No objection

IN THE SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

vs.

CASE NO. 80,656

A.G.W.S. CORPORATION, and
DUNDEE DEVELOPMENT GROUP,

Respondents.

AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE RESPONDENTS

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PRELIMINARY STATEMENT

The National Association of Home Builders (hereinafter "NAHB"), as amicus curiae, submits this brief in support of the Respondents, A.G.W.S. Corporation and Dundee Development Group (hereinafter "Property Owners"), to rebut certain arguments asserted by the Petitioner, Tampa-Hillsborough County Expressway Authority (hereinafter "Expressway Authority") and its amici, in that such arguments confuse and muddle the analytical framework of regulatory takings doctrine. The NAHB respectfully requests the Supreme Court to answer the certified question in the affirmative and to affirm the judgment of the Second District Court of Appeals since that judgment is consistent with United States Supreme Court precedent on takings law.

INTEREST OF THE AMICUS CURIAE

The NAHB, a non-profit trade association, represents 158,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its membership in Florida is 18,220. NAHB's members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers, remodelers, land use planners, engineers and attorneys. It is the principal voice of the American shelter industry.

NAHB's members are faced with countless decisions by local, state, and the federal governments on a daily basis that affect the use of privately owned property. The just compensation clause serves as a vital shield against those governmental land use restrictions that unduly oppress individuals' rights in such privately owned property. The

just compensation clause is, therefore, of paramount importance to NAHB and its members. The actual availability of an appropriate remedy for the occasional government action that results in a taking is critical to the livelihood of private landowners who either 1) are faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests, or 2) have lost all or substantially all economically beneficial or productive use of their property solely in order to serve the broader public (i.e., governmental) interests. The meaning of this two-tiered takings analysis under the just compensation clause of the federal Constitution, and how it relates to rights separately and distinctly guaranteed under the due process clause of the federal Constitution, are presented in this case. It is in NAHB's utmost interest to ensure that the Court views these critical issues in the proper analytical framework. This framework has not been presented to the Court by the Expressway Authority or its supporting amici.

The NAHB has been before the United States Supreme Court as an amicus curiae or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions.[1] Indeed, NAHB's brief was favorably cited in the Supreme Court's Nollan opinion, 483 U.S. at 840. Nollan and the rest of the nation's high Court's takings precedents are at the heart of the present Fifth Amendment

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[1] Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (of counsel to Hamilton Bank); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

controversy. Additionally, the soundness of the decisions in Joint Ventures v. Department of Transportation, 563 So.2d 622 (Fla. 1990), and Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So.2d 790 (Fla. 5th Dist. Ct. App. 1991), which support the interests of property owners and NAHB's members, is under attack by the Expressway Authority and its amici. Therefore, to protect the interests of its members, NAHB submits this amicus curiae brief to show the Court the correctness of its prior decision in Joint Ventures and of the Second District Court of Appeal's decision below.

SUMMARY OF THE ARGUMENT

Contrary to the philosophy of the Expressway Authority and its amici, the United States Supreme Court places individual rights in private property at a significantly high level in our constitutional culture. These rights in private property are protected by several provisions of the federal Constitution. The just compensation clause demands the payment of just compensation for a taking when a government act either 1) fails to substantially advance a legitimate government interest or 2) denies all or substantially all economically beneficial or productive uses of property, or both. The Expressway Authority and its supporting amici confuse the first prong of this takings doctrine with the separate and distinct guarantee against a deprivation of property without due process under the due process clause. Yet the United States Supreme Court has made it clear that the analysis of the "substantial advancement" takings test under the just compensation clause is very different from an analysis of governmental actions under the

due process clause. See Nollan v. California Coastal Commission, 483 U.S. 825, 834 n. 3 and accompanying text (1987).

The United States Supreme Court, in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992), furthered refined the second takings prong, establishing a categorical takings rule where the denial of all economically beneficial or productive use of property is a per se taking, while the denial of "less than all" or substantially all such uses must be analyzed under a now traditional three factor analysis. But even if the Lucas categorical takings rule is not applicable to the map of highway reservation statute, properly struck down by this Court in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), the categorical rule announced in Lucas should not be confused with the holding of Joint Ventures. In Joint Ventures, the highway reservation statute effected a facial taking of all affected property within the boundaries of the map of highway reservations. The Lucas and Joint Ventures decisions involve different questions. One question, of import to the Joint Ventures holding, is whether a statute is a taking on its face as to all affected property owners or a taking as applied to individual owners as determined in separate inverse condemnation actions. This is wholly distinct from the question of whether a particular land owner qualifies under the categorical or per se takings rule of Lucas or the landowner's takings claim is premised on some other basis. The Expressway Authority and its amici confuse the facial taking inquiry with the categorical or per se taking inquiry and, consequently, erroneously conclude that this Court was wrong in Joint Ventures to hold that all affected property owners suffered a per se taking because they had been denied all economically beneficial use of their property. Since they have confused the separate

inquiries, they have completely misunderstood the analytical basis of the Court's holding in Joint Ventures.

The facial takings decision in Joint Ventures, 563 So.2d 622, although perhaps not directly stated, may be squarely premised on the first prong of takings doctrine, namely that the statute does not substantially advance legitimate state interests. It does not rest, as argued by the dissent in Joint Ventures, 563 So.2d at 628 (C.J. Ehrlich, dissenting), on the basis that the statute facially deprives all affected landowners of economically beneficial or productive use of their property. Since a facial taking has been found, based on the first prong of takings doctrine, just compensation must be paid, assuming the plaintiff pleads for such relief. That the Expressway Authority is concerned about the expenses it may incur in litigating temporary takings damage awards is a recognition, albeit too late, of the constitutional consequences it should bear.

ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS ESCHEWED THE LOW LEVEL OF PROPERTY INTEREST THAT THE EXPRESSWAY AUTHORITY WOULD AFFORD THE PROPERTY OWNERS IN THEIR LAND

Most regulations affecting the use of land pass scrutiny under the Fifth Amendment's just compensation and due process clauses. But occasionally a regulation on its face or as applied crosses the Constitutional line. The very existence of the Constitution's limitations on government power is a recognition of this danger. All governmental acts must recognize and respect the individual's rights in private property. These rights are protected by the Constitutional limitations on government power in general, and the Fifth Amendment's prohibition on taking private property without just

compensation in particular. Anything short of that proper respect is repugnant to the higher considerations expressed in the Constitution. As the Supreme Court has firmly stated:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972). The sovereign's power to regulate the use of land cannot "be exercised to destroy essential uses of private property." Curtin v. Benson, 222 U.S. 78, 86 (1911). Constitutional rights in private property must be and have been continually confirmed.

More recently, for example, the nation's high Court in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), dispelled any notion that one's interest in property arises from that which the government says you can do with your property. It is a

> peculiar position that a unilateral claim of entitlement by the government can alter property rights. . . . [T]he right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange". . . that we found to have occurred in [Ruckelshaus v.] Monsanto,[467 U.S. 986, 1007 (1984)]. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy.

Nollan, 483 U.S. at 833 n. 2. Therefore, one's interest in property protected by the Constitution arises out of the ownership of the land and such interests are found within the whole bundle of rights accompanying ownership, only one of which includes the

economically beneficial or productive uses that can be derived from the property. See Lucas, 112 S.Ct. 2886, 2894 n. 7.

II. CONTRARY TO THE EXPRESSWAY AUTHORITY'S AND ITS AMICI'S CONFUSION REGARDING THE ANALYTICAL FRAMEWORK FOR TAKINGS CLAIMS AND DUE PROCESS CLAIMS, THE UNITED STATES SUPREME COURT HAS CLEARLY AND REPEATEDLY STATED THAT THE JUST COMPENSATION CLAUSE INVOLVES TWO TAKINGS TESTS

The Supreme Court has issued a long line of takings cases, culminating in its 1987 trilogy of decisions, Nollan v. California Coastal Commission, 483 U.S. 825 (1987), First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987), and Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), and bolstered by its most recent pronouncement in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

The Supreme Court has unmistakably and repeatedly held that a regulatory taking occurs if either 1) the regulation or government act does not substantially advance a legitimate government interest or 2) the regulation or government action denies a property owner all, or substantially all, economically viable, beneficial or productive use of property. Lucas, 112 S. Ct. at 2894; Nollan, 483 U.S. at 834; Keystone Bituminous Coal, 480 U.S. at 485; Agins v. City of Tiburon, 447 U.S. at 260; See also Whitney Benefits v. United States, 926 F.2d 1169, 1176 (Fed. Cir. 1991). It is crucial to maintain the distinction between these two takings tests. A compensable taking occurs when a government's action substantially advances a legitimate government interest but nonetheless denies a particular landowner all or substantially all economically viable, beneficial or productive use of the property. See, e.g., Florida Rock Industries, Inc. v.

United States, 21 Cl. Ct. 161 (1990). The Supreme Court clearly established this principle when, while affirming the Clean Water Act's grant of jurisdiction to regulate certain wetlands, it noted that a property owner can bring a takings claim in the U.S. Claims Court if a dredge or fill permit is applied for and denied, and the "effect of the denial is to prevent 'economically viable' use of the land in question." United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985).

In apparent recognition that the term "economically viable use" engenders some confusion, the Supreme Court last year for the first time changed its terminology to "economically beneficial or productive use of land." Lucas, 112 S. Ct. at 2893. And since "[p]roperty does not have rights[,] [p]eople have rights," Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972), the use of land must be economically beneficial or productive not as a general matter but in relation to the specific landowner in the particular case. This is why there is a dearth of facial takings judgments based on the denial of all or substantially all economically beneficial or productive uses of property.

Under the Supreme Court's takings doctrine, when economically beneficial or productive use of land has been denied no set formula prescribes when a regulation becomes a taking. Lucas, 112 S.Ct. at 2893; Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). Courts have been directed to review the facts and circumstances of each case in these takings situations, but three factors have been consistently relied on for guidance in analyzing a takings claim under this test:[2]

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[2] See Lucas, 112 S. Ct. at 2895 n. 8; Keystone Bituminous Coal, 480 U.S. at 495; Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986); Ruckelshaus v. Monsanto, 467 U.S. 986, 1005 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); Yancey v. United States, 915 F.2d 1534, 1539 (Fed.

1) The character of the governmental action, where the analysis focuses on whether the regulation closely resembles a physical invasion of the property or the regulation effects a practical ouster of the owner's possession or enjoyment of the property;

2) The economic impact of the regulation on the property owner. This is an objective economic analysis, comparing fair market value of the property before and after the regulation works its destructive effect; and

3) The extent to which the regulation has interfered with reasonable investment-backed expectations, which is more of a subjective economic analysis.

In evaluating these factors, courts are to keep in the forefront the basic underlying premise that the just compensation clause is "designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). See also Andrus v. Allard, 444 U.S. 51, 65 (1979). This is especially so in those situations where, as here, "there is heightened risk that the purpose [of the government's requirement] is avoidance of the compensation requirement, rather than the stated police power objective." Nollan, 483 U.S. at 841; see Joint Ventures, supra, 653 So.2d at 625 - 626.

This takings test, concerning economically beneficial or productive uses of property, was further refined last summer when the Supreme Court announced a categorical takings rule. The Court held that when there is a denial of all economically

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Cir. 1990).

beneficial or productive use of land, as opposed to a denial of "less than all" economically beneficial or productive use of land, the regulatory action effecting the same is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." Lucas, 112 S. Ct. at 2893. The other categorical or per se takings situation is when the government has physically appropriated or invaded private property. Lucas, 112 S. Ct. at 2893; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

In situations involving the first takings test, a compensable taking results from government actions that do not deny a landowner all or even substantially all economically viable, beneficial or productive use of the property but nonetheless fail to substantially advance a legitimate government interest. See, e.g., Nollan, 483 U.S. 825, 843 (holding that the California Coastal Commission's imposed easement over Nollans' land effects a taking because it does not substantially advance a legitimate government interest and concluding that if the Commission "wants an easement across the Nollans' property, it must pay for it."). See also Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991). Importantly in Nollan, the property owners did not plead for just compensation and requested only that the requirement be invalidated. Analysis under both takings tests may be necessary to protect individuals from government regulations that unfairly impose on individuals costs that properly belong with the public. In some cases, the regulation will even fail on both counts. Seawall Associates v. City of New York, 542 N.E.2d 1059, 1065-66, 544 N.Y.S.2d 542, 548-49, cert. denied, 110 S. Ct. 500 (1989) (Seawall III). Seawall III involved a facial challenge to a state statute affecting a defined class of property owners, which challenge

was based on both takings tests as well as on a due process claim. In interpreting the decision, a later state lower court noted that "'the provisions of Local Law 59 and 22, although not specifically addressed in [Seawall III], constitute per se compensable takings under the reasoning and holding of the Court of Appeals as the court declared unconstitutional [certain] provisions contained in all three Local laws . . . .'" City of New York v. 17 Vista Associates, 580 N.Y.S.2d 963, 969 (N.Y. Sup. Ct. 1991) (citing to 245 - 259 Realty Co. v. City of New York, NYLJ of June 19, 1991, p. 22, col. 3 (Sup. Ct, NY Co., 1991)).

Therefore, recognizing the distinction between the two types of regulatory takings claims, it is possible to bring each claim either as a challenge to the statute or regulation in question "as applied" to a particular landowner or on the face of the statute or regulation.

Accordingly, non-physical, regulatory takings claims can be broken down into four types of claims, as follows, where a statute, regulation or other government act

1) does not substantially advance legitimate government interests as applied to specific property owners (see, e.g., Nollan, supra, 483 U.S. 825; Surfside Colony, Ltd, supra, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371);

2) does not substantially advance legitimate government interests on its face or, namely, as applied to all affected property owners identified by the statute, regulation or government act (see, e.g., Joint Ventures, supra, 563 So.2d 622; Seawall Associates, supra, 544 N.Y.S.2d 542);

3) denies all or substantially all economically beneficial or productive use of property as applied to specific property owners, where such claims are further divided

into categorical takings for the denial of all use (see, e.g., Lucas, supra, 112 S.Ct. 2886) and taking claims asserting a denial of "less than all" or substantially all use of property; and

4) denies all or substantially all economically beneficial or productive use of property on its face or, namely, as applied to all affected property owners identified by the statute, regulation of other government act;[3]

The Expressway Authority confuses Lucas' per se or categorical rule of takings with the question concerning whether a claim is made as a facial challenge or an "as applied" challenge. Petitioner's Initial Brief On The Merits, at 25 (hereinafter "Petitioner's Initial Brief"). Therefore, in the event the Court delves into the scope of the new per se rule announced in Lucas, the NAHB asserts that the categorical rule does not focus on the value of land retained following enactment or application of a challenged statute. Lucas does not stand for the proposition that the "all" in the "all economically beneficial or productive use" takings test means that a property owner's land must be reduced to a value of zero before triggering the per se compensation requirement. Such an interpretation would be nonsense. Even wetland or land restricted to open space that can sustain no development retains some de minimis monetary value as conservation or

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[3] As previously stated, there is a dearth of these types of claims since the Constitution protects people not property and, therefore, when considering remaining economically beneficial or productive uses of property, an inquiry usually must be made into how a governmental act impacts specific property owners. As the Supreme Court has noted in referring to the denial of economic use test, property owners "face an uphill battle in making a facial attack on the Act as a taking." Keystone Bituminous, 480 U.S. at 495. But see Pennell v. City of San Hose, 485 U.S. 12, 15 (1988) (J. Scalia, dissenting). It is not inconceivable that a particular statute or regulation could effect a facial denial of all or substantially all economic use of property for all affected property owners.

park land, yet land use restrictions on such lands may amount to a denial of all economically viable or beneficial use for the particular property owner in question. See, e.g., Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990). The United States Supreme Court's own meaning of its categorical rule is enlightening. After announcing its rule, the Court stated "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Lucas, 112 S. Ct. at 2895 (first emphasis, the Court's; second emphasis added). If a property owner must leave his or her land economically idle then the owner has been made to sacrifice all economically beneficial uses. The justification for the rule is

> that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. . . . "[F]or what is the land but the profits thereof[?]" . . . Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," . . . in a manner that secures an "average reciprocity of advantage" to everyone concerned. . . .

Lucas, 112 S. Ct. at 2894. Therefore, in determining whether a categorical taking has occurred, it does not matter what value is retained in the property after the government works its destructive impact. What does matter is whether the property owner is left with any economic benefits, with the ability to extract some profit from the land, and with an option other than leaving the property economically idle. A hypothetical illustrates our argument. If a property owner invested $200,000 in developing a subdivision and could obtain $250,000 in the marketplace upon selling the planned lots, the economic

benefit to the owner is $50,000. If, then, a restrictive regulation or other governmental act (e.g., which denies the use of a number of lots) limits the owner's return to $202,000 and, thereby, reduces the economic benefit from $50,000 to $2,000, the Supreme Court's categorical rule would not apply and the owner would have to argue that he has suffered a taking under the second takings prong's three-factor analysis (i.e., character of government action, economic impact on property, and interference with reasonable investment-backed expectations). Depending on the strength of these factors in the owner's favor, the owner may or may not have suffered a taking. But, if the regulation or other governmental act was so restrictive that the owner's return is $150,000, which affords the owner the opportunity to lose $50,000, there is no economic benefit to the property owner. In this latter scenario, the Lucas categorical rule applies and just compensation must be paid, despite the fact that the land retains some intrinsic value (presumably something less than $150,000).

The Expressway Authority throughout its argument has erroneously focused its attention on how the highway reservation statute impacted the economically beneficial or productive uses of each property owner affected by the statute. The reason such a focus is wrong is that Lucas did not limit takings claims to just the second prong of the two takings tests that have been consistently repeated since Agins v. City of Tiburon, supra, 447 U.S. at 260. That substantial advancement of legitimate government interests is the first prong of takings doctrine, which was first articulated in Agins and used as the basis of the decision in Nollan, was confirmed once again in Lucas, 112 S.Ct. at 2893 - 2894. And, as discussed below, it is this first prong of takings doctrine, not the denial of

economically beneficial or productive uses, that forms the analytical basis of the decision in Joint Ventures v. Department of Transportation, 563 So.2d 622 (1990).

III. THE NATION'S CONSTITUTIONAL SYSTEM OF GUARANTEES FOR INDIVIDUAL RIGHTS DEMANDS THAT THE SUBSTANTIAL ADVANCEMENT PRONG OF TAKINGS DOCTRINE BE RECOGNIZED AS THE BASIS OF THIS COURT'S FACIAL TAKINGS HOLDING IN JOINT VENTURES, INC. v. DEPARTMENT OF TRANSPORTATION, 563 So.2d 622 (1990)

The state courts must resolve Fifth Amendment takings claims brought to them under principles enunciated by the United States Supreme Court regardless of how the state court resolves a State Constitutional takings claim. See First Church, 482 U.S. at 310 - 311. Under state constitutional provisions, the state courts are free to provide more protection to individuals than that guaranteed by the United States Constitution. Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 676-677 (1923); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). The guarantees of the federal Constitution are the required minimum that all governments must afford to individuals. Mills v. Rogers, 457 U.S. 291, 300 (1982). Therefore, while the majority in Joint Ventures, 563 So.2d 622, did not expressly discuss the application of Nollan's two prong just compensation analysis, and the dissenting opinion discusses only the second or economic use prong of takings doctrine, 563 So.2d at 628 (C.J. Ehrlich, dissenting), the Court's holding there must be read as meaning that the highway reservation statute effected an impermissible facial taking of property without just compensation because of the failure to substantially advance legitimate state interests. Joint Ventures, 563 So.2d 622. Appropriate for takings purposes, the Court did "not question the reasonableness of the state's goal to

facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal." Id., 563 So.2d at 626. This is entirely consistent with the takings concerns expressed by the United States Supreme Court:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.
>
> . . . .
>
> California is free to advance its 'comprehensive program,' if it wishes . . . but if it wants an easement across the Nollans' property, it must pay for it.

Nollan, supra, 483 U.S. at 841 - 842 (emphasis, the Court's). In fact, the means to reach the ends is the dominant question in all takings litigation. If this Court had questioned the reasonableness of the state's goals in enacting the highway reservation statute, the question should have been appropriately analyzed under traditional substantive due process doctrine, rather than destroy the proper analytical framework of takings law as the Expressway Authority and its supporting amici would prefer.

As to the takings test that focuses on when a regulation fails to substantially advance a legitimate government interest, the Supreme Court laid out its applicable rules in Nollan, supra, 483 U.S. 825. Under this test, the government must have a legitimate interest in its regulation or its challenged action (e.g., that the regulation or act promotes the public health, safety or welfare) and its regulation or action must substantially advance that interest. "We have required that the regulation 'substantially advance' the

'legitimate state interest' sought to be achieved, . . ., not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.'" Nollan, 483 U.S. at 834 n. 3 (emphasis, the Court's). Contrary to the position of amicus curiae National Audubon Society, under this takings analysis, courts must closely scrutinize government regulations rather than follow the usual high level of deference normally given to government decisions under a due process analysis. "[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . ." Id. Amicus curiae Audubon would have this Court roll back the clock to the days before Agins, supra, 447 U.S. 255, before the two separate takings tests were articulated by the United States Supreme Court. In the face of Nollan's own words, 483 U.S. at 834 n. 3, this attempt to equate the standards for the first prong of takings doctrine with substantive due process claims and, consequently, pin the sole basis of Joint Ventures on a violation of the due process clause rather than of the just compensation clause must fail. See also Michelman, Takings 1987, 88 Colum. L. Rev. 1600, 1606 (1988) (the substantial advancement takings test is a "distinctly more active and intensive judicial reexamination than the kind of desultory, 'rational basis' review that the Court has for the last half-century been applying to police-power regulations affecting economic interests, most notably including land-use regulations."); Peterson, Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335, 338 (1988) ("an enactment must bear a substantial relationship to a valid public purpose, not merely a rational relationship, the common standard in due process and equal protection

challenges."); The Supreme Court: 1986 Term, 101 Harv. L. Rev. 7, 248 - 249 (1987) ("the Court expressly refused to adopt the standard of minimum rationality . . . . The Court thus articulated a standard of heightened scrutiny for regulations challenged under the takings clause.")

This is not an academic argument. The remedies available to a harmed individual are extremely important and differ depending on what constitutional provision a claim is based. The United States Supreme Court stated that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" First Church, 482 U.S. at 315. This came just two weeks before the high Court stated, again, that "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' . . . ." Nollan, 483 U.S. at 834 (citations omitted). Thus, if an owner has property taken by the government under either takings prong the owner may demand just compensation for the loss. Of course, the demand must be pled, which was not done in either Nollan or Joint Ventures, and the owner is free to plead for the invalidity of the offending statute, converting the constitutional damage into a temporary taking, but if the government wants to take the property, it must pay for it. See Nollan, 483 U.S. at 842. Alternatively, an individual cannot demand, under the Constitution, that money damages be awarded for the violation of due process guarantees and, generally, the owner is restricted to asking for a ruling that the offending statute is invalid.[4]

[4] However, Congress has provided a broad remedial statute for violations of the federal Constitution or laws by municipal governments. 42 U.S.C. § 1983.

This interpretation of the remedies available under takings doctrine makes eminent sense. When a landowner is deprived of all or substantially all economically beneficial or productive use of his or her property, direct economic damage has been sustained and just compensation is the preferred remedy. However, when a taking is based on the failure of a statute or regulation to substantially advance a legitimate state interest, usually (but not always) the owner prefers invalidation of the offending governmental act. Therefore, compensation is generally not requested in these "substantial advancement" takings prong cases. If government enacts legislation that takes property and intends to provide no compensation, the legislation is invalid. Hodel v. Irving, 481 U.S. 704 (1987). But, the Constitution protects all types of individual interests in private property and if a particular individual wants compensation for the loss of, damage to, or intrusion into such interests, which is essentially the holding that a government act takes property for the failure to substantially advance legitimate state interests, then the Constitution demands that just compensation be paid to that individual for the loss sustained. Indeed, as the United States Supreme Court said long ago, "the question is, What has the owner lost?, not What has the taker gained?" Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910); see also United States v. Causby, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.").

IV. THE EXPRESSWAY AUTHORITY MUST BEAR THE CONSTITUTIONAL CONSEQUENCES OF THE GOVERNMENT'S ACTIONS IN ENACTING A STATUTE THAT EFFECTS A TAKING WITHOUT JUST COMPENSATION AND ITS PLEAS THAT SUCH CONSEQUENCES WOULD AMOUNT TO TOO MUCH CANNOT SUFFICE TO DISMANTLE THE CONSTITUTION

The Expressway Authority argues that the ruling below, coupled with this Court's ruling in Joint Ventures, supra, 563 So.2d 622, places an unjust burden on the government to defend itself against claims for compensation, incurring the expense of litigation fees and costs. If such a result forces the government to make better decisions that respect individual's rights in private property, NAHB submits that the Constitution demands nothing more nor less. Such a result is the necessary consequence of abiding by our Constitutional rule of law. The Expressway Authority may not like the constraints that the Constitution placed on its willingness and desire to control the costs of acquiring land for expanding its highways, but

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. [393], at 416 [1922].

First Church, 482 U.S. at 321- 322.

The just compensation clause is one of the few constraints on overbearing governmental acts and regulations. Its full application is needed by property owners of all types to balance against the heavy weight of government power. Moreover, governments are constrained by the just compensation requirement only to the extent that it means its business is to be conducted fairly, carefully and with proper Constitutional respect. The NAHB asks this Court only that the Expressway Authority

be held meaningfully accountable, as constitutionally required, for its actions against the Property Owners.

The issue before this Court in Joint Ventures, supra, 563 So.2d 622, was the impact of the map of highway reservation statute on all those persons owning land within the boundaries of the highway reservation. The Court determined that the statute effected a taking on its face. Id. Cutting through its rhetoric and dire warnings of doom to the public fisc, the Expressway Authority is apparently asking the Court that since Joint Ventures found that the statute effected a facial taking of property of all affected owners, does that create a presumption that all affected owners have had their property taken? Since "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation,'" First Church, 482 U.S. at 315, the question before the Court now is merely a restatement of the certified question before the Court in 1990. It is inconceivable that a statute effecting a facial taking as to a defined class of property owners can somehow not effect a taking as applied to a specific property owner within that class. Accordingly, the certified question before the Court should be answered in the affirmative.

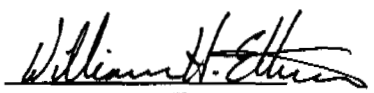
The Expressway Authority's predictions of fiscal chaos, which when all is said and done it admits is "[t]he real 'problem' here," Petitioner's Initial Brief, at 34, need not and likely will not come true. There will be no "windfall," Petitioner's Initial Brief, at 37, to any property owner because each plaintiff must still prove its damages before a jury. The Expressway Authority's claim, Petitioner's Initial Brief, at 39, that the category of owners falling within the statute's exemptions would file claims is unavailing since these property owners, unaffected by the reservation statute, are arguably not covered by Joint

Venture's facial takings ruling. But even as to them and to any other property owners who have not suffered direct economic damages, why would most of these owners bring suit? They still must prove their damages, and this amicus, an organization of 158,000 builders, developers and others in the building industry, is aware of no property owner who undertakes litigation merely to support his or her attorney. Moreover, issues such as whether the property is developable, claimed by the Expressway Authority to be solely the province of a trial on takings liability in individual cases, Petitioner's Initial Brief, at 40 - 41, will be calculated into the formulas establishing the fair market value of the property before and after the taking took effect, which analysis will take place in the trial on the amount of just compensation.

Conclusion

This amicus has never taken the position and does not propose now that private property rights are sacrosanct. However, it is a great challenge for us to make government regulators and their supporters realize that private property rights are not quaint anachronisms. No public goal or concern, no matter how important to the majority of the people, should be allowed to rise above the considerations of individual liberty and rights embodied in the Constitution. For this and the reasons stated above, this Court is urged to answer the certified question in the affirmative and affirm the decision of the Second District Court of Appeal.

Respectfully Submitted,



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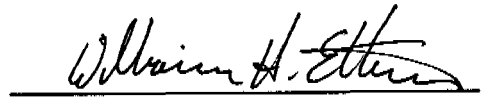

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