IN THE SUPREME COURT OF
THE STATE OF FLORIDA

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CASE NO. 71,878

JOINT VENTURES, INC.,

Petitioner,

V.

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER JOINT VENTURES, INC.
(ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT)

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STATEMENT OF THE CASE

The appellant/petitioner, JOINT VENTURES, INC., requested an administrative hearing, pursuant to Sec. 337.241(3), Fla. Stat., in order to challenge the filing of a "map of reservation" which was filed in November, 1985, and which encompassed 6.49 acres of a larger 8.3 acre tract owned by the appellants. (R:201-203). In its petition the appellants alleged that the regulation was unconstitutional and violated both the United States and Florida constitutions; that the regulation was unreasonable and arbitrary, and that the regulation had impaired and frustrated a previously executed contract for the sale of the property. (R:201-203).

At the hearing, the constitutionality of Sec. 337.241, Fla. Stat. was raised in order to preserve the issue. (R:11-12; 231-232 - Order of Hearing Officer).

Upon consideration of the evidence offered the hearing officer ruled adversely to the claim of the owner finding that it had failed to prove "that the action of DOT in filing the map of reservation is unreasonable or arbitrary." (R:237). The petition of the owner was then dismissed. (R:237-289) (A:1-8).

The hearing officer interpreted the provisions of Sec. 337.241(3), Fla. Stat., as requiring the entry of a final order rather than the usual recommended order. (R:236). The order entered was timely appealed as such by the owner. (R:241).

Subsequently, the DOT moved to dismiss the appeal alleging that the DOT, and not the hearing officer, was required to enter the final order. The District Court denied the motion, but relinquished jurisdiction of the cause to the DOT for entry of a final order. The DOT order adopted the Findings of Fact set forth in the order previously entered. It also adopted the conclusions of law expressed in the hearing officer's order, except that portion which discussed the nature of the order to be entered by a hearing officer. (R:242) (A:9-10).

The owners timely sought review of the final order and challenged the constitutionality of Sec. 337.241, Fla. Stat. After oral argument the owners moved the District Court for leave to supplement the record with certain correspondence that was not available to the owners at the time of the administrative hearing held March 27, 1986. (A:13-16). The correspondence, dated April 24, 1986, notified the owners that the purchaser had terminated the purchase agreement and demanded refund of its deposit. (A:16). The District Court subsequently denied the motion. (A:17).

During the pendency of the appeal the DOT formally condemned the property of the owners which was covered by the map of reservation. (A:21-29, 30-32). The DOT took possession, upon deposit of the "good faith" estimate on April 28, 1987 (A:33), which was 16 months after the map of reservation was imposed. The owners counterclaimed in inverse condemnation alleging a taking for the time period from the imposition of the map of reservation to the formal condemnation of the property. (A:35-39). The cause thereafter was settled as to both the formal condemnation and the

inverse claim. **(A:40-43).** The parties agreed that the appeal would remain pending notwithstanding the settlement. **(A:44-45).**

Subsequently, the DOT moved to dismiss the appeal as moot. **(A:18-61).** Upon consideration of the DOT's motion and the owners response **(A:62-70),** the Court denied the motion, finding that the cause presented a question of great public importance.; **(A:71).**

The District Court rendered its opinion on January **29, 1988,** upholding the constitutionality of Sec. **337.241,** Fla. Stat. **(A:72-89).** The Court based this ruling upon the finding that an owner has a remedy in addition to that provided by the statutory provision in that an owner can pursue an inverse condemnation action in circuit court. **(A:78-79).**

The District Court found that the cause involved a question of great public importance and certified the following question to this Court for resolution:

> Whether subsections **337.241(2)** and **(3)** are unconstitutional in that they provide for an impermissible taking of property without compensation and deny equal protection and due process in failing to provide an adequate remedy. **(A:**79)

STATEMENT OF FACTS

In November, **1985,** the Department of Transportation f led a **"map** of reservation", pursuant to Sec. **337.241(1),** Fla. Stat., which encompassed the majority of the property owned by the petitioner. **(R:28).** (See Exhibit **1:** Diagram of Reservation Area on the following page). It was stipulated by the parties that the

:CREST VILLA NO. 2.

PG. 36 NOTE: BLKS. A, B, C, D & PART OF BLK. E
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Map of Reservation
Outline of Property in Green

Department of Transportation had compiled with the necessary notice, filing and approval requirements of Sec. 337.241(1), Fla. Stat. (R:157).

The property at issue is located in Hillsborough County, Florida, adjacent to the intersection of Dale Mabry Highway and Waters Avenue. (R:65). The property is currently vacant, but is surrounded by industrial and commercial uses. (R:19;65). The property has been held for investment and potential development since 1969; has been demucked and filled at various locations (R:20); and has been partially cleared. (R:21). The highest and best use of the property is for commercial development (R:25;66), consistent with the surrounding uses of the property. (R:19;65).[1]

The parent tract is 8.3 acres in size, while the area encompassed within the reservation map is 6.49 acres. (R:22;77). To the west of the property is a drainage canal referred to as Channel H. It was present when the current owners purchased the property. (See: H.O. Exhibit 1) (R:21). With the construction of Channel H the property was essentially dewatered resulting in a diminishment of the functions normally performed by wetlands. (R:46). A portion of the property continues to perform a wetlands

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[1]It was recognized in the Order adopted by the DOT that: "During the period between 1969 and present the value of the property has gradually risen until today it is sufficiently valuable to warrant development and the cost associated therewith." (R:232) (A:2).

function **(R:47;104-105),** although the habitat has been adversely impacted by the presence of Channel H. (R:48).[2]

The entire tract falls within the jurisdiction of the county's Environmental Protection Commission. Prior to the announcement by the Department of Transportation of its map of reservation, the Environmental Protection Commission inspected the property in an effort to determine the extent to which the property was developable. In a letter to the owners it was stated that 85% of the entire tract could be developed. (R:23;41) (See: H.O. Exhibit 2) (A:12). Private consultants hired by potential buyers of the tract also confirmed the developable nature of the property. (R:25).[3]

Prior to the announcement by the DOT of the map of reservation, the owners also worked with the State Department of Environmental Regulation dredge and fill inspector. It was the job of the dredge and fill inspector to delineate areas of wetlands, make recommendations on dredge and fill permits, and to advise owners regarding the type of use that could be made of the property. (R:44). An inspection of the property was made from which it was

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[2]See also the Order adopted by the DOT. (R:233).

[3]At the hearing the DOT presented the testimony of an employee of the local DER Office in Tampa. It was represented that the determination made by the Hillsborough Environmental Commission was not binding on the DER. (R:99-100). The witness stated, however, that he did not have sufficient information to determine if 85% of the tract was developable. Nor could he made a determination of what type of development would be permitted. (R:100-101). The witness did make it clear that he was not saying that the applications for dredge and fill would be denied. (R:105).

concluded that the existing wetlands were impacted; the property was essentially dewatered by the construction of Channel H; as a result of the dewatering many of the wetlands functions were diminished. (R:45-46). A sketch of the uplands and wetlands area of the property was prepared. (R:48) (See: H.O. Exhibit 3). After viewing the property it was concluded that a 1/2 to 1 mitigation plan was acceptable. The example given was that if two acres of wetlands were to be developed, replacement of that wetlands would be required with one acre in another area of the property. (R:50-51).[4]

In October, 1985, prior to the DOT's notification of its intent to file a map of reservation, the owners entered into a contract for the sale of the entire property in the amount of $800,000. (R:27-28). There were provisions in the contract which protected the purchaser in the event it was determined that the property could not be developed. (R:35-36). It was the opinion of the owner's appraisal witness that the inability to secure permits for development, due to the filing of the map of reservation, left the property without any utility. (R:68-69).

Subsequent to the filing of the map of reservation (R:105), additional meetings took place between the DOT, the Department of Environmental Regulation, the owners, and the potential purchaser.

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[4]The DER representative offered by the Department testified that he had not personally inspected the property (R:102), but that one of his inspectors had made the preliminary determination of the extent of wetlands on the tract. (R:96). From this determination, it was estimated that 40 to 50% of the property within the area of the map of reservation was within the dredge and fill jurisdiction of the DER (R:97-98).

The purpose of these meetings was to discuss the permitting needs of the parcel, to clarify the Department of Environmental Regulation's jurisdiction over a portion of the property (R:95), and to see if the contract purchasers could still utilize the property in conjunction with the DOT. (R:32-33). Subsequent inspections confirmed that a portion of the property fell within wetlands jurisdiction (R:97-98), but the Department of Environmental Regulation had not gathered sufficient information to determine to what extent the property was developable or the type of development that would be permitted (R:100-101). The current Department of Environmental Regulation representative would not state that the property was undevelopable. (R:105).

Neither the owners nor the potential purchaser had submitted any formal development plans or applied for any of the necessary dredge and fill permits prior to the time the map of reservation was imposed. (R:33-35). Likewise, after the map of reservation was imposed, no attempt to secure development permits was made by either the owner or the potential purchaser. (R:39). As mentioned previously, all attempts at development were in the preliminary stages at the time the map of reservation was imposed.

The purpose of reserving this property was for future storm water drainage which would result from a planned project to change Dale Mabry Highway from four lanes to six lanes. (R:112-114).[5] A

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[5] The engineering witness offered by the DOT made it very clear that the purpose of filing the map of reservation was to prevent anybody from constructing buildings or making use of the property (Footnote Continued)

timetable for the construction of this project was not presented (R:123-126), although one witness thought the plan was to have construction plans completed by August, 1987, and to let a construction contract by December, 1987. (R:126). It was agreed, however, that any project is subject to change and is dependent upon funding. (R:154-155).[6]

For purposes of preserving the issue, the owners raised the constitutionality of Section 337.241, Fla. Stat. (R:11-12;74). The hearing officer entered an order, which was adopted by the Department, finding that the owners failed to prove that the "action of the DOT in filing the map of reservation is unreasonable or arbitrary." (R:237). The hearing officer apparently did not consider the evidence that the filing of the map would limit the future use of the property when deciding the issue of whether the regulation was unreasonable, since the order entered finds that this evidence "in effect, constitutes a challenge to the constitutionality of the statute." (R:237).

(Footnote Continued)
until the drainage plans could be finalized and condemnation proceedings could begin. (R:120). Th intent was to maintain the status quo until DOT made use of the property. (R:122).

[6] The District Court acknowledged in its opinion that the DOT has since condemned the property within the area of the map of reservation and that the parties had entered into a settlement on that action and on the owners' counterclaim for inverse condemnation. The Court, however, determined that "the issue addressed here is one of great public importance and is likely to recur" and certified a question to this Court for resolution.

The District Court rendered an opinion upholding the validity of the challenged provisions. (A:72-89) and certified the following question:

> Whether subsections 337.241(2) and (3) are unconstitutional in that they provide for an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide as adequate remedy. (A:79)

The owners have timely appealed and request that this Court enter its decision answering the certified question in the affirmative and declaring the challenged provisions as facially unconstitutional.

SUMMARY OF ARGUMENT

The District Court has certified the following question to this court:

> WHETHER SUBSECTIONS 337.241(2) AND (3) ARE UNCONSTITUTIONAL IN THAT THEY PROVIDE FOR AN IMPERMISSIBLE TAKING OF PROPERTY WITHOUT JUST COMPENSATION AND DENY EQUAL PROTECTION AND DUE PROCESS IN FAILING TO PROVIDE AN ADEQUATE REMEDY.

The question certified should be answered in the affirmative and the cited statutory provisions declared facially unconstitutional.

Sec. 337.241(2)(a) and (b), Florida Stat. (1986) is unconstitutional on its face as an attempted exercise of the power of eminent domain without the payment of compensation. The statute purports to deny, for up to 10 years, any use of vacant land over

which a map of reservation is imposed. During this 10-year period the owner receives no compensation even though all use of the property is denied. The imposition of a map of reservation is tantamount to the taking of an **"easement"** over the owner's property.

Sec. 337.241(2)(a) and (b), Florida Stat. (1986) is facially unconstitutional as an improper attempted exercise of the police power. Under the provision, property is not regulated. Instead, private property is <u>reserved</u> for public use without the payment of compensation.

The provisions cited above do not seek to prevent a public harm, but rather convey a tremendous public benefit. The provision benefits the public by creating a **"land"** bank into which the state can deposit private property without paying for it. The public is benefited in that they can make withdrawals from that **"land"** bank at any time during the five-year period. During the time the property is in the **"land"** bank the public, not the owner, has complete control and dominion over the property. The public further benefits because at some time in the future, if the property is acquired, they will be required to expend less costs in the acquisition. Because the regulation creates only a public benefit, it is an exercise of the power of eminent domain.

Sec. 337.241(3) places a substantially greater burden of proof to establish a taking than that required under any other situation involving a governmental taking. As such, the provision denies equal protection of the law and is unconstitutional.

Sec. 337.241(3) requires the determination of a constitutional issue by an administrative hearing officer, i.e., has a taking

occurred in violation of Article X, Sec. 6. Such determinations are to be made only by the judiciary.

The District Court, after recognizing the constitutional infirmity of the challenged provisions erred in not striking down the provision as facially unconstitutional. Instead the District Court sought to create a new remedy, contrary to the clear legislation intent of the provision. The District Court opinion should be quashed for grafting on a remedy that was not provided by the legislation.

The concurring opinion should be quashed, because it suggests that an owner should follow a futile path of permit applications, when the statute on its face prohibits the issuance of such permits.

The owners request that this court strike down the provisions in dispute as facially unconstitutional.

ARGUMENT

Over 25 years ago Justice Drew, in a special concurring opinion, exhibited foresight and wisdom when he stated:

> The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs, is no reason to depart from the firmly established principal that under our system the rights of the individual are matters of greatest concern to the Courts. The powerful government can usually take care of itself; when the Courts cease to protect the individual - within, of course, constitutional and statutory limitations - such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the necessity of the Courts in seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed. Jacksonville Expressway Authority v. Henry G. Dupree, 108 So.2d 289, 293 (Fla. 1958).

In its zeal to provide a means by which the Department of Transportation can minimize the costs of future acquisition of private property, the legislature has enacted a provision which has fulfilled the prophetic warning of Justice Drew. In the application of Sec. 337.241(1) - 337.241(4), Fla. Stat., this court can witness, first-hand, how "individual rights" are rapidly being swallowed up and disappearing into the "maw of the **sovereign."**

THE STATUTORY PROVISIONS

Section 337.241(1), Fla. Stat. (1986), provides that the Department of Transportation may prepare and file a map of reservation delineating the limits of any proposed right of way for

eventual road widening or for the initial construction of a road.

Section **337.241(2)**, Fla. Stat. **(1986)**, provides:

> 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 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). (Emphasis Supplied)

Section **380.031(4)**, Fla. Stat., referred to in the above secti n defines "development permit" as follows:

> "Development permit" includes any building permit, zoning permit, plot approval, or rezoning, certification, **variance**, or **other action** having the effect of permitting development as defined in this chapter.

Section **380.04(1)**, Fla. Stat., defines **"development"** as:

> ...the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels. (Emphasis Supplied)

The statute contains no procedure for a variance or exception to the "no permit" prohibition. Further, the statute makes no provision for compensation to an owner during the 10 years that the owner's land must remain vacant and unused.

THE IMPACT OF THE STATUTE

The net effect of the statute, where the map of reservation applies to vacant land, is to deny an owner the right to construct or develop anything on the property for at least five, and possibly up to 10 years. An owner cannot even subdivide the vacant property into 3 or more lots! Since every act relating to the property, except agricultural use (which is excluded from the definition of **"development"** per Sec. 380.04(3)(e)) requires some permit from the local or state authorities, the land must remain vacant during the 10-year period the map of reservation can remain in effect.

The purpose of this legislation is apparent: prevent all development or use of the property so that **"if"** the property is acquired during or after the expiration of the 10-year period, the cost of acquisition will have been substantially reduced or depressed by the prohibition of any use of the property.

The statute places no burden or obligation upon the Department to acquire the property after the expiration of the 5 to 10-year period. The provision allows the Department to have complete control over the property within the area of reservation, but contains no reciprocal requirement obligating the Department to go forward with project or right of way acquisition. More important,

there is no provision for compensation for the time period during which the map of reservation remains on the property.

The provision, in essence, allows the Department to create a **"land"** bank of various parcels of private property, from which the Department may or may not make withdrawals during the 10-year term. The problem, however, is that the Department is using **"private"** property to fill a **"public"** account, without offering any compensation for it. This is clearly prohibited by both the Florida and United States constitutions.

PRELIMINARY CONSIDERATIONS

The fact that the legislature has sought ways to alleviate the cost to the public for the acquisition of the land that may be used for future right of way is not reprehensible. As noted by the court in Dade County v. Still, 370 So.2d 64 (Fla. 3rd DCA 1979), affirmed 377 So.2d 689 (Fla. 1979): "It is natural for governmental authorities to seek way to prevent owners from using land which might at sometime in the future be used for streets or roads." Id. at 66. The court, however, immediately went on to state:

> Nevertheless, the principle must be adhered to that no action of the government can constitutionally deprive an individual of his property without full compensation for the taking. Article X, Section 6(a), Fla. Id. at 66.

The court condemned an attempt by the local government to suppress development of property in order to keep down future costs of acquisition in Board of Commissioners 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). In that cause the court was faced with a factual setting that evidenced a deliberate attempt by state and city officials to use every means available to restrict the private development of land within the proposed area of the Capital Center project. **Id.** at 79-80. Noting that an unreasonable and arbitrary enactment may be inspired by "legitimate motives" and "exuberant civic enthusiasm", the court went on to warn:

> However, we are not inclined to commend an arbitrary exercise of the police power by one branch of government in order to pave the way for a less expensive exercise of the power of eminent domain by another branch to the detriment of the private property owner. Even when adorned with a mantle of civic improvement we cannot conceive of a policy of government afflicted with greater potentials for abuse of the private citizen. The only difficulty with the desires of all of the officials as well as the effort which they put forth to effectuate their wishes, simply was that out of their ambition to construct an attractive Capitol Center that would be a credit to all of Florida they imposed upon certain private property owners in the involved area the burden of suffering what amounted to an arbitrary and unreasonable restraint on the use of their property. **Id.** at 85.

The same theme was expressed in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.322 (1922), where the court warned:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the

constitutional way of paying for the change. (260 U.S. at 416).

This established doctrine was recently reaffirmed in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1988)

The enactment under consideration in this cause, more than likely, was inspired by "good motives", but the "civic enthusiasm" has gone too far and has placed an unconstitutional burden on the landowner of this state.

POINT I .

SEC. 337.241(2) (a) AND (b) ARE FACIALLY UNCONSTITUTIONAL IN THAT IT MANDATES A DENIAL OF ALL USE OF VACANT PROPERTY UPON THE IMPOSITION OF A MAP OF RESERVATION IN DEROGATION OF ARTICLE X, SEC. 6 AND ARTICLE I, SEC. 2 AND 9, FLORIDA CONSTITUTION.

In its decision the District Court declined to invalidate the statute because it perceived that the owner had a remedy available by way of an inverse condemnation action in circuit court. The convenience of this remedy does not, however, address the facial unconstitutionality of the provision any more than a band-aid can be deemed a cure for skin cancer.

The provision is constitutionally offensive on its face, for several obvious reasons.

A.

First, the statute, on its face, is designed to deny an owner of vacant land any use of the property that falls within the boundaries of a map of reservation. This violates the most basic premise of private property ownership: no property shall be taken without the payment of full compensation. (Article X, Sec. 6(a), Florida Constitution). Once the map is in place **"no** development permits...shall be granted by any governmental entity for new construction of any type." Within the area of the proposed road construction "development permits...shall **not** be issued for a period of **5** years." A "development permit" includes any "action having the effect of permitting development", and **"development"** includes any activity which would cause any change in the "use or appearance" of the land.

The mere enactment of the provision is constitutionally offensive, because it evinces a clear intent to deny any and all use of vacant land upon which a map of reservation may be placed. The statute goes far beyond a mere regulation; rather it authorizes the reservation of private property for public use. The former is an exercise of the police power, the latter is properly considered an exercise of eminent domain.

This court has not hesitated to strike down, as facially unconstitutional, statutory provisions which, under the guise of the police power, are actually an exercise of the power of eminent domain. In Storer Cable T.V. of Florida, et al. v. Summerwinds Apartments Associates, Ltd., et al., 493 So.2d 417 (Fla. 1986) this court invalidated a provision which mandated that a property owner

must provide cable television access to tenants of an apartment complex and which failed to provide for any compensation to be made to the owner for such access. Id. at 418.

The provision was held to be constitutionally infirm and in violation of the requirements of Article X, Sec. 6 and Article I, Sections 2 and 9, Fla. Const. Id. at 420. The provision was held to be an unconstitutional exercise of the power of eminent domain even though the intrusion upon the owner's property was minimal: the attachment of "plates, boxes, wires, bolts and screws" to the owner's building. Id. at 419.

By comparison, the statutory provision attacked in this cause goes well beyond the minimal interference with the owner's property presented in Storer. In this cause the provision denies an owner what must be considered the cornerstone of the right of property ownership: the ability to use the property. The statute, on its face, denies all use of any property covered by a map of reservation. As such, it goes well beyond regulation and constitutes a reservation of private property for public use; i.e., an exercise of the power of eminent domain.

B.

The provision is also unconstitutional on its face as improper exercise of the state's police power. Cf: Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., supra at 85. In Tallahassee Bank & Trust Co., the court noted the fact that "many decisions" had condemned the arbitrary use of alleged "police power" legislative enactments for the purpose of freezing land value,

pending acquisition of the property, citing: Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N.W. 2d 195, 199 (Mich. 1949); Long v. City of Highland Park, 329 Mich. 146, 45 N.W. 2d 10 (Mich. 1950); Robyn v. City of Dearborn, 341 Mich. 495, 67 N.W. 2d 718 (Mich. 1954); State ex rel Tingley v. Gurda, 243 N.W. 317 (Wis. 1932); Kissinger v. City of Los Angeles, 327 P.2d 10 (Cal.Ct.App. 1958).

The decisions cited above recognize that such enactments are not a proper exercise of the police power and that it is the duty of the court to set aside legislative provisions which are discriminatory, unreasonable and oppressive and that legislative provisions which seek to **"reserve"** property in order to hold down value, so that it can be acquired less expensively at a later date, are indeed within those categories.

In State ex rel Tingley v. Gurda, supra., an ordinance was imposed which limited the use of the owner's property to residential. **Id.** at 318. In condemning the city's attempt to use the ordinance to suppress the value, of the property pending acquisition, the court went on to state:

> The zoning power is one which may be used to the great benefit and advantage of a city, but, as this case indicates, it is a power which may be greatly abused if it is to be used as a means to depress the values of property which the city may upon some future occasion desire to take under the power of eminent domain. Such a **use** of **the** power **is** utterly unreasonable, **and** cannot **be** sanctioned. **...**We have little hesitation in pronouncing this ordinance, insofar as it places relator's property in a residential district, utterly unreasonable and void, for

> which reason the judgment of the lower court must be affirmed. Id. at 320. (Emphasis Supplied)

In Long v. City of Highland, supra., we find similar condemning language directed towards the city's misuse of its legislative authority:

> Use of zoning power as a means of depressing the value of property which the municipality contemplates taking under the power of eminent domain is such a maladministration of the power to zone property as to require the deprivation of the use of such power with respect to property so affected. Id. at .

The point has been adjudicated time and again with uniform results. See Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (N.Y. 1893); Grosso v. Board of Adjustment of Millburn Tp., 61 A.2d 167 (N.J. 1948); Petersen v. City of Decorah, 259 N.W. 2d 553 (Iowa Ct. App. 1977); Henle v. City of Euclid, 125 N.E. 2d 355 (Ohio Ct. App. 1954); Hovert v. Board of County Commissioners, 278 A.2d 588 (Md. 1971); State ex rel Scandrett v. Nelson, 240 Wis. 438, 3 N.W. 2d 765 (Wis. 1942); State v. Griggs, 358 P.2d 174 (Ariz. 1960); Lackman v. Hall, 364 A.2d 1244 (Del. 1976); Roer Construction Corp. v. City of New Rochelle, 136 N.Y. S.2d 414 (N.Y. App. Div. 1954); Lomarch Corp. v. City of Enslewood, 237 A.2d 881 (N.J. 1968); Jensen v. City of New York, 399 N.Y. S.2d 1179 (N.Y. 1977); R. G. Dunbar, Inc. v. Toledo Planning Commission, 52 Ohio App. 2d 45, 367 N.E. 2d 1193 (Ohio Ct. App. 1976); Ventures in Property I v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (Kan. 1979); Maryland-National Capital Park & Planning Commission v. Chadwick, 286 Md.1, 405 A.2d 241 (Md. 1979);

Howard County v. JJM, Inc., 301 Md. 259, 482 A.2d 908 (Md. 1984); See also Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (Pa. 1951) where the court described the city's attempt to "freeze" the value of the owner's property by legislation as "a taking of property by possibility, contingency, blockade and subterfuge." Id. at 37. Citing back to Forster v. Scott, supra., the court noted that what the city "cannot do directly it cannot do indirectly, as the constitution guards as effectually against insidious approaches as an open and direct attack." Miller v. City of Beaver Falls, supra. at 38. The court went on to stress:

> The city is not without a remedy, but it cannot eat its cake and have its penny too. If it desires plaintiffs' land for a park or playground which it considers desirable or necessary for its future progress, it can readily and lawfully obtain this land in accordance with the Constitution which, we repeat, is the Supreme Law of the land. The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. All that is required is that just compensation be paid therefor. We do not propose that our Federal or State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest. Id. at 38-39.

Below, DOT argued that the creation and construction of public roads is a proper field for the exercise of the police power. There is no quarrel with this premise. However, what the DOT fails to recognize is that there is a difference between the preliminary plotting and planning of a road and activities which go beyond mere

planning. One is a proper exercise of the police power, while the other has all the vestiges of the exercise of eminent domain.

The seminal American case is Forster v. Scott, 32 N.E. 976 (N.Y. 1893), where the New York Court of Appeals articulated the sensible and ever since uniformly followed rule that while preliminary plotting and planning of public improvements **in and of itself** does not constitute a taking, where such activity goes beyond mere planning, and by statute or regulation attempts to prevent the affected landowner from using or improving his land pending the public acquisition, the regulation or statute attempting to do so becomes unconstitutional. As Forster made clear, the right of user is the most important property right and hence any legislation that would deprive the affected landowner thereof in anticipation of a condemnation, would amount to an uncompensated taking in advance of condemnation, thereby achieving indirectly what the constitution forbids **Id.** at 977. See also Lewis on Eminent Domain, Vol. 1, Sec. 226 (3rd Ed., 1909); Nichols on Eminent Domain, Vol. 1, Sec. 1.42[9] (Rev. 3rd Ed., 1976).

As the courts have uniformly done before, this court should reject any attempt to slip the disputed provisions into the category of a proper exercise of the **"police power".** The provisions clearly do not attempt to regulate the owner's use of his land to prevent a **"harm"** to others around him, which is the essence of the police power. State Plant Board v. Smith, 110 So.2d 401, 405 (Fla. 1959). The provisions instead seek to establish a "public benefit" at the expense of a private property owner. Such is not a proper exercise of the police power, but rather is an exercise of the power of

eminent domain. Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1382 (Fla. 1981); Dept. of Agriculture & Consumer Services v. Mid-Florida Growers, __So.2d__ (Fla. 1988) (13 F.L.W. 40); State of Florida v. Leone, 118 So.2d 781, 784-785 (Fla. 1960). As the court held in Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., supra. at 85, the government's attempt to freeze the value of property pending future acquisition is "an arbitrary exercise of the police power".

In Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), this court discussed the factors that have been considered when the issue is one of police power vs'. eminent domain. Therein the court stated:

> There is no settled formula for determining when the valid exercise of police power stops and an impermissible encroachment on private property rights begins. Whether a regulation is a valid exercise of the police power or a taking depends on the circumstances of each case. Some of the factors which have been considered are:
>
> 1. Whether there is a physical invasion of property.
> 2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
> 3. Whether the regulation confers a public benefit or prevents a public harm.
> 4. Whether the regulation promotes the health, safety, welfare, or morals of the public.
> 5. Whether the regulation is arbitrarily and capriciously applied.
> 6. The extent to which the regulation curtails investment-backed expectations.
>
> (Citations Omitted) Id. at 1380-1381.

While the statute under attack in this cause, on its face, goes far beyond regulation and instead quite clearly attempts to reserve private property for public use, the analysis provided in Graham is useful from the standpoint of discerning whether a legislative enactment is a proper exercise of the police power or an exercise of the power of eminent domain. Considering the factors outlined in Graham leaves no doubt that Section 337.241 falls within the latter category.

1. Invasion:

While "physical invasion" is not present in the context of the usual inverse condemnation case (taking of land), the Florida courts also recognize that a regulation, with no physical invasion, can still constitute a taking. Id. at 1381; Albrecht v. State of Florida, 444 So.2d 8, 12 (Fla. 1984); Dade Co. v. National Bulk Carriers, 450 So.2d 213, 215 (Fla. 1984). As noted in Yuba Goldfields, Inc. v. U.S., 723 F.2d 884 (Fed. Cir. 1983): "Neither physical invasion nor physical restraint constitutes a sine qua non of a constitutionally controlled taking." Id. at 887. In Yuba, as in this cause, the government has prohibited the owner's use of the land.

But if a physical invasion were required, that requirement has been satisfied. Under Sections 337.241(1) through 337.241(4), the Department actually exercises more control and dominion over the property than the fee owner. The Department literally acquires an "easement" which gives them complete control over the property for a period of up to 10 years. This control includes both the surface (no permits of "any type" shall be granted), and subsurface (Sec.

380.04(1) includes "mining" with the definition of "development") of the property. Such exercise of dominion and control, whether viewed as an involuntary easement, a forced lease, or a stolen option to purchase, constitutes a physical invasion of the owner's "property".

The taking of an easement over land by governmental activity, without an actual physical invasion of the land occurs in cases where the government uses the owner's airspace to such an extent that the taking of an avigational easement is declared. City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1st DCA 1964), cert. denied 172 So.2d 597; City of Jacksonville v. Schumann, 199 So.2d 727 (Fla. 1st DCA 1967), cert. denied 204 So.2d 327; Hillsborough Co. Aviation Authority v. Benitez, 200 So.2d 194 (Fla. 2nd DCA 1967), cert. denied 204 So.2d 328.

Under the statute an "easement" is granted which not only extends from the ground up, but also encroaches into the subsurface of the property. This easement gives the DOT greater dominion and control over the property than the owner for a period of up to 10 years. Thus, the statute allows the invasion and taking of the owner's right of use but offers no compensation. This is constitutionally prohibited.

2. Economically Reasonable Use of the Property:

It hardly needs to be stated that legislation which denies the landowner the right to do anything with his property, has also denied him the right to make an economically reasonable use of his property.

At the hearing in this cause it was undisputed that the area within which the subject property is located reflects industrial and

commercial uses. (R:19; 65). Further, there is no dispute that the property was ripe for development. **(R:232).** Due to the map of reservation, all development was prohibited.

3. Public Benefit or Prevention of Public Harm:

It takes but a cursory reading of the disputed statutory provision to come to the conclusion that it confers a public benefit rather than prevent a public harm. The provision creates a **"land"** bank from which the DOT can make withdrawals at its discretion for a period of up to 10 years. The private property is deposited into this land bank as a hedge against any attempt by the owner to utilize the property, and thus increase its value. Its sole purpose is to freeze or depress the value of private property so that when, and if, the DOT gets around to acquiring it after the expiration of 10 years, the cost to the public would be minimal.

There is no public harm being prevented such as in the imposition of regulations to protect environmentally sensitive areas, or to prevent pollution that may be caused by the owner's intended use of the land. Such is a legitimate concern within the scope of the police power. Graham v. Estuary Properties, Inc., supra at **1381.** Nor is this a land use regulation of the type imposed by local zoning laws or comprehensive land use plans. The provision makes no attempt to regulate, for the protection of the public, the nature and type of development for land management purposes or other legitimate concerns addressed by proper zoning regulations.

Without dispute, the sole purpose is to **"freeze"** the value of property so that the cost of future acquisition is reduced. The

DOT's engineering witness, when asked by counsel for the DOT "...what was your intent by filing the map of reservation in this particular instance?", candidly answered: "The intent was to put--place--the property in such a situation that no buildings or use of the property could be made until the Department was able to finalize our drainage plans and begin the condemnation **proceedings." (R:120).**

The public is benefited by having this piece of private property in a **"land"** bank account, at no cost, for possible future use. The public is also benefited because they virtually have complete control over any development or use of the property and thus achieve the purpose of freezing the value of the property. The public is further benefited by the fact that they not only have dominion and control over the property, but they are under no obligation to acquire the property at the end of the 10 year period. Finally, the public is benefited because at some time in the future, if the property is acquired, they will be required to expend less costs in the acquisition.

This court, in Graham v. Estuarv Properties, Inc., supra, noted:

> If the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power. **Id.** at 1381.

In this cause there can be no doubt that the provision in dispute is an exercise of eminent domain.

4. Promotion of Health, Safety, Welfare or Morals of the Public:

The above caption is essentially the definition of what is characterized as the "police power." 10 Fla.Jur.2d Constitutional Law, Sec. 191. The theme that consistently runs through decisions defining the proper exercise of the police power is the presence of some **"harm"** or **"evil"** to be prevented. The police power "...rests upon the fundamental principle that every one shall so use his own [property] as not to wrong or injure another." State Plant Board v. Smith, 110 So.2d 401, 405 (Fla. 1959).

Judging the statute in question by the standard set out above leaves no doubt that the provision does not constitute a proper exercise of the police power. The provision very clearly does not seek to prevent the use of private property so "as not to wrong or injure another." Rather, as a matter of convenience and expediency for the public, the public is allowed to exercise full dominion and control over the use of property owned by another. This is clearly an invalid exercise of the police power and constitutionally prohibited. State of Florida v. Leone, 118 So.2d 781, 785 (Fla. 1960).

The fact that a provision, such as the one under attack, is not a valid exercise of the police power was also recognized by the court in Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co., supra. There the court condemned as "an arbitrary exercise of police power" an attempt to suppress the value of property so that future acquisition would be less costly. Id. at 85. Cf. Div. of Admin. State of Fla. D.O.T. v. Frenchman, 476 So.2d

224 (Fla. 4th DCA 1985), pet. rev. dism. So.2d ___, where the court held:

> ...<u>a public entity's mere future intention to condemn land may not operate to prevent the landholder from using the land for a lawful purpose</u>. To say otherwise is to confer on an indefinite and uncertain public plan, which may or may not be carried out in the foreseeable future, <u>essential attributes of an actual taking</u>, while the landowner remains uncompensated for the damage until the taking actually occurs, if it does. <u>Id</u>. at 229. (Emphasis Supplied).

This court, in <u>Graham v. Estuary Properties, Inc.</u>, supra, drew a distinction between the prevention of a public harm and the creation of a public benefit, noting:

> ...the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created. In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. <u>Id</u>. at 1382.

The decision then went on to state that if the sole result of the regulation was to create a public benefit, it would not constitute a proper exercise of the police power, giving the following example:

> ...Estuary is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power. Id. at 1382.

In State Plant Board v. Smith, 110 So.2d 405 (Fla. 1959), the cour summarized the differences between the exercise of eminent domain and the exercise of the police power. Therein the court stated:

> There is a very clear distinction between an appropriation of private property to a public use in the exercise of the power of eminent domain, and the regulation of the use of property - and its destruction, if necessary - in the exercise of the police power. In the exercise of the power of eminent domain the sovereign "compels the dedication of the property, or some interest therein, to a public use, or if already dedicated to one public use, then to another." (Citations Omitted)
>
> On the other hand, the police power is exercised by the sovereign to promote the health, morals and safety of the community (Citation Omitted); it rests "upon the fundamental principle that every one shall so use his own as not to wrong or injure another." (Citations Omitted). Id. at 404-405. (Emphasis Added).

Applying the principles set forth above, the provision in question certainly meets the definition of the exerc se of eminent domain. It cannot be denied that the statute forces an owner to dedicate his property by having it placed in the public "land" bank. The public has "use" of the owner's property to the same extent as if they have been granted an easement or lease of the property for up to 10 years. Yet no compensation is offered to the owner for its

loss of this use! Such activity is not a proper exercise of the police power, but an exercise of eminent domain!

5. Artibrary and Capricious Application of the Regulation:

The record does not support a conclusion that the statutory provision in this cause was applied arbitrarily to the owner's property. The selection of this piece of property as a potential future drainage facility was apparently made after studying several sites in the area. (R:132-136).

However, even if a regulation is applied in a non-arbitrary fashion, it may still be construed as a taking. Graham v. Estuary Properties, Inc., supra at 1381; Dade County v. National Bulk Carriers, supra at 215; Albrecht v. State, supra at 12. Thus, the arbitrary nature of the application of the provision is not a determinative factor in resolving the issue presented.

6. Curtailment of Investment-Backed Expectations:

The owners have held this property since 1969 with the expectation of development. It is undisputed that the property is now ripe for development. In fact, only a short time before the filing of the map of reservation, the owners had secured a contract for the sale of the 8.3 acres of $800,000.

To say that their expectations have been curtailed would be a gross understatement. They have been destroyed! Nearly 80% of their property is taken for up to a 10-year period. They are left with little more than an acre of land, when before the taking, they had over 8 acres to utilize in development!

The provisions of Sec. 337.241(2)(a) and (b), Fla. Stat. clearly violate the prohibition, contained in Article X, Sec. 6(a),

Florida Constitution and the 5th Amendment of the United States Constitution, that private property shall not be taken without the payment of compensation. The statutory provisions allow the DOT to take and control the owner's property for a period of up to 10 years by depositing it in a "land" bank from which DOT may make withdrawals. The public benefits tremendously, but the owner gets nothing. This is both unfair and unconstitutional. The owners request that this court, as it did in Storer Cable T. V. of Florida, supra, strike down the offending statutory provisions as facially unconstitutional.

POINT II

THE DISTRICT COURT ERRED WHEN IT SUSTAINED SECTION **337.241(2)** (a) AND (b) ON THE BASIS THAT ANOTHER REMEDY WAS AVAILABLE TO THE OWNER OTHER THAN THAT WHICH WAS PROVIDED BY THE STATUTE.

The District Court recognized the constitutional infirmity of the entire provision, finding that the remedy provided in Sec. **337.241(3)** was "unconstitutional as a denial of equal protection and due process", but then it proceeded to graft onto the statute an additional remedy: inverse condemnation in circuit court.

In Storer Cable T.V. of Florida, supra, this court refused to graft such a remedy onto a statutory provision which it found to be facially unconstitutional. **Id.** at **419.** The District Court erred in doing so in this cause. The provision must be judged according to the legislative intent gleaned from the language of the provision.

Since no compensation is provided, Sec. 337.241(2) should, as was the statute in Storer, be construed consistent with its clear legislative intent, resulting in finding that no compensation was intended. As is Storer, the section should be held to be unconstitutional on its face and in derogation of Article X, Sec. 6 and Article I, Sections 2 and 9.

POINT III

SECTION 337.241(2)(a) AND (b) ARE FACIALLY UNCONSTITUTIONAL IN THAT THEY AUTHORIZE A TAKING OF PRIVATE PROPERTY WITHOUT FIRST PROVIDING AN OWNER THE RIGHT OF A HEARING AND THE RIGHT OF A JUDICIAL DETERMINATION OF PUBLIC PURPOSE AND REASONABLE NECESSITY FOR THE TAKING OF THE PROPERTY, IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF ARTICLE I SECTION 9, FLA. CONSTITUTION AND ARTICLE V, UNITED STATES CONSTITUTION.

As discussed in Issue I, the statute, on its face, is an exercise of the power of eminent domain. As such, it must meet certain minimum due process requirements, including the provision of a hearing prior to the taking of the property and a judicial determination of public purpose and reasonable necessity to acquire the property.

In State Road Dept. v. Forehand, 56 So.2d 901 (Fla. 1952), the court recognized that the minimal due process cited above must be met before a statutory eminent domain provision could be upheld. There the Court was considering a constitutional challenge to the reenacted "quick-take" provisions of Chapter 74. Earlier, the

provisions had been held to be constitutionally infirm because they allowed property to be acquired without providing the owner with a hearing prior to acquisition. Id. at 902. The reenacted provisions of Chapter 74 remedied that defect by providing for notice and hearing prior to acquisition of the property.

Section 337.241(2)(a) and (b) essentially authorizes a **"quick take"** of an owner's property, i.e., the right of use, upon the filing of the map of reservation. This occurs without any judicial hearing in which the owner can challenge or contest the matter prior to the taking. This is the same constitutional defect which invalidated the **"quick-take"** provision of Chapter 74. The provisions under consideration should be judged by no less a standard.

Section 337.241(3) does provide for an administrative hearing, if requested by the owner, after the taking has already occurred. Such an after-the-fact hearing does not meet the strict standards set down in Forehand, supra. The provisions of Sec. 337.241(2)(a) and (b) should meet the same fate ,of the early Chapter 74 reenactment: unconstitutional as a denial of due process.

POINT IV

THE PROVISIONS OF SECTION 337.241(3), FLA. STAT., ARE UNCONSTITUTIONAL AS A DENIAL OF EQUAL PROTECTION UNDER THE LAW BECAUSE IT PLACES A GREATER BURDEN OF PROOF UPON AN AFFECTED LAND OWNER THAN THAT WHICH IS REQUIRED IN AN INVERSE CONDEMNATION ACTION.

In an apparent recognition of the potential impact the statutory provisions would have upon an owner's use of his land, the legislature attempted to provide a remedy for the affected property owner in Sec. **337.241(3),** Fla. Stat. **(1986)** This portion of the statute is likewise unconstitutional as a denial of equal protection of the law.

The provision states:

> 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 150 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 150-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.[7]

In order to obtain relief, after the fact, the owner must demonstrate two things: the regulation of the property is

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[7]Notably absent is any provision for compensation to be paid for the period of time during which the map of reservation is in place. Also absent is any provision for a hearing prior to the map of reservation taking effect.

unreasonable or arbitrary **and** that the effect is to deny a substantial portion of the beneficial use of such property.

The District Court agreed with the owner's contention that the statute placed a "double burden" upon the affected property owner (Opinion, **p.** 5) (A:75). It also agreed that the provision, considered on its own, was "unconstitutional as a denial of equal protection and due **process."** (A:75). However, the court refused to strike down the provision. Instead, it attempted to graft onto the statute a new remedy not contemplated by the legislature: inverse condemnation in circuit court.

As discussed previously, the District Court was not authorized to create a remedy where none had been provided by the legislature. The legislature clearly intended to impose a double burden of proof upon an affected land owner. The constitutional viability of the provision should be determined according to that clear legislative intent. Storer Cable T.V. of Florida, supra at 419-420.

The law in this state is well established that regulation may go too far and constitute a taking if it is unreasonable or arbitrary. Graham v. Estuary Properties, Inc., supra at 1381. However, even if the regulation is not unreasonably or arbitrarily applied, the regulation can still go too far and constitute taking. In other words "...a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking." Albrecht v. State, 444 So.2d 8, 12 (Fla. 1984); Dade County v. National Bulk Carriers, 450 So.2d 213, 215 (Fla. 1984). While the law clearly states the either situation will result in a taking, the statutory provision in dispute requires a finding that

both situations exist. The owner must prove not only is the regulation arbitrary or unreasonable, but also that he has been deprived of a substantial portion of the beneficial use of the property.

The unfair and discriminatory burden placed upon an owner under Sec. 337.241(3) violates Article I, Sec. 2, Fla. Const., in that it denies equal protection and application of the law to owners who have property affected by this provision. Any other property owner, who has property "taken" by some other governmental action, would have a lesser burden of proof than an owner under the disputed provision. There is no reasonable basis 'for such discrimination or classification.

Because the map of reservation provision impinges upon the fundamental constitutional right of an individua to possess and use his own property, a "strict scrutiny" analysis must be applied. Florida High School Activities Association, Inc, v. Thomas, 434 So.2d 306 (Fla. 1983); See also In Re Estate of Greensburq, 390 So.2d 40 (Fla. 1980) where the court also noted that the application of this test "is almost always fatal" to a legislative provision, and that it imposed a "heavy burden of justification upon the state."

There is absolutely no justification for requiring an owner, who is victimized by the statute in dispute, to bear a greater burden of proof in establishing a taking than any other owner whose property has been burdened by governmental action that goes "too far." The lack of any reasonable justification is fatal to the discriminatory provision of Section 337.241(3).

POINT V

SECTION 337.241(3), FLA. STAT. (1986), IS FACIALLY UNCONSTITUTIONAL IN THAT IT ATTEMPTS TO PLACE IN THE HANDS OF AN ADMINISTRATIVE HEARING OFFICER A DETERMINATION OF CONSTITUTIONAL ISSUE, WHICH MAY ONLY BE DETERMINED IN A JUDICIAL PROCEEDING.

Section 337.241(3) also purports to place in the hands of an administrative hearing officer the determination of whether a **"taking"** has occurred. As mentioned earlier, although the statute does not use the word **"taking"**, the two things that an owner must prove under the provision are the essence of an inverse condemnation action. This interpretation is confirmed by reference to a Staff summary prepared for SB 32-B, which created the provisions in dispute.

In the Staff Summary, dated June 22, 1977, and styled "Major Points of SB 32-B", it is stated in Item No. 4:

> The DOT is required to purchase all rights-of-way and is authorized to prepare maps for proposed hearing, with the Clerk of the Circuit Court. Such recorded maps shall establish set-back lines, areas of restricted construction permits and may serve as a basis for hearings under the APA analogous to inverse condemnation suits. (Emphasis Supplied) (A:11).

If a hearing officer is to make a determination that is **"analogous** to inverse condemnation", it must of necessity rule upon issues of a constitutional nature; i.e., has a **"taking"**, in violation of Article X, Sec. 6, Fla. Constitution, occurred under

the provision. This is clearly prohibited in an administrative proceeding. Cf: Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So.2d 153, 157-158 (Fla. 1983); Broward County v. LaRosa, 505 So.2d 422, 423-424 (Fla. 1987). Constitutional issues are resolved in judicial proceedings, not administrative hearings! Determination of an inverse condemnation issue is a "purely judicial function." LaRosa, supra at 423. Each factual situation involving the issue of a taking must be judicially determined. Dept. of Health & Rehabilitative Services v. Scott, 418 So.2d 1032, 1034 (Fla. 2nd DCA 1982).

Because the statute imposes upon a hearing officer, rather than the judiciary, the burden of determining the constitutional issue, and such power resides only in the judiciary, the provision is invalid. The remedy provided by the statute is therefore constitutionally defective and would necessarily violate the concept of due process of law because it denies an owner the judicial determination to which he is entitled.

POINT VI

THE POSITION TAKEN IN THE CONCURRING OPINION - THAT QUESTION IS NOT RIPE FOR RESOLUTION BECAUSE THE OWNERS HAD NOT APPLIED FOR ANY DEVELOPMENT PERMITS AFTER THE MAP OF RESERVATION WAS IMPOSED - IS CONTRARY TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE WHICH EXPRESSLY FORBIDS THE ISSUANCE OF ANY DEVELOPMENT PERMIT.

It is apparent from the opinion that the majority of the District Court did not agree with Judge Ervin's concurring opinion

in which it is suggested that a "taking" under Section **337.241** cannot be established until an owner applies for and is denied a development **permit.**[8] It is essential that this court address this topic because Judge Ervin's suggestion, if allowed to go uncorrected, will, without a doubt, create substantial confusion in the law relating to this subject.

The owners would respectfully suggest that, for several reasons, the position taken in Judge Ervin's concurring opinion is both legally and factually unfounded. The first of these is the simple fact that what Judge Ervin suggests as appropriate action is contrary to the clear and unambiguous language of the statute itself.

Section **337.241(2)** (a) quite clearly mandates that upon the filing of a map of reservation "**no** development permits.. .shall be granted **by** any governmental entity for new construction of any **type...**" If there was any doubt of the legislative intent, Section **337.241(2)** (b) hammers home the point again by providing that the filing of the map of reservation shall establish "**An** area of proposed road construction within which development permits...shall

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[8]This issue is, of course, irrelevant to the facial constitutional attack on the statute as an improper exercise of the police power, as well as an improper exercise of the power of eminent domain without the payment of compensation and the denial of minimal due process. The question of whether an owner must apply for a variance or permit is relevant only when the issue concerns an allegation of a regulatory taking under a proper exercise of the police power, and the owner's ability to utilize his property is at issue. The statute in this cause does not regulate, but reserves private property for public future use. Further, on its face, there is no question of the extent to which an owner may use his property. Under the provision all use is strictly prohibited!

not be issued for a period of 5 years." It also provides that the 5-year period may be extended an additional 5 years.

Judge Ervin suggests that an owner ignore the statutory language and apply anyway. If the statute contained some provision for an exception or a variance from the legislative mandate, the suggestion would merit consideration. But since no such exception or variance is found in the provision, and the legislative intent to deny all permits is clearly stated, Judge Ervin's suggestion cannot be seriously considered.

It is apparent from the concurring opinion that Judge Ervin is trying to read into the legislation something that has clearly not been provided by the legislature. As noted by this court in Storer Cable T.V. of Florida, supra at 419, such a construction is not permitted where it "would be contrary to the clear intent of the **legislature."** As mentioned above, the legislative intent is very clear: No permits shall be issued!

The concurring opinion cites to a number of other legislative provisions which, in Judge Ervin's opinion, should be read "in pari materia" with Sec. 337.241 and which provide some basis for an owner to seek a permit, in spite of the clear language found in Section 337.241(2)(a) and (b). This is very similar to the approach taken by the Third District, and chastised by this court, in Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984). In that cause the District Court tried to apply, in a dredge and fill dispute, the provisions of Sec. 373.617, Fla. Stat. (1981). This court rejected the District Court's application of the provision to

the facts of that case, found that the scope of the subject matter addressed by the statute was limited, and then held:

> The courts cannot amend or complete acts of the legislature in intending to supply relief in instances where the legislature has not provided such relief. Id. at 216.

The concurring opinion in this cause has tried the same approach: judicially amending the legislation to supply relief where the legislature has provided none. Other than referring to Section 380.031(4), Fla. Stat., for a definition of "development permits", the provisions of Section 337.241(2)(a) and (b) make no reference at all to any other statutory provisions. Review of the sections cited by Judge Ervin reveal they are totally inapplicable to the map of reservation provisions.

An examination of Chapter 380, specifically Sections 380.08(1) and 380.085, which are cited in the concurring opinion, reveals: 1) it is applicable to a totally different subject matter - protection of natural resources and environment of the state - compared to Sec. 337.241 - reserving proposed road right of way for future use; 2) Sec. 380.085 is applicable only to permits "required by this part", that is, those required under Chapter 380, Part I; Section 380.085 contains no language which can be construed as evincing a legislative intent to apply that section to situations involving Section 337.241(2)(a) and (b); Section 380.08(1) specifically limits its application to activities under "this chapter", that is, Chapter 380.

The same revelations are true of Sections 403.90, 403.201 and 403.061(14)(a). Chapter 403, known as the "Florida Air and Water Pollution Control Act", and specifically the sections cited above, contain nothing which evince a legislative intent that the provisions are applicable to situations under Section 337.241(2)(a) and (b). Section 403.90 deals with environmental regulation and applies only to permits "required by this chapter". Section 403.201 refers specifically to variances "from the provisions of this act". Section 403.061(14)(a) applies to "activity...covered by this chapter" and specifically refers to activity conducted by the Department of Transportation, not private landowners.

A cursory glance at the other statutory provisions referenced in the concurring opinion reveals that they are likewise inappropriate to the subject matter addressed in Section 337.241(2)(a) and (b): Section 161.212 is part of the "Beach and Shore Preservation Act" and refers specifically to permits "required by this chapter"; Section 253.763 deals with public lands and property and refers specifically to permits "required by this chapter"; Section 373.617 is part of the "Florida Water Resources Act of 1972" and applies only to permits "required by this chapter".

As in National Bulk Carriers, supra, and Storer Cable T.V. of Florida, supra, this court should rebuke any attempts by the District Court majority, or the concurring opinion, to graft onto the existing legislation a remedy where none was provided by the legislature. This court should reject the suggestion of the concurring opinion that the owner must follow the useless route of

applying for permits when the clear legislative intent is that none should be issued.

Factually, the record also contradicts the suggestion made in the concurring opinion that an owner might receive some kind of "variance". The engineering witness presented by the DOT at the administrative hearing conducted in this case stated very clearly that the purpose of the map of reservation was to prevent anybody from constructing buildings or making use of the property until the condemnation proceedings could begin. (R:120). The intent was to maintain the status quo until DOT made use of the property. (R:122). There is absolutely nothing in the record to suggest that the DOT would have given any consideration to a "variance" or "exception" to the statutorily imposed easement over the property.

Contrary to Judge Ervin's suggestion, the matter of the owner's inability to use the property was final at the time the map of reservation was filed. The statute provides no exception or variance to the clear and unambiguous prohibition: No development permits shall be issued by any governmental entity after the filing of the map of reservation, for up to 10 years. Translated: An owner is denied all use of vacant land over which a map of reservation is imposed. Solution: Compensate the owner for the time the map of reservation is in place. Since Section 337.241(2)(a) and (b) contains contain no such compensation provision, it is an unconstitutional exercise of eminent domain in violation of Article X, Section 6. Storer Cable T.V. of Florida, supra.

Both the majority and concurring opinions try in vain to sustain Section 337.241(2)(a) and (b) by adding to the statute something that the legislature did not provide, nor intended to provide. This court, hopefully, will not follow the same twisted path. The solution to the problem presented is to recognize the constitutional infirmity of the provision and to send it back to the legislature for reenactment, consistent with the constitutional requirements of Article X, Section 6.

CONCLUSION

If the constitutional foundation of our government provided "...the land, its minerals, waters and forests are the exclusive property of the state..."[9], then a provision such as Section 337.241(2) could not be assailed. That, thank God, is not the law of Florida, nor of the United States. The court's concern for the institution of private property has been expressed many times. This brief was prefaced with the expression of concern voiced by Justice Drew in Dupree, that the individual rights of an owner not be "swallowed up and disappear in the maw of the sovereign." Prior to Dupree, Justice Terrell rebuffed the idea that the constitution of this state would permit governmental action which reduced the guaranty of the right to own property to "nothing more than the tinkling of empty words."[10] His enduring expression concerning the

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[9]Article 11 of the Constitution of the Soviet Union.

[10]State Road Dept. v. Tharp, 1 So.2d 868 (Fla. 1941).

institution of private property is keenly applicable to the modern-day threat embodied in Section 337.241(2):

> American democracy is a distinct departure from other democracies in that we place the emphasis on the individual and protect him in his personal property rights against the State and all other assailants. The State may condemn his property for public use and pay a just compensation of it, but it will not be permitted to grab or take it by force....Forceful taking is abhorrent to every democratic impulse and alien to our political concepts.
>
> If American democracy survives and lives up to the function of its creation, it must do so by adherence to the code of moral and legal conduct promulgated by the Constitution, one provision of which is the sanctity of private property. No principle has contributed more to the material development of the country or done more to stabilize and balance its citizenship....It is one of the first duties of constitutional government to protect, and where the sovereign has a right to condemn for public use, it will not be permitted to appropriate except by orderly processes. The current of the law on this point will not lead to any other conclusion.[11]

Given these considerations, the owners respectfully suggest that the Court do nothing less than:

(1) Declare Sec. 337.241(2), Fla. Stat. (1986) facially unconstitutional and in derogation of Article X, Sec. 6 and Article I, Sections 2 and 9;

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[11] Id. at 870.

(2) Declare Sec. 337.241(3) facially unconstitutional and in derogation of Article I, Sec. 2;

(3) Quash the majority opinion of the District Court which erroneously failed to declare Sec. 337.241(2) and 337.241(3) facially unconstitutional;

(4) Quash the concurring opinion of the District Court which erroneously suggested that an owner must pursue a futile permitting process that is strictly prohibited by statute.

Respectfully Submitted,

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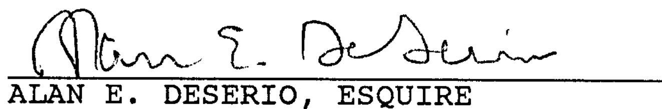
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to MAXINE F. FERGUSON, Department of Transportation, Haydon Burns Building, M.S. 58, 605 Suwannee Street, Tallahassee, Florida 32399-0458, this 1st day of March, 1988.



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