IN THE SUPREME COURT OF FLORIDA

DYNAMIC CABLEVISION OF FLORIDA, INC., MARK H. ELLIS, ERNESTO RODRIGUEZ, and JESUS R. CHECA, Appellants, v. LENNAR CORPORATION, Appellee.	Case No. 65-993 (On Appeal from the Third District Court of Appeal, Case No. 83-2769)
STORER CABLE T.V. OF FLORIDA, INC., Appellant, v. SUMMERWINDS APARTMENTS ASSOC., LTD., Appellee.	Case No. 65,620 (On Appeal From The Third District Court of Appeal, Case No. 83-2433)

ANSWER BRIEF ON BEHALF OF APPELLEE LENNAR CORPORATION

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PREFACE

Pursuant to rule 9.210 of the Florida Rules of Appellate Procedure, Appellee has omitted a statement of the case and facts since Appellee does find significant "areas of disagreement" with Appellants' statement. Fla. R. App. P. 9.210(c).

ARGUMENT

I. THE LOWER COURTS PROPERLY DECLARED A STATUTE UNCONSTITUTIONAL WHERE THE STATUTE AUTHORIZED THE PHYSICAL INVASION OF A LANDOWNER'S PROPERTY AND DESTROYED THE LANDOWNER'S RIGHT TO EXCLUDE THIRD PARTIES FROM HIS PROPERTY

In their initial brief, Appellants attempt to distinguish the Florida statute sub judice from the New York statute examined by the Supreme Court of the United States in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). However, any attempt to distinguish the statutes draws distinctions without a difference; for Appellants lose focus of the dispositive question as articulated by the Supreme Court in Loretto: "[D]id the government authorize the permanent occupation of the landlord's property by a third party?" Id. at 440. If so, the Court explained, then that authorization constitutes a "taking" of property for which compensation must be paid.

The Supreme Court in Loretto examined a New York statute, enacted "to facilitate tenant access to CATV." Id. at 423. The statute provided that a landlord may not "interfere with the installation of cable television facilities upon his property or premises" and may not demand payment from any tenant for permitting CATV, or demand payment for any CATV Company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determined to be reasonable." New York Exec. Law § 828 (McKinney Supp. 1981-1982). The Court, applying well-established principles of due process, held that

the statute was unconstitutional since it denied the landlord his right to exclude and "authorized the permanent occupation of the landlord's property by a third party." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 440 (1982).

The Florida statute under scrutiny in the present case, tracing the essence of the unconstitutional New York statute, provides:

> No tenant having a tenancy of 1 year or greater shall unreasonably be denied access to any available franchised or licensed cable television service, nor shall such tenant or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or provides such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such tenant and the providers of such services.

Fla. Stat. 83.66 (1982). Thus, the Florida statute, like the unconstitutional New York statute, authorizes the physical occupation of the landlord's property without compensation and usurps his right to exclude the third party cable TV company. The statute, in fact, authorizes a "taking" without compensation and was therefore property stricken as unconstitutional by the lower court.

The principles underlying the Courts' decision in Loretto apply equally in the present case. The Court first noted that the New York statute took the landlord's right to exclude,

"one of the most essential sticks in the bundle of rights that are commonly characterized as property." Id. at 433, quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Secondly, the Court reasoned that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." 458 U.S. at 436 (emphasis in original). Explaining that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property," the Court concluded that: "[t]o require, as well, that the owner permit another to exercise complete domination literally adds insult to injury." Id. The statute sub judice works the same madness. It authorizes the permanent physical invasion of the landlord's property by an "uninvited" third party. Like the Plaintiff/Appellant in the present case, a cable TV company can, under the statute, force itself on the owner's property despite the owner's wishes. "Such an appropriation is perhaps the most serious form of invasion of an owner's property interests." Id. at 453. In authorizing this appropriation, the state "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of very strand." Id., citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

Appellants first attempt to distinguish the New York statute from the Florida statute by arguing that the Florida statute "vests CATV access rights in the tenant not the CATV

company." Appellant's initial Brief at 9. The argument, however, results in a sophistic game of semantics. The Supreme Court noted that the New York statute, like the Florida statute, was enacted "to facilitate tenant access to CATV." 458 U.S. at 423. Thus, the New York statute was couched in terms of the landlord's duty: "no landlord shall." The Florida Statute is the "mirror-image" of the New York Statute, providing for the reciprocal rights of the tenant: "no tenant shall be denied." Nevertheless, the effect of both statutes is the same: the landlord is forced to permit a third party to occupy his property. It is this occupation by a third party that the Supreme Court held to be an unconstitutional taking per se. Although the Supreme Court noted that the New York statute does not, on its face, create the express right in the tenant, the Court reasoned:

> Of course, Teleprompter [the CATV company], not Appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation").

458 U.S. at 439 (emphasis added). The instant Florida statute does just what the United States Supreme Court prohibits. Although the language of the statute seems to create a right in tenants to require landlords to permit CATV company access to the landlord's property, the CATV company, not the tenant, owns the

property which is now physically invading the landlord's property. As the Supreme Court announced: "A[n] owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." Id. at 36 (emphasis in original). The Florida statute, in fact, forces the owner to accept onto his property, without compensation, the "stranger" and his machinery. This authorized intrusion is a redefinition of property rights which is, per se, unconstitutional.

Appellants correctly point out that the Supreme Court in Loretto specifically stated that its holding does not alter the "analysis governing the State's power" to require landlords to comply with building codes or to provide utility connections, fire extinguishers, etc., in the common area of a building, but only "[s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party." 458 U.S. at 770 (emphasis supplied). Once the government authorizes such an occupation by a third party, the occupation is a taking per se for which the government must provide the appropriate vehicle for compensation. Id.

Moreover, Appellants assert the specious argument that the Loretto decision may be distinguished because the New York statute permitted cables on the landlord's property "regardless of either the landlord's or tenants' desire for cable television and regardless of whether anyone residing in the building received such service." Appellants' Initial Brief at 10. How-

ever, this argument was addressed and disposed of in Loretto. The New York statute applied to both "crossover cables" and "noncrossover cables." "Crossover cables" extended from one building to another. "Noncrossover cables" were connected solely to provide CATV service to the landlord's own tenants. Both type of connections were under scrutiny in Loretto. The Court held: "In light of our analysis, we find no constitutional difference between a crossover and noncrossover installation." Id. at 438. Indeed, even those cables installed to service the individual tenant at his request amounts to a taking since it requires the landlord to permit third parties to occupy a portion of the landlord's property. As the Loretto Court explained: "Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of tenants, the requirement would be a taking." Id. at 436.

Similarly, Appellants' argument that the occupation is only temporary since it only applies to the tenancy is without merit. This argument was squarely rejected by the Court in Loretto:

> It is true that the landlord could avoid the requirements of §820 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.

458 U.S. at 439, n. 17. As long as the landlord rents his property, he is subject to an invasion by a third party, the cable television company; the Loretto Court clearly defined this contingency as a permanent physical invasion and held it an unconstitutional taking per se. Id. It is for this reason that the Court held the New York statute unconstitutional even as applied to noncrossover cables which served individual tenants in Mrs. Loretto's building. Thus, Appellants' argument that since the occupation is linked to the tenancy, it is not a permanent physical occupation is ill-conceived.

Finally, Appellants urge that this Court discount the application of the principles in Loretto and embrace the Supreme Court's dismissal of the appeal in Coconut Creek Cable T.V., Inc. v. Wynmoor Ltd. Partnership, Case No. 81-145304 CL (17th Jud. Cir., Broward Cty., July 9, 1982), aff'd. 434 So.2d 903 (Fla. 4th DCA) (per curiam), review dismissed, 436 So.2d 101 (Fla. 1983), app. dismissed, ____ U.S. ____, 104 S.Ct. 690 (1984).[1/] However, Coconut Creek is inapposite both procedurally and substantively. In Coconut Creek, a cable television company sought a declaration as to its rights to enter a condominium development

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1/ Appellants fallaciously assert that the Third District "did not consider the decisional significance of Coconut Creek." Appellants' Initial Brief at 19. The decision of Coconut Creek was extensively addressed by both Appellants and Appellee in their briefs and on oral argument before the Third District in this cause. The Third District recognized that Coconut Creek is inapplicable procedurally, substantively and factually and thus rejected its applicability.

complex to provide service to individual unit owners. The defendants were the developer of the complex and a council created to manage recreational and other facilities. The council was controlled completely by the developer. The dispute arose when the developer refused the cable television company access to design a system to suit the development and to interview unit owners as potential purchasers. Thus accordingly, the Broward County Circuit Court framed the issue in its final judgment: "The basic issue in this case is whether plaintiff is entitled under law to access or entry into Wynmoor Village for the purpose of making its available cable television service accessible to the residents thereof." Final Judgment at 1. The Court specifically noted that its decree only affected the CATV company's right to access to the development, but not its right to lay cable on the property, stating:

> Accordingly, by this final decree the Court does not rule upon the issue of the availability or non-availability, in whole or in part, to plaintiff of any particular easement or right-of-way within Wynmoor. Such specifics are not now before the Court and, indeed, may not, as a practical matter, ever present an actual problem. Those issues will arise, if at all, only after plaintiff has been granted the right of entry and has had the opportunity to plan a design for its system following discussions with unit owners and their associations and, perhaps, with the developer and the WYNMOOR COMMUNITY COUNCIL. In like manner, the Court by this final decree does not address the issue of whether plaintiff must be allowed or can be compelled to install any particular cable television system within Wynmoor or any part of Wyn-

> moor. Such matter, should the same become a legal problem at all, will depend upon subsequent events.

Thus, the Court specifically did not reach the issue regarding the right to install the cable on the condominium property.

That decree was appealed to the Fourth District Court of Appeal, which affirmed, per curiam, without an opinion. The developer then sought discretionary jurisdiction in the Supreme Court of Florida, which denied jurisdiction. Thereafter, the developer sought to appeal the Fourth District's per curiam affirmance to the Supreme Court of the United States. The developer filed its brief on jurisdiction. The cable television company and unit owners moved to dismiss on several grounds: (1) The federal question, i.e., the constitutionality of the statute, was not actually decided; (2) The decision rested on adequate non-federal grounds; (3) Appellants lacked standing to raise the federal question; (4) Insofar as the federal question was concerned, the decision was not final. The Supreme Court dismissed the appeal for lack of a substantial federal question.[2/]

2/ The Supreme Court's dismissal of the appeal in Coconut Creek for lack of a substantial federal question rests upon clear "procedural" grounds which do not exist here. First, the Fourth District affirmed the lower court's refusal to strike the statute by a per curiam affirmance without an opinion. As the Appellee in Coconut Creek argued, it is impossible to determine the ground upon which the appellate court affirmed in a per curiam affirmance without an opinion and therefore it is impossible to determine whether the court reached the (Continued)

Besides the obvious procedural grounds for Supreme Court's dismissal in Coconut Creek, see footnote 2, supra, it is apparent that Florida Statute, Section 718.1232 and the facts of Coconut Creek are entirely inapplicable to the facts of the present case and the instant statute. Section 718.1232 provides:

> **718.1232 Cable television service; resident's right to access without extra charge.** -- No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

As stated previously, the Circuit Court in Coconut Creek did not have to reach the merits of the constitutional argument in that the CATV company only sought access to the development. Even so, it is clear that a condominium complex presents an entirely different issue from that presented in an apartment complex. In

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merits of the substantive argument. See Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983). Second, the decision in Coconut Creek did not necessarily involve the federal question regarding the constitutionality of the statute. See, e.g., Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G Condominium Association, 361 So.2d 128 (Fla. 1978) (court will not decide constitutional arguments if other ground exists, e.g., construction of condominium documents).

Coconut Creek, for example, the condominium documents, i.e. the declaration of condominiums, contained an "Agreement for Use and Conveyance" regarding the use and ownership of the rights of way, easements and common areas of the development. The Agreement provided that during the initial state of developing the complex, the rights of way and other areas were for the "use and benefit" of the condominium unit owners. In fact, title to the areas were to vest in the unit owners within months of the decision. Thus, the court merely had to construe the condominium documents to ascertain that the developer/plaintiff was not denied any rights of possession or ownership since the rights of way were subject to the encumbrance of the unit owners and would shortly vest in fee simple in the unit owners. It is for this reason that the court found that the developer did not have standing to challenge the constitutionality of the statute.

Moreover, the developer's reliance on Loretto in Coconut Creek was truly misplaced. It was the defendant/unit owners who stood in the shoes of Mrs. Loretto, not the plaintiff/developer. The trial court was eminently correct in noting that there is a difference between a rental apartment and a condominium. Indeed, Coconut Creek did not involve a suit between a unit owner and his tenant, but a suit between the developer and the unit owners and CATV company. Obviously, the unit owners are not the developer's tenants. The Court explained:

> In this regard the Court takes special note of the recent decision of the United States Supreme Court in Loretto . . . . Such decision is not dispositive of the instant case or its issues and does not require an invalidation of Section 718.1232, Florida Statutes.
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> The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232, F.S., pronounces no such specific mandate, but expressly announces as public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus, the decision of the U.S. Supreme Court in Loretto is distinguishable from the instant case, both factually and substantively, and does not require this Court, either directly or by implication, to invalidate the Florida Statute. (Emphasis supplied).

Thus, under the facts presented in Coconut Creek, section 718.1232 did not constitute a taking per se since it merely affirmed a landowner's ("condominium unit owner's") right to permit or exclude third parties from their property. The present statute, section 83.66, on the other hand, expressly compels the landowner to forego his right to permit or exclude third parties. As the Coconut Creek Court recognized, this "attempt to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants," amounts to a taking per se and is thus unconstitutional.

II. THE JUDICIARY CANNOT, BY IPSE DIXIT, CONVERT A STATUTE WHICH PURPORTS TO GUIDE LANDLORD TENANT RELATIONSHIP INTO A GRANT TO PRIVATE CORPORATIONS OF THE POWER OF EMINENT DOMAIN

Appellants urge that this Court strike out the portion of the statute forbidding compensation and create in all CATV companys the power of eminent domain. This assertion, however, is contrary to cannons of statutory construction, the law governing eminent domain and constitutional law.

Statutes granting the power of eminent domain are in contravention of the rights of individuals. Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483 (Fla. 1947). Thus, Courts recognize that the power "is one of the most harsh proceedings known to the law. Consequently, when the sovereign delegates this power to a political entity or agency, a strict construction must be given against the agency asserting the power." Id; Boycol, Inc. v. Downtown Development Authority, 325 So.2d 451, 455 (Fla. 1975). In fact, in cases where a private corporation is attempting to assert the power, the statute is to be most strictly construed against the assertion of the grant of eminent domain. District Board of Trustees v. Allen, 428 So.2d 704 (Fla. 5th DCA 1983).

The statute sub judice does not, in any way, evince the legislative intent to create the power of eminent domain in all CATV companies. An examination of the Statute, in fact, reveals quite the opposite intent. The statute is found under the chapter governing landlord-tenant relationships, not eminent

domain. The statute itself expressly prescribes the landowner's receiving any compensation for the use of his property: ". . . nor shall such tenant or cable television service be required to pay anything of value ..." Fla. Stat. § 83.66(1). It is thus the legislature's clear intent not to create the power of eminent domain but merely to regulate the landlord-tenant relationship. Unfortunately, in doing so, the statute constitutes an unconstitutional taking and thus should be stricken in toto.

Appellants argue, nevertheless, that the provision regarding compensation may be properly stricken and that the remaining language would effectuate the legislative purpose. Appellee readily concedes that the legislature, in enacting Section 83.66, wished to provide greater CATV access to tenants. However, it was clearly not the legislative purpose to grant CATV companies with the right of eminent domain. Thus, the court's exercising the "no compensation clause" from the statute does nothing more than establish a judicially created power of eminent domain where there was none. In so doing, the court is not giving effect to the legislative intent but rather is second guessing and usurping the legislative prerogative.

For example, the Fourth District recently explained that the judiciary cannot convert a regulation of the use of property under the police power into a grant of eminent domain powers by judicially taking in a right to compensation.

> But there is a clear distinction between the appropriation of private property for public use in the exercise of the power of eminent domain, and the regulation of the use of property under the police power exercised to promote the health, morals and safety of the community. State Plant Board v. Smith, Fla. 1959, 110 So.2d 401. See also, 1 Nichols on Eminent Domain (3rd Ed.) pp. 69-70, Section 14.2(2). We hold that enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. CF., City of Miami v. Romer, Fla. 1952, 58 So.2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property. (Emphasis added).

Mailman Development Corp. v. City of Hollywood, 286 So.2d 614, 615 (Fla. 4th DCA 1973), cert. denied 293 So.2d 717 (Fla. 1974), cert. denied 419 U.S. 844 (1974). The thrust of the Mailman court's opinion is that an exercise of the police power, like zoning on landlord-tenant regulation, cannot be converted into an exercise of eminent domain by merely awarding the defendant compensation for the taking. Similarly, the present statute cannot be converted into a grant of eminent domain simply by awarding compensation, directly prohibited by the statute.

A corollary to the argument regarding eminent domain is the critical inquiry regarding whether the court should strike out the portion regarding compensation. Appellants assert that

the court has the power to strike out the offensive provision and render the statute constitutional, citing State v. Green, 355 So.2d 789 (Fla. 1978) and State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959). However, as this Court explained in State v. Green, supra, the decision as to the severability of a clause requires the court to determine "if the Legislature would have passed one without the other." 355 So.2d at 794. In the present case, the answer is a clear "no". Excising the clause specifically denying compensation to landlords for the occupation of their property would inject the Florida judiciary into a ceaseless myriad of cases in order to determine just compensation. Surely, this was not the Legislature's intent in enacting the statute. Moreover, Appellants fail to recognize that in every case cited where the Court permitted a statute to remain intact but required the payment of just compensation, the legislature had specifically provided a mechanism and procedure for determining that compensation, outside the initial jurisdiction of the court systems. For example, in a case heavily relied on by Appellants, Princeton Cablevision, Inc. v. Union Valley Corp., No. C-356-83 (N.J. Sup. Ct., Cancery Div. Middlesex Co., December 29, 1983), the New Jersey legislature had provided for a board, the Board of Public Utility Commissioners, to hear all cases to fix just compensation. Similarly, in State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), the Florida legislature created the State Plant Board specifically to determine just compensation.

Even in Loretto, the New York legislature created the State Commission on Cable Television to determine just compensation. Indeed, the Supreme Court even noted that the legislature had provided a "procedure" to determine just compensation. 458 U.S. at 425. The Florida legislature, on the other hand, created no such board to determine compensation for the taking. It merely provided that no compensation shall be paid. Excising the clause would amount to nothing less than second guessing the legislature, if not usurping the legislative function in rewriting the statute. One would assume that the legislature would not have enacted the statute in its present form, intending to open the floodgates of the judiciary to hear every case involving a CATV company's desire to provide service to an apartment building. The legislature would, as did legislatures of other jurisdictions, undoubtedly provide for a vehicle and procedure for determining just compensation, which would keep the courts from becoming even more overburdened. That procedure would and should be cost efficient to the parties and to the "system". However, the legislature did not provide the vehicle or the procedure. Hence, the mere excising of the clause would wreak havoc and would be a second guessing of the legislative function. In fact, the legislature did not provide for a "savings clause" if any particular clause would render the statute unconstitutional, further supporting the fact that the legislature would not have simply enacted the statute in its present form without the no-compensa-

tion provision. Examining the effect of the statute without the provision leads one to conclude that it is truly improbable that the legislature would enact such a statute. Thus, the lower courts were correct in striking the statute in toto, refusing to usurp the legislative function.

Appellants also argue that the present statute may be construed as implicating only the State's police power, not involving the power of eminent domain, for which compensation may be paid, citing State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959). However, Appellants fail to recognize the distinction between a statute under the State's police power and a statute granting the power of eminent domain. The statute examined in State Plant did not actually result in an exercise of eminent domain since it did not authorize an occupation of defendant's property for the public use. As the State Plant court explained: "To destroy property because it is a public nuisance is not to appropriate it to a public use."[3/] Id. at 405.

3/ Moreover, the ratio decidendi of State Plant Board is not that the statute effected a taking of property in the sense of an eminent domain, but that the enactment was unreasonably broad and not reasonably adapted to its purpose since the definition of "infested trees" included those which were "commercially profitable." 110 So.2d at 406. Thus, the Court struck that overly broad provision and furthered the original legislative purpose - to eradicate the citrus disease of "spreading decline" by destroying certain trees while paying compensation for the destruction of commercially profitable trees through the vehicle of the State Plant Board established by the legislature to fix compensation.

The Third District below "considered and rejected the possibility that the statue's constitutionality could have been (Continued)

Accordingly, the court held that the statute did not implicate the power of eminent domain. Distinguishing the two sources of power and their ramifications, this Court explained that:

> 'Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though these consequences may impair its use,' do not constitute a taking within the meaning of the constitutional provision, or entitle the owner of such property to compensation from the state or its agents, or give him any right of action. * * * The exercise of the police power by destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Pompano Horse Club, Inc. v. State, 93 Fla. 415, ___, 111 So. 801, 807 (1927). The instant statute, however, does not ask the owner of property to destroy a nuisance, but authorizes a third party to occupy the owner's land, denying the landlord of his rights of ownership and possession. Thus, the excise of the clause denying compensation would judicially convert the statute from an exercise of police power into a grant of the power of eminent domain

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saved by severing the offending provision . . . and judicially mandating that compensation be paid to the property owner." Lennar Corp. v. Dynamic Cablevision of Florida, Inc., No. 83-2769, slip op. (Fla. 3d DCA September 11, 1984) (emphasis supplied). The Court rejected this possibility because the effect of the statute without the provision was clearly not within the intent and scheme of the Florida legislature.

in CATV companies. This was clearly not the intent of the legislature. Accordingly, the lower courts properly struck the statute as unconstitutional.

III. THE FLORIDA STATUTE MAY NOT BE PROPERLY CONSTRUED AS PROVIDING FOR JUST COMPENSATION

Appellants' final argument is that the instant statute may be construed as requiring the payment of just compensation. Subsection (5) of Section 83.66 provides:

> Any cable television company which is authorized to provide service to a rental unit or complex shall be responsible for paying to the landlord any costs, expenses, or property damage that are incurred by the landlord during the installation, repair, or removal of the cable. Payment of such amounts shall not be construed as a payment of value in order to obtain or provide cable television services.

However, any attempt to construe this provision as requiring just compensation "flies in the face" of the provision specifically demanding that no compensation shall be paid. The First District Court of Appeal addressed this very issue:

> We recognize that subparagraph (5) of the statute states that the cable television company "shall be responsible for paying to the landlord any costs, expenses, or property damage that are incurred by the landlord during the installation, repair, or removal of the cable," but we decline to construe that section as authorizing a "taking" and requiring payment of just compensation in view of the strong, direct prohibition in subparagraph (1) of the statute that no franchised or licensed cable television service shall be required:

> . . . to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such tenant and the provider of such services.

Beattie v. Shelter Properties, ___ So.2d ___ (Fla. 1st DCA 1984) [9 FLW 2199].

It is in this regard that Appellants' reliance on Princeton Cablevision, Inc. v. Union Valley Corp., Docket No. D-356-83 (Sup. Ct. N.J. Dec. 29, 1983), is entirely misplaced. In fact, the holding of Princeton supports the position that the instant Florida Statute is unconstitutional. The New Jersey statute under scrutiny in Princeton utilized language quite different from that of Florida's statute. The New Jersey court explained:

> In early language, Section 49 prohibits an owner from demanding or accepting payment for permitting installation of cable service. It is plain from the context that the principal focus is on payment from tenants. In later language, Section 49 requires the franchised company
>
> > to indemnify the owner . . . for any damage caused by the installation, operation or removal of [cable] facilities . . .
>
> A generous reading of those words would include an obligation to pay damages for the taking of the owner's property. Such a reading is necessary to save Section 49 from invalidation and will therefore be made.

Id. at 9 (emphasis supplied). Thus, as the court pointed out, the New Jersey statute could be read to authorize compensation (from the cable television company) for the occupation of the landlord's property. Furthermore, New Jersey had provided for an agency to determine compensation. The Florida statute, on the other hand, unequivocally forbids any compensation from both tenant or cable television company: "nor shall tenant or cable television service be required to pay anything . . ." Fla. Stat. § 83.66(1) (emphasis supplied). Indeed, the New Jersey court in Princeton explained that if the New Jersey statute had expressly forbidden compensation from the cable television company, the statute would be properly stricken as unconstitutional. Id. at 9. It is therefore clear that the Third District was eminently correct in holding the statute unconstitutional.

CONCLUSION

For the foregoing reasons, Appellee, Lennar Corporation, respectfully requests that the Court affirm the decision of the Third District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: H. JAMES CATLIN, JR., ESQ., Paige & Catlin, 800 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131; J. CHRISTOPHER REDDING, ESQ., Dow Lohnes and Albertson, 1225 Connecticut Avenue, N.W., Suite 500, Washington, D.C. 20036; and LOUISE H. McMURRAY, ESQ., Daniels & Hicks, P.A., 1414 Alfred I. duPont Building, 169 East Flagler Street, Miami, Florida 33131, this 28th day of January, 1985.

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