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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 ASSOCS. LTD.,

Appellee.

Case No. 65,620

(On Appeal From The Third District Court of Appeal, Case No. 83-2433)

INITIAL BRIEF OF APPELLANTS DYNAMIC CABLEVISION OF FLORIDA, INC., MARK H. ELLIS, ERNESTO RODRIGUEZ, AND JESUS R. CHECA

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I. STATEMENT OF THE CASE AND FACTS

Appellants, Dynamic Cablevision of Florida, Inc. (hereinafter "Dynamic"), Mark H. Ellis, Ernesto Rodriguez, and Jesus R. Checa (hereinafter referred to as "Individual Tenants") (Dynamic and the Individual Tenants are collectively referred to as "Appellants"), brought this action pursuant to Chapter 86 of the Florida Statutes, seeking, _inter alia_, a declaratory judgment of the Individual Tenants' rights of access to Dynamic's cable television (hereinafter "CATV") service and Dynamic's right to serve the Individual Tenants under §83.66, Fla. Stat. (1982) (hereinafter "Section 83.66") and Section 8A-132(b)(2), Dade County Code. R. at 80-84.[1/] This action was heard before the Circuit Court on stipulated facts.[2/] In summary, Dynamic holds a license from Dade County which imposes a duty on Dynamic to provide CATV service to county residents, regardless of residence location. R. at 242.

1/ Because this Brief will be submitted prior to the filing of the record from the Third District Court of Appeal, all citations to the record in this Brief shall be to the record in the appeal to the Third District Court of Appeal and shall be designated by R. at ____.

2/ R. at 241-43. In a prior appeal the Third District Court of Appeal reversed the Circuit Court's dismissal of Appellants' Amended Complaint because the lower court failed to disclose the basis for the dismissal. R. at 183-85. _Dynamic Cablevision of Florida, Inc. v. Lennar Corp._, 434 So.2d 27 (Fla. 3d DCA 1983).

Appellee Lennar Corporation (hereinafter "Lennar") owns and leases most of the 712 apartment units in a 12-building complex known as Arbor Lake Club Apartments (hereinafter "Arbor Lake") located in Dade County, Florida. R. at 242. The Individual Tenants are tenants of Lennar, holding leases at Arbor Lake of at least one year duration, who have requested CATV service from Dynamic. R. at 242. Lennar refused to allow Dynamic to install the cable and wiring necessary to provide CATV service to the residents of Arbor Lake, thereby denying such residents access to Dynamic's available, licensed CATV service in violation of Section 83.66 and Section 8A-132(b)(2) of the Dade County Code. R. at 242-43.

After reviewing the stipulation of facts and hearing the arguments of the parties, the Circuit Court entered its Final Declaratory Judgment and Injunction on October 13, 1983. R. at 244-48. On November 2, 1983, after granting Lennar's motion for rehearing, R. at 251-60, the Circuit Court entered its Amended Final Declaratory Judgment and Injunction (hereinafter "Amended Judgment"). The court concluded that Section 83.66(1) is a proper exercise of the State's police power. R. at 269-73. However, the court found the precedent of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), to be controlling, and held that the intrusion of equipment necessary to provide CATV service to the tenants at Arbor

Lake would be a taking of Lennar's property for which full compensation was required under the Florida and United States Constitutions. R. at 271-72. Consequently, the Circuit Court held invalid that portion of Section 83.66(1) which provides, "nor shall such tenant or cable television service be required to pay anything of value in order to obtain or provide such service . . . ." R. at 272. Finally, the Circuit Court concluded that the offending clause could be severed from Section 83.66(1) without doing violence to the primary legislative intent, and that the statute could be saved by requiring the payment of full compensation to Lennar. R. at 272-73.

Lennar appealed the Circuit Court's decision challenging that portion of the court's ruling which concluded that the court could sever the offending clause and require that just compensation be paid for any taking of Lennar's property pursuant to Section 83.66. Dynamic and the Individual Tenants jointly cross-appealed challenging the Circuit Court's holding that Section 83.66(1) authorized a taking of property for which compensation must be paid. In a per curiam decision the Third District Court of Appeal reaffirmed its earlier holding in Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs. Ltd., 451 So.2d 1034 (Fla. 3d DCA 1984), appeal pending, No. 65,620 (Fla., filed July 16, 1984), that Section 83.66 "is

unconstitutional as permitting a taking of property without compensation." Lennar Corp. v. Dynamic Cablevision of Florida, Inc., No. 83-2769, slip op. at 1 (Fla. 3d DCA September 11, 1984) (per curiam). On September 25, 1984 Dynamic filed its notice of appeal, thereby vesting jurisdiction in this Court. Fla. R. App. P. 9.030(a)(1)(A)(ii). By order dated October 30, 1984, this Court granted Appellants' motion to consolidate this case with the pending appeal in Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assoc., Ltd., No. 65,620 (Fla., filed July 16, 1984). An expedited briefing schedule was established and the Appellants hereby submit their Initial Brief in this consolidated appeal.

II. ISSUES PRESENTED

A. Did The Third District Court of Appeal Err in Holding That Loretto Controls This Case And That Section 83.66 Effects A Taking of Lennar's Property For Which Compensation Is Required?

B. Did the Third District Court of Appeal Err In Holding That Section 83.66 Did Not Authorize Compensation To Be Paid For Any Taking Of Property Permitted By That Section?

III. SUMMARY OF ARGUMENT

Section 83.66 vests the right of cable television access in tenants and is a constitutional exercise of the State's police power over landlord-tenant relationships.

Consequently, the Supreme Court's Loretto decision is not dispositive of the issues of this case; rather, the Coconut Creek decision is controlling, and this Court should hold that the Statute does not effect a taking of property for which compensation must be paid.

Even if the Supreme Court's decision in Loretto controls the disposition of this case and Section 83.66 is construed to permit a taking of property for which compensation must be paid, that Section must be presumed valid and should not be declared unconstitutional unless patently invalid. The fundamental rules of statutory construction require this Court to make every effort to sustain the constitutionality of that Section and to give effect to the Florida Legislature's clear mandate that every tenant must have access to cable television.

Section 83.66 can be construed in a manner that will satisfy the constitutional requirement that just compensation be paid for any taking of private property. If the clause in subsection (1) of Section 83.66 prohibiting the landlord from extracting payment for the right to obtain or provide CATV service is found to be inconsistent with the constitutional mandate of just compensation, then that clause can be excised from the Statute. Since there is a self-executing constitutional mandate to provide just compensation for any taking of property, there is no need for

enabling legislation or a specific legislative mandate to pay compensation. Consequently, this Court may cure any deficiency in the Statute by severing any offending clause and requiring the payment of compensation as required by the Federal and State Constitutions. Alternatively, subsection (5) of Section 83.66 requires the cable operator to pay damages to the property owner and that subsection should be construed to include the payment of compensation.

The Supreme Court's decision in Loretto clearly establishes that the enactment of Section 83.66 was a proper exercise of the State's police power. Both federal and Florida court decisions hold that when a valid exercise of the State's police power causes a taking of private property, the proper remedy for the taking is an award of compensation, not invalidation of the law that authorized the taking in the first instance.

Alternatively, if the Court holds that compensation cannot be awarded to remedy a taking of property caused by an exercise of the State's police power, then in order to uphold the constitutionality of Section 83.66, the Court should construe the Statute in a manner that would grant CATV operators a limited power of eminent domain. Such a construction would allow for the achievement of the Legislature's purpose and any delegated authority would be circumscribed.

IV. ARGUMENTS

A. SECTION 83.66 IS A CONSTITUTIONAL EXERCISE OF THE POLICE POWER AND DOES NOT PERMIT A TAKING OF PROPERTY.

The District Court of Appeal and the Circuit Court erroneously concluded that the decision of the United States Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), controls the disposition of this case and that Section 83.66(1) permits a taking of private property for which compensation must be paid.[3/] Appellants submit that Section 83.66(1) is a valid exercise of the State's police power authority over the landlord-tenant relationship; that Section 83.66 does not effect a taking of private property; that Section 83.66 is distinguishable from

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3/ Section 83.66(1) states:

> No tenant having a tenancy of one 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 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.

the New York statute construed in Loretto and therefore Loretto is not controlling; and that Coconut Creek Cable T.V., Inc. v. Wynmoor Ltd. Partnership, Case No. 81-145304 CL (17th Jud. Cir. Broward Co., July 9, 1982), aff'd, 434 So.2d 903 (Fla. 4th DCA), review dismissed, 436 So.2d 101 (Fla. 1983), app. dismissed, ___ U.S. ___, 104 S.Ct. 690 (1984), compels the conclusions that Loretto does not control the disposition of this lawsuit and that Section 83.66 does not effect a taking of property.

The New York statute at issue in Loretto vested CATV companies with the right to install CATV equipment on the property of an apartment building for the dual purposes of developing a rooftop highway of cable and selling CATV services to the tenants of each building. The Supreme Court confirmed New York's right to impose such requirements as a proper exercise of the state's police power. See Loretto, 458 U.S. at 425. The Court held, however, that because the statute gave independent property rights to third party CATV companies, it was an excessive exercise of the state's police power and constituted a "taking" under the Fifth and Fourteenth Amendments to the Federal Constitution. Id. at 440-41. The Court remanded the case to the Court of Appeals for the State of New York to determine the amount of compensation due the landlord from the CATV company. Id. at 441.

While the New York statute is similar to Section 83.66 in that both statutes were enacted pursuant to each state's police power and both involve CATV access rights, the Florida statute is functionally and legally different from the New York statute because it vests CATV access rights in the tenant not the CATV company.[4/] To appreciate the distinction this Court need only consider the Supreme Court's opinion:

> Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that [the New York statute] does not purport to give the tenant any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decision on this ground. Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights.

458 U.S. at 439 (footnote omitted) (emphasis added). In light of the Supreme Court's admonition that its holding in Loretto was "very narrow," 458 U.S. at 441, the distinction

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4/ The New York statute is also different in that the landlord has virtually no control over the installation of the CATV wires, see 458 U.S. at 440-41 n.19, compare §83.66(2), and more than one CATV company can unilaterally install its CATV wires in the landlord's building, see 458 U.S. at 437, compare §83.66(3).

between granting a property right to the tenant as opposed to the CATV operator is critical.

Section 83.66 is an appropriate exercise of the State's power to regulate the relationship and adjust the rights of the landlord and tenant. The Supreme Court in Loretto specifically stated that its holding in no way alters or weakens the State's power to regulate the landlord-tenant relationship or to require landlords to provide access to utility connections or other necessities. 458 U.S. at 440. In a carefully considered legislative judgment concerning the landlord-tenant relationship, the Florida Legislature determined that the tenant should have as part of his leasehold interest a right of "access to any available franchised or licensed cable television service." Fla. Stat. §83.66(1). Under the Florida law, a franchised CATV operator has no right to install or maintain CATV equipment or wires on the leased premises unless it receives a request for service from a tenant. In contrast, the New York statute involved in Loretto vested any franchised CATV company with the right to install cable equipment and wires on the premises of any apartment building regardless of either the landlord's or tenant's desire for cable television service and regardless of whether anyone residing in the building received such service. Thus the Florida law is functionally and legally different from the New York statute

because it vests CATV access rights in the tenant, not the CATV company.

Additionally, a cable operator's right to utilize or occupy a small portion of the tenant's leased premises pursuant to Section 83.66 is qualified and temporary because it is dependent upon the initiation and continuation of CATV service by the tenant. The CATV operator's continued presence on the property is at the sufferance of the tenants. Viewed in this light, the CATV company's use of a portion of the leased property is clearly not a "permanent physical occupation" in the same sense as it was in Loretto where neither the landlord nor the tenant could prevent the cable company from using the leased property. See generally Troy Ltd. v. Renna, 727 F.2d 287, 291, 301 (3d Cir. 1984) (statutory tenancy laws protecting qualified senior citizen tenants from eviction for over forty years do not permit a "permanent physical occupation" of private property and do not allow a taking of property within the meaning of the Fifth and Fourteenth Amendments).

Because of these distinctions, the Circuit Court should have analyzed the statute under "the multi-factor inquiry generally applicable to non-possessory governmental activity," like the requirement that landlords provide access to utility services. See Loretto, 458 U.S. at 440. That analysis considers: the economic impact of the

regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. Id. at 432.

Unlike many other statutory obligations imposed upon the landlord, the cable access regulation has minimal economic impact. The landlord does not have to pay one dime to provide his tenants access to cable television service. There now exist requirements forcing the landlord to spend whatever monies are necessary to maintain the roofs, windows, screens, doors, floors, steps, porches, exterior walls, foundations, and all other structural components in good repair, and to expend whatever monies are necessary to maintain the plumbing in reasonable working condition. See, e.g., Fla. Stat. §83.51(1)(b). Moreover, unless there is an agreement in writing to the contrary, the landlord must provide for the extermination of rats, mice, roaches, ants and bedbugs; must provide for locks and keys; must provide for the clean and safe condition of common areas; must provide for garbage removal and outside receptacles; must provide for heat during the winter, running water and hot water. See, e.g., Fla. Stat. §83.151(2)(a).

Section 83.66 also does not interfere with the property owner's investment-backed expectations. There is no real difference between the intrusion Section 83.66 imposes upon a landlord's property rights and the intrusion imposed

by other tenant protection legislation. By protecting the right of the tenant to use the considerable areas of the building through which must pass the pipes, wires, cables, ducts, and corridors necessary to provide the tenant with water, electricity, telephone service, heat, and a safe means of entry and exit, other Florida laws perform, on a much larger scale, the same function which Section 83.66 performs by protecting the tenant's right of access to licensed CATV service. By comparison, the intrusion allowed by Section 83.66 is *de minimis* and the statute adequately protects the property rights of the owner while maintaining the appropriate balance of rights between the owner of the property and the resident therein.

Unlike the New York statute, Section 83.66 goes into some detail in offering the landlord protections against economic and aesthetic damage. The landlord can block installation of the CATV wires until he approves the detailed plans, specifications and schematics applicable to the particular installation, and finds that the installation of the cable is in harmony with the existing character of his property and does not detract from the aesthetic features of the site. In addition, if the landlord has an existing television receive unit which provides the tenants with a signal comparable to CATV, then the tenants have no right to independent CATV service. Thus, in terms of

existing tenants' rights laws already on the books, Section 83.66 is a de minimis intrusion.

Section 83.66 promotes a valid legislative concern in facilitating the renting public's access to the important educational and community benefits of CATV service. As indicated above, this type of police power regulation is in keeping with countless other pieces of health and welfare legislation. Accordingly, under the "multi-factor inquiry," which Loretto specifically held to apply to certain landlord-tenant regulations (e.g., access to utility services), Section 83.66 does not constitute a taking of property for which compensation must be paid. See 458 U.S. at 440.

United States Supreme Court precedent subsequent to Loretto clearly shows that, because of the distinctions between the New York statute considered in Loretto and Section 83.66, Loretto is not controlling. In Coconut Creek Cable T.V., Inc. v. Wynmoor Ltd. Partnership, Case No. 81-145304 CL (17th Jud. Cir. Broward Co., 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),[5] a Florida statute,

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5/ A copy of the Circuit Court's decision in Coconut Creek is included in the Appendix to Appellants' Brief at 1-10.

Section 718.1232, which is virtually identical to Section 83.66 in purpose and language, was upheld against a constitutional challenge similar to the one made by Lennar in this case. Section 718.1232 provides:

> 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.

(Emphasis added).

Pursuant to Section 718.1232, the plaintiff, Coconut Creek Cable T.V., requested access to the Wynmoor Village condominium project in order to serve the residents, both owners and tenants, who requested CATV service. Defendants, the developer and the association which managed the common areas, alleged, inter alia, that the statute constituted a taking of defendants' property. The Circuit Court dismissed the defendants' claim, holding:

> Nor does the subject statute either by its terms or under the facts existent in this case, constitute or result in a taking of defendants' property without due process or just compensation in any sense.

* * * * * *

> 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.

Coconut Creek, slip op. at 6-7 (Appendix at 6-7).

Throughout the proceeding below, Lennar attempted to avoid the binding effect of this decision [6/] by arguing that Coconut Creek merely confirmed the right of property owners (e.g., condominium unit owners) to have unfettered access to cable television services and thus is inapplicable to tenants of apartment buildings. See, e.g., Lennar's Answer on Cross-Appeal and Reply Brief at 5-7, Lennar Corp. v. Dynamic Cablevision of Florida, Inc., No. 83-2769 (Fla. 3d DCA 1984). Lennar's argument ignores the fact that the mandate of Section 718.1232 specifically applies to all condominium residents, "whether tenant or owner." The court's opinion recognized this point when it noted that "[t]he heart of the statute is the right of the condominium dweller to have access to available licensed or franchised cable

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6/ The Supreme Court's summary disposition of the appeal in Coconut Creek is a decision on the merits which is binding on the lower courts. See, e.g., Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

service . . . ." Coconut Creek, slip op. at 7 (Appendix at 7) (emphasis added).

Equally important, Lennar's position ignores the express language of the Circuit Court's opinion in Coconut Creek which clearly applies to both condominium unit owners and residents:

> [T]he Court finds and concludes as follows:
>
> 1. Plaintiff [the CATV operator] . . . is clearly entitled under law to have entry into Wynmoor Village and to have full access to its various condominium associations and to their individual unit owners and residents. . . . Only by allowing plaintiff entry into Wynmoor can the residents of that condominium complex have access to plaintiff's services which the law and statute authorize and guarantee.
>
> * * * * * *
>
> . . . No matter who holds legal title to such roadways, now or in the future, it is clear from the evidence that the Wynmoor roads exist for the use and benefit of the Wynmoor condominium unit owners and residents, and those who service them . . . . Plaintiff is entitled to pass over and make reasonable use of such roadways in providing its services to Wynmoor residents.

Id. at 4-5 (Appendix at 4-5)(emphasis added).

The Circuit Court's final order in Coconut Creek clearly permits the CATV operator to enter Wynmoor to provide CATV service to condominium unit owners and residents.

> Under the law and facts of this case plaintiff has established its right, pursuant to Section 718.1232, Florida Statutes, and otherwise, to enter Wynmoor in order that condominium unit owners and residents of Wynmoor may have access to plaintiff's franchised cable television service.

Id. at 9 (Appendix at 9) (emphasis added). Thus, under Coconut Creek, the tenant of a condominium unit has the right of access to CATV service, despite any objections by either the condominium owners association or his landlord, the individual condominium unit owner.

It is entirely proper for this Court to consider the judicial construction placed on Section 718.1232 in Coconut Creek in construing Section 83.66 since the former statute clearly served as the model for Section 83.66. See State v. Aiuppa, 298 So.2d 391, 394 (Fla. 1974). Moreover, "[i]t is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time." Garner v. Ward, 251 So.2d 252, 255 (Fla. 1971); accord, Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 525 (Fla. 1973). Because there is no significant legal distinction between tenants of condominium units and tenants of

apartment units, it follows that Coconut Creek requires this Court to uphold the constitutionality of Section 83.66. 7/

In sum, Florida's tenant CATV access statute performs, on a much smaller scale, the same function as other Florida and local laws and regulations that require a landlord to provide water, electricity, heat, and telephone service, each of which involve a third party utilizing private property to provide a necessary service to tenants. In addition, Florida's tenant access statute is substantially the same as Section 718.1232, which has been held constitutional. In concluding that the statute authorized a taking of private property, the Third District Court of Appeal overlooked the nature and underlying governmental purpose of Section 83.66, which distinguish it from the New York statute, and failed to follow the binding precedent of Coconut Creek. Section 83.66 does not constitute a taking of private property any more than other laws and regulations which determine the benefits tenants are entitled to receive

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7/ The Third District Court of Appeal's per curiam decisions in this case and in Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd., 451 So.2d 1034, holding Section 83.66 unconstitutional did not consider the decisional significance of Coconut Creek. Similarly, the First District Court of Appeal's recent decision in Beattie v. Shelter Properties, No. AT-434 (Fla. 1st DCA, October 12, 1984) did not consider the impact of Coconut Creek.

when they rent apartments or condominiums. This statute is an appropriate legislative exercise of the State's police power to prescribe rules protecting tenants, and it strikes the proper balance between the rights of the landlord and the tenant. Consequently, Section 83.66 does not constitute a taking of private property for which full compensation must be paid and is clearly constitutional.

B. IF SECTION 83.66 AUTHORIZES A TAKING OF PROPERTY, THE CIRCUIT COURT CORRECTLY HELD THAT THE STATUTE PERMITS THE PAYMENT OF COMPENSATION TO PROPERTY OWNERS AND THE THIRD DISTRICT COURT OF APPEAL ERRED IN REVERSING THAT HOLDING.

Assuming Section 83.66(1) authorizes a taking of property for which compensation must be paid, the Appellants submit that the Circuit Court properly severed the offending clause in Section 83.66(1) from the remainder of that Section; that, alternatively, subsection (5) of Section 83.66 satisfies the constitutional requirement that compensation be paid for any taking of property; and that the award of just compensation is the proper remedy for a taking of property either pursuant to the state's police power or pursuant to a necessarily implied power of eminent domain.

In Storer Cable the parties did not brief, and the Third District Court of Appeal did not specifically address

in its decision, the question of whether Section 83.66 permitted the payment of compensation to property owners who are affected by the mandate of that Section. Nevertheless, the Third District Court of Appeal in its decision below concluded that "we necessarily considered and rejected [in Storer Cable] the possibility that the statute's constitutionality could be 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., slip op. at 1-2. Like its Storer Cable decision, the Third District Court of Appeal failed once again to articulate the basis for holding Section 83.66 unconstitutional. Presumably it accepted Lennar's erroneous position that once a police power regulation effects a taking of private property the only permissible remedy available to the court is to declare the statute invalid and that curing the constitutional defect by requiring just compensation to be paid improperly converts the statute to a grant of eminent domain power. Appellants submit that the Third District Court of Appeal's phantom holding in Storer Cable, adopted without the slightest amount of analysis in the decision below, grossly ignores the fundamental rules of statutory construction and the established jurisprudence concerning the payment of just compensation.

1. THE CLAUSE DENYING COMPENSATION IS SEVERABLE.

"It is a cardinal rule of statutory construction that an act of the Legislature is presumed valid and will not be declared unconstitutional unless it is patently invalid." Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 524 (Fla. 1973). This Court has also held that "if a statute is susceptible of more than one construction, it should be given the construction which will effectuate or carry out its purpose." Garner v. Ward, 251 So.2d 252, 255-56 (Fla. 1971). Courts are obliged to construe a statute in this manner, "even though the construction given is not within the literal, strict application of the [statutory] language." Id. at 256. The primary goal of judicial statutory construction and application is "to give effect to the evident legislative intent, even if it varies from the literal meaning of the statute." Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d at 524. "Legislative intent should be gathered from consideration of the statute as a whole rather than from any one part thereof." Id.

While there is no published legislative history for Section 83.66, the legislative intent underlying that Section can be gleaned from the language of the statute itself and is unquestionably clear. Section 83.66 was

enacted to ensure that every tenant in Florida has access to the important educational and community benefits which cable television service provides. See Beattie v. Shelter Properties, No. AT-434, slip op. at 4 (Fla. 1st DCA October 12, 1984); see also Loretto, 458 U.S. at 425; cf. Coconut Creek, at 7 (Appendix at 7). Likewise, it is clear that the Legislature intended to prevent a landlord from interfering with a tenant's access to licensed and available cable television service when comparable services are unavailable to the tenant. The Legislature obviously intended to prevent "profiteering by apartment owners," Beattie v. Shelter Properties, slip op. at 4, and to eliminate the landlord's power to demand a percentage of the cable operator's revenues as the quid pro quo for allowing the CATV operator to provide CATV service to the tenants, a practice which in the past has inhibited the development of cable television. See, e.g., Loretto, 458 U.S. at 423, 425; see also id. at 444-45 n.3 (Blackmun, J., dissenting). Due to the state of art of the cable television industry the Legislature undoubtedly recognized that in order to accomplish its objective of providing tenants unimpeded access to cable services, the cable operator would necessarily have to utilize a small portion of the leased premises. Finally, it is clear from the language of subsection (5) of Section 83.66 that the Legislature

recognized that the cable operator's activities may result in damage to the landlord's property interests and that the CATV operator should pay for such damages.

In giving effect to the clear legislative intent behind Section 83.66, the lower courts should have made "every effort . . . to sustain the constitutionality" of the statute. City of Dunedin v. Bense, 90 So.2d 300, 303 (Fla. 1956); see also State v. Aiuppa, 298 So.2d 391, 396 (Fla. 1974); Dade County v. Keyes, 141 So.2d 819, 821 (Fla. 3d DCA 1962). Once the lower courts decided that the clause in subsection (1) of Section 83.66 prohibiting the payment of anything of value for the right to obtain or provide CATV service was inconsistent with the constitutional mandate that compensation must be paid for a taking of private property, they were under a duty to sever the clause and preserve the validity of the remainder of the statute unless it would lead to an "absurd" result. Dade County v. Keyes, 141 So.2d at 821; see also State v. Calhoun County, 127 Fla. 304, 170 So. 883, 886 (1936).

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions, i.e. if the expressed legislative purpose can be accomplished independently of those provisions which are void, if the valid and invalid provisions are not inseparable, if the Legislature would have passed one without the other, and if an act complete in itself remains after the invalid provisions are stricken.

State ex rel. Boyd v. Green, 355 So.2d 789, 794 (Fla. 1978); see also Presbyterian Homes of the Synod v. Wood, 297 So.2d 556, 559 (Fla. 1974).

The manifest legislative intent of the act, i.e. to provide tenants with access to a licensed cable television system, remains unimpaired by striking out the clause prohibiting payment to the property owner.[8/] Eliminating the offending clause may cause the development of CATV to be slower than the legislature desired, but it does not affect tenants' access rights. Since the main legislative goal remains intact, excising the clause from the regulation leaves an act complete in itself, which the legislature would have enacted by itself. See, e.g., High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977); Wright v. State, 351 So.2d 708 (Fla. 1977).

8/ The legislature has underscored the importance of access to cable. Section 25 of the Chapter 83-66, which is codified as §83.66, is preceded, in Section 14, by a summary paragraph with identical goals, i.e. access and no compensation to the property owner. Section 14 has not been codified because its independent significance is unknown. See Section 83.66, n. 1. However, it undoubtedly indicates the legislature's strong feelings on the subject. See also, Section 718.1232 (pertaining to condominium residents' identical rights of access); Coconut Creek, at 7 ("The heart of the statute is the right of the condominium dweller to have access to available licensed or franchised cable service . . . .").

The Circuit Court's action, curing the constitutional defect by severing the offending clause and substituting the constitutional requirement of full compensation, is consistent with Florida Supreme Court precedent. The case of State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), involved the following legislative scheme:

> Section 1 . . . provides that "[t]he citrus disease known as spreading decline caused by the burrowing nematode is hereby declared to be a dangerous public nuisance"; and in . . . §2 of the Act the Board is directed to carry out a compulsory program of containment and erradication of the disease, including the destruction of infested trees. . . . The remaining provisions of §2 . . . provided for the payment of "reasonable compensation not to exceed $1,000.00 per acre" for the destruction of uninfested trees. . . . The Act specifically provided that no compensation should be paid for the destruction of infested trees.

Id. at 403-04 (emphasis in the original). This Court held that the statutory scheme was a legitimate exercise of the State's police power, but that just compensation had to be paid for the taking of private property. Therefore the Court held that the provision placing a ceiling on the compensation for destruction of uninfested trees and the provision denying compensation for destruction of the infested trees were unlawful limitations on the measure of compensation. Id. at 408-409. The court concluded:

> It would seem that the invalid provisions of the statute could be deleted without doing violence to the primary legislative intention to provide for a compulsory program for the containment and eradication of the spreading decline.

Id. at 409.[9/] The case was remanded for, inter alia, a determination of just compensation.

The principles of State Plant Board clearly apply to the present case. The legislature provided in Section 83.66(5) that the CATV company must pay the landlord some compensation for costs, expenses and property damage incurred in the installation of CATV wires, and in Section 83.66(1) that no compensation should be paid for the right to obtain or provide CATV service. As the Circuit Court in this case concluded, the clause denying compensation is invalid because

> [a]ny legislative attempt to lessen the constitutionally mandated full compensation is invalid, whether the legislative compensation scheme calls for no compensation . . . or . . . less than the constitutionally mandated compensation . . . .

9/ The Court also noted that the Act contained a severability clause. However, such clauses are not necessary to the implementation of this rule of statutory construction. See High Ridge Management Corp. v. State, 354 So.2d at 380; State v. Calhoun County, 170 So. at 886; Dade County v. Keyes, 141 So.2d at 821.

Amended Judgment, R. at 272; see State Plant Board, 110 So.2d at 409. As in State Plant Board, the invalid limitation in Section 83.66(1) can be severed from 83.66 "without doing violence to the primary legislative intention," of providing tenants access to the educational and community benefits of CATV service. R. at 272.

2. SECTION 83.66(5) PROVIDES AN INDEPENDENT BASIS FOR SUSTAINING THE CONSTITUTIONALITY OF THE STATUTE.

Even assuming, arguendo, that the Circuit Court exceeded its power by imposing a compensation requirement under subsection (1) of Section 83.66, Appellants submit that subsection (5) of Section 83.66 provides an independent basis for concluding that the statute satisfies the constitutional requirement that just compensation be paid for any taking of private property. Subsection (5) of Section 83.66 states:

> 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.

The first sentence undeniably provides for the payment of damages to the landlord. The second sentence

does not unconstitutionally limit the payment of compensation by reiterating the prohibition in Section 83.66(1), since that clause can be construed as merely eliminating the landlord's ability to demand a percentage of the CATV operator's revenues as the *quid pro quo* for allowing the CATV operator to provide CATV service to the tenants. In light of the usual presumption of constitutionality and the judicial duty to make every effort to sustain the constitutionality of a legislative enactment, this Court should interpret this provision requiring the payment of property damages to include the payment of just compensation.

This type of analysis was recently used by a New Jersey court in substantially the same circumstances. In *Princeton Cablevision, Inc. v. Union Valley Corp.*, Docket No. C-356-83 (N.J. Sup. Ct., Chancery Div. Middlesex Co., December 29, 1983), the court dealt with a tenant CATV access statute similar to Section 83.66.[10/] The statute provides, *inter alia*, that the landlord is prohibited from both interfering with tenants' access to CATV and demanding or accepting compensation for the installation of CATV. The

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10/ The *Princeton Cablevision* decision is included in the Appendix to Appellants' Brief at 11-23.

New Jersey statute also requires the CATV company to indemnify the landlord for property damage incurred during the installation. The New Jersey court concluded that the statute authorized a taking of property, but did not find the statute unconstitutional.[11/] The court recognized both its duty to uphold a statute if at all possible and its power to engage in judicial surgery to sever a clause denying compensation or to engraft a requirement of paying just compensation. Princeton Cablevision, slip op. at 9 (Appendix at 19). More important, the court noted that, while the statute prohibits an owner from accepting payment for permitting the installation, the statute also requires the CATV company to indemnify the owner for any damage caused by the installation. The court concluded that it would give the indemnification clause a "generous reading" to include the payment of just compensation, since such a reading was necessary to save the statute from invalidation. Id.

The purposes and language of the New Jersey statute and Section 83.66 are substantially the same. Moreover, the rules of statutory construction that the New Jersey court

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11/ Construing Loretto quite broadly, the court apparently never considered the legal and factual distinctions raised by Appellants in this case regarding the taking issue. See Princeton Cablevision at 8 (Appendix at 18).

utilized are equally applicable in Florida. While the Princeton Cablevision decision is not binding precedent, it clearly is persuasive authority. Consequently, Appellants submit that Section 83.66(5) provides an independent basis for holding that the constitutional mandate requiring just compensation for a taking of property has been satisfied.

3. THE PROPER REMEDY FOR A TAKING OF PROPERTY IS AN AWARD OF JUST COMPENSATION.

Lennar argued in the proceedings below, and the Third District Court of Appeal presumably concluded, that Section 83.66 is unenforceable and an award of compensation is unavailable as a remedy because the Legislature failed to specifically direct the payment of full compensation for any taking of property that occurs pursuant to its mandate under Section 83.66. See also Beattie v. Shelter Properties, slip op. at 6. As shown in Section IV.B.2 of this Brief, Section 83.66(5) does provide a specific legislative mandate for the payment of damages (compensation) by the cable operator to the landlord-property owner. Appellants submit, however, that both federal and Florida case law clearly establish that even in the absence of a specific legislative mandate to pay compensation, this Court may remedy an authorized taking of property by awarding the property owner just compensation instead of invalidating the statute.

Alternatively, the Circuit Court may, under the circumstances of this case, construe §83.66 as granting Dynamic a limited power of eminent domain.

(a) A Court May Award Just Compensation For A Taking of Property Pursuant to The State's Police Power.

The enactment of Section 83.66 involves an exercise of the State's police power, not its eminent domain power. See, e.g., Loretto, 458 U.S. at 425. When a police power regulation causes a permanent physical occupation of property, "the property owner entertains a historically rooted expectation of compensation." Id. at 441. Enabling legislation is not required to justify an award of compensation because there is a self-executing constitutional mandate to provide just compensation. Jacksonville Express-way Authority v. Henry G. Du Pree Co., 108 So.2d 289 (Fla. 1958); Division of Admin. v. Grant Motor Co., 345 So.2d 843 (Fla. 2d DCA 1977).12/

12/ For example, Florida courts have long recognized their equitable power to award full compensation for a taking through the medium of inverse condemnation. See, e.g., Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla.), cert. denied, 444 U.S. 965 (1979); White v. Pinellas County, 185 So.2d 468 (Fla. 1966); State Road Dept. v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941); Stanton v. Morgan, 127 Fla. 34, 172 So. 485 (1937); Florida Southern R. Co. v. Hill, 40 Fla. 1, 23 So. 566 (1898); Pinellas County v. Brown, 420 So.2d 308 (Fla. 2d DCA 1982), review denied, 430 So.2d 450 (Fla. 1983); City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1st DCA 1964), cert. denied, 172 So.2d 597 (Fla. 1965).

Under both federal and Florida law, when an exercise of the police power results in a taking of property, the state or its agent, has the alternative of condemning the property or continuing the regulation and paying just compensation. See, e.g., San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J. dissenting); State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959). In San Diego Gas & Electric Co. a property owner alleged that the city's open space (zoning) law was a taking of its property without just compensation.[13/] A plurality of the Court, with Justice Rehnquist concurring, concluded that the state court's judgement was not final and dismissed the appeal. 450 U.S. at 634. Justice Brennan along with three other justices dissented and addressed the merits of the case. They concluded that the open space regulation was a proper exercise of the police power, that the regulation effected a taking of property, and that the payment of just compensation was constitutionally mandated regardless of the

13/ San Diego Gas & Electric Co. dealt with federal and California constitutional guarantees, but the same standards apply to the Florida constitutional guarantee against the taking of property without due process. Florida Canners Ass'n. v. State, Dept. of Citrus, 371 So.2d 503, 513 (Fla.2d DCA 1979), aff'd. sub nom., Coca-Cola Co. v. State, Dept. of Citrus, 406 So.2d 1079 (Fla. 1981), appeal dismissed sub nom., Kraft, Inc. v. State, Dept. of Citrus, 456 U.S. 1002 (1982).

use of eminent domain powers. Justice Rehnquist, noted in his concurrence that he found "little difficulty in agreeing with much of what is said in the dissenting opinion." Id. at 633-34. The plurality also noted that the constitutional aspects of the taking issue were not to be "cast aside lightly." Id. at 633. The courts which have considered the issue have treated Justice Brennan's dissent as a majority opinion.[14/]

Justice Brennan's opinion in San Diego Gas & Electric Co. concludes that property may be taken pursuant to an exercise of the police power and just compensation may be awarded without implicating the power of eminent domain.

> [O]nce a court finds a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

* * * * *

14/ See, e.g., Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402, 408-409 (6th Cir. 1984), cert. granted, ___ U.S. ___, 105 S.Ct. 80 (1984); Barbian v. Panagis, 694 F.2d 476, 482 n. 5 (7th Cir. 1982); In Re Aircrash In Bali, Indonesia On April 22, 1974, 684 F.2d 1301, 1311 n. 7 (9th Cir. 1982); Devines v. Maier, 665 F.2d 138, 142 (7th Cir. 1981). But see Citadel Corp. v. Puerto Rico Highway Authority, 695 F.2d 31, 33 n.4 (1st Cir. 1982), cert. denied, ___ U.S. ___, 104 S.Ct. 72 (1983).

> Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation.

Id. at 658-60 (emphasis added). Under this rule, the issue of whether a power of eminent domain was delegated to Dynamic is irrelevant. In light of the Supreme Court's decision in Loretto, the enactment of Section 83.66 is a valid exercise of the police power. See also Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 148, 459 N.Y.S.2d 743, 746 (1983). Consequently, the regulation can remain in effect as long as full compensation is paid.

Similarly, the State Plant Board decision demonstrates that in Florida an explicit grant or delegation of the power of eminent domain is not necessary and, in fact, is irrelevant in awarding compensation when a police power regulation effects a taking of private property. The Plant Board did not have a specific grant of eminent domain power and this Court never suggested that the Board needed such power to carry out its program. This Court simply stated that the prohibition against uncompensable takings applies to the excessive use of the police power as well as to the exercise of eminent domain power.

> It has long been settled in this jurisdiction, however, that the prohibition against the taking of property "without just compensation" contained in §12 [of the Declaration of Rights, Fla. Const. of 1885], is not limited to the taking of property under the right of eminent domain.

110 So.2d at 405.

In State Plant Board this Court determined that the statutory scheme was a valid exercise of the police power, that it effected a taking, and that just compensation must be paid. These conclusions combined with the distinction between a police power taking and a condemnation taking, and this Court's lack of concern with the existence of a delegated power of eminent domain, lead to one of two conclusions: either the court necessarily implied the eminent domain power from the legislative intent, or concluded that when a valid exercise of the police power effects a taking, the regulation can remain in effect and full compensation can be awarded without implicating the power of eminent domain. Because State Plant Board did not involve a condemnation or inverse condemnation proceeding, it appears that a specific delegation of eminent domain power was never considered necessary.[15/]

15/ See also Gibson v. City of Tampa, 135 Fla. 637, 185 So. 319 (1938) (dumping municipal sewage into a bay effected a taking of the right to "grow" oysters in the bay, and the "growers" were entitled to damages without need for a condemnation proceeding; no specific legislative mandate authorizing the payment of compensation to oyster growers was required).

Based on San Diego Gas & Electric Co. and State Plant Board, Appellants submit that when a taking of property occurs pursuant to the exercise of the State's police power, the proper remedy is to require the payment of just compensation and not to invalidate the whole statutory scheme.

(b) Section 83.66 Can Be Construed As Granting Franchised or Licensed CATV Operators A Limited Power of Eminent Domain.

If this Court does not hold that just compensation can be awarded to remedy a taking of property pursuant to the State's police power, in order to sustain the constitutionality of Section 83.66, the Court should construe the Statute in a manner that would grant licensed or franchised CATV operators a limited power of eminent domain. It is obvious from the legislative scheme that franchised or licensed CATV operators are the only entities capable of carrying out the legislative intent.[16/] Hence, for the pur-

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16/ It is equally well settled that the power of eminent domain may be delegated by the legislature to a private corporation organized and existing under the authority of the state to serve the public, by supplying the people on equal terms and for reasonable compensation with services or commodities and articles which because of their nature, location or manner of production and distribution can be best produced and distributed by some organized form of enterprise operating under state control.

J. Sackman, Nichols on Eminent Domain § 3.21[2] (Rev. 3d ed. 1980).

pose of fulfilling a tenant's right to receive CATV service, the licensed CATV operator must be considered the State's agent and the grant of a limited power of eminent domain is necessarily implied.

Admittedly, once the eminent domain power has been granted or delegated, it must be strictly construed. See Peavy-Wilson Lumber Co., Inc. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947). However, the rule of strict construction is separate from the judicial duty to imply the grant or delegation of eminent domain power if the legislative intent underlying the statutory scheme cannot be accomplished without it. Once the power is implied, the statute sets forth strict standards to control its exercise.[17/] The delegation of authority is carefully

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17/ Under Section 83.66(2),(6), a landlord is authorized:

> To require that the cable television company submit to the landlord detailed plans, specifications, and schematics for the proposed installation.
>
> To require that the installation of the cable be in harmony with the existing character of the complex and designed to maintain the aesthetic features of the site.
>
> * * *
>
> In the event a cable television company . . . fails to substantially comply with the plans, specifications, and requirements as agreed upon with the landlord, the landlord shall be

(footnote continued on next page)

circumscribed. The authority has been delegated to a specific class of person (licensed or franchised CATV operators) and may be used only for a limited purpose (i.e., to provide CATV service to tenants).

If the landlord is already permitting one franchised CATV company to serve the tenants, or if the landlord provides an independent television receive unit with a signal comparable to CATV, then the tenants' rights are being fulfilled and they have no right of access to a separate franchised CATV company's service. Section 83.66(3)-(4).

Because the protections afforded to the landlord by Section 83.66 are substantial and because the unequivocal purpose of that Statute is to provide tenants with access to licensed CATV services, Appellants submit that this Court should interpret Section 83.66 as granting franchised or licensed CATV operators a limited power of eminent domain, if such power is necessary to preserve the constitutionality of the statute and to accomplish the goal clearly set forth by the Florida Legislature.

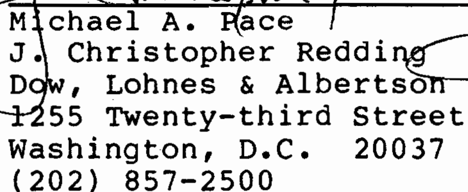
(footnote 17 continued)

> authorized to require the immediate removal of all cable equipment. Failure to remove the equipment within a reasonable time period shall make the cable television company liable pursuant to the provisions of § 810.08.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court to enter an order upholding the constitutionality of Section 83.66 and reversing the decision of the Third District Court of Appeal.

Respectfully submitted,



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November 19, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1984, a true and correct copy of the foregoing "Initial Brief of Appellants Dynamic Cablevision of Florida, Inc., Mark H. Ellis, Ernesto Rodriguez, and Jesus R. Checa" was served by mail upon the following:

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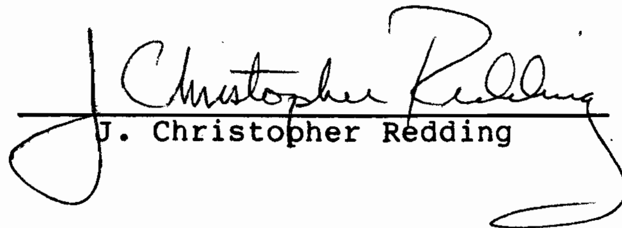

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