a h.
2-7-91

IN THE SUPREME COURT OF FLORIDA

CITY OF OCALA, a Municipal Corporation under the laws of the State of Florida,

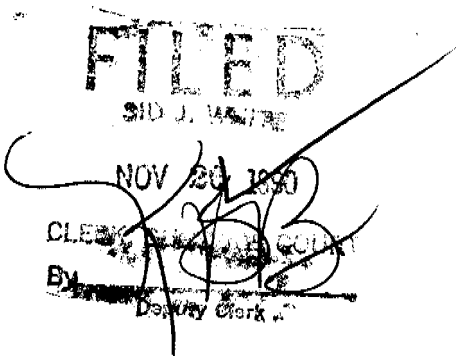
Petitioner,

vs.

O. J. NYE AND CAROLYN NYE,

Respondents.

SUPREME COURT CASE NO.: 75,984
5DCA CASE NO.: 89-00450



PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

This case is now before the Court upon this Court's order accepting discretionary jurisdiction to review the decision of the Fifth District Court of Appeal filed April 5, 1990. The relevant facts are as follows.

Petitioner, CITY OF OCALA, a municipal corporation, (hereinafter "City") filed this action in eminent domain against some one hundred forty three (143) parcels of real property located in Marion County, Florida on May 15, 1986. (R: 1-17) The purpose for the taking, as set forth in Paragraph 2 of the COMPLAINT, was based on municipal Resolution 86-10, which was attached and incorporated by reference:

> "It is necessary to take a fee simple title to the property hereafter described, together with appurtenant easements, perpetual and temporary, for the purpose of construction and reconstruction, widening and improvement of Northeast 14th Street, including, but not limited to, the construction and reconstruction of the existing roadbed to include five lanes, the construction of standard curb, gutter and sidewalks, together with underground storm drainage facilities, power and traffic signal poles, new and more efficient traffic signal equipment, improved street lighting and improved utilities." (R: 1)

The City's authority for condemning all parcels was also set forth in Paragraph 2 of the COMPLAINT:

> "2. The Plaintiff is exercising its right of eminent domain pursuant to the authorization granted to it by Chapters 73 and 74, Florida Statutes; Chapter 180, Florida Statutes; and pursuant to those certain Resolutions Number 86-10 duly and regularly adopted by the City Council, City of Ocala, Ocala, Florida on April 8, 1986, true copies of which are attached hereto and made a part hereof as Exhibits I and II." (R: 1)

The City concedes that §337.27(3) Fla. Stat. (1985) was not included in the COMPLAINT'S allegations.

With the filing of its COMPLAINT, the City also filed a DECLARATION OF TAKING seeking to avail itself of the "quick taking'' provisions of Chapter 74, Fla. Stat. (1985). One of the parcels condemned in its entirety in fee simple absolute was designated as Parcel 23 in the COMPLAINT and DECLARATION OF TAKING. (R: 1-76) This is the parcel at issue in these proceedings. This property was leased to Respondent's O.J. and Carolyn Nye (hereinafter "Nye") for the purpose of operating a business owned by the Nyes and known as the "Coffee Kettle Restaurant". (R: 80, 82-84, 286-289) The City did not list the Nyes' ownership interest in its original COMPLAINT and moved to file an amendment thereto. By ORDER rendered June 26, 1986 (R: 79), the City was permitted to file the following AMENDMENT TO THE COMPLAINT AS TO PARCEL NO. 23:

> "6. PARCEL NO. 23:
>
> SUBJECT TO: Unrecorded lease and an assignment thereof dated May 16, 1985 held by Carolyn Nye. (R: 80)

The Nyes responded through counsel by filing an ANSWER contesting the proposed taking and claiming compensation, including statutory business damages, pursuant to §73.071(3)(b), Fla. Stat. (1985) (R: 82-84). Counsel for the Nyes also filed a MOTION TO QUASH the DECLARATION OF TAKING as to Parcel 23 on the grounds that "...all of the lands described as Parcel 23 are not needed for public use and any Order of Taking entered herein should be restricted to the lands actually necessary for public use." (R: 81).

On June 30, 1986, a hearing was held on the proposed quick taking of all parcels, together with all pending motions. (R: 195-275) The trial court rendered an ORDER OF TAKING, July 7, 1986, denying Nyes' MOTION TO QUASH the DECLARATION OF TAKING as to Parcel 23, and providing in part that the subject parcels, including Parcel 23, were taken in fee simple. (R: 85-91) The ORDER OF TAKING incorporated the legal description for Parcel 23, described in the COMPLAINT, which was a total taking: (R: 85-91).

> "The West 200 feet of the following described property: Beginning at the Southeast corner of Lot 3, Block "Y" of ALLRED'S ADDITION TO OCALA, thence run North 60 feet, thence West 210 feet, thence South 60 feet, thence East 210 feet to the Point of Beginning." (R: 32)

As indicated, the property is rectangular in shape, 60 feet wide by 200 feet long and was oriented lengthwise adjacent to the 14th Street project. For the Court's convenience a sketch of this parcel, deliniated as Exhibit "A", is included herein as page 8. During the original order of taking proceeding, the City's engineer testified that forty-five feet of frontage was necessary for the new road right-of-way. (R: 225). The engineer further testified that an additional five foot strip was necessary for a utilities and construction easement. (R: 225) Finally, he testified that the remaining 10 feet by 200 feet was being taken simply because it was an "uneconomic" remainder. (R: 226)

The landowner, by counsel, agreed to the total taking. (R: 228). Thereupon, the court ruled that the Nyes did not have standing to contest the extent of the take on the basis of their interest as lessee in possession. (R: 230).

On July 14, 1986, the Nyes filed their MOTION FOR REHEARING AS TO PARCEL 23. (R: 98) The grounds asserted were as follows:

> "1. The Court misapprehended the terms of the lease between MARIE CURRY and CAROLYN NYE.
>
> 2. The Court misapprehended the law concerning the right of a public body to take lands not needed for public use." (R: 98).

The Nyes continued to operate their restaurant business on Parcel 23 until dispossessed by the City on March 16, 1987, pursuant to court order. (R: 126-127) Their MOTION FOR REHEARING was heard and granted July 2, 1987. (R: 132) Rehearing as to the taking of lessee Nyes' interest in Parcel 23 was ordered for October 14, 1987. (R: 132) The rehearing was rescheduled and conducted on November 24, 1987. (R: 133, 258-294) The sole issue in dispute was whether or not the NYES' could present their business damage claim to the jury, which in turn depended upon whether the City could take all of the property. (R: 258).

Bath parties were present and prepared to offer testimony at the rehearing. (R: 259) Instead, the parties were able to stipulate to the pertinent facts that the right-of-way plans and specifications in evidence, together with the prior engineering testimony demonstrated that a 10-foot by 200-foot strip of Parcel 23 was not necessary for the construction of the 14th Street project. (R: 261-262) This was further demonstrated by the actual construction plan which was stipulated into evidence at the hearing. (R: 262) Also stipulated into evidence was a site sketch

prepared by the City's engineering department that shows the improvement on the property and establishes that an approximately seven (7) foot strip of the building was outside of the area needed for the project. (R: 263) At this hearing the City conceded that, if the landowner had objected to the taking, the City could not have acquired all of Parcel 23 in order to construct the road. However, the City did not agree that the Nyes could have pursued their business damage claim. Quite to the contrary, the City specifically preserved its argument that the taking could be necessary, in the constitutional sense, for purposes other than actual construction of the road. (R: 260-261, 270-274) The only concession made by the City at the November 24, 1987 hearing was that the City could not have acquired the narrow strip of land exclusively for the purpose of constructing the N.E. 14th Street project. (R: 260, 271-272, 287-288)

The last matter of importance to note regarding the November 24, 1987 hearing is that the City used that occasion to advance its "constructive total taking" argument. Reduced to basics, the City's position was that the land actually needed for construction constituted such a majority of the whole that the taking was actually the equivalent of a total taking. Therefore, if the taking constructively constituted a total taking, there could be no award of business damages. (see: R: 278 ff) Nevertheless, the court ruled that the City could not and did not take all of Nyes ownership interest and the Nyes could present evidence as to the amount of their compensable business damages at the jury trial of

the case. (R: 290-293) The ORDER MODIFYING ORDER OF TAKING was rendered February 4, 1988.

On October 17, 1988, Plaintiff served its MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING (R: 162-164), together with its memorandum of law in support thereof. (R: 165-171) The basis for the Motion was the August 19, 1988 decision of this Court styled: Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d. 1267 (Fla. 1988), upholding the validity of §337.27(3), Fla. Stat. (1985). Because this statute had now been ruled constitutional, the CITY alleged that it had the authority to condemn all of Parcel 23 where, by doing so, it could defeat Nye's business damage claim and, as a result, the total acquisition costs of Parcel 23 would be reduced.

The Nye's served their MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING on October 27, 1988. (R: 174-190) The court scheduled oral argument on the Motion for November 15, 1988. (R: 295-326) No evidence was introduced and no testimony was taken because the hearing dealt exclusively with matters of law. (R: 295-326) At the conclusion of the hearing the court granted the Motion and denied Appellants' Nye business damage claim. (R: 326) On January 30, 1989, the trial court entered the ORDER AMENDING ORDER OF TAKING AS MODIFIED and PARTIAL FINAL JUDGMENT appealed from. (R: 191-193, 194). The former reinstated the total taking of Parcel 23, thereby defeating Nyes' claim for business damages. (R: 191-193). Pursuant to the PARTIAL FINAL JUDGMENT, Nyes recovered "zero" for their business damage claims. (R: 194).

Thereafter, the Nyes brought appeal to the Fifth District Court of Appeal and the City filed a cross-appeal. The principal issue advanced by the Nyes was that the trial court was incorrect in allowing the City to condemn the entire parcel in order to avoid business damages. The City's major point on cross-appeal was that the trial court erred in rejecting its "constructive total taking" theory.

On April 5, 1990 the Fifth District Court of appeal filed its opinion reversing the Trial Court's ORDER AMENDING ORDER OF TAKING AND MODIFIED and PARTIAL FINAL JUDGMENT. On May 4, 1990 the City timely filed its NOTICE requesting this Honorable Court to invoke its discretionary jurisdiction to review that decision. Lastly, on October 30, 1990, this Court entered its ORDER ACCEPTING JURISDICTION AND SETTING ORAL ARGUMENT.

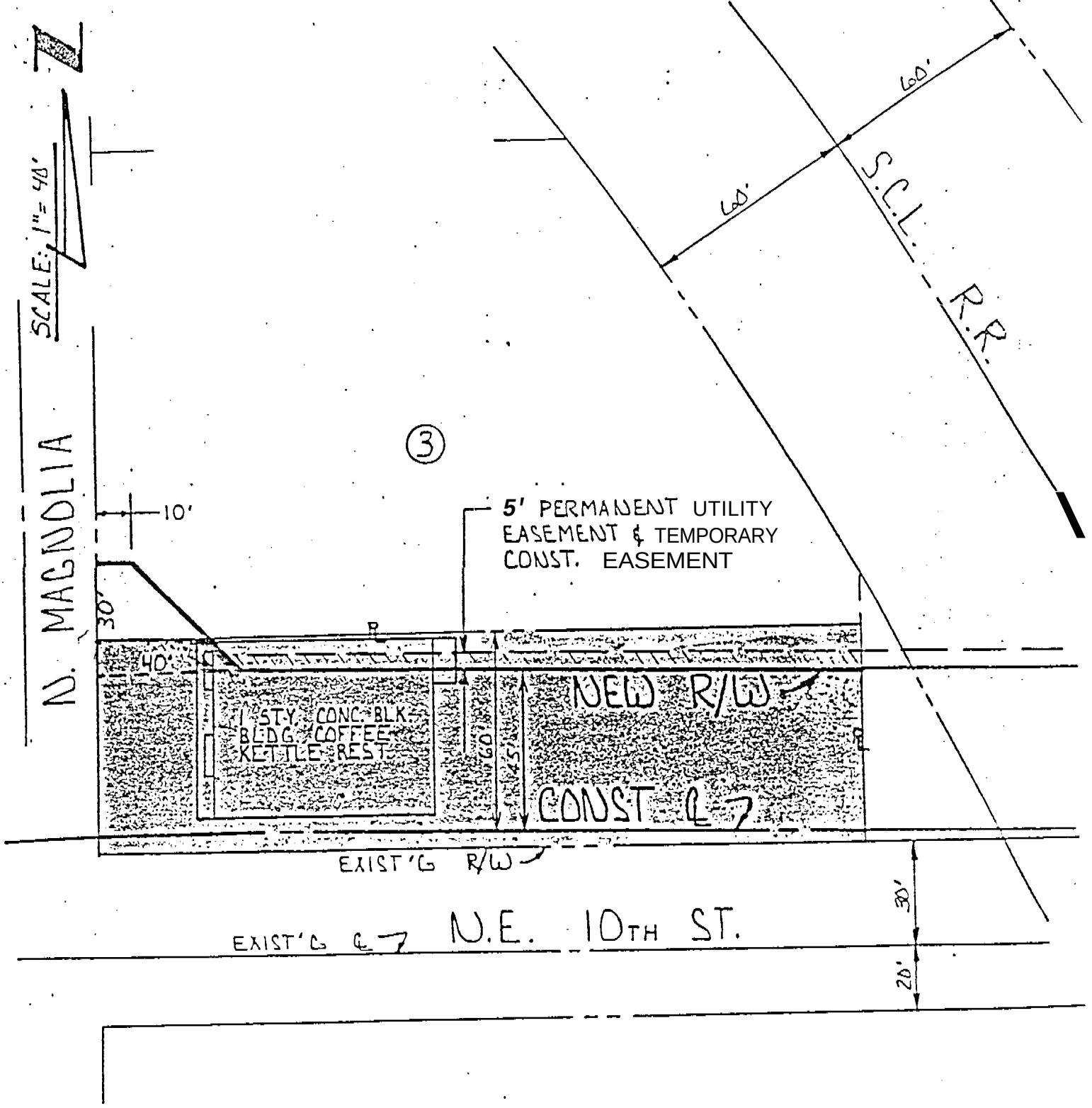

EXHIBIT A

PARCEL # 23	AREA SQ.F
DATE	REV.

SUMMARY OF TEE ARGUMENT

POINT ONE

Florida Statutes §337.27(3)(1985) allows the condemning in eminent domain proceedings of more property than is actually necessary for a public works project if the total acquisition cost will be less than the cost of acquiring only a portion of the property. Although the provisions of this statute are not specifically made applicable to municipalities, municipalities may take advantage of its terms pursuant to concepts of Home Rule power.

In construing the statutory question, three abiding principles of statutory construction should be applied. First, any ambiguity regarding the extent of delegation of Home Rule power should be liberally construed in favor of delegation. Secondly, business damages are a matter of legislative grace and any ambiguity should be strictly construed in favor of the sovereign and against the claimant. Lastly, an interpretation of the language of a statute which leads to absurd consequences should not be adopted when, considered as a whole, the statute is fairly subject to another construction that will aid in accomplishingthe manifest intent and the purposes designed.

Following these rules of statutory construction, the obvious conclusion is that the City possessed the requisite power to acquire all of the property in question thereby defeating the Nyes' claim for business damages.

POINT TWO

Business damages may be awarded only when a portion of the business premises is taken. If the entire business is taken, there is no statutory authority for an award of business damages.

Conceptually, a "total taking" does not require that every square inch of a parcel actually be condemned. At some point a taking of less than an entire parcel would leave a sliver of land so deminimis as to be totally useless. In that event, a constructive total taking would occur and no business damages could be awarded.

If the taking actually necessary for construction would result in payment of compensation based upon one hundred percent (100%) of the fair market value of the original tract, and if the remainder has no reasonable economic utility, the taking should be regarded as total. Based upon this standard, the instant taking would constitute a constructive total taking and no business damage can be owed.

ARGUMENT

POINT ONE

THE CITY OF OCALA HAD THE POWER TO CONDEMN ALL OF PARCEL 23 FOR THE PURPOSE OF DEFEATING THE NYES' BUSINESS DAMAGE CLAIM

Florida Statutes Section 337.27(3) (1985), now renumbered as Section 337.27(2) (1989), was enacted in 1984. This statute provides as follows:

> In the acquisition of lands and property, the department (of transportation) may acquire an entire lot, block, or tract of land if by doing so, the acquisition costs to the department will be equal to or less than the cost of acquiring a portion of the property. This subsection shall be construed as a specific recognition by the Legislature that this means of limiting the rising costs to the state of property acquisition is a public purpose and that, without this limitation, the viability of many public projects will be threatened.

This statute was erroneously held to be unconstitutional in State Department of Transportation v. Fortune Federal Savings and Loan Association, 507 So.2d 1172 (Fla. 2d DCA 1987). However, on August 19, 1988 this Honorable Court quashed that decision and upheld the statute's constitutionality. Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988).

By granting the State of Florida Department of Transportation the power to acquire entire parcels of property, if, by so doing, the acquisition costs will be equal to or less than the costs of acquiring a portion of the property, the Florida legislature did at the same time extent the power to Florida municipalities. This is because Florida municipalities are given broad Home Rule powers as

specified in Article VIII, §2(b) of the Florida Constitution and Florida Statutes Section 166.021.

In the decision below, the Fifth District Court of Appeal recognized these basic tenants of Home Rule power but held that a municipality did not have the power to acquire an entire tract for the purpose of avoiding business damages. The court's articulated logic was that powers of eminent domain are to be strictly construed. Thus, the court below balanced the constitutional provisions for Home Rule against a rule of statutory construction regarding eminent domain and found the rule of construction to be more compelling. That decision was in error and should be reversed by this Court.

Any ambiguity regarding the extent of delegation of Home Rule power should be liberally construed in favor of delegation. The Florida Constitution authorizes municipalities to exercise "any power for municipal purposes except as otherwise provided by law." Art. VIII, §2(b), Fla. Const.; City of Boca Raton v. Gidman, 440 So.2d 1277, 1279 (Fla. 1983). The Municipal Home Rule Powers Act provides that the legislature intends to extend to municipalities the exercise of powers for municipal purposes

> "not expressly prohibited by the constitution, general, or special laws, or county charter, and to remove **any** limitations ... on the exercise of home rule powers other than those expressly prohibited" (emphasis added). §166.021(4), Fla. Stat. (1985); **Gidman**, supra, at 1279-1280.

A "municipal purpose" is any activity or power which may be exercised by the state or its political subdivisions, such as the Department of Transportation. §166.021(2), Fla. Stat. (1985); City of Miami Beach v. Rocio, 404 So.2d 1066, 1068 (Fla. 3d DCA 1981).

The powers of municipalities, therefore, are not limited to those provided by general or special laws. Municipalities may exercise any governmental powers, including those given to the Department of Transportation, which accomplish a municipal purpose, unless the power is expressly prohibited by the constitution or by general or special laws. See, Gidman at 1280. This is because the legislature determined that the best way to recognize municipal powers is by removal of legislative direction from the statutes. Gidman at 1281; S166.042, Fla. Stat. (1985).

By contrast, agencies of the state government; for example, the Department of Transportation (D.O.T.), may only exercise those powers expressly delegated to the them. [see: Lee v. Division of Fla. Land Sales and Condominiums, 474 So.2d 282 (Fla. 5th DCA 1985).] D.O.T.'s powers are enumerated in §334.044, Fla. Stat. (1987). Similarly the Florida Constitution provides that counties not operating under county charters shall have only such power of self-government as is provided by general or special law. Art. VIII, §1(f), Fla. Const.

Because powers delegated to D.O.T. and Florida counties are strictly limited, the legislature must be careful to provide expressly what powers these governmental entities may exercise. Therefore the legislature was required specifically to provide to D.O.T. and to Florida counties the power to acquire entire parcels of property in order to avoid an obligation to pay business damages. §337.27(3), Fla. Stat. (1985); §127.01(b), Fla. Stat. (1988).

Prior to July 2, 1990, the legislature did not specifically provide this power to municipalities; however, such specific delegation was not necessary. At the moment that §337.27(3), Fla. Stat. (1985) became law, municipalities, through Home Rule powers, became authorized to exercise this power because such exercise was not expressly prohibited. See, §166.021(2), Fla. Stat. (1985); Rocio, supra at 1068.

In construing statutes such as the Home Rule Powers Act this Court has said that it is vital and essential to ascertain and give effect to the intent of the statute. Gidman at 1281. This Court has also stated that the Home Rule Powers Act is a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII, §2(b), of the Florida Constitution. City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764, 766 (Fla. 1974). Therefore, the Act must be construed so as to effectuate that purpose. Id.

By contrast, regarding business damages in eminent domain proceedings, this Court has ruled that these damages are a matter of legislative grace, and can be compared to a waiver of sovereign immunity. Fortune, supra at 1270; Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926, 928 (Fla. 1983). In Morris the Court held that issues concerning a legislative grant of business damages must be strictly construed in favor of the state and against the claimant. Id. at 928. It further held that any ambiguity in the business damages statute should be construed against the claim for business damages

and that such damages should be awarded only when an award appears clearly consistent with legislative intent. Id. at 929. Nevertheless, the appellate decision below completely ignored these principals specifically applicable to business damages when it held that a general rule of statutory construction regarding eminent domain should take precedence over the constitutional provisions for Home Rule.

Further support for the conclusion that the District Court's opinion was in error can be found in an examination of legislative intent. In the case sub judice, the clearly articulated legislative intent was to limit the rising costs of property acquisition in order to encourage the construction of public projects. See §337.27(3), Fla. Stat. (1985). To construe the legislative intent to be that only D.O.T. and Florida counties may pay limited acquisition costs, but municipalities must continue to pay high acquisition costs, would lead to illogical and unfair results. For example, in the present case, Marion County is funding 40% of the cost of the N.E. 14th Street project, the City is funding 40%, and the D.O.T. is funding 20%. (R: 165). If either Marion County or D.O.T. had commenced the eminent domain proceedings regarding parcel 23, even the Nyes would be forced to agree that no business damages would be owed. But, according to the Nyes, because eminent domain proceedings were commenced by the City of Ocala, business damages should be owed. This absurd result urged by the Respondents would occur in spite of the fact that the City is funding less than half of the N.E. 14th Street project and

that Marion County or D.O.T. could, with equal ease, have been the condemning authority.

Stare decisis makes clear that a construction of §337.27(3), Fla. Stat. (1985); §127.01(1)(b), Fla. Stat, (1988); and §166.021, Fla. Stat. (1985) leading to the result described above would be an incorrect construction. No literal interpretation should be given to a statute that leads to an unreasonable or ridiculous conclusion or purpose not designated by the lawmakers. Gidman, supra at 1281. When a statute is susceptible of and in need of interpretation or construction, it is axiomatic that courts should endeavor to avoid giving an interpretation that will lead to an absurd result. Morris, supra at 929. An interpretation of the language of a statute that leads to absurd consequences should not be adopted when, considered as a whole, the statute is fairly subject to another construction that will aid in accomplishing the manifest intent and the purposes designed. Morris, supra at 930. A law should be construed together with any other law relating to the same purpose such that they are in harmony. Gidman, supra at 1282. Courts should avoid a construction which places in conflict statutes which cover the same general field. Id. The law favors a rational, sensible construction. Id.

Following these rules of statutory construction, §337.27(3), Fla. Stat. (1985); §127.01(1)(b), Fla. Stat. (1988); and 5166.021, Fla. Stat. (1985) must be construed together, rationally and sensibly. Under such a construction the only possible conclusion is that the City may condemn parcel 23 in its entirety and avoid

paying the increased acquisition costs that would be otherwise required under §73.071(3)(b), Fla. Stat. (1985), the business damage statute.

Nevertheless, the District Court of Appeal rejected the foregoing in favor of the previously discussed tenant that the power of eminent domain should be strictly construed. In support of its holding, the Appellant Court cites Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975), and Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947). These cases, however, are clearly distinguishable from the present case.

These cases concern the burden that a political subdivision has to establish that land is being taken for a public purpose and not a private one. The cases hold only that, as a prerequisite to the taking of land from a landowner, the condemning authority must establish a public purpose and a reasonable necessity for the taking, a principal of law not contested by the City. Baycol, supra at 455; Peavy-Wilson, supra at 486. Neither of these cases address whether the power to acquire entire parcels to save acquisition costs should be strictly construed. Therefore, the lower court's reliance upon these cases was erroneous.

Lastly, as all parties are aware, the 1990 Legislature amended §166.401, Fla. Stat. (1989) so as to include specifically therein the right of municipalities to condemn entire parcels for the purpose of avoiding business damages. [pee: Ch. 90-227 518, Laws of Fla.] This law became effective July 2, 1990, nearly three

months after the District Court of Appeal opinion was filed. Candidly, this statutory amendment has little impact upon this instant case.

The City's expectation is that the Nyes will attempt to argue that this legislative intervention demonstrates that, but for the amendment, the power would not reside in municipalities. With equal ease, the City could argue that the new legislation simply confirms the previously existing legislative will and overrides the prior appellant decision in this case. However, the truth is that the 1990 amendment is really irrelevant to our case.

The issue for determination herein is one of constitutional law. At all times relevant to this proceeding, the City either did, as the result of constitutionally guaranteed Home Rule Powers, possess the authority to condemn entire tracts or it did not possess that authority. If the City did not have that power before, the Legislature could do nothing to provide it retrospectively. On the other hand, if the City did have the power previously, legislative confirmation of that fact was a mere redundancy and could not be said to have abrogated authority that had existed before.

Therefore, the issue remains before this Court as it has from the beginning of this litigation. That is, did the City in July of 1986, as the result of Home Rule guarantees, have the power to condemn all of parcel 23 for the purpose of defeating the Nyes' business damage claim. For the reasons stated supra, the answer must be yes. Therefore the decision Fifth District Court of Appeal should be reversed and the judgment of the Circuit Court reinstated.

POINT TWO

THE TAKING OF THAT PORTION OF PARCEL 23 ACTUALLY NECESSARY FOR THE CONSTRUCTION OF THE ROAD IMPROVEMENT PROJECT CONSTITUTED A CONSTRUCTIVE TOTAL TAKING AND, AS SUCH, NO BUSINESS DAMAGES ARE OWED TO THE NYES.

As noted by the appellate court below, an anomaly exists regarding business damages because S73.071, Florida Statutes, allows recovery only when a portion of the business premises is taken. If the entire business is taken, no business damages can be awarded. So, the necessary inquiry now becomes, what constitutes a "total taking" so as to negate a claim for business damages.

As it did below, the City concedes that the case law is confusing regarding disposition of a case where less than the total area of a parcel is absolutely necessary for a taking but the amount of land remaining would be so deminimis as to create a "constructive total taking." The City would respectfully invite this Court to use this case as an opportunity to give definitive guidance regarding this question.

As a threshold matter, the City submits that, at some point, a taking of less than an entire parcel would leave a strip of land so deminimis as to be totally useless. In that event, a constructive total taking would occur and no business damages would be awarded under §73.071(3)(b). For example, if the taking necessary to construct the N.E. 14th Street project would have been an area of land 59 feet 11 inches wide by 200 feet long, so that a sliver of land 1 inch by 200 feet was left after the taking, any reasonable person would be forced to agree that a constructive

total taking would have occurred. A 1/10 inch by 200 feet strip of remaining land would be an even more obvious example of what should constitute a constructive total taking.

So then, the question really is not whether a constructive total taking can, in the abstract, defeat a claim for business damages. The proper question is how to establish a workable standard for determining whether, as a matter of fact, a constructive total taking did occur.

One Florida case, Douglas v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968), concerns a taking in which the public authority condemned and destroyed 5/8's of a coin-operated laundry business structure, leaving 3/8's of the structure remaining upon the adjoining land not taken. Id. at 403. The Second District Court of Appeal treated this 5/8's taking as a constructive total taking. It stated that under the aforesaid facts the sublessee/business owners had failed to bring themselves within the purview of Florida Statutes 573.071. This was because the effect of the condemnation was to destroy the business by reason of an entire taking of both the business and the land. Id. at 404-405. The rationale of the Second District Court of Appeal was that, because the sublessee's coin-operated laundry business would require relocation, it was effectively taken in its entirety. Id. at 405.

A second Florida case, Young v. Hillsboroush County, 215 So.2d 300 (Fla. 1968), concerned a hardware business which was destroyed when the taking passed through the front of the building and

required the entire removal of the building. Id. at 301. This Court held that, under these facts, the taking was a partial taking in which the business was destroyed, and that business damages should have been awarded. Id.

In State Road Department v. Bramlett, 189 So.2d 481 (Fla. 1966), the owner of a small general store had his business destroyed by a taking by the State of Florida Road Department. Id. at 482. Because the business was located entirely on the land taken, with no part of the business located on adjoining lands, this Court held that the business damages statute did not apply and no business damages could be awarded to the business owner. Id. at 483.

The City asserts that is unclear from these cases what percentage of land and business taken, under Florida law, constitutes a constructive total taking. In the instant case approximately 83% of the total property constituting parcel 23 was necessary to be taken. After the taking a 10 feet by 200 feet strip of land remained which bordered on N.E. 14th Street. After the taking what remained of the Coffee Kettle business structure on the aforesaid strip of land was approximately a 7 feet wide by 70 feet long strip of building. See Exhibit "A" on page 8, supra.

The City's building code would not allow construction upon this sliver of land. The set back requirement for N.E. 14th Street, as specified in S7-989, page 564 of the City of Ocala Code of Ordinances, is 20 feet from the right-of-way. For the Court's convenience and ready access, a copy of Chapter 7, Division 10 of the Code of Ordinances is attached hereto as Appendix "A-1". Therefore, this remaining strip of land was of no use to the land

DIVISION 10. STREET WIDTHS AND SETBACKS

Sec. 7-986. Compliance with setbacks required.

(a) No building, structure or parking lot or space shall be permitted to be constructed, erected or altered so that any part thereof would extend toward the streets listed hereunder at a lesser distance than those specified herein, except:

(1) Signs, meeting visibility standards set forth below.

(2) Parking to be allowed in all areas ten (10) feet back from right-of-way and street width lines, except at intersections where the provisions of Section 7-739 shall supercede, and that this ten (10) feet may be reduced to five (5) feet where properly designed, subject to staff review and approval of the design.

(3) Drainage areas and appurtenances with a height measured from the right-of-way line grade, of less than two and one-half (2%) feet.

(4) Sidewalks, which shall be constructed within the right-of-way.

(b) All setbacks shall be measured in feet, at right angles in each direction, from the center line of the streets listed unless otherwise specified. Where any portion of a street listed hereunder lies within a residential district (R-1, R-1A, R-1AA, R-2, R-3, MH, TRO, PUD, RO) the setback shall be determined by either the setback listed herein or by the front yard requirement as determined by other sections of this chapter, in addition to the street width, whichever is greater.

(c) Where an R-3, RO, RBH, TRO, B-1 or B-1A zoned plot fronts on a street having a minimum of three (3) through traffic lanes, required parking and access drives shall be allowed in the required yard up to five (5) feet from the property line provided that the required five-foot setback shall be landscaped.

(Code 1961, § 22-15(a); Ord. No. 1603, § 4, 10-4-83; Ord. No. 1832, § 14, 4-15-86; Ord. No. 1903, § 7, 2-3-87; Ord. No. 2008, § 2, 6-21-88)

Sec. 7-987. Visibility standards.

All permanent structures and all new and existing trees, landscaping, and signs shall be maintained so that vision is not obstructed between two and one-half (2%) feet and ten (10) feet. Tree trunks, sign pylons, and municipal and franchise utility poles shall not be governed by the provisions of this section.

(Code 1961, § 22-15(b))

Sec. 7-988. Street widths generally.

Unless specifically provided otherwise, the minimum street right-of-way width shall be sixty (60) feet, thirty (30) feet of each side of the centerline, for all streets or portions of streets, The building official may reduce the minimum street width setback when the city engineer determines that it is not necessary or practical to maintain.

(Code 1961, § 22-15(c); Ord. No. 1662, § 1, 5-15-84)

Sec. 7-989. Minimums designated for particular streets.

Streets or portions of streets for which minimum setbacks and street widths are specifically designated are listed as follows:

Street name	*Setback*	*Street Width*
West Broadway and S.R. 40 from west city limits to S.W. Pine Avenue	20 feet from right-of-way	–
East Fort King Street from S.E. 25th Avenue to east city limits	60 feet	80 feet
S.E. Fort King Street from S.E. 16th Avenue to S.E. 25th Avenue	60 feet	80 feet
S.W. and S.E. Fort King Street from S.W. Pine Avenue to S.E. 16th Avenue	50 feet	–

Street name	*Setback*	*Street Width*
Old Jacksonville Road from North Magnolia to Old U.S. Highway 301	60 feet	100 feet
North Magnolia Avenue from Seaboard Coastline Railroad to N.W. 20th Street	60 feet	80 feet
North Magnolia Avenue from N.W. 20th Street to N.W. 28th Street	50 feet	60 feet
South Magnolia Extension and S.E. Lake Weir Avenue from south city limits to S.W. 10th Street	20 feet from right-of-way	80 feet
S.W. and N.W. Pine Avenue from south city limits to north city limits	20 feet from right-of-way	–
East Silver Springs Boulevard from N.W. Pine Avenue to N.E. 25th Avenue	10 feet from right-of-way	–
East Silver Springs Boulevard from N.E. 25th Avenue to east city limits	20 feet from right-of-way	–
S.E. and N.E. Watula from S.E. 3rd Avenue to N.E. 9th Street	50 feet	60 feet
U.S. Highway No. 27 from west city limits to 1900 feet east of centerline of I-75	20 feet from right-of-way	200 feet
U.S. Highway No. 27 from 1900 feet east of centerline of I-75 to N.W. 27th Avenue	20 feet from right-of-way	–
I-75 from south city limits to north city limits	15 feet from right-of-way	–
S.R. 200 from west city limits to 2,700 feet east of I-75	153 feet from the centerline	150 feet
S.R. 200 from 2,700 feet east of I-75 to S.W. 16th Avenue	128 feet from the centerline	100 feet
S.R. 200 from S.W. 16th Avenue to S.W. Pine Avenue	20 feet from right-of-way	–
Old U.S. Highway No. 301 from Seaboard Coastline Railroad to N.E. 8th Road	20 feet from right-of-way	–
Alternate Highway 441 from N.W. Pine Avenue to north city limits	70 feet	100 feet
County Road 464 from S.E. 25th Avenue to east city limits	20 feet from right-of-way	–
County Road 475 from south city limits to S.E. Pine Avenue	70 feet	100 feet
N.W. and N.E. 2nd Street from N.W. 7th Avenue to N.E. 25th Avenue	50 feet	60 feet
N.E. 3rd Street from N.E. 8th Avenue to East Silver Springs Boulevard	60 feet	80 feet
N.W. and N.E. 3rd Street from N.W. Pine Avenue to N.E. 8th Avenue	50 feet	60 feet

Street name	***Setback***	*Street Width*
S.W. and S.E. 3rd Street from S.W. Pine Avenue to S.E. 11th Avenue	50 feet	60 feet
N.W. 4th Street from N.W. 27th Avenue to N.W. 7th Avenue	50 feet	60 feet
S.W. and S.E. 5th Street from S.W. Pine Avenue to S.E. 11th Avenue	50 feet	60 feet
N.E. 7th Street from East Silver Springs Boulevard to east city limits	60 feet	80 feet
N.W. 7th Street from N.W. 27th Avenue to N.W. 6th Avenue	50 feet	60 feet
S.E. 8th Street from S.E. 36th Avenue to east city limits	50 feet	60 feet
S.W. and S.E. 8th Street from S.W. Pine Avenue to S.E. 11th Avenue	50 feet	60 feet
N.E. 9th Street from North Magnolia Avenue N.E. 11th Avenue	50 feet	60 feet
N.W. 10th Street from N.W. 27th Avenue to N.W. Pine Avenue	20 feet from right-of-way	—
N.W. and N.E. 10th Street from N.W. Pine Avenue to N.E. Osceola Avenue	**20** feet from right-of-way	—
S.W. 10th Street from Seaboard Coastline Railroad to S.E. 8th Street	20 feet from right-of-way	—
N.E. 14th Street from N.E. 8th Avenue to East Silver Springs Boulevard	**70** feet	90 feet
N.W. and N.E. 14th Street from N.W. 8th Avenue to N.E. 8th Avenue	**50** feet	60 feet
S.E. 17th Street from County Road No. **464** to S.E. 25th Avenue	**60** feet north of and abutting the south line of the Alvarez Grant	40 feet
S.E. 17th Street from S.E. 25th Avenue to S.E. 36th Avenue	60 feet	80 feet
S.E. 17th Street from S.E. 36th Avenue to east city limits	50 feet	60 feet
S.W. 17th Street from S.R. 200 to S.W. 7th Avenue	120 feet	200 feet
S.W. and S.E. 17th Street and County Road No. 464 from S.W. 7th Avenue to **S.E 25th** Avenue	20 feet from right-of-way	—
N.E. 19th Street from N.E. 8th Road to N.E. 14th Avenue	50 feet	60 feet
N.W. and N.E. 20th Street (Old U.S. Highway No. 301) from N.W. Pine Avenue to Seaboard Coastline Railroad	20 feet from right-of-way	—
S.W. 20th Street from west city limits to S.R. 200	60 feet	80 feet
N.E. 21st Street from N.E. 36th Avenue to N.E. 46th Avenue	60 feet	80 feet
N.W. 21st Street from N.W. 34th Avenue to N.W. 16th Avenue	60 feet	80 feet

Street name	*Setback*	*Street Width*
N.W. 22nd Street from N.W. 16th Avenue to North Magnolia Avenue	60 feet	80 feet
N.E. 24th Street from N.E. 8th Road to N.E. 36th Avenue	**50** feet	60 feet
S.E. 24th Street from S.E. 3rd Avenue to S.E. Lake Weir Avenue	50 feet	60 feet
N.W. and N.E. 28th Street from west city limits to east city limits	60 feet	80 feet
N.W. and N.E. 35th Street from the west city limits to east city limits	70 feet	100 feet
S.W. and N.W. 1st Avenue from S.W. Pine Avenue to Seaboard Coastline Railroad	20 feet from right-of-way	60 feet
S.E. **3rd** Avenue from South Pine Avenue to S.E. Watula	50 feet	60 feet
S.W. 7th Avenue from south city limits to S.W. 10th Street	60 feet	80 feet
N.E. 8th Avenue and Road and **Old** Jacksonville Road from N.E. 14th Street to north city limits	**70** feet	100 feet
N.W. 8th Avenue from N.W. 14th Street to N.W. 22nd Street	50 feet	60 feet
N.E. 8th Avenue from Silver Springs Boulevard to N.E. 14th Street	**20** feet from right-of-way	—
S.E. and N.E. 11th Avenue from S.E. Lake Weir Avenue to N.E. 14th Street	50 feet	60 feet
N.E. 14th Avenue from N.E. 19th Street to north city limits	50 feet	60 feet
N.W. 16th Avenue from N.W. 10th Street to north city limits	60 feet	80 feet
S.E. and N.E. 16th Avenue from S.E. Fort King Street to N.E. **3rd** Street	50 feet	60 feet
S.W. and N.W. 16th Avenue-from S.W. 10th Street (S.R. 200) to N.W. 10th Street	**20** feet from right-of-way	—
N.E. 17th Avenue from N.E. 3rd Street to N.E. 14th Street	50 feet	60 feet
N.E. 19th Avenue from N.E. 14th Street to north city limits	**50** feet	60 feet
S.E. and N.E. 25th Avenue from south city limits to north city limits	60 feet	80 feet
S.W. and N.W. 27th Avenue from south city limits to north city limits	**70** feet	100 feet
N.E. 30th Avenue from East Silver Springs Boulevard to N.E. 24th Street	50 feet	60 feet
N.W. 30th Avenue from West Broadway to U.S. Highway No. **27**	70 feet	100 feet
S.W. 23rd Avenue from S.W. 20th Street to West Broadway and S.R.40	**50** feet	60 feet

Street name	Setback	Street Width
N.W. 34th Avenue from U.S. Highway No. 27 to N.W. 21st Street	60 feet	80 feet
N.E. 36th Avenue from N.E. 14th Street to north city limits	70 feet	100 feet
S.E. 36th Avenue from S.E. 17th Street to south city limits	70 feet	100 feet
N.E. and S.E. 36th Avenue from N.E. 14th Street to S.E. 17th Street	60 feet	80 feet
N.E. 46th Avenue from East Silver Springs Boulevard to N.E. 21st Street	60 feet	80 feet
S.E. and N.E. 58th Avenue (CR 35) from south city limits to north city limits	70 feet	100 feet
S.W. 17th Road from S.R. 200 to S.W. 27th Avenue	20 feet from right-of-way	60 feet
S.W. 19th Avenue Road from S.W. 17th Street to S.W. 27th Avenue	20 feet from right-of-way	120 feet

(Code 1961, § 22-15(d); Ord. No. 1634, § 1, 3-6-84; Ord. No. 1661, § 1, 5-8-84; Ord. No. 1662, § 2, 5-15-84; Ord. No. 1769, § 1, 8-6-85; Ord. No. 1917, § 1, 4-7-87; Ord. No. 1926, § 1, 5-12-87)

Secs. 7-990-7-1000. Reserved.

DMSION 11. SUPPLEMENTARY DISTRICT REGULATIONS

Part A. General Provisions

Sec. 7-1001. Generally.

The provisions of this division are applicable in those instances in which the appropriate reference is made to the provisions in Division 12 of this article or when the particular provision clearly is applicable, notwithstanding the absence of an indication of applicability in Division 12.

Sec. 7-1002. Special exceptions.

The uses indicated by the number "1" in Division 12 of this article are permitted in the zones designated only after a public notice and hearing by the board of adjustment. The board of adjustment shall have the authority to require any appropriate conditions or safeguards which in the judgement of the board of adjustment are necessary to protect the basic character of the neighborhood.
(Code 1961, § 22-8(1))

Sec. 7-1003. Junkyards.

(a) It is the intent of this chapter that automotive vehicle graveyards and wrecking yards and activities shall not be permitted in the city. Such activities are not included in the definition of junkyard. Junkyards are permitted in certain industrial zones, subject to general regulations applicable in such zones.

(b) This section may be referred to in Division 12 of this article by the number "3."
(Code 1961, § 22-8(3))

Cross reference—Storage of junk vehiclee, § 13-12.

Sec. 7-1004. Bakery or delicatessen.

A bakery or delicatessen is permitted in the zones designated with the number "4" in Division 12 of this article provided any food prepared on the premises is for retail sale on the premises. This requirement is not applicable in zones which permit bakeries without qualification.
(Code 1961, § 22-8(4))

Sec. 7-1005. Produce shipping, packing and selling.

(a) It is the intent of this article to limit to specific districts the wholesale packing, shipping,