O.A. 2-7-91

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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 THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents adopt Petitioner's Statement of the Case and of the Facts with the following additions not included in Petitioner's Statement:

First, Florida Statute, section 337.27 (3) (1985), which limits acquisition costs in eminent domain cases by expressly authorizing the State and counties to condemn more property than is presently needed where it would otherwise cost more to condemn only part of the property was not included in the COMPLAINT's allegations nor Resolutions Number 86-10, adopted by the City Council, City of Ocala, Ocala, Florida, on October 22, 1985 or Number 86-50, adopted by the City Council, City of Ocala, Ocala, Florida, on April 8, 1986, attached to the COMPLAINT as Exhibits I and 11, respectively. (R-1-76)

Second, on October 17, 1988, Petitioner 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 CITY alleged that the Motion was proper pursuant to Florida Rule of Civil Procedure 1.540, due to surprise or excusable neglect because this Court quashed the opinion of the Second District Court of Appeal, State Dept. of Transportation v. Fortune Federal Savings & Loan Association, 507 So.2d 1172 (Fla. 2d DCA 1987), in State Dept. of Transportation v. Fortune Federal Savings & Loan Association, 532 So.2d 1267 (Fla. 1988) during the pendancy of this action. (R-162-164).

SUMMARY OF ARGUMENT

POINT I - TEE TRIAL COURT ERRED IN ALLOWING THE CITY OF OCALA TO CONDEMN MORE PROPERTY FROM RESPONDENTS NYES THAN WAS REASONABLY NECESSARY TO IMPLEMENT THE CITY'S 14TH STREET RECONSTRUCTION PROJECT.

Petitioner, CITY OF OCALA, appeals from a decision of the Fifth District Court of Appeal reversing a PARTIAL FINAL JUDGMENT dismissing Respondents NYES' business damage claim. (R-194) The PARTIAL FINAL JUDGMENT was based on an ORDER AMENDING ORDER OF TAKING AS MODIFIED that reinstated the total taking of Parcel 23, pursuant to the legal description contained in the COMPLAINT. (R-191-193) As a result, the NYES did not meet the "partial taking" predicate for asserting a business damage claim, pursuant to Florida Statute, section 73.071(3)(b) (1985). In reaching this result, the trial court misconstrued the applicable law in light of the facts of this case. The decision of the Fifth District Court of Appeal reversing the trial court should be affirmed.

POINT I-A - THE CITY OF OCALA HAD NO POWER TO CONDEMN ALL OF PARCEL 23 FOR THE PURPOSE OF DEFEATING RESPONDENTS' NYES BUSINESS DAMAGE CLAIM.

The trial court erred in ruling that the CITY had the power, express or implied, to take all of NYES' property. Petitioner admits that prior to 1990 the Legislature made no express grant of power to the CITY OF OCALA to take more property than is reasonably necessary for a particular project. (BR-9)

The CITY OF OCALA argues, however, that the express delegation of the claimed power to the Department of Transportation and counties,

pursuant to Chapter 84-319, Laws of Florida (1984), was impliedly granted to municipalities "pursuant to concepts of Home Rule power". (BR-9) It is clear the Legislature intended no such implied grant.

> "(3) In the acquisition of lands and property the department may acquire an entire lot, block, or tract of land, if by doing so 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." Florida Statute, section 337.27(3) (1985) [Emphasis supplied]

The Legislature granted this power specifically to the Department of Transportation and counties by separate statute.[1] There is no ambiguity. If the Legislature had intended to make the grant to the CITY OF OCALA, it would have included municipalities in that act. This is clear by the Legislature's enactment in 1990, of Chapter 90-227, section 18, Laws of Florida, which expressly amended the municipal eminent domain statute (Florida Statute, section 166.401 (1985)) to permit municipalities to exercise this power. No express grant would have been necessary in 1990 if the cities already had such power.

The power of eminent domain is an attribute of the sovereign. It is limited by the Constitution in order to protect individual property rights, Consequently, when the sovereign delegates the power to a municipality, a strict construction will be given against the municipality asserting the power. Baycol, Inc. v. Downtown Development

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[1] Florida Statute, section 127.01(1)(b) (1985).

Authority of the City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975). Under the "strict construction" mandate, the Fifth District Court of Appeal correctly held that the Legislature had not authorized the CITY OF OCALA to take all of NYES' property when only a portion was needed for a public purpose. Nye v. City of Ocala, 559 So.2d 360, 361 (Fla. 5th DCA 1990).

POINT I-B - THE TRIAL COURT ERRED IN AUTHORIZING THE TOTAL TAKING OF PARCEL 23 PURSUANT TO THE PROCEDURE EMPLOYED BY THE CITY OF OCALA.

POINT I-C - THE CITY OF OCALA WAIVED ITS RIGHT TO CONTEST THE MODIFIED ORDER OF TAKING.

Even if the CITY OF OCALA had the power to take all of the NYES' property for the purpose of defeating their business damage claim, the trial judge erred in permitting the exercise of this power without following the procedural and due process safeguards contained in Florida Statutes, Chapters 73 and 74 (1985). Some eight months after the NYES' rehearing of the ORDER OF TAKING proceeding and a determination by the trial court that the CITY OF OCALA could only take part of Parcel 23, thereby entitling NYES to a trial on their business damage claim, the CITY OF OCALA was permitted to argue the relevance of the Fortune Federal, 532 So.2d 1267, decision to the instant case. For the first time, the CITY argued that the trial court should permit the total taking of NYES' property on the basis that the authority granted to the Department of Transportation, pursuant to Florida Statute, section 337.27 (3) (1985), had been expressly or impliedly delegated to the CITY OF OCALA as well. No such power is referenced in either of the Resolutions taking the NYES' property or in the COMPLAINT which the CITY

filed. No evidentiary hearing, as required by Florida Statutes, Chapter 74 has ever been conducted to establish that the CITY is factually entitled to avail itself of Florida Statute, section 337.27(3). Furthermore, the CITY has never alleged nor proven any "surprise" or "excusable neglect" as grounds to permit it to obtain review of the ORDER OF TAKING, pursuant to Florida Rules of Civil Procedure 1.540. This rule is not a substitute for a motion for new trial, pursuant to Florida Rule of Civil Procedure 1.530, nor appellate review, pursuant to Florida Rule of Appellate Procedure 9.130. Fiber Crete Homes Inc. v. Department of Transportation, 315 So.2d 492 (Fla. 4th DCA 1975).

POINT II - 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.

This point on appeal is a red herring! There is no legitimate statutory or case law support for the CITY'S position that the taking of eighty-seven percent (87%) of NYES' property constituted a total taking for purposes of the business damage statute.

Here the leased premises, the business operations, and the restaurant building itself were located on both sides of the taking line. The trial court correctly held that "Defendant/Lessee NYE meets the [partial taking] requirement under Florida Statute Chapter 73 for presenting a business damage claim,. .." (R-143,144) That decision was properly affirmed by the Fifth District Court of Appeal. Nye, 559 So.2d 360, n.1. The decisions of both courts on this point should be affirmed. Young v. Hillsborough County, 215 So.2d 300 (Fla. 1988).

ARGUMENT

POINT I - THE TRIAL COURT ERRED IN ALLOWING THE CITY OF OCALA TO CONDEMN MORE PROPERTY FROM RESPONDENTS NYES THAN WAS REASONABLY NECESSARY TO IMPLEMENT THE CITY'S 14TH STREET RECONSTRUCTION PROJECT.

Petitioner, CITY OF OCALA, appeals from the decision of the Fifth District Court of Appeal reversing a PARTIAL FINAL JUDGMENT dismissing Respondents NYES' business damage claim, (R-194) The PARTIAL FINAL JUDGMENT was based on an ORDER AMENDING ORDER OF TAKING AS MODIFIED that reinstated the total taking of Parcel 23. As a result, the NYES did not met the "partial taking" predicate for asserting a business damage claim, pursuant to Florida Statute, section 73.071(3) (b) (1985). In reaching this result, the trial court misconstrued the applicable law in light of the facts of this case. The decision of the Fifth District Court of Appeal should be affirmed.

POINT I-A - THE CITY OF OCALA HAD NO POWER TO CONDEMN ALL OF PARCEL 23 FOR THE PURPOSE OF DEFEATING RESPONDENTS NYES' BUSINESS DAMAGE CLAIM.

This appeal involves an analysis of the scope of the powers of eminent domain which were granted by the Legislature to the CITY OF OCALA. The final order appealed from was based on a determination by the trial court that the CITY OF OCALA had the power to condemn entire parcels of property, if by doing so, its acquisition costs would be equal to, or less than, the costs of acquiring only the portion of the property that was reasonably necessary for the project. (R-191-193, 194) The trial court apparently found this power as either an express or implied grant from the Legislature based on an express grant of power

to the Department of Transportation, pursuant to Florida Statute, section 337.27(3) (1985). Scrutinizing the CITY OF OCALA'S delegated powers of eminent domain in light of the applicable constitutional limitations and prevailing case law, the Fifth District Court of Appeal correctly reversed the the trial court's prejudicial error. Nye, 559 So.2d 360. The CITY OF OCALA did not have the power *to* take all of NYES' parcel when only a portion was reasonably necessary for the construction of the project. Nye, 559 So.2d at 361, 362.

The CITY OF OCALA filed a COMPLAINT in condemnation seeking to take all of Parcel 23. (R-1-76) Parcel 23 is rectangular in shape, 60 feet wide by 200 feet long, and is oriented lengthwise adjacent to the 14th Street Project. (Exhibit A, BR-8) At all times material to these proceedings, the NYES leased the entire parcel, together with a restaurant building located thereon. (R-80, 82-84) For many years they had operated a landmark business on the property known as the "Coffee Kettle Restaurant". (R-286-289) According to the CITY'S project plans and specifications that were admitted into evidence, a maximum of 50 feet of the parcel's width was necessary for road right-of-way, construction, and utility easements. (R-225) The balance of the property, which included a portion of the restaurant building, was not needed by the CITY. (R-225-226) Based on the testimony and evidence presented, as well as stipulations of counsel (R-195-294), the trial court properly refused to permit the total taking of Parcel 23 since the 10-foot by 200-foot remaining strip was not "reasonably necessary" for the project. (R-143-144); Canal Authority v. Miller, 243 So.2d 131, 134 (Fla.

1970). The court further found that the partial taking destroyed an established business of more than five years' standing within the meaning of Florida Statutes, section 73.071(3)(b) (1985). (R-143, 144).

All parties were preparing for trial when this Court issued its decision in Fortune Federal, 532 So.2d 1267, on August 19, 1988. Based on this decision, the CITY OF OCALA served its MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING. (R-162-164) Since this Court had ruled that Florida Statutes, section 337.27 (3) (1985) was constitutional, the CITY asserted that it had the authority, on October 22, 1985, to condemn all of Parcel 23 where, by doing so, it could defeat NYES' business damage claim, thereby lessening its total acquisition cost. (R-162-164) A hearing on the CITY'S Motion was held at which no evidence was introduced nor testimony taken. (R-295-326) At the conclusion, the trial court granted the Motion reinstating the total taking of Parcel 23, thereby defeating the NYES' business damage claim. (R-326) This was error. Without regard to the obvious procedural irregularities, the CITY had no such power.

"Eminent domain" is the fundamental power of the sovereign to take private property for its own use. The power of eminent domain is an inherent attribute of the State of Florida and is absolute except as limited by the Florida and Federal Constitutions. Daniels v. State Road Department, 170 So.2d 846 (Fla. 1964); Demeter Land Company v. Florida Public Service Commission, 99 Fla. 954, 128 So. 402 (1930). The Legislature can delegate the eminent domain power, but any statute delegating the power to a political subdivision must be strictly

construed. Baycol, Inc., 315 So.2d at 451, 455; Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (1947). A succinct statement of the governing principles relied on by the Fifth District Court of Appeal was made by this Court in the Peavy-Wilson Lumber Co. case:

> "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 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, 159 Fla. 311, 31 So.2d at 485 [Citations deleted]; Nye, 559 So.2d at 361.

This strict construction principle is still applicable to cities' eminent domain powers after the adoption of the 1968 Constitution. City of Jacksonville v. Moman, 290 So.2d 105 (Fla. 1st DCA 1974); Nye, 559 So.2d at 361. Interpreting the legislative grant of eminent domain powers to the CITY OF OCALA in light of these principles discloses the trial court's error.

Petitioner admits that the Legislature has made no express grant of power to the CITY OF OCALA to take more property than is reasonably necessary for a particular project. (BR-14) The express grant to all municipalities, including the CITY OF OCALA, is contained in Florida Statutes, sections 166,401 and 166.411 (1985) entitled "PART IV, EMINENT DOMAIN". Continuing Legal Education, The Florida Bar, Florida Eminent Domain, Practice and Procedure, section 2.4, page 9 (4th Ed. 1988). The pertinent portion of Florida Statute, section 166.401 follows:

"All municipalities in the state may exercise the right and power of eminent domain; that is, the right to appropriate property within the state, except state or federal property for the uses or purposes authorized pursuant to this part." Florida Statutes, section 166.401 (1985) [Emphasis supplied]

Florida Statute, section 166.411 (1985) sets forth ten (10) separate "uses or purposes":

"(1) For the proper and efficient carrying into effect of any proposed scheme or plan of drainage, ditching, grading, filling, or other public improvement deemed necessary or expedient for the preservation of the public health, or for other good reason connected in anywise with the public welfare or the interests of the municipality and the people thereof;
(2) Over railroads, traction and streetcar lines, telephone and telegraph lines, all public and private streets and highways, drainage districts, bridge districts, school districts, or any other public or private lands whatsoever necessary to enable the accomplishment of purposes listed in s. 180.06;
(3) For streets, lanes, alleys, and ways;
(4) For public parks, squares, and grounds;
(5) For drainage, for raising or filling in land in order to promote sanitation and healthfulness, and for the taking of easements for the drainage of the land of one person over and through the land of another;
(6) For reclaiming and filling when lands are low and wet, or overflowed altogether or at times, or entirely or partly;
(7) For the abatement of any nuisance;
(8) For the use of water pipes and for sewerage and drainage purposes;
(9) For laying wires and conduits underground; and
(10) For city buildings, waterworks, ponds, and other municipal purposes which shall be coextensive with the powers of the municipality exercising the right of eminent domain." Florida Statute, section 166.411 (1985)

Florida Statute, section 166.411 does not authorize municipalities to condemn more land than is reasonably necessary for their particular project to defeat potential business damage claims.

To counter this result, the CITY argues that since the Legislature expressly delegated this authority to the Department of Transportation

(at Florida Statute, section 337.27(3) (1985)) and counties (at Florida Statute, section 127.01(1)(b)), then the CITY was impliedly included in this grant under Florida Constitution, Article VIII, Section 2(b) and Florida Statute, section 166.021 (1985). This argument has no merit.

As previously indicated, subsequent to the adoption of the 1968 Constitution, the Legislature passed Chapter 166 as Chapter 73-129, Laws of Florida. The home rule powers provisions were placed in PART I of Chapter 166 entitled GENERAL PROVISIONS. Intending for eminent domain to stand on an entirely separate basis, the Legislature segregated all of the eminent domain provisions to PART IV of Chapter 166, appropriately entitled EMINENT DOMAIN, By separating all of the eminent domain provisions, it is clear that the Legislature intended the list of uses or purposes for the exercise of eminent domain contained in Florida Statute, section 166.411 (1985) to be exclusive. Under strict construction principles, there is no implied incorporation by reference. Peavy-Wilson, 159 Fla. 311, 31 So.2d at 485. In fact, the statute contains no reference to home rule powers.

The history of the bill enacting Florida Statute, section 337.27(3) (1985) lends additional support to Respondents NYES' argument. This statute subsection was enacted by the Legislature as part of Chapter 84-319, Laws of Florida. As originally introduced, the bill was entitled "an act relating to rights of way acquisition by the Department of Transportation" which provided in subsection (3):

> "(3) In the acquisition of lands and property the department may acquire an entire lot, block, or tract of land, if by doing so 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 such means of limiting the rising costs to the state of property acquisition is a public purpose and that without such limitation the viability of many public projects will be threatened." Chapter 84-319, Laws of Florida. [Emphasis supplied]

The bill was amended to include counties by specific incorporated reference:

> (b) All counties are further authorized to exercise the eminent domain powers granted to the Department of Transportation by s.337.27(2) and (3), and the right of entry onto property pursuant to s. 337.27(6)." Chapter 84-319, Laws of Florida. [Emphasis supplied]

Prior to passage of this bill, no agency of the State could take more land than was reasonably necessary for the project. Canal Authority v. Miller, 243 So.2d at 134; Knappen v. Division of Adm., Dept. of Trans., 352 So.2d 885, 890 (Fla. 2d DCA 1977). In passing Chapter 84-319, the Legislature clearly limited this new extension of the delegated eminent domain power to the Department of Transportation and counties. No mention is made of any municipality.

That the Legislature never intended any implied delegation to the CITY OF OCALA is even more apparent from its actions in passing Chapter 88-168, Section 5, Laws of Florida, amending the municipal eminent domain statute, Florida Statutes, section 166.401 (1985). By this law, the 1988 Legislature specifically authorized municipalities to exercise the map reservation powers granted to the Department of Transportation in subsection (1) of section 337.27, Florida Statutes. This was obviously recognition by the Legislature that the various enumerated powers granted to the Department of Transportation in Florida Statutes, section 337.27 (1987) had not been granted to municipalities by

implication, If the map reservation power granted in subsection (1) of Florida Statutes, section 337.27 had never been granted by implication, it is obvious that subsection (3) of Florida Statutes, section 337.27 (the Fortune Federal power) had never been granted either.

The 1990 Legislature made this pint even more clear by specifically and expressly delegating the Fortune Federal power to municipalities. Chapter 90-227, section 18, Laws of Florida. This law amended Florida Statutes, section 166.401(2) (1989) to authorize cities to utilize the power granted to the Department of Transportation, pursuant to Florida Statutes, section 337.27(3) (1989). Petitioner incorrectly argues that this law is "irrelevant". (BR-18) The fact is that in passing this law, the Legislature expressed its intent to grant this power of eminent domain to municipalities for the first time. Furthermore, the authority to use the Fortune Federal power (Florida Statute, section 337.27(3)) was not added to the cities' home rule powers enumerated in Florida Statutes, Chapter 166, PART I, GENERAL POWERS. Chapter 90-227, section 18, Laws of Florida, amended the municipal eminent domain powers contained in Florida Statates, Chapter 166, PART IV, EMINENT DOMAIN. Home rule powers and eminent domain powers are distinct and the Legislature, at least, knows the difference.

The CITY OF OCALA asserts that the strict construction mandate for interpreting the limits of eminent domain powers delegated to municipalities, as set forth in Baycol, Inc., 315 So.2d at 451 and Peavey-Wilson, 159 Fla. 311, 31 So.2d at 485, is inapplicable to the instant case. These cases, it is argued, "..., do not address whether

the power to acquire entire parcels to save acquisition costs should be strictly construed." (BR-17). Petitioner has, again, overlooked the most basic principle of the constitutional limitations placed on the power of eminent domain. It has been a settled principle of eminent domain law throughout this century that the State and Federal Constitutions prohibit the taking of private property except for authorized public purposes. Continuing Legal Education, The Florida Bar, Florida Eminent Domain, Practice and Procedure, Section 2.2, (4th ed. 1988). It is also an unquestioned principle of Florida law that a condemnor may take private property for an authorized use only when it is necessary for such use. Wilton V. St. Johns County, 98 Fla. 26, 123 So. 527 (1921); Miller v. Florida Inland Navigation District, 130 So.2d 615 (Fla. 1st DCA 1961). It is the condemnor's duty to establish the necessity for the entire area proposed to be taken; that every square foot of property sought by the condemnor must be reasonably necessary for the proper exercise of one or more of the delegated powers of eminent domain. Knappen, 352 So.2d at 885.

Not even Petitioner's own cited cases support its asserted "Home Rule" power of eminent domain. None of these cases even deal with eminent domain! In City of Boca Raton V. Gidman, 440 So.2d 1277 (Fla. 1983), a municipality's proposed expenditure of funds for daycare, educational facilities was held to be a valid municipal purpose but remanded on other: grounds the decision affirming the trial judge's injunction of the proposed expenditure.

City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974) is similarly inapplicable. In that case, this Court held in a per curiam opinion that the municipal home rule statute was constitutional even though it authorized rent control measures, but held the particular municipal rent control statute unconstitutional as an invalid delegation of the city's legislative powers.

City of Miami Beach v. Rocio Corp. 404 So.2d 1066 (Fla. 3d DCA 1981) dealt with the City of Miami's condominium act and interpreted another police power regulation in light of the municipal home rule powers act. In that case, the Third District Court of Appeal held the City of Miami Beach was properly enjoined from enforcing ordinances placing moratoriums on condominium conversions because they conflicted with state law. Every case cited by the CITY, Rocio, Gidman, and Forte 'Sowers, discussed supra, has nothing to do with the law of eminent domain. The CITY OF OCALA cites no case, and the undersigned has found none, in which anyone even argued that there is a "Home Rule" power of eminent domain.

Petitioner next contends that any ambiguity regarding the extent of the delegation of the "Home Rule" power should be liberally construed in favor of its delegation. (BR-12) From this simple assertion, the CITY leapfrogs to the conclusion that in granting the Department of Transportation the power to acquire entire parcels of property, pursuant to Florida Statute, section 337.27(3) (1985), the Legislature has also granted the CITY OF OCALA this power. The problem with this argument is that there are no statutory ambiguities.

First, Florida Statutes, Chapter 166 contains no ambiguity. Florida Statute, section 166.021 (1985) contains no ambiguity. The reason is simple; the municipal home rule powers are different from the municipal powers of eminent domain. Cf. Florida Statutes, section 166.411 (1985). Furthermore, there is no ambiguity in Florida Statutes, section 166.411 (1985). That section does not authorize municipalities to condemn more land than is reasonably necessary far the project to defeat business damage claims.

Second, there is no ambiguity in Chapter 84-319, which enacted Florida Statutes, section 337.27 (3) (1985). This new authority was specifically and expressly limited to the Department of Transportation and counties. See, Chapter 84-319, Laws of Florida. As previously discussed, when the Legislature wanted to extend one of the powers listed in Florida Statutes, section 337 to municipalities it knew how to do so. See, Chapter 88-168, section 5, Laws of Florida; Chapter 90-227, section 18, Laws of Florida.

Even more absurd is the CITY's argument that the decision of the trial court is supported by a strict construction of the business damage statute, Florida Statutes, section 73.071(3)(b) (1985). The trial court permitted the total taking on the basis that the CITY could take advantage of Florida Statutes, section 337.27(3) (1985). It is the condemnor's burden under Florida Statutes, section 337.27 (3) (1985) to establish the amount of business damages that it is saving by taking the entire tract of property. Fortune Federal, 532 So.2d 1267. Unless there are valid business damages, pursuant to Florida Statutes, section

73.071 (3)(b) (1985), the condemnor cannot use Florida Statutes, section 337.27(3). As a result, strict construction of the business damage statute and Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc., 444 So.2d 926 (Fla. 1983) cited by the CITY, have absolutely nothing whatsoever to do with eliminating Respondents NYES' business damage claim under the facts of this case, The NYES satisfied all Florida Statute, section 73.071(3) (b) requirements. (R-225-226, 195-294).

Petitioner also engages in the misleading argument that this is a "joint" CITY/County/Department of Transportation project. (BR-15). This is irrelevant: neither the Department of Transportation nor Marion County are parties to this proceeding. These allegations are not plead and any such evidence is outside the record. First National Bank In Fort Lauderdale v. Hunt, 244 So.2d 481, 482 (Fla. 4th DCA 1971); Parker v. Parker, 109 So.2d 893, 894 (Fla. 2d DCA 1959). Additionally, it is the undersigned's belief that the assertions are incorrect based on prior sworn testimony of the CITY OF OCALA engineer.

Petitioner's final argument on this point is that preventing the CITY OF OCALA from taking more property than is reasonably necessary for its 14th Street Project would lead to "absurd consequences". It is obvious, however, that the only consequence would be limiting the quantity of the CITY'S taking to that which was proven and stipulated to be necessary for the right-of-way project, together with the trial of the NYES' business damage claim, This is not absurd. It has been the

accepted result since the original adoption of the business damage statute.

The trial court's reliance on Fortune Federal, 532 So.2d 1267 was misplaced. The decision was based on a condemnation case brought solely by the Department of Transportation and did not address the unrelated issue of some "implied" delegation of this new statutory power (Florida Statutes, section 337.27(3)) to municipalities. The trial court erred in applying Fortune Federal in the instant case. The decision of the Fifth District Court of Appeal reversing the PARTIAL FINAL JUDGMENT should be affirmed with directions to reinstate the partial taking and the NYES' claim for business damages, pursuant to Florida Statute, section 73.071 (3) (b) (1985).

POINT I-B - THE TRIAL COURT ERRED IN AUTHORIZING THE TOTAL TAKING OF PARCEL 23 PURSUANT TO THE PROCEDURE EMPLOYED BY THE CITY OF OCALA.

In Paragraph 6 of the AMENDED ORDER OF TAKING AS MODIFIED, the trial court permitted the total taking of NYES' property on the basis that the authority granted to the Department of Transportation, pursuant to Florida Statute, section 337.27(3) (1985), had been expressly or impliedly delegated to the CITY OF OCALA as well. (R-193) Even if the trial court was correct in this assumption, the CITY OF OCALA has waived its right to avail itself of this statutory power by not following the mandated procedures. As a result, the trial court erred in granting the total taking and dismissing NYES' business damage claim. The decision of the Fifth District Court of Appeal reversing the decision below should be affirmed.

The provisions of Florida Statute, section 337.27(3) (1985) were intended for application in situations specifically like the Fortune Federal, 532 So.2d 1267, case. In that case, the property and business were both owned by Fortune Federal Savings & Loan. 532 So.2d at 1268. The Department of Transportation filed a Petition in eminent domain seeking a total taking on the basis that the business damages of $2,000,000 in that case far exceeded the value of the remainder. Id at 1268. By taking the entire parcel, the Department of Transportation could eliminate Fortune Federal's business damage claim and save an estimated $1,520,000. Id. Fortune Federal had notice, through the Department of Transportation's Petition, that the Department intended to take all of the property and that it would offer business damage and appraisal testimony, pursuant to Florida Statute, section 337.27(3), at the order of taking hearing. The Department of Transportation put on testimony establishing the *good* faith estimate of value, as well as, the estimated business damage claim at the order of taking hearing. Id. The trial court granted only the taking of that part of Fortune Federal's property that was reasonably necessary for the construction of the project. Id. This Court upheld the validity of section 337.27(3) (1985) and reversed the trial court with instructions to "enter an order of taking of the entire property" based on the evidence presented ~~at the order of~~ taking hearing. Id. at 1270.

Unlike the Department of Transprtation in the Fortune Federal case, the CITY OF OCALA has not followed the procedural requirements necessary to invoke the provisions of section 337.27(3) (1985). The

CITY OF OCALA is required by statute to initiate eminent domain proceedings by passage of a legal resolution. Florida Statutes, section 166.041 (1985); Tosohatchee Game Preserve v. Central and Southern Florida Flood Control District, 265 So.2d 681 (Fla. 1972). In addition, the resolution and complaint must set forth "the authority under which and the use for which the property is to be acquired, and that the property is necessary for that use." Florida Statutes, section 73.021 (1985); Tosohatchee Game Preserve, 265 So.2d at 683; Wright v. Dade County, 216 So.2d 494 (Fla. 3 DCA 1968), cert. denied. 225 So.2d 527, cert. denied 396 U.S. 1008; Continuing Legal Education, The Florida Bar, Florida Eminent Domain, Practice and Procedure, Section 2.17, page 18, and Section 5.16, page 83 (4th *ed.* 1988). These procedures were not followed in the instant case. The defect is jurisdictional. Tosohatchee Game Preserve, 265 So.2d 681; Gulf Power Company v. Stack, 296 So.2d 572, 574 (Fla. 1st DCA 1974).

The purpose of the instant taking, as set forth in Paragraph 2 of the COMPLAINT, was the construction, reconstruction, widening and improvement of Northeast 14th Street. (R-1) This was based on official action contained in municipal Resolution 86-10, which was attached to the COMPLAINT. The CITY'S asserted authority for condemning Respondents' property was set forth in the Resolution and Paragraph 2 of the COMPLAINT, which states:

> "2. The Plaintiff is exercising its right of eminent domain pursuant to the authorization granted to it by Chapters 73 and 74, Florida Statutes; Part IV, Chapter 166, 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

October 22, 1985 and Number 86-50 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)

Section 337.27(3), Florida Statutes (1985) was not referenced in either Resolution attached to the COMPLAINT or the COMPLAINT itself. (R-1-76). Thus, the trial court erred in permitting the total taking of the NYES' property, pursuant to the CITY's Resolutions and COMPLAINT, which were insufficient on their face to authorize the utilitzation of section 337.27(3), Florida Statutes (1985). Tosohatchee Game Preserve, 265 So.2d at 683.

Additionally, provisions of the authorizing statute in eminent domain cases must be strictly construed and substantially complied with. Inland Waterway Development Company v. City of Jacksonville, 160 Fla. 913, 37 So.2d 333 (1948); City of Miami Beach v. Manilow, 232 So.2d 759 (Fla. 3d DCA 1970). In failing to state the authority under which the CITY was condemning the disputed remainder of NYES' property, and in failing to state the purpose for which the disputed reminder was being taken, and in failing to state that the disputed property was necessary for that purpose, the COMPLAINT was fatally defective. Staplin v. Canal Authority, 208 So.2d 853 (Fla. 1st DCA 1968); City of Miami Beach v. Manilow, 232 So.2d at 760.

The apparent basis for the trial court's decision was that the CITY was authorized to condemn all of NYES' property where, by doing so, it could save money. In order to meet this burden, the CITY must present evidence of its acquisition costs far the total taking and must also present evidence of its acquisition costs for a partial taking. Fortune

Federal, 532 So.2d 1267. The NYES have no duty to present testimony on this issue as it is their lands which are being taken. The NYES are under no duty to disprove that which has never been offered by the condemnor. City of Lakeland v. Bunch, 293 So.2d 66 (Fla. 1974); Canal Authority v. Miller, 243 So.2d at 134; Miller v. Florida Inland, 130 So.2d 615. Should the partial taking costs equal or exceed those of the total taking, the court is authorized to grant a total taking, Fortune Federal, 532 So.2d at 1268.

Respondents NYES were not named in the original COMPLAINT. They were added by Order rendered June 26, 1986. Two years later, everyone was preparing for: trial when this Court's decision in Fortune Federal was rendered. Thereafter, without any amended resolution, without amending its pleadings, and without leave of court, the CITY filed a MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING on October 17, 1988, asserting the right to take all of NYES' property pursuant to Florida Statutes, section 337.27 (3) (1985). (R-162-164) A hearing was held on November 15, 1988. (R-295-326) The CITY introduced no evidence nor was any testimony taken. (R-295-326) At the conclusion of the hearing, the court granted the Motion that denied Respondents NYES' business damage claim. (R-326, R-191-194).

The CITY OF OCALA has now taken the remainder of NYES' property without proper notice, without following the mandated procedures of Florida Statutes, Chapters 73 and 74, without meeting the fundamental due process requirements of an evidentiary hearing and, in complete contradistinction from the manner in which 142 other similarly situated

parcels were handled. Once again the words of Chief Judge Rawls speaking for the District Court in the City of Jacksonville v. Moman, ring true:

> "Even in this enlightened era of "big brother knows best", the right of an individual to own and acquire property must be safe-guarded against an arbitrary taking by the sovereign. The power of eminent domain is one of the most harsh proceedings known to the law, and a strict construction will be given against a political unit which arbitrarily and unreasonably attempts to exercise such power." City of Jacksonville v. Moman, 290 So.2d at 107 [Citations deleted]

POINT I-C - THE CITY OF OCALA WAIVED ITS RIGHT TO CONTEST THE MODIFIED ORDER OF TAKING.

The trial court abused its discretion in granting the **CITY'S MOTION FOR RELIEF FROM ORDER MODIFYING ORDER** OF TAKING, pursuant to Florida Rule of Civil Procedure 1.540. The motion is devoid of specific factual allegations constituting "surprise" or "excusable neglect". Furthermore, no evidence of "surprise" or "excusable neglect" was put before the trial court upon which it could base its Order granting the relief requested by the CITY.

The CITY OF OCALA bases its authority to take all of Respondents NYES' property on a legislative grant pursuant to Florida Statute, section 337.27(3) (1985) as enacted by Chapter 84-319, Laws of Florida (1984) [See, discussion, infra, **POINT I-A**]. The CITY filed this action on May 15, 1986, but failed to reference section 337.27(3) in either its COMPLAINT or attached Resolutions. (R-1-76) On NYES' rehearing of the ORDER OF TAKING, the trial court correctly ruled that the CITY could not take all of Parcel 23. (R-292-293) The ORDER MODIFYING ORDER OF TAKING was rendered February 5, 1988. (R-143-144) Two and one-half years after

filing the COMPLAINT and over eight mnths after the MODIFIED ORDER OF TAKING was entered, the CITY filed its MOTION FOR RELIEF FROM ORDER MODIFYING ORDER OF TAKING contending that this Court's decision in Fortune Federal, 532 So.2d 1267, constituted surprise or excusable neglect. (R-164)

The CITY'S Motion, pursuant to Florida Rule of Civil Procedure 1.540, is inappropriate in that its basis is the CITY'S mistaken "view of the law" rather than "surprise" or "excusable neglect". Mistaken views of the law are not appropriate grounds for filing a Rule 1.540 motion. Kuykendall v. Kuykendall, 301 So.2d 466, 467 (Fla. 1 DCA 1974).

The District Court of Appeal decision in Fortune Federal, declaring Florida Statute, section 337.27 (3) (1985) unconstitutional was not issued until 1987. Fortune Federal, 507 So.2d 1172. That decision created the "change in the law" by holding the statute unconstitutional. The CITY's argument that they somehow relied on that decision is misleading in that it occurred a full year after the CITY filed its COMPLAINT and after the original ORDER OF TAKING had been entered. This Court's decision in Fortune Federal, 532 So.2d 1267 reversing the Second District Court's decision simply restored the original scenario. To accept the CITY's argument for "excusable neglect" and "surprise", one would have to believe that the CITY somehow knew the Second District Court of Appeal was going to hold the statute unconstitutional and relied on that fact when filing the COMPLAINT a year in advance of the decision. This is ludicrous! No "surpise" or "excusable neglect" existed and the decision of the Fifth District Court

of **Appeal** reversing the erroneous PARTIAL FINAL JUDGMENT should be affirmed.

Florida Rule of Civil Procedure 1.540 is not a substitute for a Rule 1.530 motion for new trial, or appellate review. Fiber Crete Homes, 315 So.2d 492. The proper method to review an order of taking entered pursuant to Chapter 74 proceedings, is Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii). Cement Products Corp. of Sarasota Inc. v. Department of Transportation, 363 So.2d 866 (Fla. 2 DCA 1978). A court can use Florida Rule of Civil Procedure 1.540 only for grounds set forth in the rule. Fiber Crete Homes, 315 So.2d at 493. Failure to use the appropriate remedy available to the CITY effectively disposed of the issue regarding NYES' right to claim business damages. Florida Rule of Civil Procedure 1.540 does not authorize relitigation of previously disposed issues. Fassy v. Auerbach, 529 So.2d 796 (Fla. 3 DCA 1988). The decision of the Fifth District Court of Appeal should be affirmed.

POINT II - 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.

There simply is no legitimate statutory or case law to support CITY'S position that the taking of eighty-seven percent (87%) of NYES' property constituted a total taking for purposes of the business damage statute. (BR-22) The CITY is asking this Court to make a semantic "end run" on the business damage statute by holding that the trial court erred in not finding a "constructive total taking" of Parcel 23, thereby eliminating NYES' business damage claim. This argument should be

rejected and the decisions of both the trial court and the Fifth District Court of Appeal on this p i n t should be affirmed.

Business damage is governed by Florida Statutes, section 73.071(3) (b). Generally speaking, the owner (including lessees) is entitled to be compensated for damage or destruction of a business established for five (5) or more years resulting from the taking of part of the property for public right-of-way purposes:

> "(b) Where less than the entire property is sought to be appropriated, and damages to the remainder caused by the taking, including, when the action is by ... municipality ... for the condemnation of a right-of-way, and the effect of the taking of the property involved may damage or destroy an established business of more than 5 years' standing, owned by the party whose lands are being so taken, located upon adjoining lands owned or held by such party, the probable damages to such business which the denial of the use of the property so taken may reasonably cause ..." Florida Statute, section 73.071(3) (b) (1987) [Emphasis supplied]

In this case, the only issue that the CITY ever seriously raised concerning NYES' entitlement to a business damage award was the NYES' standing to contest the quantity of land taken on the basis of their status as lessee-in-possession. (R-230) The trial court agreed with the CITY'S position that, as lessees, the NYES had no standing to object to the taking and, therefore, granted a total taking of Parcel 23. The trial court's ruling precluded the NYES from meeting the partial taking requirements of Florida Statutes, section 73.071(3) (b) and constituted fundamental error of law since lessees are owners for purposes of eminent domain. Carter v. State Road Department, 189 So.2d 793, 794 (Fla. 1966). The NYES moved for rehearing based upon the court's erroneous application of the law which motion was granted. (R-132).

Rehearing as to the taking of the disputed 10-foot by 200-foot strip of NYES' property that was admittedly unnecessary for the right-of-way project was 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 had a legal right to take all of the NYES' property. (R-258) Both parties were present and prepared to offer testimny at the rehearing. (R-259) Instead, the parties were able to stipulate to the pertinent facts that the right—f-way plans and specifications in evidence, together with the prior engineering testimny, conclusively 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) *Also* stipulated into evidence was a site sketch prepared by the CITY's engineering department that showed the restaurant's location on the property and established that an approximate 7-foot wide strip of the building used to conduct the business was outside the area needed for the project. (R-263) The CITY further conceded at the rehearing that if the fee owner had objected to the taking, the CITY could not have acquired all of Parcel 23. (R-287-291) Based on the evidence presented and stipulations of counsel, the trial court ruled that the CITY could not take all of Parcel 23 and since the business was obviously located on both sides of the taking line, the NYES could present evidence as to the amount of their compensable business damages to the jury at trial (R-290-293):

"ORDERED AND ADJUDGED that:

A, Defendant/Lessee NYE has standing as an owner to contest the Order of Taking.

B. That a portion of Parcel 23 upon which the Coffee Kettle Restaurant was located and operated was not necessary for the construction of the 14th Street project.

C. The Order of Taking entered June 30, 1986, is hereby modified to reflect that the condemnation of Parcel 23 was only a partial taking.

D, Defendant/Lessee NYE meets the statutory requirements under Florida Statute Chapter 73 for presenting a business damage claim and shall be allowed to introduce evidence at the trial of this cause as to the amounts of such damages." (R-143,144)

This was a judicial issue of law and fact for the trial court to decide. City of Lakeland v. Bunch, 293 So.2d at 68. The trial court's ruling on that issue arrived at the Fifth District Court of Appeal cloaked with a presumption of correctness. Palm Beach County v. Inland Bay Club, Inc., 280 So.2d 692 (Fla. 4th DCA 1973); City of Miami v. Cox, 313 So.2d 443 (Fla. 3d DCA 1975). It was supported by substantial, competent evidence and was properly affirmed without opinion by the Fifth District Court of Appeal. Nye, 559 So.2d 360, n.1., see, Hillsborough County v. Sapp, 280 So.2d 443, 445 (Fla. 1973).

Ignoring the express provision in the business damage statute distinguishing between partial and total takings, the CITY urges this Court to reverse both the District Court of Appeal and trial court on this issue. In so doing, the CITY "respectfully invites" this Court to rewrite the business damage statute by providing an exception based on the doctrine of "constructive total takings". (BR-19, 20)

The short-lived doctrine of "constructive total takings" was laid to rest by this Court in 1968. Young v. Hillsborough County, 215 So.2d 300 (Fla. 1968). The Young decision reversed the Second District Court's decision at 206 So.2d 405 (Fla. 2d DCA 1968). Young had been decided by the Second District Court of Appeal, together with the consolidated case of Douglas v. Hillsborough County, 206 So.2d 402 (Fla. 2d DCA 1968), Young, 206 So.2d at 406. Both of these decisions involved facts similar to the instant case. Both involved partial takings of the business premises that resulted in the total destruction of the businesses. Douglas, 206 So.2d at 403; Young, 206 So.2d at 406. It was not economically feasible for Douglas (coin operated laundry) or Young (hardware company) to continue operating at their respective locations. Douglas, 206 So.2d at 403; Young, 206 So.2d at 406. In both cases, the Second District Court of Appeal affirmed the trial court's denial of the appellant's claim for business damages on the basis that the destruction of the businesses would require the businesses' complete relocation; just as if there had been a total taking of the premises, relying on Guarria v. State Road Department, 117 So.2d 5 (Fla. 3d DCA 1960); State Road Department v. Bramlett, 189 So.2d 481 (Fla. 1966). Douglas, 206 So.2d at 404, 405; Young, 206 So.2d at 406, 407.

In Guarria the Third District Court of Appeal held that under the 1959 business damage statute (former Florida Statute, section 73.10 (4)), damage to a business of more than five years' standing was not compensable when the land on which the business was located was being condemned in its entirety. Guarria, 117 So.2d at 5, 6. The principle

of that decision was affirmed by this Court under the modern version of the business damage statute in State Road Department v. Bramlett, 189 So.2d at 483. This principle is still good law, but has nothing to do with the facts of the instant case where, like Young and Douglas, there was only a partial taking of the business premises. This factual distinction was held controlling by this Court in reversing the Second District Court of Appeal's decision in Young, thereby reinstating Young's business damage claim:

> "Certiorari has been granted on the basis of decisional conflict created by application of the Guarria decision as controlling precedent in a factual situation materially at variance ... in that the condemnation award in the present case is not one for an entire taking of both the business and the land. The statute expressly provides that compensation shall be awarded for the probable damages of a business 'where ~~less than the~~ entire property is * * * appropriated * * * and the effect of the taking * * * may damage or destroy an established business * * *' (E.S.)
>
> [1,2] In view of the express provision for business damages when a partial taking destroys a business, we are unable to follow the reasoning by which the court below denies such damages, in case of a partial taking which destroys a business, on the ground that the value of the land taken 'was enhanced by the operation of a business thereon and we do not see any distinction between a partial taking and a total taking where the business was destroyed ...' The statute makes precisely this distinction, whether the business is destroyed or only damaged, and requires compensation under the prescribed circumstances for business damage on adjoining land, which can only refer to damage independent of or in addition to the value of the land actually taken. Young, 215 So.2d at 301.

This Court's opinion in Young, 215 So.2d 300, eliminates the incorrect precedential effect of the Second District Court of Appeal's Young and Douglas opinions. Wackenhut Corporation v. Judges of the District Court of Appeal, Third District of Florida, 297 So.2d 300, 301

(Fla. 1974); Wainright v. Taylor, 476 So.2d 669, 670 (Fla. 1985). The Court now has the opportunity to expressly overrule Douglas, 206 So.2d 402 (which was never appealed) to prevent another landowner from having to run a gauntlet similar to NYES' in the future.

Furthermore, careful reading of the Douglas, Young, and Bramlett decisions cited by the CITY discloses that none of them contain any facts whatsoever dealing with the economic value of the remainder after the taking. Apparently undaunted by the lack of facts to support its "comparative analysis", the CITY leaps from a discussion of these cases to its proposed "standard" by which constructive total takings should be analyzed.

> "That is, if the necessary taking 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." (BR-22, 23)

Apparently, Petitioner is asking this Court to reinstate the original total taking on the basis that the remaining 10-foot by 200-foot strip of property not needed for the right-of-way project had no economic value. (BR-21, 22) This constitutes improper argument of issues not framed by the pleadings and of facts totally outside the record. First National Bank In Fort Lauderdale, 244 So.2d 481; Parker, 109 So.2d 893. Counsel seeks to testify de novo before this Court that "this remaining strip of land was of no use to the landowner, Curry, and really represented a liability." (BR-22) This is an amazing "legal" argument in light of the fact there is not one shred of appraisal or valuation evidence or testimony on this point in the record.

Furthermore, the undersigned respectfully represents that he does not believe that the remainder has "zero" value or that a competent appraiser could be found who would so testify. [2]

It is the existence of a reminder, not its actual value that is the relevant inquiry under the business damage statute. Florida Statute, section 73.071(3) (b) (1987); Young, 215 So.2d at 301. As shown in Exhibit "A", at Page 8 of PETITIONER'S INITIAL BRIEF, the taking line

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2 Discussion at the rehearing, the court made the following comments in regard to the remainder:

> 'THE COURT: 90 or -- 90 percent or 99 percent. Now, I would concede that your example may be open to some doubt if there were two or three inches or a foot or two feet or three feet.
>
> But six to seven feet of property is more than that, and I don't think falls within the confines of the law that says that the law doesn't deal with trivialities, and that the de minimis principle does not apply in this case, so that you can't say that it was so small a portion remaining that it is not arguable to say that the whole was not taken.
>
> That's a double negative, but 1 think if -- you can't make the argument that the whole was taken because it left only seven feet.
>
> I don't buy the statemnt that the seven feet is not of benefit to somebody. To the adjoining landowner it is, because it provides side street access to his property.
>
> MR. PHELAN: Well, it --
>
> THE COURT: And it m y be that he will have a curb cut there in order to get into parking on the side of his building.
>
> MR. KREHL: As an addition to this, Your Honor, I think Mr. Highspeed could even state to you that they're trying to do that with the adjacent owner--" (R-288,289)

splits both the improved and unimproved portions of the NYES' property in a lengthwise fashion. In light of this fact and the stipulations of counsel at the rehearing (R-258-294), the trial court properly concluded that Respondents NYES met the statutory requirements to present their business damage claim. (R-290-293) This decision was cloaked with a presumption of correctness and was clearly based upon substantial, competent evidence. The decision was affirmed by the Fifth District Court of Appeal and should also be affirmed by this Court.