SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellate,

vs.

FORTUNE FEDERAL SAVINGS AND LOAN ASSOCIATION, ETC., et al.,

Appellees.

CASE NO. 70,680

ANSWER BRIEF OF APPELLEE FORTUNE FEDERAL SAVINGS AND LOAN ASSOCIATION

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PRELIMINARY STATEMENT

The Appellant, Department of Transportation, will be referred to as the "Appellant" or the "Department".

The Appellee, Fortune Federal Savings and Loan Association, etc., shall be referred to as the "Appellee" or "Fortune Federal".

The essential facts are few and have been fully recognized by both Appellant and Appellee in these Briefs. Accordingly, references to the record are unnecessary, and are omitted.

STATEMENT OF THE CASE AND FACTS

Although the Appellee, Fortune Federal, generally agrees with the DOT's statement of the case and facts, a brief statement follows to clarify certain DOT statements, as well as to crystallize the issues in this case for the Court.

The following statements appearing on page 3 of the Appellant's Statement of the Case and Facts "the Trial Court in his Order suggested in dicta that without this construction the statute would be unconstitutional because it would allow the taking of private property for a private purpose" must be changed to read "the Trial Court in his Order found 'that the FDOT admitted that there is no necessity for the taking of Tract 2, and no use of the land embraced therein is proposed by the FDOT'". The Second District Court of Appeal found that "the land is taken merely to minimize acquisition costs and is not necessary to effect a public purpose and, "the FDOT is taking more property than is necessary to expand Highway 19".

No mention of "private purpose" has appeared in the case at any stage of the proceedings.

The Appellant's Right-of-Way Resolution, Petition in Eminent Domain, and Declaration of Taking all formally concluded and publicly announced that the entire parcel, 108, consisting of 1.344 acres, was necessary for the purpose of constructing, reconstructing and maintaining the State facility.

First, in answer to Interrogatories, and then on the record at the Order of Taking hearing, the Appellant admitted

that the taking of tract 2, the larger .836 acre portion of the parent tract remaining after the taking, was not necessary for constructing, reconstructing or maintaining the facility.

The Appellant's Petition alleged that it was exercising the right of eminent domain by virtue of the authority granted to it by Chapter 334 through 339, and Chapters 73 and 74, Florida Statutes. Interrogatory number 2, directed to the Appellant, asked "Is the Petitioner relying upon the provisions of Section 337.27(3) Florida Statutes for authority to exercise the right of eminent domain in this proceeding?" The Appellant's answer was "See Petition".

Interrogatory number 3, directed to the Appellant, asked in part "is (tract 2) sought by the Petitioner in this proceeding for any specific public purpose or use?" There was no answer to this portion of Interrogatory 3. Interrogatory 3(a) asked, "For what public purpose is the .836 acre tract being acquired?" The Appellant's answer was "See Petition".

Interrogatory number 7, directed to the Appellant, was as follows: "Will the cost to acquire the entire 1.344 acre tract of the Defendant be equal to or less than the cost of acquiring the .508 acre portion thereof initially sought by the FDOT? 'If the answer to the foregoing question is "yes", please explain in detail how and why your answer is correct.'" The Appellant's answer was "yes", with no further explanation or detail.

It was undisputed that DOT needed .508 acres of this

land, and by stipulation of the parties, the DOT acquired title by Order of Taking on October 29, 1985. As to the remaining .836 acres, the property owners contested "necessity" for the taking.

This entire appeal is based on the DOT premise that saving the Florida taxpayer money, in and of itself, constitutes a "public purpose" justifying the taking of private property, under Article X, §6 of the Florida Constitution.

SUMMARY OF ARGUMENT

In its Brief the Appellant divides argument into three categories as follows:

A. Standard of Review (Page 6);

B. Public Purpose (Page 15);

C. Excess Condemnation (Page 24).

Appellant's Table of Citations lists 49 reported cases, 25 of those cases are not eminent domain cases and, hence, do not stand for the propositions for which they are cited by the Appellant, for the reason that the standard of review is different from the standard employed by the courts in eminent domain cases, and the public purposes of those cases involve social and commercial considerations foreign to the law of eminent domain.[1].

The subject matter of those 25 cases includes licensing harness racing, taxation, medical mediation, annexation, land reform, slum clearance, urban blight and urban renewal, validation of revenue bonds, stimulation of industry, assessment for road improvements, equal time for political publication, turpentine distilling, breach of construction contracts, municipal debt, removal of telephone lines, and environmental considerations.

Since the taking of private property by eminent domain is a harsh remedy, the standard of review of legislative action is far more strict then it is in the subjects set forth in the preceding paragraph.

Footnote 1. next page

Accordingly, in order to preserve the context of this Answer Brief and to efficiently invite the Court's attention only to precedents which contribute to the Court's consideration and conclusion, this Brief will analyze only those cases which are pertinent to propositions that are admitted by both parties to this cause.

The Department concedes that the question of what constitutes a "public purpose" is ultimately a judicial question [Initial Brief at 7]. Florida courts have repeatedly recognized the importance of this determination, since the "public purpose" requirement, together with that of "full compensation" constitute the only limitations on "one of the most harsh proceedings known to the law." Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451, 455 (Fla. 1975). Florida courts have further recognized that arbitrary and capricious legislative action is always subject to review.

The purpose of Article X, §6 of the Florida Constitution is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Section 337.27(3), Fla. Stats. (1985) is in direct contravention of this purpose - it authorizes the government to shift the "cost" of the taking back onto the private property owner. "Cost" provides the entire justification for the taking of property the Department determines is "excess", without resort to any other factors.

If accepted herein, the Department's position is virtually limitless. It authorizes the taking of vast tracts of land

simply to avoid the payment of compensation a comdemning authority deems to be excessive.

A summary of all theories presented, either direct or implied, to justify excess condemnation in all of the cases, texts and treatises available throughout the country are as follows:

1. Recoupment

    (A) Direct
    (B) Vicarious

2. Remnant

    (A) Property
    (B) Financial

3. Protection

4. Accessory Use

All of the foregoing, except vicarious recoupment and financial remnant, have been eliminated by the final and firm position taken by the Appellant. Direct recoupment is the taking of excess property for the purpose of resale in order to fund the public project to be constructed. Vicarious recoupment is the taking of excess land to produce funds by savings, or otherwise, in order to divert funds to the public entity, which funds are not to be used for the public project being construed. The financial remnant theory is that the land remaining after the taking, although not so small in size as to constitute a property remnant, is so small in value as to be essentially worthless.

Taking for land reform or for urban redevelopment or encouragement of industry have all involved the taking of an

entire tract, hence do not have a place in the discussion of taking of excess property in conjunction with taking of a primary tract. The official position of the Appellant remains that Tract 2 is necessary for the construction, reconstruction or maintenance of the public project to be constructed. The Appellant has never resolved, declared or petitioned otherwise. Either the Appellant instituted these proceedings in bad faith, or in the alternative, counsel for the Appellant was without authority to proceed with an entirely contradictory approach at the Order of Taking hearing.

The ultimate decision on the subjects of necessity and propriety of taking lies squarely with the Courts of Florida and the nation.

The overwhelming weight of authority is contrary to exercising, and excess taking for the purpose of, direct recoupment, and a taking for vicarious recoupment has never been sanctioned.

No Court has yet approved the taking of a financial remnant in any circumstance related in any manner to the factual position and characteristics of Tract 2, the subject of this litigation.

Entitlement to business damages under Section 73.071 F.S. is a matter of statutory integrity, not subject to executive grace.

ARGUMENT

> WHETHER SECTION 337.27(3), FLORIDA STATUTES (1985), WHICH LIMITS ACQUISITION COSTS IN EMINENT DOMAIN CASES BY ALLOWING THE STATE TO CONDEMN MORE PROPERTY THAN IS NECESSARY TO IMPLEMENT A VALID PUBLIC PURPOSE, CONTRAVENES THE FLORIDA CONSTITUTION?

or rephrased:

> WHETHER THE COST OF CONDEMNATION IN AND OF ITSELF CONSTITUTES A "PUBLIC PURPOSE" UNDER ARTICLE X, §6, FLORIDA CONSTITUTION, WHERE THE CONDEMNOR ADMITS THAT IT HAS NO NEED FOR THE PROPERTY TAKEN OR PURPOSE FOR THE TAKING OTHER THAN TO REDUCE THE COST OF ACQUISITION.

A. STANDARD OF REVIEW

As early as 1803 our Courts recognized that popular legislative action was not necessarily constitutional action, and left it up to the Courts to decide. Marbury v. Madison, 1 Cranch 137, 2L.3d. 60 (1803).

Thus, in the United States ex rel Tennessee Valley Authority v. Welch, 327 U.S. 547, 557, 66 S.Ct. 715, 90 L.Ed. 843 (1946), Justice Frankfurter wrote a separate concurrence to point out that:

> "The Bill of Rights provides that private property shall not "be taken for public use without just compensation..." This Court has never deviated from the view that under the Constitution a claim that a taking is not "for public use" is open for judicial consideration, ultimately by this Court. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume in citing these cases the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence. (emphasis added).

In order to focus upon the standard of review which applies to excess condemnation, which is the subject matter of the case in the lower court and this appeal, we must first excise cases in two other categories of subject matter, in which the standard of judicial review of legislative action is different, for good reasons.

First, the Court's have been less likely to disturb the legislative action based upon the police power in order to accomplish broad social purposes, such as land reform in Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321 (1984), and eradication of slum blight by urban renewal in the plethora of cases cited in Appellant's brief.

Second, the administrative selection of the site, location or route of a public facility is seldom disturbed, as in Catholic Burse Endowment Fund, Inc. v. State Road Department, 180 So.2d 513 (2DCA 1965).

In State of Delaware v. 9.88 Acres of Land, 253 A.2d 509 (S.Ct. Delaware 1969) the statute authorized excess taking, but "only if the portion --- is landlocked --- and the parcel remaining is of little value to the owner", accurately describing the remnant theory of the DOT herein. The Highway Department attempted to take an excess parcel that admittedly was not needed , and was taken only for an economic reason. The Supreme Court of Delaware declared the taking to be unconstitutional.

Under the law in this state, the condemning authority has always had the burden of proving "necessity" for the taking; this is and has been ultimately a judicial question to be decided

in a court of competent jurisdiction. Canal Authority v. Miller, 243 So.2d 131, 133 (Fla. 1970); State v. Jacksonville Expressway Authority, 139 So.2d 135 (Fla. 1962); Wilton v. St. Johns County, 98 Fla. 26, 123 So.527 (1929); Spafford v. Brevard County, 92 Fla. 617, 110 So.451 (Fla. 1926). Indeed, the DOT concedes this at page 7 of its brief. The purpose of such judicial review is to ensure the property rights of the citizens of the state against abuse of the condemning authority's power. Canal Authority v. Miller, 243 So.2d at 133.

In no area is judicial review more necessary than in the area of "excess" condemnation. As one of the primary law review articles cited by the DOT points out:

> "Abandoning review of excess condemnation is even more serious than a lack of review in traditional condemnation proceedings. With eminent domain, one is assured at least that the property taken will be put to a public use. Since excess condemnation is supplemental to the original taking, there is greater danger that the power to take the excess will be abused. The excess need only reasonably promote the purpose of the original condemnation in order to be permitted. Eminent domain is limited to the land needed to provide for the improvement. Excess condemnation is not so limited. Great amounts of land potentially could be taken as an excess. Thus, stricter review of excess condemnation is essential to guard against abuse and to protect the constitutional rights of private property owners. (emphasis added).

Note, 48 Tenn. L.Rev. 30, 398-399 (1981). Moreover, the concluding sentence of the DOT's quote from Note, 15 Env. L.Rptr. 565, 590 (1985) at pages 19-20 of its brief is somehow omitted.

In noting the expansion of the "public use" concept, the author concludes (in line with preceding authorities cited by the DOT) that "the implication of this broad notion of public use are extremely unsettling." Id. at 590.

Entitlement to business damages under Section 73.071 F.S. is a matter of statutory integrity, not subject to executive grace.

B. PUBLIC PURPOSE

An early Florida case, Peavy-Wilson Lumber Co., Inc., et al. v. Brevard County, 31 S.2d 483 (S.C. 1947), establishes the stationary backdrop against which every innovation must be put before the light for flaws. Peavy-Wilson, Supra remains the law in stating that:

> "The power of eminent domain is an attribute of the sovereign, it is not a vesture of the State conferred by constitution and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings known to the law, consequently when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power".
>
> "Our American Courts have been ever alert to shield the citizen against encroachment by the sovereign as experience has shown that where a right is extended a corresponding liberty is curtailed, seldom in fact to be restored".
>
> Statutes granting power, such as here asserted, are in controvention of the common rights of persons and should receive a strict construction".

Much of the DOT's brief is a plaudit to popular opinion and the need of the Government to conserve its monetary resources. There is, of course, nothing new about this need - nor is there any doubt as to its popularity. In placing this need ahead of an individual's property rights it is, however,

inimical to the spirit as well as the letter of the Constitution. The Fifth Amendment's guarantee that private property shall not be taken for public use without "just compensation" was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". Nollan v. California Coastal Commission, 55 U.S.L.W. 5145, 5147 (N.4 (1987); Armstrong v. United States, 364 U.S. 40, 49 (1960). Article X, §6 of the Florida Constitution obviously serves a similar purpose.

In stark contrast, the ostensible purpose of Section 337.27(3), Fla. Stats. (1985), which DOT readily admits, is to alleviate the public's economic burden by "limit[ing] the rising costs to the state of property acquisition". The DOT's application of the statute in the instant case is to shift the economic burden back onto the property owner, despite no showing of any government "need" or intended use for the property in question.

No case in Florida has ever held that the expenditure of public funds in and of itself constitutes either the "necessity" or "public purpose" justifying a taking. In fact, all authority is to the contrary. In Miller v. Florida Inland Navigation District, 130 So.2d 615, 624 (Fla. 1DCA 1961), concerning the analogous situation of condemnation of a greater estate, rather than a greater quantity of land, the First District flatly rejected the government's argument that the decreased price at which it could obtain the greater estate provided justification for the taking because it "would serve to decrease the tax

burden of the taxpayers of the State of Florida". The court noted that:

> "This argument is unsound and pinpoints the abuse of power that results from the attempts to acquire a greater interest than that which is necessary for the contemplated public use. The anticipated result, however beneficial to the taxpayers generally, is immaterial and irrelevant to the question of the power of eminent domain and the extent to which it may be exercised. Id. (emphasis added).

See also Knappen v. Division of Administration, 35 2 So.2d 885 (Fla. 2DCA 1977) (purpose of attracting federal funds did not amount to "necessity" for taking). So too, our courts have uniformly condemned the use of down-zoning of property the government intends to take in order to keep down commensurately the amount that the government will have to pay. Florida courts have rejected such government actions as "arbitrary and capricious", notwithstanding the fact that they have, as their sole purpose, the saving of taxpayer dollars. Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74, 84-86 (Fla. 1DCA 1959); City of Miami v. Silver, 257 So.2d 563, 567 (Fla. 3DCA), cert. den., 262 So.2d 442 (Fla. 1972).

Examination of the cases cited by the DOT indicates that they are not supportive of the proposition for which they are cited, that "economically oriented public purposes have been recognized in Florida". (DOT brief at 21). Instead, they reaffirm that in Florida, "necessity" for a taking is determined by reference to the use or the proposed use of the property

itself. Northern Investment Corp. v. City of Cocoa, 118 Fla. 405, 158 So. 887 (1935) (failure to set forth in ordinance purpose for which land is appropriated renders ordinance invalid; general allegation or "public purpose" insufficient). As this court noted in Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451, 455 (Fla. 1975), there is complete and significant difference between "public purpose" and "public benefit". Also, the Court in Baycol observed:

> "It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our fore-fathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law. (emphasis added).

The Appellant's brief goes "off limits" as it attempts to dramatize and misdirect attention to the budgetary matters, and in doing so relates facts to the court which appear no where in the record at any level and which are the opposite of accuracy. It is respectfully suggested that the judicial department should refrain from considering budgetary matters except in those cases brought solely on that subject matter. The Appellant's brief states that "those purposes are to save the publics' money by taking extra property when to do so would be cheaper than the land actually needed for the public improvement and use those savings on other vital transportation projects", without specifying any such project or projects. There will always be vital transportation projects in the State of Florida, but

there is nothing in the record to indicate that funds saved from the instant land acquisition might find their way to such projects or that the funds saved will be available for anything other than land acquisition or even that they will be carried over to ensuing fiscal years. The cost of building highways will always be with us as a necessary aspect of serving the public need. The question is only whether that cost should be borne by the using public or by a few owners of property that is unfortunately situated.

It is well said in the concurring opinion of Mr. Justice Drew in Jacksonville Expressway Authority v. Du Pree Co., 108 S.2d 198 (Sup. Ct. 1958) as follows:

> "The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the right of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual - within, of course, constitutional and statutory limitations - such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed."

C. EXCESS CONDEMNATION

The Appellant's brief on page 25 correctly concludes that "the remnant theory most clearly justifies a public purpose finding found in Section 337.27(3)." The Appellant's brief is further correct in its statement on page 26 that "the facts in the instant case do not fit within the physical remnant theory since the remainder of property taken from the Appellee was useable and had value".

Indeed, parcel 2 is bordered on two sides by modern, paved roadways after the taking. Also, the Appellant's evidence at the hearing upon the Order of Taking established the value of parcel 2 at $255,000.00 and severence damages at $2,000.00. It was hardly "worthless", which is a finding of fact that is absolutely necessary in order to invoke the financial remnant theory which the Appellant has chosen.

The Appellant relies heavily upon the opinion in People v. Superior Court, 436 P.2d 342 Calif. 1968.

The court in People, Supra found that, under the facts of that case, it was a public use to condemn remnants "that avoided substantial risk of excessive severence or consequential damages".

The Appellant is attempting to avoid business damages and in that attempt takes the position that business damages are consequential damages. Severence and consequential damages are synonymous. Business damages are not consequential damages, but are statutory special damages, as so defined in 73.071

Florida Statutes. The term consequential damages as used in People, Supra could not have meant statutory special damages in the nature of business losses, because California does not have a business damage statute.

In People, Supra the excess parcel was rendered worthless because the condemnation of the initial parcel caused the excess parcel to be landlocked. Tract 2 of parcel 108 in the case before the Court is neither landlocked nor worthless.

It hardly falls within People, Supra to take property worth $255,000.00 when severence damages are only $2,000.00.

Pertinent quotations from People, Supra are "the economic benefit to the State must be clear in order for the State to validly exercise excess condemnation" and "whether taking of such property is for a public use turns on a determination of whether the taking is justified to avoid excess severence or consequential damages, and if the Court determines that the excess condemnation is not so justified, it must find that the taking is not for public use", and "the issue of whether a taking is for public use, however, is justiciable" and "to raise an issue of improper excess taking, condemnees must show that the condemnor is guilty of fraud, bad faith, or abusive discretion in the sense that the condemnor does not actually intend to use the property as it resolved to use it".

"Accessory" condemnation describes different subject matter than "excess" condemnation, although accessory condemnation involves the taking of land that is in addition to the

initial parcel required for the primary purpose of the public facility contemplated. Typically, accessory condemnation is the taking of lands adjacent to the primary parcel in order to provide access to the primary parcel either for maintenance of the primary parcel by the condemnor or to provide ingress to and egress from the primary parcel for the public, when the primary parcel is of such nature that it will be used by the public, as for recreational purposes. Interestingly, accessory condemnation may be exercised against lands owned by others than the initial property owners, provided that the public purpose is the same.

In Montana v. Chapman, 446 P.2d 709 Montana Supreme Court 1968, the Montana Court quoted liberally, and favorably, upon People, Supra, but reached an opposite result based upon the facts, stating "where it was not conclusive that present use was highest and best use attributable to site, land remaining after appropriation retained value as a separate parcel and statute providing for taking of a whole parcel whenever condemnation of part actually needed leaves remainder in such a shape or condition as to give rise to claims or litigations over severence or other damage, was not applicable". The Montana Court found that the highest and best use of the excess parcel remaining after the taking need not be the same as its highest and best use before the taking, but that if it "retained a value as a separate parcel", even for a different use, its taking under the financial remnant theory was not justified.

In People v. Jarvis, 79 Cal. Reporter 175, Court of Appeal 1st District, 1969, the California Court of Appeal commented upon People, Supra, and in so doing was of the opinion that "finding that excess taking is justified in order to avoid excess severence or consequential damages, necessary to exercise the power of excess condemnation, is one of fact to be supported by evidence". (emphasis supplied)

The facts of the case at bar are so vastly different than, and even opposite to, the facts of People, Supra that People, Supra constitutes no authority whatsoever for invocation of the taking of Tract 2 on the theory of excess condemnation of a financial remnant.

The Appellant's lead case of People v. Superior Court is based upon a factual finding that the remnant land taken as excess to the primary taking was landlocked and essentially worthless. An extension or refinement of the theory of People, Supra, although not citing People, Supra, appeared in State of Delaware v. 9.88 Acres of Land, 253 A.2d 509 Sup. Ct. of Delaware (1969). In Delaware, Supra the Court said:

> "The highway department's contention that it will be obliged to pay a sum for the 9.88 acres substantially equivalent to the value of the whole, and that it should accordingly be allowed to take the whole, may be an attempt to apply the so called remnant theory described in 6 ALR 3rd 317 and 2 Nichol's on Eminent Domain, 3rd Edition, Section 7.5122. Whether or not this theory is good law in this state in the proper case need not be decided at this time because the facts here do not fall within the scope. To come within that theory the remnant must be practically worthless. We do not agree that the 14.76 acres is rendered practically useless or

> worthless by taking of the 9.88 acres. Although the tract remaining will be land-locked it is still worth $100 to $200 per acre according to the appraisers".
>
> "Since admittedly the highway department seeks this excess land solely because it fears that the condemnation commissioners may award to the owner a sum almost equal to the value of the entire tract by reason of the denial of access to it we must conclude that not only does the highway department not seek the excess for public purposes, but that it has no foreseeable future plans to devote the excess portion to a public use."

Condemnation for motivations of the condemning authority other than the necessity to construct public facilities has been decried and denied in Florida.

In City of Miami v. Wolfe, 150 So.2d 489 3DCA 1963, the Court denied an excess taking saying:

> "Record on condemness' summary judgment motion, in proceeding by city to condemn riparian land, purportedly for extension of drive, conclusively showed that suit was part of intensive campaign by city to block condemnees' acquisition of bay bottom lands under statute providing for sale to upland riparian owner and to itself acquire fee simple title to lands so that it would have riparian right to purchase bay bottom land and that action was brought in bad faith, amounted to gross abuse of discretion, and was properly dismissed".

Also, in Knappen v. State, 352 So.2d 885, the Court held that:

> "A condemnor may take private property for public use only when it is necessary for such use".

The taking of a parcel that is not needed in connection with

a public facility and which is neither landlocked or totally impaired or rendered worthless by the taking, but which is taken for the sole purpose of denying the property owner his right to statutory business damage must be added to the list of unnecessary or bad faith takings instituted solely to improve the condemnor's chances of attracting federal funds or to itself acquire fee simple title to lands so that the condemnor would have riparian right to purchase bay bottom land, thereby depriving the property owner of that lawful right.

In United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 66 S.Ct. 715, 90 L.Ed 843 (1946), the Court found:

> "Congress in 1942, in order to meet pressing power needs for war production, empowered the authority to construct Fontana Dam. The Dam is one of the world's largest and creates a reservoir 29 miles long. All the land owners in the area, except these six respondents who refused to sell, have received full compensation for their property. Their only convenient means of ingress and egress, except for foot trails, was North Carolina Highway 288. When the Dam was built the reservoir flooded most of the Highway, rendering it useless for travel. As a result, the area remained practically isolated".

By complete destruction of access the lands of the Respondents were rendered essentially useless, in such manner that today, forty years later, would constitute inverse condemnation. The only method of restoring access would have been to build a multi-million dollar new highway through a circuitious and mountainous route. Then as now, property owners were not allowed to dictate the creation of a new road project or to choose the route of the road. The cost-to-cure would be in a

word, mountainous. The essence of the opinion not germaine to the case at bar was simply that the TVA was allowed to condemn and pay full compensation for lands that were isolated, as well as those that were inundated, by the Fontana Dam project.

In Brown v. United States, 263 U.S. 78, 81, 44 S.Ct. 92, 101, 68 L.Ed 171, 180 (1923), from the text, the circumstances of this case are peculiar. A town was to be flooded by public improvement, the United States condemned the part of the town to be flooded and in addition condemned a portion of a bluff one hundred feet high on the other side of the river. The Court held:

> "It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one".

The case of Luke v. Massachusetts Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958) cited by Appellant to support his "remnant theory" contains commentary of the court considerably more supportive of the Appellee's position. The Court viewed the Massachusetts Turnpike Authority as "one huge undertaking" where the acquisition and construction of which necessarily landlocked several small parcels. The Turnpike Authority also condemned some private easements so that the landlocked parcels would not be totally deprived of access. The Court considered that an appropriate acquisition accessory to the land necessary for actually building the roadway, but in doing so found that "whether the taking is for public purpose is the subject for judicial examination", and further

opined that if more land was taken than was necessary for the overall turnpike project the accessory land taken was actually to be used as a part of the project.

There is no state or federal statute in existence which purports to authorize an excess taking on the basis of costs alone without other and different required predicates. There is no state or federal case which supports an excess taking on the basis of cost where the remaining land is neither landlocked, isolated or of no use and when the remaining tract, by the condemnors own admission and proof, has substantial value ($255,000.00) after the taking.

BUSINESS DAMAGES

"Business damages are not a part of constitutionally protected full compensation".

"Business damages are a matter of legislative grace".

As true as the foregoing "headnotes" are, they invite germaine contribution in order to achieve full functional dimension.

No statutory enactment necessarily enjoys constitutional protection, for the reason that every matter of basic law may be amended or repealed only in the same manner and by the same body by which it was enacted , so that the legislature is not empowered to enact a measure that would require constitutional amendment to repeal.

Nevertheless, there is a matter of statutory integrity. Although not entitled to constitutional protection against repeal, special damages in the nature of business losses are well within the meaning of full compensation. It is the function of the Constitution to be general in its terms, and it is for the statutory law to be specific, and full compensation and special business damages enjoy that relationship. Every statute is but an expansion of a constitutional concept or, in the alternative, it is unconstitutional.

Every transaction of sale involves an equal and opposite monetary reaction as between the seller and the buyer. If the seller receives less than he should, then the buyer receives more than he should. The balanced equation is this:

Constitutional full compensation + statutory special damages = acquisition costs.

If, as the Second District Court of Appeals suggests, statutory acquisition costs (337.27(3)) include special damages (73.071), then total compensation includes statutory business damages, as well as constitutional compensation. Bearing in mind that in matters of fundamental constitutional rights of preservation of life, liberty and property, broad rather than narrow construction is favored. It a statute (337.27(3)) is capable of including statutory business damages without textual reference thereto, then certainly the Constitution, which has as its function, the inclusion of statutory measures without specific reference, may do so.

The Second District Court of Appeal was of the opinion that "because the legislature includes business damages under negotiations for acquisition (337.271) we conclude that business damages constitute part of 'acquisition'". It is respectfully submitted that the subjects of acquisition and business damages are clearly separated within the provisions of 337.271, Section (4) having to do with acquisition, and Section (5) having to do with negotiating a claim for business damage if the business owner so chooses. Also emphasizing that 337.271 is only a statute inviting negotiation prior to exercise of eminent domain, Section (10) thereof provides "evidence of negotiations conducted by the parties pursuant to this Section shall not be admissible in any subsequent proceeding".

Business damages are indeed a matter of legislative grace. They are not a matter of executive grace to be allowed or denied by ad hoc interpretations or policy decisions of the Department of Transportation, especially when they are designed solely to circumvent and deprive business owners of the statutory right to business damages. While Section 73.071 is "only a statute", the same description applies to Section 337.27(3). While Section 73.071 is subject to repeal by the legislature, as is every other statute, before it is so repealed and while it is still alive as an equal part of the statutory body of law of the State of Florida, its integrity should be preserved and its provisions respected and followed.

While statutory business damages are not entitled to constitutional protection against repeal, the statute providing for business damages is deserving of the Court's attention and respect, and implementation, within the meaning of "full compensation". Again, it is the very function of statutes to define and specify more fully the brief statement of principle that constitute our Constitution.

The Appellee property owner is not asking this Court to break new ground in the Appellate Court system of the State in taking this view of inter-related constitutional and statutory interpretation. In Walters v. State Road Department, 239 So.2d 878 1DCA 1970 the Court said:

> "In addition, we think that the trial court erred in refusing to allow the jury to consider and award business damages to the Appellants. The latter duly claimed business damages in their Answer to the Petition in condemnation, and the evidence at the trial and the stipulations of the parties

> showed that damages to the Appellant's furniture business had flowed from the taking. They were entitled to recover business damages under Section 73.071 Florida Statutes, FSA quoted above, as well as under the Constitutional guarantee of "full compensation'".

In Mulkey v. State of Florida, 448 So.2d 1062, 2DCA 1984, the Court said:

> "A new trial in this matter will occur years after the actual taking. As a result, many of the business damage figures that were estimated at trial have undoubtedly been realized. In an effort to award "full compensation", we believe it is appropriate to consider actual loss and damage figures, if they exist on retrial".

Both the title and text of 337.27(3) ignore and remain silent on the subject of the business damages authorized by Section 73.071 Florida Statutes. This is true although the legislature clearly had the opportunity to include that subject matter, either in HB 84-319 which enacted 337.27(3), or in the 1985 Act which re-enacted Section 73.071, if it so intended. An example of how simple an insertion would have been sufficient to express this intent is as follows, with the words to be added as underlined: "If, by doing so, the acquisition costs to the Department be equal to or less than the sum of cost of acquiring a portion of the property and business damages provided by 73.071". Nevertheless, the same legislative session that enacted 337.27(3) left Section 73.071 intact and untouched and thereby reaffirmed the separate continued coexistence of 73.071 with other Statutes.

The Court in Vocelle v. Knight Brothers Paper Co., 118 So.2d 663 (1DCA 1960) spoke strongly in favor of containing the interpretation of a statute within its own language and it favored the principal that "a statute should be so construed so as to avoid necessity of going outside of statute for aids to construction". Also, "every statute must be construed from what is said in the statute". Also, "contrary intent must clearly appear before a statute's definition of a word or phrase may obtain any meaning other than the plain meaning conscribed". And, "if language of statute is clear and not entirely unreasonable or illogical in its operation and the Court has no power to go outside the statute in search of excuses to give different meaning to words used in statute".

CONCLUSION

This Court should find that:

1. As a matter of statutory integrity, rather than constitutional protection, business damages under Section 73.071 F.S. are included within the meaning of "full compensation" for such time as Section 73.071 F.S., in its present form, remains a part of the body of statutory law of the State of Florida.

and

2. That business damages under Section 73.071 F.S. are not included within the meaning of acquisition costs as used in Section 337.27(3) F.S.

and

3. That the facts and circumstances of this case exclude Tract 2 from the category of properties which may be properly taken under the financial remnant theory, chosen by the Appellant, because Tract 2 is not worthless, having a value of $255,000.00 after the taking.

and

4. That the holding of the Trial Court and the District Court of Appeal granting a partial taking and denying the FDOT's request for "whole take" of Appellee's property should be affirmed.

and

5. That the holding of the District Court of Appeal that Section 337.27(3) Florida Statutes 1985 is unconstitutional

should be affirmed.

and

6. That the certified question be answered in the affirmtaive. (The "conclusion" of Appellant's Brief asks that the certified question be answered in the affirmative, meaning that "Section 337.27(3) Contravenes the Florida Constitution". It is apparent that Appellant's request is that the certified question be answered in the negative.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U. S. Mail this 28th day of August, 1987, to Franz Eric Dorn, Esq., Department of Transportation, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458.

CHARLES M. PHILLIPS, JR.