In The
SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner, Case No. 80,656

v.

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

Respondents
_____/

**BRIEF OF AMICUS CURIAE**
**Orlando-Orange County Expressway Authority**

**In Support of Petitioner**
**(Upon Certified Question of District Court of Appeal, Second District of Florida)**

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## STATEMENT OF THE CASE

Respondents, A.G.W.S. Corporation and Dundee Development Group (collectively, the "landowners"), initiated separate suits for inverse condemnation alleging that a map of reservation recorded by Petitioner, Tampa-Hillsborough County Expressway Authority, pursuant to § 337.241, Florida Statutes (1987), constituted a taking of property. Multiple theories were alleged. The Circuit Court granted partial summary judgment to the landowners, determining that the recording of a map of reservation incorporating a part of a landowner's property constitutes a per se taking of property for which compensation must be paid, without regard to whether the landowner's use and enjoyment was substantially affected, and without regard to whether there was actual economic damage or loss. Upon appeal, a divided Second District Court of Appeal affirmed and certified the following question of great public importance:

> Whether all landowners with property inside the boundaries of invalidated maps of reservation under subsections 337.241(2) and (3), Florida Statutes (1987), are legally entitled to receive per se declarations of taking and jury trials to determine just compensation.

The Court has jurisdiction pursuant to Article V, Section 3(b)(4), Florida Constitution.

## STATEMENT OF THE FACTS

The record facts are limited. The landowners each own large parcels of land. The Tampa-Hillsborough County Expressway Authority recorded a map of reservation pursuant to § 337.241, Florida Statutes (1987). The map included a portion of each parcel and depicted a potential, future road right-of-way bisecting each parcel. The map existed from July 8, 1988, until the decision in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990), declaring § 337.241 (2) and (3), Florida Statutes (1987), invalid. The character of the A.G.W.S. Corporation property is not revealed. The Dundee Development Group's land was improved pasture. Dundee did not dispute the Authority's affidavit establishing that Dundee continued to have the exclusive occupancy and enjoyment of the property during the reservation period. The landowners claimed, as a matter of law, the recording of the reservation map constituted a temporary taking of property for which compensation must be paid for the period the map existed. Because the Circuit Court ruled that a taking had occurred on a per se basis, there is no record evidence regarding the actual impact, if any, on the landowners resulting from recording the reservation. It is impossible to determine from the record whether any actual harm was suffered by the landowners. As far as the record shows,

their property values may have been enhanced by the potential of a major new highway providing greater transportation convenience.

## SUMMARY OF ARGUMENT

A roadway reservation map of the type invalidated in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), does not inherently and conclusively effectuate a taking of property in every instance. To decide otherwise would overrule long established case law and allow huge compensation awards to landowners who experienced no actual economic loss.

The decision in Joint Ventures does not mandate such an untoward result. Established precedent in Florida uniformly requires a showing of actual deprivation of beneficial use before a taking will be declared. Recent decisions of the United States Supreme Court establish that no per se taking occurs merely because of a reservation map. A presumptive taking occurs only if there is either (i) a physical intrusion or (ii) a denial of all economic use. Neither of these conditions is inherent in the circumstances of a reservation map.

Many landowners whose property was included within a reservation map experienced neither loss, nor inconvenience. In some instances, affected landowners were affirmatively benefitted because local zoning authorities permitted intense development uses adjacent to the reserved right-of-way when only minimal development of the property would have been otherwise allowed.

The variety of individual circumstances is too great for a per se rule to operate rationally in every case.

Therefore, the certified question should be answered in the negative, and the decision below quashed.

## ARGUMENT

### Introduction

The issue before the Court is not academic. There are serious ramifications if the Court decides that reservation maps inherently constituted a taking of all affected property without regard to whether any actual economic damage was suffered by the landowner. Typically, a plaintiff landowner in an inverse condemnation case must first prove that the government took the plaintiff's property. For example, whether a highway encroached upon private property is determined by the Court before a jury is convened. E.g., State Road Department v. Lewis, 156 So.2d 862 (Fla. 1st DCA 1963), aff'd. 170 So.2d 817 (Fla. 1964) (Lewis I). If it is determined that private property was taken, a broad range of rights is triggered. Automatically, the landowner is entitled to a twelve-person jury trial to determine compensation. The case will be submitted to the jury on instructions that private property was taken. The jury is directed to award compensation. See generally, State Road Department v. Lewis, 190 So.2d 598 (Fla. 1st DCA), cert. dismissed 192 So.2d 499 (Fla. 1966) (Lewis II); Sarasota-Manatee Airport Authority v. Icard, 567 So.2d 937 (Fla. 2d DCA 1990). Also, the landowner is immediately entitled to have all reasonable litigation costs, including attorneys' fees, appraisal fees and other expert fees

paid by the public. E.g., Schick v. Department of Agriculture and Consumer Services, 599 So.2d 641 (Fla. 1992); County of Volusia v. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983). The rights of the individual are thus protected.

A ruling that all reservation maps constitute per se takings eliminates the first stage of an inverse condemnation case. Such a ruling would create a very real prospect that landowners who experienced no interference whatsoever with the use of their property will receive huge compensation awards. Moreover, the public would be forced to bear the substantial costs of appraisal fees, land planning fees, attorneys' fees and all other costs incurred by those landowners seeking a windfall.

It has become common for creative counsel of landowners to analogize a reservation map to a land purchase option. They obtain the testimony of appraisers regarding the "going rate" for such an option, often in the range of 1% of the land's total value per month. Over a two-year period, with interest added, this "option price" amounts to over 25% of market value. An example might be an orange grove owner who raised and marketed oranges before a reservation map was recorded, continued the grove operation during the map period, and still engaged in raising oranges after the map was cancelled. The grove owner would have suffered no actual loss, and experienced no inconvenience. Reservation maps do not affect the quantity or

price of fruit. However, under a judicial declaration that the map effectuated a per se taking, the grove owner could (i) receive a huge compensation award, (ii) still own the land, and (iii) look forward to being paid in full (again) when the land is acquired for the new highway.[1] Along the way, the public would bear all of the landowner's fees and other costs.

This Brief asserts that the law does not support the ruling of the court below. It is respectfully suggested the Court should not forge new law when the logical consequences would lead to an irrational result.

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1. Amicus believes the "option analogy" approach is flawed because it measures compensation from the perspective of what government obtained, rather than looking to the loss experienced by the landowner. This is inconsistent with established legal concepts. See, Jacksonville Expressway Authority v. Henry G. DuPree Co., 108 So.2d 289 (Fla. 1959); Kimball Laundry Co. v. United States, 338 U.S. 1, 93 L.Ed. 1765, 69 S. Ct. 1434 (1949). Nonetheless, given the principle that there cannot be a taking without compensation, and if there is an appellate court mandate that reservation maps constitute per se takings, the "option analogy" can be enticing to a trial court and jury since it provides compensation when there is no loss. If skillful landowner's counsel can raise the jury's ire, the "option analogy" provides a stick with which the jury can punish. However, compensation, not punishment, is the purpose of the Takings Clause.

I.

**INVALIDATED MAPS OF RESERVATION DO NOT CONSTITUTE PER SE TAKINGS OF PROPERTY UNDER THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.**

The Court is being requested to decide an issue not addressed in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). That question is whether every invalidated map of reservation constitutes a per se temporary taking of all lands described within such maps, thereby conclusively entitling all owners of such lands to compensation.[2] In Joint Ventures, the Court struck down the Florida highway reservation statute, § 337.241(2) and (3), Florida Statutes (1987). In so doing, the Court carefully emphasized that it was not addressing a claim for compensation, but was instead dealing with "a constitutional challenge to the statutory mechanism." Id. at 625.

The Court is now called upon to consider a claim for compensation based upon a theory that all maps of reservation constitute a per se temporary taking of affected lands.

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2. It has been estimated that over 4,000 parcels of land were affected by invalidated maps of reservation. Memorandum from Robert I. Scanlan, Interim General Counsel, Department of Transportation, to Ben G. Watts, Secretary, Department of Transportation (May 1, 1990)(Fiscal Impact of Unconstitutionality of Map of Reservation Statute)(Fla. Dept. of State, Div. of Archives, Tallahassee, Fla.).

The Court should answer the certified question in the negative. As the Court stated in Joint Ventures, "When compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of interference or deprivation of economic use." Id. at 625. This is the necessary inquiry to determine whether a compensable taking of property occurred in any particular case. The District Court of Appeal erred in not directing that such an inquiry occur.

The District Court of Appeal erred in interpreting the Joint Ventures decision as concluding that reservation maps inherently take property. Amicus understands the Court's opinion in Joint Ventures as holding the right-of-way reservation statute invalid because it permitted maps of reservation without providing adequate due process safeguards to prevent what might amount to a taking of property in some circumstances.[3] The constitutional values which inhere in the Takings Clause of the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution were among the bases for the Court's

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3. Given the construction that no administrative relief was available under the statute unless it was both unreasonable for the particular property to be designated for possible future use and there was substantial denial of beneficial use, Joint Ventures, Inc. v. Department of Transportation, 519 So.2d 1069 (Fla. 1st DCA 1988), the Court's striking of the statute was unavoidable under the Due Process Clause. The administrative remedy was illusory under that construction.

determination that the procedural mechanism established by the statute was not a permissible means for accomplishing a legitimate public goal. The Court's recognition of these cherished constitutional values was hardly a determination that in every instance a map of reservation necessarily and conclusively effectuates a taking of property. The Court's decision did not extend beyond the limited due process issue regarding the invalidity of the statutory mechanism.

If Amicus misreads the Court's Joint Ventures decision, it respectfully suggests the Court recede from that decision, at least in part, and reiterate its statement that a taking of property cannot be determined to have occurred in a particular case until "appropriate inquiry is directed to the extent of interference or deprivation of economic use." Joint Ventures, 563 So.2d at 625. If neither physical intrusion nor substantial interference with beneficial use has been experienced, no taking occurred and no compensation is owed.[4] This is the proper standard under the decisions of both the Court and the United States Supreme Court. Graham v. Estuary Properties, 399 So.2d

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4. It is well established that even a substantial diminution in value does not result in a taking per se. Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926)(75% loss of value caused by zoning not a taking). As long as some use remains, land use regulations do not effectuate a taking. Agins v. Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980)(no taking where five homes could be built on five acres overlooking San Francisco Bay).

1374 (Fla.), cert. denied 454 U.S. 1083, 70 L.Ed.2d 618, 102 S.Ct. 640 (1981); Lucas v. South Carolina Coastal Council, 505 U.S. ___, 120 L.Ed.2d 798, 112 S.Ct. ___ (1992).

**A.**

**THERE CANNOT BE A PER SE TAKING IN THE ABSENCE OF PHYSICAL INTRUSION OR DENIAL OF ALL ECONOMIC USE.**

The Court has previously held that no per se taking occurs in cases of the type now before the Court. In City of Miami v. Romer, 73 So.2d 285 (Fla. 1954)("Romer II"),[5] the Court held that if a building setback ordinance was not a valid exercise of the police power, but had been adopted solely to reduce the cost to the government of acquiring a road right-of-way, there would then remain the question:

> "whether, as applied to this particular property, there has been such a deprivation of the owner's beneficial use as to amount to a 'taking' of the strip for which compensation must be made."

73 So.2d at 287. In ruling that a specific factual inquiry into the actual adverse impact on the landowner was necessary to

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5. Prior to Romer II, the Court had rejected a facial challenge to the ordinance in question, holding that a building setback requirement furthering the public interest in having light, air and open spaces was a valid exercise of the police power even if municipal officials also had in mind a future road widening. City of Miami v. Romer, 58 So.2d 849 (Fla. 1952)("Romer I").

determine if there had been a taking within the meaning of the Constitution, the Court also stated:

> "And in this connection it should be noted that 'the mere plotting of a street upon a city plan without anything more does not constitute a taking of land in a constitutional sense.....And, this is so, even though the ordinance prevents the development of the property in a manner not conforming to the plan. In such case, payment of compensation must await the actual 'taking' of the property by the City, or such actual deprivation of a beneficial use as to amount to a compensable 'taking'. Compare In Re Chestnut Street, 118 Pa. 593, 12 A. 585 [(1888)]; In Re Sansom Street, in City of Philadelphia, 293 Pa. 483, 143 A. 134 [(1928)].[6] (Emphasis supplied.)

73 So.2d at 286-287. Thus, the essence of the question before the Court was answered in the negative nearly 40 years ago.

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6. The Pennsylvania decisions approvingly cited by the Court in Romer II concerned ordinances establishing widened right-of-ways for existing streets in the center of Philadelphia. No building within the widened area could be replaced or substantially renovated without conforming to the new road width. It was contemplated that over the course of a century, widened streets would come into existence, with compensation being paid and land acquired as building reconstruction occurred. In Chestnut Street, it was held that so long as compensation was paid when a new building had to recede to the new right-of-way line, there was no taking of property. "[T]he platting of the street upon the city plan so as to conform to the new line interferes with no one in the use and enjoyment of his property until he comes to rebuild." 12 A. at 589. In Samson Street, the landowner was left with only a 30-inch-wide strip of land outside the new street right-of-way, and ad valorem taxes on the property were greater than the rent that could be generated from the existing structure. It was held that in these "exceptional circumstances" there had been a taking "in the constitutional sense." 143 A. at 136.

The factual inquiry required in Romer II has been the hallmark of the Court's approach to takings claims. The Court has held that the determination of what constitutes a taking is a matter for judicial determination depending on the facts and circumstances of each case. Department of Agriculture v. Mid-Florida Growers, 521 So.2d 101, 104 (Fla. 1988). Thus, the landowner must first establish damage to the property which is more than incidental. It must rise to the level where beneficial use is denied. See, Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 669-70 (Fla. 1979)("If the damage suffered by the owner is the equivalent 'of a taking' or an appropriation of his property for public use, then our constitution recognizes the owner's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque injuria and compensation therefor by the public agency cannot be compelled."). Damage is not presumed. It must be proved by evidence. Absent demonstrated actual damage, no taking occurred.

Thus, the decision in Romer II is consistent with the Court's opinion in Joint Ventures, and other recent decisions of the Court. It is also consistent with recent United States Supreme Court decisions.

The ruling of the United States Supreme Court in Lucas v. South Carolina Coastal Council, supra, clarifies takings law under the United States Constitution where government has not directly appropriated the property and physically ousted the owner. The Supreme Court explained that a presumptive regulatory taking occurs in two types of situations:

> "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least in regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.[7]
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> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."[8]

Lucas, 505 U.S. at ___, 120 L.Ed.2d at 812-813.

In the case before the Court, no physical intrusion occurred and no inquiry has been made, nor any evidence submitted, as to whether all economic, beneficial or productive

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7. But see, Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), indicating that even mandating public access to private property will not constitute a taking if rationally related to ameliorating the effects of development activity.

8. The Supreme Court then proceeded to hold that the regulatory denial of all economically beneficial use of property is a taking unless such a severe impact on the property inheres "in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership."

use was denied. There is no presumptive taking under the Lucas standards.

In Lucas, the Supreme Court emphasized the importance of showing a total loss of all economically beneficial use before a regulation could be considered to effectuate a presumptive taking. The Supreme Court explained that the "usual assumption" that a regulation simply adjusts economic burdens "in a manner that secures an 'average reciprocity of advantage' to everyone concerned" was not realistic when "no productive or economically beneficial use of land is permitted." Id. at ___, 120 L.Ed.2d at 814 (emphasis in original). Further, the Court emphasized that it was limiting its ruling to the rare occasions wherein all economic use was denied. The Supreme Court recognized that government could not operate if a compensable taking was deemed to occur whenever land values were affected by government action.

Responding to Justice Stevens' dissenting criticism asserting it is arbitrary to allow compensation when a 100% loss of use occurs, but not when a 95% loss is suffered, the Supreme Court stated in a crucial footnote:

> "Justice Stevens criticizes the 'deprivation of all economically beneficial use' rule as 'wholly arbitrary'.... This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our

> categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and...the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations."

Id. at ___, n. 8, 120 L.Ed.2d at 815.[9] Thus, when there is neither physical intrusion nor total loss of economic use, the Supreme Court requires the full factual inquiry specified in its Penn Central decision, wherein importance was placed on the nature of the regulation, the nature of property

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9. In his concurring opinion in Lucas, Justice Kennedy observed:

> "Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements will be part of that analysis." Id. at ___, 120 L.Ed.2d at 824.

rights claimed to be implicated, and, most particularly, the adverse impact on the landowner.[10]

The Lucas reaffirmation of the Penn Central criteria highlights the necessity of focusing on the extent of interference "with distinct investment-backed expectations." The similar observation in Joint Ventures that "the appropriate inquiry is directed to the extent of interference or deprivation of economic use" is in accord with the Lucas ruling. In each instance, the essential inquiry relates to the loss or damage experienced by the landowner, not the benefits received by government.

When a regulation does not deprive a landowner of all economic use of property (and, therefore, no per se taking has occurred under Lucas), the required factual analysis for a takings claim focuses on the actual impact of the regulation on a landowner, not on the perceived benefit to government. A landowner who experiences no substantial interference with investment-backed expectations has not suffered a taking. The

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10. A three-part analytical structure for considering all circumstances was set forth in Kaiser Aetna v. United States, 444 U.S. 164, 175, 62 L.Ed.2d 332, 100 S.Ct. 383 (1974), suggesting that the focus be on the nature of the government action, the character of the impact on the landowner and the extent of interference with distinct investment-backed expectations. Accord, Connolly v. Benefit Guaranty Corp., 475 U.S. 211, 89 L.Ed.2d 166, 106 S.Ct. 1018 (1986). The approach taken in Penn Central was generally the same, but also focused on the nature of the property rights involved.

owner of an orange grove who raised and marketed oranges before and during the period when a map of reservation was recorded, and who had no desire to place the land to other uses, has had nothing taken by an invalidated map. There was no interference with investment-backed expectations. On the other hand, a hypothetical developer of a successful residential subdivision who suffers a total shut-down of operations, when prevented by a map of reservation from pulling a building permit, would have experienced a substantial loss and therefore deserve compensation. Such a developer would have no difficulty proving substantial interference with investment-backed expectations, and could demonstrate a taking under the United States and Florida Constitutions. In contrast, a developer maintaining land in an agricultural mode, enjoying the ad valorem tax benefits of an agricultural assessment while awaiting improvement in a recessionary market, could not show interference with investment-backed expectations so substantial as to rise to the level of a compensable taking.

Focusing upon the investment-backed expectations of the landowner is consistent with the principle "that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors Corp., 323 U.S. 373, 378, 89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390 (1945). The focus should not be on the

rights obtained by government through a map of reservation, but on whether the landowner has suffered a deprivation of substance. This has been the hallmark of decisions concerning takings in novel situations. E.g., United States v. Causby, 328 U.S. 256, 90 L.Ed. 1206, 66 S.Ct. 1062 (1946) ("Flights [of aircraft] over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.") See also, Sarasota-Manatee Airport Authority v. Icard, 567 So.2d 937 (Fla. 2d DCA 1990).

The District Court of Appeal erred. The certified question should be answered in the negative. The decision below should be quashed and the case remanded with directions that the Partial Summary Judgment entered by the Circuit Court be reversed. On further remand to the Circuit Court, there should be a factual determination of whether the map of reservation effectuated a temporary taking. There can be no ruling that there was a per se taking unless it is determined there was a denial of all economically viable or productive use of the subject property in light of the distinct investment-backed expectations of the landowner. In the absence of such total denial of use, there must be a full inquiry using the Penn Central criteria.

**B.**

**AN INVALID REGULATION AFFECTING LAND DOES NOT TAKE PROPERTY PER SE.**

When before the District Court of Appeal, the landowners argued that a full factual inquiry was unnecessary. They argued that whenever a regulation fails to advance a legitimate state interest, a per se taking occurs without regard to whether the regulation denied economically viable use of the property or imposed a physical intrusion. That is, the landowners argued there is a third category of presumptive takings in addition to the two categories enunciated in Lucas. This fallacious argument is contrary to the Court's ruling in Romer II and federal precedent.

Invalid regulations which do not substantially deprive a landowner of economically viable use of property have not been deemed compensable takings. Virtually every governmental action, and all regulation of land development and all growth management planning, affect land uses and value in some manner.[11] If all

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11. It has long been recognized in Florida that pre-condemnation activities of government, such as corridor studies, road alignment decision-making and other administrative planning do not result in a taking of property, even when there is an adverse impact on value. It has been so held because any other rule would inhibit the planning necessary for decision-making. Auerbach v. Department of Transportation, 545 So.2d 514 (Fla. 3d DCA 1989); Department of Transportation v. Donahoo, 412 So.2d 400 (Fla. 1st DCA 1982); R-C-B-S Corp. v. Tanzler, 237 So.2d 279 (Fla. 1st DCA 1970). The United States Supreme Court ruled likewise in Agins v. Tiburon, 447 U.S. 255, 263, n. 9, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980),

(footnote continued on next page)

government actions ultimately found invalid constitute a compensable taking, government could never innovate when seeking to solve the complex and changing problems confronting society. If the Takings Clause is construed to require compensation whenever a debatable regulation is stricken, then the functional sphere of government activity will be relegated to that of a by-gone era. The Takings Clause is concerned with assuring that the individual does not bear economic burdens which should be borne by the public as a whole. It is concerned with compensating the individual for real impacts, not with compensation for theoretical appropriation. Maintaining the existing requirement that the landowner demonstrate a deprivation of economic or productive use provides the necessary balance between individual rights and necessary governmental functions.

The Court ruled in Romer II that a due process violation would not be deemed to result in a taking of property unless coupled with a substantial deprivation of use. The Court thus recognized the need for focusing on the loss, if any, of the landowners, not on the perceived gain of the public. Romer II set a standard which protects individual rights while allowing government to function.

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where it described such value fluctuations as "'incidents of ownership'" which could not be considered a "taking" in the constitutional sense.

The United States Supreme Court highlighted these concerns in First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), which held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 96 L.Ed.2d at 268 (emphasis supplied). Notably, First English concerned a presumptively invalid regulation. The Supreme Court nonetheless limited its decision, only holding that compensation is required on those occasions where all economic use is temporarily and wrongfully denied. The Supreme Court was careful to state:

> "We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." Ibid.

Since First English, there have been numerous decisions reemphasizing that a compensable temporary taking does not arise when alternative economic uses remained.[12]

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12. E.g., Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989)(No compensable taking arose from wrongful denial of permit for over three years when substantial beneficial uses

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The Respondent landowners' argument that every invalid regulation effectuates a taking is based upon a misapplication of dictum contained in Agins v. Tiburon, 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), where it was stated:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see Nectow v. Cambridge, 277 U.S. 183, 188, 72 L.Ed. 842, 48 S.Ct. 447 (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 43 U.S. 104, 138, n. 36, 57 L.Ed.2d 631, 98 S.Ct. 26(1978).

This language is best understood by reference to the precedent it cites and the manner in which it has been applied in subsequent Supreme Court decisions. It is rather obvious, however, that no "per se" rules were intended to be set down in Agins, because immediately following the above-quoted language the Supreme Court stated that "no precise rule" exists.

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for property as a whole remained); Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988)(Denial of building permit not a taking when land could be put to other uses); SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988)(Ordinance which does not deny all reasonable uses does not effectuate a taking); Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F.2d 872 (9th Cir. 1988)(Taking claim failed because not shown there was no beneficial use available); Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 721 F.Supp. 1212, (N.D. Ala. 1989)(No taking results from re-zoning denial when property retained substantial value and could be used for other purposes); DeBotton v. Marple Township, 689 F.Supp. 477 (E.D. Pa. 1988)(No taking when all use not denied).

> "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken [citation omitted], the question necessarily requires a weighing of private and public interests."

In Nectow v. Cambridge, cited in Agins, the Supreme Court held a zoning ordinance invalid based upon both a factual finding that "no practical use can be made of the land in question" consistent with the zoning, and a factual finding by a special master that the zoning ordinance did not promote the health, safety, convenience or general welfare of the residents in the area. That is, no legitimate state interest was advanced and all economic use was denied. Nectow did not involve a claim for compensation, but did involve a total denial of economic use not justified by prevention of public harm.

The application of the Agins language by the Supreme Court is best demonstrated by Nollan v. California Coastal Commission, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), where the Supreme Court restated the Agins language as setting forth the standards to be utilized in analyzing a takings claim. The California Coastal Commission had utilized a land use regulation to force the landowner to accept public intrusion on the landowner's private beach property. The Supreme Court considered whether the regulation substantially advanced a legitimate state

interest so as to justify such a physical intrusion. Finding the presumptively valid governmental purposes were not substantially advanced by the physical intrusion of the public upon the Nollans' property, the Supreme Court declared the regulation invalid. As in Nectow, the Nollan court addressed the question of whether a legitimate state interest was being substantially advanced for the purpose of determining whether the government exaction could be excused on the basis of a valid exercise of the police power. This analysis was done despite the fact that the government action was so egregious as to come within the two discrete categories of presumptive takings established in Lucas (physical intrusion and denial of all economically viable use).[13]

Further, the notion that mere invalidation of a regulation constitutes a taking was implicitly rejected in Pennell v. San Jose, 485 U.S. 1, 99 L.Ed.2d 1, 108 S.Ct. 849 (1988). At issue was a rent control ordinance which mandated consideration of hardship impacts of rent increases on tenants. With Chief Justice Rehnquist writing for the Court, it was held that a facial due process challenge to the ordinance could be adjudicated, but that a Takings Clause challenge was premature. Such a challenge was considered premature because "the

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13. Accord, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 886 L.Ed.2d 419, 426, 106 S.Ct. 455 (1985)("Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.")

'essentially ad hoc, factual inquiry' involved in the takings analysis" required examination of actual effects on the landowner. By so ruling, the Court implicitly rejected the dissenting view of Justice Scalia that the regulation was invalid under the Takings Clause. Justice Scalia would have so ruled, without a factual inquiry into the extent of actual interference with economic use, based on his view that assisting "impecunious renters" was not a state interest which could be legitimately advanced by regulating the use of property. He considered the so-called "first prong" of Agins to allow a Takings Clause challenge without a full factual inquiry. The majority view expressed by Chief Justice Rehnquist rejected that position.[14]

A compensable taking does not occur merely because a regulation fails to substantially advance legitimate state interests in a proper manner. There still must be a determination that something was taken. The focus has to be on whether there was a substantial denial of economic or productive use of the affected property. See, Ellison v. County of Ventura, 265 Cal. Rptr. 795, 797-8 (Cal. 2d DCA 1990)("In order to show the government has taken private property by a regulation which

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14. In Yee v. Escondido, 503 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 153 (1992), the Supreme Court again declined to review a facial Takings Clause challenge based upon an assertion that legitimate state interests were not substantially advanced. Judgments determining there was no taking were affirmed. Justice Scalia did not dissent. In Yee compensation was sought. In Pennell only declaratory relief was sought.

does not substantially advance legitimate state interests, the landowner must show more than the invalidity of the government's action. The landowner must also show that something of value was taken.")

The two categories of presumptive takings identified in Lucas are fundamentally different from the one advocated by Respondents' misreliance upon Agins. The Lucas categories presuppose evidence of real impact upon the property--either physical intrusion or deprivation of all economic use. The loss suffered by a landowner in these situations is both real and substantial under all circumstances. However, the impact of an invalid map of reservation may be no more than theoretical, an ex post facto realization that one had not been able to use property in a way never actually intended.

Agins highlights the close (and often confusing) relationship between (i) the Due Process Clause requirement that no person be deprived of property without due process of law, and (ii) the compensation requirement of the Takings Clause. See, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985). While each constitutional guarantee is independent, each seeks to protect private interests without unduly inhibiting

government action.[15] A Takings Clause challenge to a regulation focuses on the nature of governmental interests involved, the nature of the property interests of the landowner and the extent of interference with reasonable investment-backed expectations. Penn Central, supra. Such a claim, if successful in showing a taking, results in an award of compensation according to the duration of the taking. Separately, a challenge asserting a deprivation of property without due process of law can be made on the basis of government's violation of substantive due process, with any compensation being limited to actual damages, if any. Eide v. Sarasota County, 908 F.2d 716, 720-721 (11th Cir. 1990). See also, Reahard v. Lee County, 968 F.2d 1131, 1134-1135 (11th Cir. 1992), a post-Lucas decision.

However, even under a due process analysis, there must be an examination of the particular impact experienced by the landowner before it can be concluded that a regulation goes so far as to

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15. As the United States Eleventh Circuit Court of Appeals has observed, there has been much legal debate over whether regulatory taking claims are properly addressed by only the Takings Clause, or only by the Due Process Clause. Eide v. Sarasota County, 908 F.2d 716, 721 n. 8 (11th Cir. 1990). Currently, as set forth in Eide, both clauses of the Constitution are given separate force in differing ways. Articles addressing this question include Note, Testing the Constitutional Validity of Land Use Regulations; Substantive Due Process as a Superior Alternative to Takings Analysis, 57 Wash.L.Rev. 715 (1982); Note, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation, 54 Wash.L.Rev. 315 (1979). Other articles on the subject are referenced in Williamson County, 473 U.S. at 197, n. 15.

amount to an appropriation of property. Williamson County, 473 U.S. at 199-200. In this regard, it is notable that Justice Brennan, the original proponent of compensation for temporary takings,[16] separately concurred in Williamson County, stating his view that there should be compensation for a temporary taking whether the analysis utilized was under the Takings Clause or the Due Process Clause, if the regulation denied all economically viable use.

In summary, there must be an inquiry beyond the mere recording of an invalid reservation map before there can be a determination of whether there was a taking of property. The due process violation was remedied by invalidation of the map. To seek compensation, each individual landowner must demonstrate a taking occurred by showing that the invalid map substantially denied economically viable use of his or her specific property.

**C.**

**INVALIDATED MAPS OF RESERVATION DO NOT NECESSARILY DENY SUBSTANTIAL ECONOMIC USE OF PROPERTY.**

As the Court stated in Joint Ventures, "Compensation must be paid only when [government] interference deprives the owner of substantial economic use of his or her property." 563 So.2d at

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16. See, San Diego Gas & Electric Company v. San Diego, 450 U.S. 621, 636, 67 L.Ed.2d 551, 101 S.Ct. 1287 (1981)(Brennan, J. dissenting).

625. The criteria of Penn Central provides the framework for decision in cases wherein a total loss of all economic value is not present. Lucas, 505 U.S. ___, 120 L.Ed.2d at 815, n. 8. The factors to be examined include the nature of the regulation, the nature of the property interest affected, and the extent of interference with reasonable, investment-backed expectations. Review of these factors demonstrates that maps of reservation do not necessarily or conclusively deny substantial economic or productive use of property, and in most instances probably did not interfere with economic or productive use to any significant extent.

**1. The Nature of a Map of Reservation.**

There is nothing in the nature of a map of reservation which inherently denies substantial economic use of affected lands. During the period when the maps existed, landowners had no limitation imposed on the use to which the property was already devoted. Indeed, existing agricultural and residential uses were wholly unaffected. A shopping center could fully continue to operate as a shopping center, and could even engage in substantial renovations.[17] The owner of an office building could continue to lease to both existing and new tenants. A

17. § 337.241(2), Florida Statutes (1987), provided in part that renovations of an existing commercial structure could proceed up to "20 percent of the appraised value of the structure."

farmer could continue his or her agricultural endeavors. Indeed, in most imaginable situations, the landowner would experience no immediate impact from a map of reservation.

Certainly, there could be instances where the impact of a map of reservation was so substantial as to deny beneficial economic or productive use of property. Those cases would be ones wherein the refusal of development permits frustrated investment-backed expectations. However, not every undeveloped parcel of land suffered a substantial adverse impact.

A landowner whose property was located in a rural area, clearly out of the path of development, would have suffered no loss. Such a landowner may not have been able to develop the affected property during the period of the reservation, but if there was no market for development during that time, nothing was taken. No opportunity was lost. As Justice Kennedy observed in Lucas, even in a situation where there has been a temporary total denial of use, there remains the question of whether the landowner "had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him." Lucas 505 U.S. at ___, 120 L.Ed.2d at 824 (Kennedy, J. concurring). Causation is always an issue.

Maps of reservation did not deny existing use. The maps did limit new development. Only in those instances where new or additional development of the property was in fact frustrated

could the recording of a reservation map have effectuated a taking in the constitutional sense.

### 2. The Nature of the Property Affected.

In determining the impact of a map of reservation, attention should not be focused solely on the particular uses denied to a landowner. Courts look at the effect on the property as a whole.

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the 'landmark site'."

Penn Central, 438 U.S. 130-131. The quantity of land parcels affected by reservation maps is too numerous and the circumstances of each too variable to be the subject of a per se rule applicable in all cases.

For example, properties containing environmentally sensitive lands may not have been developable, or may only have been developable to such a limited degree that no reduced intensity of development on the property as a whole necessarily flowed from recording a reservation map. Certainly, in some instances the portion of a parcel affected by a map of reservation would not have been developable regardless of the map. (It is common for

new roadways to intrude upon undevelopable environmentally sensitive land when arrangements are made for off-site mitigation of the adverse environmental impact.)

Even in the absence of environmental concerns, a map of reservation may have prevented development of a limited portion of a land parcel, but only minimally affected the entire parcel. Development may have been feasible as to the unaffected portion of a parcel, assuming there was a market for development of the property during the relevant time. Indeed, the lack of any development activity on any portion of the property during the map period might evidence a lack of intent or capacity to develop any portion of the property during the relevant time, regardless of any reservation map.

The variables involved with respect to any particular property make it impossible to presume that a map of reservation substantially interfered with economic or productive use in every instance.

### 3. The Extent of Interference.

No area of takings jurisprudence is less well defined than how to measure whether a particular interference with economic use of property is so substantial as to amount to a taking. There are no bright lines. When dealing with undeveloped land, the variations between cases can be extraordinary.

For example, local development regulations throughout Florida commonly provide for the clustering of new construction. A 50-acre parcel might be zoned to allow a total of 250 dwelling units. Those dwelling units could be spread over the entire acreage, or might be centered on a natural amenity, such as a lake, leaving substantial acreage in a natural state. A map of reservation may have applied to destroy the possibility of lakefront development, very substantially interfering with beneficial use of the property. Alternatively, the reservation may have only affected acreage which could be left in the natural state with no loss of development potential or value. The amount of acreage affected may have been significant, but there might be little interference with economic use. See, Graham v. Estuary Properties, supra.

Indeed, the variations are so great that some landowners were benefitted. Although the land within the boundaries of a map might have its development potential limited for a temporary period, the parcel as a whole may have become developable at a much greater intensity because of the map. For example, it is not uncommon for local zoning authorities to allow rezoning to permit intense apartment development on lands adjoining major roadways. Property which would have been suitable only for relatively low density, single-family residential development may have become suitable for very intense development. In some

instances, road reservations have served to assist landowners in obtaining approvals for developing their entire property in a manner not otherwise permissible.

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In summary, a per se approach is not rational. Review of the Penn Central factors may reveal that a reservation map effectuated a taking in some cases. The property owner who was (in fact) temporarily deprived of substantial economic or productive use of his or her land should receive just compensation for that deprivation. However, not all landowners suffered a compensable taking.

If there has been a taking in a constitutional sense, injury or loss will have necessarily occurred. Conversely, injury becomes a litmus or telltale for a taking event. Because loss must accompany a taking, the absence of loss conclusively eliminates a taking conclusion.

The constitutional imperative for compensation is triggered by the actual loss experienced by the landowner and is intended to make the landowner whole. Compensation should not be awarded on the basis of conjectural or speculative possibilities. To hold that every map of reservation resulted in a per se taking of all property within its boundaries will result in windfall awards to landowners who experienced no true loss. Rejection of the per

se taking argument would nonetheless assure that those who bore an actual loss will be fully compensated.

The full inquiry required to determine whether there has been a taking in a particular case can be complex. In those instances where actual development of property ceased or was substantially curtailed because of a reservation map, the landowner will have no difficulty showing a substantial interference with beneficial use of the property. That landowner will receive a full award of compensation, including reimbursement of all costs and attorneys' fees. In cases which are not clear-cut, the expenses involved could be considerable, and government will bear those expenses if a taking, in fact, occurred. In many, if not the vast majority of instances, however, no interference with economic or productive use occurred. The public should not have to bear the expense of inquiries into all conjectural possibilities an avaricious landowner might seek to investigate.

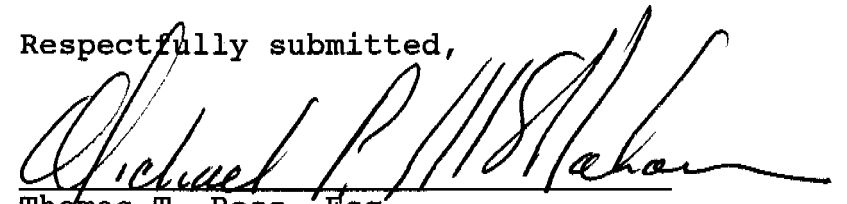
A declaration that all maps of reservation were per se takings of all lands within their boundaries would provide every such landowner with the leverage to legally blackmail governments into undeserved settlements. Such a declaration would mean that the public in every instance will bear the costs involved in analyzing the development potential of all such property, the impact of a reservation map on such development potential, and

the appraisal of all the variables involved in the land development process. The land planning costs, economic feasibility analysis costs, engineering costs, appraisal costs, surveying costs, and all of the other expenses typically involved in such a case would be borne by the public, even if the landowner was not actually harmed. Tremendous resources would be invested in development analyses, which would be useful to the landowner without regard to whether there was a compensable taking. In the process, developers would have their planning subsidized by the public. On the surface it might seem that justice was being served, but in fact it would be a feeding frenzy at the public trough. The District Court of Appeal should be reversed.

## CONCLUSION

For the reasons stated above, the Court should answer the certified question of the Second District Court of Appeal in the negative, and should quash the opinion of the District Court. This case should be remanded with directions that the Partial Summary Judgment entered by the Circuit Court be reversed, and the case remanded to the Circuit Court for a full factual inquiry into whether there was a compensable taking of property in the circumstances of each individual case.

Respectfully submitted,



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