11 Barb. 26 (N.Y. App. 1851), is curious since the case does not support their theory. Moreover, the case has never been followed anywhere - including New York - and the Fifth District properly ignored it.

In White a section of the Erie Canal was constructed on White's land but later completely abandoned and reconstructed elsewhere. These facts differ markedly from those at bar where construction is partially completed and neither the project's lands, nor any works, nor the canal purpose have been abandoned. (See pps. 34 et seq., infra.)

Moreover, the reasoning of the court in White does not support the simplistic theory that merely because the landowner retains remaining lands after condemnation he is entitled to recover the lands taken in the event of abandonment. In White the owner was not fully compensated for the portion taken but only for the amount of its value after deducting the benefit to the remaining lands.

> "That it was not the design of the legislature to vest in the state a fee simple absolute in the lands taken for the bed of the canal, is also infer-- rible from other provisions of the same section of the statute. The appraisers are directed to make a just and equitable estimate of the loss and damage, if any, over and above the benefit and advantage to the respective owners by and in consequence of making and constructing the works aforesaid. It is not the value of the land that is to be ascertained, but the loss and damage; and from this the deduction for benefit to the owner is to be made. This deduction also forms a part of the consideration for the transaction, and implies that the benefit is to be continued to the owner of the land as long as it it held for public use. It is upon this principle that the damages are appraised. In all cases, then, this deduction for benefit to the owner

> is to be made; and if, after the canal is abandoned and the owner ceases to derive any benefit from its proximity, the state can still retain the land, it is taking private property for public use without making just compensation." 11 Barb. at 28, 29. (E.S.)
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> * * *
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> ". . .The defendant has had no just compensation for his land. Compensation was made to him on the supposition that he was to be benefited by the location of the canal on his premises, and it was only the damages, over and above such benefit, that were awarded to him. That benefit has now ceased, by the abandonment of the canal, and the compensation can no longer be regarded as justly made." Id. at 32. (E.S.)

The court in White found: 1) that the State had not taken the fee simple title to the lands in question; and 2) the landowner was not fully compensated for the interest taken - he was paid for damage to his land **minus a deduction** for benefits. In contradistinction, Section 73.071(4), Florida Statutes, (1967) forbade that method of compensation. Unlike White, the landowners here were paid the **full** value of the fee interest taken. Moreover, the Canal Authority took the fee simple title to the lands here in question - which means that all claims against the land have been cleared. City of Miami v. Osborne, 55 So.2d 120 (Fla. 1951).

People v. White was never followed in later New York cases. See, Whitey v. State, 96 N.Y. (51 Sick.) 204 (1884); Bottillo v. State, 386 N.Y.S.2d 475 (App.Div. 1976). In Bottillo

the former landowner sought to recover land taken for highway purposes. The appellate court held:

> Since there are no allegations in the petition that the Department of Trans--portation acted illegally, arbitrarily or capriciously in the initial "taking" in 1971 nor that the appropriation was not for the stated public purpose, title to the realty properly vested in the State. **As long as the original condemnation was in good faith for a public purpose, the condemnor "may subsequently convert it to other uses, or even abandon it entirely, without any impairment of the validity of the estate originally acquired or [any] reversion to the former owners"** (Fur-Lex Realty v. Lindsay, 81 Misc.2d 904, 905, 367 N.Y.S.2d 389, 390). **This has long been the rule in New York** (Brooklyn Park Commissioners v. Armstrong, 45 N.Y. 234, 243 244; 19 N.Y.Jur., Eminent Domain, §67). Such a rule does not violate the Federal Constitution (Beistline v. City of San Diego, 9 Cir., 256 F.2d 12).

Petitioners' unsubstantiated contention that their argument finds support in later New York statutory law authorizing original owners of land adjoining the Erie Canal to repurchase those lands merely reinforces the point made ante at p. 20, 21. The ultimate disposition of land acquired by state agencies or instrumentalities is subject to legislative control. The Florida Legislature's enactment of Chapter 79-167, Laws of Florida, discussed infra, is: 1) a recognition that a federal project has not been abandoned or legally terminated; and 2) a prescription for disposition of Canal Authority lands when that occurs.

Petitioners also rely on the concurring opinion of Justice Ervin in Seadade Industries Inc. v. Florida Power & Light Co., 245 So.2d 209 (Fla. 1971), a case which involved an appeal from a final order of taking, not an action for rescission years after the acquisition. Justice Ervin suggested that until FP&L acquired permits needed from environmental agencies to undertake construction on land it had condemned from appellant, FP&L's title should be considered only a defeasible fee since it was possible the intended construction might never occur.

Justice Ervin's view is at most speculative dicta straying far from the reasoning of the majority opinion. In fact, it prompted the observation from Justice Drew that the court was without authority to make such a ruling. 245 So.2d at 217. In any event, a concurring opinion has no precedential value. Greene v. Massey, 384 So.2d 24 (Fla. 1980). The Fifth District appropriately distinguished Seadade in Canal Authority v. Harbond, Inc., 433 So.2d 1345 (Fla. 5th DCA 1983). It did not need to do so again.

Perhaps the most irresponsible and misleading argument in petitioners' brief is that concerning Canal Authority v. Ocala Mfg. Co., 365 So.2d 1060 (Fla. 1st DCA 1979) wherein, so petitioners assert, the First District held rescission was an appropriate remedy if the canal project were not completed. No statement could be more untrue. Although the First District Court of Appeal affirmed the trial court judgment ordering the

Canal Authority to reconvey certain of its lands, the district court carefully avoided stating that any legal theory supported the judgment, noting only that the record contained facts sufficient to support the trial court's findings of fact. The district court took great pains to point out that the Canal Authority had not contested the suit at trial and had assumed an adversary posture only on appeal.

> Several serious questions are presented on this appeal by the Canal Authority and its supporting amicus, the Governor. Yet, from the appearance of the 46-page transcript of the final hearing before a trial judge who theretofore was unfamiliar with the case, the Canal Authority assumed its present adversary position only after final judgment was entered. On several of the questions now extensively briefed by the Canal Authority and its supporting amicus, the Canal Authority was acquiescent or silent before the trial court. It is inappropriate that we disturb a judgment rendered in those circumstances. 365 So.2d 1062

The attorney who failed to assume an adversary posture at trial thereafter ceased to be employed by the Canal Authority. In any event, the Fifth District also adequately distinguished the Ocala Mfg. Co. case in Harbond, supra. As the support it lends petitioners is exiguous at best, the Fifth District did not dwell on it in the opinion below. Certainly there is no conflict between the opinions of the First and Fifth Districts.

Petitioners also cite Miller v. Inland Navig. District, 130 So.2d 615 (Fla. 1st DCA 1961); Canal Authority v. Miller, 243

So.2d 131 (Fla. 1970); and Canal Authority v. Litzell, 243 So.2d 135 (Fla. 1971), to the effect that the Canal Authority could not acquire a greater quantity of or interest in land than it needed, and this limitation should apply "to both the extent of occupation and the duration of the estate." This conclusion is not supported by anything in the cited opinions if it is offered as authority for a later **collateral attack.** Questions of the extent and necessity of the taking are determined at the time of taking according to Carlor. Reliance upon these cases for support of a collateral attack upon a final judgment in condemnation conflicts directly with Carlor.

Finally, frustration of purpose, a term petitioners have used loosely at best, refers to a doctrine that has never been applied to eminent domain proceedings. It applies to **executory** contracts and is asserted by the party whose purposes have been frustrated, not by the party who received his full due. Corbin on Contracts, § 1353 (1962); Sokoloff v. National City Bank, 208 App. Div. 627, 204 N.Y.S. 69, 71, aff'd 239 N.Y. 158, 145 N.E. 917 (1924); Wood v. Bartolino, 146 P.2d 883 (N.M. 1944); Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944); City of Miami Beach v. Championship Sports, Inc., 200 So.2d 583 (Fla. 3d DCA 1967); Shore Inv. Co. v. Hotel Trinidad, 29 So.2d 696 (Fla. 1947).

C. Alternative grounds for affirming the decision of the Fifth District Court of Appeal.

The petitioners argue that the Court should completely ignore the enactment of Chapter 79-167, Laws of Florida, as amended by Chapter 84-287, Laws of Florida. This act, inter alia, preserves state ownership of Canal Authority land in the environmentally fragile Oklawaha River Valley and provides that other, "surplus" Canal Authority land may be purchased at fair market value by the counties for public purposes, or by the owner at the time of condemnation.

As shown in the foregoing Statement of Facts at p. 2, the canal project is a **federal** project. See also, pre-trial stipulation in each case; Public Law 675, 77th Congress (56 Stat. 703) and Public Law 86-645, Sec. 104 (74 Stat. 480). The Canal Authority is merely the local sponsor for the project.[9] This court has previously recognized that **federal law** is applicable to the canal project. Canal Authority v. Ocala Mfg., Ice & Packing Co., 332 So.2d 321, 324 (Fla. 1976). The district court opinion unfortunately ignores the role of the United States in the canal project, and, by twisting the facts, finds it is "the plans of the Canal Authority to construct the canal" which have been abandoned. The uncontradicted testimony of Giles Evans, Canal Authority manager for twenty years, established that it was the

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[9] See TR-153, testimony of Giles Evans, on the respective responsibilities of the United States and the Canal Authority.

obligation of the United States to "design, construct, operate and maintain the [canal] project." [TR 153]

Chapter 79-167, Laws of Florida, as amended, is legislative recognition that the canal project has not been abandoned and cannot be legally abandoned until Congress rescinds the legal authority for the project. It also represents the will of the legislature that the lands and easements acquired by the Canal Authority be devoted to other public purposes in the event Congress deauthorizes the canal project. See §374.001, §253.781, Florida Statutes. Both the trial and district court ignored the legislature's due regard for the workings of the law making process, the annual Congressional appropriations of operation and maintenance money, and the many facts and circumstances which negate the abandonment finding. See pps. 1-9 ante.

Petitioners, citing Chapter 79-167, Section 16, argue the act does not become effective until deauthorization of the canal project by Congress and therefore it should be ignored. This is only partly true,[10] but the very fact that much of Chapter 79-167 is not yet effective makes it clear that Congress has **not** deauthorized the canal, and, therefore, the United States, which is obligated to "design, construct, operate and maintain" the

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[10] Section 16 of Ch. 79-167 was amended by Section 5 of Ch. 84-287, Laws of Florida, to make section 6 of Ch. 79-167 effective on July 1, 1984. Section 6 authorizes development of a management plan for disposition of surplus lands outside the Oklawaha River Valley.

project has not legally abandoned it. As this Court has stated, the project is "bound by federal law." Canal Authority v. Ocala Mfg., Ice and Packing, 332 So.2d 321, 324 (Fla. 1976).

Since the canal project is a federal project, and since it has clearly not been abandoned under federal law, which is the **controlling** law, it is clear that this Court must respect federal law and heed the legislature's recognition that the canal project has not been abandoned. This Court has recognized as a "universal rule" that a statute may be made effective on the happening of certain conditions or contingencies, including enactment of another law. Gaulden v. Kirk, 47 So.2d 567, 575 (Fla. 1950); Brown v. Tampa, 149 Fla. 482, 6 So.2d 287 (Fla. 1942); Town of San Mateo v. State, 117 Fla. 546, 158 So. 112 (Fla. 1934). Such contingencies do not make the statute a less effective expression of the legislative will.[11]

Certainly recognition of the legislature's right to decide the ultimate disposition of land acquired pursuant to state condemnation powers is more in accord with contemporary eminent domain law as well as the need to protect the state's critical environmental resources. Certainly a holding that recognizes the

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[11] As an authorized federal project, the canal should be immune from inconsistent application of state law whether statutory or judicial. Hill v. Florida, 325 U.S. 538, 89 L.Ed. 1782, 65 S.Ct. 1373 (1945); State of Tennessee v. Davis, 100 M.S. 257, 25 L.Ed. 648 (1880); People v. Hudson R.C.R. Corp., 228 N.W. 203, 126 N.E. 801, cert. den., 254 U.S. 631, 65 L.Ed. 447, 41 S.Ct. 7.

federal government's actions and responsibilities with respect to the project, and its right to decide the project's termination, is more in accord with legal and factual reality. It would certainly forestall the mischief of further litigation.[12]

Petitioners argue that this Court should ignore Chapter 79-167 because it may never take effect - which is simply an oblique way of saying that Congress may not deauthorize or "abandon" the project. But whether it is or is not deauthorized, whether the project has merit or not, and whether it goes forward or not, are questions our legal system commits to Congress and the Florida Legislature - not to a few former landowners whose interests were fully extinquished and fully compensated years ago.

Finally, petitioners assert as a policy consideration that it is better to have the lands back on the tax rolls. This

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[12] For example, two cases before the Fifth District which are not on appeal here but were addressed in the opinion below involved small easement interests that the Fifth District found the Authority had not used. It ruled in the opinion below that its "abandonment" finding meant those easements were extinguished. The Fifth District refused to certify those cases to this Court as involving a question of great public importance. [DCA Record at 103] The question is of great public importance because approximately 9,000 acres of land under and around Lake Oklawaha are held as perpetual easements for flooding. [TR 162, 169] The Fifth District's holding indirectly calls into question the legal status of the lake as well as the nature of the Canal Authority's responsibilities as local sponsor to the United States government. The leading eminent domain treatise would suggest that in view of Ch. 79-167, as amended by Ch. 84-287, the perpetual easements would continue since that law merely changes the public purpose but not the actual use of the easements and imposes no additional burdens. 3 Nichols, Eminent Domain, §9.35 (3d Ed. 1981).

argument pales beside the clear and compelling legislative determination that the lands in the Oklawaha River Valley are a unique and valuable resource of **statewide** importance and that their retention in public ownership is imperative. Chapter 79-167, Section 2; Section 253.781, Florida Statutes.

This Court has the authority to modify the opinion below and affirm its result. The process of reasoning by which a lower court reaches its decision is not a controlling factor in entering an affirmance or a reversal, and the appellate court will affirm if the result is correct. A decision, if correct, can be affirmed on grounds other than those assigned by the lower court. Jaffe v. Endure-A-Life Time Awning Sales, Inc., 98 So.2d 77 (Fla. 1957); Miami Beach v. 8701 Collins Ave., Inc., 77 So.2d 428 (Fla. 1954). The Supreme Court will affirm a decree of a lower court even though based on an erroneous ground if the result is justified on any other ground appearing in the record. Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483 (Fla. 1961).

Clearly, the district court was correct in holding the title to lands in question in these cases would not revert under the facts and circumstances here apparent. It was incorrect in ignoring federal law, in finding abandonment under the present facts, and in not recognizing the legislature's right to decide the final disposition of Canal Authority lands. An affirmance of the result whose reasoning is grounded in these arguments and

facts of record would preclude still more litigation and place the onus of responsibility for deciding the canal's fate exactly where it belongs - upon Congress.

POINT II IN THE EVENT OF RESCISSION OF THE CANAL AUTHORITY'S FEE SIMPLE ACQUISITIONS, THE CANAL AUTHORITY IS ENTITLED TO THE PRESENT FAIR MARKET VALUE OF ITS LANDS.

The trial court ruled that the landowners had only to repay the Canal Authority at most the 1960s purchase price to reacquire the lands in question. In one case, Couse, the court even deducted for timber and a barbecue pit the Authority removed from the land, so that Couse became entitled to repurchase for $3,930 land worth $16,000 without those amenities.

Because of its holding, the district court did not reach this issue. It is highly doubtful this Court will need to consider the question, but, out of caution, the following authority and argument is submitted.

Little case law exists concerning the proper measure of recovery for a vendee when a conveyance is rescinded following the passage of twelve years or more. However, one who suffers a loss should be fully and not partially compensated for it. In the case of an executory contract to convey land, for example, if the seller fails to convey the title to land he contracted to convey, the buyer has the right to damages measured by the value of the land at the time it should have been conveyed, less the contract price as yet unpaid. Corbin on Contracts, §1098

(1962). This rationale should apply to the present actions so that a condemnee must recompense the Canal Authority at current fair market value.

In Gleason v. Leadership Housing, Inc., 327 So.2d 101 (Fla. 4th DCA 1976), equitable estoppel was invoked against the vendor who failed to perform under an oral contract to convey land. The vendee was found entitled to monetary recovery in lieu of conveyance. The measure of that recovery was held to be the value of the subject land at the time of consummation of the promise to convey, less the original purchase price, plus interest from the date of the oral promise. A comparable situation exists in these cases so the Canal Authority should be entitled to the present fair market value of its properties.

Significant in these cases is the **unparalleled** appreciation in value of much of the property in question. (See Statement of Facts, ante.) The trial court has ruled as a matter of law that the Canal Authority is not entitled to receive the full value of the lands **it owns** and has thus awarded a windfall to certain of the plaintiffs. In effect the ruling amounts to a forfeiture of public funds. Equity abhors a forfeiture, particularly against a public authority, whose loss is felt by all state taxpayers. Dade County v. City of North Miami Beach, 69 So.2d 780 (Fla. 1953); J. C. Vereen & Sons, Inc. v. City of Miami, 397 So.2d 979 (Fla. 3d DCA 1981). Equity should take notice of the Canal Authority's contractual obligation to provide the land necessary

for the canal project to the Corps of Engineers, and the unnecessary drain upon the taxpayers which would surely occur should the Canal Authority subsequently be forced to reacquire the subject property at future fair market value.

The trial court apparently reasoned that over the years the Canal Authority has had the "productive use" of the lands in question. There is no evidence of record that the Authority has been able to devote any of the lands in question to productive and remunerative uses except in the one case, Couse, where the Authority was able to sell some timber from the land taken. The trial court, wholly inconsistent with its own logic, **deducted** the value of the timber from the amount to be repaid. The trial court thus **penalized** the Authority for the productive use of the land.

Alternatively, the Canal Authority should be entitled to receive interest on the purchase price originally paid to the plaintiffs. See, Restatement, Restitution, §159. Each of the above plaintiffs has had the productive use of the purchase price it received for at least ten years. In other rescission cases, courts have held frustrated purchasers were entitled to interest. See, Resnick v. Goldman, 133 So.2d 770 (Fla. 3d DCA 1961); Rice v. Hilty 559 P.2d 725 (Colo. App. 1976); Rugg v. Midland Realty Co., 261 Pa. 453, 104 A. 685 (Pa. 1918).

POINT III RESPONSE TO AMICUS CURIAE BRIEF OF FLORIDA POWER & LIGHT.

Realizing the chaos that could ensue in the law of eminent domain were fee simple takings suddenly made subject to reverter, and remembering its own acquisition of property by the eminent domain power, FPL's argument treads a tenuous line. Its argument that the Carlor rule should be observed **and** the title to Canal Authority property should revert is necessarily based on facts and distinctions that do not exist.

FPL suggests that, unlike the circumstances of Carlor, the Canal Authority did not "completely take title" to the lands in question - that there was a "reservation of rights" in remaining landowners. This assertion merely recasts petitioners' argument and is both factually misleading and legally deficient.

The Canal Authority took fee simple title to all lands in question.[13] As already pointed out, the so called "reservation of rights" was made in only 2 of the 9 cases before the Court. Insofar as FPL suggests its argument applies to all cases, it simply ignores the facts. Furthermore, the "reservation" only amounted to a gratuitous grant by the Canal Authority to the previous owner of a right of access to the proposed Eureka Pool over land taken in fee simple. That access is not an interest in

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[13] See final judgments and district court opinion in the appendix to this brief.

title, vested, contingent or conditional; it is not a basis for reverter; nor is it a condition subsequent. Moreover, in no way does the record reflect that the right of access diminished the compensation paid for the property taken, nor does FPL even suggest such.

The two cases on which FPL's peculiar argument relies provide it no support.[14] Neither involved eminent domain proceedings. In each case a deed of conveyance contained a condition that if the land conveyed were not used for specified purposes within a certain time, the grantor would have the right to reacquire the land. A mere right of access is not an interest that would trigger a non-existent reverter clause or condition subsequent.

FPL's second suggestion - that all lands taken in fee simple should be treated as easements and the Court should hold all Canal Authority easements extinguished - is so frivolous that one can only conclude FPL is playing games with this litigation and the Court's time. The case was not tried on this theory, nor is any authority for it offered. There was never any question in the mind of the trial court or the district court that the Canal Authority took fee simple title. Both courts made that finding should the amicus care to read their opinions.

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[14] Owenby v. City of Quincy, 95 So.2d 426 (Fla. 1959); Genet v. Florida East Coast Railway Co., 150 So.2d 272 (Fla. 3d DCA 1963).

In its opinion below, the Fifth District did note that the two small easement interests it found extinguished because of "abandonment of the project" had never been used. Many of the Canal Authority fee simple and easement interests are in use - for example, the 9,000 acres underlying Lake Ocklawaha (see footnote 12, ante). FPL's suggestion that this Court declare all fee simple interests to be easements and all easements extinguished not only ignores this factual distinction but also the Canal Authority's right to litigate the matter and the rather elementary appellate principle that a court will not decide issues or interests not before it.

CONCLUSION

The decision of the Fifth District Court of Appeal should be affirmed because the result is correct. It is respectfully suggested that the opinion should be modified in accordance with the authority and reasoning in Point IC of this brief.

Respectully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States Mail to C. RAY GREENE, ESQUIRE, Greene & Greene, P.A., Post Office Box 188, Ft. McCoy, Florida 32637; CHARLES R. FORMAN, ESQUIRE, Piccin, Atkins, Krehl & Forman, Post Office Box 159, Ocala, Florida 32678; and to LEWIS F. MURPHY, Steel Hector & Davis, 4000 Southeast Financial Center, Miami, FL 33131-2398, this 7th day of September, 1984.

Louis F. Hubener

LOUIS F. HUBENER