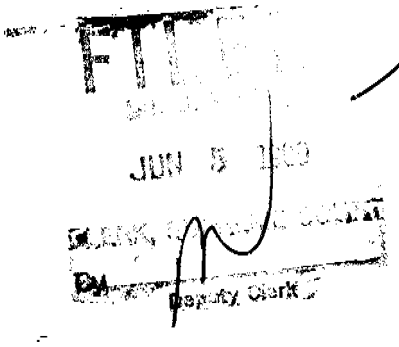
IN THE SUPREME COURT OF FLORIDA



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

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts contained in Petitioner's Brief on Jurisdiction.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision rendered April 5, 1990, in this cause neither expressly construes the provisions of the Florida Constitution cited by Petitioner nor expressly and directly conflicts on the same question of law with the District Court of Appeal's decision rendered in Douglas v. Hillsborough County, 206 So.2d 406 (Fla. 2d DCA 1968), and therefore application of Florida Constitution, Article V, Section 3(b)(3) and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(ii) and 9.030(a)(2)(A)(iv) to invoke the discretionary jurisdiction of this Court is improper. The District Court's application of Florida law is correct. Review by this Court would ultimately lead to the same result reached below. Furthermore, the decision was not certified as being one of great public importance by the Fifth District and there exists no alternate "substantial ramification" standard as asserted by Petitioner. This Court should deny Petitioner's request to invoke the Court's discretionary jurisdiction, pursuant to Article V, Section 3, of the Florida Constitution.

ARGUMENT

I. THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY CONSTRUE A PROVISION OF THE STATE CONSTITUTION AS REQUIRED TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT, PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(ii), UNDER ARTICLE V, SECTION 3(b)(3), FLORIDA CONSTITUTION.

The decision below is a straightforward example of statutory construction and application and is not based upon an express construction of the Florida Constitution. The mere fact that the District Court's Opinion recites Petitioner's position that Florida Constitution, Article VIII, Section 2 and the "home rule" powers conferred by section 166.021(2), Florida Statutes (1985) authorize a municipality to take more property than is necessary for a public purpose does not create an interpretation of the City's constitutional limitations upon condemning private property. Mere application of constitutional provisions is not sufficient to characterize an opinion as interpreting the State Constitution. Ogle v. Pepin, 273 So.2d 391, 392 (Fla. 1973). Discretionary jurisdiction cannot be based on the argument that a constitutional provision is "inherently" construed. Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958); Ogle, 273 So.2d at 392.

Petitioner's reliance on Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964), to illustrate discretionary jurisdiction is misplaced for *two* reasons. First, Daniels, 170 So.2d at 847, involved the direct appeal jurisdiction of the Supreme Court formerly granted under Article V, Section 4, Florida Constitution (1885), based upon the trial court's construing Florida

Constitution, Article XVI, Section 29 (1885) to be inapplicable to public condemnors. Daniels, 170 So.2d 846, does not involve the present discretionary jurisdiction of this Court arising when constitutional provisions are "expressly" construed. Art. V, s 3(b)(3), Fla. Const. (1980). Second, the opinion below did not expressly construe any provisions of the Florida Constitution. The Opinion below is based upon application of section 337.27, Florida Statutes, in light of well settled principles of Florida law that eminent domain powers are strictly construed.

The power to condemn property is not constitutionally derived but an attribute of the State of Florida. Peavy-Wilson Lumber Co. v. Brevard County, 31 So.2d 483, 485 (Fla. 1947). A municipality's authority to condemn is derived through Florida Statutes sections 166.401 and 166.411 and limited pursuant to Florida Constitution, Article X, Section 6. The constitutional limitation on the State's power to condemn has traditionally limited the State to only take private property necessary for a public purpose. Wilton v. St. Johns County, 98 Fla. 26, 123 So. 527 (1929); Canal Authority v. Miller, 243 So.2d 131 (Fla. 1970). The Fifth District Court of Appeal correctly applied this well settled principle to the facts of this case.

The Fifth District Court of Appeal recognized that the powers of eminent domain are to be strictly construed[1] and, therefore, correctly refused to extend to municipalities the

1 Peavy-Wilson, 31 So.2d at 485; Baycol Inc. v. Downtown Development Authority of the City of Fort Lauderdale, 315 So.2d 451, 455 (Fla. 1975).

authority conferred to the Department of Transportation and counties by section 337.27(2), Florida Statutes (1989)[2]. As noted in the Opinion at footnote 5:

> "... the legislature amended § 166.401, Florida Statutes, in 1988 to explicitly authorize municipalities to exercise eminent domain powers granted to DOT in § 337.27(1) but did not include in this authorization the power granted DOT by § 337.27(2) ..." [Emphasis theirs]. (App. 4)

Florida Constitution, Article VIII, Section 2(b) does not enlarge the municipalities power of eminent domain beyond the extent to which the State itself can exercise the power. Florida Constitution, Article VIII, Section 2(b) provides, in part,

> "municipalities ... may exercise any power for municipal purposes except as otherwise provided by law ...". Art. VIII, § 2(b), Fla. Const.

This language is express recognition that Article X, Section 6 of the Florida Constitution is the appropriate constitutional provision to be applied. The Opinion below applies Florida Constitution, Article X, Section 6 in holding,

> "... a municipality in Florida today does not have the power of eminent domain to acquire an entire tract when only a portion of the tract is needed for a municipal purpose ..." (App. 4)

Florida Constitution, Article X, Section 6 is not expressly construed. Any reasonable doubt as to the extent of a municipality's power to condemn is resolved against the municipality. City of Miami Beach v. Fleetwood Hotel Inc., 261 So.2d 801, 803 (Fla. 1972). The powers granted under Florida Constitution,

[2] Previously § 337.27(3), Florida Statutes (1985).

Article VIII, Section 2(b) are not "absolute" or "supreme". Lake Worth Utilities Authority v. City of Lake Worth, 468 So.2d 215, 217 (Fla. 1985). The legislatures' retained powers remain all pervasive. Id. Therefore, the District Court's application of Florida Constitution, Article X, Section 6 to this case is correct and does not constitute an express interpretation of constitutional provisions limiting municipalities' authority to condemn for municipal purposes. Furthermore, if this Court were to accept jurisdiction, application of Florida Constitution, Article X, Section 6 and section 337.27(2), Florida Statutes would lead to the same result reached below. The Petitioner's request to invoke discretionary jurisdiction of this Court under Florida Constitution, Article V, Section 3(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii) should be denied.

II. THE OPINION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH AN OPINION RENDERED BY ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW AND, THEREFORE, THE PETITION TO INVOKE DISCRETIONARY JURISDICTION UNDER FLORIDA CONSTITUTION, ARTICLE V, SECTION 3(b)(3) SHOULD BE DENIED.

The Fifth District Court of Appeal Opinion in the instant case holds that a municipality does not have the authority to exercise powers of eminent domain expressly conferred to the Department of Transportation and counties by section 337.27(2), Florida Statutes (1989). No District Court of Appeal decision has held otherwise. Petitioner's assertion of conflict with Douglas v. Hillsborough County, 206 So.2d 406 is incorrect. The Petition for discretionary review should be denied.

In Douglas, the Second District Court held that appellant had not "brought himself within the purview of section 73.071, Fla. Stat., F.S.A.". The Douglas opinion determines applicability of section **73.071,** Florida Statutes. Section **337.27,** Florida Statutes, did not even contain a provision permitting the Department of Transportation and counties to condemn more property than necessary at the time Douglas was rendered. Hillsborough County was not a municipality attempting to apply the provisions of section **337.27,** Florida Statutes expressly given to the Department of Transportation and counties, In the instant case, Respondents' eligibility under section **73.071,** Florida Statutes **(1985)** is undisputed, the requirements for complying with section **73.071** are not at issue. No express and direct conflict with the Second District's Douglas, 296 So.2d **406,** opinion is mentioned anywhere in the Opinion below. Reaves v. State, **485** So.2d **829, 830** (Fla. **1986).** Douglas does not, on its face, collide with the Fifth District Court of Appeal Opinion below on the same point of law to create inconsistency or conflict. Therefore, Petitioner has not met the constitutional standard required to trigger conflict jurisdiction. Kincaid v. World Insurance Company, 157 **So.2d 517, 518** (Fla. **1963).**

The conflict cited by Petitioner in State Road Department v. White, 161 So.2d 828 (Fla. 1964), is distinguishable because an incorrect statement of law existed in Gross v. Ruskin, **133** So.2d 759 (Fla. **3d DCA** 1961), which if applied to identical facts would lead to a different conclusion than reached in White. City of Jacksonville v. Florida First National Bank of Jacksonville, **339**

So.2d 632, 633 (Fla. 1976). The Fifth District Court of Appeal has made no expression in direct conflict with the Second District Court of Appeal by holding that a municipality cannot avail itself of the authority granted to the Department of Transportation and counties by section 337.27(2), Florida Statutes (1989). The White, 161 So.2d 828, reliance on Gross, is further distinguishable since it was rendered prior to the 1980 amendments to the Florida Constitution. "Inherent" OK "implied" conflicts no longer serve as a basis for jurisdiction. Department of Health and Rehabilitative Services v. National Adoption Counselins Service, Inc., 498 So.2d 888, 889 (Fla. 1986). Therefore, discretionary review based upon Florida Constitution, Article V, Section 3(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) should be denied. Reaves, 485 So.2d at 830; Kincaid, 157 So.2d at 518.

Finally, no doctrine of a "constructive total taking" exists anywhere in the Douglas opinion or Florida law. To the extent Douglas states an incorrect application of business damage eligibility, the precedential value has been subsequently corrected in the Second District Court of Appeal and by this Court's pronouncement in Young v. Hillsborough County, 215 So.2d 300 (Fla. 1968)[3]. Douglas holds no precedential value with which the Fifth District's Opinion can conflict and, therefore, the Petition for Discretionary Jurisdiction should be dismissed. Wainwright v. Taylor, 476 So.2d 669, 670 (Fla. 1985).

[3] Both Douglas and Young, 206 So.2d 405, were rendered by the Second District on January 17, 1968.

III. THE SUPREME COURT OF FLORIDA HAS NO DISCRETION TO ACCEPT APPELLATE JURISDICTION BASED UPON PETITIONER'S ASSERTION THAT THE DECISION OF A DISTRICT COURT OF APPEAL HAS "SUBSTANTIAL RAMIFICATIONS".

Petitioner's final argument that the Opinion of the Fifth District Court of Appeal has "substantial ramifications" for municipal condemnations is not a proper ground for invoking this Court's review. Neither Florida Constitution, Article V, Section 3 nor Florida Rule of Appellate Procedure 9.030(a) contain any provision for invoking this Court's discretionary jurisdiction based upon a petitioner's contention that the case will have "substantial ramifications". Petitioner's request to invoke discretionary jurisdiction on this basis should be denied,

Furthermore, the District Court of Appeal was not requested and did not certify its Opinion as passing upon a question of great public importance. Certification of questions as being of great public importance is solely within the discretion of the District Court and a condition precedent to discretionary review under Florida Constitution, Article V, Section 3. Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 834 (Fla. 1959). Therefore, this Court has no alternate basis upon which to grant discretionary review. Id.

As set out in Argument I, supra, discretionary review by this Court would lead to the same result reached by the Fifth District Court of Appeal below. A municipality's power of eminent domain is granted pursuant to sections 166.401 and 166.411, Florida Statutes. This case deals with a municipality's attempt to avail itself of the provisions of section 337.27(2),

Florida Statutes. Section 337.27 expressly conveys authority to the Department of Transportation, counties, and municipalities in subsection (1), but only to the DOT and counties at subsection (2). These grants of power are to be strictly construed. Peavy-Wilson, 31 So.2d at 485; Baycol, 315 So.2d at 455. Therefore, as succinctly stated by the Fifth District Court of Appeal:

> "If it is the desire of the legislature to give municipalities this more expansive power of eminent domain, it can easily do so in the same manner it has empowered the DOT and counties." (App. 4)

Petitioner's request to recognize the substantial ramifications of the Opinion below is a specious attempt to have this Court address an argument that is properly made to the State Legislature. Petitioner's request to invoke the discretionary jurisdiction of this court is without foundation and should be denied.

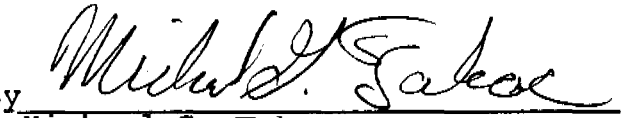
CONCLUSION

This Court has no discretionary jurisdiction upon which to review this cause and, therefore, the Petition for Review should be denied. The Opinion rendered by the Fifth District Court of Appeal does not expressly construe provisions of the Florida Constitution, nor does the Opinion expressly and directly conflict with precedent set by the Second District Court of Appeal in Douglas v. Hillsborough County, 206 So.2d 406. The Opinion below merely applies well settled principles of Florida law designed to protect individuals from the harsh powers of the sovereign. Finally, there is no basis upon which the Supreme

Court may accept jurisdiction to review the decision of a District Court of Appeal based upon Petitioner's own allegation that the Opinion has "substantial ramifications". The Petition for review should be denied.

Respectfully submitted,

FORMAN, KREHL & LANDT

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a truce and correct copy of the foregoing has been furnished to WILLIAM H. PHELAN, JR. and ROLLIN E. TOMBERLIN, BOND, ARNETT & PHELAN, P.A., P.O. Box 2405, Ocala, FL 32678, by U.S. Mail, this 4th day of June, 1990.

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A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1990

O J. NYE, et al.,

Appellants/Cross-Appellees,

v. CASE NO. 89-450

CITY OF OCALA, etc., et al.,

Appellees/Cross-Appellants.

Opinion filed April 5, 1990

Appeal from the Circuit Court
for Marion County,
Wallace E. Sturgis, Jr., Judge.

Charles R. Forman and Michael G. Takac
of Atkins, Krehl & Forman, Ocala,
for Appellants/Cross-Appellees.

William H. Phelan, Jr., and Rollin E. Tomberlin
of Bond, Arnett & Phelan, P.A.,
Ocala, for Appellees/Cross-Appellants.

COWART, J.

The issue in this case is: when a municipality exercises the power of eminent domain and all of a tract of land is not needed for municipal purposes, but the cost to acquire the entire tract would be equal to, or less than, the cost of acquiring only a portion of the tract,[1] can the municipality condemn the entire tract?

Appellee, a municipality, sought to condemn property to widen N.E. 14th Street. The property which is the subject of this appeal, parcel 23, fronts 200 feet along the street and is 60 feet in depth. The municipality actually needs only 50 feet of the 60 foot depth for the street widening. This parcel

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[1] This anomaly exists because section 73.071(3)(b), Florida Statutes, which authorizes special damages for a taking which damages or destroys an established business, is only applicable when less than the entire business premises is sought to be appropriated. See Young v. Hillsborough County, 215 So.2d 300 (Fla. 1968); State Road Department v. Bramlett, 189 So.2d 481 (Fla. 1966); Douglass v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968); and Palm Beach County v. Awadallah, 538 So.2d 142 (Fla. 4th DCA 1989), rev. denied, 548 So.2d 662 (1989).

contains a building leased to a tenant who has operated a business thereupon for more than five years. The tenant asserted a claim for special damages to its business under section 73.071(3)(b), Florida Statutes, which statute is applicable when less than an entire tract is to be condemned. The municipality amended its eminent domain petition to take the additional 10 foot width of the tract so as to eliminate the business damage claim. The tenant contended that the municipality has only the authority to take land by eminent domain for the municipal purpose and therefore has no authority to take the 10 foot remainder. The municipality contended that under its home rule powers, Art. VIII, section 2(b), Fla. Const., and section 166.021, Florida Statutes, it may exercise any power for municipal purposes except when expressly prohibited by law. "Municipal purpose" is defined as "any activity or power which may be exercised by the State or its political subdivisions", § 166.021(2), Fla. Stat., and since the State, Department of Transportation (DOT) as well as counties are expressly permitted by statute to condemn more property than is necessary where they would save money by doing so, §§ 337.27(2),[2] 127.01(1)(b), Fla. Stat., the municipality contends it may likewise do so and thus avoid the business damage claim.

Because section 73.071(3)(b), Florida Statutes, authorizes damages for a taking which damages or destroys an established business only when less than the entire property is sought to be taken, it is often less costly to the condemning authority to acquire an entire tract and thus eliminate business damages than to acquire only a portion of a tract and pay business damages. See e.g., Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988). The problem however is that a condemning authority traditionally has had only the authority to take private property which is necessary for the public purpose. Wilton v. St. Johns

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[2] Previously section 337.27(3), Florida Statutes.

County, 98 Fla. 26, 123 So. 527 (1929); Knappen v. Division of Administration, 352 So.2d 885 (Fla. 2d DCA 1977), cert. denied, 364 So.2d 883 (1978). However, the legislature has made a specific exception as to DOT in section 337.27(2), Florida Statutes, which essentially provides that when the cost to acquire an entire parcel is equal to or less than the cost of acquiring a portion of the tract, DOT is authorized to acquire the entire tract.[3] By section 127.01(1)(b), Florida Statutes, the legislature has expressly given counties this special eminent domain power granted DOT to take all of a tract of land when only a part is needed. The legislature has not seen fit to amend the statutes empowering municipalities to exercise the power of eminent domain (§§ 166.401, 166.411, Fla. Stat.) to authorize municipalities, in the exercise of their eminent domain powers, to take all of a tract when only a portion is needed for the public purpose.

According to our supreme court:

> The power of eminent domain is an attribute of the sovereign. It is not a vesture of the state conferred by constitution or statute. It is circumscribed by the constitution [4] and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings known to the law, consequently when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power.

Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947). See also Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975).

Because powers of eminent domain are to be strictly construed and because the legislature has expressly given DOT and counties the authority to take an entire tract when only a portion is needed but has not extended that authority to

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[3] The constitutionality of this subsection (then § 337.27(3)) was upheld in Department of Transportation v. Fortune Federal.

[4] Art. X, § 6, Fla. Const.

municipalities,[5] we resolve the issue in this case by holding that a municipality in Florida today does not have the power of eminent domain to acquire an entire tract when only a portion of the tract is needed for a municipal purpose merely because the cost to acquire a portion of the tract is more than the cost of acquiring the entire tract. If it is the desire of the legislature to give municipalities this more expansive power of eminent domain, it can easily do so in the same manner it has empowered DOT and counties.

Accordingly, the court's order of January 30, 1989, denying appellants' business damage claim by permitting the total taking of parcel 23 is reversed and the cause remanded for proceedings not inconsistent with this opinion.[6]

REVERSED and REMANDED.

DANIEL, CJ., and GOSHORN, J., concur.

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[5] Indeed, we note the legislature amended section 166.401, Florida Statutes, in 1988 to explicitly authorize municipalities to exercise eminent domain powers granted to DOT in section 337.27(1) but did not include in this authorization the power granted to DOT by section 337.27(2). See Ch. 88-168, Laws of Florida.

[6] We intentionally do not address the effect, if any, of the lease provision relating to the rights of the parties to the lease in the event the leased premises are taken by eminent domain.