085

FILED
SID J. WHITE
SEP 9 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

10/4

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPT. OF TRANSPORTATION,

Appellant,

vs. **Case No. 82,175**

MICCOSUKEE VILLAGE SHOPPING CENTER, et al.

Appellee.

JURISDICTIONAL BRIEF OF PETITIONER MICCOSUKEE VILLAGE SHOPPING CENTER, LTD.

ALAN E. DeSERIO, ESQUIRE
Fla. Bar No. 155394
BRIGHAM, MOORE, GAYLORD, ULMER AND SCHUSTER
777 South Harbour Island Blvd.
Suite 900
Tampa, Florida 33602
(813)229-8811

JOSEPH W. FIXEL, ESQUIRE
Fla. Bar No. 0192026
211 South Gadsden Street
Tallahassee, Florida 32301
(904)681-1800
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF CASE AND FACTS 2

SUMMARY OF ARGUMENT 6

BASIS FOR EXERCISING JURISDICTION 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Childers v. Hoffmann-LaRoche, Inc.,
540 So. 2d 102 (Fla. 1989) 7

Department of Transportation v. Weisenfeld,
617 So.2d 1071 (Fla. 5th DCA 1993) 5,7,8

Jollie v. State,
405 So.2d 418 (Fla. 1981) 7

Joint Ventures, Inc. v. Dep't of Transp.,
563 So.2d 622 (Fla. 1990). 2,3,4,8

Mathis v. Foote Steel Corp.
515 So.2d 983 (Fla. 1987). 7

Orlando/Orange Cnty Expressway Auth. v.
W&F Agrigrowth-Fernfield, Ltd.,
582 So.2d 790 (Fla. 1991). 3,4,5

Tampa-Hillsborough County Expressway Authority v.
A.G.W.S. Corp., 608 So.2d 52 (Fla. 5th DCA 1991). 5,6,7

PRELIMINARY STATEMENT

The Respondent in this cause is the State of Florida, Department of Transportation. For the purposes of this brief they will be referred to as the "DOT." The Petitioner, Miccosukee Village Shopping Center, Ltd., will be referred to as the "owners" or "Miccosukee."

References to the Appendix accompanying the Petitioner's Jurisdictional Brief will be by the symbol "A". References to the transcript of the Summary Judgment hearing will be referred to by the symbol "TR".

STATEMENT OF CASE AND FACTS

The Complaint filed in this cause alleges that a vacant tract of land owned by Miccosukee Village, was burdened with maps of reservation filed by the DOT, pursuant to § 337.241, *Fla. Stat.* (1988), in October 1988 and July 1989. (Paragraph 6). Attached to the Complaint, as exhibits, was a certified copy of a warranty deed containing a full legal description of the property and copies of the maps of reservation. (Exhibits A; C; D). Exhibits C and D reflect, as alleged in the Complaint, that the maps of reservation covered a significant portion of the owners' property and bisected the property into two segments.

It was alleged that the owners' property was being reserved in order to prevent any use of the property until the DOT's plans for construction of the Capital Circle project could be finalized and implemented. (Paragraph 7). The Complaint further alleged that, § 337.241, *Fla. Stat.* (Supp. 1988), prohibited any construction, or the issuance of any

development permits for a five year period, which could be extended for an additional five years; that the statute denied the owner the right to construct upon or develop the property covered by the map of reservation, "freezing" the development of the property for the benefit of the DOT; and that the statute did not require the DOT to acquire the property during the ten year period, or go forward with the project for which the property had been reserved. (Complaint, paragraphs 8; 9; 10).

The Complaint also alleged that the map of reservation left the property, within the reserved area, with no utility or economically beneficial use; denied the owner the investment-backed expectations it had with regard to the property; and denied the substantial beneficial use of the owners' property. (Complaint, paragraphs 11; 12; 13).

In paragraph 15, the Complaint referred to the decision rendered by the Florida Supreme Court in *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So.2d 622 (Fla. 1990). In describing the character of the decision it was alleged that the court ruled that, § 337.241(2) and (3), *Fla. Stat.* (1987), unconstitutionally permitted the state to take private property in violation of the United States and Florida Constitutions and that the Supreme Court ruled that the map of reservation provisions did not advance a legitimate state interest.

In Paragraphs 17 and 18 of the Complaint, citing to the Supreme Court ruling in *Joint Ventures, Inc.,* the owners alleged that the filing of the map of reservation pursuant to the unconstitutional statutory provision, resulted in a temporary taking of their property without payment of full compensation. If further alleged that because the statutory provisions failed to advance a legitimate state interest, the filing of the map of reservation constituted a temporary taking of the owners' property.

The Motion for Summary Judgment, citing to the decisions of *Joint Ventures, Inc. v. DOT*, 563 So.2d 622 (Fla. 1990) and *Orlando/Orange Cnty Expressway Auth. v. W&F Agrigrowth-Fernfield, Ltd.*, 582 So.2d 790 (Fla. 1991), alleged that there were no material facts in dispute with regard to the fact that the map of reservation provisions failed to advance a legitimate state interest and, therefore, the application of those provisions to the subject property constituted a "taking" in violation of the United States and Florida Constitutions. There were no allegations in the motion relating to the economic impact that the maps of reservation had upon the property.

At the hearing on the Motion for Summary Judgment counsel for the DOT agreed that there were <u>two</u> tests to determine if a "taking" of private property had occurred, "[o]ne being an economic test. The other being a non-economic test." (TR:11). Counsel for the DOT then continued:

> The economic is whether the regulation denies an owner economic, viable use of his property. <u>And the non-economic test, that being whether the ordinance or regulation advances legitimate state interest</u>. And both of these are very important. (Emphasis supplied). (TR:11).

Counsel for the DOT subsequently stated that it was their position that "the Plaintiffs have not been denied substantial economic use of the property" (TR:15), and that the question of whether a deprivation of substantial economic use of the property had occurred was a question of fact to be resolved by the trial court at a hearing on the "taking" issue. (TR:22).

Later in that same hearing the following colloquy took place between the trial judge and counsel for DOT:

THE COURT: But, at least, as to the issue of taking, doesn't Joint Ventures read in conjunction with the Agrigrowth case, doesn't that pretty much dictate that the recordation of the map of reservation is by law, a taking?

MR. PANTALEON: Your Honor, I would agree that to the extent that Agrigrowth is an out-cropping from the district court, Fifth District, that just by the mere recordation there exists a temporary taking." (Emphasis supplied). (TR:23)

In the Order Granting Summary Judgment (A:3-7) the trial court did not rule that a "taking" had occurred because the owner had been denied the substantial economic beneficial use of the property. Rather, the order merely stated that "the temporary takings were accomplished by the application of the reservation maps to the Plaintiff's property." In support of this finding the trial court cited to the decisions of *Joint Ventures, Inc. v. Dep't of Transp.,* 563 So.2d 622, 625 (Fla. 1990) and *Orlando-Orange Cnty Expressway Auth. v. W&F Agrigrowth-Fernfield*, Ltd., 582 So.2d 790 (Fla. 5th DCA 1991). Attached to the Order were reduced versions of the two maps of reservation that were imposed upon the property. (A:6-7)

On appeal the district court entered an opinion on March 22, 1993,[18 Fla.L.Weekly D827](A:1) affirming the summary judgment based upon this Court's decision in *Joint*

Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990), as interpreted by 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 (Fla. 1991). The district court also cited as authority the decision of *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2nd DCA 1992), (A:10-17) which is currently pending before this Court in Case No. 80,656. The district court then certified a question to this Court, which slightly modified that posed in the *A.G.W.S. Corp.* case:

> WHETHER [BY VIRTUE OF THE HOLDING IN JOINT VENTURES, INC. v. DEPARTMENT OF TRANSPORTATION, 563 SO. 2D 622 (FLA. 1990),] 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 [IN INVERSE CONDEMNATION ACTIONS] TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

On rehearing, the district court withdrew its previous opinion, this time reversing the summary judgment. [18 Fla.L.Weekly D1572] (A:2). The district court based its decision upon *Department of Transportation v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th DCA 1993)[Judges Goshorn, Peterson, Diamantis dissenting], wherein the 5th District receded from its prior decision in *W&F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d at 790. The majority in *Weisenfeld* certified that its decision was in direct conflict with the *A.G.W.S. Corp.* decision. *Weisenfeld*, 617 So. 2d at 1074. *Weisenfeld* is now pending before this Court in Case No. 81,653.

In the second opinion rendered the district court stated:

> In adopting such an approach, we recognize that our opinion herein expressly conflicts with the opinion of the Second District in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2d DCA

1992), pet. for review filed, Case no. 80,656 (Fla. Oct. 21, 1992). Id. at D1572.

The petitioner, Miccosukee Village Shopping Center, timely filed a notice to invoke the discretionary jurisdiction of this court, based upon the above statement of the district court recognizing express conflict with the *A.G.W.S. Corp.* decision. (A:8-9) It was the understanding of the undersigned that the district court statement was sufficient to meet the requirements of Fla.R.App.Pro. 9.120(d), and that no jurisdictional brief was necessary. The undersigned was informed by phone, on September 7, 1993, that the statement of district court relied upon was not sufficient to avoid the jurisdictional brief requirements and that a jurisdictional brief should be filed as soon as possible. This brief is submitted in compliance with that request.

SUMMARY OF ARGUMENT

There are a number of justifications for this Court to exercise conflict jurisdiction in this cause. These include: a statement by the lower court that its decision is in conflict with that of another district court (A:2); that the decision of the lower court relies upon another decision which expressly stated that it was in conflict with the decision of another district court; that the decision of the lower court relies upon a decision that is currently under review by this Court in Case No. 81-653; and that the opinion of the lower court expressly and directly conflicts with the *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2d DCA 1992) (A:10-17), which is also under review before this Court in Case No. 80,656.

BASIS FOR EXERCISING JURISDICTION

A. STATEMENT BY DISTRICT COURT OF EXPRESS CONFLICT.

When rendering its final opinion the district court stated that the decision "expressly conflicts" with *A.G.W.S. Corp.*, 608 So. 2d at 52. While the district court did not use the term "certify" in its statement, it is clear that an invitation to resolve the conflict has been made and that invitation should be accepted.

B. RELIANCE UPON A DECISION WHICH WAS CERTIFIED TO BE IN CONFLICT WITH THE A.G.W.S. CORP. DECISION.

In its final opinion the district court cited as authority the decision of *Department of Transportation v. Weisenfeld*, 617 So. 2d at 1071. The majority opinion in *Weisenfeld* specifically certified that its decision was in conflict with *A.G.W.S. Corp.* See *Weisenfeld*, 617 So. 2d at 1074. Given the fact that the district court in this cause has expressed conflict, and has relied upon a decision which likewise expresses conflict with *A.G.W.S. Corp.*, the conflict jurisdiction of this Court should be exercised.

C. RELIANCE UPON A DECISION WHICH IS CURRENTLY PENDING BEFORE THIS COURT.

The *Weisenfeld* decision relied upon by the court in this cause, is currently pending before this court in Case No. 81-653. This court may, therefore, exercise conflict jurisdiction over the cause at hand. *Jollie v. State*, 405 So. 2d 418 (Fla. 1981); *Mathis v. Foote Steel Corp.*, 515 So. 2d 983 (Fla. 1987); *Childers v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102 (Fla. 1989).

D. THE DECISION OF THE DISTRICT COURT IN THIS CAUSE EXPRESSLY AND DIRECTLY CONFLICTS WITH A.G.W.S. CORP. ON THE SAME QUESTION OF LAW.

In *A.G.W.S. Corp.* and in *Miccosukee Village* the owners filed inverse condemnation

claims alleging that the imposition of a map of reservation upon their respective properties resulting in a "taking" of property without the payment of full compensation. In both cases the owners moved for and obtained partial summary judgments on the "taking" issue based upon this Court's decision in *Joint Ventures, Inc.* On appeal the Second District Court of Appeal affirmed the granting of the summary judgment on the "taking" issue, finding that such a result was required by the decision in *Joint Ventures, Inc.* The First District Court of Appeal reversed the summary judgment on the same legal issue, citing to *Weisenfeld*, which held that the decision in *Joint Ventures, Inc.* did not determine the "taking" issue. The opinions are irreconcilable and, on the face of the opinion rendered in the cause at hand, the district court specifically recognizes that conflict exists. Given the legal issue presented, and the fact that the district courts have resolved that issue in a conflicting manner, jurisdiction should be exercised to resolve that conflict.

CONCLUSION

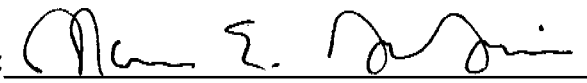
Conflict jurisdiction should be exercised in this cause. The decision of the district court should be quashed and the order granting summary judgment in favor of Miccosukee Village Shopping Center, Ltd., on the "taking" issue, should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to THOMAS F. CAPSHEW, Assistant General Counsel and THORNTON J. WILLIAMS, General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458, on this 8th day of September, 1993.

ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
Brigham, Moore, Gaylord,
Ulmer and Schuster
777 S. Harbour Island Blvd., Suite 900
Tampa, Florida 33602
(813)229-8811

JOSEPH W. FIXEL, ESQUIRE
Florida Bar No. 0192026
211 South Gadsden Street
Tallahassee, Florida 32301
(904)681-1800
Attorneys for Appellee

By: 
ALAN E. DeSERIO, ESQUIRE

APPENDIX

INDEX TO APPENDIX

ITEM	PAGE
St. of Fla., D.O.T. v. Miccosukee Village Shopping Center, Ltd., 18 Fla. L. Weekly D827 (Fla. 1st DCA 1993)	1
St. of Fla., D.O.T. v. Miccosukee Village Shopping Center, Ltd., 18 Fla. L. Weekly D1572 (Fla. 1st DCA 1993) (on rehearing)	2
Order Granting Partial Summary Judgment	3-6
Notice to Invoke Discretionary Jurisdiction	7-8
Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp. 608 So.2d 52 (Fla. 5th DCA 1991)	9-16

ZIMMERMAN AND COMPANY, INC. v. SOUTHTRUST BANK. 2nd District. #92-04113. March 24, 1993. Appeal from nonfinal order of the Circuit Court for Sarasota County. Affirmed. *See Carpenter v. Benson*, 478 So. 2d 353 (Fla. 5th DCA 1985), *review denied*, 488 So. 2d 829 (Fla. 1986); *Hauser v. Dr. Chatelier's Plant Food Co.*, 350 So. 2d 548 (Fla. 2d DCA 1977).

* * *

Jury trial—Taxation—Question certified whether a taxpayer is entitled to a jury trial, pursuant to Article I, Section 22 of the Florida Constitution, in a tax refund case under Section 72.011(1), Florida Statutes, where one of the conditions of Section 72.011(3), Florida Statutes, has been met

THE PRINTING HOUSE, INC., Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF REVENUE, Respondent. 1st District. Case No. 92-2725. Opinion filed March 22, 1993. Petition for Writ of Certiorari. Lorence Jon Bielby and Keith C. Hetrick of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Tallahassee, for petitioner. Robert A. Butterworth, Attorney General; Lisa M. Raleigh and Lealand L. McCharen, Assistant Attorneys General, Tallahassee, for respondent.

On Motion for Rehearing or Clarification, Or Alternatively Motion for Rehearing En Banc, and Motion for Certification of the Question

[Original Opinion at 18 Fla. L. Weekly D244]

(KAHN, J.) We deny Respondent's Motions for Rehearing and Rehearing En Banc and grant the Motion to Certify the Question. We certify to the Florida Supreme Court, as a question of great public importance, the following question:

IS A TAXPAYER ENTITLED TO A JURY TRIAL, PURSUANT TO ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION, IN A TAX REFUND CASE UNDER SECTION 72.011(1), FLORIDA STATUTES, WHERE ONE OF THE CONDITIONS OF SECTION 72.011(3), FLORIDA STATUTES, HAS BEEN MET?

(SMITH and MICKLE, JJ., CONCUR.)

* * *

Eminent domain—Inverse condemnation—Map of reservation—Question certified whether, [by virtue of the holding in *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990),] 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 [in inverse condemnation actions] to receive per se declarations of taking and jury trials to determine just compensation

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Appellant, v. MICCOSUKEE VILLAGE SHOPPING CENTER, et al., Appellees. 1st District. Case No. 92-989. Opinion filed March 22, 1993. An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge. Thornton J. Williams, General Counsel; and Thomas F. Capshew, Assistant General Counsel, DOT, Tallahassee, for appellant. Alan E. DeSerio, of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, Tampa; and Joseph W. Fixel, Tallahassee, for appellees.

(WIGGINTON, J.) We feel compelled to affirm the partial final summary judgment entered in favor of the property owners in this inverse condemnation proceeding based on the supreme court's holding in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), as interpreted by the Fifth District in *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 (Fla. 1991). *See also, Tampa-Hillsborough County Expressway Authority v. A. G. W. S. Corp.*, 608 So.2d 52 (Fla. 2d DCA 1992). However, as was true with our colleagues in the Second District, we are concerned with both the practical and the legal ramifications of the *Joint Ventures* decision. *See, id.* (Campbell, A.C.J., concurring specially; Altenbernd, J., dissenting). Accordingly, we join with them in certifying to the supreme court the question posed by Judge Altenbernd's dissent, with the following modifications:

WHETHER, [BY VIRTUE OF THE HOLDING IN *JOINT VENTURES, INC. V. DEPARTMENT OF TRANSPORTATION*, 563 SO.2D 622 (FLA. 1990),] 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 [IN INVERSE CONDEMNATION ACTIONS] TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

(KAHN and MICKLE, JJ., CONCUR.)

* * *

Contracts—Real property sale—Sellers' misrepresentation or failure to disclose unobservable material defects in property about which sellers knew—Jury verdict awarding damages to buyers supported by facts and law—Error to fail to award attorney's fees to buyers—Error to award prejudgment interest from date of jury verdict rather than date of closing

MARIAN M. and ROBERT C. REID, Appellants, v. DOGULAS S. CRUCET and MICHAEL H. SHERIDAN, Appellees. 1st District. Case No. 92-211. Opinion filed March 22, 1993. An Appeal from the Circuit Court for Leon County. N. Sanders Sauls, Judge. Lorence Jon Bielby of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., and Robert C. Reid, Tallahassee, for Appellants. Sheldon Zipkin of Roth, Zipkin, Cove & Roth, North Miami Beach; Walter Dartland, Tallahassee; Joseph Boyd, Jr. of Boyd & Branch, P.A., Tallahassee, for Appellees.

(PER CURIAM.) The Reids, buyers of a residential home, brought this action against the sellers for damages which resulted when the sellers misrepresented or failed to disclose unobservable material defects in the property, about which they knew, and the buyers relied to their detriment upon these representations. The jury's verdict awarding the buyers $30,000 damages is supported by the facts and the law. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). However, the trial court erred in failing to award the Reids their attorney's fees and in awarding prejudgment interest from the date of the jury verdict rather than the date of closing. *Burkett v. Rice*, 542 So. 2d 480 (Fla. 2d DCA 1989); and *Thomas v. Toth*, 539 So. 2d 8 (Fla. 2d DCA 1989).

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion. (ERVIN, SMITH AND BARFIELD, JJ., CONCUR.)

* * *

Criminal law—Juveniles—Sentencing—Restitution—No causal relationship between victim's damages and defendant's conviction of leaving scene of accident resulting in injury to another person—Error to direct defendant's mother to pay defendant's restitution in event that defendant failed to pay—Error to assess attorney-fee lien against defendant's mother for services rendered to her son by court-appointed counsel without affording mother notice and opportunity to contest amount of lien

IN THE INTEREST OF L.A.D., a child, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-2657. Opinion filed March 22, 1993. An Appeal from the Circuit Court for Duval County. Brad Stetson, Judge. Deborah A. Schroth of Jacksonville Legal Aid, Inc., Jacksonville, for Appellant. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(ERVIN, J.) In this appeal from a delinquency adjudication, appellant, the mother of L.A.D.,[1] challenges an order directing her to pay restitution in the event that L.A.D. failed to make such payment, and in ordering her to pay attorney's fees for services rendered to her son by court-appointed counsel. Upon review of court-ordered supplemental briefs, we conclude that imposition of restitution upon the child, or upon the mother if the child failed to pay, was invalid, and that the error in directing same is fundamental. We therefore vacate the restitution portion of the order as it pertains to appellant. As to the attorney-fee issue, because the mother did not receive prior notice informing her she could be assessed for her son's attorney-fee obligation, we reverse and remand for further proceedings consistent with this opinion.

Following L.A.D.'s plea of guilty to the offense of leaving the scene of an accident resulting in an injury to another person, the court determined that L.A.D. had committed a delinquent act and

orders. (GUNTHER and POLEN, JJ., concur. HERSEY, J., dissents without opinion.)

* * *

BATTLE v. STATE. 4th District. #92-2469. July 7, 1993. Appeal from the Circuit Court for Palm Beach County. AFFIRMED on the authority of *Herrington v. State*, No. 92-1654 (Fla. 4th DCA June 23, 1993) [18 Fla. L. Weekly D1485].

WRIGHT v. STATE. 4th District. #92-1658. July 7, 1993. Appeal from the Circuit Court for St. Lucie County. Affirmed on the authority of *Herrington v. State*, No. 92-1654 (Fla. 4th DCA June 23, 1993) [18 Fla. L. Weekly D1485].

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES v. HUEWITT. 4th District. #92-1246. July 7, 1993. Petition for writ of certiorari to the Circuit Court for St. Lucie County. The petition for writ of certiorari is granted and the order requiring the mother and child to submit to blood tests is quashed. *See Dept. of Health and Rehabilitative Services v. Day*, 615 So. 2d 176 (Fla. 2d DCA 1993); *Morgan v. Morgan*, 466 So. 2d 13 (Fla. 4th DCA 1985); *Decker v. Hunter*, 460 So. 2d 1014 (Fla. 3d DCA 1984).

* * *

CLAUDE SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-1495. L.T. Case No. 90-13129 CF10B. Opinion filed July 7, 1993. Appeal of order denying rule 3.850 motion from the Circuit Court for Broward County; Robert B. Carney, Judge. Claude Smith, Madison, pro se appellant. No appearance required for appellee.

(PER CURIAM.) Affirmed with leave to file no later than twenty days from the date of the issuance of the mandate in this case, a properly sworn rule 3.850 motion seeking relief based upon the factual allegations contained in the appellant's "Petition for Consideration" dated June 8, 1993. (DELL, C.J., POLEN and KLEIN, JJ., concur.)

* * *

Eminent domain—Inverse condemnation—Map of reservation—Genuine issue of material fact exists as to whether taking occurred as result of inclusion of property within boundaries of map of reservation—Error to grant summary judgment in favor of property owner

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Appellant, v. MICCOSUKEE VILLAGE SHOPPING CENTER, et al., Appellees. 1st District. Case No. 92-989. Opinion filed July 7, 1993. An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge. Thornton J. Williams, General Counsel; and Thomas F. Capshew, Assistant General Counsel, DOT, Tallahassee, for appellant. Alan E. DeSerio, of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, Tampa; and Joseph W. Fixel, Tallahassee, for appellees.

ON MOTION FOR REHEARING
[Original Opinion at 18 Fla. L. Weekly D827]

(PER CURIAM.) We grant the Department of Transportation's Motion for Rehearing, withdraw our previous opinion, and substitute the following opinion therefor.

This case originated below as an inverse condemnation proceeding and involves the issue of whether the mere inclusion of appellees' property within the boundaries of the map of reservation filed by the Department of Transportation pursuant to subsection 337.241(1), Florida Statutes (1987), amounted to a per se taking under the supreme court's decision in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). The trial court granted a partial final summary judgment on that basis in favor of appellees, expressly relying on the Fifth District's interpretation of *Joint Ventures* as set forth in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. 5th DCA 1991).

However, very recently, the Fifth District reconsidered *Agrigrowth*, and in an *en banc* opinion, expressly receded from its decision therein. *See Department of Transportation v. Joseph Weisenfeld*, 18 Fla. L. Weekly D803 (Fla. 5th DCA March 26, 1993). Upon careful review of that court's majority and concurring opinions in *Weisenfeld*, we adopt the view taken by Judge Griffin in her specially concurring opinion. Judge Griffin's exposition carefully defined "[t]he 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' . . ." *Id.* at D807. "[A] regulatory enactment declared unconstitutional as an invalid exercise of police power does not necessarily mean a 'taking' of the regulated property has occurred." *Id.* Accordingly, "[a] traditional 'takings' analysis must still be applied to each affected parcel." *Id.*[1]

Because the trial court granted appellees' motion based on an erroneous interpretation of the law, and because we discern a genuine issue of material fact on the question of whether a taking of appellees' property occurred, the partial final summary judgment entered in favor of appellees is hereby REVERSED, and the cause is REMANDED for further proceedings. (JOANOS, KAHN and MICKLE, JJ., CONCUR.)

[1]In adopting such an approach, we recognize that our opinion herein expressly conflicts with the opinion of the Second District in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2d DCA 1992), *pet. for review filed*, case no. 80,656 (Fla. Oct. 21, 1992).

* * *

Civil procedure—Abuse of discretion to deny defendant's motion for relief from default judgment entered when defendant failed to appear at pretrial conference with new attorney as required by order granting former attorney's motion to withdraw where defendant was not properly served by former attorney with motion to withdraw, did not actually receive order granting motion, and had no notice of plaintiff's oral application for default

BERMUDA ATLANTIC LINE LIMITED, Appellant, v. FLORIDA EAST COAST RAILWAY COMPANY, Appellee. 1st District. Case No. 92-2939. Opinion filed July 7, 1993. An appeal from the Circuit Court for Duval County. Thomas Oakley, Judge. George E. Schultz, Jr. and Karen H. Hildebrand of Holland & Knight, Jacksonville, and Susan L. Turner of Holland & Knight, Tallahassee, for appellant. Lawrence J. Roberts of Hinshaw & Culbertson, Miami, for appellee.

(PER CURIAM.) Appellant, Bermuda Atlantic Line Limited, appeals the denial of its motion for relief from a default judgment. The default was entered when appellant failed to appear at pretrial conference with a new attorney as required by the court's order granting the motion to withdraw of the appellant's former attorney. Appellant was not properly served by its attorney with the motion to withdraw, nor did appellant actually receive the order granting the former attorney's motion.[1] At the pretrial hearing, appellees made an oral application for default, of which appellants had no notice. Under these circumstances, we find that the trial court abused its discretion in denying the defendant's motion for relief from the default judgment. *Seinsheimer Co., Inc. v. Cobia Point Condominium Ass'n*, 18 Fla. L. Weekly, D950 (Fla. 3d DCA April 13, 1993). We therefore reverse. (ERVIN and WOLF, JJ., and CAWTHON, Senior Judge, concur.)

[1]We decline to impute notice of this order to appellant where appellant's counsel did not actually contact appellant but rather faxed the order to an address which was not the address of the appellant or its registered agent. *See Seinsheimer Co., Inc. v. Cobia Point Condominium Ass'n*, 18 Fla. L. Weekly D950 (Fla. 3d DCA April 13, 1993). While appellant's attorney indicated he had sent material there in the past which had reached appellant, it is unclear from the record before us what relationship the appellant had with the address in question.

* * *

Criminal law—Sentencing—Trial court did not exceed legal limitations prescribed by statutes or sentences prescribed by guidelines when it imposed concurrent sentences of 22 months' incarceration in two cases followed by consecutive periods of probation in three other cases and imposed sentences in five other cases which ran concurrently with the various consecutive sentences—Claim that trial court could avoid limitations of guidelines by sentencing defendant to further imprisonment without credit for time served upon revocation of probation premature—Written sentence to be corrected to conform to oral pronouncement

LEE ANDRE REYNARD, Appellant, v. STATE OF FLORIDA, Appellee. 1st

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA CIVIL ACTION

MICCOSUKEE VILLAGE SHOPPING CENTER, LTD., a Florida Limited Partnership, and FLORIDA TITLE GROUP, General Partners,

Plaintiffs, CASE NO. 91-3553

vs.

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE came before this Court on Plaintiffs' Motion for Summary Final Judgment and the Court having considered the pleadings, heard the arguments of counsel, considered the applicable law and having been otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' motion for summary final judgment is GRANTED.

2. The Court finds no genuine issue of material fact that would dispute the occurrence in this case of a temporary taking of the fee sample interest in that certain portion of Plaintiffs' property which was affected by the filing of maps of reservations

000424

(pursuant to Sec. 337.241, Fla. Stat.), attached as Exhibit "A" to this Order.

3. The Court further finds that the temporary takings were accomplished by the application of the reservation maps to Plaintiffs' property which occurred on October 5, 1988 and July 10, 1989, when the maps were filed in the public records of Leon County. The takings continued through July 27, 1990 when the maps of reservation were dismissed by the defendant and the Joint Ventures decision became final. Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622, 625 (Fla. 1990); Orlando-Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So.2d 790 (Fla. 5th DCA 1991); Orlando/Orange County Expressway Authority v. Orange North Associates, No. 91-474 (Fla. 5th DCA, December 27, 1991).

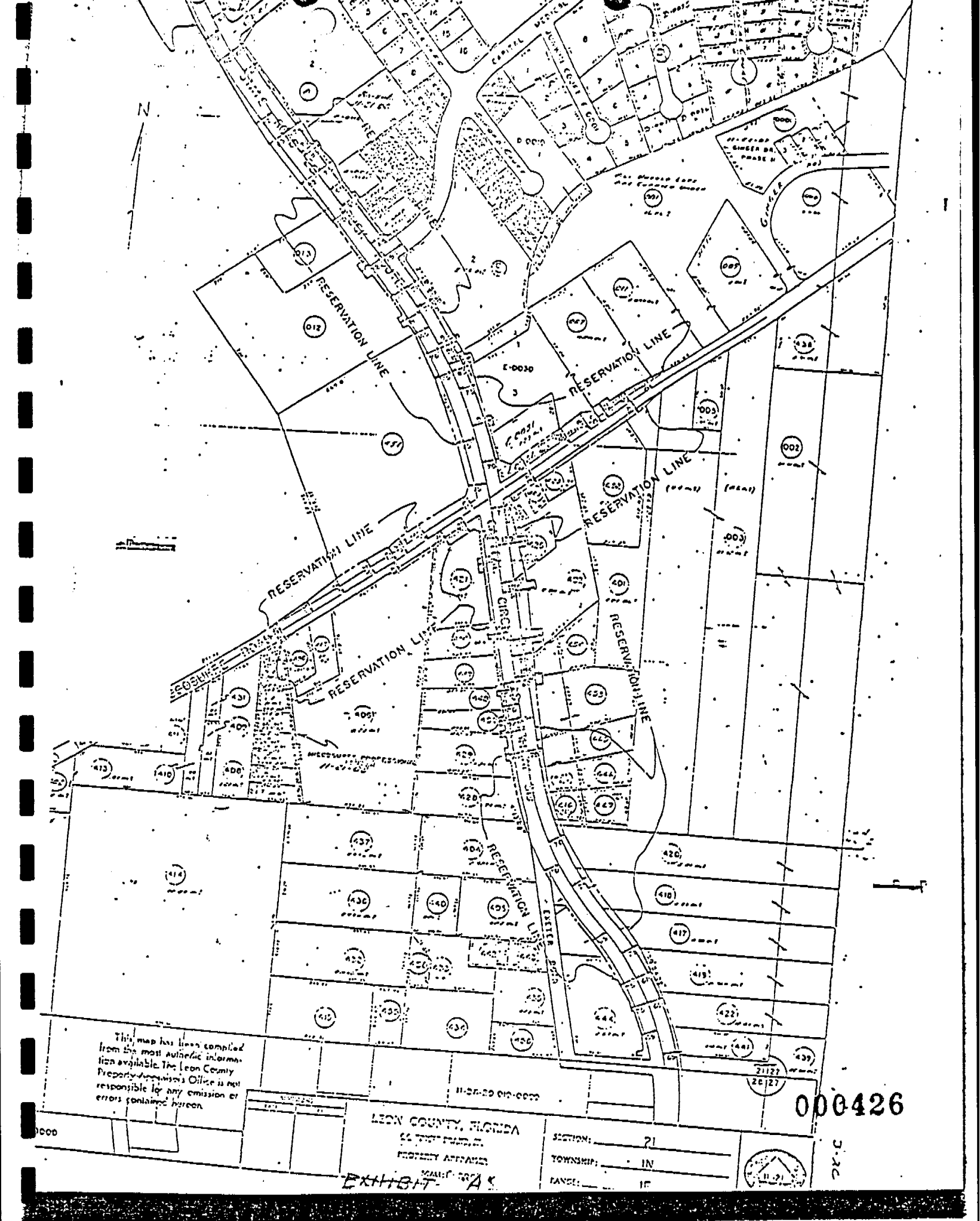
4. At a date to be established upon motion of either party, the Court shall conduct a jury trial, pursuant to Sec. 73.071, Fla. Stat., to determine the amount of full compensation to be paid by Defendant to Plaintiffs Miccosukee Village Shopping Center, Ltd., and Florida Title Group, Inc., for the takings of the property rights described in the order.

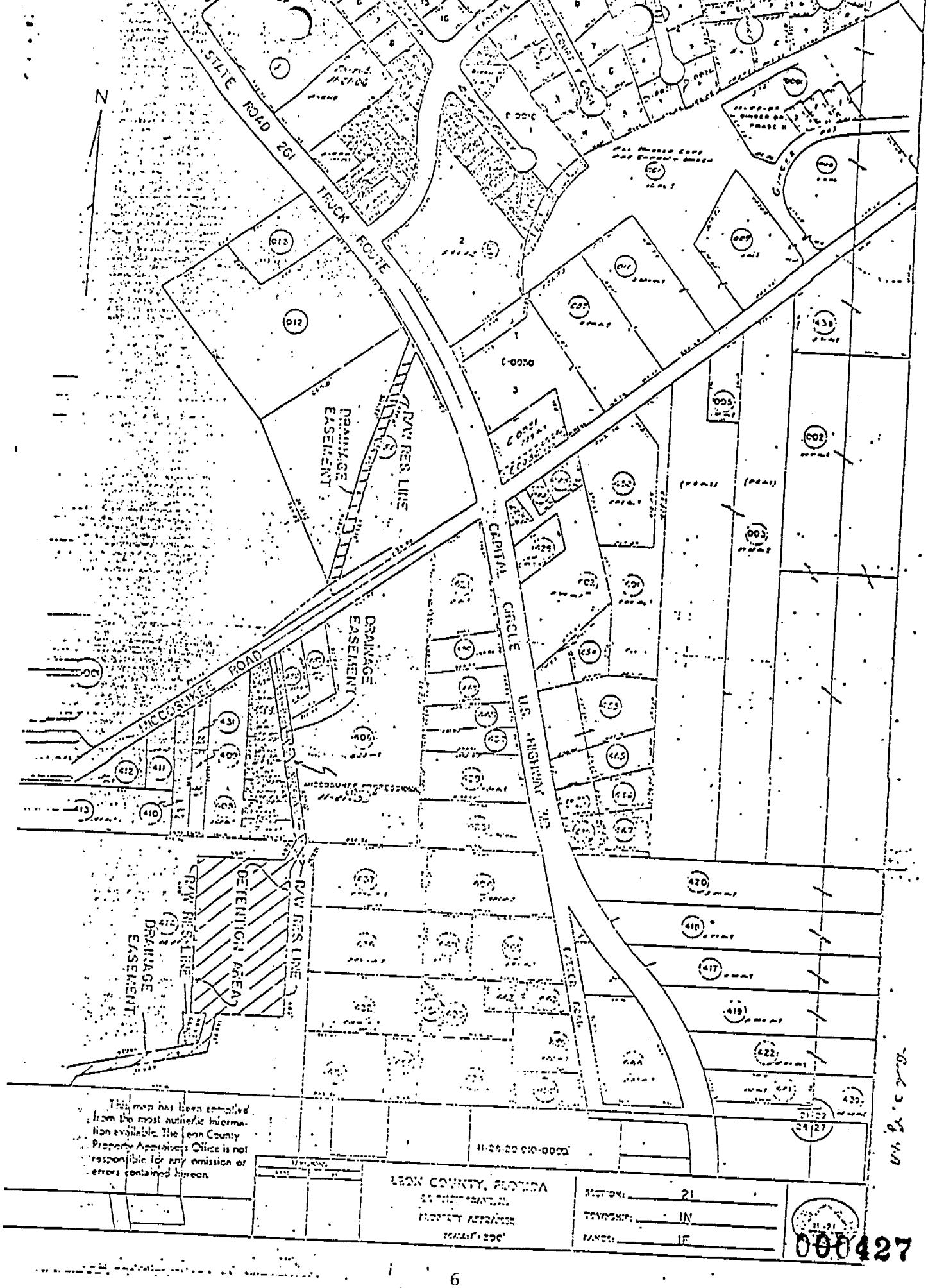
DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida this 21st day of February, 1992.

P. Kevin Davey
Circuit Court Judge

cc: I. Ed Panteleon, Esquire
Joe W. Fixel, Esquire

000425


RESERVATION LINE
RESERVATION LINE
RESERVATION LINE
RESERVATION LINE
RESERVATION LINE
RESERVATION LINE
CIRCLE
EXETER
This map has been compiled from the most authentic information available. The Leon County Property Appraiser's Office is not responsible for any omission or errors contained hereon.
LEON COUNTY, FLORIDA
PROPERTY APPRAISER
SECTION: 21
TOWNSHIP: 1N
RANGE: 1E
EXHIBIT "A"
000426


N
STATE ROAD 261
TRUCK ROUTE
CAPITAL CIRCLE
U.S. HIGHWAY 90
MISSISSIPPI ROAD
R/W RES LINE
DRAINAGE EASEMENT
DETENTION AREA
This map has been compiled from the most authentic information available. The Leon County Property Appraiser's Office is not responsible for any omission or errors contained hereon.
LEON COUNTY, FLORIDA
SECTION: 21
TOWNSHIP: 1N
RANGE: 1E
000427

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION,

Appellant,

vs. DCA CASE NO. 92-989

MICCOSUKEE VILLAGE SHOPPING
CENTER, LTD., et al.,

Appellees

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that MICCOSUKEE VILLAGE SHOPPING CENTER, appellees/petitioners, invokes the discretionary jurisdiction of the Florida Supreme Court to review the decision of this Court rendered July 7, 1993. The decision is certified to be in direct conflict with a decision of another district court of appeal.

Respectfully Submitted,

ALAN E. DeSERIO, ESQUIRE
BRIGHAM, MOORE, GAYLORD,
ULMER & SCHUSTER
777 S. Harbour Island Blvd., Suite 900
Tampa, Florida 33602
(813)229-8811

JOSEPH W. FIXEL, ESQUIRE
Florida Bar No. 0192026
211 South Gadsden Street
Tallahassee, Florida 32301
(904)681-1800
Attorneys for Appellee

By _____
ALAN E. DeSERIO, ESQUIRE
Fla. Bar No. 155394

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to THOMAS F. CAPSHEW, Assistant General Counsel and THORNTON J. WILLIAMS, General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458, on this 3rd day of August, 1993.

ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
JAY W. SMALL, ESQUIRE
Florida Bar No. 0562890
Brigham, Moore, Gaylord, Wilson,
Ulmer and Schuster
777 S. Harbour Island Blvd., Suite 900
Tampa, Florida 33602
(813)229-8811

JOSEPH W. FIXEL, ESQUIRE
Florida Bar No. 0192026
211 South Gadsden Street
Tallahassee, Florida 32301
(904)681-1800
Attorneys for Appellee

By: _____
ALAN E. DeSERIO, ESQUIRE

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 Ventures* 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-