IN THE SUPREME COURT
OF FLORIDA

JOSEPH WEISENFELD, TRUSTEE,
AND COMMUNITY DEVELOPERS
OF ORANGE COUNTY, INC.,

Petitioners, CASE NO.: 81,653

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF FLORIDA

Respondent,
_____/

APPEAL FROM AN EN BANC DECISION OF THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA CERTIFYING QUESTION IN CONFLICT WITH OTHER DISTRICT COURTS OF APPEAL OF THE STATE OF FLORIDA

PETITIONERS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioners, COMMUNITY DEVELOPERS OF ORANGE COUNTY, INC. ("COMMUNITY DEVELOPERS") and JOSEPH WEISENFELD, TRUSTEE, were the Plaintiffs/Appellees below and will be collectively referred to herein as "Weisenfeld," except where individual designations are appropriate.

Respondent, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, was the Defendant/Appellant below and will be referred to herein as the "DOT."

References to the Appendix of this brief shall be indicated (A____). The Appendix contains a copy of the lower court's en banc decision in this case as well as a copy of the case with which it is in certified conflict - Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992). Additionally, the Appendix contains copies of an Order denying Weisenfeld's Motion for Attorney's Fees and an Order denying Weisenfeld's Motion for Rehearing on that issue.

STATEMENT OF THE CASE AND OF FACTS

On September 29, 1988, the DOT recorded a map of reservation against a portion of property Weisenfeld held as Trustee in Seminole and Orange counties. In a Second Amended Complaint (A-29-43) Weisenfeld alleged that the property had been acquired to be developed as a project called Country Creek. The map encompassed all of the Orange County property and a substantial portion of the Seminole County property.

Recording the map of reservation against Weisenfeld's property had the effect of temporarily "freezing" (Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 626 (Fla. 1990)) the existing use of that property. Pursuant to Section 337.241(2), Florida Statutes (1987), once the map was recorded, no development permits, as defined by Section 380.031(4), Florida Statutes (1987), could have been be granted "by any governmental entity, for a period of 5 years from the date of recording such map, for new construction of any type or for renovation of an existing nonresidential structure that would exceed 20 percent of the appraised value of the structure." The recording of the map of reservation not only prohibited the issuing of development permits for an initial period of five years, it empowered the DOT to extend that period for an additional five years, if it so desired.

The impact of the map of reservation stemmed not so much from its potential duration as from the sweeping limitations it imposed on the uses of Weisenfeld's property. A development permit is defined by Section 380.031(4), Florida Statutes (1987), as including "any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter." Development is defined in Section 380.04(1) of the chapter as "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels." Thus, imposition of the map of reservation effectively prohibited Weisenfeld from developing those portions of his property affected by the map.

On September 15, 1989, Weisenfeld filed suit in inverse condemnation to compel the DOT to take his property and/or to provide compensation for the time the map of reservation remained in effect. A-1-11. In his Complaint, Weisenfeld alleged that recording the map of reservation had prevented the development of his property. A-3-5. He alleged that the property had been acquired for the purpose of developing it pursuant to an existing Master Concept Plan. Id. (The Master Concept Plan is at A-6B). He further alleged that "By the time the Department of Transportation had filed the map of reservation, construction was either completed, underway or planned on all of the property";

that "the map of reservation made further construction impossible"; and that "if the development of the property had been permitted to proceed as scheduled, then the use of all property, construction, and marketing could have been conducted as a part of the overall plan to minimize costs and maximize returns."

On April 26, 1990, this Court, in Joint Ventures, found the statute that authorized the filing of maps of reservation unconstitutional because it permitted a taking without compensation. Joint Ventures, 563 So. 2d at 628. On June 1, 1990, the DOT withdrew the map of reservation. A-115.

On September 9, 1991, partial summary judgment as to liability was granted in favor of Weisenfeld.[3] On March 22, 1993, the District Court of Appeal sitting en banc receded from its holding in Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991), rev. den. 591 So. 2d 183 (Fla. 1991), reversed the summary

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[3] At the time the trial court granted summary judgment on behalf of Weisenfeld as to the property in Seminole County, it also granted a motion by the DOT to sever out all allegations as to the Orange County property and to transfer that portion of the Complaint to the Orange County Circuit Court. Subsequently, the trial court in the Orange County case also granted summary judgment as to liability. A notice of appeal of the Orange County decision was filed by the DOT on October 8, 1991. Department of Transportation v. Weisenfeld, Fla. 5th DCA Case No. 93-00051. That case remains pending to date. On April 2, 1993, after it issued its en banc decision in this case, the Fifth District issued an Order denying Weisenfeld's Motion to Consolidate the two cases on appeal.

judgment and certified conflict with A.G.W.S. Corp., 608 So. 2d 52. Weisenfeld timely filed a Notice of Appeal with this Court.

SUMMARY OF THE ARGUMENT

For almost two years, from September 29, 1988 to June 1, 1990, the DOT, under authority granted it pursuant to Section 337.241, Florida Statutes (1987), imposed a map of reservation against a portion of Weisenfeld's property. While the map remained in effect, that property was effectively frozen, as Weisenfeld was prohibited by law from developing it. In freezing Weisenfeld's property, the DOT did not seek to regulate the use of the property. It did not act under even the color of the state's police power. Instead, it acted for the sole purpose of reducing the cost of later acquiring the property. In other words, it took the property so affected for a public purpose. The freezing of Weisenfeld's property thus represented a taking, pure and simple, for which compensation must be paid.

In Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), the United States Supreme Court recognized that even in a regulatory context: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests,... or denies an owner economically viable use of his land," (emphasis added) (citations omitted). There are thus two separate, distinct and totally different situations in which even a zoning law will effect a

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As the United States Supreme Court recognized in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987), no subsequent action by the DOT, "can relieve it of the duty to provide compensation for the period during which the taking was effective." Moreover, this Court in Joint Ventures, expressly rejected the reasoning advanced by the appellate court below that trial courts should consider the circumstances of each map of reservation in determining whether a taking has occurred.

Based upon existing Florida and Federal case law, the filing of the map of reservation in the instant case constituted a per se temporary taking for which compensation must be paid. The question of whether or not the filing of the map denied WEISENFELD all "economically viable use" of his property is, therefore, moot. Under Joint Ventures and under the first Agins alternative a taking occurred. That fact does not have to be proven a third time. Accordingly, the decision below must be reversed and the DOT must be required to compensate Weisenfeld for the twenty months during which it took his property.

ARGUMENT

I. Because the Filing of the Map of Reservation Prevented Weisenfeld from Developing his Property, Both Florida and Federal Law Recognize That He Is Entitled to Compensation For The Temporary Taking of His Property.

Although frequently labeled a regulatory taking by the courts and by Weisenfeld in previous pleadings, the filing of a map of reservation should properly be characterized as a statutory exercise of the power of eminent domain. The filing does not regulate anything. It simply prohibits a property owner, albeit temporarily, from making full use of his property. The effect of the filing is to transfer the power to develop the property from the landowner to the DOT. The filing has no purpose other than to allow the taking authority to purchase the property at some undefined future date based upon the use of the property at the time the map is filed, not upon the use the property would have, had it not been for the filing. The filing of a map of reservation compels the property owner to give up the right to develop his property without giving the property owner anything in return.

Temporary takings have long been recognized as compensable in the State of Florida. For example, it is routine in road projects to provide compensation not only for property taken in fee but also for what are known as temporary construction easements. See e.g., Trailer Ranch, Inc. v. City of Pompano Beach, 500 So. 2d 503 (Fla. 1986); Division of Administration, State Department of Transportation v. Decker, 450 So. 2d 1220

(Fla. 2d DCA 1984). In acquiring a temporary construction easement, the taking authority gains the right to use a portion of a land owner's property for a temporary period of time. The taking authority does so, however, only upon paying compensation to the land owner for the right to use his property in a specified manner for a specified period of time.

Temporary construction easements are acquired by the exercise of the taking authority's power of eminent domain. Whether the landowner would have used the property during the time of the easement is irrelevant. Similarly, it does not matter how much the easement interferes with or deprives the landowner of the economic use of his property. The amount of the landowner's remaining property is even more irrelevant. This is true because the acquisition of such easements has nothing to do with the exercise of police power. It advances a public good; it does not prevent a public harm. Such an easement, therefore, can only be acquired upon payment of full compensation to the property owner.

A regulatory taking, in contrast, is one resulting from the exercise of the state's police power. It is designed to prevent a public harm, or as this Court recognized in Joint Ventures, "for the protection of the general welfare." 563 So. 2d at 625; see also Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1379 (Fla. 1981) cert. den. sub nom Taylor v. Graham, 454 U.S. 1083 (1981). In such cases, where the danger to the public is

manifest, courts traditionally attempt to balance the need to prevent the danger against the property rights of the landowner. Under such circumstances, it is arguably permissible to consider the impact of the taking upon the property owner before determining whether the regulation has gone so far as to constitute a taking.

As can be seen, the filing of a map of reservation is far more akin to the taking of a temporary construction easement than to a regulatory taking. In filing the map of reservation, the DOT did not seek to prevent a public harm. No harm would have befallen the public had Weisenfeld been able to proceed with the development of the Country Creek project. Instead, the DOT sought only to advance a public good -- that of reducing the future cost of land acquisition by preventing Weisenfeld from developing property which the DOT might subsequently decide to condemn, presumably at a higher price than if the DOT could force the property to be preserved as raw land. As this Court noted in Joint Ventures:

> Indeed, the legislative staff analysis candidly indicates that the statute's purpose is not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property. Staff of Fla. H.R. Comm. on Transp., H.B. 314 (1985) Staff Analysis (March 25, 1985).

Id. at 626.

By filing the map of reservation, the DOT effectively acquired an easement over Weisenfeld's property which prevented him from developing it. In that respect, the impact of the filing differed little from the acquisition of a construction easement routinely taken by the DOT. While the land owner may retain title to the underlying property, such an easement prevents him from developing it. Under such circumstances, as in the instant case, the State must pay for the taking.

In determining this appeal, this Court should be governed by: First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990); as well as by the reasoning stated by the District court of Appeal, Second District in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d DCA 1992); and by the District Court of Appeal, Fifth District in its prior decision in Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd, 582 So. 2d 790 (Fla. 5th DCA 1991).

In First English the United States Supreme Court held that a temporary regulatory taking requires compensation[4] and concluded: "where the government's activities have already worked a taking of all use of property, no subsequent action by the

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[4]The Court subsequently reaffirmed its holding that regulatory takings are compensable in Nolan v. California Coastal Commission, 483 U.S. 825 (1987).

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 321.

In Joint Ventures this Court held that the imposition of a map of reservation was facially unconstitutional because it temporarily and for an impermissible purpose permitted the state to take private property without just compensation. Joint Ventures, 563 So. 2d at 628.

Finally, the majorities in A.G.W.S. Corp. and in W & F Agrigrowth, affirmed summary judgments against taking authorities "on the issue of the Authority's liability for the temporary taking" of property within a map of reservation filed by the Authorities. W & F Agrigrowth, 582 So. 2d at 792; A.G.W.S. Corp., 608 So. 2d 52.

Since the imposition of the map of reservation against Weisenfeld's property constituted a temporary "taking," since no subsequent action by the DOT could relieve it of its duty to provide compensation for the period during which the taking was effective, and since summary judgment is appropriate in such cases, it follows inalterably that the trial court correctly held that Weisenfeld's property was taken during the time the map of reservation remained in effect and correctly ordered trial on the issue of compensation. Accordingly, this court must now re-affirm its holding in Joint Ventures and reverse the en banc decision below.

A. Under First English, the DOT is Required to Compensate Weisenfeld for any Temporary Taking of His Property.

In First English, the United States Supreme Court considered an interim county ordinance that prohibited property development in much the same way the filing of a map of reservation did. First English, 482 U.S. 304. By virtue of that ordinance no one could "construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within" an area designated as an interim flood protection area. Id. at 307. First English Church, which had maintained a campground within the flood protection area, protested that the interim ordinance constituted a regulatory taking. The California Court of Appeals, citing the California Supreme Court opinion in Agins v. City of Tiburon 598 P.2d 25 (Cal. 1979), aff'd. on other grounds, 447 U.S. 255 (1980), rejected that argument concluding that a landowner could not maintain an inverse condemnation suit based upon a regulatory taking. 482 U.S. at 308-9.

On appeal, however, the United States Supreme Court began its analysis by recognizing that the holding in Agins, 598 P.2d 25, was not applicable because the regulations considered to be at issue by the state court in that case did not effect a taking. First English, 482 U.S. at 311. The Court then turned its attention to the issue of: "whether the Just Compensation Clause [and by implication, Article 10, Section 6 of the Florida

Constitution] requires the government to pay for `temporary' regulatory [in that case] takings." Id. at 313.

The Court initially concluded that under the Fifth Amendment, "government action that works a taking of property rights necessarily implicates the `constitutional obligation to pay just compensation.'" Id. at 315 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)). Quoting Justice Holmes, the Court noted: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. at 322. (Citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Court further found that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the Fifth Amendment with respect to compensation. Id. Citing the basic rule articulated in Pennsylvania Coal Co., the Court reiterated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." First English, 482 U.S. at 316. The Court went on to note:

> While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.

Id.

Having reaffirmed the right of a property owner to use an inverse condemnation suit to obtain compensation for even a regulatory taking, the Court proceeded to consider "whether abandonment [as in the instant case, of the regulations that caused the taking] by the government requires payment of compensation for the period of time during which [those] regulations deny a landowner all use of his land." First English, 482 U.S. at 318. In its analysis the Court considered a series of cases involving the temporary appropriation of private property by the United States for use during World War II. Id. See, Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945). The Court then concluded: "These cases reflect the fact that `temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. First English, 482 at 318. The Court further noted that invalidation of an ordinance creating a taking, "though converting the taking into a `temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 319. "[N]o 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 321.

The application of the First English decision to the instant case is striking. As with the interim ordinance in First English, the map of reservation filed against Weisenfeld's property had the effect of preventing him from developing all property affected by that map for a temporary period of time, which could have extended for up to ten (10) years. If the imposition of the interim regulatory ordinance against the First English Church could constitute a taking, so much more must the statutory imposition of the map of reservation constitute a taking of Weisenfeld's property. Given the holding of the United States Supreme Court in First English, this Court must, therefore, reject DOT's argument that a landowner affected by the improper filing of a map of reservation may obtain no relief beyond the striking of the regulation.

B. Under Joint Ventures, the Filing of the Map of Reservation Constituted a Temporary Taking of Weisenfeld's Property.

The constitutionality of the statute under which maps of reservation were filed, was first raised in Joint Ventures. When the District Court of Appeal, First District, reviewed the matter, it found the statute constitutional, but only because a property owner had a right to seek compensation, as in First English, by way of a suit in inverse condemnation. Joint Ventures, Inc. v. Department of Transportation, 519 So. 2d 1069 (Fla. 1st DCA 1988), rev'd, 563 So. 2d 622 (Fla. 1990). When

this Court considered the issue, however, it did not question the affected landowner's right to file a suit in inverse condemnation: instead, it asked whether such a right was sufficient to preserve the constitutionality of the statute. Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). Applying the reasoning of First English, this Court found the statute unconstitutional, because it per se authorized a taking without compensation.

It is important to recognize that this Court's decision in Joint Ventures is implicitly predicated upon the conclusion that the filing of a map of reservation was not an attempt to advance a legitimate state interest but was instead "a thinly veiled attempt to `acquire' land by avoiding the legislatively mandated procedures and substantive protections of Chapters 73 and 74." Id. at 625. As such, this Court concluded that the statute authorizing the filing of a map of reservation unconstitutionally permitted the state to take private property without compensation and without the procedural protections of the eminent domain statute. Id. at 623, 628.

It should be emphasized that the dissenting justices in Joint Ventures argued that a trial court should consider the circumstances of each map of reservation to determine whether a taking has occurred. These are the very arguments which the lower court has resurrected in its en banc decision below. However, in holding subsections 337.241(2) and (3) facially

unconstitutional and in concluding that the filing of a map of reservation constituted a taking, the majority of this Court rejected those very arguments. Accordingly, as Judge Campbell recognized in A.G.W.S. Corp., "because a taking has, under Joint Ventures, been found to have taken place, we must offer those landowners an opportunity to prove whether or not they have suffered actual damages." 608 So. 2d at 52.

C. Because the Filing of a Map of Reservation Constituted a Temporary Taking, the Trial Court Correctly Entered Summary Judgment Against the DOT.

In W & F Agrigrowth, 582 So. 2d 790, which became the basis for A.G.W.S. Corp., the Fifth District considered the very questions raised once again by DOT in this case. In that case the Expressway Authority, like DOT in this case, filed a map of reservation against property in early 1988. Like the DOT in this case, the Authority removed the map after the Joint Ventures decision. Like the DOT in this case, the Authority refused to accept liability for temporarily taking property affected by the map. As in the instant case, the trial court granted summary judgment on the issue of liability against the Authority for the temporary taking and ordered a jury trial on the matter of compensation.

On appeal the court affirmed, concluding that the reservation map "clearly imposed a development moratorium on the

land, freezing Agrigrowth's property and effectively preventing Agrigrowth from selling or developing its land." Id. at 792. According to the court, the recording of a reservation map "does not advance a legitimate state interest; it only advances an improper government purpose of taking private property without paying just and full compensation." Id. at 792. For that reason, the court recognized not only the appropriateness of a suit in inverse condemnation for the temporary taking represented by the filing of a reservation map, but also the appropriateness of entering summary judgment as to liability against the authority that filed the map. The only issue, therefore, was "the amount of full compensation to be paid Agrigrowth." The trial court in the instant case has done nothing more than the trial courts did in W & F Agrigrowth and in A.G.W.S. Corp. The trial court's decision must, therefore, be affirmed for the same reasons as those set forth in W & F Agrigrowth, as adopted by the District Court of Appeal, Second District, in A.G.W.S. Corp.

II. Because the Decision Below Ignores the Holding of the United States Supreme Court in First English and Adopts the Dissenting Opinion of this Court in Joint Ventures, It Must be Reversed.

In the decision below three judges writing for the majority quoted this Court's holding in Joint Ventures that:

> Generally, the state must pay property owners under two circumstances. 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.

The majority, nevertheless, went on to characterize the filing of a map of reservation as a "mere `attempt'... to improperly acquire land in the guise of police regulation ...." Department of Transportation v. Weisenfeld, ___ So. 2d at ___, 18 Fla.L.Weekly D803 at D804 (Fla. 5th DCA March 26, 1993).

In so holding the majority ignored the fact that the map of reservation had frozen Weisenfeld's use of his property for the twenty months it remained in effect. It also ignored the holding of the majority of this Court in Joint Ventures and of the United States Supreme Court in First English.

In Joint Ventures the dissent refused to find that the filing of a map of reservation constituted a taking, reasoning

> in circumstances ... where the restrictions do not deprive the owner of substantially all beneficial use of his property, there is no taking, and no constitutional right to compensation.

563 So. 2d at 628. Although that position was rejected by the majority of this Court, the Fifth District Court of Appeal in the decision below has now asserted:

> Our inquiry, then, must be directed to the extent of the interference or deprivation of Weisenfeld's economic use of this property. Joint Ventures at 625. Only if that interference deprived him of all or substantial use of this property would he be entitled to compen-

> sation. Moreover, the owner's affected property interest must be viewed as a whole.

Weisenfeld, ___ So. 2d at ____, 18 Fla.L.Weekly at D804. With these words the majority in the court below effectively reversed this Court's holding in Joint Ventures by adopting the reasoning of the dissent.

Judge Harris in a concurring opinion[5] joined with the majority based on the mistaken assumption that because this Court found the statute authorizing the filing of a map of reservation unconstitutional, no taking had occurred. According to Judge Harris, "no court has yet determined that the attempted enforcement of an invalid act can constitute a `taking' justifying inverse condemnation as opposed to other cause of action." Weisenfeld ____ So. 2d at ____, 18 Fla.L.Weekly at D805. In so stating, Judge Harris ignored the holding of the United States Supreme Court in First English that invalidation of an ordinance creating a taking "is not a sufficient remedy to meet the demands of the just compensation clause," and 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." First English, 482 U.S. at 321. Judge Harris also based his concurrence on the assumption that this Court struck the statute "because the state

[5]No other judges joined in the concurrence.

lacked the authority to enact such a provision under the police power." Weisenfeld, ____ So. 2d at ____, 18 Fla.L.Weekly at D805. In making that assertion Judge Harris ignored this Court's holding that the statute was "invalid as a violation of the fifth amendment to the United States Constitution and Article X, section 6(a) of the Florida Constitution." Joint Ventures, 563 So. 2d at 623.

Judge Griffin, who also concurred,[6] equally ignored this Court's stated basis for its holding in Joint Ventures. According to Judge Griffin, this Court's opinion was based on a violation of due process. Having misstated this Court's holding, Judge Griffin then followed a due process analysis to the conclusion that unless Weisenfeld has sought a variance his "inverse condemnation claim should be entirely barred." Weisenfeld, ____ So. 2d at ____, 18 Fla.L.Weekly at D808. In reaching that conclusion, however, Judge Griffin ignored this Court's express holding that the remedial provisions which permitted variances under the statute are "illusory." Joint Ventures, 565 So. 2d at 628.

In contrast, the three dissenting judges below correctly recognized that this Court "clearly held that the filing of the map of reservation was a taking of private property, albeit a temporary taking." ____ So. 2d at ____, 18 Fla.L.Weekly at D810.

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[6]No other judges joined in the concurrence.

In so reasoning, the dissenting judges correctly applied the law. The decision below must now be reversed and the reasoning of the dissenting judges readopted by this Court.

III. The Spectre of Substantial Attorneys' Fees Cannot Provide a Justification for Denying Weisenfeld's Constitutional Right to Full Compensation.

The majority in the en banc decision below, and the dissent in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992) appear to predicate their decisions on their concern for the state's exposure to the attorney's fees and costs that are constitutionally required once it is determined that a taking has occurred. Such considerations may be tempting in an age of shrinking governmental budgets, but they cannot justify denying a property owner his constitutional right to full compensation. The central issue must always be the existence vel non of a compensable taking, which, as this Court recognized in Joint Ventures, has occurred.

Moreover, as the dissent below recognized, any fear of excessive attorneys' fees should be allayed by recent amendments to Section 73.092, Florida Statutes (1989). In determining the amount of reasonable attorney's fees and costs to be awarded in a condemnation proceeding, Florida trial courts are required by statute[7] to give the greatest weight to the benefits conferred

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[7] The legislature has recently amended Section 73.092, Florida Statutes (1989), which governs the criteria used to determine attorney's fees in eminent domain cases. The amended

upon the landowner as a result of the efforts of the inverse condemnee's legal counsel. These same courts are vested with the discretion to award little or no attorney's fees if the results are minimal or if counsel prosecute meritless claims.

In the instant case, it is particularly unseemly for the DOT to raise the spectre of excessive attorneys' fees. The DOT

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statute is applicable to all cases filed after October 1, 1990. The language of the amended statute leaves no doubt that the primary factor in the trial court's determination of a proper attorneys' fee award is benefits to the client. The statute now reads in pertinent part:

> (1) In assessing attorney's fees in eminent domain proceedings, the court shall give greatest weight to the benefits resulting to the client from the services rendered.
>
> . . .
>
> (2) In assessing attorney's fees in eminent domain proceedings, the court shall give secondary consideration to:
>
> (a) The novelty, difficulty, and importance of the questions involved.
>
> (b) The skill employed by the attorney in conducting the cause.
>
> (c) The amount of money involved.
>
> (d) The responsibility incurred and fulfilled by the attorney.
>
> (e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client. § 73.092 (1) and (2) Fla. Stat. (1991) (emphasis added).

continued to file maps of reservation even after constitutional challenges had been raised by affected landowners. The original appellate decision in Joint Ventures was issued by the First District Court of Appeal on January 29, 1988. Suit was filed in W & F Agrigrowth on January 20, 1988, and in A.G.W.S. Corp. on July 8, 1988. None of this, however, deterred the DOT from filing a map of reservation against Weisenfeld's property on September 29, 1988.

Having acted in reckless disregard for the dictates of the Florida Constitution and Weisenfeld's property rights, DOT cannot now expect affected property owners to bear the risk of attorneys' fees. Within this context, it is even more apparent that it is improper for a court to place the burden of the proceedings upon the landowner whose resources are slight in comparison with those which the state can bring to bear in any inverse condemnation proceeding.

CONCLUSION

The filing of the map of reservation, much like the acquisition of a temporary construction easement, represented a taking. Because it did not regulate anything, the filing cannot be treated as a regulatory taking. It simply bestowed a benefit upon the DOT and deprived Weisenfeld of the full use of his property.

The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Agins, 447 U.S. at 260. Whether the taking is permanent or temporary does nothing to alter the law that full compensation must be paid for a taking. In First English, the United States Supreme Court specifically held that "temporary" takings are not different in kind from permanent takings, for which the Constitution clearly requires compensation. 482 U.S. at 318. Moreover, as the Court noted in that case, the subsequent invalidation of an ordinance that permits a taking without compensation, though converting the taking into a "temporary" one, is not "a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 319. If a taking occurs, albeit temporarily, compensation must be awarded. See, Florida State Turnpike Authority v. Anhoco Corp., 116 So. 2d 8 (Fla. 1959).

Ordinarily, an owner must prove a taking in order to establish a right to set forth a cause of action in inverse condemnation. In the instant case, however, this Court in Joint Ventures has already ruled that the filing of a map of reservation constitutes a taking of any property against which the map is imposed. In Joint Ventures, this Court invalidated the statute that authorized the DOT to file maps of reservation because it did not "advance a legitimate state interest; it only advance[d] an

improper government purpose of taking private property without paying just and full compensation." In W & F Agrigrowth and in A.G.W.S. Corp., the courts similarly recognized that the filing of a map of reservation represented an impermissible attempt to "land bank" private property without compensation and that, in such cases, summary judgment as to liability for a temporary taking is appropriate. In entering partial summary judgment as to liability the trial court below did nothing more than apply the above decisions and the mandate of Article X, Section 6 of the Florida Constitution and the Fifth Amendment of the United States Constitution which require compensation for the taking of any private property.

Ultimately, as the trial court ruled in this case, a jury will have to determine the amount of compensation - whether nominal or substantial - to which Weisenfeld is entitled as compensation for the imposition of the map of reservation against his property. In having that determination made, Weisenfeld has an absolute right under the Florida Constitution to be made whole by being awarded attorney's fees. See, Dade County v. Brigham, 47 So. 2d 602 (Fla. 1950); Orange State Oil Co. v. Jacksonville Expressway Authority, 143 So. 2d 892 (Fla. 1st DCA 1962). As with all other taking cases in Florida, those fees will be based primarily on the benefit conferred upon the landowner through the efforts of his counsel.

For all the above reasons, the trial court's Order on Plaintiff's Motion for Partial Summary Judgment as to Liability and Order of Taking should now be affirmed and the matter remanded so that a jury may determine the compensation due Weisenfeld.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.P.S. overnight mail this 4th day of June, 1993, to Thomas F. Capshew, Esquire, Assistant General Counsel, and Thornton J. Williams, Esquire, General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS58, Tallahassee, Florida 32399-0458.

Respectfully submitted,

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161/31:402/19

INDEX TO APPENDIX

1. En Banc Decision dated March 26, 1993.

2. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So.2d 52 (Fla. 2nd DCA 1992).

3. Order Denying Appellee's Motion for Attorney's Fees dated April 2, 1993.

4. Order Denying Appellee's Motion for Rehearing on Motion for Attorney's Fee dated May 17, 1993.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT JANUARY TERM 1993

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

DEPARTMENT OF TRANSPORTATION,

Appellant,

v. CASE NO.: 91-2234

JOSEPH WEISENFELD, Trustee,

Appellee.

Opinion filed March 26, 1993

Non-Final Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge.

Thornton J. Williams, General Counsel and Thomas F. Capshew, Assistant General Counsel, Tallahassee, for Appellant.

Gordon H. Harris and G. Robertson Dilg of Gray, Harris & Robinson, P.A., Orlando, for Appellee.

EN BANC

COBB, J.

The plaintiff below, Weisenfeld, alleged that the filing of a map of reservation by the Department of Transportation (DOT) constituted a temporary regulatory taking of his property entitling him to compensation. DOT denied the allegations, and raised various affirmative defenses.

Weisenfeld moved for a partial summary judgment on liability on the basis that DOT "must be liable as a matter of law for having temporarily inversely condemned Plaintiff's property." The trial court granted the motion, conditioned upon proof of ownership of the property in question. In other words, the trial court held that, assuming the ownership of the property by

Weisenfeld, there was, *ipso facto*, liability on the part of DOT for having merely filed the map. The trial court unequivocally found that Weisenfeld had been injured and must be compensated. The language of the trial court's order reads:

> 10. Having taken the Plaintiff's property from September 29, 1988 to June 1, 1990, DEPARTMENT OF TRANSPORTATION must now be required to compensate the Plaintiff for the value of that taking, plus damages caused by the taking and reasonable costs, including attorneys' and appraisers' fees incurred by Plaintiff in the instant action.

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. See Allen v. Orlando Regional Medical Center, 606 So. 2d 665 (Fla. 5th DCA 1992).

We reverse the instant summary judgment based upon our reading of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) and Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990).

In Joint Ventures the Florida Supreme Court affirmatively answered the certified question whether subsections 337.241(2) and (3), Florida Statutes (1987)[1] unconstitutionally provided for an impermissible taking of private

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[1] These sections provided:

> (2) Upon recording, such map shall establish:
> (a) A building setback line from the centerline of any road existing as of the date of such recording; and no development permits, as defined in s.

property without just compensation. It held that the statute in question was not an appropriate regulation under the police power but was "merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain." Joint Ventures at 625. The court stated:

> Generally, the state must pay property owners under two circumstances. 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

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> 380.031(4), shall be granted by any governmental entity for new construction of any type or for renovation of an existing commercial structure that exceeds 20 percent of the appraised value of the structure. No restriction shall be placed on the renovation or improvement of existing residential structures, as long as such structures continue to be used as private residences.
>
> (b) An area of proposed road construction within which development permits, as defined in s. 380.031(4), shall not be issued for a period of 5 years from the date of recording such map. The 5-year period may be extended for an additional 5-year period by the same procedure set forth in subsection (1).
>
> (3) Upon petition by an affected property owner alleging that such property regulation is unreasonable or arbitrary and that its effect is to deny a substantial portion of the beneficial use of such property, the department or expressway authority shall hold an administrative hearing in accordance with the provisions of chapter 120. When such a hearing results in an order finding in favor of the petitioning property owner, the department or expressway authority shall have 180 days from the date of such order to acquire such property or file appropriate proceedings. Appellate review by either party may be resorted to, but such review will not affect the 180-day limitation when such appeal is taken by the department or expressway authority unless execution of such order is stayed by the appellate court having jurisdiction.

effectively deprives the owner of the economically viable use of that property,[6] thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.[7]

* * *

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." Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 n. 36, 98 S. Ct. 2646, 2666 n. 36, 57 L. Ed. 2d 631 (1978). Thus, when compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use.

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[6] Palm Beach County v. Tessler, 538 So. 2d 846, 849 (Fla. 1989) ("There is a right to be compensated through inverse condemnation when governmental action causes a *substantial* loss of access to one's property even though there is no physical appropriation of the property itself.") (emphasis supplied); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485, 107 S. Ct. 1232, 1238, 94 L. Ed. 2d 472 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). See also J. Sackman, Nichol's The Law of Eminent Domain § 6.09, at 6-55 (rev. 3rd ed. 1985) ("The modern prevailing view is that *any substantial interference* with private property which destroys or lessens its value . . . is, in fact and in law, a 'taking' in a constitutional sense." (Emphasis supplied.)).

[7] 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 borne by the public as a whole.'" Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141, 3147 n. 4, 97 L. Ed. 2d 677 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960)).

It must be emphasized that Joint Ventures did not deal with a claim for compensation, but only with a constitutional challenge to the statutory

mechanism. The mere "attempt" embodied in the mechanism to improperly acquire land in the guise of police regulation, thereby circumventing the procedural and substantive safeguards of Chapters 73 and 74, does not automatically equate with a compensible taking. Therefore, Joint Ventures does not support the conclusion, as contended by Weisenfeld, that the mere filing of a reservation map by DOT creates a cause of action on his part.[2]

In First English, it was held that the Fifth Amendment to the United States Constitution requires governmental compensation as a remedy for temporary regulatory takings subsequently invalidated. Such compensation is due "where the government's activities have already worked a taking of all use of the property." First English, 482 U.S. at 322, 107 S. Ct. at 2389. The United States Supreme Court recently reaffirmed this standard. See Lucas v. South Carolina Coastal Council, _____ U.S. _____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

Our inquiry, then, must be directed to the extent of the interference or deprivation of Weisenfeld's economic use of his property. Joint Ventures at 625. Only if that interference deprived him of all or substantial economic use of his property would he be entitled to compensation. Moreover, the owner's affected property interest must be viewed as a whole. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 497, 107 S. Ct.

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[2] In Note, Takings - Isn't There a Better Approach to Planned Condemnations? - Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), Fla.St.U.L.Rev., Vol. 19, #4, P. 1169 (1992), the writer points out that if Joint Ventures stands for the proposition that all of DOT's reservations effect unconstitutional takings, then the "dimensions of the potential public liability are staggering." This would result from courts awarding attorney's fees and costs to all plaintiffs who had established a taking and the fact that an owner would be free to sue the state for damages, "at the State's expense."

1232, 94 L. Ed. 2d 472 (1987); Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). The record before us reveals that no evidence whatsoever was adduced before the trial court to sustain a factual determination that Weisenfeld suffered such a substantial deprivation of the use of his property.

The result reached by the trial court is consistent with our recent opinion in Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA), rev. denied, 591 So. 2d 183 (Fla. 1991). For the reasons heretofore set forth in this opinion, and for those elucidated by the scholarly dissent of Judge Altenbernd in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992), we recede from Agrigrowth, which was an unfortunate opinion in several respects. For example, it asserts that a regulation effects a taking if it does not substantially advance a legitimate state interest. It cites, as support for this remarkably broad generalization, the case of Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). The language in Agins giving rise to this assertion in Agrigrowth related to the application of a general zoning law to particular property. In Agins, the United States Supreme Court determined that there was no taking and no entitlement to damages resulting from an ordinance placing the owner's land in a residential planned development and open space zone, thereby reducing the number of residences that could be constructed on the property.

Moreover, Agrigrowth seems to equate the Florida Supreme Court's finding of unconstitutionality in respect to subsections 337.241(2) and (3), Florida Statutes (1987) with a taking of property if a reservation map is filed, irrespective of any further allegation or showing of damage to the owner. Joint Ventures simply does not say that.

We reverse the summary judgment entered below and certify conflict with Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So.2d 52 (Fla. 2d DCA 1992).

REVERSED AND REMANDED for further proceedings consistent with this opinion.

DAUKSCH and SHARP, W., JJ., concur.
HARRIS, J., concurs and concurs specially, with opinion.
GRIFFIN, J., concurs and concurs specially, with opinion.
GOSHORN, CJ., PETERSON and DIAMANTIS, JJ., dissent, with opinion.

HARRIS, J., concurring specially. Case No. 91-2234

I concur, but for different reasons, with Judge Cobb's opinion that the summary judgment in this matter must be reversed. I write because the issue relating to the effectiveness of an invalid statute has not been covered.[1]

The dissent starts from the perspective that the recording of the map was a "taking" and has caused at least nominal damages to the landowner, thereby entitling the landowner to a remedy. It latches onto *Joint Ventures* as a basis for finding that inverse condemnation is that remedy.[2]

I start by examining what the State did, the legal and practical effect of the State action, the effect that such action may have had on the landowner, and the remedy, if any, that might be appropriate. Neither I nor the other members of the majority assume that damages, even nominal, occurred. And I, just as fervently as the dissent, grab onto *Joint Ventures* -- but for the proposition that inverse condemnation may not be the remedy even if the landowner is entitled to relief.

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[1] I write from a different perspective, but reach the same result as Judge Altenbernd in *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2d DCA 1992). He perceives, however, that the statute enacted in violation of due process constitutes a "taking"; I urge it does not.

[2] I submit that nominal damages is not a proper basis for inverse condemnation. "Under Florida law, the owner must have been deprived of all beneficial use of the property in order to be entitled to compensation for inverse condemnation, and the extent of the property's decline in value had to be determined before the taking issue could be resolved . . . thus, in the present case, the factual dispute over market value damage precludes a grant of partial summary judgment on whether a taking has occurred. The partial summary judgment is reversed and the case remanded to determine whether there was substantial market value damage to constitute a taking, which would then require the Authority to institute eminent domain proceedings." *Sarasota-Manatee Airport Auth. v. Icard*, 567 So. 2d 937 (Fla. 2d DCA 1990), *rev. denied*, 576 So. 2d 288 (1991). In our case, summary judgment was entered without even a proffer of proof of damages.

THE STATE ACTION

What the State did was to record a map pursuant to a state statute which had the intended purpose of controlling future development of affected property for a substantial period of time.

THE LEGAL EFFECT OF THE ACTION

The statute, and therefore the map, had no legal effect. The statute was held unconstitutional because it was beyond the authority of the legislature to enact. Its legal effect is as though it never existed.[3] As a matter of

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[3] This is stated with perhaps more certainty than is justified. I agree completely with Justice Barkett's statement in *Martinez v. Scanlan,* 582 So. 2d 1167, 1176 (Fla. 1991):

> When a court declares a statute facially unconstitutional, it means, in plain English, that the enactment has been null and void from the outset. It is a declaration that the legislature acts outside its power when it contravenes constitutional dictates.
>
> Having decided that this legislative enactment is a facially unconstitutional violation of the single-subject rule, the Court has no power to breathe constitutional life into it for the period between its enactment and the Court's declaration of facial invalidity. How can a court require compliance with an act it says the legislature had no authority to enact? Logically, it cannot, judicial fiat notwithstanding.

The confusion I now have is that Justice Barkett's statement was in dissent and the majority did, in fact, breathe constitutional life temporarily into the act. But in doing so, the majority stated through Justice McDonald, (*Martinez* at 1174):

> In determining whether a statute is void *ab initio*, however, this court seemingly has distinguished between the constitutional authority, or power, for the enactment as opposed to the form of the enactment. *McCormick v. Bounetheau*, 139 Fla. 461, 190 So. 882 (1939).

McCormick holds:

> The enactment is void *ab initio* if it violates a command or prohibition express or implied of the Constitution, while

law, the statute and the map could not prevent development of any of the affected property. If this proposition is accepted, then it must be agreed that the only basis for a judgment against the State is either to punish the State for its audacity in attempting this process or else to compensate the landowner for actual (not presumed) damages suffered because of the State's effort.

THE PRACTICAL EFFECT OF THE MAP

I agree that although the map had no legal effect, it might well have had a practical effect. For example, an owner desiring to develop might have been refused a permit by an official relying on the presumed validity of the statute. This would be similar to the *First English* and *Lucas* situations except that in both those cases the offending ordinance or statute was a legal act that went too far. No court has yet determined that the attempted enforcement of an invalid act can constitute a "taking" justifying inverse condemnation as opposed to some other cause of action. It may be that the zoning official's refusal to grant a permit based on the presumed validity of the invalid act is sufficient official action to cause a taking. I suggest, however, that even in this case the more appropriate remedy would be slander of title.

> if deficient because of form as distinguished from power there may be a *de facto* jurisdiction to protect organic rights created "before the illegality of enactment is adjudged."

McCormick at 894.

While it might be said that the legislation's deficiency in *Martinez* was a matter of form (failure to comply with the single subject rule), certainly the statute in the present case was invalid because of a lack of power to enact.

A prospective buyer (if the property was on the market) might have withdrawn from negotiations because of the presumed validity of the statute. While there would appear to be damages in this situation, there is no governmental action on which to base a taking. The enactment of a void statute is not governmental action and no affirmative attempt to enforce the void statute is present. Slander of title again would appear to be the remedy.

Even more remote, an owner desiring development or sale of his property might have delayed a development application (as alleged in this case) or the listing of the property for sale in reliance on the presumed validity of the statute. Again, no official action. In the case of development, the owner should be required at least to allege and prove that his intent to develop preceded the holding by the supreme court that the statute was unconstitutional. Inverse condemnation based on afterthought should not be permitted. And in the case of a delayed listing, to presume damages is to presume a ready, willing and able buyer. Even if a remedy exists, damages are extremely speculative.

Finally, a prospective buyer or developer interested in the owner's property, which is not listed, might have failed to contact the owner to see if the property would be available for sale because of the presumed validity of the statute. Again, no official action, no exhaustion of remedies and the damages are even more speculative. Here we must assume that not only would there be an offer, but an offer acceptable to the owner.

THE EFFECT ON THE LANDOWNER

How does Weisenfeld claim his property interest was affected? He alleges that:

> By filing the Map of Reservation, the DOT totally prevented plaintiffs from developing [the property] [because] . . .
>
> Pursuant to §337.241(2)(b), Florida Statutes, plaintiffs were prohibited during the time the Map of Reservation remained in effect from obtaining a development permit . . .

Before the statute was held unconstitutional, the owner did nothing formally to move ahead with the development of his property. He filed for no permit; he did not seek a court determination as to the validity of the act. He doesn't even allege that he would have applied for a building permit but for the map. He only alleges that he was prevented from marketing and developing the property as a unit. But if he delayed development because of the bad marketing conditions of 1988 or adverse interest rates or other financing difficulties, then the filing of the map caused no damages -- not even nominal. The owner exhausted no administrative remedy and he even failed to prove, by affidavit at the hearing on summary judgment, that the recording of the map caused any delay whatsoever.

And even if the owner suffered compensable injury, I urge the remedy is slander of title (the State's claiming an interest in or control over his land that it does not have)[4] rather than inverse condemnation (a judicially recognized "taking" without any governmental action and in excess of the State's authority).

ANALYSIS OF *JOINT VENTURES*

Weisenfeld contends that the fact that the Florida Supreme Court held section 337.241 unconstitutional, as a matter of law, establishes that his property was "taken."

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[4] *See, e.g., Gates v. Utsey*, 177 So. 2d 486 (Fla. 1st DCA 1965).

It is true that section 337.211, which was enacted to limit development and thus hold down property value while the State decided whether to condemn, was held unconstitutional by the supreme court in *Joint Ventures* as a "thinly veiled attempt to acquire land by avoiding" condemnation and thus was an unconstitutional exercise of the police power.

The court refused to accept DOT's position that economic reasons (keeping the land affordable) justified such use of the police power:

> It would be an unwarranted extension of *Fortune Federal*, [532 So. 2d 1267 (Fla. 1988)] 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. The state may not use its police power in such a manner.

Joint Ventures at 626.

It is apparent, therefore, that section 337.241 was held unconstitutional because the state lacked the authority to enact such a provision under the police power.

The police power authorizes the regulation of property for the purpose of "public safety, health, morals, comfort and general well being." *Joint Ventures* at 625. 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.[5] This distinction is important when we consider the landowner's remedy.

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[5] Further, since the Florida Constitution, Article X, Section 6(1) (unlike the United States Constitution), conditions even the exercise of eminent domain on a valid "public purpose," the deliberate suppression of land value on property that the State may later decide to condemn, does not appear to meet that criteria. The fact, as found by the *Joint Ventures* majority, that the State lacked the power to enact the statute could not be cured by providing compensation. The *Joint Ventures* dissent urged that since inverse condemnation provided compensation, the statute was constitutional. But the constitution does not permit the State to increase its power merely by paying

Although Weisenfeld has shown no effort to develop the affected property between the time that the map was recorded and the statute was held unconstitutional, after the ruling on the constitutionality of the statute, he now seeks compensation under the theory of inverse condemnation for the temporary taking that he alleges previously occurred. The trial court found, and the dissent finds, that a taking did occur.

Weisenfeld urges that *Joint Ventures* requires the payment of compensation to everyone affected by a map recorded pursuant to the unconstitutional statute. He urges that the recording of the map, taking into account the provisions of the unconstitutional statute, constitutes a taking of his right to develop his property. Not so. If the statute had been held constitutional, then his rights would have been affected by the statute and compensation might have been appropriate. But an unconstitutional statute is a void statute and, more importantly, void *ab initio*. *See, e.g., Bhoola v. City of St. Augustine Beach*, 588 So. 2d 666 (Fla. 5th DCA 1991). Therefore, neither the statute nor the map recorded pursuant thereto could have any legal effect on Weisenfeld's rights merely because they appeared in the statute books or in the public records of the county. Only an improper application of the invalid statute to an asserted right could cause damage. Just as an

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for it. If it lacked the power to enact the statute, that power is not provided merely because the State agrees to pay compensation. Suppose the legislature mandated that all residences be painted red and agreed to pay the cost of painting and for diminution in property value. The statute would not be valid under the police power because it does not sufficiently relate to general welfare and would not be valid under the power of eminent domain because it lacks the necessary "public purpose." Compensation would not cure these defects.

unobserved falling tree makes no sound, the passive existence of an unconstitutional statute constitutes no taking of any rights.

The position taken by the dissent suggests that once *Joint Ventures* was successful in having the statute declared unconstitutional as being beyond the powers of the legislature to enact, it could, on remand, claim inverse condemnation for damages incurred because of the "taking" which resulted before the decision on unconstitutionality.

This seems contrary to the rationale of *Key Haven Assoc. Enters. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982) which, although considered in another context, nevertheless seems to limit inverse condemnation to those situations in which "the party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings." Although *Key Haven* dealt with the issue as to when one could seek inverse condemnation under an application of the exhaustion of remedies argument, I submit the reasoning is equally applicable to an election of remedies situation.

Should one be permitted to urge that a statute is ineffective because it is beyond the legislative power to enact, prevail on that argument, and then urge that the statute had sufficient validity to cause at least a temporary taking?

I concede I have found no case directly answering this question. It appears, however, that *Atlantic Int'l. Inv. Corp. v. State*, 478 So. 2d 805 (Fla. 1985) suggests the answer: [quoting from its earlier opinion in *Key Haven*]

> Whether a party agrees to the propriety of the action or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation

> comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper.

I submit that the language must be read to mean that the party must agree to the propriety of the action or the court must determine that the governmental action was appropriate before inverse condemnation based on regulatory taking is available. If the court determines the act was constitutionally invalid (not merely invalid as constituting a taking without compensation), the plaintiff has prevailed and has elected his remedy.

In *Joint Ventures*, the court held:

> Thus when compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use. [Emphasis added.]

Joint Ventures at 625. This obviously refers to the existence of a valid governmental regulation that does interfere with, or deprive of, intended economic use. Certainly valid regulations that go "too far" can constitute a "taking." This is not such a case.

Although the application of an invalid statute to an asserted right of an owner will justify an action for damages, a void statute (including the filing of a map under such statute) cannot constitute a taking merely by its presence within the statute books. The provisions of an unconstitutional statute are not self-executing.

Joint Ventures, instead of creating a gold mine of inverse condemnation cases in favor of anyone fortuitous enough to have even a fraction of their property located within the affected area, has instead prevented such cases by holding the statute unconstitutional and therefore void and ineffective as to the property rights of anyone. This is what distinguishes this case from

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). In order to justify an action, therefore, the owner must allege and prove that the invalid statute was improperly asserted against his claimed property right -- such as a denial of a permit.

In *First English*, the court held:

> These cases reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. . . . Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. [Emphasis added.]

First English, 482 U.S. at 318-19.

It is important to recognize the context in which the court in *First English* uses the term "invalidate." The court is addressing (and reversing) the rule in California that a landowner is not entitled to compensation "until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." *First English*, 482 U.S. at 308.

The reason for such a rule was that the California court believed that once a valid regulation or ordinance was deemed to have gone "too far," and thus would require that compensation be paid to the landowner, the legislative body could decide to amend or rescind the objectionable legislation or could elect to continue the regulation and pay the compensation. But the decision should be the legislature's and not the property owner's. The court in *First English* agreed that the legislature should be the one to decide whether the

taking, once established, should be permanent or temporary. But that decision does not end the matter.

> [W]e have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land. [Emphasis added.]
>
> Once a court determines that a taking has occurred, the government retains the whole range of options already available -- amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. . . . 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. [Emphasis added.]

First English, 482 U.S. at 321.

The *First English* court was not using the term "invalidate" in the sense that the statute is unconstitutional because it is beyond the authority of the legislature to enact (as in our case), but rather was contemplating a valid regulation that causes an unconstitutional taking of property unless compensation is paid.[6] If the statute is beyond the authority of the legislature to enact, the legislature cannot (nor would it have any reason to) amend or withdraw it; it is void. It was the lawful ordinance that causes an

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[6] It is the taking without compensation that is unconstitutional, not the ordinance which causes the taking. This position is also accepted in the *First English* dissent:

> There is no dispute about the proposition that a regulation which goes "too far" must be deemed a taking. . . . When that happens, the government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes.

First English, 482 U.S. at 328. A statute can never go "too far" if it is an invalid enactment.

unconstitutional taking which is subject to amendment, withdrawal or ratification upon payment of compensation that concerned the *First English* court.

The facts of *First English* are important. In that case the church's retreat facilities (dining hall, bunk houses, etc.) were destroyed in a flood. The county immediately passed an ordinance preventing the church from rebuilding because of safety concerns and the church immediately asserted its right to compensation because of the "taking." The church claimed that it was being denied "all use" of its property. Until the ordinance was replaced by a less restrictive one,[7] the county -- under color of the ordinance -- did in fact deny the church all use of the property. The *First English* court held that the county's enforcement of the more restrictive ordinance (admittedly valid during the term of its enforcement) which denied all use of the owner's property constituted a "temporary taking." But in *First English* there is no doubt that the ordinance was a proper exercise of the police power. It was a valid ordinance.

In our case the statute was beyond the authority of the legislature to enact under the police power and was void. Standing alone, it could not constitute a taking. There are no allegations that the invalid statute was improperly asserted against any rights of Weisenfeld[8] and therefore summary judgment should be entered in favor of DOT.[9]

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[7] The ordinance was never held to be beyond the authority of the county to enact. In fact, everyone considered the ordinance effective to do what it was intended to do. It was a classic "police power" ordinance (safety) which went "too far."

[8] Weisenfeld filed no affidavit in support of the summary judgment. Even his complaint fails to assert that he made any effort to obtain a development permit. There is no showing in the record that his failure to develop was not

based more on the economic climate than on any perceived regulatory restriction. Justice Kennedy in his special concurring opinion in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) held:

> The facts necessary to the determination [whether a temporary taking had occurred] have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements [such as apply for a permit?] will be part of that analysis. 112 S.Ct. at 2902-03.

Again, in *Lucas*, there was a concession that the Beachfront Management Act was valid under South Carolina law. The question, therefore, was whether the valid act constituted a "taking."

[9] Since the invalid statute could take none of Weisenfeld's rights, inverse condemnation appears to be the wrong remedy in any event. If the recording of the map prevented financing, for example, it appears slander of title would be the remedy. If a governmental official asserted the invalid statute to the detriment of a landowner, then 42 U.S.C. section 1983 might be the appropriate remedy. See generally the due process argument contained in the *First English* dissent.

GRIFFIN, J., concurring specially.

I agree that the decision in *Joint Ventures, Inc. v. Department of Transportation,* 563 So. 2d 622 (Fla. 1990), does not support the approach earlier taken by this court in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th DCA), *rev. denied*, 591 So. 2d 183 (Fla. 1991). DOT correctly contends that a regulatory enactment declared unconstitutional as an invalid exercise of police power does not necessarily mean a "taking" of the regulated property has occurred. A traditional "takings" analysis must still be applied to each affected parcel.

The relationship between the invalidity of land-use regulation that interferes with property rights in violation of due process and land use regulation that effects a "taking" is not easily understood:

> [T]he nature of the difficulty plaguing Court decisions on this issue is substantial and fundamental: It stems from a continuous failure to articulate a consistent view of the relationship between "deprivations" and "takings" when considering attacks on the constitutionality of state and local regulations restricting private property rights.

Michael J. Davis & 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, 394 (1989). The fifth amendment contains two discrete protections: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The first of these is

commonly called the "police power;" the second is the power of eminent domain. Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence In a Legal System With Integrity,* 63 St. John's L. Rev. 433, 437 (1988). One of the problems in the area of regulatory takings law is that:

> [C]ourts frequently fail to make the distinction between two ways in which government may abuse its power: first, government may act arbitrarily, in violation of due process; second, government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. In the first case, the government action is simply invalid; in the second case, the government action is invalid absent compensation, and so government may either abandon its regulation or validate its action by payment of appropriate compensation, i.e., by exercising its power of eminent domain. The failure to distinguish between these two abuses of government power contributed to the confusion and apparent incoherence of taking law.

Wiseman, *supra*, at 438. *Eide v. Sarasota County,* 895 F.2d 716 (11th Cir. 1990), *cert. denied,* ____ U.S. ____, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991) (dividing theories into three: just compensation, due process takings and arbitrary and capricious due process).

Uncertainty in this area may stem from the way the word "invalid" is used in the cases. Apparently, a land use regulation can be either "invalid" (unconstitutional) because it violates the requirements of due process or "invalid" because the regulation "goes so far" that it becomes a taking requiring compensation. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 80-81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980); *Lucas v. South Carolina Coastal Council,* _____ U.S. _____, 112 S. Ct. 2886, 2895 n.8, 120 L.Ed.2d 798, 815 n.8 (1992). A land use regulation that is invalidated because it violates due process requirements can give rise to a damage remedy. It is not

a "taking requiring compensation."[1] Wiseman, *supra,* 463-464.[2] A land use regulation referred to as "invalid" by the United States Supreme Court because it interferes with property rights without compensation is not usually struck down as unconstitutional; it is either withdrawn by the government or continued in force with payment of compensation.[3] A statute is usually struck down only if it violates due process, a rare phenomenon.[4]

If a land use regulation can be declared unconstitutional without being a "taking,"[5] it becomes essential to determine the basis on which our supreme

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[1] *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

[2] *See also* Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence,* 49 Ohio St. L.J. 591, 592 (1988).

[3] *See, e.g., Presbytery of Seattle v. King County,* 787 P.2d 907 (Wash.), *cert. denied,* 498 U.S. 911, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990), where the Washington Supreme Court observed:

> If a regulation is not aimed at a legitimate public purpose, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance will be struck down as violative of due process and the remedy is invalidation of the regulation. No compensation (which properly belongs with a "taking" analysis) is warranted in the face of a due process violation.

Id. at 913.

[4] "*Joint Ventures* is noteworthy because the statute was declared unconstitutional on its face." Thomas E. Roberts and Thomas C. Shearer, *Report of the Subcommittee on Land-Use Litigation and Damages: Regulation, Property Rights, and Remedies,* 23 The Urban Lawyer 785, 794 (1991).

[5] One Supreme Court decision has arguably equated a regulation found to be an invalid exercise of police power with a "taking". *Nollan v. California Coastal Com'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The *Nollan* majority used a due process analysis to invalidate a requirement that the landowner allow an easement for public access as a condition of issuance of a building permit. *Id.* at 837. The *Nollan* court was careful to note, however, that the interference with property rights involved there fell into a very special category - a permanent physical invasion of the property.

court invalidated subsections 337.241(2)(3) in *Joint Ventures*. If the statute were declared "invalid" because its interference with private property rights was so extreme that the land owner was deprived of "all use," it might be a "taking" for which "temporary taking" compensation would be payable. On the other hand, if the statute were held unconstitutional because it offended the other requirement of the fifth amendment that a citizen not be "deprived" of his property without "due process of law", then no inverse condemnation compensation is payable, only actual damages are recoverable.

There is admittedly some language in the *Joint Ventures* opinion that appears to reference a takings analysis. As discussed above, however, the very fact that the statute was held unconstitutional indicates the statute was deemed to violate the fifth amendment due process guarantee. Furthermore, in the main, the *Joint Ventures* opinion focuses squarely on the question whether the statutory scheme provides a proper means to a valid end - a classic due process inquiry:

> 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.

563 So. 2d at 626. The *Joint Ventures* court expressly observed that:

> 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 economic use.
>
> Here, however, we do not deal with a claim for compensation, but with a constitutional challenge to the statutory mechanism. 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 (citations omitted) (emphasis added). This certainly must be the reason why the *Joint Ventures* majority did not respond to the dissent's argument that the challenged statute may or may not operate as a "taking," depending on the circumstances of each affected parcel. The extent of interference or deprivation (*i.e.*, whether there was a "taking") was simply irrelevant to the court's decision to declare the statute unconstitutional. The statute was held invalid because it did not meet the requirements of due process, not because it always resulted in a "taking." In *Joint Ventures* the court eschewed any factual analysis that would support a "taking" claim and invalidated the statute on due process grounds.

If Weisenfeld can show that he was actually damaged by the violation of his due process rights when the state imposed a map of reservation on his property, he should recover those damages. There is no basis to conclude on this record, however, much less from *Joint Ventures*, that this plaintiff ever suffered a temporary "taking" of his property. If not barred by other defects in his claim, he might recast his cause of action to seek redress for the violation of his due process rights, or attempt to show that, when the state imposed the map of reservation on his land, he suffered a denial of all economically viable use of the land[6] - a compensable "taking."[7]

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[6] The *Joint Ventures* court suggests the test in Florida is a "substantial interference." 563 So. 2d at 624, n.6.

[7] DOT also argues that because the record shows that the portion of Weisenfeld's property affected by the map of reservation was minimal (approximately 4%), there is a genuine issue of fact as to whether he was

There is also a procedural element to these post-*Joint Ventures* "takings" claims that may preclude summary judgment. The United States Supreme Court has consistently held, reinforced by both *First English* and *Lucas*, that in order for an aggrieved landowner to assert a claim that a given land use regulation has worked a "taking" of his property, he must show that he has availed himself of the relief provisions afforded by that same statute. "A court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 348, 106 S. Ct. 2561, 2566, 91 L. Ed. 2d 285, *reh. denied,* 478 U.S. 1035, 107 S. Ct. 22, 92 L. Ed. 2d 773 (1986). As explained

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deprived of all (or even "substantial") economic use of his land. Justice Scalia addressed this "segmentation" argument in *Lucas,* 112 S. Ct. at 2894, n.7, as follows:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property - *i.e.,* whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

(citations omitted). *See also Presbytery,* 787 P.2d at 914-915.

by the Supreme Court in *Williamson County*, 473 U.S. at 187-195, the procedural steps available to a property owner to be relieved of the allegedly confiscatory effects of land use regulation must be tried before a "taking" can be asserted.[8] This is a sensible limitation which would avoid exactly what is occurring in the many cases filed after *Joint Ventures* where landowners who were unaware of the map of reservation, who had no intention of developing their land, no ability to develop their land, or who never took any steps to develop their land have filed inverse condemnation suits to recover compensation (and attorney's fees) for a "temporary taking" of their property rights based solely on the operation of the limiting part of the statute, ignoring the relief-giving part of the statute. Unlike the plaintiff in *Joint Ventures*, in the present case, it appears that Weisenfeld never sought to obtain a variance that would allow issuance of a permit.[9] If, on remand, it appears that these facts are true, the inverse condemnation claim should be entirely barred.[10]

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[8] *See* § 337.241(2)(b), -.241(3), Fla. Stat. (1989).

[9] Weisenfeld alleges the property was acquired in 1983 and 1986. There is no allegation of any development permit application or other effort to seek approval for development prior to the map of reservation filing on September 29, 1988. There is no allegation of any effort to invoke the relief provisions of the statute prior to filing the instant action for inverse condemnation one year later, in September, 1989.

[10] I recognize that such exhaustion is unnecessary as a predicate to making a facial challenge to the constitutionality of a land use statute or regulation. I also acknowledge that the *Joint Ventures* court did not find the remedial provision adequate to save the legislation. However, Weisenfeld's suit only asserts a claim for inverse condemnation, seeking compensation for a "taking" that occurred until the statute was invalidated. A taking claim requires resort to the relief provisions of the challenged regulation. *Eide*, 908 F.2d at 723-26.

Per curiam dissent.

The trial court's ruling on a motion for summary judgment that as a matter of law, constitutionally, a temporary taking of Weisenfeld's property occurred when the appellant, Department of Transportation (DOT), recorded in the public records a map of reservation pursuant to sections 337.241(2) and (3), Florida Statutes (1987), should be affirmed where the map of reservation filed had the effect of prohibiting development on a portion of Weisenfeld's property until DOT recorded a withdrawal of the map.

The Case Law

This district has previously addressed the issue of whether the filing of a map of reservation results in a temporary taking. In Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA), review denied, 591 So. 2d 183 (Fla. 1991), a three member panel of this court held that the recording of a map of reservation constituted a temporary taking of private property without compensation in contravention of the Fifth Amendment of the United States Constitution and Article X, Section 6(a) of the Florida Constitution. In W & F Agrigrowth, the Authority filed and recorded a map of reservation pursuant to section 337.241(1),

Florida Statutes (1987). The landowner alleged that the recordation of the map resulted in a denial of his right to construct or develop anything on the property for as long as ten years and that the filing of the map constituted a taking of his property without just compensation. The landowner further alleged that as a result of the filing of the map, he was damaged by the loss of a contract to sell his property. The trial court granted the motion for summary judgment. The trial court found that a temporary taking had occurred and indicated that a jury trial would be held on the question of damages.

On appeal by the Authority, the W & F Agrigrowth panel held:

> We hold that when a governmental entity, by use of a recorded reservation map, attempts to "land bank" private property in a thinly veiled attempt to acquire such property by avoiding constitutionally and legislatively mandated procedural and substantive protections, and in the process freezes property and depresses land values in anticipation of eminent domain proceedings, such action constitutes a taking of property and an inverse condemnation action will lie. Joint Ventures; Hernando County v. Budget Inns of Florida, Inc., 555 So.2d 1319 (Fla. 5th DCA 1990). See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); Agins v. City of Tiburon, supra. The recording of a reservation map does not advance a legitimate state interest; it only advances an improper government purpose of taking private property without paying just and full compensation which violates clear constitutional mandates.

W & F Agrigrowth, 582 So. 2d at 792. Four other panels of this court have followed W & F Agrigrowth: Seminole County Expressway Auth. v. Bullet, 595 So. 2d 105 (Fla. 5th DCA 1992);

Orlando/Orange County Expressway Auth. v. West 50 Ltd., 591 So. 2d 682 (Fla. 5th DCA 1992); Orlando/Orange County Expressway Auth. v. West Orange Nurseries, 590 So. 2d 1129 (Fla. 5th DCA 1992); and Orlando/Orange County Expressway Auth. v. Orange North Assocs., 590 So. 2d 1099 (Fla. 5th DCA 1991). See also Palm Beach County v. Wright, 18 Fla. L. Weekly D384 (Fla. 4th DCA Jan. 27, 1993) and Tampa-Hillsborough Expressway Auth. v. A.G.W.S. Corp., 17 Fla. L. Weekly D2232 (Fla. 2d DCA Sept. 23, 1992). As previously noted, the Florida Supreme Court denied review of W & F Agrigrowth at 591 So. 2d 183 (Fla. 1991).

In Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990), decided during the pendency of the appeal in W & F Agrigrowth and relied on therein, the Florida Supreme Court considered the effect of subsections 337.241(2) and (3), Florida Statutes (1987). The court addressed a question certified by the district court of appeal and stated the following:

> We have for review Joint Ventures, Inc. v. Department of Transportation, 519 So.2d 1069 (Fla. 1st DCA 1988), in which the district court asked in a certified question whether subsections 337.241(2) and (3), Florida Statutes (1987), unconstitutionally permit the state to take private property without just compensation.[1] We answer the question in the affirmative, finding those subsections invalid as a violation of the fifth amendment to the United States Constitution and article X, section 6(a) of the Florida Constitution.

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[1] The question which the district court certified to be of great public importance is:

> Whether subsections 337.241(2) and (3) are unconstitutional in that they provide for an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide an adequate remedy.
>
> Joint Ventures, Inc. v. Department of Transp., 519 So.2d 1069, 1072 (Fla. 1st DCA 1988). We have discretionary jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Id. at 623 (emphasis added). By answering the certified question in this fashion, the court clearly held that the filing of the map of reservation was a taking of private property, albeit a temporary taking.[1] The holding of the court is further emphasized by Justice Ehrlich's dissenting opinion, which attempted to argue:

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[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) established that the Fifth Amendment to the United States Constitution requires the government to pay compensation for a temporary taking of a landowner's property as well as for a permanent taking. The Court held

> that invalidation of the [challenged] ordinance without payment of fair value for the use of the property during this period of time [between the taking and the invalidation of the challenged ordinance] would be a constitutionally insufficient remedy.

Id. at 322, 107 S.Ct. at 2389. See also Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

The Eleventh Circuit Court of Appeals, citing Joint Ventures, stated, "The Florida courts have recognized that under First Lutheran Church property owners have the right to bring reverse condemnation proceedings seeking compensation for regulatory takings." Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1542 (11th Cir. 1991).

> Although in most circumstances imposition of a map of reservation on vacant land will deprive the owner of substantially all beneficial use of the property, it cannot be said that every conceivable application of this statute will effect a taking.

Joint Ventures, 563 So. 2d at 628 (Ehrlich, C.J., dissenting) (emphasis in original). However, a majority of the court failed to agree with this argument and decided otherwise.[2]

Turning now to the instant case, Weisenfeld sought damages on the theory of inverse condemnation, just as this court suggested was appropriate in W & F Agrigrowth. In his complaint, Weisenfeld alleged the following:

> 1. Weisenfeld had purchased his property specifically to develop it pursuant to a master concept plan;
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> 2. By the time the Department of Transportation had filed the map of reservation, construction was either completed, underway, or planned on all of the property;
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> 3. The map of reservation made further construction impossible; and

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[2] Other courts have also invalidated reservation schemes. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (holding that the freezing of property pursuant to the filing of a map, without the condemnation of the land, amounted to an unconstitutional deprivation); Maryland-National Capital Park & Planning Comm'n v. Chadwick, 405 A.2d 241 (Md. 1979) (holding that the Commission's action placing the landowner's property in public reservation which restricted any reasonable use of that property for up to three years, was tantamount to a "taking" in a constitutional sense); Lackman v. Hall, 364 A.2d 1244 (Del. Ch. 1976) (finding that a statute authorizing the establishment of prospective highway right-of-way areas and restricting improvements within those areas which would increase the cost to the state if it decided in the future to condemn, constituted an improper exercise of power of eminent domain).

> 4. If the development of the property had been permitted to proceed as scheduled, then the use of all property, construction, and marketing could have been conducted as a part of the overall plan designed to minimize costs and maximize returns.

Upon finding that a temporary taking had occurred, the trial court entered a partial summary judgment against DOT solely on the issue of liability for the temporary taking based on the clear and well-reasoned opinions in Joint Ventures and W & F Agrigrowth.

It has been urged that Joint Ventures is somehow distinguishable from the instant case. This contention is based on language in Justice Barkett's opinion observing that the Joint Ventures court did not have before it a claim for compensation. Joint Ventures, 563 So. 2d at 625. However, this argument ignores the fact that neither the issue on appeal in the instant case nor in any of this court's four previous opinions following W & F Agrigrowth involved a claim for compensation. Instead, just as in Joint Ventures, the property owner here asserted that the filing and recording of the map of reservation constituted a taking. Whether the allegations in the complaint relating to damages or compensation are susceptible of proof is a separate issue that has not been addressed by the trial court, and consequently, is not before this court on appeal.

The Theoretical Basis

The main question presented is whether a citizen has redress and a remedy against the government for governmental action which

is unconstitutional and whether the legislative branch may authorize such unconstitutional action and limit the citizen's remedy. The scope of this question is narrowed in this case to whether the filing and recording of a "map of reservation" by the Department of Transportation (DOT) constitutes a "taking" of a property interest in the land described in the map for which compensation should be paid the landowner under the "taking" clauses of the State and Federal constitutions.

Part of the difference of judicial opinion as to the correct answer to this question, as presented in this particular case, appears to have a theoretical basis which is exemplified by the question: "Does a legal cause of action always include an element of 'damages'?" The answer to this question should be "no", although many believe otherwise. There are distinct theoretical differences between a cause of action and damages. A cause of action is the statement of a claim for which the law provides a remedy. Further, the law provides a remedy for a violation of all legal rights. Damages are only incidental to a cause of action and are to provide recompense for loss, if any, that results from the breach of a legal right.

Confusion results from the fact that the one best known legal cause of action is for the tort of negligence, and that cause of action peculiarly does incorporate by definition an element of damages as an element of the cause of action. This is true because it relates to an unintended act and in creating that cause of action wisdom dictated that it was not in the public

interest to provide a legal remedy when the consequence of the unintended act, such as an unintended jostling or bumping in a crowded elevator, although technically the violation of the right not to have an offensive or harmful personal bodily contact, nevertheless, was trivial in that no genuine harm occurred. However, for all intentional torts to persons or property, (such as assault, battery and trespass) damages are presumed to flow from the intentional violation of a legal right and therefore damages, while not a part of the cause of action itself, are a given adjunct. This distinction explains the existence of the legal concept of "nominal damages" and the failure to make this distinction causes some to argue that every cause of action requires an element of damages.[3] Whenever the intentional invasion of a legal right occurs the law infers some damage to the party whose rights were violated and if no evidence is adduced as to any particular specific loss or damage, the law "rights" or remedies the wrong by awarding nominal damages, usually in the amount of $1.00.

The constitutional right to own private property includes at least three aspects: (1) the right to use the property, (2) the right to improve the property to enhance its value, and (3) the right to transfer or alienate the property. Next only to the right to use and improve it, is the value of the right to sell it

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[3] The arguments usually give illustrations such as: if a drunk driver races through town but hits no one there is no civil cause of action or if a tree falls in the forest and no one is there to hear it, does it make a sound?

and sometimes, when the property no longer has use or investment value to the present owner, to that owner the right to sell it becomes the most valuable right.

As a practical matter in the marketplace, real property cannot be sold unless the owner has a marketable title. A land title is not marketable if it is subject to some cloud, doubt, threat or suspicion, which would deter a reasonable man from buying it. The marketability of title to land is a valuable aspect of the ownership of that land. The law recognizes that legal right and affords the owner a remedy for an intentional violation of that right. It is an intentional tort to slander or disparage the owner's record title to real property by any act which foreseeably impairs the property's vendibility.[4]

The very purpose of section 337.241, Florida Statutes, which the Supreme Court has now held to be unconstitutional,[5] was to

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[4] Because a claim may sound in tort does not prevent it from being "nothing less than a claim of inverse condemnation, which clearly is meritorious." In re Forfeiture of 1976 Kenworth Truck, 576 So. 2d 261, 263 (Fla. 1990).

[5] Section 13.17 Blight (Threat of Condemnation) of Florida Eminent Domain Practice and Procedure, 4th Ed., May, 1992 Supp., provides:

> In Joint Ventures, Inc. v. Dept. of Transportation, 563 So.2d 622 (Fla. 1990), the Supreme Court held that the map of reservation statute, F. S. 337.241, was a facially unconstitutional taking of private property without full compensation. The statute, at subsection (2) and (3), permitted the state to record a map for future right of way needs on a site-specific basis. Recording of the map prohibited all development of lands subject to the map. The court ruled that a regulation that

freeze the value of the property by encroaching on the owner's right to improve the property and impairing its marketability by notifying prospective purchasers that the property was under threat of condemnation. The DOT was not required by the statute to file such maps of reservation[6] and DOT knew, or should have known, that such action clouded the owner's title, impaired the marketability of the lands described and violated the property owner's rights.[7] The statute being held unconstitutional does

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> "froze" property in order to depress its value of anticipation of future condemnation was unconstitutional and a per se taking.
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> The decision of Orlando/Orange County Expressway Authority v. W & F Agrigrowth-FernField, Ltd.,, 582 So.2d 790 (Fla. 5th DCA 1991), rev. denied, 591 So.2d 183, builds on the Joint Ventures doctrine and is in accord with the United States Supreme Court's view in Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980), to the effect that once a showing of "no legitimate state interest" has been made, there is no requirement to demonstrate market loss or economic harm in order for a taking to be found by summary judgment. "[T]hus, in order to establish a taking, Agrigrowth need only show that the Authority's action in recording the reservation map invaded some property right of Agrigrowth." W & F. Agrigrowth-FernField, Ltd., supra, at 792.

[6] And even if the statute required the maps to be filed, the result is still state action.

[7] When the government contemplates eminent domain proceedings any governmental action that impairs the use or market value of private property in order to reduce the amount of future compensation to the owner is wrong. See Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Co., 108 So. 2d 74 (Fla. 1st DCA 1958). An individual doing the same act for the same purpose would find himself the defendant in a law action of many counts (including conspiracy, slander of title, civil theft, fraud, interference with business relationships), seeking

not legitimize the act of clouding the title to private property for an ulterior purpose. The fact that the legislature will pass a statute attempting to authorize the violation of a constitutionally guaranteed property right does not make that violation any less wrong.[8] The filing of the map of reservation in the public records was definitely calculated to, and did, cloud the title to the land described in it and gives constructive and actual notice to prospective lenders and purchasers that the state is threatening to acquire title by eminent domain proceedings and that action takes from the owner valuable aspects of his property.

Whether or not a particular owner suffered any specific damages as a result of such filing and taking is an entirely separate matter. If the recording of the map caused the owner no special damages the owner will be entitled to only nominal

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punitive as well as compensatory damages. Many RICO convictions are based on less egregious conduct. In Olmstead v. United States, 48 S.Ct. 564, 575 (1927), Justice Brandeis, dissenting, wrote:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ...

[8] It only gives the acting state agency attempting to avoid moral and legal responsibility for its act the weak excuse that, "We were only doing what the legislature said we could do. We didn't know the courts were going to hold the statute unconstitutional."

damages of $1.00. On the other hand, if the owner suffered special damages as a result of the filing of the map, the owner should receive compensation for the loss of those property rights.

Take a real example. A property owner owns a home within the area described in the map of reservation. The property owner's employer transfers him to a distant location. The property owner needs to sell his home here in order to obtain funds to purchase a home for his family at his new place of employment. Because of the map of reservation the owner cannot sell the home for a fair value because no one wants to buy a home which is under a threat of condemnation. For the same reason financial institutions will not lend purchase money to prospective buyers, nor funds to the owner to make needed repairs. The property owner cannot move his family. The State will not formally file eminent domain proceedings and compensate him and yet it has effectively prevented the sale of the property to anyone else for a fair value. The owner and family suffers substantial damages. This condition can continue for months and years and until either the State formally files eminent domain proceedings and pays the owner[9] or a court grants the owner some remedy for the wrong.

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[9] It is very doubtful that the State's action to "withdraw" the recorded map or filing a disclaimer can effectively "unrecord" the map of reservation or its effect in the marketplace. Notice gives knowledge which remains after the notice no longer exists. Just as one cannot "unring" a bell, one cannot take back the knowledge once given by a "notice". The map of reservation continues to constitute a threat of contemplated eminent domain proceedings and to blight the title and impair the vendibility of

Except in the minds of those who believe that benefit to the public ("society") is more important than, and justifies encroachment on, individual rights State action intentionally clouding the title to property in order to control or reduce its market value and to thereby "benefit" the public at the expense of the individual is not justified, and is legally and morally wrong. All such action should be soundly condemned and individual citizens who have suffered injury as the result of this unfortunate governmental policy and action should be compensated for their damages, if any.

Windfall Attorney's Fees

In the recent United States Supreme Court opinion, Farrar v. Hobby, 6 Fla. L. Weekly Fed. S787 (U.S. Sup. Ct. Dec. 14, 1992), the Court ruled that although petitioners who recovered only $1.00 in nominal damages against one defendant in a civil rights action were "prevailing parties" as to that defendant under The Civil Rights Attorney's Fees Award Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. §1988, under the circumstances of the case a "reasonable fee" was no fee. In affirming the Court of Appeal's decision which reversed the fee award, the United States Supreme Court states:

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the property even after the map is withdrawn. The cat cannot be put back into the bag because once a harm, or a threat of harm, is understood, the knowledge of it causes apprehension which has a life of its own and lives after the source of the original notice no longer exists.

Although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under §1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award under Hensley v. Eckerhart, 461 U.S. 424 (1983). [Texas State Teachers Assn. v. Garland Independent School District, 489 U.S. 782, 793 (1989)]. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." Hensley, supra, at 436. Accord, Marek v. Chesney, 473 U.S. 1, 11 (1985). In this case, petitioners received nominal damages instead of the $17 million in compensatory damages that they sought. This litigation accomplished little beyond giving petitioners "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated" in some unspecified way. Hewitt, supra, at 762. We have already observed that if "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount."

* * *

Having considered the amount and nature of damages awarded, the court may lawfully award low fees or no fees without reciting the 12 factors bearing on reasonableness, see Hensley, 461 U.S., at 430, n. 3, or multiplying "the number of hours reasonably expended . . . by a reasonable hourly rate." id., at 433.

* * *

When a failure to prove an essential element of his claim for monetary relief, see Carey, supra, at 256-257, 264, the only reasonable fee is usually no fee at

> all. In an apparent failure to heed our admonition that fee awards under §1988 were never intended to "'produce windfalls to attorneys,'" Riverside v. Rivera, supra, at 580 (plurality opinion)(quoting S. Rep. No. 94-1011, p. 6 (1976)), the District Court awarded $280,000 in attorney's fees without "consider[ing] the relationship between the extent of success and the amount of the fee award." Hensley, supra, at 438.

Farrar v. Hobby, 6 Fla. L. Weekly Fed. at S790-S791.[10]

This view of the United States Supreme Court involving the propriety of awarding full fees where a party has achieved only nominal or insubstantial success[11] has been followed in Florida. See Malagon v. Solari, 566 So. 2d 352 (Fla. 4th DCA 1990); Pappert v. Mobilinium Associates V., 512 So. 2d 1096 (Fla. 4th DCA 1987). In Malagon, the fourth district cites to the ruling in Hensley v. Eckerhart, 461 U.S. 424 (1983) as follows:

> In Pappert v. Mobilinium Associates V., 512 So.2d 1096 (Fla. 4th DCA 1987), this court relied on Hensley in its holding that the extent of success by the prevailing plaintiffs should be utilized by the trial court in determining the amount of fees due those plaintiffs. Quoting Hensley, this court said:
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[10] It should be noted that the dissenting opinion in Farrar v. Hobby, supra, concluded that the reasonableness issue was not before the Court and that the only point on appeal was the one regarding whether petitioners were prevailing parties. The dissenting opinion would have remanded for further proceedings including the assessment of a reasonable fee.

[11] Justice O'Connor in her concurring opinion characterized such success as "purely technical or de minimis." Farrar, 6 Fla. L. Weekly Fed. at S792.

> But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. 103 S.Ct. at 1943.

Malagon, 566 So. 2d at 354.

Although in a successful inverse condemnation action the property owner is entitled to attorney's fees,[12] the award of nominal or insubstantial damages in a subsequent trial is controlled by the court and must bear both on the propriety and amount of any fee award. See also § 73.092, Fla. Stat. (1991). Therefore, the spectre of possible windfall attorney's fees in this or any other similar case neither has to be, nor should be, a factor regarding the sole issue before this court of whether the recording of the map of reservation constituted a taking.

The order of the trial court determining that a temporary taking of Weidenfeld's property occurred when the DOT recorded the map of reservation should be affirmed.

GOSHORN, C.J., PETERSON and DIAMANTIS, JJ., concur.

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[12] County of Volusia v. Pickens, 435 So. 2d 247 (Fla. 5th DCA) pet. for rev. denied, 443 So. 2d 980 (Fla. 1983).

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,
Appellant,

v.

A.G.W.S. CORPORATION, Appellee.

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,
Appellant,

v.

DUNDEE DEVELOPMENT GROUP, Appellee.

Nos. 92-00065, 91-03263.

District Court of Appeal of Florida, Second District.

Sept. 23, 1992.

Appeals from nonfinal orders of the Circuit Court for Hillsborough County; Gasper Ficarrotta, Judge.

William C. McLean, Jr., William C. McLean, Jr., P.A., Tampa, for appellant.

S. Cary Gaylor, Marc I. Sachs, and Alan E. DeSerio, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, Tampa, for appellees.

Thornton J. Williams, Gen. Counsel, and Thomas F. Capshew, Asst. Gen. Counsel, for amicus curiae Florida Dept. of Transp.

PER CURIAM.

Affirmed. *See Orlando/Orange County Expressway Auth. v. W & F Agri-growth-Fernfield, Ltd.*, 582 So.2d 790 (Fla. 5th DCA 1991). We also agree to certify to the supreme court the question posed by Judge Altenbernd's dissent as follows:

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.

CAMPBELL, A.C.J., and HALL, J., concur.

CAMPBELL, A.C.J., concurring specially with opinion.

ALTENBERND, J., dissenting with opinion.

CAMPBELL, Acting Chief Judge, Specially concurring.

I have concurred with Judge Hall that we must affirm these consolidated cases on the authority of *Orlando/Orange County Expressway Authority v. W & F Agri-growth-Fernfield, Limited*, 582 So.2d 790 (Fla. 5th DCA 1991), because I believe that case is a correct interpretation of the state of the law in Florida regarding the issues raised in these cases based upon the precedent of *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla.1990).

Since I am bound by the precedent of our supreme court in *Joint Ventures*, I conclude I must affirm. *See Hoffman v. Jones*, 280 So.2d 431 (Fla.1973). Were I able to decide otherwise, I would agree with Judge Altenbernd, for I conclude his reasoning is sound. My concern arises because cases such as these which find that a taking has occurred based upon the authority of *Joint Ventures* may well involve landowners who have suffered no actual damage. Yet, because a taking has, under *Joint Ventures*, been found to have taken place, we must offer those landowners an opportunity to prove whether or not they have suffered actual damages. This could result in the state being liable for substantial costs and attorney's fees.

ALTENBERND, Judge, dissenting.

These consolidated cases involve two landowners, each having had a portion of its land temporarily affected by a map of reservation recorded pursuant to subsections 337.241(2) and (3), Florida Statutes (1987). The map was intended to preserve land for use in a future transportation corridor. Such maps and their underlying statutory basis were invalidated by the supreme court in *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d

622 (Fla.1990). Thus, for a period of about two years, this recorded map limited development opportunities for the portions of land inside the corridor.

After the decision in *Joint Ventures*, these two landowners filed inverse condemnation actions seeking monetary damages for the temporary taking of their land. The trial court followed the Fifth District and granted a partial summary judgment, holding that a temporary taking of these lands had occurred, even if the specific parcels were not substantially affected by the recorded map. *See Orlando/Orange County Expressway Auth. v. W & F Agri-Growth-Fernfield, Ltd.*, 582 So.2d 790 (Fla. 5th DCA), *review denied*, 591 So.2d 183 (Fla.1991).[1]

The issue in this case is whether the supreme court in *Joint Ventures* truly intended to establish a per se inverse condemnation claim for such landowners. If so, then *every* corridor landowner is entitled to a jury trial on the issue of just compensation, even if it sustained no substantial interference with the use of its land during the brief period these statutes were in effect.

I cannot accept the Fifth District's opinion as a true reflection of the intent of the supreme court or as an appropriate per se rule of constitutional law. I would obey the reasoning in *Joint Ventures*, as well as recent United States Supreme Court precedent, and hold that a landowner is not entitled to just compensation, attorney's fees, and costs as a result of these short-lived maps of reservation unless it establishes at trial that the temporary existence of such a map actually deprived it of a substantial "economically beneficial or productive use of [its] land." *See Lucas v. South Carolina Coastal Council*, — U.S. —, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Because of the ambiguity I perceive within *Joint Ventures*, I would also certify this issue to the supreme court.

I. THE FACTS

In the mid–1980s, the legislature enacted section 337.241, Florida Statutes (1987).[2]

[1] The trial court was obligated to follow the controlling opinion from the Fifth District and, thus, I do not fault its decision. *See Pardo v. State*, 596 So.2d 665 (Fla.1992).

[2] § 337.241 provided as follows:
(1) The department or any expressway authority created under chapter 348 with eminent domain authority pursuant to chapter 74 shall acquire all rights-of-way and may prepare and record maps of reservation for any road within its jurisdiction or for any road for which it administers the right-of-way fund. Any such maps shall delineate the limits of the proposed right-of-way for the eventual widening of an existing road or shall delineate the limits of proposed rights-of-way for the initial construction of a road. Before recording such map, the department or expressway authority shall advertise and hold a public hearing and shall notify all affected property owners of record, as recorded in the property appraiser's office, and all local governmental entities in which the right-of-way is located, by mail at least 20 days prior to the date set for the hearing. After the public hearing, the department or expressway authority shall send the map to the clerk of the court of the affected county, who shall forthwith record the map in accordance with chapter 177 in the public land records of the county. Minor amendments to such maps are not subject to the notice and public hearing provisions of this section, except that property owners directly affected by changes in a minor amendment and all local governmental entities in which a minor amendment occurs must be notified by mail. Minor amendments are defined as those changes which affect less than 5 percent of the total right-of-way within the map.
(2) Upon recording, such map shall establish:
(a) A building setback line from the centerline of any road existing as of the date of such recording; and no development permits, as defined in s. 380.031(4), shall be granted by any governmental entity for new construction of any type or for renovation of an existing commercial structure that exceeds 20 percent of the appraised value of the structure. No restriction shall be placed on the renovation or improvement of existing residential structures, as long as such structures continue to be used as private residences.
(b) An area of proposed road construction within which development permits, as defined in s. 380.031(4), shall not be issued for a period of 5 years from the date of recording such map. The 5–year period may be extended for an additional 5–year period by the same procedure set forth in subsection (1).
(3) Upon petition by an affected property owner alleging that such property regulation is unreasonable or arbitrary and that its effect is to deny a substantial portion of the beneficial use of such property, the department or expressway authority shall hold an administrative hearing in accordance with the provisions of chapter 120. When such a hearing results in an order

In general, this statute allowed the Department of Transportation and any expressway authority to prepare and record maps of reservation, indicating corridors of land which could be used for road development or improvement in the future. Subsection (2) of the statute restricted development within these corridors. Subsection (3) gave an affected property owner the right to an administrative hearing, essentially to compel the state to acquire the affected property.

In January 1988, the First District upheld the constitutionality of this statute, but certified to the supreme court a question concerning the constitutionality of subsections (2) and (3). *Joint Ventures, Inc. v. Dep't of Transp.*, 519 So.2d 1069 (Fla. 1st DCA 1988). On April 26, 1990, the supreme court answered the question and declared these statutory subsections unconstitutional in a sharply divided decision. *Joint Ventures v. Dep't of Transp.*, 563 So.2d 622 (Fla.1990).

The Tampa–Hillsborough County Expressway Authority (the Authority) filed a map of reservation on July 8, 1988, describing a corridor running north-south in an area generally west of Dale Mabry Highway. This occurred after the First District's opinion in *Joint Ventures*, but before the supreme court's opinion. The restrictions on development created by this map were effectively eliminated when the supreme court invalidated the relevant subsections on April 26, 1990.

In early 1991, Dundee Development Group (Dundee) filed a complaint alleging a temporary taking of its land under the Authority's map of reservation and seeking damages for the period from July 8, 1988, to April 26, 1990. The complaint states that, at all relevant times, Dundee owned 205.53 acres located on the north side of Van Dyke Road, approximately one mile west of Dale Mabry Highway. It claims that a "significant portion" of Dundee's land falls inside the corridor and that the corridor bisects this property.[3]

The complaint alleges a taking under several different legal tests. First, it maintains that the map of reservation had left "the property within the map of reservation with no utility or economically beneficial use." In the alternative, it alleges that the map constituted a "physical invasion" of the property. Third, the map destroyed Dundee's "investment-backed expectations." Finally, the map resulted in "the denial of a substantial portion of the beneficial use of [Dundee's] property." Procedurally, it is important to realize that under the rule announced by the Fifth District in *Agrigrowth*, Dundee was not required to prove any of these theories before it obtained a partial summary judgment declaring a taking.

In the trial court, the Authority moved to dismiss, and Dundee moved for summary judgment. The Authority filed an affidavit in opposition to summary judgment stating that the land in question was "vacant pasture, improved pasture lands currently used for agricultural purposes." The trial court granted summary judgment on the issue of taking because it was undisputed that Dundee owned the land and the land was partially inside the reservation. Under the rationale of *Agrigrowth*, "no proof of loss in market value [was] necessary to

finding in favor of the petitioning property owner, the department or expressway authority shall have 180 days from the date of such order to acquire such property or file appropriate proceedings. Appellate review by either party may be resorted to, but such review will not affect the 180-day limitation when such appeal is taken by the department or expressway authority unless execution of such order is stayed by the appellate court having jurisdiction.
(4) Upon the failure by the department or expressway authority to acquire such property or initiate acquisition proceedings, the appropriate local governmental entity may issue any permit in accordance with its established procedures.

3. It is unclear how much acreage constituted the "significant portion." At least in legal argument, the Authority suggests that the affected portion of the land is less than 10% of the total parcel. Under well-established precedent, an inverse condemnation action concerning a use restriction affecting only a portion of a parcel of property is difficult, if not impossible, to prove. *See State, Dep't of Envtl. Reg. v. Mackay*, 544 So.2d 1065 (Fla. 3d DCA 1989); *see also State, Dep't of Envtl. Reg. v. Schindler*, 604 So.2d 565 (Fla. 2d DCA 1992).

establish a taking. Loss of value is relevant to the issue of the amount of full compensation to be paid to [the landowner]." 582 So.2d at 792.

At this point in these proceedings, the judicial determination of a constitutional taking has occurred and a jury will be convened to determine damages. *See Dep't of Agric. & Consumer Servs. v. Polk*, 568 So.2d 35 (Fla.1990). The jury will decide whether those damages are large, small, or even nominal. The trial court will then enter judgment for that amount, plus attorney's fees and costs.[4]

II. THE PROBLEMATIC HOLDING IN *JOINT VENTURES*

In *Joint Ventures*, the supreme court held that subsections 337.241(2) and (3), Florida Statutes (1987), unconstitutionally permitted the state to take private property without just compensation, and declared those statutes "invalid as a violation of the fifth amendment to the United States Constitution and article X, section 6(a), of the Florida Constitution." 563 So.2d at 623. Despite this express holding under a just compensation theory, the court emphasized that the issue on appeal was not an individual's right to compensation. For example, the court stated:

> [W]hen compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use.
>
> *Here, however, we do not deal with a claim for compensation*, but with a constitutional challenge to the statutory mechanism. Our inquiry requires that we determine whether the statute is an appropriate regulation under the police power, as DOT asserts, or whether the statute is merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain.

Joint Ventures, 563 So.2d at 625 (emphasis added). Moreover, the opinion relies upon *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), which clearly contemplates a per se temporary taking only if "all use of property" is affected.

Despite the language in the opinion which seems to facially invalidate these statutes on a just compensation theory, I conclude it is unfair to read the Florida Supreme Court's opinion as if it intentionally created a remedy under a per se rule of temporary taking for use in inverse condemnation proceedings involving any portion of land inside these reserved corridors. Because the supreme court, in its holding, cited article X, section 6(a), rather than article I, section 9, of the Florida Constitution, I can fully understand why the majority believes it must declare a per se rule. Nevertheless, I am convinced that the strong disagreement between the majority and the dissent led to polarized discussions in the *Joint Venture* opinion and that the majority opinion simply did not fully enunciate its reasoning. Between the polarized positions, there is a middle ground of substantive due process. The heart of the majority's reasoning in *Joint Ventures* relies upon this middle ground.

III. THE REASONING IN *JOINT VENTURES*

This case involves two similar constitutional theories: just compensation and deprivation of property without due process. A landowner's right to just compensation is provided in article X, section 6(a), in conjunction with the state's right concerning eminent domain.[5] Article I, section 9, prevents a taking of property without due

4. To avoid complexity, this opinion does not summarize the facts concerning the consolidated appeal. The claim of A.G.W.S. Corporation is factually and procedurally similar to Dundee's. A.G.W.S. owns a 38.8–acre parcel, a portion of which is inside the same corridor.

5. "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Art. X, § 6(a), Fla. Const.

process.[6] While these protections appear in separate sections of the Florida Constitution, they are adjacent to one another in the fifth amendment to the United States Constitution.[7] Despite the similarity between these theories, it is clear that "just compensation" [8] and "deprivation of property without due process" are separate and distinct constitutional theories. Both involve "takings" and "police power," but the analysis of these concepts under a just compensation theory is different from the analysis under a due process theory. Thus, it is critical that a just compensation "taking" not be confused with a "taking" without due process.

A review of the precedent shows that a statute may be valid under one of these two theories, but invalid under the other. *See Dep't of Agric. v. Mid-Florida Growers, Inc.*, 521 So.2d 101 (Fla.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988); *Graham v. Estuary Properties*, 399 So.2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981); *Conner v. Reed Bros., Inc.*, 567 So.2d 515 (Fla. 2d DCA 1990). A landowner may be entitled to damages under one theory, but not under the other. *See Mid-Florida Growers; Conner.* At least as a matter of logic, any legally available result under a due process theory can occur in connection with any available result under a just compensation theory.[9]

Subsections 337.241(2) and (3) may be facially unconstitutional, as an improper exercise of police power under a theory of due process, but they are not facially unconstitutional under a theory of just compensation. Facial unconstitutionality under a theory of just compensation only occurs when, as a matter of law, a statute necessarily results in an uncompensated taking of all affected property. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 501–01, 107 S.Ct. 1232, 1250, 94 L.Ed.2d 472, 498 (1987) (statute cannot be held facially invalid under takings clause unless it is shown to result in taking of all affected property); *Glisson v. Alachua County*, 558 So.2d 1030, 1037 (Fla. 1st DCA) (to find statute facially invalid under takings clause, it must deprive every affected parcel of land of all economically viable use), *review denied*, 570 So.2d 1304 (Fla.1990).

Facial unconstitutionality under a just compensation theory is the result of a per se taking without adequate procedures to provide prompt, just compensation. Although it may have been unclear at the time *Joint Ventures* was decided, it is now quite clear that only two conditions justify a judicial determination of a per se taking. The United States Supreme Court has limited per se violations of the takings clause to "two discrete categories." *Lucas*, — U.S. ——, ——, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798, 812 (1992). These per se violations are restricted to statutes that mandate a physical invasion of all affected properties or to statutes that necessarily take all economic use of all parcels of property affected by the law. *See Lucas; Glisson.* In examining the first category, the recorded map of reservation does not con-

6. "No person shall be deprived of life, liberty or property without due process of law...." Art. I, § 9, Fla. Const.

7. "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

8. The constitutional right to just compensation is frequently referred to as the "takings clause." Because I am attempting to distinguish between a taking of property without due process and a taking for purposes of eminent domain, I will refer only to just compensation to avoid confusion.

9. For examples of cases recognizing different causes of action under just compensation and due process, see *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.1990), *cert. denied*, — U.S. ——, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir.1991); *See generally* The Florida Bar, Continuing Legal Education *Florida Eminent Domain Practice and Procedure* § 13.27 (4th ed. 1988).

For examples of other results on these two theories, see *Belcher v. Florida Power & Light Co.*, 74 So.2d 56 (Fla.1954) (constitutional under both theories); *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs.*, 493 So.2d 417 (Fla.1986) (unconstitutional under both theories).

stitute a physical invasion of property. *See, e.g., Northcutt v. State Rd. Dep't,* 209 So.2d 710 (Fla. 3d DCA 1968) (road construction on adjacent property not a taking requiring just compensation because it involved no physical invasion of subject property), *writ discharged,* 219 So.2d 687 (Fla. 1969).

In considering the second category, it is obvious that subsections 337.241(2) and (3) did not take "all economically beneficial or productive use" [10] of every parcel of land subject to this reservation. Undoubtedly, many parcels inside the corridor were virtually unaffected by the recorded map.[11] It is difficult to believe that the owner of scrub land, citrus groves, and other agricultural acreage sustained substantial economic injury by the filing of this map. A person, who had a home inside this area and had no intention of moving unless and until the state exercised its power of eminent domain, would find it difficult to prove substantial damage as a result of the map of reservation.[12]

In light of *Lucas,* any suggestion that these statutes were invalidated in *Joint Ventures* on the basis of a facial just compensation theory, thereby creating a multitude of per se takings in the context of inverse condemnation, is simply unsupported by the relevant facts. Especially when the supreme court took pains to demonstrate that it was not deciding issues associated with a claim for compensation, I am unwilling to attribute such an illogical result to that court.[13]

On the other hand, it is quite clear that the majority opinion in *Joint Ventures* invalidated these statutes under substantive due process. To be valid under due process principles, a regulation must be rationally related to a legitimate state interest. *Joint Ventures,* 563 So.2d at 625. The legislative history of section 337.241, as well as the Department's argument in the case, led the supreme court to conclude that the purpose of the limitations on development was to "freeze" the value of the affected properties in order to "reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. Citing several cases that invalidated attempts to depress land values in order to reduce the future cost of acquiring property by eminent domain, the court found that this purpose was not a legitimate state interest. *Id.* Such application of the due

10. It appears that a deprivation of "all" economic use is necessary to declare a per se taking, whereas only "substantial" deprivation is required to entitle an individual landowner to just compensation in a case-specific context. *See Lucas v. South Carolina Coastal Council,* — U.S. —, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Sarasota-Manatee Airport Auth. v. Icard,* 567 So.2d 937 (Fla. 2d DCA 1990), *review denied,* 576 So.2d 288 (Fla.1991). Because some parcels within these corridors almost certainly suffered minimal, if any, damage as a result of the map, even the lesser "substantial" loss threshold cannot be met by all affected parcels.

11. Indeed, some landowners with parcels that include small portions inside the corridor may actually have benefitted from the map. Before the map, the landowners knew a road was proposed but had little assurance where it would be built. Such uncertainty can affect one's ability to develop property. After the recording of a map, a landowner can predict the course of a roadway with greater certainty. In this case, for example, it is possible that the corridor prevented development of 20 acres, while allowing the remaining 185 acres to be developed with some assurance that a road would be built nearby.

12. I am assuming that the state could not use the filing of the map as evidence of reduced land values in a formal condemnation proceeding. *See Board of Comm'rs v. Tallahassee Bank & Trust Co.,* 108 So.2d 74, 81 (Fla. 1st DCA 1958) (it would be "totally unjust" to permit the state to rely on ordinances restricting land use as evidence of depressed land values in effort to reduce amount of just compensation awarded in eminent domain proceeding), *writ quashed,* 116 So.2d 762 (Fla.1959).

13. Recently, the Eleventh Circuit has suggested that a just compensation claim is unavailable if a landowner seeks to invalidate a regulation. "Just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest; the validity of the regulation is not at issue." *Reahard v. Lee County,* 968 F.2d 1131 (11th Cir.1992). While I doubt this is true concerning a claim for a temporary taking, it is arguable that an order invalidating a statute under a just compensation theory leaves landowners with a damages remedy only under a due process theory. *See Houle v. Twachtmann,* 6 F.L.W. Fed. 358, 1992 WL 209631 (N.D.Fla. Mar. 11, 1992).

process balancing test is found throughout the *Joint Ventures* opinion.

In contrast, the majority's opinion does not discuss whether every parcel within the corridor was rendered economically useless. Such a discussion would be required for a finding of facial invalidity under a just compensation theory. Therefore, regardless of the constitutional provision cited by the majority in *Joint Ventures*, I conclude that the statute was invalidated by application of the substantive due process balancing test, rather than as a matter of eminent domain or just compensation.

The two landowners in this case have not obtained a judicial declaration of taking on a due process theory, nor have they proven that the statutes resulted in a just compensation taking as applied to their land. I recognize that these statutory subsections may indeed have had substantial impact upon specific parcels within the reserved land. Such substantially affected landowners have the right to file inverse condemnation actions challenging the subsections as applied and to receive damages if successful. There are, however, important practical distinctions between litigation on an "as applied" takings theory and a per se just compensation takings theory.

IV. THE PRACTICAL RAMIFICATIONS

Whether the landowners must prove a substantial economic deprivation before they can receive a judicial determination that a taking has occurred, or whether *Joint Ventures* renders such a map a per se taking entitling every affected landowner to just compensation, is not an esoteric issue of interest only to constitutional theorists. It has very practical ramifications for the judicial system, for the Department of Transportation, for the expressway authorities, and for the landowners whose properties lie within these corridors.

If the issue in an inverse condemnation proceeding is whether a taking has occurred, the burden of proof is on the landowner and the issue is tried before a judge. *Dep't of Agric. and Consumer Servs. v. Polk*, 568 So.2d 35 (Fla.1990); *Sarasota–Manatee Airport Auth. v. Alderman*, 238 So.2d 678 (Fla. 2d DCA 1970). If the landowner loses, the state is not responsible for the landowner's costs or attorney's fees. *See* The Florida Bar, Continuing Legal Education, *Florida Eminent Domain Practice and Procedure* § 13.34 (4th ed. 1988). As a result, the landowner accepts an economic risk by filing the action. Presumably a rational landowner will only file such an action if there is solid evidence that the map of reservation caused the landowner substantial economic harm.

On the other hand, if a taking has been established and the only issue is the amount of just compensation to be awarded, the matter will be tried by jury. Under the per se approach adopted by the majority and *Agrigrowth*, the jury will be informed that the court has found a taking as a matter of law and that the jury's function is merely to determine just compensation. *See* § 73.071(3), Fla.Stat. (1991); The Florida Bar, Continuing Legal Education *Florida Eminent Domain Practice and Procedure* § 11.2. Although a jury can certainly award zero damages for the elements of severance or business damages in an inverse condemnation case, a jury cannot legally award zero damages as just compensation for an entire constitutional taking. If a jury could legally award zero damages, this would mean that the state could "take" property that had no value. This would trivialize the constitutional right to just compensation. *See County of Sarasota v. Burdette*, 479 So.2d 763 (Fla. 2d DCA 1985) (even where state presented no evidence as to value of property taken, jury could not have awarded zero damages just compensation), *review denied*, 488 So.2d 830 (Fla.1986).

Even in a case involving nominal damages, the state will bear the burden of the landowner's costs and attorney's fees. *Volusia County v. Pickens*, 435 So.2d 247 (Fla. 5th DCA), *review denied*, 443 So.2d 980 (Fla.1983). Thus, landowners will risk little or nothing in bringing suit. Even if its damages are minimal or speculative, virtually every landowner will have an incentive to file suit. I believe that the con-

stitution is a rational document and should not be interpreted to reach such an irrational result.

VI. CONCLUSION

Because it is apparent that the maps of reservation recorded under section 337.241 involved several corridors throughout Florida and that hundreds or even thousands of landowners could be entitled to jury trials on the issue of just compensation under the per se analysis adopted by the majority and the Fifth District, I would certify the following question to the supreme court:

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

ABG REAL ESTATE DEVELOPMENT COMPANY OF FLORIDA, INC., a Florida corporation, Petitioner,

v.

ST. JOHNS COUNTY, Florida, etc., Respondent.

No. 92-1297.

District Court of Appeal of Florida, Fifth District.

Sept. 25, 1992.

Rehearing Denied Nov. 13, 1992.

Property owner brought petition for writ of common-law certiorari seeking review of decision of order which had upheld decision of Board of County Commissioners which denied application by owner to modify development plan for commercial village within Planned Unit Development (PUD). The District Court of Appeal, Cobb, J., held that: (1) property owner presented prima facie case of its entitlement to modification of the final development plan; (2) circuit court applied incorrect standard of law; and (3) owner's petition would be granted, but Board would not be directed to grant the application.

Petition for certiorari granted; order of circuit court quashed.

W. Sharp, J., concurred in result only.

1. Zoning and Planning ⇐471.5

Staff report of county planning and zoning department supporting approval of property owner's application for modification of development plan for commercial village within planned unit development (PUD) was strong evidence that granting of owner's application for modification to add fast food restaurant would not significantly increase traffic already generated by shopping center alone; the report found that reduction in total square footage which owner proposed would negate any traffic increase generated by the fast food restaurant.

2. Zoning and Planning ⇐471.5

Where owner makes prima facie showing that it is entitled to a modification of final development plan for commercial village within Planned Unit Development (PUD), Board of County Commissioners is required to bring forward clear and convincing evidence of some public necessity to overcome the owner's prima facie case.

3. Zoning and Planning ⇐471.5

Circuit court is required to find that there is "competent substantial evidence" to support Board of County Commissioners' denial of application for modification of final development plan for commercial village within Planned Unit Development (PUD) when the owner has come forward with a prima facie case.

4. Zoning and Planning ⇐471.5

Circuit court's apparent use of the "fairly debatable" standard when review-

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

DEPARTMENT OF TRANSPORTATION,
Appellant,

v. Case No. 91-2234

JOSEPH WEISENFELD, Trustee,
Appellee.
_____/

DATE: April 2, 1993

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR ATTORNEY'S FEES, filed December 27, 1991, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Gordan H. Harris, Esq., and G. Robertson Dilg, Esq.
Thomas F. Capshe, Esq., and Thornton J. Williams, Esq.

GH&R
GHH
APR 5 1993

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

DEPARTMENT OF
TRANSPORTATION,
Appellant,

v. Case No. 91-2234

JOSEPH WEISENFELD,
Trustee,
Appellee.
_____/

DATE: May 17, 1993

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING, filed April 7, 1993, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAM, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Gordan H. Harris, Esq.
Thomas F. Capshew, Esq.