IN THE SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

vs.

A.G.W.S. CORPORATION,

Respondent.
_____/ CASE NO.: 80,656

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

vs.

DUNDEE DEVELOPMENT GROUP,
a Florida General Partnership,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

THE TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY, the defendant below and petitioner here, will be referred to as the "EXPRESSWAY AUTHORITY". A.G.W.S. CORPORATION, a plaintiff below and respondent here, will be referred to as "A.G.W.S.". DUNDEE DEVELOPMENT GROUP, a plaintiff below and respondent here, will be referred to as "DUNDEE". STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, will be referred to at "FDOT".

Citations to the Appendix to this brief will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE

This appeal involves two consolidated cases. The procedural history for each is similar, but not identical. Accordingly, each case will be discussed separately below.

A.G.W.S.

A.G.W.S. initiated an inverse condemnation action by filing a complaint alleging that a map of reservation was filed by the EXPRESSWAY AUTHORITY which encompassed a portion of A.G.W.S.'s property and resulted in a "taking." (A 36-43) A.G.W.S. alleged several different types of takings theories in the complaint. (A 38-40) The complaint was amended to include the allegation that the property was subject to a mortgage. In response to the Amended Complaint, the EXPRESSWAY AUTHORITY filed a Motion to Dismiss and/or Strike the Amended Complaint arguing that paragraphs 7-12 of the Amended Complaint contained legal conclusions rather than plain statements of ultimate facts. (A 61-63) The Motion to Dismiss also argued that the mortgage holder should be named as a real party in interest in this suit. (A 62)

A.G.W.S. filed a Motion for Summary Judgment arguing that this Court's opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990) resolved the "taking" issue as a matter of law and A.G.W.S. is entitled to summary judgment on the "taking" issue. (A 64-67) After a hearing on A.G.W.S.'s Motion for Summary Judgment and the EXPRESSWAY

AUTHORITY's Motion to Dismiss, the trial court granted summary judgment on the "taking" issue and denied the Motion to Dismiss. (A 68-70) An appeal was timely taken to the Second District Court of Appeal.

DUNDEE

DUNDEE initiated an inverse condemnation action by filing a complaint alleging that a map of reservation was filed by the EXPRESSWAY AUTHORITY which encompassed a portion of DUNDEE's property and resulted in a "taking." (A 1-8) In response to the Complaint, the EXPRESSWAY AUTHORITY filed a Motion to Dismiss and/or Strike the Complaint arguing that paragraphs 7-13 of the Complaint contained legal conclusions rather than plain statements of ultimate facts. (A 18-19)

DUNDEE filed a Motion for Summary Judgment arguing that this Court's opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990) resolved the "taking" issue as a matter of law and DUNDEE is entitled to summary judgment on the "taking" issue. (A 20-22) The EXPRESSWAY AUTHORITY filed an Affidavit in Opposition to the Motion for Summary Judgment. (A 23-24) After a hearing on DUNDEE's Motion for Summary Judgment and the EXPRESSWAY AUTHORITY's Motion to Dismiss, the trial court granted summary judgment on the "taking" issue and denied the Motion to Dismiss. (A 33-35) An appeal was timely taken to the

Second District Court of Appeal.

The two appeals were consolidated in the Second District Court of Appeal. After a full briefing by the parties, the Second District Court of Appeal reviewed the cases without oral argument and entered its opinion affirming the finding of a taking, citing to the Fifth District Court of Appeal's decision in Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, LTD, 582 So.2d 790 (Fla. 5th DCA 1991) review denied. 591 So.2d 183 (Fla. 1991). (A 71-75)

The Second District also certified the following question to this Court:

> WHETHER ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, Case No.: 92-00065 Tampa-Hillsborough County Expressway Authority v. Dundee Development Group, Case No.: 91-03263. Consolidated (Fla. 2nd DCA September 23, 1992)[17 FLW D2232].

STATEMENT OF THE FACTS

The facts in these cases have not been fully developed due to the trial courts' granting of summary judgment soon after the cases were filed. The admissible evidence before the trial courts at the time of the hearing on the motion for summary judgement was: the certified deeds, mortgage, and maps of reservation attached to the unverified complaints, and the Affidavit in opposition to plaintiff's motion for summary judgment filed in DUNDEE. Again, each case will be discussed separately below.

A.G.W.S.

A.G.W.S. took title to 38.8 acres by warranty deed in September 1985. (A 44) On July 8, 1988, the EXPRESSWAY AUTHORITY filed a map of reservation pursuant to §337.241, Florida Statutes (1988) for the Northwest Expressway Project. (A 58-60) Attached to the complaint were certified copies of sheet number 14 and 15 of the map of reservation, which A.G.W.S. alleges encompassed portions of its property.

While A.G.W.S. made other factual allegations in the Amended Complaint, no evidence was presented by A.G.W.S. in support of its claim. On July 27, 1990, this Court's opinion in Joint Ventures became final, invalidating all maps of reservation filed pursuant to §337.241, Florida Statutes (1987).

DUNDEE

On May 9, 1988 DUNDEE took title to approximately 203 acres of land from Dundee Ranch, Inc.(A 9-11) An unauthenticated survey filed with the Complaint bears a preparation date of March 15, 1988 and shows a line labeled "proposed southerly right-of-way line Northwest Hillsborough Expressway," clipping a small corner of DUNDEE's parcel "B" in the upper left hand corner of the survey. (A 14) On July 8, 1988 the EXPRESSWAY AUTHORITY filed a map of reservation for the Northwest Hillsborough Expressway project, which DUNDEE alleges encompassed a portion of its property. Attached to the Complaint were certified copies of Sheets 1, 18 and 19 of the map of reservation.(A 15-17) On July 15, 1988, DUNDEE took title to Parcel "C" of its property, containing approximately 2.75 acres. (A 12-13)

The portion of DUNDEE's land reserved by the map of reservation was described as "...vacant improved, pasture lands currently used for agricultural purposes." (A 23) It is uncontroverted that neither the EXPRESSWAY AUTHORITY nor any of its agents physically took or possessed any of DUNDEE's property or denied DUNDEE "...its sole, continuous and exclusive occupancy and enjoyment of the property reserved by the Map of Reservation." (A 23-24)

SUMMARY OF ARGUMENT

The Legislature enacted the map of reservation statute as a planning tool. Numerous maps were filed pursuant to the presumptively valid statute. This Court found the statute facially unconstitutional for failing to substantially advance a legitimate state interest. Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990).("Joint Ventures II") All maps in the state were invalidated by the decision.

Subsequent to this Court's decision, numerous property owners have sought compensation for a temporary "taking" of their property during the effective dates of the invalidated maps of reservation. These cases fall into four distinct categories: cases involving property specifically exempted from the regulation of the statute; cases involving property already developed to its highest and best use; cases involving property with unknown development potential or plans; cases involving property that was in the process of being developed and the map of reservation proximately caused cessation of the development.

The District Courts of Appeal have construed this Court's Decision in Joint Ventures II as establishing a per se "taking" rule for all maps of reservation. To the contrary, no case in regulatory takings jurisprudence (including Joint Ventures II) has adopted a per se rule of compensation for cases where the regulation is stricken for failing to substantially advance a

legitimate state interest. A per se approach is only applied in cases of a physical invasion or denial of all economically viable use.

Neither this Court's jurisprudence nor the United States Supreme Court's jurisprudence supports a per se rule for map of reservation cases. No other federal or state jurisprudence supports such a rule.

The Fifth District overshot the mark in its attempt to fashion a remedy for unconstitutional maps of reservation. The court, in Orlando/Orange County Expressway Authority v. W. & F. Agrigrowth, 582 So.2d 790 (5th DCA), review denied, 591 So.2d 183 (Fla. 1991), established a per se rule of law which holds that the mere filing of a map of reservation constitutes a "temporary taking" of any property covered by that map of reservation. This is true, under W & F Agrigrowth, regardless of whether the damages caused by the taking are large, small, or non-existent. In other words, the filing of a map of reservation is synonymous with "taking of property."

The per se rule of W & F Agrigrowth is an irrebuttable or conclusive presumption of a "taking." Irrebuttable presumptions are constitutionally disfavored because they preclude individualized determinations of the facts upon which substantial rights or obligations may depend. These presumptions operate to deny the party against whom they are directed a fair opportunity to

rebut them.

Consequently, in the instant cases, the irrebuttable presumption of a "taking" closed the courtroom door in the EXPRESSWAY AUTHORITY's face when the question of liability was being considered. The operation of this rule deprived the EXPRESSWAY AUTHORITY of its rights under the Due Process and Equal Protection Clauses of both the Federal and Florida State Constitutions to fairly present evidence in its own defense. Furthermore, the enforcement of such a rule of absolute liability effectively denied the Appellant the right to full access to the courts as guaranteed by Article I, Section 21 of the Florida Constitution.

A case by case analysis of map of reservation cases balances the competing interests of individual rights and our democratic form of government. Such an analysis allows both parties their day in court. Property owners whose property was exempted from regulation or already developed to its highest and best use would not be awarded compensation. Property owners whose property was in the process of being developed and the map of reservation proximately caused a temporary cessation of development will be provided compensation. The state's constitutional rights to due process and access to the courts will be preserved. The state's interest in avoiding unproductive litigation will be honored without infringing on a property owner's constitutional rights.

The decision of the Second District Court of Appeal should be quashed and the cases remanded with instructions that a property owner is only entitled to a ruling that a taking has occurred when he has proven by competent substantial evidence that the affect of the map of reservation was to deprive him of substantial economic use of his property as a whole.

ARGUMENT

WHETHER ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED TO RECEIVE PER SE DECLARATIONS OF "TAKING" AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

I. INTRODUCTION.

In the early 1980's, the Florida Legislature provided FDOT with a planning tool for future highway construction by enacting the map of reservation statute codified at §337.241, Florida Statutes (1985). The statute allowed FDOT to file a map in the public records that delineated future transportation corridors. Upon the filing of a map, local governments were prohibited from issuing development orders for construction within the boundaries of the designated corridor for a period of five years. §337.241(2), Florida Statutes (1985). The map was effective for five years, unless withdrawn. The statute had an administrative challenge provision. §337.241(3), Florida Statutes (1985).

Even in its earliest form, the map of reservation statute provided for two exemptions from its restrictions, renovations of existing commercial structures of less than 20% of the appraised value of the structure and renovation or improvement of existing residential structures as long as they are used as private residences. §337.241(2), Florida Statutes (1985).

In 1985, the legislature amended the map of reservation statute to allow expressway authorities created under Chapter 348 to file maps of reservation. Chapter 85-149, §2, Laws of Florida. After numerous maps were filed by both FDOT and the Expressway Authorities pursuant to the statute, this Court addressed the facial constitutionality of the statute in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990). ("Joint Ventures II")

This Court found the map of reservation statute to be unconstitutional:

> We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal. Here, the means are not consistent with the constitution.

Id. at 626. This Court held that the map of reservation statute constituted an exercise of the state's police power "with a mind toward property acquisition." Id. at 627. Joint Ventures II had the affect of voiding all maps of reservation filed in the State of Florida as of July 27, 1990, the date this Court's opinion became final.[1] The opinion did not discuss the statutory exemptions.

Subsequent to this Court's opinion in Joint Ventures II, numerous property owners have filed inverse condemnation claims

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[1] The legislature has recently repealed the map of reservation statute. Chapter 92-152, §108, Laws of Florida.

against the FDOT and Expressway Authorities based upon invalidated maps of reservation. The first appellate case addressing an inverse condemnation compensation claim based on Joint Ventures II, was Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, LTD, 582 So.2d 790 (5th DCA), review denied 591 So.2d 183 (Fla. 1991). W & F Agrigrowth has been interpreted as holding that Joint Ventures II entitles every property owner to a jury trial on compensation, regardless of the amount of damages. Other appellate cases subsequent to W & F Agrigrowth have followed W & F Agrigrowth without any independent analysis in the opinion. Seminole County Expressway Authority v. Bullet, 595 So.2d 105 (Fla. 5th DCA 1992)[affirming the trial court's granting of summary judgment for a "taking" of residential property[2]]; Orlando/Orange County Expressway Authority v. West 50 LTD., 591 So.2d 682 (Fla. 5th DCA 1992); Orlando/Orange County Expressway Authority v. West Orange Nurseries, 590 So.2d 1129 (Fla. 5th DCA 1992); and, Orlando/Orange County Expressway Authority v. Orange North Associates, 590 So.2d 1099, 1100 (Fla. 5th DCA 1991); ["Whether any damages flowed from the taking in the instant case, thus entitling compensation to be awarded to the landowner, is to be determined by a jury."].

The suits filed in these two cases are representative of the inverse condemnation claims made in the suits arising from Joint

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[2] Petitioner has filed a Request to Take Judicial Notice of the briefs filed in the Fifth District Court of Appeal contemporaneously with this Initial Brief.

Ventures II. The claim is simply that (1) this Court found in Joint Ventures II that a "taking" had occurred, (2) a map of reservation touched their property, therefore they are entitled to compensation. This argument has been successfully made in both of these cases and the property owner has not been required to prove anything further prior to the trial court finding that a "taking" has occurred and ordering a jury trial on valuation. Such an interpretation of this Court's opinion in Joint Ventures II is an unwarranted extension of regulatory takings jurisprudence and exposes the state to payment of unnecessary attorneys fees and costs.

This Court addressed a facial challenge to the statute in Joint Ventures II. The cases being filed now are claiming compensation for the effect a map had on their property as it was applied to their property. These "as applied" map of reservation cases fall into four distinct categories. The first type are ones where the property is used as a residence or is developed commercially and the proposed renovation does not exceed 20% of the appraised value of the structure. These are the uses exempted from regulation by the statute. A second category is property that was developed to its highest and best use prior to the filing of a map of reservation.

The third type of case is the type in which these two cases on appeal fall. In this type of case, the area of the property encompassed by the map of reservation is, at this time, unknown and

the current use of the property has not been proven. In addition, it has not been determined whether the property owner had any verifiable intent and capacity to develop or whether the map of reservation actually frustrated the property owner's actual attempts at development.

The fourth and final category of cases are the situations where the map of reservation covers a substantial portion of the vacant property that was in the process of being developed and the property owner can prove by competent substantial evidence that his attempts to develop the property were actually frustrated by the filing of the map of reservation.

The property owners in these inverse condemnation cases allege that they own property, a portion of which was encompassed within an invalidated map of reservation. The property owners argue that this Court's ruling in Joint Ventures II entitles them to an automatic finding that a "taking" of their property occurred during the effective dates of the map of reservation without any further inquiry, and that they are then entitled to a jury trial to determine damages, whether substantial or nominal.

The property owner's interpretation of Joint Ventures II not only violates the express holding of Joint Ventures II but is wholly unsupported by regulatory takings caselaw from any state or federal jurisdiction. No court, including this Court and the United States Supreme Court has adopted a per se entitlement to

compensation for regulations invalidated for failing to substantially advance a legitimate state interest. "A use restriction which fails to substantially advance a legitimate state interest may result in a "taking." Joint Ventures II, 563 So.2d at 625, footnote 9. [emphasis supplied] "...[A] use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose...." Penn Central, 438 U.S. at 127 [emphasis supplied].

II. NO COURT HAS ADOPTED A PER SE ENTITLEMENT TO COMPENSATION RULE FOR REGULATORY TAKINGS THAT FAIL TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

A. THIS COURT IN JOINT VENTURES II DID NOT ADOPT A PER SE ENTITLEMENT TO COMPENSATION.

A reading of the majority opinion in Joint Ventures II indicates that the Court was not dealing with a claim for compensation. This Court specifically stated it was not addressing a claim for compensation, but focused its analysis on a constitutional challenge to the statutory mechanism. Joint Ventures II, 563 So.2d at 625. Because this Court expressly did not rule on the question of compensation for the property owner in Joint Ventures II, this Court's ruling in Joint Ventures II should not be stare decisis (or any other form of controlling precedent) that every property owner is entitled to compensation.

Counsel for A.G.W.S. and DUNDEE have argued that even though this Court did not deal with compensation in Joint Ventures II,

this Court did find in Joint Ventures II that a "taking" occurred, and because the takings clause is "self executing," everyone whose property was touched by a map of reservation is entitled to compensation. While A.G.W.S. and DUNDEE have cited to various cases containing broad statements that compensation is required when a "taking" is found, A.G.W.S. and DUNDEE have not cited to one case which awards compensation to a property owner solely on the basis that the regulation is facially unconstitutional for failing to substantially advance a legitimate state interest.

Every case in regulatory takings jurisprudence that awards compensation to a property owner analyzes the extent of deprivation of economic use caused by the regulation prior to awarding compensation. That is precisely the standard enunciated by this Court in Joint Ventures II when a property owner claims entitlement to compensation:

> 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. In effect, this deprivation has been deemed a "taking.". . . 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 the economic use.

Joint Ventures II, 563 So.2d at 625 [citations omitted].

In Joint Ventures II the map filed by the Florida Department of Transportation (FDOT) covered 6.49 acres of an 8.3 acre vacant

parcel owned by Joint Ventures, Inc. Joint Ventures II, at 623. Joint Ventures challenged FDOT's action in an administrative hearing and FDOT's action was upheld. Id. at 624. Joint Ventures appealed the Final Order to the First District Court of Appeal, which found the map of reservation statute constitutional but certified the question to this Court. Joint Ventures, Inc. v. Department of Transportation, 519 So.2d 1069 (Fla. 1st DCA 1988)("Joint Ventures I").

The maps of reservation in this case were filed after the First District Court of Appeal upheld the statute's constitutionality. While the Joint Ventures appeal was pending in the First District Court of Appeal, FDOT initiated condemnation proceedings against Joint Ventures for the parcel and Joint Ventures filed a counterclaim seeking compensation for a "taking" of its property. Joint Ventures I, 519 So.2d at 1069. The eminent domain action and the counterclaim resulted in a monetary settlement between the parties. Id. Therefore, the issue before this Court in Joint Ventures II was not whether Joint Ventures was entitled to compensation, but whether the statute was facially unconstitutional for failing to advance a legitimate state interest: "Here, however, we do not deal with a claim for compensation, but with a constitutional challenge to the statutory mechanism." Joint Ventures II, 563 So.2d at 625.

The current rule of law that individual property owners are not entitled to compensation when a regulation under the police

power is invalidated for failure to substantially advance a legitimate state interest has a long, well documented history. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed 322 (1922) [cited with approval in the majority opinion in Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. _____, 120 L.Ed.2d 798, 814 (1992)].[3]

Every case which finds a regulation facially unconstitutional for failing to substantially advance a legitimate state interest

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[3] Prior to the United States Supreme Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), there was some question whether the government was obligated to pay a property owner compensation for a temporary denial of all use of the property owner's property. The United States Supreme Court answered the question as follows:

> We merely hold that where the government's activities have already worked a "taking" of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id., at 321. A.G.W.S. and DUNDEE would have this Court and the courts of Florida extend the United States Supreme Court's holding to require that any invalidation of a police power regulation entitles the property owner to compensation regardless of the effect the regulation had on the use of the owner's property. Such an unwarranted extension of the law would have a serious impact on both the fiscal health of governmental entities and the legislature's ability to fashion laws for the public good. In fact, "government would hardly go on" if the agencies implementing the legislature's enactments were faced with the possibility that any statute declared facially unconstitutional would expose the agency to suits for compensation by every person or entity affected by the regulation.

provides as a remedy to the property owner the striking down of the regulation. No case has awarded compensation.

B. THIS COURT'S PRIOR REGULATORY TAKINGS JURISPRUDENCE DID NOT ADOPT A PER SE ENTITLEMENT TO COMPENSATION WHEN A REGULATION IS INVALIDATED FOR FAILING TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

In cases where this Court has upheld a facial challenge to a regulation for failing to substantially advance a legitimate state interest, this Court has consistently provided the remedy of invalidating the regulation. Burritt v. Harris, 172 So.2d 820 (Fla. 1965); Alford v. Finch, 155 So.2d 790 (Fla. 1963).[4]

The restriction imposed by a map of reservation is analogous to zoning restrictions on the use of property. This Court has clearly stated that the remedy for a confiscatory zoning ordinance is striking the regulation. Dade County v. National Bulk Carrier, Inc., 450 So.2d 213, 216 (Fla. 1984).[5]

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[4] Counsel for A.G.W.S. and DUNDEE may attempt to distinguish Alford and Burritt by arguing the property owner in those cases didn't seek compensation but sought an injunction or a declaratory remedy. That distinction is without a difference because invalidation is precisely what was sought by the property owner in Joint Ventures II, not compensation.

[5] The importance of this Court deciding this case on the merits is underscored by the fact the United States District Court for the Northern District of Florida has suggested that Joint Ventures II, "silently discarded the central ruling of National Bulk Carriers." Villas of Lake Jackson, Ltd. v. Leon County, 796 F.Supp. 1477, 1483 (N.D.Fla. 1992).

This Court has addressed another analogous situation in which a truck owner sought damages under an inverse condemnation theory for the seizure of its truck by the state. In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So.2d 261 (Fla. 1990). In the Kenworth Tractor Trailer case, the truck was seized pursuant to the forfeiture statute and a trial court later ordered the truck returned to the owner. The truck was not returned to the owner for two years after the trial court's order. Id. at 263. This Court reiterated the rule that the State is not liable for damages during the time it has seized property when acting "upon probable cause and in good faith," but directed that damages for inverse condemnation be paid during the time the truck was wrongfully detained after a court had ordered the vehicle returned. Id. at 262-263. Quoting from Justice Erlich's specially concurring opinion in Wheeler v. Corbin, 546 So.2d 723 (Fla. 1988), the Court noted that the state cannot be held liable for the deprivation of liberty inherent in detention following an arrest or the loss of use of property when seized upon probable cause and in good faith. Holding the state liable for these types of deprivations "would be detrimental to the public interest, since public officers would be discouraged from performing their duties conscientiously." Id. at 260.

Every legislative enactment is presumed valid: "It is an apodictic aphorism that acts of the legislature are presumptively valid." Village of North Palm Beach v. Mason, 167 So.2d 721, 727, n.2 (Fla. 1964). To hold the state liable for every map of

reservation that was filed under the presumptively valid map of reservation statute would be equally detrimental to the public interest and would discourage public officers from performing their duties conscientiously. Every map of reservation filed in the State of Florida was filed pursuant to a presumptively valid statute. The maps of reservation in these cases were filed in the public records some five months after the statute was found to be constitutional by the First District Court of Appeal. Joint Ventures I, 519 So.2d at 1072. Had the EXPRESSWAY AUTHORITY attempted to enforce the maps of reservation after this Court had declared them invalid, then any affected property owner would be entitled to compensation for a "taking" just as the owner of the truck in Kenworth Tractor Trailer. However, since the maps of reservation were filed pursuant to a presumptively valid statute, no compensation should be required unless it can be proven that the regulation deprived the owner of substantial economic use of the property.

Counsel for A.G.W.S. and DUNDEE may argue in their Answer Brief that this Court has held that once a "taking" is established, compensation must be paid, citing to Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988) cert. denied 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). In Mid-Florida Growers, the Department of Agriculture and Consumer Services burned 281, 474 healthy citrus trees. Id. at 102. No one can argue that the Department of Agriculture's action of destroying the healthy citrus trees had the effect "so complete as to deprive

the owner of all or most of his interest in the subject matter, [thereby]...amount[ing] to a taking." Id. at 103[6] [quoting from United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359-60, 89 L.Ed.2d 311 (1945)].

As opposed to a per se approach in "physical invasion" cases, this Court has adopted a case by case approach in regulatory takings cases, listing several factors to be considered. Graham v. Estuary Properties, Inc., 399 So.2d 1374, 1380 (Fla.1981), cert. denied, Taylor v. Graham, 454 US 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981).

C. THE UNITED STATES SUPREME COURT HAS NEVER AWARDED COMPENSATION UNDER A PER SE RULE SIMPLY BECAUSE THE REGULATION FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

A.G.W.S. and DUNDEE have asserted that "the concept of a taking without the opportunity to claim compensation is abhorrent

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[6] In another "physical invasion" case, regulatory "takings" were described as follows:

> However a 'taking' also occurs under the police power when state regulation of private property results in a substantial deprivation of the beneficial use of the property. The test is not merely whether the state acts under the police power, but whether the regulation 'goes too far' so that the deprivation of economic use or diminution of property value 'reaches a certain magnitude!

Department of Agriculture & Consumer Serv. v. Polk, 568 So.2d 35, 48 (Fla.1990)(Barkett, J., concurring specially.).

to the constitution." (DUNDEE's Answer Brief in the Second District Court of Appeal, pg. 7) If such is true, then the United States Supreme Court case heavily relied upon by A.G.W.S. and DUNDEE of Nollan v. California Costal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) is itself "abhorrent to the constitution." Like this Court in Joint Ventures II, the Court in Nollan found that the regulation challenged had the purpose of "avoidance of the compensation requirement rather than the stated police power objective." Nollan, 483 U.S. at 841. The Court held that the regulation did not advance a legitimate state interest. Id. at 837. Even with this finding, the United States Supreme Court did not award the Nollans compensation, but struck the regulation and ruled that if the government wanted the property interest "it must pay for it." Id. at 842. If, as A.G.W.S. and DUNDEE argue, a property owner is entitled to compensation even under the "non-economic test" of Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), then the United States Supreme Court itself was incorrect in not awarding compensation to the Nollans. It is respectfully submitted that the EXPRESSWAY AUTHORITY's position is a correct interpretation of the state of the law of regulatory takings and A.G.W.S. and DUNDEE's attempts to extend regulatory takings jurisprudence well beyond any current state of the law should be rejected.

Every property owner with similar restrictions to the one in Nollan that has sought compensation has been unsuccessful for various reasons. California Costal Commission v. Superior Court,

210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.Ct.App. 1989) [barred by res judicata]; Antoine v. California Costal Commission, 8 Cal.App. 4th 641, 10 Cal.Rptr.2d 471 (Cal.Ct.App., 1992) [condition permissible if sea wall encroaches on public land]. See also Patrick Media Group, Inc. v. California Costal Commission, 9 Cal. App.4th 592, 11 Cal.Rptr.2d 824 (Cal.Ct.App. 1992) [inverse condemnation action for compelled removal of billboards barred by res judicata].

In Agins, the United State Supreme Court cited to Nectow v. Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed 842 (1928) as an example of a case finding a "taking" by a regulation that does not substantially advance a legitimate state interest. Agins, 447 U.S. at 260. In Nectow, the remedy provided the property owner was a modification of the regulation, not compensation.

The United States Supreme Court has adopted a per se entitlement to compensation only when there is a physical invasion of the property or when the property owner has been denied all beneficial use of the property. Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. _____, 120 L.Ed.2d 798, 814 (1992). Every other case is decided on a case by case basis: "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in...essentially ad hoc,

factual inquires....'" Id., at 812.[7]

D. NO OTHER JURISDICTION HAS EVER AWARDED COMPENSATION UNDER A PER SE RULE SIMPLY BECAUSE THE REGULATION FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

The regulatory takings jurisprudence of the federal circuit encompassing Florida is consistent with this Court's and the United States Supreme Court's holdings. "If the regulation does not substantially advance a legitimate state interest, it can be declared invalid." Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir. 1992). A just compensation claim does not seek invalidation of the regulation, but seeks monetary compensation. Id. "Just compensation claims admit and assume that the subject regulation substantially advances a legitimate state interest...the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of its property." Id. at 1136. In resolving the issue of whether the property owner has been denied all or substantially all economically viable use, "the fact finder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations." Id.

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[7] In a case subsequent to W. & F. Agrigrowth, the Fifth District Court of Appeal correctly cited to this standard. Vatalaro v. Department of Environmental Regulation, 601 So.2d 1223, 1228 (Fla.5th DCA 1992) ["The inquiry into whether a taking has occurred is done on a case by case basis."]

A facial challenge to a regulation as an invalid exercise of the police power has as its remedy the striking down of the regulation. Eide v. Sarasota County, 908 F.2d 716, 721-722 (11th Cir. 1990), cert denied ____ U.S. ____, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). Two reasons have been advanced for the rule of law that successful facial challenges to a regulation as an invalid exercise of the police power results in invalidation of the regulation rather than compensation. First, compensation claims admit and assume that the regulation is valid. Reahard, 968 F.2d at 1136. Second, a facial challenge to a regulation as an invalid exercise of the police power has a broader benefit to the society rather than to a particular property owner:

> Consistent with the view that facial challenges are allowed primarily for the benefit of society, rather than for the benefit of the litigant, a victory by the plaintiff in such cases normally results in an injunction or a declaratory judgment, which serves the broad societal purpose of striking an unconstitutional statute from the books.

Weissman v. Fruchtman, 700 F.Supp. 746, 753 (S.D.N.Y. 1988). The broad societal purpose is borne out by the remedy awarded by this Court in Joint Ventures II. Once the map of reservation statute was determined to be an invalid exercise of the police power, the statute was declared unconstitutional and was invalidated. Every property owner affected by a map of reservation was freed from any restrictions imposed by the invalidated maps of reservation. If the property owner wants compensation for the affect of the invalidated map on his property, the question of whether any particular property owner is entitled to compensation for the

period the maps were in effect should be decided on a case by case basis by inquiring into the extent of deprivation of economic use. Joint Ventures II, 563 So.2d at 625; Reahard, 968 F.2d at 1136.

These cases are in a similar posture to the case of Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989), cert. denied 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990). The California courts had declared invalid a conditional variance that required part of Moore's property be deeded to the City of Costa Mesa. Id. at 261. Moore filed a federal suit claiming that he was entitled to compensation for the partial temporary taking caused by the previously invalidated conditional variance. The 9th Circuit Court of Appeals affirmed the District Court's dismissal with prejudice of Moore's complaint for failure to state a claim. The appeals court held that Moore must allege and prove that he was denied all use of his property prior to being awarded compensation. Id., at 263. The Court held "his allegations are insufficient to state a claim for unconstitutional regulatory taking for which compensation is due, and there is no case law that supports his position." Id. at 264.

A similar claim was rejected in the California state courts in Ellison v. County of Ventura, 217 Cal.App.3rd 455, 463, 265 Cal.Rptr. 795 (Cal.Ct.App. 1990). In Ellison, the court rejected the landowner's argument that if he proves the regulation fails to substantially advance a legitimate state interest then he is entitled to compensation. The Court ruled "that in order to show

the government has taken private property by a regulation which does not substantially advance a legitimate state interest, the landowner must show more than the invalidity of the government's action. The landowner must also show that something of value was taken." Id., 265 Cal.Rptr. at 799. The Court rejected Ellison's claim for compensation, noting that Ellison conceded that the regulation had not deprived him of all beneficial uses of the property. Id., at 797.

III. A CASE BY CASE ANALYSIS WILL PROTECT BOTH PARTIES' CONSTITUTIONAL RIGHTS AND WILL STRIKE A PROPER BALANCE BETWEEN THE COMPETING INTERESTS OF INDIVIDUAL RIGHTS AND OUR DEMOCRATIC FORM OF GOVERNMENT.

A. A PER SE RULE CREATES AN IRREBUTTABLE PRESUMPTION WHICH VIOLATES THE EXPRESSWAY AUTHORITY'S CONSTITUTIONAL RIGHTS.

The adoption of a per se taking rule in cases where the regulation is invalidated for failing to substantially advance a legitimate state interest will be the equivalent of holding that the EXPRESSWAY AUTHORITY is not entitled to the same due process of law, the same equal protection of the law, and the same access to the courts constitutionally guaranteed to every other litigant in the State of Florida.

In the instant case, the Second District affirmed per curiam the trial court's ruling on the authority of the Fifth District's decision in W & F Agrigrowth, 582 So.2d 790. W & F Agrigrowth

established a per se rule of law which holds that the mere filing of a map of reservation constitutes a taking of property by the state. That holding impermissibly extinguishes the Appellant's constitutional right under the Due Process Clause of Fourteenth Amendment and Article I, Section 9 of the Florida Constitution to controvert the presumption of a "taking" in map of reservation litigation.

Furthermore, by denying the Appellant the opportunity to be heard in opposition to the alleged "taking," the lower courts have deprived the Appellant of its constitutional right to access to the courts as guaranteed by Article I, Section 21 of the Florida Constitution.

Yet further, by establishing its per se rule, the Fifth District has arrogated to itself a power that this Court has said the judiciary does not possess. This Court has long held that substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by the courts. State v. Furen, 118 So.2d 6, 12 (Fla. 1960).

The EXPRESSWAY AUTHORITY not only has a constitutional right to access to the courts, but a substantive statutory right as well. Section 348.54(1), Florida Statutes (1991), which deals with the powers of the this EXPRESSWAY AUTHORITY, provides that "the authority shall have the power: (1) To sue and be sued, implead and be impleaded, complain and defend, in all courts."

The rule announced in W & F Agrigrowth not only extinguished the EXPRESSWAY AUTHORITY's constitutional and statutory rights to defend itself in court, but appropriates to itself a power that the judiciary does not possess: the power to diminish the substantive rights conferred upon the EXPRESSWAY AUTHORITY. Courts should not by ipse dixit fashion remedies that extinguish substantive and procedural rights guaranteed by the constitution and by statute.

The court in W & F Agrigrowth has established through judicial pronouncement a per se rule of law which would not be permitted to stand if passed by the legislature. Neither should this rule be permitted to stand because it was created by an appellate court.

In its effort to fashion a remedy for the recording of unconstitutional maps of reservation, the Fifth District, painting with the broadest of brush strokes, established an irrebuttable presumption of a "taking" regardless of the facts relating to the individual properties involved. The court erred in so doing. Whether judicially created or statutorily created, the law is well settled that irrebuttable or conclusive presumptions are constitutionally infirm. City of Coral Gables v. Brasher, 120 So.2d 5 (Fla. 1960).

"In its simplest form a presumption is an inference permitted or required by law of the existence of one fact, which is unknown or which cannot be proved, from another fact which has been proved. The fact presumed may be based on a very strong probability, a weak

supposition or an arbitrary assumption." United States v. Gainey, 380 US 63, 78, 13 L Ed.2d 658, 667, 85 S.Ct. 754 (1973)(Black, J. Dissenting).

"A presumption is an assumption of fact which the law makes from the existence of another fact or group of facts. §90.301(1), Florida Statutes (1987). A presumption is typically an evidentiary tool which compels a trier of fact to find the truth of an ultimate fact which is only supported circumstantially by evidence of predicate facts and which is not satisfactorily rebutted by the opposing party's evidence." Tomlinson v. Dept. of Health & Rehab. Services, 558 So.2d 62, 66 (Fla. 2d DCA 1990). When a court employs these types of presumptions, the trier of fact is permitted, but not required, to accept the existence of the presumed fact even in the absence of evidence to the contrary. And, of course, the opposing party is permitted to rebut the presumption with countervailing evidence of its own.

On the other hand, an irrebuttable or conclusive presumption relieves the party in whose favor the presumption operates of its burden of persuasion by removing the presumed element from the case entirely if that party proves the predicate facts. These irrebuttable presumptions operate as granite rules of law which no amount of refuting proof will budge. When fact A is proven, fact B must be taken as true.

It is axiomatic that the fundamental requisite of due process

of law is the opportunity to be heard. Yet, a defendant confronted by such an irrebuttable presumption will not even be given the opportunity to be heard in rebuttal. For all practical purposes, the defendant is barred from the courthouse when the issue of liability is presented to the court. Once the plaintiff produces evidence sufficient to establish the basic predicate fact, the defendant is then precluded from offering evidence to negate the presumption flowing from that fact. See State ex rel. Boyd v. Green, 355 So.2d 789 (Fla.1978).

In cases such as the ones sub judice, all that the plaintiff has been required to do is prove that a map of reservation touched even one square inch of his property (the predicate fact) to prove that his property has been "taken" (the presumed element). Whether the map touching the property was in effect for two years or two days is of no consequence to the outcome. Since the W & F Agrigrowth presumption is conclusive as against the EXPRESSWAY AUTHORITY, the EXPRESSWAY AUTHORITY is powerless to defend itself by rebutting the presumption in a fair manner. The rule of W & F Agrigrowth denies the EXPRESSWAY AUTHORITY full access to the courts and is an impermissible abridgment of due process and equal protection of law.

"The test for the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. [citations omitted] Second, there must be a right to rebut in a fair manner. [citations

omitted]" Straughn v. K. & K. Land Management, Inc., 326 So.2d 421, 424 (Fla.1976). The per se rule of W & F Agrigrowth fails both parts of the test.

First, under the legal definition of "taking," which will be discussed below, there is no rational connection between the fact proven (i.e., a map of reservation touched a landowner's property) and the ultimate fact presumed (i.e., that the property had, therefore, been "taken").

For instance, in a situation where a map of reservation crossed an infinitesimally small portion of a landowner's property, (say the one square inch mentioned above) for a short period of time (e.g., two days) the legal definition of "taking" has not been met. Yet, under W & F Agrigrowth, the irrebuttable presumption is that even in such a de minimis circumstance there was a "taking" for purposes of inverse condemnation. This just does not make sense.

The real "problem" here, from the point of view of the EXPRESSWAY AUTHORITY, (and from every other state agency that has filed maps of reservation) is that the Plaintiffs in such lawsuits are entitled to payment of all attorney's fees and all costs associated with such litigation regardless of actual damages (if any) proven. The state is obligated to pay these costs notwithstanding the underlying merits of the case and, again, regardless of actual damages (if any) proven.

The W & F Agrigrowth rule, as Judge Altenbernd implied in his dissent, amounts to a full employment act for attorneys. As is widely known, attorneys' fees in eminent domain cases are among the highest in the state, regardless of the results the property owner's attorneys obtain in court. It is not unusual for attorney's fees in these cases to exceed the damages to a landowner's property by many thousands of dollars.

Consequently, the enormous incentive to bring "nuisance suits" (to borrow from the insurance defense bar) occasioned by the W & F Agrigrowth Rule is almost irresistible. To permit a rule to stand which encourages such suits surely cannot be sound public policy.

Secondly, the irrebuttable presumption of a "taking" set forth in W & F. Agrigrowth, even concerning such nominal intrusions as in the examples mentioned above, is just that, irrebuttable. The rule precludes any right to rebut in a fair manner.

"Daniel Webster most aptly said 'Due process of law means a law which hears before it condemns which proceeds upon inquiry and renders judgment after trial.'" Wilson v. Pest Control Commission of Florida, 199 So.2d 777, 780 (Fla. 4th DCA 1967). The irrebuttable presumption created by the W & F Agrigrowth rule is a law which does not hear before it inversely condemns and precludes inquiry at trial!

The application of irrebuttable presumptions in civil

proceedings such as the one sub judice, is to all but transform those proceedings into hearings on damages. Questions of liability have been disposed of by the presumption.

Irrebuttable presumptions, which are neither necessarily nor universally true, are disfavored under both the Fifth and Fourteenth Amendments, because they preclude individualized determinations of the facts upon which substantial rights or obligations may depend. "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S. 441, 446, 37 L.Ed.2d 63, 93 S Ct. 2230 (1973). "...[A] statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." Id.

From the point of view of a defendant foreclosed from fairly rebutting such presumptions, it makes little difference whether the irrebuttable presumption arrives in the form of a statute, an ordinance, a policy, an administrative regulation, or a common law rule. The result remains the same: the defendant is denied its rights to full access to the courts, to the equal protection and to due process of law.

The Fifth District's reliance on Joint Ventures II to fashion a remedy in W & F Agrigrowth is misplaced. There is nothing in Joint Ventures II that justifies the court's conclusion in W & F

Agrigrowth that the mere filing of a map of reservation is synonymous with a "taking" of property. This Court's holding in Joint Ventures II was merely that maps of reservation are unconstitutional because they permit the state to take land without just compensation and fail to provide an adequate remedy for the taking. The question still remains open whether in individual cases there has, in fact, actually been a "taking."

Undoubtedly, some of the hundreds of landowners whose property fell within the boundaries of the maps of reservation will be able to meet the legal definition of a taking. All, however, will be entitled to their day in court to claim damages for their "temporary taking," even if those damages were nominal or nonexistent.

The EXPRESSWAY AUTHORITY, on the other hand, will not be so fortunate. If a per se rule is adopted by this Court, the EXPRESSWAY AUTHORITY will be compelled to sit silently to one side while the line of plaintiffs whose properties lie along the length of the EXPRESSWAY AUTHORITY's right of way take advantage of the windfall bestowed upon them by the per se declaration of taking mandated by W & F Agrigrowth. This surely cannot have been the public policy intent of Joint Ventures II! "Due process requires that no one shall be personally bound until he has had his 'day in court."' Scholastic Systems, Inc., v. LeLoup, 307 So.2d 166, 169 (Fla.1974). This EXPRESSWAY AUTHORITY has not had its day in court because cases involving entirely different parties (Joint

Ventures II and W & F Agrigrowth) have been interpreted to preclude the EXPRESSWAY AUTHORITY's day in court.

If the per se rule of W & F Agrigrowth is permitted to remain the law in Florida, every one of the thousands of parcels of property reserved throughout the State under a map of reservation, without exception, has already been "temporarily taken." The adverse financial consequences of such a holding on the already overburdened State treasury are incalculable.

The EXPRESSWAY AUTHORITY would be the very first to acknowledge that if a landowner has truly has been deprived of substantial economic benefit by a map of reservation, then he should be fully compensated for the loss. If, on the other hand, he has not, the EXPRESSWAY AUTHORITY should not be precluded from defending itself against such claims by an irrebuttable presumption. All that the EXPRESSWAY AUTHORITY asks of this court is that it be granted the same due process rights and access to the courts enjoyed by every other litigant in Florida to defend itself.

B. A CASE BY CASE RULE BALANCES THE COMPETING INTERESTS OF INDIVIDUAL RIGHTS AND OUR DEMOCRATIC FORM OF GOVERNMENT AND PRESERVES BOTH INTERESTS.

As argued under Section II of this brief, both this Court and the United States Supreme Court have preferred a case by case analysis in determining whether a property owner is entitled to compensation for a "taking." Neither has adopted a per se

entitlement to compensation rule. A case by case approach balances the competing interests of the private property owner and the state and infringes upon the constitutional rights of neither.[8] The reasonableness of the case by case approach is borne out by an analysis of the four categories listed previously (see pp. 14-15).

The first category are those properties which fall within the exemptions of the statue: used primarily as a residence or developed commercially and the proposed renovation does not exceed 20% of the appraised value. A per se rule has been held to require compensation even in these cases. Bullet 595 So.2d at 105. Under a case by case analysis, these property owners would not be entitled to compensation because the exemption operates to remove their property from the affects of the regulation.

The second category is property that was developed to its

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[8] Regulatory takings jurisprudence is in a state of flux because of the two competing irreconcilable interests involved. One commentator has characterized the regulatory takings debate as follows:

> A dialectic swirling around a contradiction that unsuccessfully attempted to reach a synthesis of the conflict posed by the necessity of maintaining an economic system committed to the institution of private property, on the one hand, and a system of government committed to values of democracy and popular sovereignty on the other.

Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem, 62 University of Colorado Law Review 599, 606 (1991).

highest and best use prior to the filing of the map of reservation. Under a per se rule, the property owner would be entitled to a finding of a "taking" and a jury trial to determine valuation even though there were no development rights to "take" because they had been fully utilized by the property owner. Under a case by case analysis, because the development rights in the parcel were already fully utilized by the property owner, there is no property interest for the map of reservation restriction to "take" and compensation should not be awarded.

The fourth category of cases are the situations where a map of reservation covers a substantial portion of the vacant property that was in the process of being developed and the property owner can prove by competent substantial evidence that his attempts to develop the property were actually frustrated by the filing of the map of reservation. Under a per se rule, the property owner need not prove any of these facts prior to being awarded compensation. A case by case analysis would provide compensation to these property owners and the judicial inquiry into the extent of interference prior to finding a "taking" would serve as a check point to verify the property owner's bona fide intent, capacity, and progress to develop his property.

These two cases serve as an example of the application of per se rule to cases under category three. At this stage in these cases, it is not proven whether either property owner had either the plans or the ability to develop their property. It is unknown

whether the property is even developable because of topography, configuration, or other valid land use regulations. If the property is undevelopable for some independent, valid reason, a per se approach could result in a windfall to the property owner by paying for a non-existent right.

A case by case analysis of category three cases does not bar recovery by the property owner. It looks at the facts of each case to determine whether the extent of the interference or deprivation of economic use rises to the level of "taking."[9] Joint Ventures, 563 So.2d at 625. Lucas, 120 L.Ed.2d at 814; Penn Central, 438 U.S. at 124. Deciding the "as applied" map of reservation cases on a case-by-case basis will protect both the property owner's constitutional right to full compensation when the map caused "substantial interference" and protect the taxpayers from paying the disproportionate costs of litigating nominal damage cases.

In summary, the "per se taking" rule advanced by A.G.W.S. and DUNDEE would require a jury trial for every category of "as applied" map of reservation cases, regardless of whether the property was exempt from the statute and regardless of whether the property had already been developed to its highest and best use.

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[9] The maps of reservation had no affect on a property owner's current use of the property, only a change in use requiring a development permit. A property owner's present use of the property is his primary expectation of use. Penn Central, 438 U.S. at 136.

The case by case analysis adopted by the United States Supreme Court and this Court provides compensation to property owners who were actually deprived of substantial economic use of their property by the invalidated regulation. The case by case basis would bar neither the property owner nor the state from the courthouse. A balance would be struck that would provide compensation to those who actually had "substantial interference" of their use of the property and provide the state with the ability to defend itself and avoid costly unproductive litigation.

Perhaps A.G.W.S. and DUNDEE are entitled to compensation because the affect of the map of reservation was to deprive them of substantial economic use of their property. However, this country's regulatory takings jurisprudence requires that the property owners do more than "simply file a lawsuit." Lucas, 120 L.Ed.2d at 813 n.6. If the property owners in these cases want compensation, they should be required to allege and prove that the invalidated regulation during its effective dates deprived them of "substantial economic use" of their property. Joint Ventures II, 563 So.2d at 625. Examining the extent of the deprivation of the economic use, the courts of this state should be instructed that the property owners affected by invalidated maps of reservation are only entitled to an order finding a "taking" has occurred if the invalidated map of reservation deprived the property owner of substantial economic use of his or her property as a whole. This holding would protect both the property owner's and the state's constitutional guarantees and serve the taxpayer's interest in not

having to defend nominal damage cases.[10] Allowing nominal damage cases not only trivalizes the constitutional right to just compensation, A.G.W.S., 17 FLW at 2235 [Judge Attenbernd, dissenting], but wastes the resources and time of the judiciary specifically and the state generally.

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[10] In the federal system and the majority of states, a property owner's attorneys fees and costs are borne by the property owner, not paid by the condemning authority. See Geoffrey B. Dobson, Payment of Attorney Fees in Eminent Domain and Environmental Litigation, in 2 Selected Studies in Highway Law 939-N59 (Robert W. Cunliffe ed., 1988) In those states and the federal system, nominal damage inverse condemnation cases are not economically productive for the property owner.

CONCLUSION

The question certified by the Second District Court of Appeal should be answered in the negative and the Second District's decision quashed. The trial court's order finding a "taking" has occurred should be reversed and the cause remanded with instructions that a finding of a "taking" should only be entered after the property owner has proven that the map of reservation deprived him of substantial economic use of his property as a whole.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 21st day of December, 1992 to S. CARY GAYLORD, ESQUIRE, MARC I. SACHS, ESQUIRE, and ALAN E. DESERIO, ESQUIRE, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, 777 S. Harbor Island Blvd., #900, Tampa, FL 33602-5701.

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