IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 31 1988
CLERK, SUPREME COURT
By
Deputy Clerk

JOINT VENTURES, INC.,

Petitioner,

vs.

CASE NO. 71,878

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Respondent.

ANSWER BRIEF OF RESPONDENT
DEPARTMENT OF TRANSPORTATION

MAXINE F. FERGUSON
Appellate Attorney
THOMAS H. BATEMAN, III
General Counsel
Department of Transportation
Haydon Burns Building, MS 58
605 Suwannee Street
Tallahassee, FL 32399-0458
904/488-9425

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS . . . . ii-v

PRELIMINARY STATEMENT vi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2-4

SUMMARY OF ARGUMENT 4a-4b

ARGUMENT

THE STATUTORY PROVISIONS 5-7

EFFECT OF THE STATUTE 7

PRELIMINARY CONSIDERATION 7-8

POINT I 9-27

POINT II 28-29

POINT III 30-32

POINT IV 33-34

POINTV 35

POINT VI 36

CONCLUSION 37

CERTIFICATE OF SERVICE 38

APPENDIX 39

INDEX TO APPENDIX . . . . A-i

TABLE OF CITATIONS

CASES	PAGE
A.B.A. Industries, Inc. v. City of Pinellas Park, 366 So.2d 761 (Fla. 1979)	11
Agins v. Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980)	8, 24
Andrus v. Allard, 444 U.S. 51, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979)	10
Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., 108 So.2d 74 (Fla. 1st DCA 1958), writ quashed, 116 So.2d 762 (Fla. 1959)	21, 22
City of Lake Worth v. Walton, 462 So.2d 1137 (Fla. 4th DCA 1984)	9
City of Miami v. Romer, 58 So.2d 849 (Fla. 1952)	18, 19, 20, 21, 22
City of Miami v. Romer, 73 So.2d 285 (Fla. 1954)	21, 22, 24
Connor v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968)	18
Dade County v. Palladeno, 303 So.2d 692 (Fla. 3rd DCA 1974)	14
Dade County v. Still, 370 So.2d 64 (Fla. 3rd DCA 1979)	22
Dade County v. Still, 377 So.2d 689 (Fla. 1979)	22, 23, 24
Euclid v. Ambler Realty, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)	12, 13, 18, 19
First Lutheran Church v. Los Angeles County, 482 U.S. ____, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987)	28

Forester v. Scott, 136 N.Y. 577,
32 N.E. 976 (N.Y. 1893) 25, 26

Gorieb v. Fox, 274 U.S. 603,
71 L.Ed 229, 47 S.Ct. 675 (1927) 18, 19, 30

Graham v. Estuary Properties,
399 So.2d 1374 (Fla. 1981) 26, 30

Grand Trunk Western R. Co. v. City of Detroit,
326 Mich. 387, 40 N.W.2d 195 (1949) 25

Grossman Holdings Ltd. v. Hourihan,
414 So.2d 1037 (Fla. 1982) 17

Hoyert v. Board of County Commissioners,
278 A.2d 588 (Md. 1971) 25

James H. Holden Co. v. Connor,
257 Mich. 580, 241 N.W. 915 (1932) 17

Johnson v. State ex rel. Maxcy,
99 Fla. 1311, 128 So. 853 (Fla. 1930) 18

Keystone Bituminous Coal Assoc. v. DeBenedictis,
480 U.S. ____, 94 L.Ed.2d 472,
107 S.Ct. 1232 (1987) 7, 8, 10

Kingston East Realty Co. v. State,
133 N.J. Super 234, 336 A.2d 40 (1975) 17

Lackman v. Hall,
364 A.2d 1244 (Del. 1976) 25, 26

Liquor Store v. Continental Distilling Corp.,
40 So.2d 371 (Fla. 1949) 16

Long v. City of Highland Park,
329 Mich. 146, 45 N.W.2d 10 (1950) 25

Maxcy, Inc. v. Mayo,
103 Fla. 552, 139 So. 121 (1931) 11

Mayer v. Dade County,
82 So.2d 513 (Fla. 1955) 21

McInerney v. Ervin,
46 So.2d 458 (Fla. 1950) 37

McKusick v. Houghton,
171 Minn. 231, 213 N.W. 907 (1927) 20

Miller v. City of Beaver Falls,
368 Pa. 189, 82 A.2d 34 (1951) 26

Penn Central Transportation Co.
v. New York City, 438 U.S. 104,
57 L.Ed.2d 631, 98 S.Ct. 2646 (1978) 8, 10, 24, 27

Peterson v. City of Decorah,
259 N.W.2d 553 (Iowa App. 1977) 25

Rachleff v. Mahon,
124 So.2d 878 (Fla. 1st DCA 1960) 36

Robyn v. City of Dearborn,
341 Mich. 495, 67 N.W.2d 718 (1954) 25

Rotenberg v. City of Fort Pierce,
202 So.2d 782 (Fla. 4th DCA 1967) 33

Southern Bell Telephone and Telegraph v. State,
75 So.2d 796 (Fla. 1954) 14, 15

State Department of Transportation v. Donahoo,
412 So.2d 400 (Fla. 1st DCA 1982) 24

State ex rel Municipal Bond & Investment Co. v. Knott,
114 Fla. 120, 154 So. 143 (1934) 16

State ex rel Tingley v. Gurda,
309 Wis. 63, 243 N.W. 317 (1932) 25

State v. Powell,
497 So.2d 1188 (Fla. 1986) 27

State v. Saiez,
489 So.2d 1125 (Fla. 1986) 11

State Road Department v. Chicone,
158 So.2d 753 (Fla. 1963) 23

State Road Department v. Forehand,
56 So.2d 901 (Fla. 1952) 31

Storer Cable T.V. of Florida, et al. v. Summerwinds
Apartment Associates, Ltd. et al.,
493 So.2d 417 (Fla. 1986) 10, 28

Symonds v. Buckin,
197 F.Supp. 682 (D.Md. 1961) 17

Town of Indialantic v. McNulty,
400 So.2d 1227 (Fla. 5th DCA 1981) 9, 16

FLORIDA STATUTES

Florida Environmental Land and Water
Management Act, Chapter 380 26

Chapter 73 . . . . 30, 31, 32, 35

Chapter 74 . . . . 30, 31, 32, 35

Chapter 120 33

5334.035, Fla. Stat. (1987) 14

S337.241, Fla. Stat. (1987) . . . . passim

§380.04(1), Fla. Stat. (1987) 7

S732.9185, Fla. Stat. (1983) 27

PRELIMINARY TATEMENT

For purposes of this brief, the following symbols or abbreviations shall be utilized:

The Record on Appeal shall be referred to as "R:" followed by the appropriate page number;

The Appendix accompanying this Brief shall be referred to as "A:" followed by the appropriate page number;

The Respondent, DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, shall be referred to as the "DEPARTMENT";

The Petitioner, JOINT VENTURES, INC., shall be referred to as "JOINT VENTURES";

The Department of Environment Regulations shall be referred to as "DER";

The Hillsborough County Environmental Planning Council shall be referred to as "EPC"; and

The Initial Brief filed by JOINT VENTURES shall be referred to as "I.B." followed by the appropriate page number.

STATEMENT OF THE CASE

The Department accepts Joint Ventures' Statement of the Case with the following exceptions:

On page 2 of the Initial Brief, Joint Ventures refers to a document which the first District Court of Appeal specifically denied to be supplemented in the record. Although Joint Ventures' reference to its Motion to Supplement Record may be proper, the Department takes exception to the conclusory statements as to the contents of a document which have not been incorporated in the record.

The Department also disagrees with Joint Ventures' statement that the parties ''agreed that the appeal would remain pending notwithstanding the settlement." (I.B. p. 3) As argued in the Motion to Dismiss for Mootness filed with the First District Court of Appeal, the settlement of the eminent domain proceeding was not signed by the Department's General Counsel or any attorney of record in this cause. The Department's eminent domain attorney had no authority to bind the Department involving any case in which she was not the attorney of record. Accordingly, once the eminent domain proceedings commenced, the issues in the instant cause became moot, and the Department properly filed its Motion to Dismiss.

Additionally, Joint Ventures omits any reference to the District Court's finding that the issues on appeal are rendered moot because of the eminent domain proceedings. (A: 2)

STATEMENT OF FACTS

Joint Ventures attacks the facial constitutionality of 5337.241, Florida Statutes (1987). Hence, a lengthy recitation of the facts present in the instant cause is unnecessary in understanding the legal issues presented.

Moreover, Joint Ventures does not attack the hearing officer's factual findings in the Recommended Order. However, much of the evidence relied upon by Joint Ventures in its brief was either rejected by the hearing officer for lack of credibility or was simply not addressed by the hearing officer in his factual findings. At this point, Joint Ventures may not supplement the hearing officer's findings nor represent as facts, evidence specifically rejected by the hearing officer. The factual findings of the hearing officer are the operative and controlling facts on appeal. Also, Joint Ventures omits certain of the hearing officer's factual findings. Consequently, the Department makes the following specific additions or corrections to Joint Ventures' Statement of Facts.

Joint Ventures states that the construction of Channel H and the prior demucking activities of the owner has resulted in a "dewatering" of the property. The only reference to the effect of Channel H and the demucking as to the property is found in Finding of Fact number 6 which states in pertinent part: "Both Channel H and the earlier demucking have caused some diminution of the property's wetlands effectiveness." (A: 3) Contrary to Joint Ventures' assertions, there was no factual finding that the property had been "essentially dewatered."

On page six of the Initial Brief, Joint Ventures contends that the county EPC determined that 85% of the entire tract could be developed. This statement is a distortion of the facts for two reasons. First, the

letter from the EPC, itself, clearly shows that the 85% figure was not a final determination by the EPC, but merely the preliminary opinion of a water quality manager. In fact, the letter further states "however, for a more accurate determination, a detailed field inspection must be performed." (R: 184) Second, the hearing officer gave little credence to the EPC's preliminary estimate. (R: 231-237) The hearing officer reasoned that DER can override any estimate made by the EPC and that the DER exercises ultimate jurisdiction over dredge and fill permits involving development of wetlands. (R: 231-237) The hearing officer specifically held that the preliminary studies of DER indicating that only approximately 50% of the property was developable was the more credible evidence. (R: 233; 237)

The Department rejects that paragraph beginning on page six of the Initial Brief and continuing on to page seven. The entire paragraph is based upon the testimony of Allen Hooker, a former DER dredge and fill inspector. However, Mr. Hooker was not employed by DER at the time of the hearing and consequently was not testifying as DER's representative. Additionally, Mr. Hooker's testimony was only his opinion based upon a preliminary inspection of the property and was not a determination by DER as to whether the property or any portions thereof was developable. Furthermore, Mr. Hooker was unable to state when he inspected the property and whether his determination of the extent of wetlands was based upon current statutory methodology for establishing wetland delineations. (R: 54-56) The hearing officer made no factual findings based on the testimony of Mr. Hooker. Joint Ventures did not take exception to the hearing officer's order; nor has Joint Ventures ever claimed that the

factual findings of the hearing officer should be supplemented. As stated above, Joint Ventures may not unilaterally resolve issues of fact.

The Department rejects that sentence on page seven of the Initial Brief which states that the owner's appraisal witness opined that the property was left without utility. Again, the hearing officer made no such finding, but rather concluded that Joint Venture "is free to do with the property exactly what it has done with the property since it was acquired in 1969." Additionally, such statement fails to take into consideration the 1.81 acres fronting Dade Mabry highway, which are not included within the map of reservation. (R: 246)

SUMMARY OF ARGUMENT

Section 337.241, Florida Statutes, is facially constitutional as a valid exercise of the police power and does not per se constitute a taking as to all property located within an area of reservation. It is well established that statutory authority providing for safe and adequate highways provides one of the clearest examples for the exercise of the police power. Section 337.241, Florida Statutes, is necessary to protect Florida's transportation corridor which will be necessary to manage Florida's projected growth into the next century.

The primary purpose of Section 337.241, Florida Statutes, is to prevent landowners from building in the setback area once a map of reservation is filed. The purpose of the statute is not to depress or freeze the value of the property; on the contrary, the statute is a valid attempt by the legislature to limit property development in an area vitally needed for transportation development. This Court has upheld the validity of setback ordinances even where the local governments were using these ordinances in anticipation of condemning the property within the setback area.

In challenging a map of reservation as applied to a particular parcel, an affected landowner may either pursue the legislatively created administrative remedy found in subsection (3) **or** pursue its constitutional right of bringing an inverse condemnation action. The remedies available to affected landowners to insure compliance with federal and state constitutions need not be spelled out in legislative enactments. Moreover,

due process is provided either through the administrative hearing process, or in those circumstances where a taking is alleged, through inverse condemnation proceedings.

Section 337.241, Florida Statutes, does not violate equal protection of the law because it treats all landowners within an area of reservation who administratively challenge the reservation similarly. Also, if a landowner pursues an inverse condemnation action, he receives the same treatment as other landowners claiming an inverse taking.

ARGUMENT

The Statutory Provisions

Joint Ventures fails to include the entirety of 5337.241, Florida Statutes, in this portion of its brief. Since the Court must read the entire statute in determining the constitutionality of subsections (2) and **(3)** the entire statute is set forth below:

> 337.241 Acquisition of rights-of-way for roads; recording of maps of reservation for proposed rights-of-way; establishment of building setback lines; restrictions of issuance of development permits; hearings. - -
>
> (1) The department or any expressway authority created under chapter 348 with eminent domain authority pursuant to chapter 74 shall acquire all rights-of-way and may prepare and record maps of reservation for any road within its jurisdiction or for any road for which it administers the right-of-way fund. Any such maps shall delineate the limits of proposed rights-of-way for the eventual widening of an existing road or shall delineate the limits of proposed rights-of-way for the initial construction of a road. Before recording such map, the department or expressway authority shall advertise and hold a public hearing and shall notify all affected property owners of record, as recorded in the property appraiser's office, and all local governmental entities in which the right-of-way is located, by mail at least 20 days prior to the date set for the hearing. After the public hearing, the department or expressway authority shall send the map to the clerk of the court of the affected county, who shall forthwith record the map in accordance with chapter 177 in the public records of the county. Minor amendments to such maps are not subject to the notice and public hearing provisions of this section, except that property owners directly affected by changes in a minor amendment and all local governmental entities in which a minor amendment occurs must be notified by mail. Minor amendments are defined as those changes which affect less than 5 percent of the total right-of-way within the map.

(2) Upon recording, such map shall establish:

(a) A building setback line from the centerline of any road existing as of the date of such recording; and no development permits, as defined in s.380.031(4), shall be granted by any governmental entity for new construction of any type or for renovation of an existing commercial structure that exceeds 20 percent of the appraised value of the structure. No restriction shall be placed on the renovation or improvement of existing residential structures, as long as such structures continue to be used as private residences.

(b) An area of proposed road construction within which development permits, as defined in s.380.031(4), shall not be issued for a period of 5 years from the date of recording such map. The 5-year period may be extended for an additional 5-year period by the same procedure set forth in subsection (1).

(3) Upon petition by an affected property owner alleging that such property regulation is unreasonable or arbitrary and that its effect is to deny a substantial portion of the beneficial use of such property, the department or expressway authority shall hold an administrative hearing in accordance with the provisions of chapter 120. When such a hearing results in an order finding in favor of the petitioning property owner, the department or expressway authority shall have 180 days from the date of such order to acquire such property or file appropriate proceedings. Appellate review by either party may be resorted to, but such review will not affect the 180-day limitation when such appeal is taken by the department or expressway authority unless execution of such order is stayed by the appellate court having jurisdiction.

(4) Upon the failure by the department or expressway authority to acquire such property or initiate acquisition proceedings, the appropriate local governmental entity may issue any permit in accordance with its established procedures.

The primary purpose of 5337.241, Florida Statutes, is to provide a necessary mechanism by which the state may protect Florida's transportation corridor and manage Florida's projected growth. The statute is a valid

attempt by the legislature to limit property development in areas vitally needed for transportation development. Contrary to Joint Ventures' contentions, the statute does not prohibit the paying of compensation if, as applied to a particular parcel, a taking actually occurs.

Effect of the Statute

Section 337.241, Florida Statutes (1987) does not impair the present use of any property. Nor does the statute exploit private property for public use. Moreover, Joint Ventures admits that even as to vacant land, uses of the property remain available to the landowner which would not require permitting or constitute development as defined in §380.04(1), Florida Statutes (1987). (**See** I.B. p. 15) Consequently, Joint Ventures' continual assertion that a map of reservation precludes all use of vacant land is bogus.

Once a map of reservation is filed, the Department does not have "complete control" over the property. The landowner continues in full possession of the property; may continue to use the property in its current usage; may maintain the property as it presently exists; may renovate existing commercial structures if such renovation is 20% or less of the appraised value of the structure; may make unlimited improvements to any residence on the property if it continues to be used as such; and may sell, devise, give-away or donate the property.

Preliminary Consideration

A facial attack on a land use regulation "is an uphill battle". Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 94 L.Ed.2d 472, 495, 107 S.Ct. 1232 (1987). A highway reservation law is facially

unconstitutional as a taking of property, only if it can be determined that the temporary restrictions on development imposed by the law constitute a taking no matter how it is applied. In other words, the only question to be addressed in a facial attack of a statute is whether the mere enactment of the statute constitutes a taking. Keystone, supra at 495.

As noted by the Supreme Court in Keystone, supra, the test to be applied in a facial challenge of a land use regulation is fairly straightforward. A land use regulation may be a taking of it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." Keystone, supra at 488 citing Agins v. Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978).

Application of the above test to Joint Ventures' facial statutory attack demonstrates that Joint Ventures has not satisfied its burden of showing that the enactment of 5337.241, Florida Statutes (1987) constitutes a taking.

POINT I

SECTION 337.241, FLORIDA STATUTES, (1987) IS FACIALLY CONSTITUTIONAL

A.

Section 337.241, Florida Statutes (1987) is facially constitutional as a valid exercise of the police power. Although as noted by the First District Court of Appeal "in a proper case a showing could be made that a taking has occurred via subsection 337.241(2)" (A: 4), a finding of a taking in a hypothetical "as applied" situation does not render a statute facially unconstitutional. That a statute may be unconstitutional as applied in certain factual circumstances is not dispositive of the statute's facial constitutionality. This is particularly true where the hypothetically situated landowner has an adequate remedy available either under subsection (3) or through its basic constitutional right to pursue **a** judicial determination of a "taking". **See** City of Lake Worth v. Walton, 462 So.2d 1137 (Fla. 4th DCA 1984) in which the court held that due process was not violated where one claiming a deprivation of right can obtain full redress for the wrongs complained of.

A facial constitutional attack fails in the instant case because the statute cannot be unconstitutional to "all land similarly situated". **See** Town of Indialantic v. McNulty, 400 So.2d 1227 (Fla. 5th DCA 1981). In most situations the filing of a map of reservation would have little or no effect on property within the reservation. Several examples come to mind: A modern McDonald's Restaurant that has already expanded its facilities to meet its future needs. Since 5337.241, Florida Statutes (1987) does not restrict present uses, McDonald's would lose nothing by having its lands placed in reservation. Or a property owner who has a small **de** minimus

corner clip of his property included within a map of reservation. This landowner, probably, would lose nothing if he were unable to use this small segment of property for even the maximum time period. Or as to the owner of vacant land who can develop that portion of the property not located in the reserved area or whose land is not legally or physically developable. In determining whether a taking has occurred, one must look to the entire property, not just that segment affected by the reservation. Penn Central, supra at 428 U.S., 130. Keystone, supra; Andrus v. Allard, 444 U.S. 51, 65, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979). Because the application of §337.241, Florida Statutes, will not **per se** constitute a taking as to all property located within an area of reservation, it is not susceptible to facial attack.

Joint Ventures urges this Court to find the statute facially unconstitutional by distorting its effect. If the landowner is denied the beneficial use of a substantial portion of the property and the reservation is arbitrary or unreasonable, subsection (3) provides an administrative avenue of relief and the Department must either remove the reservation, acquire the property, or commence eminent domain proceedings. On the other hand, if the reservation denies the landowner all beneficial use of the property **or** the reservation is arbitrary or unreasonable, the landowner may still bring an inverse condemnation action in circuit court. Contrary to Joint Ventures' argument, Section 337.241, Florida Statutes (1987) does not prohibit the payment of compensation if a taking is established.

Joint Ventures' reliance on Storer Cable T.V. of Florida, et al. v. Summerwinds Apartment Associates, Ltd. et al., 493 So.2d 417 (Fla. 1986) is without merit. In Storer, supra, a provision mandating property owners to allow cable access to tenants of an apartment complex was challenged as an

unconstitutional taking. This Court struck down the provision because "the legislature made no finding that cable television serves a 'public purpose' under Article X, Section 6, of the Florida Constitution, . . ." Id. at 420. Additionally, a major factor in determining that the provision was constitutionally infirm was the actual, permanent, physical invasion of the landlord's property.

In the instant case, Joint Ventures sensibly does not propose that maps of reservation fail to serve a public purpose. Also, under a map of reservation there is no actual, permanent or temporary, physical invasion of private property.

B.

When addressing the propriety of an exercise of the police power, the issue is whether the enactment is reasonable for the public safety, health, morals, or general welfare. It is the duty of the courts to sustain police power measures unless they are clearly, plainly, and palpably arbitrary, unreasonable, and in violation of the constitution. State v. Saiez, 489 So.2d 1125 (Fla. 1986); Maxcy, Inc. v. Mayo, 103 Fla. 552, 139 So. 121 (Fla. 1931). Not only should a statute be construed in such a manner as would be consistent with the constitution, but a presumption of constitutionality exists until the contrary is proved beyond a reasonable doubt. A.B.A. Industries, Inc. v. City of Pinellas Park, 336 So.2d 761 (Fla. 1979).

Joint Ventures claims the Department's authority under 5337.241, Florida Statutes (1987) emanates from the state's power of eminent domain not from an exercise of the police power. The Appellant's scholarly but overly narrow characterization of the state's police power speaks from a

voice that died long ago upon the pronouncement of Euclid v. Ambler Realty, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

In Euclid, the United States Supreme Court upheld a comprehensive zoning ordinance as a legitimate exercise of the police power and rejected a property owner's claim that this zoning ordinance deprived the owner of liberty and property without due process of law. The ordinance regulated and restricted the location of trades, industries, apartment houses, two-family houses, single family houses, the lot area to be built upon, and the size and height of any building. The Euclid Court acknowledged earlier case law authority that recognized the validity of ordinances that required property owners to set aside open spaces. In upholding this statute, the Euclid Court explained that the police power was elastic and could be expanded to serve the needs of a modern world:

> Building zone laws are of modern origin. They began in this county about twenty-five years ago. Until recent years, urban life was comparatively simple: but with great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles are rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a

> degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

Id. at 386-387.

The Euclid Court further noted that the land use regulation to be valid must bare a relationship to some aspect of the police power. The Court found that the zoning ordinance furthered many of the aspects of the police power, including the fact that the ordinance would expedite local transportation. **Id.** at 394.

The Euclid concept of the police power in 1926 is even more appropriate to the transportation needs of Florida in 1987. 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 337.241, Florida Statutes (1987) is an important tool to accomplish this goal.

---

[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.

Section 337.241, Florida Statutes, is in furtherance of the police power in many respects. This statute is part of the Florida Transportation Code. The purpose of the Code is expressed in 5334.035, Florida Statutes:

> 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. <u>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</u>. 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)

Thus, the Legislature in effect is saying in the above-quoted language that 5337.241, Florida Statutes, is an expression of the police power of the state.

The courts have also recognized that the creation of safe and adequate highways is a proper field for the exercise of the police power.[4] <u>See</u> <u>Southern Bell Telephone and Telegraph v. State</u>, 75 So.2d 796 (Fla. 1954); <u>Dade County v. Palladeno</u>, 303 So.2d 692 (Fla. 3rd DCA 1974). In <u>Southern Bell</u>, <u>supra</u>, the Florida Supreme Court recognized that the construction of the Jacksonville Expressway was a benefit to the public. Even *so*, the <u>Bell</u>

---

[4]**Part** of that power is the Department's discretion as to <u>where</u> and <u>when</u> to locate state roads. <u>See</u> <u>Webb v. Hill</u>, 75 So.2d 596 (Fla. 1954); <u>State v. Florida State Improvement Commission</u>, 75 So.2d (Fla. 1954). Courts cannot interfere with this power of the Department unless there has been an abuse of discretion. Section 337.241 is one aspect of this discretion; it is a planning tool to aid the Department in determining <u>when</u> and <u>where</u> to locate a road.

Court clearly indicated that the construction of the expressway was a valid exercise of the police power:

> It is true that the Jacksonville Expressway contemplates a gigantic system of roads and bridges, engineered to the most modern ideas and designed to handle a great volume of traffic. Outside of size, concept and method of financing, it is no different from many other road improvements. Its primary purpose is to handle vehicular traffic - the same as any other highway. True, its roadways are wider, access is limited, and its cost much greater; but it is still a highway designed to handle vehicular traffic and , although tolls are charged on the bridges to aid in the financing, it is nevertheless a public highway. Its construction promotes the general welfare and insures the safety of the traveling public.
>
> The Court takes judicial notice that the millions of automobiles being produced and sold in this Country and placed upon its highways have created a condition that makes safe, adequate highways the very first order of business of the various states and the political subdivisions thereof. It provides one of the clearest fields for the exercise of the police power. (emphasis supplied)

Id. at 799.

At the administrative hearing, the Department's Regional Drainage Design Engineer testified that the use of 5337.241, Florida Statutes, is "essential in order for the Department to provide the public transportation conveyance." (R: 151) Thus, the statute promotes many aspects of the police power. If the Department is prevented from widening its highways due to the spiraling costs of acquiring right of way, the roads could become unsafe and inadequate. If landowners are allowed to build in the transportation corridors that the statute is designed to protect, the added cost of acquiring right of way could make a badly needed transportation project financially unfeasible. Florida has long recognized that the

"economic interests of a state may justify the exercise of its continuing and dominant protective police power for the promotion of the general welfare, notwithstanding interference with lawful callings and even contracts." State ex rel Municipal Bond & Investment Co. v. Knott, 114 Fla. 120, 154 *So.* 143 (1934). See also Liquor Store v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949). Moreover, as facts in the instant case suggest, building in the corridor could in a given case make a project physically unfeasible. Suppose for example, that after a project had been announced, the landowner constructed a building and in the process filled in and eliminated the only reasonable place the Department could dispose of and treat stormwaters. Such construction could threaten an entire project or perhaps force a compromise solution with regard to the disposal of the stormwaters that would not be as beneficial to the environment. There can be no question that the "police power" may be exercised to protect and preserve the environment. McNulty, supra.

There are a number of other evils which 5337.241, Florida Statutes, is designed to alleviate. First, it prevents landowners from being able to exploit the fact that its property is being condemned and profit from the condemnation proceedings themselves. An announcement that property will be condemned encourages some landowners to build - where they might not have done *so* otherwise - at today's construction prices and to sell tomorrow at a profit to a captive buyer. The statute is merely requiring the landowner to mitigate damages by not spending money on improvements in an area which will soon be condemned.

Second, the statute prevents a condemning authority from overanxiously condemning more property than it may have a use for in the future. Without the reservation statute, the State would likely have to acquire a great

deal more property than it would need, and then be required to sell the property later at a loss as surplus property. Section 337.241, Florida Statutes, prevents landowners from having their property taken needlessly.

In addition to the greedy condemnee and paranoid condemnor hypotheticals above, and aside from the question of who is doing the losing or gaining, the statute simply prevents economic waste, a concept that is contrary to public policy. **See,** e.g. Grossman Holding, Inc. v. Hourihan, 414 So.2d 1037 (Fla. 1982).

For example, it would be extremely wasteful for a landowner to build in a transportation corridor a new hotel that has an economic life of approximately 40 years only to have the government destroy the building after two years. It would be even worse for the government to have to excavate a site that had been previously filled by the landowner, to provide for a stormwater detention area. The police power surely can be used to prevent such waste. The Department may also have to pay to relocate people and businesses which located in the needed corridor. In addition to the economic waste that can be prevented if the statute cannot be applied, there is also the human factor of having to uproot and relocate people who might build in the needed area. A similar statute aimed to prevent these same harms was held to be a valid exercise of the police power. Kingston East Realty Co. v. State, 133 N.J. Super 234, 336 A.2d 40 (1975).

The lack of effective transportation planning for future needs is also an evil the police power is designed to prevent. A setback ordinance, utilized to plan for future needs, is a valid purpose within the police power. **See** James H. Holden Co. v. Connor, 257 Mich. 580, 241 N.W. 915 (1932); Symonds v. Buckin, 197 F.Supp. 682 (D.Md. 1961).

Moreover, the highways in Florida are the very arteries of commerce. In Connor v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968) and Johnson v. State ex rel. Maxcy, 99 Fla. 1311, 128 So. 853 (Fla. 1930) this Court held that the protection of large industries constituting great sources of the State's wealth are affected to such an extent by the public interest as to be within the police power. Surely, if the protection of a private industry is within the exercise of the police power, then a fortiori the protection of highway corridors would be included within this power.

The building setback line called for in §337.241 is analogous to building setback ordinances. The courts have consistently upheld the validity of such laws. In Gorieb v. Fox, 274 U.S. 603, 71 L.Ed 229, 47 S.Ct. 675 (1926), the U.S. Supreme Court, relying on Euclid for the first time, upheld the facial validity of a local ordinance imposing a setback line.[5]

The Florida courts have consistently upheld the facial validity of setback ordinances. The seminal case is City of Miami v. Romer, 58 So.2d 849 (Fla. 1952) (hereinafter "Romer I"). In "Romer I" the

---

[5]The Supreme Court has not decided a case involving a setback ordinance since Gorieb. However, the court did uphold the facial constitutionality of a zoning ordinance in Agins v. Tiburon, supra. In Tiburon, landowners acquired five acres of unimproved land in the city of Tiburon for residential development. Thereafter, the city was required by California to prepare a plan governing land use and the development of open space land. In response the city adopted zoning ordinances that placed the landowner's property in a zone in which property may be devoted to one family dwellings, accessory buildings, and open space uses, with density restrictions permitting the landowner to build between one and five single-family residences on their tract. The court found that this ordinance substantially advanced the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and was a proper exercise of the city's police power to protect its residents from the ill effects of urbanization.

constitutionality of an ordinance was challenged which provided that "no building could be erected on any street in the City of Miami closer than 25 feet to the centerline of a street." A lessee who lived on a street that was 30 feet wide was denied permission to build on the ten foot strip of the lessor's property that was within the setback. The lessee was able to obtain a line and grade permit to build up to the setback line and to build a sidewalk on 5 feet of the strip. On the other 5 feet of the strip the City of Miami did temporary paving to eliminate a traffic hazard created by drainage problems.

The landowner filed an inverse condemnation suit against the city alleging that the city had taken the ten foot strip of property. The trial court decreed that the entire ten foot strip of property had been taken and awarded $6,818.18.

The appellate court ruled that there was not "as a matter of fact" an appropriation to public use by the City of the entire 10 foot strip, "and that the trial court must have meant in its order that the statute on its face took the entire ten foot strip." Id. at 851. The Supreme Court rejected this argument and cited to Euclid and Gorieb for the proposition that this ordinance was a valid exercise of the police power in that it promoted and conserved the public health, safety, comfort, convenience, or general welfare.

The Romer I Court specifically held that "a municipality is not required to establish building setback lines through the exercise of the power of eminent domain but may do so through the exercise of the police power and without compensation to the property owners." Id. at 852.
What makes Romer I particularly applicable to the facts of the instant case is that in Romer I testimony was adduced indicating that the city had plans

to use the strip to eventually widen the street. In other words the city was using its ordinance the same way the Department is using its reservation map under §337.241, Florida Statutes. Nevertheless, the Romer I Court ruled that the city's intentions did not constitute a taking:

> The fact that, as shown by the testimony adduced at the trial, the city officials may have had in minds an eventual widening of the right-of-way on the particular street abutting appellees' property does not, in our opinion, constitute a "taking" of the appellees' property for public use, within the meaning of Article XII of the Declaration of Rights. Until such time as the City officials find that the public interest will be best served by condemning all or any portion of the 10-foot strip for street purposes, the property owner is free to use such strip of land in any lawful manner and for any lawful purpose, except the construction of a building thereon. (emphasis supplied)

Id. at 852.

The Romer I Court also rejected the Appellant's argument that the setback line created an easement over his property. The Romer I Court cited McKusick v. Houghton, 171 Minn. 231, 213 N.W. 907, 908 (1927) as follows:

> . . . setbacks lines or building lines do not really create an easement in the strict legal sense. No one acquires any right of passage or other use to the exclusion of the owner over that part of the lot upon which buildings or structures are forbidden. The effect of setback lines and open yards and spaces in zoning ordinances is merely to regulate the use of property. It gives no beneficial use to another, except as light and air may rest undisturbed in the space where structures are prohibited. This restriction of use is based upon the exercise of the police power for the general welfare, and is not based on contract rights or the exercise of the power of eminent domain. (emphasis supplied)

Romer I. at 851.

The Romer I opinion concluded that it would not foreclose the possibility that the setback ordinance could be unconstitutional as applied to a particular piece of property.

In City of Miami v. Romer, 73 So.2d 285 (Fla. 1954) ("Romer II"), the Court announced upon certiorari review:

> . . . the mere plotting of a street upon a city plan without anything more does not constitute a taking of land in a constitutional sense so as to give an abutting owner the right to have damages assessed." (citation omitted) And this is so, even though the ordinance prevents the development of the property in a manner not conforming to the plan. In such case, payment of compensation must await the actual "taking" of the property by the City, or such actual deprivation of a beneficial use as to amount to a compensable "taking". (citations omitted).

Id. at 286-287.

In Mayer v. Dade County, 82 So.2d 513 (Fla. 1955) this Court followed Romer I and upheld the facial constitutionality of a similar setback ordinance. The Court, however, concluded that an unlawful taking might occur if the ordinance was being applied against the landowner differently than other property owners that were similarly situated.

Next, in the progression of cases is Board of Commissioner of State Institutions v. Tallahassee Bank and Trust Co., 108 So.2d 74 (Fla. 1st DCA 1959), writ quashed 116 So.2d 762 (Fla. 1959) to which opposing counsel frequently cites. However, this case needs to be put in proper perspective: Neither this Court nor the district court declared that the zoning ordinance that restricted development was facially invalid or unconstitutional. The courts merely held that the statute could not be used to prevent landowners at the condemnation valuation hearing from presenting comparable sales based on uses not allowed by the ordinance.

The trial court allowed such evidence. On appeal the First District Court of Appeal affirmed, ruling that it would be an unconstitutional taking to allow the condemnor to use the statute to depress the value of the property.

Dade County v. Still, 370 So.2d 64 (Fla. 3rd DCA 1979) ("Still I") and Dade County v. Still, 377 So.2d 689 (Fla. 1979) ("Still II") provide an important corollary to the rule in Board of Commissioners, supra and link Board of Commissioners to the Romer decisions. In Still I, Dade County had passed a setback ordinance in 1936 prohibiting landowners from building anything within a 70 foot corridor along county streets. In 1951 another ordinance was enacted extending the corridor to 100 feet. Condemnation proceedings were brought for a portion of the landowners' property within the corridor. At pretrial the trial court ruled that the County could not present evidence of the road width and setback ordinance in order to effect a depreciation in the market value of the property. On appeal the district court recognized the validity of the ordinance stating:

> It is natural for governmental authorities to seek ways to prevent owners from using land which might at sometime in the future be used for streets or roads. Therefore, it cannot be held reprehensible for the County to attempt by such procedure to alleviate the cost to the public for the acquisition of these areas. See Rochester Business Institute, Inc. City of Rochester, 25 A.D.2d 97, 267 N.Y.S.2d 274 (1966).

Still I at 66.

The court, however, distinguished the principles in Romer 11, observing that in Still the city had formally taken the landowners property, and that "the existence of the ordinance declaring a future intent to take should not be presented to the jury as a basis for a price

less than that which would have existed without the declaration of future taking". Id. Once again the court is discussing condemnation valuation principles, rather than statutory constitutionality issues.

In Still II this Court affirmed both the lower court and the District Court. The Court acknowledged that there "was no 'taking' of the subject property by [the setback] ordinances". Still 11, supra at 689. The court, however, noted that the case was at the posture of a taking, and that "since the owner received no compensation at the time the ordinance was passed, the county [could not] seek to have the owner's compensation reduced by reason of its own governmental action". Id. at 290. The court then cited to State Road Department v. Chicone, 158 So.2d 753 (Fla. 1963), which held that a condemning authority cannot benefit from a depression in property value caused by a prior announcement that the property would be taken for a public project. Chicone held that compensation must be based on the value that the property would have had at the time of the taking had it not been subjected to the depreciating threat of condemnation.

One of Appellant's prime concerns is that 5337.241, Florida Statutes, would be used to depress property values within the reservation area so that the condemning authority could acquire the property at a cheaper price. This is not one of the intended purposes of the statute. Even if a condemning authority had this improper motive, the Romer/Still/Chicone evidentiary rule concerning setback ordinances would prevent the statute from being used in this manner and the landowner would receive full compensation for his property based on current values of similar properties. Valuation would be made exclusive of any effect of the map of reservation.

Admittedly §337.241, Florida Statutes, does not require the Department to condemn the property it includes within the map of reservation. However, the setback ordinances in Still and Romer did not require the government to condemn the land within the setback either, yet both ordinances were upheld. In a closely related matter, the First District Court of Appeal cited to Romer II and Still II and held that neither the Department of Transportation's failure to purchase or condemn property nor representations made to property owners in connection with a possible purchase of property constitute a taking. State Department of Transportation v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982). Also, the U.S. Supreme Court has rejected the argument that a loss in value caused by an aborted eminent domain proceeding would constitute a taking. Agins v. Tiburon, supra. The Agins Court stated at footnote 9 of the opinion:

> Appellants also claim that the city's precondemnation activities constitute a taking. See nn 1, 3, and 5, supra. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also City of Walnut Creek v. Leadership Housing Systems, Inc., 73 Cal App 3d 611, 620-624, 140 Cal Rptr 690, 695-697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'' (Citations omitted)

Agins, supra at 263. See also Penn Central, supra, at 438 U.S. 131.

Joint Ventures' copious string cites are easily distinguishable from the instant cause. The majority of Joint Ventures' cases fall within one of two categories: either the governmental entity was acting outside its scope of authority or the law being applied prohibited compensation even if a taking actually occurred. In this first category, the courts addressed the constitutionality of a statute or law **as** applied. For example, in Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949), the court, in addressing the constitutionality of a zoning ordinance as applied, held that the city was misusing its zoning authority in not following the guidelines in its enabling act. Accord Peterson v. City of Decorah, 259 N.W.2d 553 (Iowa App. 1977); Hoyert v. Board of County Commissioners, 278 A.2d 588 (Md. 1971); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950); Robyn v. City of Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954); State ex rel Tingley v. Gurda, 309 Wisc. 6, 243 N.W. 317 (1932).

Forester v. Scott, 136 N.Y. 577, 32 N.E. 976 (N.Y. 1893) and Lackman v. Hall, 364 A.2d 1244 (Del. 1976) are illustrative of the second category where courts have struck down statutory provisions when the provision prohibits compensation, even if a taking actually occurs. In Lackman, supra, no remedial measures were provided in §337.241(3), Florida Statutes, and the statute under review specifically provided that a map of reservation was not a taking. Consequently, in a particular factual situation where the landowner was denied all beneficial use of his property, the statute prohibited his filing an inverse condemnation claim which left the landowner without any available remedy. Again, as noted by the First District below ". . . a landowner has a constitutional right to file an action in inverse condemnation in an appropriate forum, which in

this state could be the circuit court." (A: 6) Unlike the statutes in Forester, supra, and Lackman, supra, 5337.241, Florida Statutes, does not violate this right.

Also, Joint Ventures' reliance on Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951) is without merit. Initially it must be noted that Pennsylvania, unlike Florida, has a constitution which requires compensation for both a taking and damage. Additionally, in Miller, supra, the city attempted to reserve land for a park under a local ordinance. In holding this ordinance unconstitutional, the Court specifically distinguished the facts before it from those in which the public streets were involved. **Id.** at 37.

Joint Ventures urges this Court to apply the test set forth in Graham v. Estuary Properties, 399 So.2d 1374 (Fla. 1981) to the instant cause. Again Joint Ventures fails to distinguish between a facial and as applied constitutional challenge. In Estuary Properties, supra, this Court addressed the constitutionality of the Florida Environmental Land and Water Management Act of 1972, ch. 380, Fla. Stat. (Supp. 1974) **as** applied to a particular parcel of land. As expressed by this Court, "(W)hether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case." **Id.** at 1380. Even a cursory review of the factors listed by the court reveals that the individual peculiarities of an affected parcel are what is being analyzed, not the facial constitutionality of a statute.

Joint Ventures attempts to classify 5337.241, Florida Statutes, as an exercise of the state's eminent domain power rather that of the state's police power, by arguing that **§337.241,** Florida Statutes, promotes a public benefit rather than prevents a public harm. However, as argued above, the

planning and construction of safe and adequate highways is a proper field for the exercise of the police power and prevents the public harm of an inadequate, unsafe, poorly planned transportation system. Joint Ventures' vision to the contrary is myopic.

Additionally, in the area of land use regulation, the benefit-harm distinction has been discredited by the U.S. Supreme Court. Penn Central, supra, at 438 U.S. 133-134. Accord State v. Powell, 497 So.2d 1188 (Fla. 1986) in which this Court noted that 5732.9185, Florida Statute (1983) is a valid exercise of the police power in that it "promotes the permissible state objective of restoring sight to the blind". **Id.** at 1193. Clearly, 5732.9185, Florida Statutes, does not prevent a public harm, but does promote a public benefit.

In summary, the United States Supreme Court and the Florida Courts have consistently denied facial constitutional attacks on land use regulations and have stated that a taking does not occur until the state actually "takes" the property. Such a taking can occur when the state commences condemnation procedures. When this occurs, the Department will not be able to use the effect of the application of 5337.241, Florida Statutes, to devalue property at the valuation hearing. Therefore the statute should be upheld as facially constitutional.

POINT II

THE DISTRICT COURT PROPERLY SUSTAINED 5337.241, FLORIDA STATUTES, ON THE BASIS THAT ANOTHER REMEDY WAS AVAILABLE TO THE OWNER OTHER THAN THAT WHICH WAS PROVIDED BY THE STATUTE.

The District Court opinion below found 5337.241, Florida Statutes, constitutional since a landowner "has an appropriate avenue of relief for its claim of taking and its entitlement to just compensation therefor. . ." (A: 7) Inverse condemnation is not a creature of the legislature but a constitutional right:

> We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation. . .'" (citations omitted)

First Lutheran Church v. Los Angeles County, 482 U.S. ____, 96 L.Ed.2d 250, 264, 107 S.Ct. 2378 (1987).

The remedies available to affected landowners to insure compliance with federal and state constitutions need not be spelled out in detail in a legislative enactment. The affected landowner has a constitutional right to pursue compensation via an inverse condemnation action if a taking actually occurs. The legislature need not include a reiteration of this right in 5337.241, Florida Statutes (1987), as long as the statute does not prohibit compensation in a case where a taking actually occurs.

Storer Cable, supra, does not support Joint Ventures' argument. As noted above, this Court, in Storer, refused to severe the no Compensation

clause, not because the Court refused to draft a remedy onto the subject statute but because the Legislature never determined that cable television served a public purpose.

POINT III

SECTION 337.241, FLORIDA STATUTES, DOES NOT DEPRIVE AN OWNER OF DUE PROCESS.

As argued above, §337.241, Florida Statutes, is an exercise of the state's police power which in three certain circumstances may evolve into an eminent domain proceedings. The first of these circumstances is where after the filing of the map of reservation, the Department decides to begin the construction of the highway project. At this point in time, the Department would file a condemnation action under either Chapter 73 or 74, Florida Statutes, and a judicial determination of public purpose and necessity would follow.

The second situation exists where the landowner seeks administrative review under subsection (3). If it is determined that the Department's actions were arbitrary or unreasonable , and that the landowner was denied the beneficial use of a substantial portion of his property, then the Department must either remove the reservation, acquire the property or proceed to file a condemnation action. This language is a lesser standard than that standard for a constitutional taking. A constitutional taking only occurs when a regulation deprives the landowner of all reasonable uses. Estuary Properties, supra; Gorieb, supra. "Substantial portions of" is less than "all". Thus, a property owner affected by 5337.241, Florida Statutes, actually has an easier standard to meet than an inverse condemnation plaintiff. In fact, the statute requires the Department to initiate condemnation proceedings when less than a "constitutional taking" is shown. When the requisite showing has been made, the Department is given only two options: file a condemnation action or lose the reservation.

If nothing else, this provision of the statute, which requires the Department to file an eminent domain action or lose the reservation, saves the statute from constitutional infirmity. The landowner can prove the reservation is unreasonable and substantially denies use and thereby defeats the reservation. The Department then must chose between losing the reservation or acquiring the property. Full due process is provided the landowner through the administrative hearing process to protect the property's value and use or to force the Department to proceed with acquisition. Should the Department proceed with the condemnation action under Chapter 73 or 74, there would be a judicial determination of public purpose and necessity before a taking occurs.

The third circumstance is in those rare situations when a map of reservation as applied to particular property constitutes a taking. In those circumstances inverse condemnation actions are available to the landowner in which again a judicial determination is made as to public purpose and necessity. Presumably, this is the situation Joint Ventures is addressing. However, Joint Ventures fails to cite any authority for its contention that a land-use regulation is facially unconstitutional because in certain factual situations takings may occur prior to a judicial hearing. Again, Joint Ventures confuses facial and as applied constitutional challenges of a statutes. If Joint Ventures' argument was correct all zoning ordinances and land use regulations would be facially unconstitutional because any regulation given a proper factual showing may constitute a taking. This however does not mean that the regulation is facially unconstitutional.

State Road Department v. Forehand, 56 So.2d 901 (Fla. 1952) does not further Joint Ventures' argument. In Forehand, this Court struck down the

first "quick take" statute as unconstitutional since it allowed, prior to any court determination of public purpose and necessity, the actual physical taking and putting to public use of all properties condemned under Chapters 73 & 74, Florida Statutes. Unlike this first "quick take" provision, 5337.241, Florida Statutes, does not authorize the Department, in any situation, to take physical possession of property and put it to public use prior to a judicial hearing.

POINT IV

SECTION 337.241(3), FLORIDA STATUTES,
DOES NOT DENY EQUAL PROTECTION OF LAW

Section 337.241(3), Florida Statutes does not violate equal protection of the law in that the statute applies to all persons similarly circumstanced. **See** Rotenberg v. City of Fort Pierce, 202 So.2d 782 (Fla. 4th DCA 1967). All landowners whose property is subject to a map of reservation have two remedies available to challenge the reservation. First is the statutory administrative remedy whereby an affected landowner may request a hearing in accordance with the provisions of Chapter 120. §337.241(3), Fla. Stat. (1987). During the hearing, no determination is made as to whether a taking occurred. Rather, if the landowner shows that the map is unreasonable or arbitrary and that its effect is to deny a substantial portion of the beneficial use of the property,[6] the Department must either acquire the property or file an eminent domain proceeding. From this point on, the landowner is treated the same as any person whose lands are being condemned by the Department.

The other remedy available to an affected landowner is inverse condemnation. As argued above, this remedy is not a creation of the District Court or of the Legislature, but is a constitutional right. If the landowner alleges that a taking has occurred, he has the same rights and burdens as any other property owner proceeding under an inverse claim.

---

[6]As argued above in Point 111, this language is a lesser standard than that standard for a constitutional taking. A constitutional taking only occurs when a regulation deprives the landowner of **all** reasonable uses. Estuary Properties, supra.

In summary, §337.241(3), Florida Statutes, treats all landowners within an area *of* reservation who administratively challenge the reservation similarly. Also, if the landowner alleges a taking, he receives the same treatment as other property owners claiming inverse condemnation. Consequently, §337.241(3), Florida Statutes, does not deny equal protection *of* law.

POINT V

SECTION 337.241(3), FLORIDA STATUTES, DOES NOT REQUIRE A HEARING OFFICER TO MAKE A DETERMINATION OF A CONSTITUTIONAL ISSUE.

As argued above in Point 111, during an administrative hearing under §337.241(3), Florida Statutes, the hearing officer does not determine whether a taking has occurred. This is determined by a circuit court judge either when the Department files an eminent domain proceeding under Chapters 73 and 74, Florida Statutes, or when the landowner files an inverse condemnation action. The mere fact that a legislative staff summary likens the administrative proceeding to an inverse suit does not alter this. Accordingly, Joint Ventures' argument is uncompelling.

POINT VI

JOINT VENTURES' ARGUMENT AS TO THE CONCURRING OPINION SHOULD BE DISREGARDED AS IRRELEVANT.

Joint Ventures' argument challenging the concurring opinion of Judge Ervin is indeed puzzling in that it is well known that concurring opinions have no binding effect as precedent and are not a part of the law of the case. Rachleff v. Mahon, 124 So.2d 878 (Fla. 1st DCA 1960). This argument should be disregarded as even Joint Ventures admits the issue is irrelevant. **See** I.B. p. 42, footnote 8. However, the Department does agree with Judge Ervin that Joint Ventures' appeal was not ripe as they failed to prove in the proceedings below that the subject property had lost beneficial use of a substantial portion of the property.

CONCLUSION

Joint Ventures' academic knowledge of the Constitution of the Soviet Union is impressive, but it is abundantly clear that Joint Ventures has lost sight of basic tenets of American jurisprudence. Inherent in every civilized government is the sovereign power to regulate the use of private property in furtherance of the public health, safety, morals and general welfare. This Court long ago noted:

> It (the police power) was inherent in the people long before the constitution was promulgated and the makers of the constitution declined to meddle with it. It was recognized as a power outside the constitution limited by the concept of common sense and reason. It was one of the powers reserved to the States by Article 10 of the Federal Constitution.

McInerney v. Ervin, 46 So.2d 458 (Fla. 1950).

Accordingly, the Department of Transportation asks this Court to find 5337.241, Florida Statutes (1987) constitutional, to affirm the decision entered by the First District Court of Appeal, and to answer the certified question in the negative.

Respectfully submitted,

MAXINE F. FERGUSON
Appellate Attorney
FLORIDA BAR NO. 441139
THOMAS H. BATEMAN, III
General Counsel
Department of Transportation
Haydon Burns Building, MS 58
605 Suwannee Street
Tallahassee, FL 32399-0458
904/488-9425

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 31st day of March, 1988 to ALAN E. DeSERIO, ESQUIRE, 777 South Harbour Island Boulevard, Suite 900, Tampa, Florida 33602.

MAXINE F. FERGUSON

INDEX TO APPENDIX

DOCUMENT PAGE

1. Opinion of the District Court dated January 29, 1988 1