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)

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

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I. ARGUMENT

A. SECTION 83.66 DOES NOT AUTHORIZE A PERMANENT PHYSICAL OCCUPATION OF LENNAR'S PROPERTY.

Lennar admits that the dispositive question on the "taking" issue is whether the state has authorized a permanent occupation of the landlord's property by a third party. Answer Brief on Behalf of Lennar Corporation at 1 (hereinafter "Lennar Brief"). Lennar's arguments conveniently overlook the relevant statutory and common law in Florida that governs the landlord-tenant relationship. Moreover, Lennar's arguments ignore the Supreme Court's specific limitations on the scope of its decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In that case the Court specifically stated that its holding "is very narrow" and its decision in no way alters or weakens the state's power to regulate the landlord-tenant relationship or to require landlords to provide or permit connections to public services or other necessities. 458 U.S. at 440-41. Considering these two self-imposed limitations on the Court's Loretto decision and the relevant statutory and common law in Florida relating to the tenant's property interest in the leased premises, it is clear that Section 83.66 is distinguishable from the New York statute reviewed by the Supreme Court in Loretto and that Loretto should not control the disposition of this case.

In Florida a residential tenant's interest in the leased "premises" includes the dwelling unit, its structure, and appurtenant facilities, grounds, areas and property which are held out for tenant use. Fla. Stat. 83.43(5)(1973). Under Florida common law a lease transfers the landlord's possessory and use interest in the leased premises to the tenant and "for all practical purposes is equivalent to absolute ownership." See,

e.g., Williams v. Jones, 326 So.2d 425, 433 (Fla. 1975); DeVore v. White, 30 So.2d 924 (1947); State Road Dept. v. White, 148 So.2d 32, 34 (Fla.2d DCA 1963); see generally, 34 Fla. Jur. 2d, Landlord and Tenant § 12 (1982).

Section 83.66 represents a carefully considered legislative judgment that a part of the tenant's leasehold interest should include the right to use the leased premises for "access to any available franchised or licensed cable television service." Consequently, under Florida law the cable operator who provides service to tenants of an apartment building would use or occupy a small portion of the tenants' leased premises; it would not be using or occupying the landlord's property. Such a construction of Section 83.66 is not a redefinition of property rights; rather it is a legitimate regulation of the tenants' use of their existing leasehold property interests.

In contrast to the Florida statutory and common law scheme regulating the landlord-tenant relationship, the New York law examined in Loretto did "not purport to give the tenant any enforceable property rights with respect to CATV installation" and the Supreme Court specifically noted that "the lower courts did not rest their decisions on this ground." 458 U.S. at 439. Equally important, the Supreme Court declined "to hazard an opinion as to the respective rights of the landlord and tenant under state law prior to the enactment of . . . [the cable access law] to use the space occupied by the cable installation." Id. at 439 n.18.

Clearly the underlying issue of who has the right, as between the landlord and tenants, to possess and use the property on which the cable wires and equipment are attached was not resolved by either the New York

courts or the Supreme Court in Loretto. Instead the Supreme Court assumed that the cable operator used and possessed the landlord's property.[1/] Such an assumption cannot be made in this case in light of the Florida statutory and common law relating to tenants' property interests in the leased premises. Accordingly, Loretto cannot control the disposition of this case.

Because the Florida cable operator will use and occupy the tenants' leased premises to deliver its services instead of the landlord's property, the duration of the cable attachment to such property is qualitatively different from that which occurred under the New York statute considered in Loretto. A Florida cable operator's right to install or maintain cable wires or equipment on the tenants' leased premises is qualified because it is totally dependent upon the voluntary initiation and continuation of cable services by the tenants. In contrast, the New York statute vests any franchised cable company with the right to install and maintain cable equipment and wires on the landlord's property regardless of either the landlord's or the tenant's desire for cable television service and regardless of whether anyone residing in the building received such service.

1/ The language of the New York statute does provide support for the Court's assumption. It states in part that "[n]o landlord shall . . . interfere with the installation of cable facilities upon his property or premises . . . ." New York Executive Law § 828 (McKinney Supp. 1982) (emphasis added). No such language exists in Section 83.66.

Lennar claims that such distinctions were specifically rejected in Loretto. Lennar Brief at 5-6. Lennar's argument completely misconstrues the thrust of Appellants' claims. The Loretto Court understandably reached its conclusion because the landlord's property was used in both crossover and noncrossover situations. 458 U.S. at 438. In Florida the cable operator will use the tenants' leased premises and property, not the landlord's property. Therefore, the use and occupation of the tenants' property for the provision of cable television service is temporary and exists only as long as the tenants continue their residence and voluntarily decide to continue such cable service. See Troy Ltd. v. Renna, 727 F.2d 287, 291, 301 (3d Cir. 1984) (statutory tenancy law protecting qualified tenants from eviction for over 40 years after termination of tenancy is not authorizing a "permanent physical occupation" of the landlord's property).

The decision 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), supports the validity of the arguments raised by Appellants. See Appellants' Initial Brief at 14-19. Lennar attempts to distinguish this decision; however its position is flawed because it ignores the express findings and conclusions of the Circuit Court in Coconut Creek. See Coconut Creek at 4-5; Appellants' Initial Brief at 17-18.[2/]

2/ Lennar also argues that Coconut Creek only confirms the right of condominium unit owners to permit or exclude third parties from their property and to have unfettered access to cable television service and thus is

footnote continued...

The court in that case recognized that the mandate of Section 718.1232, Fla. Stat., guarantees condominium residents and cable operators more than the mere right to enter a condominium development temporarily for purposes of designing a system and soliciting customers; it guarantees the authority to use the roadways and other common areas of the development to provide and receive cable service. Clearly the guarantee of access to the cable operator's service would be meaningless unless it includes the concomitant right to use the roadways and other common areas for the installation of cable and other equipment which are required to receive such service. The decision in Coconut Creek preserves these rights and the lower courts erred in failing to recognize the decisional significance of this case.

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 APPEALS ERRED IN REVERSING THAT HOLDING.

Although it is somewhat unclear, it appears Lennar is arguing three basic points: (1) that Section 83.66 does not provide for the

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...footnote 2 cont.

inapplicable to a proper resolution of this case which involves tenants of apartment buildings. Lennar Brief at 10-12. As demonstrated in Appellants' Initial Brief at 16-18, both the mandate of Section 718.1232, Fla. Stat., and the Circuit Court's opinion in Coconut Creek reflect that all condominium residents "whether tenant or owner" have the right to obtain cable television service and that there is no significant legal distinction between tenants of condominium units and tenants of apartment buildings.

payment of compensation and is therefore unconstitutional; (2) that any judicial construction of the statute requiring the payment of compensation improperly converts the statute into a grant of eminent domain power; and (3) that a police power regulation authorizing a taking of private property must be declared invalid. Lennar's arguments ignore the fundamental rules of statutory construction and established jurisprudence surrounding the payment of just compensation.

1. Section 83.66 Does Provide For Payment Of Compensation To Any Landlord Whose Property Is Taken Pursuant To That Statute.

When this Court is required to pass on the constitutionality of a legislative act, it assumes "the gravest and most delicate duty that this Court is called on to perform." Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (Burger, C.J., plurality opinion). There is a strong presumption the legislature acted with knowledge of existing constitutional parameters and intended the statute to function in a constitutional manner. Courts accordingly have the duty to interpret a statute, susceptible of several readings, in a way as to avoid any doubt as to its constitutionality. See, e.g., Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation District, 274 So.2d 522, 524 (Fla. 1973); City of Dunedin v. Bense, 90 So.2d 300, 303 (Fla. 1956). Lennar's arguments are ill-conceived, as they would lead the Court on a path directly contrary to these fundamental rules.[3/]

3/ If Lennar is claiming that Section 83.66 is unconstitutional on its face because it lacks specific language authorizing the payment of just compensation, its argument is without merit. Express statutory recognition of the obligation to pay compensation for a taking of property is not necessary. See, e.g., Jacobs v. United States, 290 U.S. 13, 16 (1933); Lomarch Corp. v. City of Englewood, 237 A.2d 881, 884 (N.J. 1968) ("statute is not constitutionally defective for failure to expressly provide for compensation").

Subsection (5) of Section 83.66 requires the cable operator to "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." If a taking of private property occurs under Section 83.66, it would occur at the earliest during the installation of the cable wires. Section 83.66(5) reflects the Legislature's recognition that actions taken by the cable operator pursuant to this statute may result in damage to the landlord's property interest and that the cable operator should pay for such damage. This Court has often equated compensation for a taking of property as a payment of damages. See, e.g., Gibson v. City of Tampa, 185 So. 319, 321 (Fla. 1938). See also Princeton Cablevision, Inc. v. Union Valley Corp., 478 A.2d 1234, 1241 (N.J. Super. Ct. Ch. Div. 1983). Clearly this interpretation of the term "property damage" is not unreasonable and therefore should be adopted over other interpretations that would render the statute invalid.

Lennar argues that Appellants' construction of subsection (5) "flies in the face" of the prohibition in subsection (1). Lennar Brief at 20. Lennar fails to recognize the Court's obligation to make every effort to reconcile any inconsistencies in the statute before declaring it unconstitutional. City of Dunedin v. Bense, 90 So.2d at 303. In this case the perceived inconsistencies are easily resolved.

The proscription in Section 83.66(1) against the payment of "anything of value in order to obtain or provide" cable service was intended "to prevent profiteering by apartment owners." Beattie v. Shelter Properties, 457 So.2d 1110, 1113 (Fla. 1st DCA 1984). See Loretto,

458 U.S. at 425; id. at 444 n.3 (Blackmun, J., dissenting) (prohibition against payment designed to "'prohibit gouging and arbitrary action' by 'landlords'"); Princeton Cablevision, 478 A.2d at 1239 (purpose of statute is "to bar the entity controlling access from improperly exacting tribute"). Clearly the Legislature did not intend by the prohibition to deny property owners their constitutionally mandated and protected right to just compensation and this Court should not impute such motivation to the Legislature. Awarding compensation for a taking of property through payment for "property damage" under Section 83.66(5) would obviously not be "exacting tribute" or "profiteering" and thus would not violate the intent and purpose underlying the prohibition of subsection (1). In fact, the Legislature contemplated this situation and confirmed that payments under subsection (5) "shall not be construed as payment of value in order to obtain or provide cable television services." See § 83.66(5).

Appellant's analysis of Section 83.66(5) is supported by the decision in Princeton Cablevision wherein a New Jersey court upheld a tenant cable access statute substantially similar to the Florida provision on the grounds argued by Appellants. Lennar claims Princeton Cablevision is distinguishable, arguing that the principal focus of the New Jersey cable access statute is on prohibiting payment from tenants whereas "[t]he Florida statute . . . unequivocally forbids any compensation from both tenant or cable television company." Lennar Brief at 22. This argument, which is based on a very selective reading of Princeton Cablevision, is particularly ill-conceived since a simple review of the court's opinion reveals that the "real point" of the New Jersey cable access statute "was

to prevent landlords from exacting an excessive price from tenants who want to receive or from cable companies who want to provide cable services." Princeton Cablevision, 478 A.2d at 1239.

Lennar also argues that in Princeton Cablevision and other cases cited by Appellants the courts only upheld the validity of statutes because the Legislature had provided an administrative procedure for determining compensation. This argument has little merit. This Court has consistently held that the determination of just compensation is a "judicial function." See State Plant Board v. Smith, 110 So.2d 401, 407 (Fla. 1959). Clearly the right to just compensation under the Constitution is not dependent upon the existence of an agency to handle the claim. "[T]he Constitution does not embody any specific procedure or form of remedy that the States must adopt . . . ." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting). Since the Legislature did not consider it necessary to set up an agency to handle claims arising under Section 83.66(5), it is reasonable to assume that the Legislature made a conscious decision to have all compensation claims under Section 83.66 resolved by the courts. In any event, the validity of Section 83.66 should not depend upon the Legislature creating a specific administrative procedure to review compensation claims.

Appellants' proposed interpretation of Section 83.66(5) offers a sound and reasonable basis for concluding that the constitutional mandate of just compensation will be satisfied and fulfills the Court's duty to construe the statute so as to sustain its constitutionality. Equally important, this construction of Section 83.66(5) allows this Court to

uphold the Legislature's principal objective of providing cable television service to tenants who, without this law, are "a captive market for the sale of inferior television reception service at excessive costs." Beattie v. Shelter Properties, 457 So.2d at 1113.

2. Construing Section 83.66 To Require The Payment of Compensation Does Not Convert The Statute Into A Grant of Eminent Domain Power.

In upholding the constitutionality of Section 83.66 the Circuit Court in this case concluded that the prohibition on payment in Section 83.66(1) could be severed from the statute without doing violence to the primary legislative intent and that the statute could be saved by enforcing the "self-executing" constitutional mandate requiring the payment of compensation for a taking of private property. R. at 272-73. Without articulating the basis for its decision the Third District Court of Appeal improperly reversed this holding. Lennar Corp. v. Dynamic Cablevision of Florida, Inc., 456 So.2d 935, 935 (Fla.3d DCA 1984). Supporting this decision, Lennar argues that severing any portion of the statute or engrafting on the statute a requirement to pay just compensation is inconsistent with the legislative intent, "usurp[s] the legislative function," and converts the statute into a grant of eminent domain powers. Lennar Brief at 13-20.

This Court's cases establish that it will sever any unconstitutional provision of Section 83.66 and "uphold the remainder if that which is left is complete in itself, sensible, and capable of being executed, whether or not the enactment contains a severability clause." State v.

Williams, 343 So.2d 35, 38 (Fla. 1977). The legislative intent to provide tenants with access to licensed or franchised cable television and prevent "profiteering by apartment owners" can still be accomplished by modifying the prohibition on payment in subsection (1) to allow for the payment of just compensation. The remaining portions of the act are sensible and complete and there is no evidence, short of sheer speculation, that the Legislature would not have passed the remaining provisions had it known that a part of the statute would be modified.[4/]

The remaining question therefore is whether the statute, as modified, is "capable of being executed." Lennar argues that the Court cannot uphold the validity of the statute by modifying the deficient clause because it would judicially convert the statute from an exercise of police power into a grant of the power of eminent domain in CATV companies." Lennar's Brief at 19-20. Simply stated, Lennar's position is unsupported by the controlling cases.

The enactment of Section 83.66 involves an exercise of the State's police power, not its eminent domain power and the payment of compensation does not automatically convert the statute into a grant of eminent domain

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4/ Lennar claims the Legislature would not have enacted Section 83.66 knowing that compensation must be paid to landlords because it would "open the floodgates of the judiciary" and inject the courts into "a ceaseless myriad of cases." Lennar Brief at 16-17. Lennar has done itself a disservice. This blatant scare tactic is irrelevant to this Court's duty to make every effort to sustain the constitutionality of the statute. City of Dunedin v. Bense, 90 So.2d 300, 303 (Fla. 1956). Moreover, it proves too much. The legislature is aware that virtually every piece of substantive legislation, at least initially, subjects the courts to increased workloads.

power. See, e.g., Loretto, 458 U.S. at 425. Once a court finds that a police power regulation has effected a "taking" the property owner is entitled to an award of compensation, with or without a specific statutory authorization to pay. See id. at 441; San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 653-54, 658-60 (Brennan, J., dissenting); Jacobs v. United States, 290 U.S. 13, 16 (1933) ("Statutory recognition [of the obligation to pay compensation for a taking of property] was not necessary."); Appellants' Initial Brief at 34 & n.14. This is the rule because there is a self-executing constitutional mandate to provide just compensation. See, e.g., United States v. Clark, 445 U.S. 253, 257 (1980); San Diego Gas, 450 U.S. at 654 (Brennan, J., dissenting); Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So.2d 289 (Fla. 1958); Division of Admin. v. Grant Motor Co., 345 So.2d 843, 845 (Fla.2d DCA 1977); see generally, 6 P. Nichols, Eminent Domain § 2541 (3d rev. ed. 1972). Awarding compensation does not supplant a legislative function, it merely enforces a constitutional mandate. Accordingly, Section 83.66 is "capable of being executed" should the prohibition in subsection (1) be modified to require the payment of compensation.

3. When A Police Power Regulation Causes A Taking Of Private Property The Proper Remedy Is To Award Compensation, Not To Invalidate The Statute.

Lennar argues that the only relief available to remedy a taking of property pursuant to the state's police power is a judicial determination that the law is invalid or unenforceable. Lennar Brief at 15. This argument is plainly erroneous. The Supreme Court's decision in Loretto, a

case which Lennar conveniently ignores, obviously rejects this position. There the Court affirmed New York's authority to enact its tenant cable access statute pursuant to its police powers, 458 U.S. at 425, and remanded the case to the New York courts for a determination of just compensation. Id. at 441. It did not invalidate or hold the New York statute unconstitutional, as Lennar suggests throughout its brief. See Lennar Brief at 2, 4-5, 7.

The weakness of Lennar's position is also evident from its failure to discuss or distinguish the dissenting opinion of Justice Brennan in San Diego Gas, 450 U.S. at 636, which has been treated by lower courts as a majority opinion. See Appellants' Initial Brief at 34 & n.14 and cases cited therein. The constitutional rule proposed by Justice Brennan requires the payment of compensation whenever property is taken pursuant to the state's police power. 450 U.S. at 658. The state, not the court, has the option to revoke or otherwise amend the police power regulation, to condemn the property formally, or "to continue the offending regulation"; in any case "the action must be sustained by proper measures of just compensation" when it results in a taking of property. Id. at 659-60.

As described in the Initial Brief (pages 33-37), Appellants' position on this issue is clearly supported by this Court's decision in State Plant Board, 110 So.2d 401. Lennar seeks to distinguish State Plant Board by arguing that the statute involved in that case "did not actually result in an exercise of eminent domain since it did not authorize an occupation of defendant's property." Lennar Brief at 18. The simple answer is again provided by Loretto which established that tenant cable access statutes

like Section 83.66 are enacted pursuant to the state's police powers and do not result in an exercise of eminent domain. The destruction of a person's property, as in State Plant Board, is a far greater deprivation of property rights than the physical occupation of such property upheld in Loretto. In both cases, however, this Court and the Supreme Court confirmed that a state can take such legislative action pursuant to its police powers, not its eminent domain powers, so long as it pays the constitutionally mandated just compensation. Lennar's argument, therefore, must be rejected.

II. CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellants' Initial Brief, this Court should 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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March 18, 1985

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1985, a true and correct copy of the foregoing "Reply 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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