IN THE SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,

Petitioner,

v.

Case No. 80,656

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

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS A.G.W.S. CORPORATION & DUNDEE DEVELOPMENT GROUP

(CERTIFIED QUESTION FROM SECOND DISTRICT COURT OF APPEAL)

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PRELIMINARY STATEMENT

For the purpose of this Answer Brief, the Respondents, A.G.W.S. Corporation and Dundee Development Group, will utilize the following symbols: "PA" shall refer to the Appendix accompanying the Initial Brief of the Petitioner, Tampa-Hillsborough County Expressway Authority. "RA" shall refer to the Appendix accompanying the Answer Brief of the Respondents. "TR/A.G.W.S." shall refer to the transcript of the hearing on the Motion for Summary Judgment in *A.G.W.S. Corporation v. Tampa-Hillsborough County Expressway Authority*. "TR/DUNDEE" shall refer to the transcript of the hearing on the Motion for Summary Judgment in *Dundee Development Group v. Tampa-Hillsborough County Expressway Authority*.

STATEMENT OF THE CASE & FACTS

While the government's Initial Brief generally relates the procedural history and the facts of the two causes pending before the Court, it is incomplete and cannot be accepted as totally accurate. As such, the respondents/owners are required to supplement and correct the government's presentation.

A.G.W.S. CORPORATION

The Amended Complaint (PA: 36-43) filed in this cause alleges that a 38.80-acre tract of land owned by A.G.W.S. Corp. was burdened with a map of reservation filed by the Expressway Authority, pursuant to Sec. 337.241, *Fla. Stat.* (1988), in July 1988. Attached to the Amended Complaint, as exhibits, were certified copies of the deed, property description, and a copy of the map of reservation. (Exhibits A & C) (PA: 44-45; 58-60). Exhibit C reflects, as alleged in the Amended Complaint, that the map of reservation

covered a significant portion of the owner's property. A diagram developed from Exhibit C, which outlines the property and highlights the map of reservation burdening the property, is included in the Appendix to this Answer Brief (RA: 1). It is provided only as a visual aid in order that the Court might clearly understand the factual setting of this cause.

The Amended Complaint further alleged that Sec. 337.241, *Fla. Stat.* (Supp. 1988) prohibited any construction, or the issuance of any development permits for a five year period, which could be extended for an additional five years; that the statute denied the owner the right to construct upon or develop the property covered by the map of reservation; and that the statute did not require the Expressway Authority to acquire the property during the ten year period, or go forward with the project for which the property had been reserved. (Amended Complaint, paragraphs 8, 9, 10).

The Amended Complaint also alleged that the map of reservation left the property, within the reserved area, with no utility or economically beneficial use; denied the owner the right to make use of the reserved property; destroyed the developability of the property under **the existing and approved development plan**; prohibited the completion of the development of the property as planned; denied the owner's the investment-backed expectations it had with regard to the property; denied the substantial beneficial use of the owner's property; and extinguished a fundamental right of ownership, that is the owner's right to use the property. (Amended Complaint, paragraphs 11, 12, 13).

In paragraph 14 it was alleged that the filing of the map of reservation constituted an exercise of the power of eminent domain rather than a legitimate exercise of the police power, conferring a public benefit rather than preventing a public harm.

In paragraph 15, the Amended Complaint referred to the decision rendered by the Florida Supreme Court in *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990). In describing the character of the decision, it was alleged that the court ruled Sec. 337.241(2) and (3), *Fla. Stat.* (1987) unconstitutionally permitted the state to take private property in violation of the United States and Florida Constitutions.

In Count I, citing to the Supreme Court ruling in *Joint Ventures, Inc.*, the owner alleged that the filing of the map of reservation, pursuant to the unconstitutional statutory provision, resulted in a temporary taking of their property without payment of full compensation.

While this cause was pending before the Second District Court of Appeal, A.G.W.S Corporation submitted an Emergency Motion to Expedite Appeal, dated March 11, 1992. (RA: 13-18). It was the hope of the owner that the appeal could be resolved quickly so that the cause could proceed to jury trial on April 6, 1992, as agreed by the parties and scheduled by the trial court. The motion stated that at the hearing on the motion for summary judgment it was represented that the owners had an approved subdivision on the property, known as Chantilly Springs. As a result of the filing of the map of reservation, they were unable to proceed with their development and the owners were near bankruptcy due to the continuing debt service on the property. (TR/A.G.W.S.: 5, 17) (RA: 3-6). The government agreed that this owner had been classified as a "hardship case," and that an appraisal of its property was being prepared in order to expedite some kind of "assistance" or "relief" for the owner. (TR/A.G.W.S.: 11) (RA: 5). Exactly what relief the owners might expect upon completion of the appraisal was not specified. The motion, which suggested

alternate ways by which the cause could proceed to trial as scheduled, was opposed by the government. (RA: 19-23). Upon consideration of the motion, the government's response and the owner's reply (RA: 24-40), the motion was denied. (RA: 41).

Upon rendering its opinion in September, 1992, the Second District Court of Appeal also entered orders regarding the owner's motions to tax appellate fees and costs. The District Court reserved ruling on the motion "pending determination of damages." (RA: 42). A motion for rehearing as to both A.G.W.S. and Dundee was filed, which, in part, notified the District Court that the parties had reached a settlement of damages payable for both the temporary taking and the subsequent formal condemnation of the A.G.W.S. property. (RA: 43-45). Attached to the motion was a Stipulated Final Judgment, dated September 28, 1992, in which the government agreed to pay A.G.W.S. Corporation $450,000.00 for "all inverse condemnation claims," including the claim based upon the two year period that the map of reservation remained in place. Since damages had been determined as to A.G.W.S., with regard to its inverse condemnation claim, it was contended that, pursuant to the District Court's order, fees and costs for the appeal should be paid. The District Court agreed, withdrew its previous orders and remanded the determination of fees and costs to the trial court. (RA: 55).

DUNDEE DEVELOPMENT GROUP

The Complaint filed in this cause alleged that a vacant tract of land owned by Dundee, was burdened with a map of reservation filed by the Expressway Authority, pursuant to Sec. 337.241, *Fla. Stat.* (1988), in July 1988. (PA: 1-8). Attached to the Complaint, as exhibits, were certified copies of a survey of the property, and a copy of the

map of reservation. (Exhibits B & C). Exhibit C reflects, as alleged in the Complaint, that the map of reservation covers a significant portion of the owner's property and bisects the property into two segments. (PA: 15-17). A diagram developed from Exhibit C, which outlines the property and highlights the map of reservation burdening the property, is included in the Appendix to this Answer Brief (RA: 2). It is provided only as a visual aid in order that the Court might clearly understand the factual setting of this cause.

Contrary to the government's representation, the map of reservation did not merely clip "a small corner" of the Dundee property. (Petitioner's Initial Brief, p.6). The map of reservation, as shown in Exhibit C attached to the Complaint (PA: 15-17), cuts through the property near its center in a southwest to northeast direction. With the map in place, more than half of the property is effectively "landlocked" to the north of the map of reservation. Prior to the imposition of the map of reservation, the entire property had over 3,500 feet of frontage on Van Dyke Road. (Complaint, paragraph 2). The property is located in a rapidly growing area and was surrounded by residential development to the south, west and northeast, including the Cheval development, which was described as an "upscale subdivision." (Complaint, paragraph 2). The remainder of the allegations were similar to those set forth in the A.G.W.S. Amended Complaint.

During the hearing on Dundee's Motion for Summary Judgment, counsel for the Expressway Authority, in the presentation of his argument, agreed that in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), the statutory provision authorizing the filing of a map of reservation was "declared unconstitutional because it was, in effect, a taking." (TR/DUNDEE: 24; 48-49) (RA: 8; 9-10). Counsel agreed, in response

to an inquiry by the trial judge, that the "taking" was not an issue in the matter. (TR/Dundee:49) Rather, it was the contention of Expressway Authority that the Complaint did not sufficiently allege the "nature and extent of rights taken." (TR/DUNDEE: 34-55) (RA: 8; 11-12).

SUMMARY OF ARGUMENT

This is not a "regulatory takings" case. The imposition of a map of reservation which freezes property in its current state for ten (10) years is an act of "eminent domain." Government acquisition of private property interests for the purpose of furthering a public project or enterprise is an exercise of the power of eminent domain requiring full compensation therefor. Art. X, Sec. 6(a), Fla. Const.; Fifth Amendment, U.S. Const.

Regulatory takings cases assume a valid exercise of the police power. When such a regulation affects private property, the usual inquiry is the economic effect of the regulation. Does it "go too far"? An extensive body of case law has been developed by this Court and the United States Supreme Court which analyzes the economic effect of valid regulations on an *ad hoc* basis to determine if a regulatory "taking" has occurred. These cases are constitutionally and analytically distinct from "freezing" cases. Traditionally, our common law decisions unmask regulatory freezing schemes, exposing them as guileful attempts to acquire private property by legislation without paying for that property.

The *Joint Ventures* decision, *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990) (*Joint Ventures, Inc. "II"*), carefully analyzed the state's map of reservation statute, Sec. 337.241(2)(3), *Fla. Stat.* (1988), for what it actually was. This Court took pains to express the important distinction between acts of the police power (regulatory) and

actions in the nature of eminent domain (*de facto* condemnation). The map of reservation was clearly exposed as an acquisition by government for a public project. Such an acquisition of private property interests must entail the payment of full compensation to the owner singled out thereby.

The instant case involves the imposition of an identical map of reservation onto the private lands of the Respondents, A.G.W.S. Corporation and Dundee Development Group. By freezing development on both properties, the Petitioner, Tampa-Hillsborough County Expressway Authority, sought to use the map of reservation legislation as a device to hold down future acquisition costs of the proposed Northwest Hillsborough Expressway project. A separate *ad hoc* determination need not be made in every case where the legislation has been implemented since this Court has expressly held the identical legislative device to be an exercise of eminent domain, that, when actually implemented as here, will give rise to a claim for compensation.

Assuming arguendo, the implementation of this map of reservation was not an act of eminent domain as held in *Joint Ventures, Inc. "II"*, the imposition of this legislative freeze would still be a "taking" requiring compensation. The United States Supreme Court has held repeatedly that legislation is void on its face as an uncompensated taking, without an *ad hoc* economic inquiry, if the regulation either fails to substantially advance a legitimate state interest or, by its terms, denies the affected landowner all reasonable economic use of his or her property.

This Court found in *Joint Ventures, Inc. "II"*, that the act of reserving private property for public use, in the guise of a mere regulation, was not legislation in the furtherance of

a "legitimate state interest." An uncompensated seizure of a private property interest for a public enterprise by means of legislation or regulation is also recognized by the United States Supreme Court as not a "legitimate" state interest. Thus, by definition, a taking has occurred with the implementation of an admittedly "illegitimate" act upon the property of these landowners. Once a "taking" has been found by the court, compensation must be paid, at least for the duration of the invalid act.

Policy reasons advanced to withhold the right to compensation, such as the possibility of windfalls to affected citizens or the specter of payment of attorneys' fees to nominally successful litigants, are irrational and ineffective. Irrational, because the existing law in Florida protects the government from spurious, non-meritorious claims and penalizes landowners and their attorneys for litigating nominal claims. Ineffective, because the constitutional protections of the Fifth Amendment and Article X, Section 6(a) of Florida's organic law cannot be avoided or evaded by arguments that violations of such protections will cost the government money.

The policy reasons requiring compensation for temporary, illegal takings are strong, however. In addition to the unambiguous language of both State and Federal Constitutions mandating compensation for the public's seizure of private property, government must have some economic disincentive to avoid enacting such "guises" as the map of reservation statute herein. Otherwise, the government simply plays a game of enactment-litigation-invalidation-amendment and then further litigation. Our citizenry and our constitutions cannot be so abused.

I. NATURE OF THE CASE: EMINENT DOMAIN OR REGULATORY TAKING

A. *Joint Ventures* Analysis

The issue decided in *Joint Ventures, Inc. "II"*, 563 So. 2d at 622, was that the map of reservation statute, subsections 337.241(2) and (3), was unconstitutional in that it permitted "the state to take private property without just compensation," in violation of both "the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution."[1] *Id.* at 623.

In *Joint Ventures, Inc. "II"*, this Court clearly announced that a "thinly veiled attempt to 'acquire' land by avoiding the legislatively mandated procedural and substantive protections of Chapters 73 and 74" is plainly unconstitutional. The statutory freeze is unconstitutional, according to this court's decision because the development moratorium is really an exercise in eminent domain, not a police power exercise.

Unless this distinction between a valid exercise of the police power and an exercise of the sovereign's power of eminent domain is understood at the outset, legal analyses can be hopelessly confused and misdirected. The government and its amici travel lengthy roads in analyzing when a valid regulation "goes too far" and results in an *ad hoc* taking. They bitterly assail a "*per se*" rule "unfairly" and "unprecedentedly" engrafted onto the current body of regulatory takings law. The problem is, of course, that Petitioner's statement of the

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[1]Please note that the Florida constitutional violation which expressly dealt with Art. X, Sec. 6(a), was the "takings" clause which requires "full compensation" and not the "equal protection" or "due process" clauses found in other sections of our constitution. Please also note that this Court rephrased the question certified by the District Court, effectively eliminating the questions of due process and equal protection. *Joint Ventures, Inc. "II"*, 563 So. 2d at 623, n.1.

issue and its subsequent analysis have nothing at all to do with the constitutional issue at stake in *Joint Ventures, Inc. "II"*, nor in the instant case. This case, like *Joint Ventures, Inc. "II"*, is a *de facto* state action in eminent domain.

In *Joint Ventures, Inc. "II"*, Justice Barkett, for the majority, took pains to distinguish "regulation under the police power from acquisition under the power of eminent domain. *Joint Ventures, Inc. "II"*, beginning at 624-627.

> Our inquiry requires that we determine whether the statute is an appropriate regulation under the police power, as DOT asserts, or whether the statute is merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain. *Joint Ventures, Inc. "II"*, at 625 (emphasis supplied).
>
> Although regulation under the police power will always interfere to some degree with property use, compensation must be paid only when that interference deprives the owner of substantial economic use of his or her property. (Citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).)
>
> . . . .
>
> Thus when compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use. *Joint Ventures, Inc. "II"*, at 625 (emphasis supplied).
>
> The power of eminent domain, however, is set out quite differently:
>
> Under the power of eminent domain, the state has the inherent right to take private property for public use without the consent of the owner. (Citation omitted). In so doing, the state is obliged to make full compensation. *Id.* at 624 (emphasis supplied).

"Regulation is analyzed in terms of the police power, whereas acquisition is analyzed in terms of the state's power of eminent domain." *Id.* at 625. In its argument in the *Joint Ventures* cases, the government had argued that Sec. 337.241 was a "permissible regulatory exercise of the state's police power because it was necessary for various economic reasons."

Id. at 625. This Court expressly rejected that characterization of the nature of the map of reservation statute:

> Rather than supporting a "regulatory" characterization, these circumstances [reduced cost of acquisition] expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive provisions of chapters 73 and 74 [Florida's Eminent Domain Code]. *Joint Ventures, Inc. "II"*, at 625. (Emphasis supplied).

B. Acts of eminent domain versus acts of police power

This Court's analysis is supported by a long tradition in American jurisprudence.

> Under the police power, rights of property are impaired, not because they became useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be determined to public interests. It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former (eminent domain) recognizes the right to compensation, while the latter principle does not. Prof. Ernst Freund, *The Police Power*, Sec. 511 (1904).

"There is a very clear distinction between an appropriation of private property to a public use in the exercise of the power of eminent domain, and the regulation of the use of property . . . in the exercise of the police power." *State Plant Board v. Smith*, 110 So. 2d 401, 404 (Fla. 1959). Under the power of eminent domain, when the sovereign appropriates private property or some interest therein to a public use, such a "taking, as it is called, cannot be made even by the sovereign without just compensation." *Moody v. Jacksonville T. & K. W.R. Co.*, 20 Fla. 597, 606 (Fla. 1884); *Lamar v. Jacksonville Terminal Co.*, 27 Fla. 225, 237 (Fla. 1900).

The older description of the difference between police power and eminent domain as set out by Prof. Freund (prevention of harm vs. creation of public benefit) still has vitality

as noted by this Court in *Graham v. Estuary Properties*, 399 So. 2d 1374, 1381 (Fla. 1981); see also, *Department of Agric. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988). A refinement of that distinction, however, seems to have more widespread currency, i.e., "neutral arbiter (police power) vs. public enterprise (eminent domain)."

> Government interference (with the use of private property) is based on one of two concepts - either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others. [Citing Sax, *Taking and Police Power*, 74 Yale L.J. 36, 62, 63]. Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. *Lutheran Church v. City of New York*, 316 N.E.2d 305, 310 (N.Y. 1974) (emphasis supplied).

The essence of the distinction between police power and eminent domain is that in eminent domain there is a transfer of a private property interest to the state in furtherance of a public enterprise. See Sackman, "*The Impact of Zoning and Eminent Domain Upon Each Other*," Institute on Planning and Zoning and Eminent Domain, 107, 110-111 (1971); Joseph Sax, *Taking and Police Power*, 74 Yale L.J. 36, 62, 63 (1964); 1 *Nichols on Eminent Domain*, Sec. 1.42[2] (Rev. 3d Ed. 1989).

As noted by the Court in *Joint Ventures, Inc. "II"*, the instant case is not a situation where the government, in the proper exercise of its police power, has imposed some restriction on the use of property that was intended to advance the health, safety and welfare of the public in general. In such an instance, the validity of the provision is generally not at issue and the question is whether the regulation has denied the owner the economic beneficial use of the property to the extent that compensation should be required. In other words, whether a valid police power regulation has gone "too far," requiring the

payment of compensation. Instead, this cause deals with statutory provisions enacted under the "guise" of the police power, but which, in reality were de facto "condemnation" provisions enacted to specifically advance uniquely governmental functions. Without dispute, we are dealing with an enactment that was intended to burden property owners for the sole purpose of providing the government with a particular benefit or advantage in the performance of a function in its "enterprise" capacity.

The United States Supreme Court has similarly recognized this distinction. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the court specifically noted a category of governmental activities, burdening private property, that are usually held to constitute a "taking," that is those which may be characterized "as acquisitions of resources to **permit or facilitate uniquely public functions**." *Id.* at 128. In *Penn Central*, the court found that regulations which placed some restrictions on the use of historic landmarks did not fall within the category described above. It reached this conclusion after finding that the challenged provision "neither exploits appellants' parcel for **city purposes** nor facilitates nor arises from any **entrepreneurial** operations of the city." *Id.* at 135.

The court in *Penn Central* referred to the frequently cited[2] article, Joseph Sax, Takings and the Police Power, 74 Yale L. Journal 36 (1964), in support of its recognition that this type of governmental activity is generally found to constitute a "taking" for which compensation may be claimed. In that article as noted above, the author distinguishes

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[2]*Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2897; 2898; 2913; 2915 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 (1985); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 442 (1982); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 650 (1981).

between "the role of the government as participant and the government as mediator" between competing private economic interests. "The losses to individual property owners arising from governmental activity of the first type result in a **benefit** to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any government enterprise." *Id.* at 62.

In the detailed analysis presented in *Joint Ventures, Inc. "II"*, 563 So. 2d at 622, the majority opinion quoted with approval from the decision of *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266, 273-274 (Tex. Ct. App. 1975), wherein the court recognized the exact distinction discussed above. After rejecting the government's "regulatory" characterization of the map of reservation provisions, and exposing the provision as a "thinly veiled" scheme to "acquire" property under eminent domain, but without the payment of compensation, the majority opinion found the distinction drawn in *Garrett Brothers* to be analogous to the cause before it. *Garrett Brothers*, citing to the Sax article, distinguished between the government functioning under the police power, as an arbiter of disputes between competing interests, and the role it plays when it exercises power to prevent the development of property, which would increase the cost of some future planned acquisition of such property. The court noted that to permit the government to gain such an advantage was "clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among the members of the community.

Joint Ventures, Inc. "II", 563 So. 2d at 626.[3] As recognized by this Court in *Joint Ventures, Inc., "II"*, 563 So. 2d at 624, n.7, the above quoted principle is the very reason for the existence of the compensation clause. It is a provision that was **designed** to bar the government from forcing some individuals to bear burdens, which in all fairness, should be borne by the public as a whole. See, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Once the analysis takes the form adhered to by this Court in *Joint Ventures, Inc. "II"*, i.e., a "takings" analysis based upon principles of eminent domain, compensation inevitably follows. Or more accurately put, the right of the citizen/condemnee to pursue his or her claim for compensation is guaranteed.

> The right of "eminent domain" when exercised, admittedly "takes" the property or interest therein, from the owner for the benefit of some specific public improvement. Since eminent domain does "deprive" the owner, it becomes necessary that he be compensated . . . . The police power is to be clearly distinguished from the right of eminent domain; and the distinction lies in this: that in the exercise of eminent domain, private property is taken for public use and then the owner is invariably entitled to compensation therefor . . . . Metzenbaum, *The Law of Zoning*, Vol. I, p.74-75 (2d Ed. 1955). (Emphasis supplied).

That Florida and the United States courts recognize the principle that eminent domain requires compensation is set out more fully below. The point is raised here, however, to clarify the importance of the police power/eminent domain distinction made in *Joint Ventures, Inc. "II"*.

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[3]*City of Austin v. Teague*, 570 S.W.2d 389, 393-394 (Tex. 1978), reiterated the principle set forth in *Garrett Brothers*, disapproving decisions to the contrary. See also *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. App. 1989), finding that an unconstitutional taking occurred where the city, acting in its enterprise capacity, took unto itself "private resources for the public good." *Id.* at 1070; See also *Mentzel v. City of Oshkosh*, 146 Wis. 2d 804, 432 N.W.2d 609 (Wis. Ct. App. 1988).

> Once we characterize an excessive regulation as a taking, the mandate of Art. I, Sec. 16, requires just compensation. Likewise, the 5th and 14th Amendments require payment for the time that the public had use of the land while the regulation remained effective. Thus, choosing to invoke the takings analysis instead of the due process test will necessarily trigger the specter of financial liability. *Orion Corp. v. State*, 747 P.2d 1062, 1077 (Wash. 1987).

C. Why does the implementation of the map of reservation require the "eminent domain" analysis?

Once it is understood that there is a vital difference between a valid police power regulation and a *de facto* act of eminent domain mandating compensation, the question becomes: Why is the implementation of the map of reservation statute an act of eminent domain? The first answer is that it is because the Florida Supreme Court said so:

> Rather than supporting a "regulatory characterization, these circumstances [reduced cost of acquisition] expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive provisions of chapters 73 and 74 [Florida's Eminent Domain Code]. *Joint Ventures, Inc. "II"*, at 625.

The second answer is that in viewing a "freezing" statute as an appropriation of property by eminent domain, this Court was adhering to established precedent in analyzing similar legislative schemes.

> Because the exercise of the police power does not require compensation to be made to the owner of the property affected, that power has occasionally been attempted to be used as a cover for, and as a substitute in place of, the use of eminent domain, for the purpose of attempting to avoid the necessity of paying compensation to the owner.
>
> It is to be noted, however, that the courts have quickly resented such practices and have sternly frowned upon such methods: unmasking such as a "guise." Metzenbaum, *supra*, at p.77.

Or as Joseph Sax put it:

> Initially, it is obvious that whether the government takes title or possession of the subject property, is merely a matter of the form which it chooses to

> proceed. One of the oldest tricks of capitalizing on form is to try to depreciate the value or inhibit the development of property through zoning, so that it has a much reduced market value when the government gets around to buying it. Thus, the government gets most of the value of property without any formal "taking" . . . . The state courts have quite uniformly rejected these guises and required the payment of compensation. Sax, 74 Yale L.J. at 46, 47.

Sax specifically cited the case of *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (Pa. 1951), as a typical example of where the government had reserved private property "for parks or roads or schools, with the effect of preventing development and thus, holding down the price for future proposed public acquisition." *Id.* at 73. Sax concluded that "[s]ince such platting has the economic effect of acquiring an option to buy at a given price, it should be treated as a resource acquisition for whatever government purpose is receiving the benefit of the option," and would require the payment of compensation. *Id.* at 73.

The government's use of a map of reservation explicitly and specifically exploits the "use" of private property in order to "permit [and] facilitate" a uniquely governmental function, i.e., future road building. *Penn Central*, 438 U.S. 128. Indeed, as noted by this Court in *Joint Ventures, Inc. "II"*, 563 So. 2d at 622, "the legislative staff analysis candidly indicates that the statute's purpose is **not** to prevent an injurious use of private property, but rather reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. In every case where a map of reservation was utilized, a "resource acquisition" or *de facto* condemnation has taken place. Notwithstanding the fact that the monetary value of the government's "use" of the private property, during the time the map was in place, may indeed be minimal, it constitutes a *de facto* exercise of eminent domain nonetheless, and the right to claim compensation may not be denied.

Numerous courts have agreed. "A zoning restriction imposed to depress value with a view to future eminent domain proceedings itself creates a cause of action in inverse condemnation against the governmental unit enacting the zoning ordinance." *People v. South Pacific Transp. Co.*, 109 Cal. Rptr. 525, 528 (Cal. 2d DCA 1973); "[t]o prevent plaintiff from improving its land in order that the municipality may continue to have a drainage area by the means here employed is clearly a taking without due process or compensation and hence unconstitutional," *Antonelli Constr. v. Milstead*, 112 A.2d 608, 614 (N.J. 1955).

> The injustice to property owners of permitting a municipal body to tie up an owner's property for three years[4] must be apparent to everyone. The city can change its mind and abandon or refuse to take property at the end of three years; but in the meantime the owner has been, to all intents and purposes, deprived of his property and its use and the land is practically unsalable ....
>
> The action of the City of Beaver Falls in plotting this ground for a park or playground and freezing it for three years is in reality a taking of property by possibility, contingency, blockade, and subterfuge, in violation of the clear mandate of our constitution that property cannot be taken or injured or applied to public use without just compensation having been first made and secured. *Miller v. City of Beaver Falls*, 82 A.2d 34, 37 (Penn. 1951) (emphasis supplied).

Please see also: *Morris County Land I, Co. v. Parsippany-Troy Hills Twp.*, 193 A.2d 167 (N.J. 1948), *Forster v. Scott*, 32 N.E. 976, 977 (N.Y. 1893) (one of the earliest decisions to unmask legislative freezes as eminent domain in disguise); and *Grosso v. Board of Adjustment*, 61 A.2d 167 (N.J. 1948), wherein the town's official map depicted owner's property within the bed of a proposed street. The owner was, thus, denied a rezoning application to permit him to build on his property. The court found a taking:

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[4]Florida's map of reservation permits a ten-year freeze.

> . . . The [police] power is broad and comprehensive; but it may not be invoked to secure what is in essence the taking of lands, for the taking of private property for public use without just compensation is forbidden by the state constitution and the [federal constitution] as well . . . . [T]his right of private property consists of the right to use and enjoy it, unless the right of immediate possession is vested in another. But there is not difficulty in classifying this case. Lands may not be taken for highway use, presently or in futuro without just compensation. *Id.* at 168, 169.

The Court in *Grosso* continued by noting that the placement of the "official map" upon the property ". . . would be a public use for which private property is subject to appropriation only under the power of eminent domain. Private property may not be confiscated under the guise of police regulations." *Id.* at 169. To like effect are: *Hager v. Louisville & Jefferson County Planning & Zoning Comm'n*, 261 S.W.2d 619, 629 (Ky. Ct. App. 1953); *Sheer v. Town of Evesham*, 445 A.2d 46, 74 (N.J. 1982), where the owners of land frozen by "public" zoning were awarded a temporary taking from the inception of the zoning to its rescinding. The owners were entitled to the option value of their lands under the takings clause. *Id.* at 74. See also, *Lomarch v. City of Englewood*, 237 A.2d 881 (N.J. 1968), where a one-year freeze was invalidated, but the owner was awarded compensation under an implied option theory for the duration of the freeze.

Contrary to the government's challenge that the landowners find one decision awarding compensation for an illegitimate act of government, it is unusual to discover a freezing-eminent domain case without compensation being mandated.

D. What property interest has been taken by the implementation of the unconstitutional map of reservation?

Property, in its legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with its right to use, enjoyment and disposition. *Tatum Bros.*

Real Est. & Invest. Co. v. Watson, 109 So. 623, 626 (Fla. 1926). In the meaning of the state and federal constitutional provisions, "property" is not limited to the physical object of ownership, but includes the right to acquire, use, enjoy, possess, sell and dispose of it for lawful purposes, "and the constitution protects each of these essentials." *Kass v. Lewin*, 104 So. 2d 572, 578 (Fla. 1958). These fundamental attributes of property, including the right to use, are acknowledged as well by the United States Supreme Court, *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

Certainly "property" is subject to reasonable limitations of the police power, but a property owner in Florida may put his or her own property to any reasonable and lawful use so long as neighboring owners are not injured thereby, and so long as the law does not pronounce the use a "nuisance." *Reaver v. Martin Theaters*, 52 So. 2d 682, 683 (Fla. 1951).

By the express terms of the map of reservation statute, "no development permits . . . shall be granted by any governmental entity for new construction of any type" and such "development permits shall not be issued for a period of 5 years from the date of recording such map. The 5 year period may be extended for an additional 5 year period . . .", as cited in *Joint Ventures, Inc. "II"*. This was the property interest taken from the landowners in this cause when the map was imposed on their lands. Under the statute, no new construction was permitted and renovations were severely curtailed for any existing use, except for a residence, which could be renovated, but must continue to be used solely as a residence. Thus, an owner was prohibited from making any use of his or her property except that to which it was currently devoted.

The property interest acquired may be described at common law by a variety of accepted terms as: a "negative easement," i.e., an interest in land that restrains the landowner from making a certain use of his or her land which might otherwise have been lawfully accomplished but for the restriction. Thompson, *Commentaries on the Modern Law of Property*, Vol. 2, Sec. 382; or "a non-consensual servitude." J. Rehnquist, dissenting in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 143 (1978); or a lease; or an option, *Lomarch*, 237 A.2d at 884. But, however the interest is denominated, it is something the government did not own prior to the implementation of its map.

The fact that the use acquired by the government is a future use, not yet physically enjoyed by the owner, does not change the nature of it as constitutionally protected from taking without compensation. *Boom Co. v. Patterson*, 93 U.S. 403, 408 (1879); *Chicago M & St. P. R. Co. v. Wisconsin*, 59 L.Ed. 1423, 1429 (1915); "The owner's right to property is protected even when it is not actually in use . . . ."

As broad as the police power may be, it may not be used to deny an owner use without compensation in order to further a public enterprise. The right to build on one's own property is a recognized and constitutionally protected property right. If the government wants the use of private property for its own purposes, it must pay for that use. *Nollan v. California Coastal Comm'n*, 97 L.Ed.2d 677, 687 n.2 (1987). See *Division of Admin., State of Fla. D.O.T. v. Frenchman*, 476 So. 2d 224, 229 (Fla. 4th DCA 1985).

It is clear by this Court's analysis in *Joint Ventures, Inc. "II"*, that a real and substantial property interest enjoyed by a fee owner was transferred to the public by the operation of the map of reservation. It is this transfer of a property right, for the benefit

of a proposed public highway, that is expressly forbidden by our constitutions without full compensation paid therefor.

II. "PRACTICAL (BUT NOT PROBABLE) CONSIDERATIONS" - THE SPECTER OF WINDFALL RECOVERIES AND UNJUSTIFIED PAYMENT OF FEES AND COSTS.

This is probably as good a point as any to deal with the fear tactics utilized by the government in its less than novel contention that if this Court does not overrule the decision in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th DCA 1991), *rev. denied*, 591 So. 2d 183 (Fla. 1991), a "floodgate" will be opened, the courts will be inundated with claims for compensation, governments will be bankrupted and the world, as we know it, will come to an end. Except for those born yesterday, even those who have had minimal exposure to the evolution of the law in the area of "takings" jurisprudence recognize that the government's claims of "Armageddon" are not new, and have been generally disregarded as unsupported hysteria. As noted in *Garrett Brothers*, 528 S.W.2d at 274:

> To hold a governmental agency liable under the facts of this case will not cause the heavens to fall, nor will it transform government into a giant shackled into inactivity by the fear of potential liability. It will still be free to enact zoning ordinances, building codes, health regulations, traffic laws, etc. In brief, it will still be able to "govern" without fear of financial disaster. The only result will be that it will not be able to "rig" the market in its favor. That is, government will merely be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern.

See Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" View on Just Compensation for Regulatory Taking of Property*, 19 Loyola of Los Angeles Law Rev. 685, 749-753 (1986); see also *Owen v. City of*

Independence, 445 U.S. 622, 656 (1980), rejecting the "risk to fisc" argument as a credible basis for allowing the government to escape liability for constitutional violations.

The argument presented by the government is twofold. First, *W & F Agrigrowth* will "allow **huge** compensation awards to landowners who experienced **no** actual economic loss," and will encourage "nuisance" suits even though the claimant has not experienced any economic loss or detriment in the use of his property. Second, the government will be burdened with all the costs, including attorney fees, incurred by those that pursue these "spurious" claims, **regardless** of the results obtained in court.[5]

To begin with, it is an oxymoron to suggest that a "huge" compensation award will be obtained even though the claimant has suffered "no" actual economic loss. As correctly noted by the dissent below, "[P]resumably a rational landowner will only file such an action if there is solid evidence that the map of reservation caused the landowner substantial economic harm." (Opinion, p.18). Indeed, no knowledgeable and experienced practitioner would advise a client to pursue a map of reservation claim, unless there was "solid evidence," supported by the facts and expert testimony, of substantial economic impact.[6] The courts in Florida have long resisted any attempt to be compensated for unfounded or speculative claims for damages. *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955); *Jacksonville Transp. Auth. v. ASC Assoc.*, 559 So. 2d 330, 333-334 (Fla. 1st DCA 1990).

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[5]See *Brief of Amicus*, Orlando-Orange County Expressway Authority, pp.4, 7; *Initial Brief* of Tampa-Hillsborough County Expressway Authority, pp. 34-35, 37, 38; *Brief of Amicus*, Palm Beach County, pp. 2, 3-4, 5; *Brief of Amicus*, National Audubon Society, p.4.

[6]Take for example, the A.G.W.S. Corporation inverse claim, which, after the experts from both sides considered the matter, was settled for $450,000, which most people would agree is hardly a "spurious" or "unfounded" claim.

Thus, the lack of any evidentiary support for a damage claimed would open the door for a directed verdict against the claim. Clearly, there is nothing to be gained by the client in pursuing a "spurious" claim. See also, Sec. 57.105, *Fla. Stat.*, which allows the award of attorneys' fees against a party bringing a suit that is determined to have a "complete absence of a justiciable issue of either law or fact raised by the complaint."

The dissent below incorrectly states that "landowners will risk little or nothing in bringing suit," and that "[E]ven if its damages are minimal or speculative, virtually every landowner will have an incentive to file suit." (Opinion, p.19). This statement indicates an unawareness of the vast array of procedural safeguards that are intended to discourage the pursuit of frivolous condemnation claims, and disregards the eminent code contained in Chapters 73 and 74, which this Court, in *Joint Ventures, Inc."II"*, found to be directly applicable to a cause such as this. Before the cause ever gets to the trial stage, Section 73.032, Fla.Stat., permits the government to file an **offer of judgment**. Section 73.092(6),Fla.Stat., provides that if the offer of judgment is rejected, and the verdict is less than or equal to the offer made by the government, "**no attorney fees or costs** shall be awarded for time spent by the attorney or cost incurred after the time of rejection of the offer." Thus, the pursuit of a spurious claim puts a party "at risk" that they will be paying, **out of their own pocket**, the costs and fees generated in the pursuit. The offer of judgment provision provides a very effective means for discouraging such frivolous claims. See, *Crigler v. State of Fla., D.O.T.*, 535 So. 2d 329 (Fla. 1st DCA 1988): "Section 73.092(7)-(9) offers the landowner the incentive to realistically assess his claim, **and discourages the landowner from litigating a meritless claim**." (Emphasis supplied).

The government contends that the *W & F Agrigrowth* decision "amounts to a full employment act for attorneys,"[7] and costs and attorney fees will have to be paid "regardless" of the results obtained. The attorney fee statute itself, Sec. 73.092, *Fla. Stat.*, which is totally ignored by the government, belies the credibility of this position. At the very outset, this provision makes it very clear that the **results obtained** for an owner will be the controlling consideration in the determination of the amount of fees to be awarded. Subsection (1) states: "In assessing attorney's fees in eminent domain proceedings, the court **shall** give the **greatest weight to the benefits resulting to the client from the services rendered.**" While the "benefits obtained" have long been listed as the first of several considerations affecting the determination of fees to be awarded, in 1990 the provision was amended to specifically require that the benefits obtained be given the "greatest weight."[8] Subsection (2) actually permits the government to make a written offer to the claimant even before counsel is hired. This has the effect of defining the "benefits" by a comparison of the written offer to compensation awarded by the final judgment or settlement. Under the provision, the same thing can be done after counsel is retained. Given the fact that "benefits" obtained for the claimant have been, and will continue to be, given the greatest weight, it is clear that the scenario painted by the government - exorbitant fees regardless of results - is an illusion

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[7]See *Initial Brief* of Tampa-Hillsborough County Expressway Authority, p.35.

[8]The prior fee statute, by listing "benefits resulting to the client from the services rendered" as the number one consideration in determining the fee to be awarded, likewise provided protection against the award of unreasonable fees and costs where no results were obtained. See, Sec. 73.092, *Fla. Stat.* (1989).

intended to mislead this Court.[9] Because the Department of Transportation was a major participant in the drafting and passage of the current fee statute, it has absolutely no excuse for this attempt at deception.[10] There clearly is no "incentive," for a client or an attorney, to bring claims if the "damages are minimal or speculative."

The government and the amici disdain the trial judiciary by suggesting the lower courts would award anything other than "reasonable" fees and costs, as directed by Section 73.091, *Fla. Stat.* This provision codifies longstanding judicial pronouncements that the costs reasonably incurred by an owner in an eminent domain proceeding must be reimbursed or the owner would receive less than full compensation for the taking of his or her property. *Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950). The same reasoning justifies the payment of a reasonable attorney's fee to counsel employed to insure that an overzealous government does not run roughshod over the owner in the name of "public good." *Tosohatchee Game Preserve, Inc. v. Central & Southern Fla. Flood Control Dist.*, 265 So. 2d 681, 684 (Fla. 1972). It must be presumed that the trial judge will properly apply the statutory criteria and award fees and costs that are "reasonable" under the circumstances.

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[9]The express prohibition of basing an award upon a percentage of the recovery, found in the 1989 version of the attorney's fee provision, has been deleted. The fact that a trial judge can now award 30, 40 or even 50% of a minimal recovery hardly provides an incentive to pursue anything less than a substantial and provable claim.

[10]The Final Staff Analysis & Economic Impact Statement, dated July 27, 1990, in the section describing "Long Run Effects," states that the amended fee statute should prevent an attorney from getting a "fee which may be equal to or greater than the benefits obtained for the landowner." In the final "Comments," the staff summary notes that "[T]he bill is the product of a compromise between the Department of Transportation and the Eminent Domain Bar."

Even if, notwithstanding these protections, the government is subjected to an award that it considered excessive or unjustified under the circumstances of the case, it has a remedy available - appellate review. Indeed, the appellate courts have not been shy to reverse fee awards that it deemed insupportable under the facts of a particular case. See *Taylor v. First American Bank & Trust*, 17 Fla.L.Weekly D2514 (Fla. 4th DCA 1992); *Gevertz v. Gevertz*, 17 Fla.L.Weekly D2524 (Fla. 3d DCA 1992).

It is factually undisputed that the government, in July, 1988, made a conscientious and deliberate decision to implement the map of reservation statute, notwithstanding the potential liability it would incur if this Court answered the certified question, posed January, 1988, by the District Court of Appeal in *Joint Ventures, Inc. v. Department of Transportation*, 519 So. 2d 1069, 1072 (Fla. 1st DCA 1988) (*Joint Ventures, Inc. "I"*), in an affirmative manner.[11] The government was, as of January, 1988, on notice that there was a risk that, if it did lose, it would eventually be required to pay for the burden it imposed on a relatively small group of owners for the benefit of the public as a whole. It is not the job of this Court to save the government from the consequences of "shortcuts" that are determined to be lacking in their compliance with constitutional mandates. As was stated by Justice Holmes in the seminal decision of *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922), "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the

[11]In *Joint Ventures, Inc."I"*, the decision clearly put the government on notice of potential inverse condemnation suits when it cited *Lomarch Corp. v. City of Englewood*, 237 A.2d 881 (N.J. 1968), for the position that such reservation provisions have given rise to decisions requiring the payment of compensation.

constitutional way of paying for the change." *Id.* at 160. Please see, *State Road Dep't v. Tharpe*, 1 So. 2d 868, 870 (1941).

III. VIEWED AS A REGULATORY TAKING - LIABILITY IN EVERY INSTANCE.

Since the statute was not a "regulatory" provision, but rather a "thinly veiled" illegitimate attempt at condemnation without compensation, there is no need to conduct a regulatory analysis. However, even if we were to consider this cause as a regulatory taking case, summary judgment on the issue of liability would be mandated in every instance where a map of reservation was actually placed over private property, thereby placing any development in "deep freeze" for up to ten (10) years.

A. What we have here is a failure to substantially advance legitimate state interests!

The government maintains that this Court, in *Joint Ventures, Inc."II"*, invalidated the map of reservation provisions on the basis that they failed to substantially advance any legitimate state interest. (Initial Brief of Expressway, pp. 7-8; 18-19). It then contends that no compensation is required when a "taking" is established under such circumstances and that invalidation of the offending provision is the only remedy available to an owner. The owners certainly agree that the map of reservation provisions clearly failed to substantially advance any legitimate state interest. Indeed, the decision in *Joint Ventures, Inc. "II"*, is entirely consistent with the well-established majority rule that the government will not be permitted to reserve, "freeze," or landbank private property for future governmental use. "Such action has been consistently prohibited." *Id.* at 626, citing *Board of Comm'rs v. Tallahassee Bank & Trust Co.*, 108 So. 2d 74, 86 (Fla. 1st DCA 1958), *writ quashed*, 116 So. 2d 762 (Fla. 1959); *Kissinger v. City of Los Angeles*, 161 Cal.App.2d 454, 462, 327 P.2d 10,

16 (Cal. Ct. App. 1958); *Robyns v. City of Dearborn*, 341 Mich. 495, 67 N.W.2d 718, 720 (Mich. 1954); *Long v. City of Highland Park*, 329 Mich. 146, 153, 45 N.W.2d 10, 13 (Mich. 1950); *Grand Trunk Western R. Co. v. City of Detroit*, 326 Mich. 387, 40 N.W.2d 195, 199 (Mich. 1949). See also, *Lackman v. Hall*, 364 A.2d 1244 (Del. Ch. 1976); *Petersen v. City of Decorah*, 259 N.W.2d 553 (Iowa Ct. App. 1977); *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (Md. 1984); *Gordon v. City of Warren Urban Renewal Comm'n*, 185 N.W.2d 61 (Mich. Ct. App. 1971), *aff'd*, 199 N.W.2d 465; *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (N.Y. 1893); *Maryland-National Capital Park & Planning Comm'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (Md. 1979); *Lomarch Corp. v. City of Englewood*, 237 A.2d 881 (N.J. 1968); *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (Pa. 1951).

In finding such enactments constitutionally offensive, a common thread of justification is found in the fact that the government's attempt to regulate had no "nexus" between the owners' current or proposed use of the property and the prohibition or restriction sought to be imposed. These were <u>not</u> attempts to prohibit some current or planned "noxious" use of the property, thus protecting the health, safety, or welfare of the public. Rather, the enactments merely made it more convenient to carry on in the performance of a uniquely governmental function in its "enterprise" capacity. It is the lack of such a "nexus" which leads inevitably to the conclusion that the provision does not substantially advance any legitimate state interest. *Nollan*, 483 U.S. at 837. Reserving, "freezing" or landbanking private property for future public use cannot, as a matter of law, provide a "nexus" between a "legitimate" prohibition or restriction and the owner's use of his property. Thus, in every instance where the provision is implemented, regardless of the

factual setting, it will always result in a "taking," because it fails to substantially advance any legitimate state interest. Clearly, there is no need, as suggested by the government, to make an ad hoc factual inquiry into every case where a map of reservation was implemented. Regardless of the facts, a map of reservation will always fail to substantially advance any legitimate state interest, which will always give rise to a "taking." See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The government describes this Court's decision in *Joint Ventures, Inc. "II"*, as involving a "facial" attack upon the map of reservation statute as a regulatory provision. The response that follows assumes arguendo that this contention is correct. When a "facial" attack is made upon a regulatory provision, the basic allegation is that regardless of the factual setting to which the scrutinized provision is applied, a "taking" will occur. The particular or localized impact of the provision (economic or use impairment) on a specific piece of property is irrelevant to the consideration. *Yee v. City of Escondido*, 112 S.Ct. 1522, 1532 (1992); see also *Pennell v. City of San Jose*, 485 U.S. 1, 18-19 (1987), J. Scalia and O'Conner dissenting. No matter what type of property the provision is applied to, a "taking", as defined under the law, will occur. In other words a per se "taking" occurs in every instance.[12]

[12]Attempts by the government and amicus participants to categorize the type of property or factual setting in which a "taking" will occur when a map of reservation is involved clearly misses the boat. The nature of the property, in terms of its use, is clearly irrelevant when a facial challenge is made in the context of a regulatory taking. *Pennell*, 485 U.S. at 18-19.

B. *Agins* Revisited: Two independent "taking" standards.

The U.S. Supreme Court has, contrary to the position taken by the dissent below, clearly stated that a "facial" taking occurs for either of **two separate and distinct reasons.** In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the court held that a regulation "effects a taking if the ordinance does not substantially advance legitimate state interest, . . . **or** denies an owner economically viable use of his land." *Id.* at 260 (emphasis supplied). These independent standards have been reiterated over and over again, appearing most recently in *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886, 2893-2894 (1992). See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan*, 112 S.Ct. 2886, 2893-2894 (1992). It was clearly recognized as the standard by this Court in *Joint Ventures, Inc.*, 563 So. 2d at 625, n.9.

The government and its "friends" have taken two approaches to the initial independent test set forth in *Agins*. They either ignore it or they attempt to relegate it to a "due process" category, contending that it is not a valid consideration under a "takings" analysis. It is clearly their position that only the second standard announced in *Agins* - denial of economically viable use of the land - can result in a compensable taking. Those supporting the government's position attempt to rewrite the law.

At the outset, certain terms should be clarified. By use of the term "takings" we, of course, correctly refer to the constitutional prohibition against taking private property for public use without the payment of full or just compensation. See Joseph Sax, "*Takings and the Police Power*," 74 Yale L.J. 36, n.2 (1964). Use of the term "taking" by the government and the dissent below, to describe settings involving due process considerations, is inaccurate

and unnecessarily confuses the matter.[13] It is more than a case of semantic quibbling to require a distinction between the "deprivation" that is the subject of a due process review, and a "takings" analysis under the compensation clause. The standards are **not** the same. *Nollan*, 483 U.S. at 834, n.3. As set forth below, both of the independent tests set forth in *Agins*, and reiterated in subsequent United States Supreme Court decisions, have been at the heart of the "takings" analysis, rather than "due process."

Since the dissent below relied heavily upon the decision of *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232 (1986), that opinion provides a good starting point toward demonstrating the error of the government's position. In *Keystone*, the requirements of a Pennsylvania "Subsidence Act," and certain implementing regulations, were "facially" challenged as a violation of "the Takings Clause." *Id.* at 1236. In portions of the complaint that the Supreme Court considered "relevant," the Association alleged that sections of the Subsidence Act "constitute a **taking without compensation** in violation of the Fifth and Fourteenth Amendments." *Id.* at 1239. In its resolution of the case, the Supreme Court neither mentioned nor gave any consideration to an alleged "due process" violation.[14] Significantly, however, in the consideration of the Association's claim, the Supreme Court did state:

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[13]See *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), where the court incorrectly uses the term "taking" to describe violations of both the compensation clause and the due process clause. *Id.* at 720-721.

[14]Indeed, when the Supreme Court discussed the disposition of the "takings clause" claim, it specifically cited to that portion of the 5th Amendment, wherein it states "nor shall private property be taken for public use, without just compensation". *Id.* at 1240, n.10.

> The two factors that the court considered relevant, have become **integral** parts of our **takings analysis**. We have held that land use regulation can effect a **taking** if it 'does not substantially advance legitimate state interests, . . . **or** denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (Citations omitted); see also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). (Emphasis supplied). *Id.* at 1242.

The Court's statement is clear, concise and without qualification: the two independent standards set forth in *Agins* are an "integral part of [the Court's] **taking analysis**," not due process.

After making the statement quoted above, the Court continued its inquiry by considering the Association's claim in light of these two "tests." Considering the first of the "takings" standards (whether the provision substantially advanced legitimate state interests) (107 S.Ct. at 1242-1246), the Court found that the provision under scrutiny reflected a substantial public interest in preventing activities that amounted to a public nuisance, and that it did not violate this prong of the *Agins* test. *Id.* at 1246. Significantly, after recognizing that past precedent required that it assess the "true nature" of the provision, notwithstanding its legislatively stated purposes (*Id.* at 1243, n.16), the Court continued by noting "that the nature of the State's interest in the regulation is a **critical factor** in determining whether a **taking** has occurred, and thus **whether compensation is required**." *Id.* at 1243.[15] (Emphasis supplied). It is no coincidence that the requirement of

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[15]In *Joint Ventures, Inc.*, 563 So. 2d at 625, this court ferreted out the "true nature" of the map of reservation provisions as nothing more than a "thinly veiled" scheme to acquire private property without paying for it. That this Court did not address the issue of compensation due to the owners in *Joint Ventures, Inc. "II"*, does not support the contention made by the dissent below, that the cause was resolved on a "due process" basis. As (continued...)

compensation was discussed in the context of the Court's consideration of the " true nature" of the provision. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in **takings** analysis." *Id.* at 1244.

Upon finding that the provision did not violate the first standard set forth in *Agins*, the Court then moved onto the second *Agins* standard. Upon considering the **second** standard the Court stated that "[t]he test to be applied in considering **this** facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land' . . . ." *Id.* at 1247. Contrary to the position taken by the dissent below and the government, the Supreme Court did not state that this was the **sole** test to determine a "taking", but only that it was the test to be applied when the second prong of *Agins* was under consideration. Economic or use impact is relevant to the second test only, but it is **not** the only test under which a taking can be established. *Yee*, 112 S.Ct. at 1532; *Pennell*, 485 U.S. at 18-19. Two standards, not one, are "integral parts of [their] takings analysis," and whether a land-use provision fails to substantially advance legitimate state interests is the first to be considered. *Id.* at 1242.

In *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987), the Court again made it clear that the "takings" analysis included **both** of the *Agins* standards. Therein, the Court reiterated:

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[15](...continued)
conceded by the government, prior to rendition of the *Joint Ventures, Inc. "II"* opinion, the matter of compensation due for the inverse condemnation claim was settled. Thus, the issue of whether the owner was "entitled to compensation" was simply not before this Court. (*Initial Brief*, p.18). Indeed, this Court made note of the fact that a settlement had occurred. *Joint Ventures, Inc. "II"*, 563 So. 2d at 624, n. 5.

> We 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. *Agins v. Tiburon*, 447 U.S. 255(1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose.") *Nollan*, 483 U.S. at 834. (Emphasis supplied.)

Once again, the Court made it clear that there are two standards under which the "takings" analysis is conducted. If a provision must meet both of these standards in order to "not effect a taking," then obviously a violation of either will result in a "taking." The fact that the first standard of *Agins* is not a "due process" consideration was also clearly recognized by the Court. In response to the contention of one of the dissenters, the majority of the Court rebuffed the idea that the "takings" standards "are the same as those applied to due process or equal protection claims." *Id.* at 834, n.3. Continuing, the Court stated:

> To the contrary, our verbal formulations in the **takings** field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective. (Citations omitted). But there 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 . . . . *Nollan*, 483 U.S. at 834, n. 3. (Emphasis supplied).

Contrary to the position of the dissent below, the recent United States Supreme Court decision in *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. at 2886, did not alter, but affirmed the *Agins* standards for the determination of a "taking" under the just compensation clause of the United States Constitution. The misplaced reliance upon *Lucas* by the dissent below and the government to support the position that there are only two

situations where a "per se" taking will be found, becomes readily apparent by a cursory review of the opinion. First, consider the fact that "*Lucas* did **not** take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation **regardless** of whether the legislature had acted in furtherance of legitimate police power objectives." *Id.* at 2890 (emphasis supplied). Thus, without question, the Court was not confronted with the first of the *Agins* standards and the "true nature" or public purpose of the provision was not at issue or a concern of the Court. As we continue through the decision, contrary to the dissent's statement, no where do we find the Court stating that there are **only** "two" situations where a "per se" taking can arise. Rather, the Court notes that they have "described <u>at least</u> two discrete categories of regulatory action as compensable without case-specific inquiry into **the public interest advanced** in support of the restraint." *Id.* at 2893 (emphasis supplied). The Court continued by describing these categories as those involving physical invasions, where "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation," and "where regulation denies all economically beneficial or productive use of land." *Id.* at 2893. This portion of the *Lucas* decision does nothing more than state the unremarkable principle that the public purpose (legitimate state interest) of the provision being scrutinized is not a consideration in those particular scenarios. It did <u>not</u> say that those factual settings are the <u>only</u> situations where a "per se" taking can occur, giving rise to a claim for compensation. Indeed, in the very next sentence the Supreme Court states, without qualification:

> As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 2893-2894 (emphasis supplied).

The first *Agins* standard (wherein the "true nature" of the provision is examined to determine if a public purpose or legitimate state interest is substantially advanced) is not a due process consideration. That standard has been and remains today an "integral" part of the "takings" analysis. *Keystone Bituminous Coal Assoc.*, 107 S.Ct. at 1242; *Nollan*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

IV. IF A "TAKING" HAS OCCURRED THEN COMPENSATION IS REQUIRED.

Next, to the issue of compensation. The dissent and the government contend that no compensation is due when it is judicially determined that a "taking" has occurred because a provision fails to substantially advance legitimate state interests. Of course, this contention is made under the mistaken belief that the first *Agins* standard is a "due process" inquiry, rather than a part of the "takings" analysis. Since this is not the case, to adopt the position of the dissent and the government would require that this Court ignore the foundation constitutional premise, clearly and definitively stated by both this and the United States Supreme Court, that once a "taking" has been determined, regardless of the nomenclature used to describe how the taking occurred, compensation must be paid.

Consider what the courts have stated: "In the event of a taking, the compensation remedy is required by the Constitution." *Department of Agric. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103-104, n.2 (Fla. 1988); "The sovereign must make just compensation for any property taken." *Department of Agric. v. Mid-Florida Growers, Inc.*, 505 So. 2d 592, 593 (Fla. 2nd DCA 1987), decision approved 521 So. 2d 101; "If it should be determined that

the government's activities effected a taking, subsequent action, such as invalidating the ordinance, will not relieve the government of its duty to provide compensation for the period that the ordinance was in effect." *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990); "Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 315 (1987).

> Indeed, government regulations which either do not substantially advance legitimate state interests or which deny an owner economically viable use of his land, or both, effect a taking requiring payment by the government to the landowner of just compensation. *Snyder v. Board of County Comm'n, Brevard County*, 595 So. 2d 65, 70 (Fla. 5th DCA 1991).
>
> The 5th amendment to the United States Constitution provides that private property [shall not] be taken for public use, without just compensation. Article X, Sec. 6(a), of the Florida Constitutions provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner" . . . . Neither provision qualifies the requirement to pay. Thus, the only relevant question is whether a "taking" has occurred. If there has been a "taking," compensation must be paid, regardless of the nomenclature used to describe the state's power. *Department of Agriculture v. Polk*, 568 So. 2d 35, 48 (Fla. 1990), concurring opinion of *Justice Barkett*. (Emphasis supplied).

See also, *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th DCA 1991), *rev. denied*, 591 So. 2d 183 (Fla. 1991).[16] The

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[16]Two of the justices which dissented in *Joint Ventures, Inc. "II"*, were among the five justices who unanimously voted not to accept review of the *W & F Agrigrowth* decision. It was these same justices that viewed the majority opinion in *Joint Ventures, Inc. "II"*, 563 So. 2d at 622, as finding a taking under "every conceivable application" of the statute. *Id.* at 628. This is exactly what the owners in this cause contend was the ruling of the court in *Joint Ventures, Inc. "II"*. Thus, it would appear that the denial of review in *W & F Agrigrowth* strongly suggests that the government's main argument, presented in the cause at hand (no (continued...)

court in *W & F Agrigrowth* recognized the established principle that "[a] regulation effects a taking if it does not advance a legitimate state interest, or if the regulation denies an owner economically viable use of his land." *Id.* at 792. The court continued, "[i]t is axiomatic that the constitutions of the United States and the state of Florida require that just and full compensation be paid in the event of a taking." *Id.* at 792.

The government cites to the earlier decision of *Dade County v. National Bulk Carriers, Inc.*, 450 So. 2d 213 (Fla. 1984), in support of the contention that no compensation is required. In *National Bulk Carriers, Inc.*, this Court ruled that if the application of a zoning provision resulted in a "taking," invalidation of the provision was the remedy afforded the injured property owner. *Id.* at 216. Of course, subsequently the United States Supreme Court ruled to the contrary in *First English*, 483 U.S. at 304, and determined that invalidation was "not a sufficient remedy to meet the demands of the Just Compensation clause," and that compensation must be paid. *Id.* at 319. The construction of the 5th Amendment to the federal Constitution in a manner that provides greater protection from governmental intrusion upon the fundamental rights of citizens is binding upon the states. *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992). Such guarantees of the federal Constitution are the required minimum that all governments must afford to their citizens. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). This Court effectively limited its holding in *National Bulk Carriers, Inc.*, when it cited to *First English* for the premise that "the right to seek relief

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[16](...continued)
taking under every application of the statute), has already been rejected as an unwarranted limitation of the ruling in *Joint Ventures, Inc. "II"*.

through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation." *Joint Ventures, Inc. "II"*, 563 So. 2d at 627. See *Villas of Lake Jackson v. Leon County*, 796 F.Supp. 1477 (N.D. Fla. 1992), wherein the court recognizes that the decision in *First English* altered the rule set forth in *National Bulk Carriers, Inc.*, and that in *Joint Ventures, Inc. "II"*, this Court "silently discarded the central ruling of *National Bulk Carriers*." 796 F.Supp. at 1482-1483. See also, *Barima Investment Co., Inc. v. United States*, 771 F.Supp. 1187, 1189 (S.D. Fla. 1991). Clearly, *National Bulk Carriers*, and subsequent decisions citing thereto, can no longer be cited as authority for the "no compensation" rule maintained by the government.

The fact that compensation is required when a "taking" is determined under either of the two independent tests announced in *Agins* was confirmed recently in the decision of *Yee v. City of Escondido*, 112 S.Ct. 1522, 60 U.S.L.W. 4301 (1992). In *Yee*, the United States Supreme Court had under consideration a local rent control ordinance which the owners contended amounted to a physical invasion of their property. Prior to rejecting this contention, for reasons not related to the issue presented in the cause at hand, the Supreme Court reiterated the general law with regard to the "taking" issue under the 5th Amendment. The court initially noted that "most" of its cases interpreting the takings clause fall within two classes: physical occupation of property or regulation of use of property. 112 S.Ct. at 1526. With regard to the second class of cases the court stated:

> "But where the government merely regulates the use of property, **compensation is required** only if considerations such as the **purpose of the regulation or the extent to which it deprives the owner of the economic use of the property** suggest that the regulation has unfairly singled out the

> property owner to bear a burden that should be borne by the public as a whole." 112 S.Ct. at 1526 (emphasis supplied).

Compensation is required where either the purpose of the regulation (that is, whether the regulation substantially advances a legitimate state interest), or the deprivation of economic use unfairly place a burden on a particular property owner that should be borne by the public as a whole. Deprivation of economic use of the property is not, as contended by the government and "friends," the only occasion that gives rise to the requirement that compensation be paid as a result of a regulatory taking. The purpose of the map of reservation statute has been found by this Court to be acquisitory in nature.

The government states that it has not found any appellate level decision wherein an owner was awarded compensation for a "taking" under the *Agins* first standard. This contention is somewhat "scary," not because of its persuasiveness in affecting the outcome of this cause, but due to the "assumption" that is at the heart of the statement. The dual independent standards for a "taking" were clearly announced in 1980. Unlike the government in this cause, most governmental entities do not deliberately set out to engage in "illegitimate" unconstitutional behavior. The government's contention regarding the lack of appellate level decisions assumes just the opposite. The fact that there is little appellate precedent addressing the first *Agins* standard is a tribute to the fact that during the intervening decade, no government agency has had the temerity to impose openly "illegitimate" regulations and then defend them long enough to produce a published appellate opinion. Governmental entities that are caught doing so would, understandably, tend to settle such matters at the trial level, usually before trial. Further, substantial justification for the lack of appellate precedent relating to the first *Agins* standard is found

in the fact that, as recognized in *Nollan*, 483 U.S. at 825, past Supreme Court cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id* at. 834. (Emphasis supplied). Importantly, the court went on to note that decisions "have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." *Id*. at 834-835. With such a broad range of purposes satisfying the "legitimate state interest" requirement, it is understandable that attacks based upon the first standard of *Agins* would be few in number and have only a minimal chance of success. Indeed, it has been acknowledged that a party faces an "uphill battle" when attempting to mount such a challenge. *Keystone*, 107 S.Ct. at 1247. The lack of elaboration or direction, combined with the expansive definition of purposes that satisfy the "legitimate state interest," provides the soundest explanation, consistent with existing law, for the absence of decisions at the appellate level on this generalized principle. Specifically, however, as noted previously, there is ample precedent for compensation awarded where the regulation attacked is found to be condemnation in disguise (36 A.L.R. 3d 471), and there is no lack of authority for the bedrock constitutional principle that once a "taking" has occurred, regardless of the nomenclature used to describe it, compensation must be made available to the citizen who has suffered the constitutional violation. See *Snyder*, 595 So. 2d at 70; *Yee*, 112 S.Ct. at 1526; and cases cited on pages 37-39 of this Answer Brief. That is the controlling principle in this cause.

V. SOUND POLICY CONSIDERATIONS REQUIRING COMPENSATION.

A. The public benefit should be borne by the public as a whole.

The requirement that compensation must be paid is equally compelling when a "taking" is determined under either of the *Agins* standards. As held by the Court in *Yee*, 112 S.Ct. at 1522, in both situations "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Id.* at 1526. It has long been recognized that the just compensation clause of the Fifth Amendment "was designed" to bar Government from forcing some people alone to bear such "public burdens." *Armstrong v. United States*, 364 U.S. 1563, 1569 (1960); *First English Evangelical Lutheran Church*, 482 U.S. at 318-319; *Agins*, 447 U.S. at 260; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978). *Joint Ventures, Inc.*, 563 So. 2d at 624, n.7. As noted in the often cited Brennan dissent, "mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens, which in all fairness, should be borne by the public as a whole," citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The opinion continued by recognizing that "[W]hen one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." *San Diego Gas*

& Electric Co. v. City of San Diego, 101 S.Ct. 1287, 1306 (1981).[17] See also *Yee*, 112 S.Ct. at 1526; *First English*, 482 U.S. at 318-319.

The same theme was set forth by this court in *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981). There, among the factors to be considered in determining whether a "taking" has occurred, this Court listed "[W]hether the regulation confers a public benefit or prevents a public harm." *Id.* at 1381. It continued by noting that "[I]f the regulation creates a public benefit it is more likely an exercise of eminent domain . . . ." *Id.* at 1381. As explained earlier, the map of reservation statute provides one of the clearest examples of a legislative provision enacted specifically to advance a uniquely governmental function. It is undeniable that it provides the government with a particular benefit or advantage in the performance of a function in its enterprise capacity. No public harm is sought to be prevented. No noxious use of an owners land is sought to be curtailed. No rationale "**nexus**" exists between the owner's use of his land and the "servitude" imposed by the statute. *Nollan*, 483 U.S. at 825. The benefit derived from the map of reservation remaining in place, for up to 10 years, is purely "public." The burden, however, is purely

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[17]While a dissenting opinion generally carries little precedential value, Justice Brennan's dissent was unique in that, although the majority opinion found the cause lacked finality for disposition purposes, five justices approved the analysis and conclusion contained in the dissenting opinion, which determined that compensation was constitutionally required if a "taking" occurred, regardless of the means by which the "taking" was accomplished. 101 S.Ct. at 1294-1295; 1296. Commentators have noted the uniqueness of the Brennan dissent, and the fact that courts nationwide began almost immediately citing to the dissent as authority for the premise that compensation was required for a regulatory taking. See Michael Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's Views on Just Compensation for Regulatory Taking of Property*, 19 Loyola of Los Angeles L. Rev. 685, 686 (1986). Six years later, a majority adopted the position taken in the Brennan dissent when it rendered *First English*, 482 U.S. at 304.

"private," being borne solely by those who have the grave misfortune of falling within the bounds of the "reserved" property. There could be no clearer example of a setting where the government has forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." That is why compensation is required.

B. The explicit constitutional language cannot be ignored.

The payment of compensation when a "taking" occurs under the first *Agins* test is mandated by the explicit and unqualified language of the constitutional provisions that the government has violated, that is, the full or just compensation provisions of the United States and Florida Constitutions. This was forcefully stated in Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.*, 101 S.Ct. at 1305. Therein, it was recognized that as soon as private property has been taken, regardless of the method by which it was accomplished, "the landowner has already suffered a constitutional violation, and 'the self executing character of the constitutional provision with respect to compensation,' . . . is triggered." The opinion noted that the United States Supreme Court has "consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation **must** be awarded." *Id.* at 1305. (Emphasis by court). It commented on the nature of the action a landowner could bring to compel the payment of compensation and that the right to recover just compensation for property taken by the government for public use, was "guaranteed by the Constitution . . . [and] rested upon the Fifth Amendment." Statutory recognition or authorization is not necessary, nor is a promise to pay. "Such a promise was implied because of the duty to pay imposed by

the Amendment." *Id.* at 1305. In *First English*, 482 U.S. at 315, the majority of the court, after citing with approval that portion of Brennan's dissent quoted above, confirmed as "law" the self-executing nature of the compensation clause and that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" The government's attempt to change this bedrock constitutional principle should be rejected without a second thought by this Court.

C. Economic disincentives - the only sure way to stop the games that government plays.

Another very compelling justification for the payment of compensation for a "taking" under either of the *Agins*' standards is the undeniable fact that mere invalidation "hardly prevents enactment of subsequent unconstitutional regulations by the governmental entity." *San Diego Gas & Electric*, 101 S.Ct. at 1306, n.22. In demonstrating this point, the Brennan dissent references the 1974 annual conference of the National Institute of Municipal Law Officers, wherein a California City Attorney gave his fellow City Attorneys the following advice:

> IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra "goodies" in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura* [citation omitted] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> . . . .
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.

Commentators Berger & Kanner stated the "real world" concerns quite plainly in a section found in their article *Thoughts on the White River Junction Manifesto, supra*, styled "Games the Government Plays":

> Using mere invalidation as a remedy is an invitation to abuse. The major problem is that the only "relief" granted the property owner is the right to have the regulating entity draft a new regulation. The courts cannot direct the entity to adopt any particular regulation. The upshot of this is that the property owner is at the mercy of the regulator. . . .
>
> Thus, the supposedly victorious property owner, who has succeeded in having a court invalidate an unconstitutional regulation, finds that his reward is an invitation to become a yo-yo. In response to the judgment, the entity simply enacts another unconstitutional regulation. The game can continue until the property owner exhausts his patience, his sanity, his wealth, his time on earth, or all four. When the property owner finally succumbs, the entity - even though it has lost every judicial round - emerges victorious. Its disincentive to unconstitutional conduct is nonexistent. The property owner's relief is likewise.
>
> Plainly, this is a game a property owner cannot win. It is a game he should not have to play. It is so cynical, unfair and surreal that, to the extent it is tolerated by the courts, it quite properly puts the legal system into disrepute. Berger & Kanner, 19 Loyola of Los Angeles Law Rev. at 733-735.

Post *Joint Ventures, Inc. "I"*, legislative activities provide a prime example of the "Games the Government Plays," as expressed above. What happened after the First District Court of Appeal certified to this Court the question of whether the map of reservation provisions were "unconstitutional in that they provide for an impermissible taking of property without just compensation?" *Joint Ventures, Inc. "I"*, at 1072. What did the government do in response to the fact that the First District Court of Appeal sharply criticized the "double burden" requiring the owner to show that the map of reservation was both unreasonable or arbitrary and that it denied a substantial portion of the beneficial use of the property? What did the government do when the First District, upon determining

that the owner "has a basic constitutional right to pursue a judicial determination of a 'taking' and its entitlement to compensation for the alleged taking which purportedly occurred under section 337.241(2)," cited to the decision of *Lomarch Corp. v. City of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968), which recognized that a statute placing a one year moratorium on the development of property needed for future public use, "necessarily implied that the state would pay the landowner the value of an 'option' to purchase the land for one year?" (Emphasis supplied).

Subsequent to the First District's opinion, the government, in 1989, amended Sec. 337.241(2). But, it was not to remove or soften the effect of the "no development" prohibition that automatically went into effect upon the filing of a map of reservation. To the contrary, the government added yet another set of "hoops" for the owner to jump through, in addition to the impossible "double-burdens" previously mentioned. Now, the owner faced the burden of a "variance" procedure that, on its face, was clearly designed to consume additional time, effort and financial resources on the part of the owner. See Section 337.241(2)(b), *Fla. Stat.* (1989). A variance from the impact of the map of reservation could be granted "only" if the owner could prove all of the following: that the map constituted an "unnecessary hardship" if applied to the property; the need for a variance arose from some "condition peculiar to the property;" approval of the variance would not be "contrary to the public interest;" and approval of the variance "would not interfere substantially with the proposed transportation use of the corridor." Whose interest was the legislature seeking to protect with this variance procedure? Surely not the owners! It is clear that the legislature was merely preparing for the next generation of challengers

to what this Court described as a "thinly veiled" scheme to acquire private property without the payment of compensation. *Joint Ventures, Inc. "II"*, 563 So. 2d at 625. By amending the provision time and again, and laying out new maps of reservation under the amended provisions, the government could keep the owners embroiled in continuous judicial skirmishes until one of several events takes place: (1) the government finally decides to formally condemn the property for its long announced project; (2) it changes its mind about the necessity for the roadway and abandons the project; or (3), the owner finally succumbs, having exhausted "his patience, his sanity, his wealth, his time on earth, or all four." Berger & Kanner, *supra* at 734.

Clearly, if the option of monetary compensation is eliminated, the "disincentive to unconstitutional conduct" becomes nonexistent. The invitation to abuse, however, takes on the imprimatur of judicial approval, and "to the extent it is tolerated by the courts, it quite properly puts the legal system into disrepute." Berger & Kanner, *supra* at 735.

That the government would accept the invitation to abuse is clear by the amendments made subsequent to the decision in *Joint Ventures, Inc. "I"*. More amazing, however, is the government's admission that, notwithstanding the fact that the District Court of Appeal certified to this Court the question of whether the map of reservation provisions authorized an "impermissible taking of property without just compensation," it still determined to utilize the provisions, and filed maps of reservation for certain projects. Clearly, it did so in order to "milk" every last drop of advantage or "benefit" from the provisions before this Court could rule on the matter. It now comes to this Court claiming that it is unfair to make it pay for the burden it imposed upon a limited group of property owners. The government

has tried to excuse its risky behavior by citing the general principle that a legislative enactment is presumed valid. (Initial Brief, pp.21-22). That principle would carry some weight if the issue before this Court was the validity of the map of reservation provisions. But that is not the case. The provisions were judged invalid, literally years ago, as a violation of the compensation clauses of the federal and state constitutions. The government's feeble justification for its behavior could never override the fundamental constitutional principle that when a "taking" has been declared, compensation is required.

There is nothing of record to indicate that, prior to the filing of the map of reservation addressed in *Joint Ventures, Inc. "I"*, the government had filed any other such maps. In those cases where a judicial determination of a "taking" has been made, including the cause at hand, the maps were generally filed after *Joint Ventures, Inc. "I"*. Had the government merely waited for the final word from this Court, A.G.W.S. and Dundee would not be here today. The government's liability for compensation could have been limited to the *Joint Ventures, Inc.* parcel only. Since it chose instead to implement a statute, which this Court subsequently determined to be a "thinly veiled" scheme to acquire private property for public use, the government must pay for the burden imposed upon the "few" for the benefit of the public as a whole. No amount of wailing can relieve it from the consequences of its acts. The time has come to reap what it has sown.

CONCLUSION

The certified question presented to this Court should be answered in the affirmative, and the decision of the District Court of Appeal should be affirmed.

APPENDIX

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