SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

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

Appellees.

CASE NO. 70,680

INITIAL BRIEF OF APPELLANT DEPARTMENT OF TRANSPORTATION

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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 Associations, etc., shall be referred to as the "Appellee" of "Fortune Federal".

Due to the advanced briefing schedule of this Court a record has not been transmitted to date. Accordingly, citations shall be made to the record transmitted to the Second District Court of Appeal.

STATEMENT OF CASE AND FACTS

This is a direct appeal from a decision of the Second District Court of Appeal declaring Section 337.27(3), Florida Statutes (1985) unconstitutional. The Second District also certified the following question to this Court as being one of great public importance:

> 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?

The District Court decision was in response to an appeal from a circuit court order rendered April 2, 1986 denying an order of taking for a "whole take" pursuant to Section 337.27(3), Florida Statutes (1985), and granting only a partial taking. (R: 189-190) As the opinion of the Second District Court of Appeal indicated, the facts are not in dispute.

On August 23, 1985, the Florida Department of Transportation filed a Petition in Eminent Domain to acquire Parcel 108. (R: 1-9) Parcel 108 was owned by Fortune Federal Savings and Loan Association. (R: 1-9) The entire tract of land included in the Petition is 1.344 acres in size and is rectangular shaped. Located on this property was a one-story prefabricated building that contained the Fortune Federal Savings and Loan. (T: 1-7) The property is located on U.S. 19 in Tarpon Springs, at the southwest corner of U.S. 19 and Lime Street. (T: 17) The Department needs .508 acres of this land that fronts on U.S. 19 for the purpose of widening U.S. 19 (T: 17) By stipulation of the parties, the .508 acres was acquired by the Department of Transportation by order of taking entered on October 29, 1985. (T: 92; R: 25, 27) At that time there was a pending dispute as to

whether the Department could acquire the remaining .836 acres of the parent tract which consisted of vacant land. (T: 92)

At the hearing on the Order of Taking on October 29, 1985, the Department's appraiser testified that the value of the whole parent tract was $480,000.00. (T: 21) He further testified that full compensation for the .508 acres was $225,000.00. (T: 21) This was based on $155,000.00 value for the land, $68,000.00 for the improvements and $2,000.00 for severance damages. (T: 19-21)

The Department then presented the testimony of a certified public accountant who testified on the subject of business damages. He testified that the taking of the .508 acres would destroy the business since it could not survive on the remainder property. (T: 34)

He further testified that the bank was going to claim in excess of $2 million dollars in business damages. (T: 34) He was also of the opinion that the bank's business damages would exceed the difference between the value of the .508 acres alone and the value of the entire parent tract. (T: 34) In other words the total costs in acquiring the .508 acres alone would exceed the cost of acquiring the entire parent tract. (T: 35)

The Department's right of way administrator then testified. He confirmed that the bank's business damage claim would exceed the total value of the property. (T: 38) He testified that by statute (Section 337.271, Florida Statutes) the Department was required to negotiate business damage claims with the landowner. (T: 38) He further testified that a "whole take" pursuant to Section 337.27 was justified since the "acquisition costs to the department [would] be equal to or less than the cost of acquiring a portion of the property." (T: 39)

There was absolutely nothing in the record that would indicate that the Department intended to use the remaining .836 acres for private purposes or to sell it to private individuals.

The trial court issued Findings of Fact and Conclusions of Law in its order denying the "whole take" on the basis that business damages were not a part of the "acquisition costs" mentioned in Section 337.27(3), Florida Statutes. The trial court in effect ruled that in order for Section 337.27(3) to apply allowing the Department to acquire an entire tract, the direct costs of the land itself for the part taken and severance damages must exceed the value of the whole tract of land. The trial court made this ruling to save the constitutionality of the statute. 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.

In the appellate briefs the primary issue raised was the statutory interpretation question which the Second District Court of Appeal decided in favor of the Department. However, the Department briefed the constitutional question in the interest of judicial economy to avoid a remand to the lower court, an inevitable ruling by the trial court of unconstitutionality of Section 337.27(3), Florida Statutes, and another piecemeal appeal of that ruling. The Second District Court ruled against the Department on the constitutional issue, certifying the question for this Court to resolve.

SUMMARY OF ARGUMENT

The Second District Court of Appeal clearly erred by declaring Section 337.27(3), Florida Statutes (1985) unconstitutional. Section 337.27(3) clearly allows condemnation of excess property based on a public purpose. The Second District erroneously failed to defer to explicit determinations made by the Legislature that Section 337.27(3) served a public purpose. Those purposes are to save the public's 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. The courts have broadly deferred to judicial determinations of public purpose and have not invalidated such a determination unless the Legislature's action is completely arbitrary and capricious, and bears no reasonable relationship to a public purpose. The public purposes specified by the Legislature clearly pass as that very narrow standard of review.

While the standard of review in construing excess condemnation statutes has narrowed, the judicial concept of what constitutes a public purpose has broadened to the full extent of the police power. The scope of the public purpose, as the Second District Court of Appeal held, is no longer limited to taking needed for the direct public improvement project. Rather, this Court, the United States Supreme Court, and courts from other jurisdictions have expanded the public purpose concept to embrace broad economic and social goals.

The precise question in the instant case is one of first impression: The constitutionality of an excess condemnation statute has never been challenged in Florida. However, statutes such as 337.27(3) have been upheld largely under the financial remnant theory. That theory provides

that a public purpose is served if the excess condemnation will save or avoid the payment of severance or consequential damages that would be equal to or greater than the cost of taking the greater amount of property. In the instant case taking the extra property would save the state almost two million dollars in business damages that would have to be paid in order to pay business damages. Saving the public's money and the promotion of good governmental business decisions are the paramount public purpose under this theory which the Appellant would ask this Court to adopt and uphold the constitutionality of Section 337.27(3), Florida Statutes (1985). The certified question of the Second District Court of Appeal should be answered in the negative.

ARGUMENT

THE SECOND DISTRICT COURT ERRED IN DECLARING SECTION 337.27(3), FLORIDA STATUTES, UNCONSTITUTIONAL

A. STANDARD OF REVIEW: THE JUDICIARY SHOULD DEFER TO LEGISLATIVE DETERMINATIONS OF WHAT CONSTITUTES A PUBLIC PURPOSE

The Second District Court of Appeal has specifically declared that Section 337.27(3), Florida Statutes (1985) is unconstitutional because the statute purportedly allows the taking of private property without a public purpose. The court specifically certified the question as follows:

> 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?

In its opinon the District Court omitted to consider the very important element that a specific finding was made by the Legislature that the reduction of right of way acquisition cost by total takings would serve a public purpose. The Legislature has made such a specific statement in Section 337.27(3), viz:

> (3) In the acquisition of lands and property, the department may acquire an entire lot, block, or tract of land if, by doing so, the acquisition costs to the department will be equal to or less than the cost of acquiring a portion of the property. This subsection shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the state of property acquisition is a public purpose and that, without this limitation, the viability of many public projects will be threatened. (emphasis supplied)

The standard of review pertaining to the constitutional challenge of a statute is that the courts should resolve all doubts as to the validity of a statute in favor of constitutional validity. Carter v. Sparkman, 335 So.2d 802, 805 (Fla. 1976). If possible, a statute should be construed in such a manner as would be consistent with the Constitution; that is, in such a way as to remove it from constitutional infirmity. Id. at 805. The presumption of constitutionality of legislation continues until the contrary is proved beyond a reasonable doubt by the challenger. A.B.A. Industries, Inc. v. Pinellas Park, 366 So.2d 761 (Fla. 1979).

This Court has stated that a legislative determination of public purpose "is presumed to be valid and should be upheld unless it is arbitrary and unfounded - unless it is so clearly erroneous as to be beyond the power of the legislature." State v. Miami Beach Redevelopment Agency, 392 So.2d 875, 886 (Fla. 1980). See also State v. Housing Finance Authority of Polk County, 376 So.2d 1158 (Fla. 1979). The question of what constitutes a public purpose is a question of fact for the Legislature to determine, and this finding should be given great weight. State v. Housing Finance Authority of Polk County, supra; State v. Monroe County, 148 Fla. 111, 3 So.2d 754 (1941); Jackson Lumber Co. v. Walton County, 95 Fla. 632, 116 So. 771 (1928). This finding should not be disturbed unless proved beyond a reasonable doubt by the challenger. Pinellas Park, supra.

The question of what constitutes a public purpose is ultimately a judicial one; however, the standard of review has become increasingly narrow. Wilton v. St. Johns County, 98 Fla. 26, 123 So. 527 (Fla. 1929). This Court enunciated that principle in Wilton and stated:

> While the Legislature may, in providing for the condemnation of private property, determine in the first instance whether the

> use for which it is proposed to allow the condemnation is a public use, and such determination will be accorded great weight by the courts, this legislative determination is not final. It is universally held that whether a particular use is public or not is a judicial question. [citations omitted] But Nichols on Eminent Domain, departing somewhat from the accepted rule, says that the real question for the courts to decide is not whether the proposed use is a public one, "but whether the legislature might reasonably consider it a public one." This is but another way of saying that all reasonable presumptions will be indulged by the courts in favor of the validity and constitutionality of the legislative determination, but the courts must in the end determine the question.

The United States Supreme Court has taken an extremely deferential approach to its review of public purpose determinations made by state courts in eminent domain actions where these issues were raised under the 14th Amendment. See Rindye Co. v. County of Los Angeles, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed 1186 (1923). In fact the Court noted that it has not invalidated a state eminent domain action for this reason in the 20th century. United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 547, 66 S.Ct. 715, 90 L.Ed. 843 (1946).

The United Supreme Court has adopted a similarly deferential approach toward federal exercises of eminent domain. United States ex rel. Tennessee Valley Authority v. Welch, supra, was a 1946 decision upholding the T.V.A.'s condemnation of property near a dam but not actually necessary for the construction of the dam itself. Justice Black wrote for the majority:

> We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. Any departure from this

> judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.

Id. at 551-552.

The scope of judicial review was narrowed even further in Berman v. Parker, 348 U.S. 26, 75 S.Ct 98, 99 L.Ed 27 (1954) where the court upheld a congressional act authorizing the use of eminent domain power to accomplish slum clearance and urban renewal. After the power of eminent domain had been exercised, the Act authorized reconveyance of the property from the condemning authority to private entities to effectuate redevelopment of the property. Justice Douglas wrote that "enlisting private enterprise for urban renewal is but one means of effecting the public purpose" and those means "are for Congress and Congress alone to determine". Id. at 32.

In similarly sweeping terms, Justice Douglas declared the limits of judicial review:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Id. at 32.

The standard of review announced in Berman is remarkably similar to the narrow standard of review announced in Florida cases cited supra. In

fact Berman has been very influential in shaping the standard of review in State constitutional decisions, viz:

> Although Berman is not binding on state courts interpreting their own constitutions, it has nevertheless been widely cited. The decision defines the substantive limits of the fifth amendment's public use clause, which is virtually identical to many state constitutional provisions. Also, because the Berman Court was sitting as the District of Columbia's highest court, the decision prescribes a relationship between court and legislature that state courts may consider persuasive.

Note, "Public Use, Private Use, and Judicial Review in Eminent Domain", New York University Law Review, Volume 58, p. 409 (1983).

The standard of review was narrowed once again in Hawaii: Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). This case involved the constitutionality of the Hawaii Land Reform Act. This act sought to use the eminent domain power of the State of Hawaii to condemn lands of a few large landholders and then redistribute the lands to other private individuals through resale. The Hawaii Legislature made several findings that this pattern of ownership was artificially inflating the value of the land on the islands and causing other kinds of economic harm to the public. The legislature also made several corresponding findings that the redistribution scheme would serve a public purpose.

The Midkiff Court once again upheld the constitutionally of social and economic legislation and repeated the rule in Berman regarding judicial deference to legislative findings of public purpose and repeated that the standard is "an extremely narrow one." Id at 2329.

What is especially significant about Midkiff was the court's responses to arguments that the redistribution scheme probably would not work or would not obtain the social or economic goals desired. The court stated that "deference to the legislature's public use determination is required until it is shown to involve an impossibility." Id. The Court stated that it would not substitute its judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." Id. The Court further noted:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether in fact the provision will accomplish its objectives is not the question: The [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective." Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-672, 101 S.Ct. 2070, 2084-2085, 68 L.Ed.2d 514 (1981); see also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981); Vance v. Bradley, 440 U.S. 93, 112, 99 S.Ct. 939, 950, 59 L.Ed.2d 171 (1979). When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal courts.

Id. at 2230.

Moreover, statutes are presumptively valid and constitutional and may not be struck down by a court merely because the court disagrees with the legislature. The judiciary may not hold laws invalid simply because they

are inconsistent with their individual social or economic theories or with what they deem to be sound public policy. CBS, Inc. v. Federal Communications Comm., 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981) cert. denied 449 U.S. 950, 101 S.Ct. 353, 66 L.Ed.2d 213 (1981). For the court to rule a statute invalid, such statute must violate organic law. Biscayne Kennel Club, Inc. v. Florida State Racing Comm., 165 So.2d 762 (Fla. 1964).

In the instant case, the Legislature in the text of Section 337.27(3), Florida Statutes, has clearly made two findings of public purpose:

1. To limit the rising costs to the state of property acquisition.

2. That without the above-limitation the viability of many public projects will be threatened.

The District Court actually did not even analyze the sufficiency of the legislative findings let alone defer to them. Rather, the court used the wrong standard of review and relied on the rule that "a condemning authority cannot take more lands or a greater interest therein than necessary to serve the particular public use for which it is being acquired;" citing to State Department of Natural Resources v. Hudson Pulp & Paper Corp., 363 So.2d 822 (Fla. 1st DCA 1978); Canal Authority v. Miller, 243 So.2d 131 (Fla. 1970); Dade County v. Paxson, 270 So.2d 455 (Fla. 3rd DCA 1972) cert. denied 283 So.2d 862.

The Legislature had made no determination in any of those cases that the excess condemnation made by the state would serve a public purpose. Also, there was no showing by the government in any of those cases that the

excess property in those cases would be cheaper than simply condemning a smaller piece of the property. On the other hand, in the instant case the evidence clearly showed that the taking of the entire property would save the state almost two million dollars beyond what a partial taking would cost.

This Court has clearly indicated that a different standard of review applies in a situation where the legislature has made a finding of public purpose. State v. Housing Finance Authority of Polk County, supra. There the court distinguished State v. Washington County Development Authority, 178 So.2d 573 (Fla. 1965). In Washington a statute was declared unconstitutional which authorized the sale of bonds and the use of the proceeds to purchase mortgages of private residences. The Court in Housing Finance Authority of Polk County noted that in Washington the Legislature had not made a specific finding of public purpose. The distinguishing factor in the Housing Finance Authority of Polk County case was that the Legislature had made a specific finding of public purpose with regard to a very similar type of statute. The court acknowledged the Legislature's statement of public purpose and found that "the issuance of the Authority's revenue bonds is adequately supported by a proper public purpose." Here, the District Court made no analysis of the specific legislative determination.

To conclude, this Court should defer to the explicit legislative determinations that the excess condemnation allowed by Section 337.27(3), Florida Statutes (1985) would constitute a public purpose. The

Legislature's objectives of saving the taxpayer's money and using that money to construct other badly needed transportation projects clearly falls within that realm of permissible constitutional purpose. This is a topic that will be discussed more fully in the next section.

B. THE LEGISLATURE PROPERLY STATED A PUBLIC PURPOSE IN ENACTING SECTION 337.27(3), FLORIDA STATUTES (1985)

The remaining issue to be decided is whether the Legislature's declaration of public purpose is valid and within the realm on the Florida Constitution. To be deemed invalid, the Legislature's declaration of public purpose must be arbitrary and capricious and must be so clearly erroneous as to go beyond the power of the Legislature. State v. Miami Beach Redevelopment Agency, supra; State v. Housing Finance Authority of Polk County, supra. The twin declarations made by the Legislature certainly are not arbitrary and capricious and certainly do not go beyond the power of the Legislature. The Legislature certainly has the power, if not the duty, to conserve public funds. There can be no question that the conservation of public funds to enable the state to finance other state highway projects serves a public purpose.

The key to this argument is the meaning of the phrase "public purpose" found in Article X, Section 6 of the Florida Constitution. That section provides:

> No private property shall be taken except for a public purpose and with full compensation there for paid to each owner or secured by deposit it the registry of the court and available to the owner.

Most of Florida's jurisprudence that has interpreted this phrase against the government has focused on the dichotomy between the state's use of its eminent domain power for private as opposed to public purposes. See e.g. Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975); Grubstein v. Urban Renewal Agency of City of Tampa, 115 So.2d 745 (Fla. 1959). In each of the above-cited cases the condemning authorities

were using their authority to condemn property to directly benefit a private venture. In each case there was an incidental public benefit in the project to be constructed; however, the court found that the use of the state's power was primarily to serve private purposes. Accordingly, this Court in each case invalidated the state's actions.

The District Court incorrectly relied on Baycol and then later incorrectly stated that the conservation of public funds through the enactment of Section 337.27(3), Florida Statutes provided a "public benefit," but did not serve a "public purpose". The public benefit distinction has only been used in the case law where the state was using its eminent domain power to further a private purpose. Here, there is nothing in the record that would show that the Department intends to use the excess property condemned to benefit a private entity or individual. Furthermore, there is absolutely nothing "private" about conserving the public's money so that other badly needed public highway projects can be financed.

Outside of the public/private dichotomy, the phrase "public purpose" has not taken on a technical meaning and has not become a term of art. Words of the State Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests they have been used in a technical sense. City of Jacksonville v. Glidden Co., 124 Fla. 690, 169 So. 216 (1936). Furthermore, there is a presumption in favor of the natural and popular meaning in which words are usually understood by the people who have adopted them in the State Constitution. Id. As was stated in Hillsborough County v. Bregenzer, 151 Fla. 747, 10 So.2d 498 (Fla. 1942):

> The great clauses of the Constitution must be considered in light of our whole experience, and not merely as they would be interpreted by its framers in the conditions and with the outlook of their time.

The Preamble to the Florida Constitution indeed is a living constitution, phrased in the present tense which provides that the people must presently and constantly affirm it to give it any efficacy. Therefore, the real question is how would the people of the State of Florida interpret the phrase "public purpose?" Is there any doubt that if the ten million citizens were asked whether a statute promoting government efficiency and good business decision making in saving the public's funds (taxpayer's money) would serve a public purpose? One only needs to look at the popularity of the Tax Watch group or the outcry over any proposed tax increase in the legislature to answer this question affirmatively.

For years the public and the courts have chastised wasteful government expenditures as being contrary to the public purpose. The reverse should also hold true. If the government is able to acquire more land at a cheaper price than a smaller piece of the same property, such a common sense approach would directly inure to the benefit of the public and would obviously serve a public purpose. The government should not be required to pay more for a portion of property than the whole. This would be the perfect example of the concept of economic waste. Section 337.27(3) is a statute that prevents economic waste, a concept that is contrary to public policy. See e.g., Grossman v. Hourihan, 414 So.2d 1037 (Fla. 1982).

Furthermore, the people of Florida would certainly say that the ability to use the savings from acquiring a whole take in this case to finance other badly needed transportation projects in Florida would serve a public purpose. The creation of safe and adequate highways is a proper

field for the exercise of police power. See Southern Bell Telephone and Telegraph v. State, 75 So.2d 796 (Fla. 1954).

In considering the surrounding circumstances, with regard to an interpretation of the public use requirement, this Court should consider some revealing facts facing Florida's Transportation system and needs: In 1986, Florida became the 5th largest state and has the fourth highest growth rate.[1] Florida expects tremendous future population growth. Florida's present transportation infrastructure including its highways are already in serious trouble.[2] Projected revenue will be inadequate to fund transportation projects needed to accommodate the projected growth.[3] Florida must spend its available funds frugally and strategically. Section 337.27(3), Fla. Stat. (1985) is an important tool to accomplish this goal.

We know how the people of Florida themselves would speak on this issue of what constitutes a public purpose. We also know how the Legislature, as representatives of the people has spoken in explicit terms of public purpose with regard to the use of Section 337.27(3). An administrative agency has exercised its discretion to condemn an entire tract of land in what it feels to be a public purpose. This Court should also interpret the public purpose clause in view of the will of the people of the State of Florida.

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[1] St. Petersburg Times, Dec. 31, 1986, p. 1, Col. 2.

[2] See. The Palm Beach Post, Dec. 26, 1986, p. 2E, Col. 1 (Letter of Thomas E. Drawdy, Sec. of Dept. of Transportation).

[3] O'Neal, Yielding to the Warning Signs, Central Florida Weekly, Supplement to the Orlando Sentinel, Jan. 5, 1987 at 23, Col. 2.

The concept of what is a public purpose under Article X Section 6 of the Florida Constitution is an elastic concept that has grown over time. This concept is best illustrated in State v. Monroe County, 148 Fla. 111, 3 So.2d 754 (1941) which challenged a statute and county resolution authorizing a bond issue to construct a county airport on the basis that the airport would not serve a public purpose. This Court upheld the constitutionality of the statute and found that it stated a valid public purpose. Said the court:

> What constitutes a county purpose is not static and inflexible. If we had been confronted with this question in the days of the pony express, we would have doubtless held the act bad but in a day when the country is air minded, when travel and commodity conveyance by air is such a vital part of the daily life and is so intimately connected with the general welfare we must refrain from holding that it is not a proper county purpose as contemplated by the Constitution.

Id. at 756.

Nationwide, this century the courts have moved from a very narrow view of public use to a very broad one. Note: Hawaii Housing Authority v. Midkiff: The Public Use Requirement In Eminent Domain, Env. L. Rptr. Vol. 15, p. 565, 591 (1985). As that note indicated:

> . . . the power of the state to condemn land based on its inherent police powers is ever expanding. The legislatures and the courts are no longer reluctant simply to replace an old use with a new one considered "better." The power of eminent domain seems to be limitless provided there is any semblance of a public use.
>
> The public use definition also has undergone tremendous expansion. At present, the scope of its meaning defies definition. Initially, transfers from private individuals were upheld only when there was some direct public benefit. Later, transfers from private

> individuals to other private individuals were allowed even if the public benefits were indirect and debatable. The decision in Midkiff sanctions transactions that are outright transfers from one private individual to another.

The great expansion of the public purpose requirement stems largely from the courts' approval of social and economic factors in establishing the public purpose behind eminent domain statutes. The United States Supreme Court has been a leader in this area. In Both Berman, supra, and Midkiff, supra, the court equated the sovereign's power of eminent domain with the police power. The court noted that the eminent domain power was coextensive with the very broad scope of the police power that had been greatly expanded to meet modern needs. The eminent domain power was found merely as one means to implement the police power. Id. Thus, the Supreme Court found the urban renewal statute in Berman and the legislation to accomplish the redistribution of land to correct deficiencies in the market attributable to land oligopoly in Midkiff to be rational exercise of the eminent domain power.

The Florida Legislature has also indicated that Section 337.27(3), Florida Statutes is a police power measure through Section 334.035, Florida Statutes, which provides:

> The purpose of the Florida Transportation Code is to establish the responsibilities of the state, the counties, and the municipalities in the planning and development of the transportation systems serving the people of the state and to assure the development of an integrated, balanced statewide transportation system. This Code is necessary for the protection of the public safety and general welfare and for the preservation of all transportation facilities in the state. The chapters in the Code shall be considered components of the total code, and the provisions therein, unless expressly limited in scope,

shall apply to all chapters. (emphasis supplied)

Section 337.27(3), Florida Statutes is part of the Florida Transportation Code and an aspect of the police power of this state.

Likewise, Florida court's have broadened the interpretation of public purpose to be coextensive with the police power.

Economically oriented public purpose have been recognized in Florida. See Catholic Burse Endowment Fund, Inc. v. State Road Department, 180 So.2d 513 (1st DCA 1965) cert. denied 188 So.2d 814 (Fla. 1966), wherein the court held that a condemning authority may acquire more property or a greater estate than is necessary for the immediate project when the decision by the condemning authority is based on a standard of economy; State v. Miami Beach Development Agency, supra, upholding the urban renewal statute as constitutional; Northern Investment Corporation v. City of Cocoa, 118 Fla. 405, 158 So. 889 (1935) which held that payment of a debt of a municipality is a "public purpose" for which land may be acquired.

The Second District Court has obviously ignored the evolutionary growth of the public purpose doctrine and has followed an antiquated rule that a "condemning authority cannot take more land or a greater interest therein than necessary to serve the particular use for which it is being acquired." This Court incorrectly cited to this Court's decision in Canal Authority v. Miller, 243 So.2d 131 (Fla. 1970) as authority for this proposition. This Court did not use the phrase "particular use," rather it used the phrase "particular purpose". The distinction is crucial. The word "use" implies that the property must be necessary for the specific physical project for which the property is condemned. Indeed, that formed the basis of the court's reasoning in the instant case: The court noted

the taking of the entire tract was not necessary for the construction of U.S. 19.

The phrase "particular purpose" on the other hand is obviously not limited to a physical project, but is obviously intended to include broader economic and social goals. Moreover, in Trailer Ranch, Inc. v. City of Pompano Beach, 500 So.2d 503 (Fla. 1986), this court removed the word "particular" as a modifier of "purpose" in reciting the rule in Canal Authority:

> A condemning authority exercising the power of eminent domain is not permitted to acquire a greater quantity of property or interest therein than is necessary to serve the public purpose for which the property is acquired. (emphasis supplied)

By deleting the word "particular" from the above-quoted rule, this Court has obviously rejected the principle that the phrase public purpose is limited to takings for specific physical projects.

Also, as has already been stated, Canal Authority and the other cases cited by the Second District Court of Appeal are distinguishable from the instant case, because in those cases the Legislature made no specific declaration of public purpose. Also, in each of those cases the condemning authorities made no showing that taking extra property or the entire tract of property would save the public's money, which savings could lead to the undertaking of other badly needed public projects. This concept of taking extra property to serve the public purpose is one species of the expanded notion of the public purpose doctrine that has been accepted by the courts. Nevertheless, it has been pejoratively labeled by unhappy commentators as excess condemnation. Since this concept is uniformly referred to in this

manner, the Department will maintain this nomenclature and afford the topic the dignity of a separate section in this brief.

C. THE PRINCIPLE OF EXCESS CONDEMNATION SHOULD BE RECOGNIZED AS AN ASPECT OF THE PUBLIC PURPOSE DOCTRINE IN FLORIDA

Nichols, on Eminent Domain §7.25 p. 146 has the most widely accepted definition of excess condemnation:

> Excess condemnation, which is the acquisition by the government through eminent domain of more property than is necessary directly for a public improvement, where permitted at all, is upheld if it can fairly be said to be for a "public use".

The phrase "excess condemnation" is a misnomer. The term does not mean an excess beyond that which is legally permitted. The term "excess" only refers to more land than is actually needed to construct the project. R. Cushman, Excess Condemnation 1-4 (1917). One authority has aptly stated:

> Reaching a determination as to what constitutes a public use is particularly difficult in the area of excess condemnation. Under this aspect of eminent domain, the condemning authority is empowered to take more land than is actually necessary for public improvement. Although the additional land condemned is referred to as "excess" this is, in fact, a misnomer since the connotation is that more land is being taken than be justified under public use. If this were the use, such a taking would be unconstitutional.

NOTE: Excess condemnation - To Take or Not to Take A Functional Analysis, NEW YORK LAW FORUM, P. 119, 120 (1969)

In order to accept the concept of excess condemnation this Court must accept and continue to follow the expanded view of public use discussed in point B of this brief. Courts have generally accepted excess condemnation as a natural consequence of a greatly expanding society. Id. at 120; See

generally, United States v. Bowman, 367 F.2d 768 (7th Cir. 1966). The Florida Legislature, like legislatures in other jurisdictions has "sensed that the public need may be better served if the power of eminent domain is allowed to be exercised in a more flexible manner" and has promulgated an excess condemnation statute such as Section 337.27(3), Florida Statutes (1985). See 6 ALR 3d 297, 309, Right to Condemn Property in Excess of Needs for a Particular Public Purpose, (1966).

Excess condemnation has been traditionally justified under three separate theories of public use: remnant, protective, and recoupment. Nichols, supra, §7.25 p. 7-149. A recent commentator has suggested justification under a fourth theory: the Broader Public Purpose Theory. Note, "The Effect of the Public Use Requirement on Excess Condemnation", 48 Tennessee Law Review, p. 394 (1981).

All four theories are somewhat interrelated and many apply to a single transaction, even though the theories are theoretically distinct. R. Cushman, supra, note 1 at 9. They all have some bearing on the analysis of Section 337.27(3), Florida Statutes. However, the Remnant Theory most closely justifies the public purpose findings found in Section 337.27(3), Fla. Stat. (1985). Accordingly, the remnant theory will be discussed in detail followed by the brief discussion of the other theories later in the brief.

The remnant theory has been looked upon favorably by most of the courts that have had occasion to deal with it. 6 ALR 3rd, supra, at 297. Originally, the remnant theory provided that the taking of extra land (the remnant) - was justified if that land had been rendered useless by the original taking. Nichols supra, note 5, §7.5122[1](a). If the remnant is

of little or no practical value to the landowner because it is small, odd-shaped, or land locked, the remnant is called a physical remnant. Id. Economic waste is avoided if governments are allowed to take remnants. Note, The Effect of the Public Use Requirement on excess condemnation, Tennessee Law Review, Volume 48 p. 370, 384.

The facts in the instant case do not fit within the physical remnant theory since the remainder property taken from the Appellee was usable and had value. However, the remnant theory been has expanded in modern times and is no longer applicable only to small unusable portions of property. Note, Excess Condemnation, supra, p. 120. Two new economically oriented theories of remnant acquisition have developed: economic remnants and financial remnants. See generally, Nichols, supra, note 5, §7.5122[1][b] to .5122[1][c].

The economic and financial remnant theories are very similar and the latter is really a variety of the former. Note, The Effect of the Public Requirement on Excess Condemnation, supra p. 386.

An economic remnant is created when the condemnation of the entire tract of land is slightly more expensive than the condemnation of the needed land. Note, Excess Condemnation, supra, note 3, at 125. The public use requirement has been held to be satisfied under this theory if the taking of the whole parcel secures an economic benefit to the government. United States ex rel. T.V.A. v. Welch, supra; People ex rel. Department of Public Works v. Superior Court, 68 Cal.2d 206, 218, 65 Cal. Rptr. 342, 436 P2d 342 (1968); State v. Buck, 94 N.J. Super 84, 226 A.2d 840 (1967). Such an economic benefit essentially translates into sound business judgment by the government by saving the taxpayer's money. State v. Buck, supra p. 840.

The financial remnant theory only differs from the economic remnant theory in that the focus on the former is the savings on the total compensation the government will have to pay the landowner by condemning excess property as opposed to the comparison of the land values of the larger property as opposed to the smaller property. Note, Excess Condemnation, supra, p. 127. Thus, under this theory excess condemnation is justified as a means of saving the taxpayer's money by the government avoiding the payment of severance and other consequential damages that would occur if only the smaller portion needed to construct the public improvement were taken. See People ex rel. Department of Public Works v. Superior Court, supra (Superior Court). As Nichols, notes:

> This theory is becoming more and more prevalent especially with the courts accepting a broader meaning of public use. The test today is predominantly economic, with the determining factor being whether or not the landowner will save money.

Id. at p. 7-161.

The facts in the instant case clearly fall within the financial remnant theory in that the state will be able to save almost two million dollars of business damages by taking all of the Appellee's property. This action is clearly warranted after analyzing the seminal case on the subject, Superior Court, supra.

The Superior Court case presents an exaggerated example of how a financial remnant can greatly exceed in sheer size the land necessary for the actual project. In that case the Department of Public Works of California, needed to condemn .65 acres for right of way to construct a highway. Such a taking would have landlocked 54 adjacent acres owned by the condemnee. The Department of Public Works then sought to condemn the

additional 54 acres pursuant to a state excess condemnation statute to avoid having to pay excessive damages as a result of the loss of access to the adjoining property. The additional 54 acres was not necessary for the construction of the freeway. The Department of Public Works pointed out that in addition to protecting the public purse, the state would be able to "reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes." Superior Court, supra, 436 P.2d at 3.

The landowners challenged the excess condemnation on the basis that the taking was purely for an economic purpose and that such a purpose was not a "public purpose". They also argued that a 54 acre tract could not be a remnant of the .65 acres needed to construct the highway and that the excess condemnation was unconstitutional because it was not physically necessary for the construction of the freeway.

The trial court agreed with the condemnees principally on the proposition that any property not physically necessary for the project could not be properly taken for a public use. The court also stated that if the state statute were interpreted as allowing excess condemnation, it would be unconstitutional.

The California Supreme Court reversed, holding that the California statute authorizes the trial court to proceed with the action to condemn the 54 acres. The court, however, stated that the court could refuse to "condemn the property if it [found] that the taking is not justified to avoid excessive or consequential damages." Id. at 345. This type of instruction in the instant case would not be necessary since the Department presented ample undisputed evidence at the order of taking hearing that the taking of the entire property would save almost two million dollars.

In supporting its holding, the California Supreme Court first noted the broad rule of judicial deference to legislative determinations of public purpose; citing to United States ex rel. Tennessee Valley Authority v. Welch, supra.

In upholding the legislature's finding of public purpose the court stated:

> In section 104.1 the Legislature has determined that excess condemnation is for a public use whenever remaining parcels are of little value or in such a condition as to give rise to claims or litigation concerning severance or other damages. Although the statutory language is broad, it may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants or condemnations that avoid a substantial risk of excessive severance or consequential damages. On the record before us, the taking in the present case is justified on the latter ground.

Id. at 346.

The court also noted that the 54 acre tract was a financial remnant and not a physical remnant and endorsed the financial remnant theory:

> In the present case the entire parcel can probably be condemned for little more than the cost of taking the part needed for the highway and paving damages for the remainder. It is sound economy for the state to take the entire parcel to minimize ultimate costs.
>
> Under these circumstances excess condemnation is constitutional. "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of costs. [Citations.] And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public." U.S. ex rel. Tennessee Valley Authority v. Welch, supra, 327 U.S. 546, 554, 66 S.Ct. 715,

90 L.Ed. 843; see also United States v. Agee, (6th Cir. 1963) 322 F.2d 139; Boston v. Talbot, (1910) 206 Mass. 82, 89, 91 N.E. 1014; New Products Corp. v. State Hwy. Comr., (1958) 352 Mich. 73, 86, 88 N.W.2d 528; Kern County High School Dist. v. McDonald, supra, 180 Cal. 7, 16, 179 P.180; People v. Thomas, supra, 108 Cal.App.2d 832, 836, 239 P.2d 914.)

The facts in the instant case are much stronger than those in Superior Court. Here, the business damages for the partial taking would greatly exceed the compensation for a total taking. In Superior Court, excess condemnation was justified merely if severance damages would approximate or equal the cost of taking the extra property. Also, the remnant in the instant case is much smaller in size to the property actually needed for the public improvement. Therefore, the reasoning in Superior Court should apply a fortiori to the facts of the instant case.

The Superior Court quote to U.S. ex rel. Tennessee Valley Authority v. Welch, supra, is indicative that the United States Supreme Court had earlier endorsed the financial remnant approach.

In Welch, supra, the United States Supreme Court upheld a decision to take more land than was needed to build a dam. TVA had planned to build a dam that would flood the only road to an isolated mountain community. The TVA chose to pay damages, but the damage award was not acceptable to the authorities because the money could not restore access to the road. Instead, the entire community and isolated areas were also condemned by the T.V.A., although they were not physically needed for the construction of the damn.

Some of the landowners in the community challenged the excess taking, claiming that Congress had not specifically authorized the TVA to condemn excess property. In spite of this lack of explicit statutory

authorization, the Welch Court viewed the entire transaction as an integrated effort by TVA to achieve its broad authorization to foster physical, economic and social development of the area. Consideration of costs was a valid public purpose determination. Said the court, "T.V.A. was not supposed to waste the money of United States." Welch, supra 327 U.S. at 550.

Again, Welch should apply with even stronger force to the instant case, in that Section 337.27(3), Florida Statutes is an explicit authorization for the remnant theory and excess condemnation, with express public policy statements to back up those theories contained within the statute itself.

An incomplete list of other cases from other jurisdictions that support the theory of excess condemnation and the remnant theory are as follows: State v. Totowa Lumber & Supply Company, 96 N.J. Super 232 A.2d 655 (N.J. 1967); May v. Ohio Turnpike Commission, 172 Ohio St. 553, 178 N.E.2d 920 (Sup. Ct. 1962); Tracey v. Preston, 172 Ohio St. 567, 178 N.E.2d 923 (Sup. Ct. 1962); Luke v. Massachusetts, Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958); U.S. Tennessee Valley Authority v. Two Tracts of Land Containing a Total of 1464 Acres More or Less in Louden County, Tennessee, 532 F.2d 1083 (1976) cert. denied 429 U.S. 827, 97 S.Ct. 84, 50 L.Ed.90 (1976); Brown v. United States, 263 U.S. 78, 81, 44 S.Ct. 92, 101, 68 L.Ed. 171, 180 (1923); United States v. Agee, 322 F.2d 139, 141 (6th Cir. 1963); United States v. Certain Real Estate Lying on the South Side of Board Street, 217 F.2d 920, 924 (6th Cir. 1954); Starr v. Nashville Housing Authority, 145 F.Supp 498 (M.O. Tenn. 1956), aff'd, 354 U.S. 916, 77 S.Ct. 1378, 1 L.Ed.2d 1432 (1957); Emmons v. Detroit, 255 Mich. 558, 238 N.W. 188

(1931); Armstrong v. Detroit, 286 Mich 277, 282 N.W. 147 (1938); New Products Corp. v. Ziegler, 352 Mich. 73, 88 N.W.2d 528 (1958).

Also other states have enacted, statutes that sanction excess condemnation under the remnant theory. That list partially includes: §10; Del. Code Ann. Tit. 17, §175 (1975); Hawaii Rev. Stat. §101-2 (1976); N.J. Rev. Stat. §27-7A-4.1 (1966) Vt. Stat. Ann. Tit. 19 §221 (1968); Wash. Re. Code §47.52.050 (1970); D.C. Code Ann. §16. 1331 (1966); Ill. Stat. Ann. Ch. 24, §21-21 (1962); Miss. Code Ann. §8039-05 (1957).

It is expected that the Appellee will attempt to argue that an employment of the financial remnant theory to eliminate its business damage claim is unconstitutional or at least unfair from the standpoint of full compensation. This argument has absolutely no merit and has no constitutional dimension.

Section 337.27(3), Fla. Stat. does not violate the mandate of Article X, Section 6 of the Florida Constitution which requires that full compensation be paid to the property owner whenever private property is taken for a public purpose. The full compensation alluded to in Article X, §6 includes value of the land taken, appurtenances, leaseholds and damages to the remainder. State Road Department v. Bramlett, 189 So.2d 481 (Fla. 1966); City of Hollywood v. Jarksey, 343 So.2d 886 (Fla. 1977); Mulkey v. Department of Transportation, 448 So.2d 1062 (Fla. 2nd DCA 1984); Division of Administration, State Department of Transportation v. Grant Motor Company, 345 So.2d 843 (Fla. 2nd DCA 1977). Section 337.27 does not allow the Department to pay less than full compensation. In fact, the property owner will receive full compensation for the entire tract of land taken, which pursuant to Chapter 73, is the value of the property sought to be appropriated.

What the property owner will not be entitled to in the whole take is business damages under §73.071(3)(b). Business damages, however, are derived solely by statute and are not part of that constitutionally protected concept of fully compensation. Tampa-Hillsborough County v. K.E. Morris Alignment, 444 so.2d 926 (Fla. 1983); City of Miami v. Coconut Grove Marine Properties, Inc., 358 So.2d 1151 (Fla. 3rd DCA 1978); State Road Department v. Bramlett, supra; State Road Department v. Abel Investment, 165 So.2d 832 (Fla. 2nd DCA 1964). Business damages are allowed only if there is a partial taking; and therefore, a landowner is not entitled to such damages where all the property on which the business is located is taken. State Road Department v. Bramlett, supra; Intercoastal Dryrock, Inc. v. State Road Department, 203 So.2d 19 (Fla. 3rd DCA 1967).

As stated above, §337.27(3) authorizes the Department to take the Defendant's entire parcel for which the Defendant will receive the full value of the land taken. The denial of business damages does not violate Art. X, §6, Fla. Const. since business damages are not an element of full compensation but are merely a legislative grant which has been limited by §337.27(3), Florida Statutes (1985).

The other theories of excess condemnation merit brief consideration. The recoupment theory allows the State to condemn extra property to be sold in order to diminish overall cost of a particular public improvement Nichols, supra §7.25[3] p. 169. One of the other underlying justifications for this theory is that the public is entitled to the appreciation in value to the excess property caused by the expenditure of funds and the construction of the public improvement, especially when the landowner has done nothing that would cause the property to appreciate. Note, Excess Condemnation, supra p. 150.

Recoupment is not a theory that is favored by the courts largely because it almost always involves the resale the condemned excess property to private individuals solely for a profit. Id. Indeed, one commentator has suggested that a more stringent standard of review should be followed by the courts where the power of excess condemnation is used for purely governmental purposes. Note, "Public Use, Private Use, and Judicial Review in Eminent Domain," 58 New York University Law Review, p. 409 (1983).

Recoupment was not used as a motive or a theory for the taking in the instant case nor is it a theory behind the enactment of Section 337.27(3), Florida Statutes. There is nothing in the record that indicates that the Department intends to take the excess lands from the Appellee and resell them to the public. Such a resale, however, is justified under the remnant theory where recoupment is not the primary motive. Superior Court, supra, 432 P.2d at 347; See also Note, Excess Condemnation, p. 155. Rather, the record shows that the primary motive in the instant case is to initially avoid having to pay business damages on a partial taking, a permissible goal under the remnant theory. Superior Court, supra.

The Broader Public Purpose Doctrine is self-explanatory. Under this doctrine excess condemnation is justified if it can accomplish a broader public purpose than that of the original taking. Note, "The Effect of the Public Use Requirement on Excess Condemnation," supra p. 396. This theory is directly related to the liberal public use definition and the narrow scope of review that is given legislative decisions that has already been discussed in this brief. Id.

The Broader Public Purpose doctrine has its applicability to the instant case. Although the excess condemnation will allow the Department to save taxpayer's money (remnant theory), it will also serve a broader

public purpose in that the Department will be able to use the savings to build other badly needed transportation projects.

Finally, the Protective theory has the least application to the instant case. The Protective theory sanctions excess condemnation where it is deemed necessary to preserve and protect property for a future public improvement or to secure the desirable development of its surroundings. Here, there is no evidence that the extra property was taken to preserve or protect U.S. 19.

Also, the record does not show that the Department had any future plans to use the extra property taken from the Appellee. However, the protective theory comes into play when one considers the overall benefits the savings experienced from using Section 337.27(3), Florida Statutes could have on the Florida Transportation System. Due to the expected population growth in Florida and the crisis that Florida's road system already faces, the employment of Section 337.27(3) could be seen as a protective measure to enable the Department to be able to build other badly needed highway projects.

To conclude, Section 337.27(3) is plainly constitutional under the broader concept of the meaning of public purpose under this Court's rulings, the United States Supreme Court rulings and from key rulings from other jurisdictions. Furthermore, Section 337.27(3) is fully justified under the financial remnant theory, which has been accepted by a number of jurisdictions. Accordingly, the certified question from the Second District Court of Appeal should be answered in the negative. Section 337.27(3), Florida Statutes should be declared constitutional and the opinion of the Second District Court of Appeal declaring it unconstitutional should be quashed.

CONCLUSION

This Court should answer the certified question in the instant case in the affirmative and declare Section 337.27(3), Florida Statutes to be constitutional. The portion of the opinion of the Second District Court of Appeal declaring the statute to be unconstitutional should be quashed. The portion of that opinion finding that business damages are part of "acquisition costs" in Section 337.27(3) should be affirmed. Furthermore, this cause should be remanded to the trial court with instructions that the trial court enter an order of taking for the entire 1.344 acres of the Appellee's land.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 17th day of July, 1987 to CHARLES M. PHILLIPS, JR., ESQUIRE, 611 Druid Road East, Suite 107, Clearwater, Florida 33516.

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