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IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,
DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

v.

CASE NO. 74,373

ROBERT **H.** BONANNO,
as Circuit Judge of the
13th Judicial Circuit,

Respondent.

RESPONSE OF AMICUS CURIAE MAY BROTHERS, INC.

May Brothers, Inc., urges the Court to deny the writ of prohibition, saying:

Introduction

The State, apparently dissatisfied with having to litigate so-called "citrus canker" inverse taking claims in the courts, is seeking to remove those claims from the courts and, conceding liability, have compensation determined by an executive branch hearing officer. The State contends that Chapter 89-91, Laws **of** Florida, divests the courts of all jurisdiction over this class of cases, including cases pending on the act's effective date, and even including cases (like Amicus May Brothers') in which the plaintiffs **right** to a judicial determination of full compensation was adjudicated before Chapter 89-91 was enacted or took effect. See Order of Taking in May Brothers, Inc. v. Dept. **of** Agriculture and Cons. Services dated April 24, 1989 (App. 1 to Amicus' Motion to Appear).

Chapter 89-91 also attempts to prejudge or control the determination of full compensation in executive branch proceedings by creating a statutory value schedule which is presumed correct, and which the owner-condemnee must rebut. **As** argued below, the

statutorily assigned values are arbitrary and do not comply with the judicially developed rules to implement the constitutional full compensation right in condemnation proceedings. The statute also arbitrarily limits the owner's right to attorney's fees to ten percent of the benefit achieved (value proved above the schedule value), unless he can show a greater fee is justified. These provisions substantially depart from the existing law applicable to all other condemnation proceedings, and substantially impair the owner-condemnee's ability to recover full compensation.

The act is completely silent **as** to any reason for removing these actions from the courts. The only justification can be found in the act's legislative history. The Senate sponsor, Senator Karen Thurman, explained the act's real purpose in her presentation to the Senate Finance and Tax Committee on May **26, 1989:'**

Senator Thurman: This is going to be a revenue positive bill, eventually. You may not recognize that in that clothing at this point, but **I** think it is, to the State, considering what we've been through the last couple of months.

* * *

Question: I just want it for the record, to get her to **. . . so** everyone understands what the price tag of this bill is. What we think it is.

Senator Thurman: The State General Revenue right now is $15 million, the next year we come back for an additional $5 million. That finishes out the program as we see it.

You know, the numbers that we have heard discussed, if we continued in the way that things

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'Judicial notice may be taken of this public record, which is available on tape recording at the Florida Senate.

are going right now, could be anywhere up to $200 million, and *so* we had to take kind of an aggressive advance defense, or offense, and see if we couldn't come up with and generate some numbers that we think are reasonable.

* * *

Senator Bruner: I want you to tell me this is really going to save **us** money if we can work this thing out in kind of an arbitration type method, or get these people to consent to this . . .

Senator Thurman: It does.

Senator Bruner: . . . as opposed to letting them go to court and **the** damages come in one verdict after another, *so* that I can go home and say I voted this way to save **us** money.

Senator Thurman: This is . . . trust me.

Chairman: The intent of the bill, Senator Thurman, is to save money over the . . .

Senator Thurman: Absolutely.

The act's real purpose, therefore, is to squeeze **$200** million in claims down to a small percentage of this amount.[2] This legislative history, together with the statutory value schedule, sends a clear message to the executive branch hearing officers to keep compensation awards low. This is not a permissible reason to divest this class of condemnees of their constitutional right to a judicial determination of full compensation, as is guaranteed all other persons whose property is taken.

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[2]The House of Representatives Agriculture Committee's Final Staff Analysis and Economic Impact Statement (Ex. 1 p. 7) shows the total funds budgeted for compensation to be approximately **$28** million over two fiscal years. This figure includes compensation for claims barred **by** the statute of limitations.

I. CHAPTER 89-91 INFRINGES ON CONSTITUTIONAL JUDICIAL POWERS BY ASSIGNING TO THE EXECUTIVE BRANCH THE ISSUE OF COMPENSATION DUE FOR PROPERTY TAKEN.

Article 11, Section 3, Florida Constitution expressly guarantees the separation of powers. Article V, Section 1, reinforces this guarantee, providing in part:

> Courts.-- The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality.

The power to determine full compensation due for the taking of private property is an exclusively judicial function. It cannot be performed directly or indirectly by the Legislature. See, e.g., Spafford v. Brevard County, 92 Fla. 617, 110 So. 451,454-55 (1926); Hillsborough County v. Kensett, 107 Fla. 237, 144 *So.* 393, 396 (1932); State Plant Board v. Smith, 110 So.2d 401, 407 (Fla. 1959); Daniels v. State Road Dept., 170 So.2d 846, 851-52 (Fla. 1964); Behm v. Dept. of Transportation, 383 So.2d 216, 218 (Fla. 1980); State ex rel. State Road Dept. v. Wingfield, 101 So.2d 184, 186 (Fla. 1st DCA 1958). The law is the same in most other jurisdictions. 3 Nichols on Eminent Domain Section 8.9 (Rev. 3d ed. 1985); 4 Nichols on Eminent Domain Section 12.1[3] (Rev. 3d ed. 1985). Daniels, above, 170 So.2d at 851-52, provides the most thorough discussion of this issue (e.s.):

> It has been said that "[t]he preservation of the inherent powers of the three branches of government -- legislative, executive, and judicial -- free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule." Simmons v. State, 1948, 160 Fla. 626, 36 So.2d 207. And if the legislation hampers judicial action or interferes with the discharge of judicial functions, it cannot be given effect. 11 Am.Jur., 908, cited in Simmons v. State, supra.
>
> It is well settled that the determination of what is just compensation for the taking of private property for public use

"is iudicial function that cannot be performed bv the legislature either directly or by any method of indirection." Spafford v. Brevard, supra, 110 **So.** at page 455, quoted in State Plant Board v. Smith, Fla. 1959, 110 So.2d 401. [other citations omitted]

As stated in Baltimore & Ohio R. Co. v. U. **S.,** supra, 298 **U.S.** 349, 56 S.Ct. 797, **80** L.Ed. at p. 1224:

"The just compensation clause may not be evaded or impaired by any form of legislation. Against the opposition of the owner of private property taken for public use, the congress may not directly or through anv legislative agency finally determine the amount that is safeguarded to him **bv** that clause. If as to the value of his property the owner accepts legislative or administrative determinations * * * no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount."

And in Monongahela Navigation Co. v. **U. S.,** supra, 148 **U.S.** 312, 13 S.Ct. 622, 37 L.Ed. 463, in which the Supreme Court struck down an Act of Congress purporting to exclude an element of value (the franchise to collect tolls) in the purchase of the lock and dam of the Navigation Company, the court said that just compensation means that "a full and perfect equivalent for the property taken" must be returned to the owner, and that

"By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. but this is a iudicial, and not a legislative, question. * * * It does not rest with the public, taking the property, through congress or the legislature. its representative, to sav what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just cornpensation shall be paid, and the ascertainment of that is a iudicial inquiry."

It is inappropriate for an executive branch hearing officer to decide compensation issues, because compensation is a constitutional right. See Dept. of Environmental Regulation v. Bowen, 472 So.2d 460 (Fla. 1985), approving and adopting 448 So.2d 566, 568 (Fla. 2d DCA 1984), where the Second District succinctly said:

Inverse condemnation actions cannot be adjudicated by administrative boards or agencies.

Other recent decisions recognize that the executive branch cannot provide this constitutional remedy under the Administrative Procedure Act, and that only the courts can decide inverse condemnation actions based on a valid exercise of police power. Kev Haven Assoc. Enterprises v. Board of Trustees, 427 So.2d **153,** 157, **159** (Fla. **1983);** Albrecht v. State, **444** So.2d **8,** 12-13 (Fla. **1984).** If the inverse condemnation action presents factual issues, such as the amount of compensation due, then it must be brought in Circuit Court.

If Chapter **89-91** is upheld, the State will have little reason ever to litigate taking or compensation issues in the Circuit Courts again. Anytime the State is dissatisfied with judicial rulings on an issue, it could simply reassign all cases involving that issue to an executive branch forum, including even cases pending in the courts based on a previously adjudicated taking as the State contends here. The State can control the appointment and assignment of hearing officers to determine those cases, and assure that these officers are not unsympathetic to its position. The State can also enact procedural rules and evidentiary presumptions which favor its position, making it impossible for an adverse party to prevail on the facts, as it has done in Chapter **89-91.**

Chapter **89-91** is the first step toward establishment of an executive branch "court" to decide all compensation claims against the State (and potentially local governments as well). If this Court determines that the Legislature may assign the constitutional issue of full compensation to the executive branch, then the Legislature may assign other constitutional issues to the executive branch as well. Executive appointed hearing officers could then decide compensation issues in all inverse taking cases, and even in direct taking cases. **Thus** the owners of property taken by the State or local government for road

building in Tampa, West Palm Beach, and Miami would have to plead their cases for constitutional compensation before hearing officers who reside in Tallahassee, and who have no knowledge of the community where the property is located, and no responsibility or accountability to the owner-condemnee by election (as in the case of circuit judges) or selection (as in the case of jurors). Indeed, this executive branch forum could be given jurisdiction to determine other constitutional issues, such as liability for takings in inverse condemnation cases, or non-common law monetary claims of any kind in which the State is interested, subject only to appellate court review on any issues of law.

The drafters of the Florida Constitution expressly prohibited the establishment of any executive branch court in derogation of the traditional judicial powers vested in the Circuit Courts. Article **V,** Section **1,** Florida Constitution.

The State is not allowed to select the forum in which it litigates constitutional issues. If the State violates or threatens to violate a person's constitutional rights, that person may sue for redress in the Circuit Court of the county where the cause of action arose. Under the "sword-wielder" doctrine, the State has no venue privilege and must defend in that Circuit Court. See Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362, 365 (Fla. 1978); Hancock v. Wilkenson, 407 So.2d 969 (Fla. 2d DCA 1981); Dept. of Transportation v. Morehouse, 350 So.2d 529 (Fla. 3d DCA 1977), cert. denied, 358 So.2d 129 (Fla. 1978). The sword wielder doctrine protects the property owner in an inverse condemnation case from having to litigate its compensation claim, and any subsequent enforcement proceedings, in a forum other than the Circuit Court in the county where the taking occurred. Conner v. Mid-Florida Growers, Inc., 541 So.2d 1252, 1255 (Fla. 2d DCA 1989).

The State argues that Circuit Court jurisdiction is based only on statutes, which may be repealed or modified. The cases cited by the State do not involve constitutional causes of action, however, nor establish any Legislative authority to create an executive branch "court" to decide constitutional issues. The Courts' jurisdiction to decide constitutional issues is based on the Constitution itself. Such jurisdiction cannot be legislatively reduced, see State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 **So.** 508 (1933), and State ex. rel. B.F. Goodrich Co. v. Trammell, 140 Fla. 500, 192 **So.** 75 (1939); or impaired, directly or indirectly, see Daniels, Bowen, and other cases cited therewith. The judiciary's power to decide compensation is derived from the Constitution and does not depend upon the statutes implementing that power. Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101, n. 2 at 103 (Fla. 1988) (constitutional full compensation guarantee is self-executing, and not dependent upon implementing statutes).

To bypass the Circuit Court is to deny the judicial determination of value. The opportunity for judicial review of the executive determination of value in the First District Court of Appeal is not a substitute for trial in a Circuit Court. The determination of value in condemnation is predominantly a question of fact. See Miller v. United States, 620 F.2d 812, 837 (Ct.Cl. 1980); Behm v. State Dept. of Transportation, 336 So.2d 579 (Fla. 1976); Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 541 So.2d 1243, 1248, 1250 (Fla. 2d DCA 1989). Appellate review of hearing officers' factual findings is limited to a determination of whether competent substantial evidence supports those findings. Section 120.68(10), Fla. Stat. A District Court of Appeal cannot provide judicial factfinding, which is the foundation for the judicial determination of full compensation under the Constitution.

Chapter **89-91's** declaration that the executive branch forum is an exclusive procedure to obtain compensation also would deny owner-condemnees the right to sue in the United States District Courts for just compensation required by the Fifth and Fourteenth Amendments. **A** state statute obviously cannot deny litigants access to the federal courts to enforce rights guaranteed by the United States Constitution. Even if Chapter **89-91** were valid under the Florida Constitution, it would be invalid under the Supremacy Clause of the United States Constitution.

The State's reliance on State Plant Board v. Smith, 110 So.2d **401** (Fla. 1959), is misplaced. Smith presented a different factual situation, in which the owners sought to enjoin the State from summarily destroying trees deemed infested or threatened by nematodes. The owners requested a pre-destruction hearing on the propriety and reasonableness of the destruction and on the amount of compensation due if destruction were required. Because the slow-moving nematodes posed no imminent public danger requiring summary destruction, the Court held that a pre-destruction hearing on the destruction and compensation issues was necessary to satisfy due process.

This is comparable to the due process requirements for summary condemnation of real estate in "quick-take" proceedings. The condemnor must establish, before taking the property, the propriety of its action and the good faith estimate of value taken, which **is** made available to the condemnee. If the condemnee remains dissatisfied, he or she may request a jury trial to determine final full compensation. Of course, neither the Legislature nor the condemnor agency may limit compensation in any way, either the good faith value estimate required before the taking, or the final determination of full compensation, as the Smith case decided.

The State now construes Smith to hold that the condemnee must accept whatever forum the Legislature assigns for the determination of compensation, even the condemnor agency, subject to court review only on issues of law. The opinion contains no such ruling. In particular, it does not hold that the Legislature can require the condemnee to accept the determination of compensation in an executive branch forum after a summary taking has occurred.

Here, the State declared the disease found to be an imminent public danger. **This** unilateral declaration was required to be accepted as true, and the State was allowed to carry out summary destruction of trees without any pre-destruction hearing. Plaintiffs' only remedy was to bring a post-destruction action for inverse condemnation, in which they could establish that their plants were healthy and that full compensation was required. Under Bowen, Key Haven, and Albrecht, above, that action for inverse condemnation can only be brought in the Circuit Court. Whatever pre-destruction procedure may be allowed in a case like Smith, that procedure cannot displace the instant Plaintiffs' constitutional right to seek **full** compensation for property already destroyed by an inverse condemnation action in the Circuit Court.

Smith also held that statutory limitations on compensation due for property taken violated the just compensation guarantee in Article I, Section 12, Florida Constitution **(1885).** The Court held that the statutory prohibition on compensation for destruction of nematode-infested trees, and the $1000 per acre limitation on compensation for destruction of noninfested trees, were unconstitutional. The Court confirmed at **407-08,** that compensation is for the judiciary to determine:

> It is settled in this state that "the determination of what is just compensation for private property that is taken for public use is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection." Spafford v. Brevard County, supra . . .
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> * * *
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> As noted above, the question of what is "just compensation" must be finally determined by the judiciary, unless the grove owner is satisfied by the amount offered by the Board's agent.

The Court, having expressly held that compensation for property taken is a judicial question which the Legislature cannot determine, certainly did not hold that the Legislature could circumvent this restriction by delegating this issue to the condemnor agency. The Legislature cannot do by indirection what it cannot do directly.

The Smith opinion concludes by saying that "[t]he remainder of the Act is valid and effective." Id. at 409. This sentence confirms the opinion's express holdings that the compulsory pull and treat program, subject to payment of "just and fair" compensation, is constitutional if compensation is judicially determined as required by the express rulings quoted above. This last sentence is not an adoption of any novel constitutional principle supporting the State's argument here?[3]

[3] Cunningham v. State Plant Board, 112 So.2d 905 (Fla. 2d DCA 1959), cert. denied, 115 So.2d 701 (Fla. 1959), does not support the State's position. The owners there did not seek any pre-destruction injunctive relief, as in Smith, but sued the State in tort after the destruction. The main issue was whether the suit in tort could be maintained against the State. Because the State had not generally waived sovereign immunity, see Spangler v. Florida State Turnpike Auth., 106 So.2d 421 (Fla. 1958), it could require tort claimants to proceed in an administrative forum to obtain relief as a form of largess. The Court had no choice but to require the tort claim to proceed in this forum. After sovereign immunity for tort claims was waived, however, all unliquidated tort claims must be judicially determined. See Broward County v. LaRosa, discussed at pp. 12-13 below. Cunningham did not involve a taking claim, and did not adopt or discuss any principle that the State could require compensation for property taken to be decided in an executive branch forum,

A statute that delegates to an administrative agency the issue of compensation due for property taken is unconstitutional. See Florida Power Corp. v. Federal Communications Comm'n, 772 F.2d 1537 (11th Cir. 1985), rev'd on other mounds, ___ U.S. ___, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). The Eleventh Circuit held that a statute took property by requiring electric companies to lease their pole facilities involuntarily to cable television companies. The statute prescribed a formula by which the FCC was to determine the "just and reasonable " rental rate for each particular situation. The Court held this provision unconstitutional as a usurpation of the judicial power to determine compensation for property taken, which could not be exercised by an administrative agency. Id., 772 F.2d at 1544-46. The Supreme Court held that the statute did not effect a taking, because the statute applied only to regulate existing voluntary rental relationships, and did not require parties to enter those relationships involuntarily. Therefore, the Supreme Court did not reach the issue of whether the Congress could enact a formula for just compensation to be applied by an administrative agency. The Eleventh Circuit's decision is nevertheless persuasive that any delegation of the compensation issue to the executive branch would be unconstitutional.

By analogy, the constitutional limit upon the Legislature's powers to authorize administrative bodies to decide statutory or common law damages issues was described in Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987). The Court held that a county ordinance allowing an executive agency to award damages for discriminatory practices, including damages for humiliation and embarrassment, violated the separation of powers guarantee and denied the defendant his constitutional right of access to the courts. The Court said:

> . . . we cannot imagine a more purely judicial function than a

> contested adjudicatory proceeding involving disputed facts that results in an award of unliquidated common law damages for personal injuries in the form of humiliation and embarrassment.
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> . . . The mere characterization of the board's power to award unliquidated damages as quasi-judicial does not change the fact that the power amounts to an unconstitutional delegation of judicial authority.
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> . . . Moreover, Article V, Section 1, Florida Constitution. . . recognizes the distinction between judicial and quasi-judicial power and authorizes the board to be empowered only with the latter. Indeed, to interpret this constitutional provision otherwise would not only ignore its plain language, but would also vest the legislative branch with the authority to create courts other than the four types that the constitution authorizes.

Id. at 423-24. The Court distinguished between quantifiable (liquidated) damages such as back rent or back wages, which may be awarded by an executive hearing officer, and nonquantifiable (unliquidated) damages, which can only be judicially determined. Id., n. 5 at 424.

LaRosa dealt with a statutory cause of action, not a constitutional entitlement. Nevertheless the distinction made in LaRosa between liquidated claims and unliquidated damage claims is analogous here. An unliquidated claim is one in which the amount of compensation cannot be computed except on conflicting evidence, inferences and interpretations. Town of Longboat Key v. Carl E. Widdell & Son, 362 So.2d 719 (Fla. 2d DCA 1978). The compensation entitlement for a taking is clearly unliquidated until the jury, considering all facts and circumstances which bear a reasonable relationship to the owner's loss, including conflicting expert testimony in most cases, fixes it by verdict. Behm, above, 383 So.2d 218-19. Therefore, even if full compensation for a taking were only a statutory claim, LaRosa would require that it be determined initially by factfinding in the trial courts, as all other unliquidated claims must be determined under the Florida

Constitution. Because this case is an unliquidated constitutional claim, the LaRosa decision requiring that unliquidated claims be judicially determined applies here with even greater force.

The concept of requiring a condemnee to **sue** in an executive branch forum is directly contrary to the public policy expressed in the State Comprehensive Plan statute enacted in 1985. The Legislature there confirmed that compensation for property taken should be determined in a judicial rather than an administrative forum. Section 187.201(15)(a) and (b)(2), Fla. Stat. The Legislature acknowledged the constitutional goal of protecting private property rights, and recognized that the judiciary would protect these rights better than an executive branch forum. The 1989 Legislature recognized this also. It simply created a forum less favorable to the property owner for this class of taking cases, while leaving intact its constitutionally required policy that all compensation issues must be judicially determined.

The usual rationale for resolving disputes in an administrative forum is to apply the technical expertise of an administrative agency to the subject matter of a uniform regulatory scheme. See generally Northeast Airlines. Inc. v. Weiss, 113 So.2d **884** (Fla. 3d DCA 1959), cert. denied, 116 So.2d 772 (Fla. 1959); **1** Am.Jur.2d Administrative Law Section 12 (1962). No such rationale supports Chapter 89-91. This is not a regulatory program, but **a** case by case judicial remedy for the effects of regulatory excess. The hearing officers assigned by the State will have no special expertise in citrus affairs or citrus valuation, and are probably less knowledgeable of these matters than judges and juries from citrus producing counties. The absence of any special executive branch expertise confirms that Chapter 89-91 is purely a fiscal measure to reduce full

compensation claims, and that is not a legitimate basis to support this intrusion upon constitutional judicial powers and property owners' rights.

II. CHAPTER 89-91 IMPROPERLY ATTEMPTS TO PREJUDGE COMPENSATION BY ALTERING PRINCIPLES APPLICABLE TO THE DETERMINATION OF FULL COMPENSATION, AND IS NOT *AN* ADEQUATE SUBSTITUTE FOR JUDICIAL DETERMINATION.

Chapter **89-91** makes reference to Kugler v. White, 281 So.2d 1 (Fla. 1973), as the arguable basis for its validity. Kugler held unconstitutional a statute that eliminated small common law and statutory claims (under $550) against a negligent motor vehicle operator. The Court held that the Legislature could not abolish a common law or statutory cause of action without providing a reasonable alternative approach, unless the abolition is based on an overpowering public necessity, which cannot be met in any other way.

Kugler provides no support for Chapter **89-91,** because the cause of action here is based on the Constitution, and not on any common law or statutory right. Only the Courts can determine the remedy for an impairment of constitutional right by the executive branch; the executive branch cannot determine the remedy for its own unconstitutional regulatory excess. Although the Legislature may modify common law or statutory rights of action, it cannot modify a constitutional right of action, especially by allowing the condemnor's agent to determine the condemnee's remedy. Thus Kugler has no application here.

Even if the Legislature could modify constitutionally guaranteed rights, Chapter **89-91** would not satisfy the Kugler requirement that it create a reasonable alternative

approach. The Legislature has stacked the evidentiary deck against the condemnee, making it practically impossible for him to prevail on the merits. The combined effect of these statutory provisions is to prejudge and burden the condemnee's right to obtain compensation, and thereby diminish that right.

In a judicial condemnation proceeding, the condemnor has the burden to prove the value of the property taken. See City of Fort Lauderdale v. Casino Realty. Inc., 313 So.2d 649,652 (Fla. 1975) (concurring opinion of Justice Overton, joined by three other Justices). The Court apparently reasoned that where the valuation evidence is equally persuasive on both sides, the owner's valuation should be favored. The Constitution comprehends that the initial duty of proceeding and burden of proof are on the condemnor to establish the value of the property taken, and the owner has nothing to rebut until the condemnor presents competent evidence of that value. Culbertson v. State Road Dept., 165 So.2d 255 (Fla. 1st DCA 1964); Jones v. City of Tallahassee, 304 So.2d 528 (Fla. 1st DCA 1974), cert. denied, 333 So.2d 21 (Fla. 1976). The condemnor cannot avoid this burden by refusing to produce evidence. See Manhattan Properties Ltd. v. Div. of Administration, 541 So.2d 655 (Fla. 2d DCA 1989). These rules implement, and are an essential part of, the owner's constitutional right to full compensation.

Chapter 89-91 rewrites these requirements. Section 3(1) of the act creates a presumptive value schedule for categories of plants taken. Section 6(12) places the burden of proof on the condemnee to overcome the presumed values set forth in the schedule.

The condemnor would never have to present any competent evidence of value, and the condemnee could not as a practical matter challenge the statutory values on which the condemnor relies. If the statutory values are based on invalid surveys or data, faulty

economic theories, or even mathematical errors, the legislators and legislative staff who assigned these values are immune from having to justify them. See Section 120.58(1)(b), Florida Statutes (legislators and legislative employees immune from subpoenas under Chapter 120). Thus Chapter 89-91 gives the condemnor an insurmountable evidentiary advantage not available in judicial condemnation proceedings.

Moreover, the statutorily assigned values are arbitrary and do not comply with the judicially developed rules for valuation in condemnation cases. For example, the assigned values are based on 1984 prices. Many cases, including this case and May Brothers' case, involve takings in late 1985, after the January 1985 freeze caused the market price of nursery stock to rise generally. See Dept. of Agriculture and Consumer Services v. Mid-Florida Growers, Inc., 541 So.2d 1243 (Fla. 2d DCA 1989). Market prices from 1984 are of doubtful relevancy in 1985 cases, and certainly should not be presumed correct. Many of the statutorily assigned values are based on variable production costs, and do not consider return to fixed investment or probable profit, as the Constitution requires. See Monongahela Nav. Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893); State Plant Board v. Smith, 110 So.2d 401, 403, 408 (Fla. 1959). See generally Board of Commissioners v. Tallahassee Bank & Trust Co., 100 So.2d 67 (Fla. 1st DCA 1958), affd, 108 So.2d 74 (Fla. 1959) (consideration given to condemned property's reasonably adaptable profitable uses); Div. of Bond Finance v. Rainey, 275 So.2d 551 (Fla. 1st DCA 1973) (same). Chapter 89-91 ignores the judicially developed rules for valuing condemned property case by case, and prejudices the evenhanded consideration of all facts and circumstances relevant to value, as is constitutionally required. See Mid-Florida Growers, Inc., above.

The United States Court of Claims: in holding that compensation for property taken could not be fixed by an administrative agency, held that no single compensation formula could satisfy the constitutional requirement for just compensation:

> The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a reasonable judgment having its basis in a proper consideration of all relevant facts.
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> * * *
>
> While mindful of the complexity of the task confronting the War Shipping Administration, we are of the opinion that any method aimed, as was that of the War Shipping Administration, at the establishment of a rate applicable to all of **a** large class of dry cargo vessels, is "plainly inaccurate" when applied to any particular vessel. There can be no presumption as to the correctness or the fairness of a rate made applicable indiscriminatelv to all vessels of a certain class. Although it mav be impracticable, from the Government's standpoint, to determine just compensation for each particular vessel, the right to a judicial determination, if the owner is dissatisfied with the compensation determined for his vessel, is guaranteed bv the Merchant Marine Act and bv the Fifth Amendment.

American-Hawaiian Steamship Co. v. United States, **124** F.Supp. **378, 381-83** (Ct.Cl. **1954),** cert. denied, **350 U.S. 863, 76** S.Ct. **103,** 100 L.Ed. **766 (1955)** (e.s.) (citations omitted).

The arbitrariness of the Chapter **89-91** value schedule **is** proved by a single example. The schedule presumes the correct value of mature field grown budded trees destroyed in November **1985** to be **$3.346.** The number of such trees is reduced by a survival factor of

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"The former Court of Claims was established by Congress under the express grant of authority in Article **111,** Section **1,** United States Constitution. See former **28** U.S.C. Section **171.** The current Claims Court was established by Congress under the express grant of authority in Article **I,** Section **8,** clause **9,** United States Constitution. See **28** U.S.C. Section **171.** The Florida Legislature previously had authority to establish courts under Article V, Section **1,** Florida Constitution (1885). The proliferation of courts was one reason for the revision of Article V. Now the Legislature is prohibited from establishing new courts. Article V, Section **1,** Florida Constitution.

0.836, resulting in an effective value of $2.797 per tree destroyed. If the same trees were planted in a grove they would be called resets. The schedule presumes the value of each tree as a reset to be $7.48, with no survival factor reduction. Replanting trees in a grove obviously does not more than double their value. The discrepancy in values may simply reflect the greater political influence in the Legislature of grove owners, as opposed to nursery owners. The determination of even presumptive full compensation cannot reasonably be left to the political process, but must be determined case by case in the courts as required by the American-Hawaiian Steamship decision.

Finally, Chapter 89-91 also alters the rules relating to computation of the condemnee's attorney's fees. Reasonable attorney's fees are part of the full compensation guaranteed by the Constitution. Crigler v. State Dept. of Transportation, 535 So.2d 329 (Fla. 1st DCA 1988). Section 6(13) of the act allows attorney's fees, but creates a presumption that the fees will not exceed 10 percent of the benefit obtained, i.e., the amount recovered in excess of the value computed under the act. The condemnee's attorney will have to work much harder in the executive branch forum to overcome the adverse burden of proof. The condemnee will not be compensated for this extra effort, however, as he would be in an ordinary condemnation case. The presumption that ten percent of the benefit is an appropriate fee is completely arbitrary, and fails to take into account the factors normally used to determine fees under Section 73.092, Fla. Stat. and Rule 4-1.5 (B), Rules for Professional Conduct. Compare State Dept. of Natural Resources v. Gables-by-the-Sea Inc., 374 So.2d 582 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980), requiring that consideration be given to the factors set forth in the statute and the former Code of Professional Responsibility, including the novelty, difficulty

and importance of the case and whether the client's fee obligation is fixed or contingent.

Section 6(13) makes it economically impractical to challenge the statutory value schedule. Condemnees will either be forced to accept the statutory values, or to pay counsel out of their own pockets, contrary to the full compensation guarantee, see Dade County v. Brigham, 47 So.2d 602 (Fla. 1950), and Georgia South. & Fla. Rv. Co. v. Duval Conn. Railroad Co., 187 So.2d 405 (Fla. 1st DCA 1966).

The executive branch forum provided by Chapter 89-91 is not a reasonable substitute for an independent judge and jury as factfinder for this constitutional issue. Moreover, as stated above, the combined effect of the reallocation of the burden of proof, the immunity of the Legislature from having to justify the statutory values, the arbitrariness of the statutory values, and the restrictions on awards of attorney's fees, is to substantially prejudge and diminish the constitutional right to full compensation. These restrictions are collectively just as effective in impairing full compensation rights as the statutory cap on compensation which the Court struck down in State Plant Board v. Smith. Even if the Legislature could relegate the judicial function of determining compensation to the executive branch, which it obviously cannot do, Chapter 89-91 would not provide an adequate substitute for existing rights as required by Kugler v. White.

III. CHAPTER 89-91 DENIES EQUAL PROTECTION OF THE LAW TO CITRUS CANKER CONDEMNEES AS AGAINST ALL OTHER TYPES OF PERSONS WHOSE PROPERTY HAS BEEN TAKEN.

Chapter 89-91 discriminates against "citrus canker" condemnees, imposing on them an executive branch forum and other burdens discussed above, not required of any other class of persons whose property has been taken. This legislative classification denies the

canker condemnees equal protection of the law.

Equal protection issues under Article I, Section **9,** Florida Constitution (and the Fourteenth Amendment) are determined with reference to whether the legislative classification involves a suspect class or a fundamental right. In re Estate of Greenberg, **390** So.2d **40** (Fla. **1980). This** case involves deprivation of a fundamental right explicitly guaranteed by the Constitution.

The Plaintiffs' right of access to the courts guaranteed by Article I, Section 21, Florida Constitution, is the essential foundation for enforcement of all other constitutional rights. Without this right, other constitutional rights would be unenforceable. See State ex. rel. Lawson v. Woodruff, **134** Fla. **437, 184** ***So.*** **81 (1938)** (predecessor provision is one of "paramount, insuperable commands" in Declaration of Rights, designed to effectuate the security and enjoyment of organic unalienable rights); Village of Belle Terre v. Boraas, **416** U.S. **1, 7, 94 S.** Ct. **1536, 39** L.Ed.2d **797 (1974);** Note, Article I. Section 21: Access to Court in Florida, 5 F.S.U.L. Rev. **871 (1977).** Because this right is fundamental, any legislation impairing it for a class of condemnees must be subjected to strict judicial scrutiny. Only a compelling state interest can justify this discriminatory classification.

No justification (compelling or otherwise) for removing canker claims from circuit court to an executive branch forum is provided in the act itself, and the only rationale apparent from its legislative history is the impermissible objective of reducing full compensation claims by eighty-five to ninety percent. Thus the classification in the act fails to satisfy the strict scrutiny test or the compelling interest standard applied where fundamental rights are denied. Such a purpose is not even a rational basis for classification, if no fundamental right were involved.

Florida courts have determined it would be absurd to treat inverse condemnees differently from direct condemnees. In State Road Dept. v. Lewis, 190 So.2d 598,600 (Fla. 1st DCA 1966), cert. denied, 192 So.2d 499 (Fla. 1966), the First District said:

> Next the Department questions the propriety of the allowance of attorney's fees in an inverse condemnation case. We summarily dispose of this contention by observing that the sovereign without due process confiscated the property belonging to one of its citizens. Viewing the Department's argument to a logical conclusion, we find its position to be that if it complies with the law of this state by instituting an eminent domain action, it is liable for attorney's fees: but if it unlawfully appropriates a citizen's property without instituting such an action, it thus escapes liability for the attorney's fees incurred by the aggrieved owner. The absurdity of this argument disposes of this point contra to the Department's contention.

Id., 190 So.2d at 600. This rationale has been approved by other state courts. See Flatt v. City of Brooksville, 368 So.2d 631, n. 1 at 632 (Fla. 2d DCA 1979); Volusia County v. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983), review denied, 443 So.2d 980 (Fla. 1983).

If the act's classification has any compelling (or even legitimate) purpose, the act fails to identify that purpose and expose it for judicial review. The purpose described by the act's sponsor is not a legitimate purpose. Accordingly, the imposition of the executive branch forum and the accompanying burdens on establishment of full compensation discriminate against the class of "citrus canker" condemnees who are subject to these provisions, in violation of equal protection of the laws?

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[5]The Circuit Court construed Chapter 89-91 not to apply to claimants whose grove trees were destroyed. If the Legislature discriminated between nursery tree owners and grove tree owners, then this classification is likewise irrational and causes the statute to fall.

IV. CHAPTER 89-91 IMPAIRS VESTED RIGHTS TO A JUDICIAL DETERMINATION OF FULL COMPENSATION, INCLUDING ATTORNEY'S FEES.

A. THE INSTANT CASE

The State took the instant Plaintiffs' property in **1984** and **1985.** Their rights to full compensation, as determined by the judicial branch under standards applicable to all taking actions, accrued on the date of taking. They brought their actions in court to enforce these rights in **1988.** The Legislature then enacted Chapter **89-91** to divest the courts of jurisdiction, impose a forum in the executive branch, and prejudge the determination of full compensation, in **1989.** The retrospective application of this statute to this case impairs Plaintiffs' vested rights.

A statute which destroys, or adversely affects, a vested right in connection with a previous transaction is unconstitutional. McCord v. Smith, 43 So.2d **704, 708-09** (Fla. **1950).** Even if Chapter **89-91** does not destroy the owners' full compensation rights, it so adversely affects those rights that it is unconstitutional.

Whether a particular right is **"vested"** ***so*** that it cannot be retrospectively "divested" involves consideration of three factors: the strength of the public interest, the extent to which the right is abrogated, and the nature of the right abrogated. State Dept. of Transportation v. Knowles, 402 So.2d 1155 **(Fla. 1981).** In Knowles, the court refused to apply a statute immunizing public employees from liability for torts committed in the course of employment retroactively to a pending case in which a jury verdict had been rendered but no judgment entered. The court concluded that a state legislature cannot take away from a private party a right to recover money that is due when the legislature acts. Id. at **1158-59.** This rationale was extended in Rupp v. Bryant, **417** So.2d **658** (Fla.

1982), in which the plaintiff had filed suit for neghgence, but had not liquidated the claim by jury verdict, when the Legislature abolished liability for certain defendants by statute. Again, the Court deemed the pending claim to be a vested right, and held the statute could not retrospectively divest it.

Consideration of the three Knowles factors here shows no justification for divesting Plaintiffs of their right to have this judicial issue decided in the courts. The nature of the right impaired and the extent of the impairment may be considered together. The rights impaired here are the constitutional right of access to courts and the constitutional right to full compensation determined in accordance with the standards or principles required for all taking cases. The right to full compensation requires and contemplates the application of the compensation principles judicially developed to implement that right. As discussed above, the denial of the right to judicial factfinding, the reallocation of the burden of proof, and imposition of arbitrary criteria prejudging compensation and attorney's fees, operate cumulatively to deny these constitutional rights. Any legislation that substantially lessens the efficacy of the means for enforcing a constitutional right adversely affects the constitutional right itself.

The right to attorney's fees is clearly a right which vests when the cause of action accrues. It may not be retroactively imposed, divested or altered by statute. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985). L. Ross, Inc. v. R. W. Roberts Const. Co., 481 So.2d 484 (Fla. 1986); Godbey v. Walsh, 530 So.2d 343 (Fla. 1st DCA 1988). Chapter 89-91 imposes an arbitrary presumption limiting attorney's fees, but that provision cannot apply retroactively to a cause of action which accrued prior to the act. This analysis is all the more compelling where the right to attorney's fees is based on the constitutional

guarantee of full compensation which cannot be legislatively impaired.

The Knowles decision also requires that public interest involved be considered in determining whether or not rights have vested. Chapter 89-91's purpose, as described by its sponsor, is to reduce the State's liability. This objective is impermissible because it impairs the constitutional guarantee of full compensation for property taken. No public interest other than reduction of liability is even suggested:

In summary, consideration of the nature of the rights, the extent of their

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[6]The act's preamble refers to the potential disruption of the legislative budget process, but this potential disruption could occur regardless of whether compensation is initially determined by hearing officers or by courts. Courts can enforce administrative orders if the agency itself does not do so. Section 120.69, Florida Statutes.

The actual potential for disruption is minimal, because the courts will undoubtedly allow the political branches every reasonable opportunity to raise revenue and appropriate funds to pay the obligation. See Hillsborough County v. Kensett, above. The State has ample notice of the amounts claimed in pending cases, and can appropriate and reserve funds annually to pay those claims as it does for highway condemnation cases. Only in extraordinary circumstances, such as where administrative officials continuously and deliberately refuse to seek funding to pay finally adjudicated obligations, will the courts issue mandamus or other enforcement process as a last resort. See Conner v. Mid-Florida Growers, Inc., 541 So.2d 1252 (Fla. 2d DCA 1989). The Court's opinion in Conner makes it very unlikely this extraordinary situation will recur in the context of citrus canker claims. Litigation in the judicial forum does not threaten the separation of powers, so long as the State makes reasonable provision to comply with court rulings awarding compensation constitutionally required.

Other supposed benefits of the act, as suggested by the Final Staff Analysis and Economic Impact Statement, are that condemnees will be paid "in a more timely manner" (Ex. 1 p. 7), and that the condemnees will not have to prove the state's liability. (Ex. 1 p. 8) Since Mid-Florida Growers, Polk, May Brothers and the subject Plaintiffs have already proved the State's liability in court, this benefit is illusory in their cases. Other claimants may also prevail on liability based on collateral estoppel or on similar evidentiary records. The promise of more timely payment is certainly illusory. Administrative proceedings are frequently more protracted than jury trials. For example, the hearing officer has 90 days after hearing to render a decision. Section 120.59, Fla. Stat. Juries are usually quicker. If the State's real purpose were to confer these "benefits" upon the condemnees, it would have made the executive branch forum optional, as it did in tax disputes, cf. Section 72.011, Fla. Stat., rather than mandatory.

impairment, and the public interest involved, as required by Knowles, shows that the Plaintiffs' rights to a judicial determination are vested, and may not be retroactively divested by the Legislature. The Respondent Circuit Judge ruled correctly on this point.

B. MAY BROTHERS' CASE

The Amicus May Brothers' right to full compensation, as determined by jury trial in accordance with judicially developed standards for compensation, was adjudicated and vested on April 24, 1989. See Order of Taking (App. 1 to the Motion to Appear as Amicus). This Order provides (Paragraph 31):

> Trial by jury shall proceed on the issue of full compensation for Plaintiff's 73,482 budded trees. Defendant shall be considered the condemnor and shall be governed by the laws, rules and procedures applicable in condemnation proceedings.

Chapter 89-91 was then enacted and took effect on June 20, 1989.[1] Thus, even if the instant plaintiffs, whose rights to full compensation were adjudicated after the act's effective date, can be divested of their rights to proceed in the courts, May Brothers' case would present a different issue. The Legislature cannot divest May Brothers of rights vested under a preexisting judicial decree.

The foundation for inverse condemnation cases is that the property owner may bring an action in court to compel the condemnor to institute condemnation proceedings for property taken. See Flatt v. City of Brooksville, 368 So.2d 631, 632 (Fla. 2d DCA 1979), citing Kirkpatrick v. City of Jacksonville, 312 So.2d 487, 489 (Fla. 1st DCA 1975). May

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[1] The Circuit Court's ruling in May Brothers' case, including detailed findings of fact rejecting the State's alleged defenses to liability, helped convince the Legislature that continued litigation over liability for other "citrus canker" claims would be futile. This realization led to the enactment of Chapter 89-91 as a new way to limit the State's liability.

Brothers obtained a court adjudication of its right compelling the State to proceed with condemnation of the citrus trees destroyed. Chapters 73 and 74, Fla. Stat., were the applicable laws at the time of this adjudication, and so the State is compelled in May Brothers' case to institute condemnation proceedings under those statutes.

A judicially established right is normally considered a vested right which may not be divested by subsequent statute. 32 Fla. Jur. 2d Judgments and Decrees Section **81.** Moreover, once a condemnee has demanded a jury trial on compensation, that right cannot be divested by unilateral action of the condemnor. Div. **of** Administration v. Grossman, 536 So.2d 1181 (Fla. 3d DCA 1989). Accordingly, May Brothers' adjudicated right to a jury trial may not be divested.

The Legislature itself has recognized that the owner's right to compensation is "vested" when the government in quick-take proceedings obtains an order of taking, and obtains title to the property taken. Section 74.061, Fla. Stat., provides:

> **Vesting of title or interest sought.** Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the said lands shall be deemed to be condemned and taken for the use of the petitioner, and the right to compensation for the same shall vest in the persons entitled thereto. Compensation shall be determined in accordance with the provisions of chapter 73...

The right to jury trial is established in Section 73.071, **Fla.** Stat. Thus even **the** Legislature acknowledges that the owner's right to full compensation determined by a jury is vested upon adjudication of the taking and the owner's loss of the property. Accordingly, any ruling the Court may make upholding the validity of Chapter 89-91 in this case should distinguish and except cases like May Brothers', in which the right to a jury trial was vested by adjudication and statute before the act took effect.

CONCLUSION

The compensation issue is exclusively one for the judiciary, and may not properly be decided by an agent of the political branches which did the taking. Chapter 89-91 deprives the condemnee of judicial factfinding which is the essential foundation for the judicial determination of compensation. The act presents no legitimate reason for divesting the courts of jurisdiction over the compensation issue or for prejudging the amount of compensation due. Reducing the State's liability is not a legitimate reason for denying these rights.

The Legislature may not demand that its citizens forego one constitutional right (access to courts) as a condition for obtaining another constitutional right (compensation for property taken). Such an unconstitutional condition is an impermissible burden on the exercise of a constitutional right. Government may not take private property, then dribble compensation back as a privilege burdened by conditions. See generally Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989) (scholarly article discussing numerous rationales for doctrine of unconstitutional conditions). This is particularly true in cases like May Brothers' where the right to a judicial determination has vested by adjudication before the act's effective date. Condemnees have the right to full compensation for property taken and the right to have that compensation determined by an independent judge or jury, under judicially developed compensation standards, not by an executive branch hearing officer applying an arbitrary value schedule. They may not be forced to sacrifice one right to obtain the other.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the counsel below by U. S. Mail this 21 day of July, 1989

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