

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellant,

Vs.

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

Appellees.

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**FILED**

SID J. WHITE

OCT 6 1980

CLERK, SUPREME COURT

By *[Signature]*

Deputy Clerk

CASE NO. 70,680

REPLY BRIEF OF APPELLANT  
FLORIDA DEPARTMENT OF TRANSPORTATION

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SUMMARY OF ARGUMENT

The Legislature has created Section 337.27(3), Fla. Stat. (1985) for the stated public purpose of limiting the rising cost of property acquisition to assure funds are available for future transportation projects. This Court has recognized that the promotion and preservation of the economic welfare and prosperity of the state is a legitimate public purpose. Section 337.27(3) meets this public purpose test and must be upheld as constitutional because the legislative determination of public purpose is not patently erroneous.

Appellee's attempt to reargue the construction of the term "acquisition costs" should be rejected, since no cross appeal was filed to preserve the issue. Business damages may be considered as part of the acquisition costs to determine whether Section 337.27(3) is applicable. There is no constitutional right to business damages. So the elimination of the award of business damages by the acquisition of the entire property does not constitute a constitutional deprivation. Section 337.27(3) is constitutional.

ARGUMENT

SECTION 337.27(3), FLORIDA  
STATUTES, IS CONSTITUTIONAL

The constitutional issue before this Court is fairly straightforward. The Legislature created the Florida Transportation Code to establish the responsibilities of the

state 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. See Section 334.035, Fla. Stat. (1985). In order to develop this integrated, balanced statewide transportation system in the most financially feasible way possible, the Legislature gave the Department several tools to expand available resources to assure that the insufficient monies available go as far as possible toward developing that system. This Court must decide if this legislative scheme of financial efficiency constitutes a public purpose. The answer can only be yes, and Section 337.27(3) is one of the valid tools to accomplish this overall purpose.

The Transportation Code has several important tools for stretching the taxpayer's transportation dollars: 1) Section 339.155(6)(c) provides for the designation of transportation corridors so that local governments can develop comprehensive plans consistent with future transportation needs; 2) Section 337.27(2) allows the Department to acquire property within designated corridors up to 10 years before creation of the final design plans; 3) Section 337.241 allows governmental entities to file maps of reservation to restrict development within designated right of way limits; and finally, 4) Section 337.27(3) allows the Department to 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."

The Legislature went one step farther than the statutes in the cases cited by Appellee by specifically stating that this statutory means of limiting the rising cost of property acquisition is a public purpose to preserve resources for other viable public projects. This clear statement of public purpose is presumed valid and may only be rejected by this Court if patently erroneous. State v. Housing Finance Authority of Pinellas County, 506 So.2d 397 (Fla. 1987).

Section 337.27(3), Fla. Stat. must be analyzed in relation to the entire scheme of the Florida Transportation Code. It is not simply a cost saving scheme. The public purpose expressed is to assure that the limited resources available are used to the full extent to construct and expand the transportation system for all Floridians and the many visitors to the State, which is the very economic lifeblood of the State. Contrary to Appellee's assertions, this Court has long recognized the legitimate public purpose of preserving the economic welfare and prosperity of the State, even if certain particular property owners bear a larger share of the burden. In State v. City of Miami, 379 So.2d 651 (Fla. 1980); State v. City of Riviera Beach, 397 So.2d 685 (Fla. 1981); and State v. Osceola County Industrial Development Authority, 424 So.2d 739 (Fla. 1982), this Court approved the sale of revenue bonds for the "public purpose" of promoting economic prosperity, promoting the economy and welfare of the state, and promoting tourism. Surely the preservation and expansion of the State's infrastructure to

preserve and expand the economic welfare of the state serves this same public policy. It just cannot be said that this legislative statement of public purpose in Section 337.27(3) is patently erroneous.

The Appellee has mixed the concepts of "necessity" and "public purpose" even though they are separate and distinct concepts. Appellee relies on State of Delaware v. 9.88 Acres of Land, 253 A.2d 509 (Del. 1969) as support for his arguments that the excess land itself must be needed for the project and that necessity is ultimately a judicial question. Appellee's argument fails on both counts. First of all, the factual situations are different. Unlike the Florida Transportation Code, the Delaware statutory scheme did not allow advance acquisition of right of way, did not have the specific statement of public purpose, nor did it involve business damages. The Delaware Supreme Court did not declare the statute unconstitutional. Instead the Court would not let the Highway Department acquire the whole tract under the facts in the case, because under Delaware law any land acquired had to have "immediate or immediately foreseeable plans for its public use," and the remainder had to be worthless. Id. at 511. The Florida courts have never placed an immediate use restriction on the exercise of eminent domain power.

Second, the Florida Legislature has determined necessity and stated the public purpose to be served. The Legislature found the necessity of the exercise of the power of eminent domain to be the acquisition of the entire parcel to preserve



funds for future projects. The term "necessity" is not found in Art. X, Section 6, Fla. Const. Contrary to Appellee's assertion, the initial determination of necessity is a legislative function. In Wilton v. St. Johns County, 123 So. 527 (Fla. 1929) this Court recognized the distinction:

While, as we have seen, the question of public use vel non is ultimately a judicial question, yet if the purpose is a public one, the question of whether or not it is necessary to exercise the power of eminent domain to acquire the property for the accomplishment of such purpose is generally held to be a legislative question; especially so in those instances where the Legislature itself takes direct action.

Id. at 534-535. The decision on necessity has already been made in Section 337.27(3).

The proper judicial role in this case at the trial level was to determine whether the Department's decision to acquire the entire property because of the extremely high business damages should be overturned because of fraud, bad faith, or gross abuse of discretion. Id. at 535. Once the acquisition cost is shown to exceed the value of the parcel, the Department has met the necessity requirement. The facts submitted at the order of taking hearing fully support the Department's decision to acquire the whole parcel.

In People ex rel. Department of Public Works v. Superior Court of Merced County, 65 Cal.Rptr. 342, 436 P.2d 342 (Cal. 1968), the statute allowed an entire parcel to be taken when the remainder is of little value to its owner or when the taking

gives "rise to claims or litigation concerning severance or other damage." The California Supreme Court recognized the legitimate public purpose served by a statute which allows purchase of "financial remnants." These financial remnants are parcels which avoid a substantial risk of severance or consequential damages. The Court said: "It is sound economy for the state to take the entire parcel to minimize ultimate costs." Id. at 347.

The Florida statute is narrower than the California statute because it requires the acquisition costs to equal or exceed the value of the whole property, not just give rise to damage claims. In Florida, "financial remnants" may be created by excessive business damages. It is a legitimate exercise of legislative power to allow the acquisition of the whole tracts to minimize ultimate costs.

Since the District Court of Appeal construed the term "acquisition costs" to include business damages and Appellee has filed no cross appeal, that portion of Appellee's brief reasserting their interpretation of the statute should not be considered by this Court. However, it is clear that the District Court of Appeal's interpretation that acquisition costs include business damages is correct. Only in the worst case where the remainder is worthless would the partial take acquisition equal the cost of the whole take. The only way for the cost of a partial take to exceed a whole take would be to include potential business damages in the equation. So it is clear that the Legislature intended business damages to be included in "acquisition costs."

Appellee vainly attempts to place business damages "within the meaning of full compensation." However, it cannot be argued that business damages are part of full compensation and Appellee's reliance on Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970) is totally misplaced. The concept of business damages being part of full compensation has been rejected. See Jameson v. Downtown Development Authority of City of Fort Lauderdale, 322 So.2d 510 (Fla. 1975); Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983). Business damages are a matter of legislative grace. Being a matter of legislative grace, it would not be unconstitutional to deprive certain additional landowners of business damages by operation of Section 337.27(3), Fla. Stat. There is no constitutionally protected right to business damages. The landowner would still receive full compensation for the entire property acquired which would include moving costs.

This Court should recognize the legitimacy of the economic decision made by the Legislature in Section 337.27(3), Fla. Stat. This Court should recognize the legitimate public purpose of stretching the taxpayer's transportation dollar to preserve and protect the vital transportation network in Florida, to protect the State's economy and welfare by facilitating the tourist industry and economic development, and to allow expansion of this critical segment of the State's infrastructure. This Court should find Section 337.27(3), Fla. Stat. to be a constitutional exercise of the legislative authority.

This exercise of legislative delegation to the Department will not go unchecked, since the acquisition of a particular parcel must still be shown to be necessary for the public project, and the additional acquisition of the remainder must still be justified by showing the cost of the partial take would equal or exceed the cost of a whole take. This offers the due process protection against arbitrary or unreasonable actions by the Department.

CONCLUSION

Appellant asks this Court to answer the certified question in the negative<sup>1</sup>. and declare Section 337.27(3), Florida Statutes (1985) to be constitutional. This cause should be remanded to the trial court with instructions to enter an order of taking for the entire parcel.

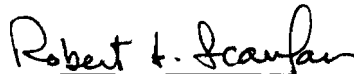
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 6th day of October, 1987, to CHARLES M. PHILLIPS, JR., ESQUIRE, 611 Druid Road East, Suite 107, Clearwater, Florida 33516.



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ROBERT I. SCANLAN

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<sup>1</sup>.The statement in the Initial Brief that the certified question should be answered affirmatively is incorrect.