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SUPREME COURT OF FLORIDA

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JOSEPH WEISENFELD, Trustee,

Petitioner,

vs. CASE NO.: 81,653

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT
STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

JOSEPH WEISENFELD, as Trustee, Petitioner (Appellee below) and COMMUNITY DEVELOPERS OF ORANGE COUNTY, INC. Petitioner (Appellee below) shall be referred to in this brief collectively as "WEISENFELD." The State of Florida, Department of Transportation, Respondent (Appellant below) shall be referred to in this brief as the "DEPARTMENT". References to the Appendix filed by the DEPARTMENT contemporaneously with the Initial Brief in the Fifth District Court of Appeal will be referenced in this brief as (DCA App.) with the appropriate page numbers inserted.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts contained in WEISENFELD's Initial Brief is replete with inaccuracies and impermissible argument. For example, WEISENFELD states "the map encompassed all of the Orange County property and a substantial portion of the Seminole County property." (IB pg. 1) As found by the Fifth District Court of Appeal in its en banc opinion, WEISENFELD did not present "a scintilla of proof" to the trial court in support of its claims. Department of Transportation v. Weisenfeld, Case No.: 91-2234 (Fla. 5th DCA March 26, 1993)[18 Fla. L. Weekly D803] The only evidence contained in the record is directly contrary to WEISENFELD's statement that the map of reservation encompassed a substantial portion of the Seminole County property.[1] The affidavit of Byron Rudd was presented to the trial court and Rudd, a licensed professional land surveyor, stated under oath that less than 4% of the property WEISENFELD claims ownership to was affected by the map of reservation. (DCA App. 113-114)

WEISENFELD's Statement of the Case and Facts also contains impermissible argument. The second paragraph on page 1 of the Initial Brief and the first paragraph on page 2 of the Initial Brief are nothing more than WEISENFELD arguing his position rather than an objective statement of facts contained in the record or an objective statement of the procedural history of the case. Rather

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[1] The Orange County property was severed from the suit as being outside the jurisdiction of the Eighteenth Judicial Circuit. (DCA App. 142)

than pointing out every inaccuracy or impermissible argument, the DEPARTMENT submits the following objective Statement of the Case and Facts.

On May 15, 1991, Counsel for WEISENFELD filed a pleading entitled Amended Complaint, which in fact was WEISENFELD's second Amended Complaint.[2] (DCA App. 29-43, 52-68) The second Amended Complaint alleged it was a claim for inverse condemnation based upon the filing of a map of reservation by the DEPARTMENT. (DCA App. 52) The second Amended Complaint alleged that the filing of the map prevented WEISENFELD and Community Developers of Orange County from developing and marketing several of the tracts owned by them. (DCA App. 54) The second Amended Complaint alleged that the Plaintiffs were prohibited from obtaining a development permit, although there were no allegations that development permits were sought during the period the map was in place. (DCA App. 54) The Second Amended Complaint alleged that the Florida Supreme Court "has found that the imposition of a Map of Reservation represents a per se unconstitutional taking of property without compensation, [therefore] Defendant must be liable, as a matter of law, for having temporarily taken Plaintiffs' property." (DCA App. 56-57) WEISENFELD demanded full and fair compensation for the property allegedly taken and attorneys fees and costs. (DCA App. 57)

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[2] The pleadings in the trial court contained in the DCA Appendix at pages 1-51 are included in the Appendix for the Court's and opposing counsel's convenience and are not summarized in this Statement of the Case and Facts.

The DEPARTMENT filed an Answer denying all the substantive allegations of the second Amended Complaint and raising three affirmative defenses. (DCA App. 69-71) The first affirmative defense was that the Plaintiffs had failed to exhaust their administrative remedies. (DCA App. 70) The second affirmative defense was that the Plaintiffs had failed to mitigate their alleged damages. (DCA App. 70) The third affirmative defense was that the Plaintiffs had failed to state a cause of action, for which relief could be granted. (DCA App. 70)

WEISENFELD moved for a partial summary judgment as to liability. (DCA App. 78-79) The motion alleged:

> Now that the Florida Supreme Court has found that the imposition of a Map of Reservation per se represents an unconstitutional taking of property without compensation, Defendant must be liable, as a matter of law, for having temporarily inversely condemned Plaintiff's property.

(DCA App. 79) WEISENFELD filed a Memorandum in Support of its Motion for Summary Judgment arguing that both Florida and federal law recognized that a landowner is entitled to compensation for a temporary regulatory taking of his property and that Florida case law recognizes the right of the landowner to employ a suit in inverse condemnation to recover damages for a temporary regulatory taking. (DCA App. 80-97)

The DEPARTMENT filed a pleading entitled Department's Motion to Dismiss and Response in Opposition to Plaintiff's Motion for

Partial Summary Judgment as to Liability. (DCA App. 98-111) In its response, the DEPARTMENT argued that the Plaintiffs had failed to file any evidence to support the allegations of the second Amended Complaint. (DCA App. 100-102) The DEPARTMENT also argued that the affidavit and certified copies of plat books filed by the DEPARTMENT raised a genuine issue of material fact as to ownership. (DCA App. 102-103) Finally, the DEPARTMENT argued that WEISENFELD was not entitled to summary judgment as a matter of law because Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990) ("Joint Ventures II,") did not stand for the proposition that the map of reservation is a compensable taking. (DCA App. 103-111)

The DEPARTMENT filed certified copies of Seminole County Plat Book pages, which indicated that some of the property claimed to be owned by WEISENFELD had previously been dedicated to Seminole County for road purposes and that other property was not in his ownership. (DCA App. 112) The DEPARTMENT also filed the affidavit of Byron D. Rudd, a licensed Professional Land Surveyor in the state of Florida. (DCA App. 113-115) Mr. Rudd stated in his affidavit that the area affected by the map of reservation covers approximately four percent of the area described in deeds attached to the Second Amended Complaint. (DCA App. 114) Mr. Rudd also examined the certified copies of the Seminole County Plat Books filed with the court and stated under oath that part of the area reserved by the map of reservation does not appear to be owned by

the Plaintiff. (DCA App. 115)

A hearing was held before Judge McGregor on August 20, 1991 and, after argument of counsel, the court indicated its ruling to grant summary judgment as to liability for the Seminole County property.(DCA App. 135) The court's Order on Plaintiff's Motion for Summary Judgment as to Liability and Order of "Taking" of Seminole County property cited several cases which will be discussed in the argument section of this brief.(DCA App. 137-146) In granting the Motion for Summary Judgment, the court conditioned the award of damages as follows: "Any award of damages shall be conditioned upon proof of ownership of the property in question." (DCA App. 141) This appeal timely followed. (DCA App. 147)

SUMMARY OF ARGUMENT

Even under the most liberal interpretation of the summary judgment rule, WEISENFELD failed to meet his burden of proving he is entitled to summary judgment as a matter of law. WEISENFELD presented absolutely no evidence to the trial court to support the allegations contained in the unverified complaint. The trial court recognized WEISENFELD's complete absence of proof by stating in the order granting summary judgment that any damages awarded to WEISENFELD would be subject to WEISENFELD proving ownership of the property in question.

WEISENFELD for the first time in this case argues in his Initial Brief that the maps of reservation are not a regulation but an exercise of the state's eminent domain power. Because WEISENFELD argued before the trial court and the District Court of Appeal that the map of reservation constituted a regulatory taking, the argument that the maps of reservation are truly an exercise of the eminent domain power has been waived. Even so, the legislation authorizing maps of reservation clearly falls within this Court's definition of an exercise of the police power. Had this Court determined that the maps of reservation were truly an exercise in eminent domain, the proper remedy would have been compensation rather than striking down the exercise of a power the DEPARTMENT clearly possesses.

The Fifth District Court of Appeal's en banc majority opinion

in this case correctly interprets this Court's opinion in Joint Ventures II to be adopting a case by case analysis for compensation for maps of reservation and did not adopt a per se entitlement to compensation. If WEISENFELD's argument is accepted, this Court's statement in its majority opinion that when compensation is claimed the appropriate inquiry is into the extent of the interference or the deprivation of economic use would be rendered dicta. Because this Court expressly stated in Joint Ventures II that it was not dealing with a claim for compensation, Joint Ventures II cannot be stare decisis for any other property owner's entitlement to compensation.

This Court's prior regulatory takings jurisprudence provides as a remedy the striking of a regulation that fails to substantially advance a legitimate state interest. None of this Court's prior decisions have awarded compensation on this ground alone without looking into the extent of economic interference. The United States Supreme Court has never awarded compensation solely upon the ground that the regulation fails substantially advance a legitimate state interest and, in a similar case to the at hand, provided a remedy of striking the regulation rather than compensation for the period of time the regulation was in effect. Other jurisdictions are consistent with the Fifth District Court of Appeal's interpretation of Joint Ventures II and United States Supreme Court precedent.

By reaffirming this Court's standard that when compensation is claimed the appropriate inquiry into the extent of interference or deprivation of economic use of the property as a whole, the proper balance will be struck between the government's power to regulate and a property owner's right to use his or her property. If a regulation deprives a property owner of substantial economic use of his or her property then a trial court will determine a taking has occurred, even if the regulation is temporary. By requiring proof of deprivation of substantial economic use of the property, juridical resources and the resources of the state will not be wasted on nominal or nonexistent damage cases brought by property owners under a per se rule. The Fifth District Court of Appeal's decision in this case should be affirmed in all respects.

ARGUMENT

I. THE EVIDENCE IN THE RECORD IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S RULING THAT WEISENFELD IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF COMPENSATION.

WEISENFELD completely ignores the en banc majority opinion's observation that WEISENFELD did not meet his burden of proof:

> This summary adjudication by the trial court that compensation is due the plaintiff was not based upon a scintilla of proof in regard to damages supporting the motion - no depositions, no affidavits, no interrogatories, no sworn pleadings. Indeed, the only affidavit before the court was filed by the state to rebut any possible claim of ownership to a portion of land covered by the reservation map.

Department of Transportation v. Weisenfeld, Case No.: 91-2234 (Fla. 5th DCA March 26, 1993) [18 Fla. L. Weekly D803].

The Fifth District Court of Appeal correctly ruled that the trial court committed reversible error in granting summary judgment in favor of WEISENFELD on the issue of compensation because WEISENFELD did not meet his burden of proof. WEISENFELD failed to place in evidence sufficient admissible evidence to support the cause of action.

The Fifth District Court of Appeal has recently held "a summary judgment should not be granted unless, construing all the evidence most favorably to the nonmoving party, there is no genuine issue of material fact and the movent is entitled to a judgment as

a matter of law." American Crime Prevention Corp. v. Computerized Monitoring Service, Inc., 539 So.2d 1175, 1176 (Fla. 5th DCA 1989)[citing to Holl v. Talcott, 191 So.2d 40 (Fla. 1966).] See also, Stewart v. Boho, Inc., 493 So.2d 95 (Fla. 4th DCA 1986). The moving party must conclusively prove that there is no triable issue of material fact. American Crime, at 1176 Only after the moving party has conclusively proven that proposition does the burden shift to the opposing party. Id. at 1177. Florida Rules of Civil Procedure require that a trial court examine the evidence contained in the record to determine the propriety of a summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fla.R.Civ.P. 1.510(c).

None of the Complaints were verified and there were no depositions filed or any other discovery. Accordingly, WEISENFELD did not offer "sufficient admissible evidence to support his claim." DeMesne v. Stephenson, 498 So.2d 673, 675 (Fla. 1st DCA 1986). "[A]ll evidence before the court plus favorable inferences reasonably justified thereby are to be liberally construed in favor of the opponent." Aagaard-Juergensen, Inc. v. Lettelier, 540 So.2d 224, 225 (Fla. 5th DCA 1989).

There was absolutely no evidence before the trial court to

support the bald allegations of the second Amended Complaint. Allegations are defined as "the assertion, claim, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove." Black's Law Dictionary, 68 (5th ed. 1979). WEISENFELD has set out in his second Amended Complaint what he "expects to prove." Proof is defined as "the establishment of a fact by evidence." Black's Law Dictionary, 1093 (5th ed. 1979).

Evidence has been defined as "something legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it." Webster's Third New International Dictionary, 788 (Unabridged 1986). Evidence must be used to prove allegations. Absent proof, a plaintiff is not entitled to a judgment.

Examining the record in its entirety in this case, there is no evidence to support any of WEISENFELD's allegations. None of WEISENFELD's pleadings were verified. No depositions were filed. No answers to interrogatories were on file. No admissions were on file from either an answer to the complaint or in response to requests for admissions. WEISENFELD filed no affidavits in support of its position. There is not one stick of evidence in the record in support of WEISENFELD's allegations.

In fact, the trial court recognized it did not have evidence before it to support the allegation that WEISENFELD owned the

property: "Any award of damages shall be conditioned upon proof of ownership of the property in question." (A 141) In other words, the trial court ruled that the second Amended Complaint sufficiently alleged and WEISENFELD proved that the DEPARTMENT owed someone some money for the filing of the map, it just may not be WEISENFELD! If WEISENFELD didn't own the property, he has no standing to sue the DEPARTMENT. Because a "taking" has now been found, WEISENFELD's costs and attorneys' fees will be paid even if it is later determined WEISENFELD is not the real party in interest.

This country's judicial system is bottomed on the proposition that a judgment will not be entered against a party unless and until sufficient facts to support that judgment either (1) are determined by a fact finder to have been proven or (2) are admitted by the parties. Because no evidence was filed by WEISENFELD to support the allegations of the second Amended Complaint, the trial court's summary judgment in this matter has the effect of the entry of a default judgment pursuant to Fla.R.Civ.P. 1.500 which, under Florida case law, deems the allegations of the complaint admitted. There is no question that the DEPARTMENT timely filed its appearance in this case and has vigorously defended it. The trial court erred as a matter of law in entering summary judgment in favor of WEISENFELD without requiring proof of each and every essential allegation of the complaint.

II. THE FILING OF A MAP OF RESERVATION IS AN EXERCISE OF THE STATE'S POLICE POWER, NOT AN EXERCISE OF EMINENT DOMAIN.

In its Initial Brief, WEISENFELD attempts to tell this Court that its opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990) ("Joint Ventures II") found that the governmental action is really an exercise in eminent domain rather than an exercise of the police power. (IB 7-10, 15-17) While acknowledging that WEISENFELD's previous pleadings characterize the map of reservation as a regulatory taking, WEISENFELD "changes boats midstream" to now argue for the first time before this Court that the filing of the map of reservation was not a regulation of WEISENFELD's property but an exercise of the power of eminent domain. (IB 7)[3] A theory not argued to the trial court is considered waived and cannot be raised for the first time on appeal. See Universal Underwriters Ins. vs. Morrison, 574 So.2d 1063, 1065 (Fla. 1990); Epperson vs. Dixie Insurance Co., 461 So.2d 172 (1st DCA 1984), rev. denied 471 So.2d 43 (Fla. 1985).

Counsel for the DEPARTMENT will not presume to tell this Court what it held in Joint Ventures II, but would point out that this Court repeatedly referred to the action condemned in Joint Ventures II as an exercise of the police power: "The state may not use its police power in such a manner." Id., at 626. See also Id., at 625,

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[3] The argument made by WEISENFELD to the trial court that was successful was that Joint Ventures II found maps of reservation "unconstitutional because it permitted a temporary regulatory taking but did not provide compensation." (DCA App. 86) WEISENFELD again cited Joint Ventures II for proposition that there has been "a 'taking' by regulation...." (DCA App. 93)

fn. 9, and 627. The Legislature's enactment of the map of reservation statute clearly falls within this Court's historical definition of an exercise of 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 II.

The Department of Transportation was the governmental entity involved in Joint Ventures II. 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 as an exercise of a power the Department of Transportation clearly has.[4] There is no question in this case now before this Court that the map of reservation was withdrawn. (DCA App. 56, 79, 85, 139)

WEISENFELD likens the map of reservation to a construction easement. (IB 7-8, 10). In fact, WEISENFELD goes so far as to argue "[t]he effect of the filing is to transfer the power to develop the property from the landowner to the DOT." (IB 7). This argument clearly overstates the legal effect of a map of reservation. The legislative enactment did not allow the DEPARTMENT to do anything with the property encompassed by a map of reservation: it did not permit the DEPARTMENT to possess the property; it did not permit the DEPARTMENT to use the property, and it did not permit the DEPARTMENT to develop the property. All of these factors distinguish a map of reservation from a construction easement.

WEISENFELD also argues that the difference between the police power and the eminent domain power is a difference between

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[4] 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.

prevention of harm verses creation of public benefit. (IB 8-9) The prevention of harm verses creation of public benefit analysis was specifically rejected by the United States Supreme Court last term.

The 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. [5]

The property owners in this inverse condemnation case 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. No cases, including Joint Ventures II, support the argument advanced by WEISENFELD and there are strong public policy considerations that

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[5] The United States Supreme Court has found the "public use" requirement of the takings clause to be "conterminous with the scope of a sovereign's police powers." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984).

weigh against adopting such a rule.

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

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.[6]

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

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[6] "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]. The government entity "may not be 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. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 656, fn. 23 (1981)(J. Brennan, dissenting).

constitutional challenge to the statutory mechanism.[7] 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.

WEISENFELD argues that this Court found in Joint Ventures II that a "taking" occurred, and because that finding "necessarily implicates the 'constitutional obligation to pay just compensation'," entitling everyone whose property was touched by a map of reservation to compensation. (IB p. 13) While WEISENFELD has cited to various cases containing broad statements that compensation is required when a "taking" is found, WEISENFELD has 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

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[7] WEISENFELD argues in the Initial Brief that this Court found the variance provision to be "illusory." (IB 21) What this Court apparently found illusory were the provisions contained in §337.241(3), Florida Statutes (1989) that provided an administrative challenge to the map. The variance provision contained in §337.241(2)(b), Florida Statutes (1989) was not discussed in this Court's opinion.

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].

The holding in Joint Ventures II was that when compensation is claimed due to governmental regulation of property, the appropriate inquiry directed to the extent of the interference or deprivation of economic use. Joint Ventures II, 563 So.2d at 625. Reversible error occurred in the trial court in this case when the trial court did not inquire into the extent of the interference or deprivation of economic use in this case.[8] Weisenfeld, 18 Fla. L. Weekly at D804. Joint Ventures II holds that the deprivation or interference must be "substantial" before a compensable taking is found. Id. Even if WEISENFELD alleged substantial interference and presented sufficient admissible evidence to prove substantial

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[8] While the Fifth District Court of Appeal originally misinterpreted Joint Ventures II to hold a per se taking had occurred, the en banc decision in this case receding from the earlier opinion found it to be "an unfortunate opinion in several respects." Weisenfeld, 18 Fla. L. Weekly at D804.

interference (See Issue I), the DEPARTMENT's countervailing evidence raised a genuine issue of material fact as to whether the alleged regulation substantially interfered with WEISENFELD's economic use.

In Joint Ventures II the map filed by the DEPARTMENT covered 6.49 acres of an 8.3 acre vacant parcel owned by Joint Ventures, Inc. Joint Ventures II, at 623. Joint Ventures challenged the DEPARTMENT's action in an administrative hearing and the DEPARTMENT'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").[9]

While the Joint Ventures appeal was pending in the First District Court of Appeal, the DEPARTMENT 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

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[9] The map of reservation in this case was filed after the First District Court of Appeal upheld the statute's constitutionality. (DCA App. 54)

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.

WEISENFELD argues in his Initial Brief that the majority in the Fifth District Court of Appeal adopted the dissent from this Court's decision in Joint Ventures II. (IB pp. 16, 20) Nothing could be further from the truth. The Fifth District's majority opinion simply gave legal effect to this Court's majority opinion in Joint Ventures II that compensation due to governmental regulation of property is only awarded when governmental interference deprives the owner of substantial economic use of his or her property. Joint Ventures, 563 So. 2d at 625. This statement contained in the majority's opinion, coupled with the dissent's fear that every property owner would be claiming compensation, indicates that the majority in Joint Ventures II did not intend to open the public coffers for everyone who had a map of reservation filed on their property, but compensation is only due to those property owners who can prove that the interference deprived them of substantial economic use of their property as a whole. The only evidence before the trial court in this case was that the map of reservation did not deprive WEISENFELD of substantial economic use of his property as a whole.

The majority opinion in Weisenfeld is properly concerned with wasting state resources by paying attorney's fees and costs of property owners litigating a "taking" of nominal or even non-existent property rights. This case is a perfect example of the abuse resulting from an interpretation of Joint Ventures II as a per se taking. In this case, the only evidence before the trial court was presented by the DEPARTMENT in the form of an affidavit of a licensed professional land surveyor. (DCA App. 113-115) The surveyor determined that the map of reservation overlapped approximately 4% of the area claimed to be owned by WEISENFELD. (DCA App. 114) In addition, a certified copy of a plat filed in the Seminole County Plat Book indicates that part of the area claimed to be owned by WEISENFELD was dedicated for road right-of-way in 1985. (DCA App. 112B, 115A) Finally, and most importantly, WEISENFELD proceeded with development of his Country Creek subdivision in spite of the map of reservation and even alleges in the second Amended Complaint that tracts B, H, and I (indicated on proposed master concept plan, DCA App. 64) were already developed.[10]

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

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[10] "Tract 'B' has already been developed for residential use." (DCA App. 53) "Plaintiffs were forced to develop tracts 'H' and 'I' without being able to use.... the Orange County property...." (DCA App. 55) In other words, even by WEISENFELD's own allegations, development of the property proceeded in spite of the map of reservation and he has therefore not been deprived of substantial economic use of his property as a whole.

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 (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)].[11]

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

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[11] 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 (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. WEISENFELD 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).[12]

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 Carriers, Inc., 450 So.2d 213, 216 (Fla. 1984).[13]

This Court has addressed another analogous situation in which

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[12] Counsel for WEISENFELD 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.

[13] 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).

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 map of reservation in this case was filed in the public records some eight months after the statute was found to be constitutional by the First District Court of Appeal. Joint Ventures I, 519 So.2d at 1072. The map of reservation in this case was withdrawn before this Court's Decision in Joint Ventures II became final. (DCA App. 56) Had the DEPARTMENT 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. Surely the DEPARTMENT cannot be faulted for utilizing a Legislative mechanism that was expressly held to be constitutional by a Florida District Court of Appeal.

Counsel for WEISENFELD may argue in their Reply 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 (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[14] [quoting from United States v. General Motors Corp., 323 U.S. 373, 378 (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 U.S. 1083 (1981).

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[14] 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.).

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.

While the DEPARTMENT agrees with WEISENFELD that an understanding of the holdings in First English Evangelical, Joint Ventures, and Agrigrowth are important to a proper determination of this appeal (IB 10), the DEPARTMENT disagrees with WEISENFELD in what those cases say. The United States Supreme Court stated its holding in First English Evangelical 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.

482 U.S. at 321. In this case, WEISENFELD has neither alleged nor proven the alleged map of reservation worked a taking of "all use of [his] property." The map of reservation statute, even during its effective dates, had no effect on the present use of the property. §337.241, Florida Statutes (1987).

WEISENFELD also ignores the subsequent history of the First English Evangelical case. The Supreme Court reversed and remanded the case "for further proceedings not inconsistent with this opinion." 482 U.S. at 332. Upon remand, the California Court of Appeal ruled that no compensable taking had occurred because the regulation did not deny First English of "all use" of its property. First English Evangelical Lutheran Church of Glendale v. County of

Los Angeles, 210 Cal. App. 3rd 1353, 258 Cal.Rptr. 893, 902 (Cal. App. 2d Dist. 1989). Even though the regulation in First English Evangelical prohibited the construction of structures on a part of the property owner's property (just as alleged in this case) the Court held that the present use of the property was unaffected and the property owner could use the property consistent its current zoning. Id. at 902, 904.

The property owner, dissatisfied with the court of appeal's ruling, again sought review by the United States Supreme Court, but certiorari was denied. 110 S.Ct. 866, 107 L.Ed.2d 150 (1990). In addition, this Court specifically stated that the United States Supreme Court's decision in First English offered "no guidance" to the issue presented in Joint Ventures II. Joint Ventures II, 563 So.2d at 627, note 11. Contrary to WEISENFELD's argument in his Initial Brief, this Court in Joint Ventures II expressly refused to apply the reasoning of First English.

The DEPARTMENT does not argue that a taking cannot be temporary. However, what each and every Supreme Court case says is that the regulation must "deny a landowner all use of his property" before a compensable taking is found. First English Evangelical, 482 U.S. at 318. The Florida Supreme Court requires the deprivation or interference to be substantial. Joint Ventures, 563 So.2d at 625.

The United States Supreme Court has found a regulation to be unconstitutional for failing to substantially advance a legitimate state interest but did not direct payment of compensation during the effective dates of the regulation. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). 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 WEISENFELD argues, 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 DEPARTMENT's position is a correct interpretation of the state of the law of regulatory takings and WEISENFELD'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, (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.[15]

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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[15] The Fifth District Court of Appeal correctly cited to this standard in other cases prior to Weisenfeld. 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.

This case is 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 (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.

E. A CASE BY CASE ANALYSIS WILL PROVIDE COMPENSATION TO THOSE PROPERTY OWNERS WHO HAVE ACTUALLY SUFFERED DEPRIVATION OF SUBSTANTIAL ECONOMIC USE AND AVOID NEEDLESS LITIGATION OF NOMINAL CLAIMS.

This case serves as a good example of why regulatory taking cases should be decided on a case by case basis. At this stage in this case, it is not proven whether WEISENFELD even owns the property: "Any award of damages shall be conditioned upon proof of ownership of the property in question." (DCA App. 141) 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 does not bar recovery by WEISENFELD. Such an analysis 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."[16] Joint Ventures II, 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 WEISENFELD would require a jury trial for every "as applied" map of reservation case, 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 (as it appears to be in the case at hand).

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.

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[16] The map 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.

Perhaps WEISENFELD is entitled to compensation because the affect of the map of reservation was to deprive him of substantial economic use of his 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. Weisenfeld, 18 Fla. L. Weekly at D804. 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.[17] Allowing nominal damage cases not only trivalizes the constitutional right to just compensation, Tampa-Hillsborough County Expressway Authority v.

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[17] 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. In Florida, nominal damages inverse condemnation cases are only economically productive for the property owner's attorneys and expert witnesses, who are paid by the state.

A.G.W.S. Corporation, 608 So.2d 52, 58 (Fla. 2nd DCA 1992) [Judge Attenbernd, dissenting], but wastes the resources and time of the judiciary specifically and the state generally.

WEISENFELD cites to the amendment of §73.092, Florida Statutes (1989) as a method for the trial court to minimize costs and attorney's fees for minimal claims. (IB pp. 22-23, fn. 7) The amendment cited by WEISENFELD only applies to cases filed after October 1, 1990. Ch. 90-303, §6, Laws of Fla. Such an amendment would not apply retroactively to WEISENFELD's suit that was filed on September 15, 1989. (DCA App. 1, 5)

CONCLUSION

The Fifth District Court of Appeal's decision in this case should be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing have been furnished by U.S. Mail on this 29th day of June, 1993 to G. ROBERTSON DILG, ESQUIRE, 12th Floor - Southeast Bank Building, 201 East Pine Street, Post Office Box 3068, Orlando, Florida 32802.

THOMAS F. CAPSHEW