IN THE SUPREME COURT OF
THE STATE OF FLORIDA

JOINT VENTURES, INC.,

Petitioner,

v.

Case No. 71,878

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA,

Respondent.

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

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TABLE OF CONTENTS

Table of Contents i

Citation of Authorities ii

Preliminary Considerations 1

Argument 2

Conclusion 14

CITATION OF AUTHORITIES

Aains V. City of Tiburon,
447 U.S. 255, 65 L.Ed.2d 106,
100 S.Ct. 2138 (1980) 7

Board of Commissioners of State Institutions
V. Tallahassee Bank & Trust Co.,
108 So.2d 74 (Fla. 1st DCA 1959), writ quashed,
116 So.2d 762 (Fla. 1959) 5

City of Miami v. Romer,
58 So.2d 849 (Fla. 1952) 7, 8

City of Miami V. Romer,
73 So.2d 285 (Fla. 1954) 8, 9, 10

Division of Administration, State of Florida,
Dept. of Transportation V. Frenchman,
276 So.2d 224 (Fla. 4th DCA 1985), pet. rev.
dism., ___ So.2d ___ 12, 13, 14

Euclid V. Ambler Realty Co.,
272 U.S. 356, 47 S.Ct. 114, 71 L.Ed. 303 (1926) . . 13

Forster V. Scott,
136 N.Y 577, 32 N.E. 976 (N.Y. 1893) 10

Fox V. Treasure Coast Regional Planning Council,
442 So.2d 221 (Fla. 1st DCA 1983) 3

Graham V. Estuary Properties, Inc.,
399 So.2d 1374 (Fla. 1981) 3, 6

Kirby Forest Industries, Inc. V. U.S.,
104 S.Ct. 2187, 467 U.S. 1, 81 L.Ed.2d 1 (1984) . . 11, 12

Lee County V. New Testament Baptist Church,
507 So.2d 626 (Fla. 2nd DCA 1987) 5, 6

Loretto V. Teleprompter Manhattan CATV Corp.,
458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d
868 (1982). 4

Miller V. City of Beaver Falls,
268 Pa. 189, 82 A.2d 34 (Pa. 1951) 10

Penn Central Transportation Co. V. City
of New York,
98 S.Ct. 2646, 438 U.S. 104, 57 L.Ed. 631 (1978) . . 2, 3

Prunevard Shopping Center V. Robins,
447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d
741 (1980). 7

State Road Dept. V. Tharp,
1 So.2d 868 (Fla. 1941) 14

Storer Cable T.V. of Fla. V. Summerwinds
Apartments Associates, Ltd.,
493 So.2d 417 (Fla. 1986) 4

181, Inc. V. Salem County Planning Board,
133 N.J.Super. 350, 336 A.2d 501
(Super. Ct. 1975) 5, 6

Other Authorities:

Florida Statutes:

Section 337.241(2) 1, 2, 4

Section 337.241(2)(a) 6

Section 337.241(2)(b) 6

Section 337.241(3) 1, 2, 4

Chapter73 11

Chapter74 ll

PRELIMINARY CONSIDERATIONS

The argument presented by the DOT reflects an attitude that has probably reached epidemic proportions throughout this country. It is an attitude fostered daily by just about every business seeking to ply its trade. The attitude is probably best described as the **"credit-card"** syndrome.

How easy it is to pull out that small piece of plastic, run it through the imprinting machine, and walk away with your latest "absolutely had to have **it"** purchase. Of course, stirring deep within is the knowledge of the fact that in a few short weeks, the time to pay for the indulgence will arrive. For those who have overindulged, this can truly be a time of wailing and gnashing of teeth. Some pay promptly. Some pay a portion of their debt. Some pay nothing at all!

Now we consider Sec. **337.241(2)** and **(3)**, **Fla. ~~Stat.~~**, offering the DOT a **"credit-card,"** the map of reservation, with no limit to the account. With this credit-card, the DOT can acquire, specifically as to vacant property, the very essence of property ownership - the right to use it. Unfortunately, the DOT takes the position that need not pay for its purchase. The constitution, however, does not permit such an attitude. Instead, it mandates that if the State wishes to take property rights, it **must** pay **for** them.

There is no **"credit-card"** available to the State which permits the taking of property without payment. If the State owned all the property, there would be no problem. But it does not! It must pay for what it takes.

ARGUMENT

A. Throughout its brief, the DOT maintains that Sec. 337.241(2) and (3), do not deny the owners in this cause the use of the property covered by the map of reservation. In doing so, it discusses various situations other than that presented in this cause. What we are concerned with in this cause is ~~vacant~~ property!

When the statute is applied to the vacant property in this cause, it denies the owner all economically viable use of that property. The statute is specific - no development permits shall be issued by any governmental entity. Because the terms **"development"** and "development permit" are so broadly defined in Sec. **380.031(4)** and Sec. **380.04(1)**, the owners in this cause can make no viable use of the property.

DOT appears to suggest that the owners in this cause can use the property for **"agricultural"** purposes. It ignores the fact that the property is surrounded by industrial and commercial uses. That the property is ripe for development is undeniable. To suggest that the owners grow crops as an economically viable use is ludicrous!

B. The DOT has also suggested that in determining whether a taking has occurred, this Court should look at the owners ability to use his entire property, rather than just the area affected by the reservation. This position is rebutted simply by reviewing the decision of Penn Central Transportation Co. v. City of New York, **98** S.Ct. **2646, 438** U.S. **104, 57** L.Ed.2d **631 (1978)**, cited by the DOT.

In Penn Central, the terminal located on the owner's property was designated as a **"landmark"** and the entire block on which the terminal was located was designated as a "landmark site." **(98** S.Ct.

at 2655). When it discussed the taking issue and the "interference with the rights in the parcel as a whole," the court defined the parcel as "the city tax block designated as a 'landmark site'." 98 S.Ct. at 2662. What the court was discussing when it referred to the parcel as a whole was the area affected by the regulation itself.

When discussing the extent to which the regulation interfered with the owner's use of the property, and whether that interference justified the exercise of eminent domain, the court stated that the resolution of the issue required "a careful assessment of the impact of the regulation on the terminal site.'! 98 S.Ct. 2665. Again, the court clearly indicated that its concern was with the property that fell within the area of the regulation. Cf: ~~Fox v. Treasure Coast~~ Regional Planning Council, 442 So.2d 221 (Fla. 1st DCA 1983), where the owner's entire 1,704 acre tract development was subject to a development order issued under the provisions of Chapter 380 (1983). When determining if the denial of development use on a portion of the tract constituted a taking, the court's consideration of the "tract as a whole," was a reference to the property subject to the D.R.I. regulation. The same is true of ~~Graham v. Estuary~~ Properties, Inc., 399 So.2d 1374 (Fla. 1981). There, the owner's entire 6,500 acre tract development was subject to the D.R.I. regulations of Chapter 380.

It is the "whole" area, subject to the map of reservation, that is to be considered when determining if a taking has occurred. Since all viable economic use of that specific area is strictly prohibited under the statute, the fact of a taking cannot be denied.

C. DOT suggests that a mere "corner clip" of property by a map of reservation could not constitute a taking. This Court rejected the de minimus argument in Storer Cable T.V. of Fla. v. Summerwinds Apartments Associates, Ltd., 493 So.2d 417 (Fla. 1986). There, this Court noted: "A taking results regardless of the size of the area occupied." Id. at 419. It also cited, with approval, the language of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), where the court stated that "constitution protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."

D. The DOT's claim of no "permanent" taking under the map of reservation provisions is absurd. The statute denies the owner the use of his vacant land for up to 10 years! How long must an owner lose the right to use its property for the taking to be considered "permanent?" Cf. Storer Cable, supra, where this Court rejected a similar "permanency" argument. Id. at 419.

E. In response to owners position that the statutory provision is an improper exercise of the State's police power, the DOT tries to slip the provision into various legitimate categories, including "creation of safe and adequate highways." The point DOT misses is that Sec. 337.241(2) and (3) goes far beyond mere planning of roadways. Further, the provision goes far beyond the mere plotting of a roadway. Under the provision, the use of the land is actually reserved to the public.

The provision goes far beyond the permissible scope of regulation. Despite the DOT's denials, upon the filing of the map

of reservation, the DOT exercises far more control and dominion over the property than the owner. After the map is filed, who determines how the property can be used? Surely not the owner!

DOT's attempts to distinguish the out-of-state decisions, which have uniformly condemned the type of provision under attack in this cause, again misses the point. The cases were cited to point out the fact that the courts have consistently rejected such "reservation" provisions as an improper attempted exercise of the police power.

Florida is no exception. In an analogous situation, the court in Board of Commissioners of State Institutions v. Tallahassee Bank & Trust co., 108 So.2d 74 (Fla 1st DCA 1959), writ quashed, 116 So.2d 762 (Fla. 1959), declared the government's attempt to restrict private development in order to keep down the future costs of acquiring the property to be an "arbitrary exercise of the police power." Id. at 85.

This court should also review the recent decision of Lee County v. New Testament Baptist Church, 507 So.2d 626 (Fla. 2nd DCA 1987), (A:8-11), where the court declared facially unconstitutional a land use provision requiring the dedication of road right of way as a condition for issuance of a building permit. After finding that the provision violated the "rational nexus" test, in that there was no reasonable connection between the required dedication of land and the anticipated needs of the community caused by the owners proposed use of its land, the court went on to adopt the approach taken in 181, Inc. v. Salem County Planning Board, 133 N.J.Super. 350, 336 A.2d 501, 506 (Super. Ct. 1975). There, the court confirmed that "a

compulsory dedication," to be constitutionally valid, must have a rational nexus. The court in 181, Inc., supra, went on to hold:

> It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements -- not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. Lee County, supra at 629.

Two important principles were recognized in the Lee County decision. First, a provision can be declared facially unconstitutional because it exceeds the boundaries of a proper exercise of the police power. Second, it recognized that "land-banking" for future road use, as allowed in the provisions under review in this cause, is not a proper exercise of the police power!

If a land-use regulatory provision requires, in order to be constitutionally valid, a rational nexus between a compulsory dedication and the impact of the owners planned development of its land, how can Sec. 337.241(2)(a) and (b) be sustained? The provisions mandate a compulsory "dedication" regardless of how the owner intends to use its property. Further, the dedication is prompted not by an owners plan of development, but rather by an alleged general public need that might arise in the future! No clearer example of "public benefit" could be made. Graham, supra.

No clearer example of the type of situation where the exercise of the power of eminent domain is appropriate can be given.

F. DOT vainly attempts to deny that the purpose of the provision is to "freeze" the value so that future acquisition is less expensive. The intent is readily apparent on the face of the provision and is clearly revealed upon the application of that provision to vacant land.

Even if the purpose of the provision could be considered as a proper exercise of the police power, then the public at large, rather than a single owner, should bear the burden of an exercise of state power in the public interest. Agins v. City of Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 at 2141 (1980); Pruneyard Shopping Center v. Robins, 447 U.S. 74 at 83, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

G. DOT maintains that the provisions are analogous to a setback zoning ordinance. It then proceeds to rely upon decisions where setback ordinances have been sustained. Even a cursory reading of these cases shows that they contain the "seeds" of defeat for the DOT's position.

First, consider the decision of City of Miami v. Romer, 58 So.2d 849 (Fla. 1952). (A:1-4). Contrary to the implication given by the DOT, the only thing prohibited from being constructed within the area of the setback was a "building." It did not prohibit the owners from utilizing that area for other uses. In fact, it was a finding of the court that:

> ". . . the property owner is free to use such strip of land in any lawful manner and for any lawful purpose, except a the construction of a

building thereon." Id. at 852. (Emphasis supplied).

The same owners made a second visit to the courts in City of Miami v. Romer, 73 So.2d 285 (Fla. 1954). (A:5-7). They had amended their complaint to allege that the purpose of the setback ordinance was to prevent any building within the setback area so that it would enable the city to acquire the property "without having to pay the cost of any other improvements that might otherwise have been erected on said property." Id. at 286. The decision does not reflect that the Supreme Court considered any other allegation made in the complaint relating to an alleged improper use of the police power. The court went on to hold that the amended complaint stated a "cause of action" in that it could be construed to allege:

> that the setback ordinance was enacted without regard to the public health, safety and general welfare, and thus as an unreasonable exercise of the police power. . ." Id. at 287.

The court cited back to its earlier opinion noting:

> We said in our previous opinion, City of Miami v. Romer, 58 So.2d at page 852, that the fact that, as shown by the testimony adduced at the trial, the city officials may have had in mind 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.

It further explained:

> If the ordinance was, in fact, a reasonable exercise of the police power, then obviously it could make no difference to the validity of the ordinance that the City might eventually widen the particular street which we are concerned -- or any other of the streets within its corporate limits, affected by the ordinance in question, for that matter.

It then clarified the matter further by stating:

> But we did not mean to say that if the ordinance was invalid as an improper exercise of the police power -- if, as a matter of fact, it bore no reasonable relationship to the promotion of the general health and well-being of the community and the need for light, air and open spaces therein -- there would not have been a "taking" insofar as Romer's property was concerned. Id. at 286. (Emphasis supplied).

Several things can be gleaned from the court's recitation. If the setback was prompted by a valid exercise of the police power, keeping open areas in front, side and back of a building, it would be upheld. However, the court makes it quite clear that if the setback was shown to have been enacted solely for an improper purpose, that is the freezing of the land value pending acquisition, the imposition of the provision would have constituted a "taking" of the owner's property. Id. at 286. If this was not what the court had in mind, it would not have found that the owner's complaint stated a cause of action.

The Romer decisions, when read in their entirety, reveal that the owner was not denied all use of the property within the setback area, and thus, do not sustain DOT's argument, but rather clearly defeat it. See also, Miller v. City of Beaver Falls, 268 Pa. 189, 82 A.2d 34 (Pa. 1951), which was relied upon by the court in Romer II, supra. at 287, where the court described the city's attempt to "freeze" the value of the owner's property by zoning as "a taking of property by possibility, contingency, blockade and subterfuge." Id. at 37. Citing back to Forster v. Scott, 137 N.Y. 577, 32 N.E. 976 (N.Y. 1893), 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 plaintiff's 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 requires 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 believes to be in the best public interest. Id. at 38-39.

The premise that a taking will occur if the government denies the owner use of his property pending condemnation was recently affirmed by the U.S. Supreme Court in Kirby Forest Industries. Inc. v. U.S., 104 S.Ct. 2187, 467 U.S. 1, 81 L.Ed.2d 1 (1984). In Kirby, the court addressed the issue of when the date of taking occurs in a "straight condemnation" proceedings for purposes of assessing interest against the government.[1]

The owner maintained that under "straight-condemnation" of unimproved land, the owner is deprived of all the significant interests associated with ownership long before the government tenders payment. (104 S.Ct. at 2196).

The court rejected this argument basing its decision upon the fact that:

> The government never forbade petitioner to cut the trees on their land or to develop the tract in some other way. Indeed, petitioner is unable to point to any statutory provision that would have authorized the government to restrict petitioner's usage of the property prior to payment of the award. (104 S.Ct. 15 2196-2197).

The court also recognized that it would be compelled to find a "taking" if the owner's claims of impairment of use were accurate, but since the owner could not establish the denial of use, the claim

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[1] This would be comparable to Florida's "slow-take" provisions found in Chapter 73, Fla. Stat., in which title to property is not vested in the condemnor until after payment of the final judgment. Chapter 74, Fla. Stat.,, authorizes the use of"quick-take" provisions which allow the acquisition fo title to property prior to final judgment.

would not stand. (104 S.Ct. at 2196). The owner in this cause has been denied the use of his property. It must remain vacant and unimproved for at least five years, and possibly even longer. As held in Kirby, this court should be compelled to find that an exercise of eminent domain has occurred.

If any further persuasion is needed, the owners would refer the court to the recent decision of Division of Administration, State of Florida, Dept. of Transportation v. Frenchman, 476 So.2d 224 (Fla. 4th DCA 1985), pet. rev. dism., ___ So.2d ___. In Frenchman, the DOT maintained that because the owners knew that a strip of land was "earmarked as a future right-of-way," any damages caused by the taking of improvements within the area "earmarked," was "attributable to the owner's own negligence or illegal use of the land being appropriated". Id. at 229.

The court rejected the DOT's contention noting:

> If the land had been a dedicated street or way, or if it were shown that the owners had, in bad faith, made improvements on the right-of-way merely so that they could collect damages, the state's reply would have merit. But 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. 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, essential attributes of an actual taking, while the landowner remains uncompensated for the damage until the taking actually occurs, if it does. Id. at 229.

H. The DOT also tries to analogize the provisions under attack to a "zoning" provision. It maintains that the provisions can be sustained under the rationale announced in ~~Euclid v. Ambler Realty~~ Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). In Euclid, the court considered an ordinance which placed the owner's property into several zoning categories ~~allowing different types~~ of ~~uses~~. The court sustained the ordinance finding that it was a proper exercise of the police power. There is nothing in Euclid, however, that can remotely be construed to sustain a statutory provision which does not allow the owner to make any economically viable use of his land. Such a provision is clearly an exercise of eminent domain and not the police power.

I. The Frenchman, ~~supra~~, decision disposes of the DOT's inane "greedy owner" argument. DOT suggests that an evil to be prevented by the statute is to prevent owners from being able to exploit the fact its property is going to be used for a road by building within the proposed right of way in hopes of reaping a "profit" when the property is acquired. This argument is just plain stupid! Why anyone, in his right mind, would take the tremendous risk of recovering back the cost of the building constructed, much less expect to reap a profit from such an act, defies explanation.[2]

[2] If the DOT's position cited above is any reflection of the general financial acumen prevalent in the DOT, then we have the answer as to why the DOT continuously fails to stay within its budget year to year.

If someone was stupid enough to build within a proposed right of way, with the intent of increasing the damages recoverable, then DOT's remedy is "bad faith" as provided in ~~Frenchman~~.

Apparently consistent with its incompetence in financial matters, the DOT suggests that it needs to be protected from its incompetence in planning matters also, and that the statute prevents them from taking more property than they need. It is respectfully suggested that a simple provision which allows the DOT to ~~plot~~ a roadway, without literally forcing an owner to dedicate its property within the area plotted, would achieve the same result.

If, however, DOT wants sufficient control over the property to prevent use of that property, then eminent domain is the remedy. The DOT's need to plan should not be satisfied at the expense of private property rights. Otherwise, the guaranty of the right to own property will be reduced to "nothing more than the tinkling of empty words." State Road Dept. v. Tharp, 1 So.2d 868 (Fla. 1941).

CONCLUSION

Upon consideration of this cause, the owners respectfully request that the Court do nothing less than:

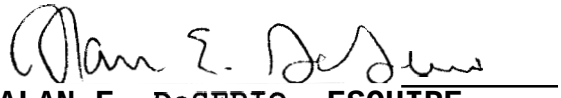
(1) Declare Sec. 337.241(2), Fla. Stat. (1986), facially unconstitutional and in derogation of Article X, Sec. 6 and Article I, Sections 2 and 9;

(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 than an owner must pursue a futile permitting process that is strictly prohibited by statute.

Respectfully submitted,



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