IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION, :

Petitioner, :

vs. : CASE NO. 81,046

JOSEPH DIGERLANDO, :

Respondent. :

ANSWER BRIEF OF RESPONDENT JOSEPH DIGERLANDO

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PRELIMINARY STATEMENT

For purposes of this Answer Brief, Respondent, Joseph DiGerlando ("DiGerlando") will utilize the following abbreviations: "DOT" shall refer to Petitioner, the Florida Department of Transportation. "A" followed by a specific page reference, shall refer to the Appendix, "P. Brief" refers to Petitioner's Initial Brief, followed by reference to a specific page number.

STATEMENT OF CASE AND FACTS

On December 6, 1991, Respondent DiGerlando filed a Complaint for Inverse Condemnation in the Thirteenth Judicial Circuit for Hillsborough County, Florida. The Complaint asserted that DOT had filed a map of reservation on July 15, 1988, which resulted in a temporary taking of DiGerlando's property. The exhibits attached to the Complaint included a copy of the actual DOT map of reservation, highlighting the encumbered portion of DiGerlando's property, and a metes and bounds legal description of DiGerlando's entire parcel. (A1-5).

DOT filed a Motion to Dismiss the Complaint on January 6, 1992, which was denied by Court Order dated February 4, 1992. (A6-8). DOT subsequently filed an Answer and Affirmative Defenses to the Complaint on February 25, 1992. (A9-11). DOT's Answer admitted that DOT had filed maps of reservation and conceded that "it must pay full compensation when the Court makes a determination that a taking occurred." (A9). The only affirmative defenses asserted by DOT were either legally insufficient, or applied to the amount of damages suffered by DiGerlando, not to the issue of whether a taking occurred. (A10).

DiGerlando subsequently filed a Motion for Summary Judgment on the taking issue. (A12-17). A summary judgment hearing was held before Judge John Gilbert on April 27, 1992. (A18-38). Following the hearing, Judge Gilbert ruled that a taking had occurred based on DOT's filing of the map of reservation, and issued an Order

granting the Summary Judgment on May 5, 1992. (A39). The Order reserved jurisdiction for the Court to determine the amount of DiGerlando's damages resulting from the taking. (A39). DOT thereafter filed its timely Notice of Appeal to the Second District Court of Appeal. (A40-42).

On December 9th, 1992, the Second District Court of Appeal affirmed the decision of the trial court in a per curium decision. Dep't of Transp. v. DiGerlando, 609 So. 2d 165 (Fla. 2d DCA 1992) (citing Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d DCA 1992)). (A43). The Second District Court of Appeal certified the following question to the Florida Supreme Court:

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

On January 5, 1993, DOT gave notice of invoking the discretionary jurisdiction of the Supreme Court of Florida and on January 13, 1993, this Court entered its Order Postponing Decision of Jurisdiction and Briefing Schedule.

SUMMARY OF ARGUMENT

In Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990), this Court determined that §§ 337.241(2) and (3), Fla. Stat. (1987) unconstitutionally permitted the state to take private property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution. Id. at 623. The "acquisition" of private property by § 337.241 was analyzed in terms of the state's power of eminent domain as opposed to an exercise of the state's police power. Id. at 624-626.

The instant case involves the acquisition of DiGerlando's property under a map of reservation filed pursuant to § 337.241 in 1988 by DOT. The land encumbered by the map was "taken" for potential use in future road construction. This "taking" of DiGerlando's property entails the payment of full compensation. The amount of damages suffered by DiGerlando is not an issue which is before this Court.

In the alternative, if viewed under a regulatory "takings" analysis, § 337.241 failed to advance a legitimate state interest and, therefore, constituted a "taking" under the 2-prong test established by the United States Supreme Court in Agins v. City of Tiburon, 447 U.S. 255 (1980). Where a regulation either "fails to substantially advance a legitimate state interest or denies an owner economically viable use of his land" a taking occurs. Id. at 260. § 337.241 was not a regulation of property for the purpose of

"public safety, health, morals, comfort and general well-being." Instead, it was a blatant effort by the state to give itself a competitive advantage by depressing land values in anticipation of condemnation proceedings. The United States Supreme Court has held that a regulation which fails to advance a "legitimate state interest" constitutes an uncompensated taking of private property. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Where a regulation is found unconstitutional for failing to advance a legitimate state interest, courts do not require a property owner to also prove deprivation of economic use to establish a "taking".

The spectre of potentially "massive" government liability raised by the state is just that -- a ghost. In reality, the safeguards provided by the Florida Rules of Civil Procedure and the limitations on fee awards under case law and Chapters 73 and 74, Fla. Stat. (1991) militate against such a "doomsday" scenario. Moreover, the state and federal constitutions cannot be ignored on the basis that to do so will save the state money. Just as the constitution does not permit the state to increase its power merely by paying for it, so the enforcement of the constitution does not depend on the government's potential cost of doing so. State and federal constitutions are a limitation on government power. Government, like all institutions, often operates under the maxim "give an inch, take a mile." When the "taking" involves the acquisition by government of private property for a public project,

the law is clear that the public as a whole, as opposed to the unfortunate individual, must bear the cost.

ARGUMENT

I. DIGERLANDO IS ENTITLED TO COMPENSATION AS A RESULT OF DOT EXERCISING ITS POWER OF EMINENT DOMAIN.

A. In Joint Ventures, This Court Held That § 337.241, Fla. Stat. (1987) Was, In Effect, an Effort to Acquire Land By Circumventing the Constitutional and Statutory Protections Afforded Private Property Owners Under the Principles of Eminent Domain.

In Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622 (Fla. 1990), this Court held that §§ 337.241(2) and (3), Florida Statutes (1987) permitted the State to take private property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article X, § 6(a) of the Florida Constitution. Id. at 623. While the actual holding of Joint Ventures is not in dispute, the exact basis for the Court's decision has been a source of confusion for advocates and members of the judiciary.[1]

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[1] See Dep't. of Transp. v. Weisenfeld, No. 91-2234 (Fla. 5th DCA, filed March 26, 1993) (en banc) (not final until disposition of motion for rehearing). In a sharply divided opinion, the Fifth District Court of Appeal receded from Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991). Agrigrowth, citing Joint Ventures, held that maps of reservation filed pursuant to § 337.241 effected a "taking" based on the statute's failure to advance a legitimate state interest. "A regulation effects a taking if it does not substantially advance a legitimate state interest or if the regulation denies an owner economically viable use of his land.

The central issue in Joint Ventures was not, as DOT contends, "whether the statute was facially unconstitutional for failing to advance a legitimate state interest." P. Brief 16. Had DOT engaged in a careful reading of Joint Ventures, it would have recognized that this Court's opinion was based on the distinction between the confiscation of private property under the government's

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Agins v. City of Tiburon, 447 U.S. 255 (1980)." 582 So.2d at 792.

In Weisenfeld, the majority chose to disregard the "legitimate state interest" prong of Agins in favor of a "substantial economic deprivation" analysis. The problem with the majority's analysis is that it proves too much. Under the regulatory taking analysis employed by the United States Supreme Court, it is unnecessary to discuss "economic deprivation" to a particular property owner in the "takings" context where a statute or regulation has been found unconstitutional for failing to advance a legitimate state interest. See supra pp. 13-18.

Moreover, as Judge Harris noted, "The state's effort to give itself a competitive advantage if it later decided to acquire the property does not fit any recognized justification for the exercise of the police power." Weisenfeld at 6. In fact, Joint Ventures held § 337.241 unconstitutional as a "thinly veiled attempt to 'acquire' land by avoiding the legislatively mandated procedural and substantive protections of Chapters 73 and 74." Joint Ventures, 523 So. 2d at 625. Clearly, § 337.241 was not a police power regulation, and therefore the majority's inquiry into the extent of the interference or deprivation of the owner's economic use of the property is inapposite. See supra pp. 5-10.

A per curium dissent in Weisenfeld takes issue with the majority's disavowance of Agrigrowth and, more importantly, their stilted reading of Joint Ventures. As the dissent notes, the majority's attempts to distinguish Joint Ventures based on the fact that no compensation claim was before the Court, ignores the fact that the property owner in Joint Ventures, like the property owner in the instant case, is only asserting that the filing and recording of the map of reservation constituted a taking. The amount of damages suffered by the property owner is another issue, and one to be decided at a later time. The dissent also viewed with skepticism the "windfall attorneys fees" argument posed by the majority.

power of eminent domain and the regulation of private property under the government's police power. Id. at 624-25. Ultimately, the Joint Ventures Court held that the statute at issue violated the constitution because the state was attempting to acquire property under its power of eminent domain while only providing an after-the fact remedy to the property owner. Id. at 627.

The facts in the Joint Ventures case are analogous to those involved in this appeal. In Joint Ventures, the property owner contracted to sell a parcel of vacant land contingent upon the buyer's ability to obtain the necessary development permits. Sometime thereafter, DOT determined that a portion of the land was needed for drainage associated with the planned widening of a highway and recorded a map of reservation in accordance with § 337.241(1), Fla. Stat. (1987). The owner contested the map of reservation at an administrative hearing in accordance with the remedy provided by the statute. The hearing officer found against the owner and the owner appealed to the First District Court of Appeal arguing that the statute, as applied to his property, effected a "taking." On appeal, the district court concluded that the challenged statute was constitutional because the owner could seek compensation through inverse condemnation.

The Supreme Court of Florida reversed the district court's decision and held that the statute violated the United States and Florida constitutions. Distinguishing between the two circumstances in which the state must pay property owners, the Court noted:

> First, the state must pay when it confiscates private property for common use under its power of eminent domain. Second, the state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.

Joint Ventures, 563 So. 2d at 624. The Court further explained:

> [T]he former involves the taking of property because of its need for the public use while the latter involves the regulation of such property to prevent its use thereof in a manner that is detrimental to the public interest.

Id. at 625 (citing J. Sackman, Nichols' The Law of Eminent Domain, § 1.42 at 1-133 to 1-134 (rev. 3d ed. 1988) (emphasis in original).

Continuing its discussion, the Court determined:

> 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.

Id. at 625. DOT proposed various economic reasons for the statute, including allowing DOT to acquire land at decreased costs. Analyzing DOT's true designs, the Court concluded:

> Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of Chapter 73 and 74.

Id. The Court determined that the means by which the legislature attempted to achieve its goals were not consistent with the Constitution:

> We perceive no valid distinction between "freezing" property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings.

Id. at 626. The Court found the statute unconstitutional because it limited the property owner to an after-the-fact remedy of inverse condemnation and deprived him of the benefit of formal condemnation proceedings. Id. at 627.

The Court's analysis in Joint Ventures reflects the distinction between acts of eminent domain and acts of police power, and is supported by established principles of common law. See e.g. State Plant Board v. Smith, 110 So. 2d 401, 404 (Fla. 1959) (recognizing the distinction between private property appropriations for public use under eminent domain and regulation of property in the exercise of police power). Traditionally, the state takes property by eminent domain because it is useful to the public, and regulates property under the police power because it is harmful to the public. See Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981); see also Department of Agriculture v. Mid-Florida Growers, Inc., 521 So. 2d 101, 103 (Fla. 1988).[2]

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[2] Examples of the state's eminent domain power would include the transfer of private property interests to the state for the purposes of establishing a public park, school or highway. On the other hand, the state would exercise its police power by establishing building restrictions in flood zones or enacting zoning regulations to protect the breeding grounds of endangered species.

In Joint Ventures, as well as the case at hand, the filing of the map of reservation was clearly aimed at the possibility of acquiring land at a later date for use in public roads. While the map was in place, DiGerlando was denied the right to construct upon or develop the property covered by the map of reservation.[3] Accordingly, this Court correctly held that the statute was merely an attempt to circumvent the protections afforded private property owners under the established principles of eminent domain, thereby avoiding payment of just compensation under Chapters 73 and 74, Fla. Stat. (1987). Joint Ventures, 563 So. 2d at 625.

B. The State is Obliged to Make Full Compensation for Using Its Eminent Domain Power.

Where the state exercises its inherent right to take private property for public use under its power of eminent domain, the state is obliged to make full compensation. Joint Ventures, 563

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[3] As recently articulated by the Fifth District Court of Appeal in Snyder v. Board of County Comm'n., Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991):

> The most valuable aspect of the ownership of property is the right to use it. Any infringement on the owner's full and free use of privately owned property, whether the result of physical limitations or governmentally enacted restrictions, is a direct limitation on, and diminution of, the value of the property and the value of its ownership and accordingly triggers constitutional protections. All incidents of property ownership are protected from infringement by the state unless regulations are reasonably necessary to secure the health, safety, good order, and general welfare of the public. Id. at 70. (Citations omitted).

So. 2d at 624; Lamar v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225, 237 (Fla. 1900); Moody v. Jacksonville T. & K. W. R. Co., 20 Fla. 597, 606 (Fla. 1884). Compensation is guaranteed by the Fifth Amendment of the United States Constitution which provides that "private property [shall not] be taken for public use, without just compensation." That protection applies to the states through the Fourteenth Amendment. Chicago B. & Q. R. R. v. City of Chicago, 166 U.S. 226 (1897). In addition, Florida's Constitution provides "no private property shall be taken except for a public purpose and with full compensation." Article X, § 6(a), Fla. Const.

This Court has already determined that DOT exercised its power of eminent domain upon the filing of the map of reservation under § 337.241, Fla. Stat. (1987). As such, DiGerlando is entitled to a jury trial to determine the amount of compensation he is constitutionally guaranteed.

II. ALTERNATIVELY, DIGERLANDO HAS SUFFERED A "TAKING" AT THE HANDS OF DOT AND IS ENTITLED TO COMPENSATION UNDER THE REGULATORY TAKING ANALYSIS APPLIED BY THE UNITED STATES SUPREME COURT.

DiGerlando contends that by filing the map of reservation, DOT exercised its power of eminent domain which entitles DiGerlando to full and complete compensation. For purposes of argument, however, DiGerlando is also entitled to a jury trial to determine compensation as a result of the taking of his property by a regulation

which has been found unconstitutional for its failure to advance a legitimate state interest. Joint Ventures, 563 So. 2d at 626.

A. A "Taking" Has Occurred Under the First Prong of Agins Because This Court Has Determined That § 337.241, Fla. Stat. (1987) Does Not Substantially Advance a Legitimate State Interest.

The United States Supreme Court has long recognized that a land use regulation effects a "taking" if the ordinance does not substantially advance a legitimate state interest or denies an owner economically viable use of his land. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citations omitted) (emphasis supplied); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 485 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 650 (1978). Where a property owner establishes that either of these criteria are met, a taking has occurred and the property owner is entitled to full compensation. See discussion supra pp. 13-18.

This Court has already determined that § 337.241, Fla. Stat. (1987) does not substantially advance a legitimate state interest. Joint Ventures, 563 So. 2d at 626. In Joint Ventures, this Court stated:

> 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. We acknowledge that the state may properly attempt to

> economize the expenditure of public funds. . .. It would be an unwarranted extension . . . to conclude that the state may deliberately restrict land use under its police power before the commencement of condemnation proceedings without the duty of compensation.

Id. (emphasis original) (citations omitted).

Thus, under Joint Ventures, this Court determined that a taking occurred upon the filing of the map of reservation under the first prong of Agins. DOT argues that DiGerlando's right to compensation is predicated on a showing that he was deprived of due process of law and all economically viable use of his land. P. Brief 24-36. As further explained below, because DiGerlando has satisfied the first prong of the Agins analysis, he is entitled to a jury trial to determine compensation without making a further showing.

1. Whether the Owner Has Been Denied All Economically Viable Use of His Land Is Not Relevant.

DOT argues extensively that in order to establish a "taking," DiGerlando must make a showing under both prongs of Agins. P. Brief 14-26. In making this argument, DOT flatly ignores both the plain language of the Agins standard and the analysis employed by the United States Supreme Court in subsequent cases.

Case law demonstrates that the two tests under Agins are completely independent of one another. In reaching a determination that a regulation constitutes a taking under the first prong of Agins, courts have not required a showing of any of the factors

considered relevant under the second prong. Furthermore, the Supreme Court's intention to hold the government accountable where the property owner satisfies either of the two tests is clear from decisions where the regulation in question does advance a legitimate state interest. In those cases, the Court does not end its inquiry upon concluding that the regulation advances a legitimate state interest, but instead proceeds to determine whether the regulation effects a taking under the second standard. See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

As an initial matter, the Supreme Court has stated in plain language that a taking occurs where a regulation either "fails to substantially advance a legitimate state interest or denies an owner economically viable use of his land." Agins, 447 U.S. at 260; Keystone Bituminous Coal, 480 U.S. at 485. On the other hand, "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan, 483 U.S. at 834; Penn Central, 438 U.S. at 138.

In the cases following Agins, the United States Supreme Court has held that a taking occurs if the regulation does not substantially advance legitimate state interests. The Court has not required the property owner to also prove that he had been denied all economically viable use of his land.

For example, in Nollan, the Supreme Court held that a regulation which required the granting of a public easement across a beach front section of private property as a condition for awarding a permit to build a house on the property effected a taking without just compensation. Nollan, 483 U.S. at 839. The government claimed that the regulation's purpose was to protect the public's ability to see the beach and assist the public in gaining access to the beach. Under the regulation, once the owner obtained a permit, he was allowed to build any structure upon the property, regardless of whether the public could still view the beach. Id. at 837. The Court found that while the purpose of the regulation was acceptable, the regulation was unconstitutional because it lacked the necessary nexus with the means to achieve that goal:

> [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Id. at 837. (Citations omitted).

Under the second prong of Agins, courts look at various factors to determine if the owner has been denied all economically viable use of his property: (1) the character of the government action; (2) the impact of the regulation on the property owner; and

(3) the extent to which the regulation has interfered with the property owner's reasonable investment backed expectations. See Lucas v. South Carolina Coastal Council, 120 L.Ed. 2d 798, 815 n.8 (1992); Keystone Bituminous Coal, 480 U.S. at 495; Penn Central, 438 U.S. at 124. DOT argues that a trial court should also require a showing of these factors prior to allowing a property owner in DiGerlando's position a jury trial on compensation. This argument is patently incorrect. The economic factors which the Supreme Court has developed to aid courts in making a determination under the second prong of Agins are completely irrelevant to the issue of whether a taking has occurred under the first prong of Agins.

In Nollan, the Supreme Court did not require the property owner to prove any of the economic factors in order to reach its determination that the regulation at issue did not substantially advance a legitimate state interest. Nollan, 438 U.S. at 827-842. At least two other courts have held that a regulation effects a taking under the first prong of Agins without any discussion of the economic factors. Seawall Assoc. v. City of New York, 542 N.E. 2d 1059 (N.Y. 1989); Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371 (Cal. Ct. App. 1991).

In Seawall Assoc., the New York Court of Appeals held that a municipal law which established a five year moratorium on the demolition of single room occupancy housing and required the owners to restore the housing to a habitable condition constituted a taking of private property. The Court found the regulation unconstitutional under both prongs of Agins but noted "Either

would be sufficient to invalidate a property-use regulation." Id. at 1066. The Court determined that there was not a sufficiently close nexus between the burdens imposed by the ordinance and "the end advanced as the justification for [them]." Id. at 1068 (citing Nollan, 483 U.S. at 834).

> [T]he nexus between the obligations placed on [the] property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.

Id. at 1069. In reaching its decision that the regulation failed to advance legitimate state interests, the Court did not consider any of the economic factors associated with the second Agins test. See also Surfside Colony, 277 Cal. Rptr. at 378 (regulation which forced property owner to grant public access to private beach in return for permission to build a revetment did not substantially advance legitimate state interests).

Further support for the position that a taking occurs upon a finding that either of the Agins prongs is satisfied is found in cases where the courts have determined that the regulation in question substantially advances legitimate state interests. In such cases the court does not end its inquiry upon its finding that no taking has occurred under the first prong of Agins, but proceeds to determine whether a taking has occurred under Agins' second prong.

For example, in Penn Central, the property owner did not contest the city's objective of preserving structures with historic significance as an entirely permissible government goal or that the restrictions imposed were appropriate means to achieve those purposes. Penn Central, 438 U.S. at 129. Because the property owner admitted that it did not have a case under the first prong of Agins, the Court proceeded to analyze whether the restriction denied the owner economically viable use of its land. Id. at 138. Likewise, in Keystone Bituminous Coal, the Supreme Court applied the two part test finding first, that the regulation furthered a legitimate state interest and second, that the property owners failed to show diminution of value. Keystone Bituminous Coal, 480 U.S. at 492-93.

2. The Proper Standard For Determining Whether A Regulatory Taking Has Occurred Does Not Involve a Due Process Analysis.

The proper analysis for determining whether a regulatory taking has occurred is separate and distinct from a due process or equal protection analysis. In their arguments, DOT and its amici rely on legal standards related to due process or equal protection.[4] The United States Supreme Court has specifically rejected

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[4] These arguments are, in large part, a reflection of Judge Altenbernd's dissent in Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52, 52-59 (Fla. 2d DCA 1992). Judge Altenbernd chose to ignore the well-accepted two-prong analysis of Agins in favor of a single standard derived from Lucas v. South Carolina Coastal Council, 120 L.Ed. 2d 798 (1992) requiring the property owner to prove the loss of a substantial "economically

the Agins standard employed in its regulatory taking analysis as the same standard for due process or equal protection claims:

> 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, [citing Agins], not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.1.

This Court, in answering the certified question posed by the district court in Joint Ventures, specifically omitted any reference to equal protection and due process, finding instead that § 337.241, Fla. Stat. (1987) violated the Fifth Amendment to the United States Constitution and Article X, § 6(a) of the Florida Constitution. Joint Ventures, 563 So. 2d at 623. Thus, the analysis under Agins is separate and distinct from a due process analysis. DiGerlando seeks relief under the Takings Clause of the United States Constitution and the Florida Constitution. To the extent the DOT and its amici rely on traditional notions of due

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beneficial or productive use of [his] land." 608 So.2d at 53. While novel, Judge Altenbernd's analysis is structurally flawed and its reliance on Lucas is misplaced. In Lucas, the petitioner was not challenging the validity of the purpose served by regulations which precluded him from building habitable structures on a South Carolina barrier island. Therefore, there was no reason to address the first prong of Agins. In fact, the United States Supreme Court actually reiterated the Agins standard in Lucas. "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 814 (citing Agins).

process, they are either confusing the two concepts or deliberately attempting to lead this Court astray.

B. The Owner Is Entitled to Compensation For the Period of Time During Which the "Taking" Occurred.

The Supreme Court of the United States has consistently recognized that the "just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking' compensation 'must' be awarded." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting). Once a taking has occurred, "the compensation remedy is required by the Constitution." Department of Agriculture v. Mid-Florida Growers, 521 So. 2d 101, 103-04 n.2 (Fla. 1988). Mere invalidation of a regulation falls short of fulfilling the fundamental purpose of the just compensation clause. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987); San Diego Gas & Elec., 450 U.S. at 656. Where the government's activities have already worked a taking on private 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. First English, 482 U.S. at 3021.

DOT argues that DiGerlando should not be permitted a jury trial on compensation because no appellate court has yet affirmed a compensation award upon a showing that the regulation at issue fails to advance legitimate state interests. This argument is so ludicrous that it does not merit a serious response. If DOT's

logic prevailed in our legal system, the common law would be forever trapped in its medieval origins. Obviously, courts do not need to decide whether claimants are entitled to recover damages in cases where the claimants are not seeking damages.

In Joint Ventures, for example, the parties entered into a monetary settlement during the pendency of the appeal before the district court. Joint Ventures, 563 So.2d at 624 n.5. Likewise, in Nollan, the property owners sought merely to invalidate the regulation at issue and did not seek damages for their loss as a result of the taking. Nollan, 483 U.S. at 829. The fact that the majority of cases settle prior to litigation or that the property owners only seek invalidation of the oppressive legislation, should not deprive DiGerlando of that to which he is constitutionally entitled.

C. Public Policy Is Served By Holding the State Accountable for Its Actions.

DOT argues that if this Court allows compensation upon a showing that the regulation does not advance legitimate state interests, property owners will flood the courts with frivolous inverse condemnation claims. DOT claims that property owners and their attorneys will be encouraged to file such suits, regardless of their merit, because § 73.092, Fla. Stat. (1991) provides for attorneys' fees awards even in cases where damages are nominal.

DOT's position is merely another attempt to divert this Court's attention from the real issues. The prospect of a deluge

of meritless inverse condemnation cases is absurd in light of the numerous procedural safeguards intended to discourage the pursuit of frivolous claims. Under § 73.032, Fla. Stat. (1991), the government may file an offer of judgment under which it can recover attorneys' fees from the property owner if the owner cannot prove its case. If a property owner files a case in which there is a complete absence of judiciable fact or law, the DOT can seek attorneys' fees pursuant to § 57.105, Fla. Stat. (1991).

In addition, courts are always restrained to awarding "reasonable" attorneys' fees. More specifically, under the statute which awards attorneys' fees in inverse condemnation claims, § 73.092, Fla. Stat. (1991) the trial court is required to give the "greatest weight to the benefits resulting to the client from the services rendered." Thus, under the statute, if the property owner has only a nominal claim, this factor would weigh heavily against the attorney collecting a substantial fee award. Finally, if all else fails, the government can appeal any award that it considers unreasonable.

CONCLUSION

A determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single property owner, must bear the burden of an exercise of state power. Agins, 447 U.S. at 260. The Fifth Amendment protection exists to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice should be born by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

The right to own private property must be safeguarded against an overzealous government. It is indeed ironic that DOT now shrilly cries that its constitutional rights have been violated by this Court's opinion in Joint Ventures; it was DOT's action in attempting to "landbank" private property while circumventing the "constitutional and statutory protections afforded private property ownership under the principles of eminent domain" which brought us before this Court.

DiGerlando is not asserting that the government does not have the right to take his property but only that the government is required by the Constitution to compensate him for his loss. DOT and other government entities should not be allowed to trample on private property rights in an effort to circumvent the state and federal constitutions, without accepting the responsibility for their actions. Accordingly, the certified question should be

answered in the affirmative, and the decision of the Second District Court of Appeal should be AFFIRMED.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to **Thornton J. Williams, Esquire**, General Counsel, and **Thomas F. Capshew, Esquire**, Assistant General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458; **Michael P. McMahon, Esquire**, Akerman, Senterfitt & Eidson, P.A., 10th Floor, Firstate Tower, Post Office Box 231, Orlando, FL 32802; and **Robert P. Banks, Esquire**, Assistant County Attorney, Palm Beach County, Post Office Box 1989, West Palm Beach, FL 33402-1989, this 2nd day of April, 1993.

Attorney