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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO.: 81,046

JOSEPH DiGERLANDO,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Joseph DiGerlando, Plaintiff/Respondent shall be referred to in this brief as "DiGERLANDO." The State of Florida, Department of Transportation, Defendant/Petitioner shall be referred to in this brief as the "DEPARTMENT." The Appendix to the initial brief contains all of the pleadings and evidence in the Circuit Court file. It also contains a copy of the Transcript of the hearing conducted on April 27, 1992. References to the documents in the Appendix to the initial brief shall be shown as (A), with the appropriate page numbers inserted.

References to Petitioner's Initial Brief on the merits shall be shown as (IB), with the appropriate page numbers inserted. References to Answer Brief of Respondent DiGERLANDO shall be shown as (AB), with the appropriate page numbers inserted.

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.

A. THE POLICE POWER VERSUS EMINENT DOMAIN DISTINCTION.

In its Answer Brief, DiGERLANDO argues for the first time in this case that this Court's opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990) found that the governmental action is really an exercise in eminent domain rather than an exercise of the police power. (AB pp. 5-11) As will be argued below, the police power verses eminent domain distinction has been rejected by both courts and commentators and does nothing to resolve the issue on appeal. In the alternative, the governmental action found unconstitutional by this Court in Joint Ventures clearly falls within this Court's long-held definition of an exercise of the police power.

The state is limited to the exercise of its police power for the protection of the general welfare. Joint Ventures, 563 So. 2d at 625. The Constitutions of both the United States and the State of Florida require that the exercise of eminent domain be for a "public use" or "public purpose." U.S. Const. amend. V; Art X, §6, Fla. Const. The United States Supreme Court has found the "public use" requirement of the "takings clause" to be "coterminous with

the scope of a sovereign's police powers." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984). Various commentators have called the distinction between police power and eminent domain "illusory," "word play," and "circular reasoning and empty rhetoric." Berger & Kanner, Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loy.L.A.L.Rev. 685, 723-724 (1986).

This Court in Joint Ventures found that the means utilized by the Legislature to facilitate the general welfare were not consistent with the Constitution and concluded "the state may not use its police power in such a manner." Joint Ventures, 563 So. 2d at 626. In essence, this Court found that the map of reservation statute was outside the scope of the state's proper exercise of its police power. One commentator has advanced the theory that if a regulation does not substantially advance a legitimate state interest, the regulation exceeds the limits of the goals a government may pursue and therefore falls outside the public use limitation of the just compensation clause. Patrick Wiseman, When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity, 63 St. John's L. Rev. 433, 443-46, 463-64 (1989). The remedy for such a finding is invalidation of the attempted exercise of the police power, which is precisely the remedy provided by this Court in Joint Ventures.

The Department of Transportation was the governmental entity involved in Joint Ventures. There can be no question that the

Department of Transportation has both the duty to plan proposed transportation facilities (§334.044(12)&(13), Florida Statutes (1991)), and the power to exercise eminent domain to provide for the transportation needs of the State of Florida. §334.044(6), Florida Statutes (1991). Had this Court determined that the map of reservation statute was in actuality an exercise of eminent domain, the appropriate remedy would have been to require that the DEPARTMENT condemn the interest "acquired" by the filing of the maps of reservation rather than striking the regulation.[1] By ruling that the regulation was outside the legitimate scope of the DEPARTMENT's powers, the ruling must necessarily imply that the regulation also falls outside the "public purpose" ambit of the DEPARTMENT's eminent domain powers. There is no question in these cases now before this Court that the property owners have admitted that any restriction imposed by the map of reservation was invalidated when this Court's opinion in Joint Ventures became final. (A 14)

If this Court decides it is important to characterize the regulation ruled unconstitutional in Joint Ventures as either an exercise of the police power or an exercise of eminent domain, the Legislature's enactment of the map of reservation statute clearly falls within this Court's historical definition of an exercise of

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[1] This Court stated that the state could facilitate the general welfare by economizing the expenditure of public funds, citing to Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988). However, the use of the police power to achieve that goal is "not consistent with the constitution." Joint Ventures, 563 So.2d at 626.

the police power. Hunter v. Green, 142 Fla. 104, 194 So. 379 (1940). "The expression 'police power', in a broad sense, included all legislation and almost every function of civil government." Id., at 380. This Court went on to define "police power" as the power vested in the legislature by the Constitution to make reasonable laws not repugnant to the Constitution "as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." Id. The state's police power to regulate "is limited only by the requirements of fundamental law that the regulations shall not invade private rights secured by the Constitution." Carroll v. State, 361 So.2d 144, 147 (Fla. 1978). When an attempted exercise of the police power passes the bounds of reason it will be stricken down and declared void. Id., at 146. Striking of the statute is the remedy provided by this Court in Joint Ventures.

DiGERLANDO advances the argument that the distinction between the police power and the eminent domain power is determined by the difference between preventing a harm and creating a public benefit. (AB pp. 9-10) The United States Supreme Court in Lucas v. South Carolina Coastal Council, 120 L. Ed. 2d 798 (1992), expressly rejected the "harm preventing verses benefit conferring" distinction as "often in the eye of the beholder." Id., at 818. The distinction "is difficult, if not impossible, to discern on an objective, value free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone" to determine which regulations require compensation. Id., at 819.

In addition, the problems with using of the harm preventing verses benefit conferring distinction is illustrated by the following example. The exercise of a local government's police power to limit factories to areas of industrial zoning confers a benefit on the public in the form of aesthetics and increasing the value of residential property which is not located nearby such factories. The very same exercise of the police power may prevent a harm in the form of preventing exposure to noxious fumes or hazardous waste. Depending on one's prospective and how the use is defined, the harm preventing versus benefit conferring characterization can be made either way. Such characterization has little to do with whether the regulation requires compensation to the property owner.

B. REGULATORY TAKINGS ANALYSIS

In his Answer Brief, DiGERLANDO admits that this Court in Joint Ventures found that the map of reservation statute violated the first prong of the Agins v. City of Tiburon, 447 U.S. 255 (1980) test. (AB pg. 13) DiGERLANDO then goes on to argue that because of this Court's finding, he is entitled to compensation. This argument ignores the remedy provided to the property owner in Joint Ventures and every other case finding a violation of the first prong of the Agins test and ignores the express language of this Court in Joint Ventures that states if a property owner wants compensation, they must show that the interference deprives the

owner of substantial economic use of his or her property.[2] Joint Ventures, 563 So. 2d at 625.

Contrary to DiGERLANDO's argument, the DEPARTMENT is not viewing the two prongs of the Agins test in the conjunctive: the DEPARTMENT agrees that the two prongs of the Agins test are in the disjunctive. The point of disagreement is that DiGERLANDO asserts he is entitled to compensation under either prong of the Agins test and the DEPARTMENT asserts that DiGERLANDO is only entitled to compensation under the second prong of the Agins test. The DEPARTMENT's Initial Brief argued that compensation has only been awarded by any court in the nation under the second prong of the Agins test and the DEPARTMENT then advanced public policy arguments why compensation should not be awarded under the first prong of the Agins test. The only response to these arguments by DiGERLANDO are generalized statements taken out of context from caselaw not directly on point. For DiGERLANDO to prevail, he should either advance the argument that what he is urging has been done (it in fact has not been done and there is therefore no caselaw supporting it) or that what he is urging should be done (and there is no valid reason for paying property owners for fluctuations in value based upon regulations absent a showing of specific, substantial

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[2] Contrary to DiGERLANDO's assertions (AB p. 7) there are no facts developed in this case to know whether they are "analogous" to the facts in Joint Ventures. At this point we do not know if DiGERLANDO was attempting to develop the property, we do not know if the property was developable, we do not know the extent of his property affected, but we do know that DiGERLANDO did nothing administratively to avoid the affects of the map, as the property owner did in Joint Ventures.

deprivation of economic use of the property).

Ten judges from three of the five District Courts of Appeal in Florida have either rejected the same argument advanced in this case by DiGERLANDO or expressed concern over the practical and legal ramifications of such a rule.[3] At least two of these Judges have suggested this Court actually performed a due process analysis in Joint Ventures.[4] In Joint Ventures, the due process issue was clearly included in the question certified by the First District Court of Appeal. Joint Ventures, 563 So.2d at 623, fn.1. Such an interpretation of Joint Ventures would be consistent with this Court's prior decisions.[5]

In fact, this Court's analysis in Joint Ventures appears to fit squarely within the framework of a due process "deprivations" analysis rather than a "just compensation" analysis, as the former

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[3] Department of Transportation v. Weisenfeld, Case No. 91-2234 (Fla. 5th DCA March 26, 1993) [18 Fla. L. Weekly D803] [Judges Cobb, Dauksch, Sharp, Harris (specially concurring), and Griffin (specially concurring)]; Department of Transportation v. Miccosukee Village, Case No. 92-989 (Fla. 1st DCA March 22, 1993) [18 Fla. L. Weekly D827] [Judges Wigginton, Kahn, and Mickle] (motion for rehearing pending); and Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So.2d 52 (Fla. 2nd DCA 1992) [Judges Campbell (specially concurring), and Altenbernd (dissenting)]; and, Department of Transportation v. Fowler, Case No. 91-1426 (Fla. 5th DCA April 16, 1993) [18 Fla. L. Weekly D987] (motion for rehearing pending).

[4] Weisenfeld, 18 Fla. L. Weekly at D807 [Griffin, J., concurring specially]; A.G.W.S., 608 So.2d at 52. [Altenbernd, J., dissenting].

[5] See IB pp. 18-21, and City of Miami v. Romer, 73 So.2d 285, 286-87 (Fla. 1954). See also Lee County v. New Testament Baptist Church, 507 So.2d 626 (Fla. 2nd DCA), cert. denied 515 So.2d 230 (1987). [where an ordinance was found facially unconstitutional and an inverse condemnation claim rejected in the same opinion].

is described in one article:

> Consequently, the Court's analysis of fourteenth amendment "deprivations" has focused almost exclusively on the legitimacy of the governmental activity imposing the restriction, rather than on the impact of the restriction upon the property owner. Therefore, the remedy for a plaintiff successfully establishing an unconstitutional deprivation has been a declaration that the governmental activity is ultra vires, with injunctive relief against enforcement. Due process cases have thus come to be characterized by careful examination of governmental authority, little examination of individual impact, and injunctive relief for successful plaintiffs.

Michael J. Davis and Robert L. Glicksman, To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses, 68 Or. L. Rev. 393, 399-400 (1989).

DiGERLANDO argues that the property owner in Nollan v. California Coastal Commission, 483 U.S. 825 (1987) did not have to prove the second prong of the Agins test. (AB pg. 16) The property owner in Nollan did not have to prove the second prong of the Agins test because they were not seeking compensation, and the United States Supreme Court did not award compensation. The property owner in Joint Ventures did not have to prove the second prong of the Agins test. This is also because the property owner in Joint Ventures did not seek compensation, and this Court did not award compensation. This Court did expressly define the inquiry if one is seeking compensation and there is no question in this case that the trial court did not conduct such an inquiry.

DiGERLANDO then argues that neither Seawall Associates v. City

of New York, 542 N. E. 2d 1059 (N.Y. 1989) nor Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal App. 3rd 1260, 277 Cal. Rptr. 371 (Cal. Ct. App. 1991) looked at the economic impact. (AB pg. 16) Neither Seawall Associates nor Surfside Colony looked at the economic impact to the property owner because neither awarded compensation. In Seawall Associates the remedy provided by the court was to declare the local law "null and void" and the court enjoined the local government from implementing the law's provisions. Seawall Associates, 542 N. E. 2d at 1061, 1072. In Surfside Colony, the property owner filed a Petition for a Writ of Mandate. Surfside Colony, 277 Cal. Rptr. at 375. In California, a petition for Writ of Mandate challenges the validity of the regulation and compensation is only awarded when a petition for writ of mandate is joined by an inverse condemnation action. See California Costal Commission v. Superior Court, 210 Cal. App. 3rd 1488, 258 Cal. Rptr. 567, 570 (Cal. Ct. App. 1989).

The Answer Brief all but concedes that there are no cases directly on point: no court in the United States has affirmed a compensation award solely upon the showing that the regulation at issue fails to advance a legitimate state interest.[6] (AB pp. 20-

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[6] The three cases cited by DiGERLANDO for the proposition that compensation must be paid (AB p. 20) either analyze the extent of deprivation of the owner's use of the property or assume that the regulation denies all economic use of the property. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 321-322 (1987); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 653 (1981); Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101, 103 (Fla. 1988), cert. denied 488 U.S. 870 (1988). In fact, in San Diego Gas, Justice Brennan stated in a footnote that the government entity "may not be

21) Rather than address the cases cited in the Initial Brief that have specifically rejected such a position, (IB pp. 24-27) DiGERLANDO labels the DEPARTMENT's argument as "ludicrous" and goes on to argue "public policy" issues. (AB pp. 21-22) DiGERLANDO's "public policy" arguments are not public policy arguments at all, but merely an attempt to convince this Court that if it adopts an overbroad constitutional principle, "procedural safeguards" will staunch the bleeding from the public treasury. DiGERLANDO lists three procedural safeguards: §73.032, Florida Statutes (1991); §57.105, Florida Statutes (1991); and the DEPARTMENT's right to appeal an unreasonable award. (AB pg. 22) Under the first, DiGERLANDO's counsel asserts "the government may file an offer of judgment under which it can recover attorney's fees from the property owner if the owner can not prove its case." (AB pg. 22) That statement is patently wrong. There is no provision in Chapter 73 providing for an assessment of the DEPARTMENT's attorney's fees against the property owner. §73.092(6), Florida Statutes (1991) only has the effect of limiting the assessment of attorney's fees against the DEPARTMENT to the time spent prior to the rejection of an offer if the jury verdict or judgment is less than or equal to the offer of judgment.

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forced to pay just compensation under the Fifth Amendment" where the police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare. Id., at 656, fn. 23. This Court's decision in Joint Ventures falls under the category of cases described by Justice Brennan in footnote 23 rather than the category of cases where the regulation completely deprives the owner of all or most of his interest in the property.

DiGERLANDO's assertion that the DEPARTMENT could employ §57.105, Florida Statutes (1991) to assess attorney's fees completely ignores the fact that under DiGERLANDO's proposed rule of law every single property owner will be entitled to a summary judgment finding that a "taking" had occurred by the filing of the map of reservation affecting his property. It is respectfully submitted that no trial court in this state would award attorney's fees in favor of the DEPARTMENT under §57.105, Florida Statutes (1991) after it had entered summary judgment on the issue of liability against the DEPARTMENT. Obviously if the trial court finds the DEPARTMENT liable then there can be no question that the property owner has raised a justiciable issue.

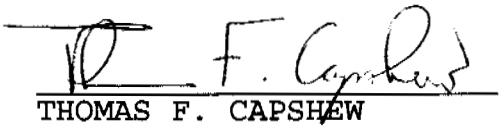
Finally, DiGERLANDO argues the DEPARTMENT would have the "procedural safeguard" of an appeal of an unreasonable award. The DEPARTMENT has a constitutional right to an appeal of any unreasonable award. Robbins v. Cipes, 181 So. 2d 521, 522 (Fla. 1966)[citing to the former constitutional provisions, see now Art V, §4(b)(1), Fla. Const.] Therefore, the DEPARTMENT's right to appeal an unreasonable award has nothing to do with crafting a rule of law in this case that would strike a proper balance between individual property rights and the government's police power. As noted in the Initial Brief, the United States Supreme Court noted long ago that "[g]overnment 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 (1922).

Contrary to the pre-eminence of private property rights argument advanced in the Answer Brief, each property owner is not a sovereign, able to do with his property whatever he wishes without regard to the rights or interests of other property owners or the public. Freedom is not free. Inextricably joined to a property owner's freedoms protected by the Bill of Rights is the responsibility to consent to the democratic form of government that harbors those freedoms. The freedoms expressed in the Bill of Rights are balanced with our form of collective government. In a perfect world, they are balanced equally: excessive government regulation is repugnant to our Constitution just as is excessive individual freedom.

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.

Respectfully submitted,



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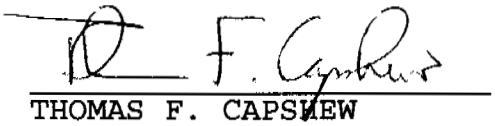
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Initial Brief has been furnished by U.S. Mail on this 4th day of May, 1993 to ROBERT C. SANCHEZ, ESQUIRE, 101 East Kennedy Blvd, Post Office Box 1102, Tampa, Florida 33601.



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