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IN THE SUPREME COURT OF FLORIDA

RICHARD M. DAVIDUKE

Petitioner,

vs. CASE NO. 82,314

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

Respondent.

_____/

ANSWER BRIEF ON THE MERITS OF RESPONDENT STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

THE STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, the defendant below and respondent here, will be referred to as the "DEPARTMENT". RICHARD M.DAVIDUKE, one of the plaintiffs below and petitioner here, will be referred to as "DAVIDUKE".

Citations to Petitioner's Appendix to the Initial Brief will be indicated as (PA) followed by the appropriate page number(s) and citations to the Appendix to this Answer Brief will be indicated as (RA) followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

While Petitioner's Initial Brief generally relates the procedural history and facts, it is incomplete and cannot be accepted as totally accurate. In accordance with Fla. R. App. P. 9.210(c) the DEPARTMENT supplements and corrects DAVIDUKE'S presentation.

DAVIDUKE initiated his action by the filing of a complaint for equitable relief in the nature of inverse condemnation. (PA 1-7) DAVIDUKE claimed that he acquired three parcels of land in Lake County Florida with the intention of constructing a convenience store on the property. (PA 2-3) DAVIDUKE further claimed that the DEPARTMENT filed a map of reservation pursuant to §337.241(1), Fla. Stat. (1987) "which encompassed the majority of the plaintiff's property." (PA 2) The complaint alleged that in the April of 1990 DAVIDUKE sought approval of a site plan for the property and, according to DAVIDUKE, the site plan request was denied "solely" because of the map of reservation. (PA 3-4) The complaint claimed that the map of reservation constituted a physical invasion of the property and denied DAVIDUKE any economically viable use of the reserved property, constituting a temporary "taking" through and including May 29, 1990 when the map of reservation was withdrawn. (PA 6) The complaint requested that a "taking" be found and that a jury trial be held on the amount of compensation. (PA 7)

Exhibit "A" to the complaint is a partnership agreement of which DAVIDUKE is a principal. Exhibits "B" and "C" are legal descriptions of the three (3) parcels acquired by the partnership.

Exhibits "D" and "E" to the complaint are copies of the maps of reservation allegedly encompassing DAVIDUKE's property and Exhibit "F" is a copy of the site plan submitted by DAVIDUKE to the Lake County authority. (PA 19-21) DAVIDUKE submitted an affidavit in support of his complaint, which essentially verified its allegations. (PA 22-30) Attached to the affidavit was a letter from Gregory K. Stubbs and the minutes of the Lake County Commissioners meeting indicating DAVIDUKE's site plan had been denied. (PA 26-30)

DAVIDUKE moved for summary judgment soon after filing the complaint (PA 31-36). Claiming the "taking" issue was decided as a matter of law in this Court's opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990) the motion sought an order determining that a compensable taking had occurred and asking to proceed with a jury trial on valuation.

The DEPARTMENT filed a motion to dismiss, arguing the factual allegations were not sufficient to state a cause of action. (PA 37-39) The trial court denied the motion to dismiss. (PA 108) The DEPARTMENT filed a Memorandum of Law in Opposition to DAVIDUKE's Motion for Summary Judgment, arguing that there were insufficient facts on record to grant summary judgment and that the documents attached to the memorandum of law created genuine issues of material fact, precluding summary judgment. (PA 51-107) The memorandum of law also argued that DAVIDUKE was not entitled to a summary judgment as a matter of law based on the Joint Ventures decision. The DEPARTMENT argued that "if compensation is to be

paid in this case it is only to be paid when the interference "deprives the owner of substantial economic use of his or her property." Joint Ventures, 563 So. 2d at 625. (PA 60) More importantly, summary judgment can not be granted because according to the minutes of the Lake County Commissioner's meeting (Exhibit "A" to the DEPARTMENT's memorandum of law) DAVIDUKE's property is in the Wekiva River Protection Basin, does not have the proper zoning for commercial use, and no building plans were received with the site plan. (RA 1-5) Each one of these inadequacies constituted an independent ground for denying the development permit and, therefore, the map had no effect on DAVIDUKE's attempt to develop the property. As such genuine issues of material fact clearly existed and summary judgment was improper.

The deposition of Gregory K. Stubbs, the Director for Current Planning for Lake County Planning and Development Department was also filed with the trial court. (RA 7-44) Mr. Stubbs first indicated that DAVIDUKE's site plan was denied solely because of the map of reservation (RA 19-20). However, he corrected his testimony later in the deposition after reviewing the minutes of the Commission meeting and stated under oath that the site plan would have been rejected whether or not the map of reservation was in effect. (RA 36-37)

After a hearing on DAVIDUKE's Motion for Summary Judgment, the court entered an order denying the motion ruling:

> That the Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990)

> case requires that there must be proof that the property owner was deprived of a substantial economic use of the property before compensation can be awarded.
>
> That the plaintiffs must show more than the fact that a map of reservation was filed pursuant to Chapter 337, Florida Statutes.

(PA 113-114)

Ten months later, DAVIDUKE filed a pleading entitled Motion for Summary Judgment on Defendant's Affirmative Defenses, arguing essentially the same points raised in the original Motion for Summary Judgment. (PA 115-120) The DEPARTMENT opposed the renewed motion, arguing that a motion for summary judgment previously denied may be renewed only when additional proof is filed. No new proof was filed. (PA 121-130, 131-133) The DEPARTMENT distinguished the decisions relied upon by DAVIDUKE and again pointed out to the trial court that Mr. Stubbs had testified that the site plan would not have been granted even if the map of reservation had not been filed. (PA 126) The DEPARTMENT also objected to DAVIDUKE's use of a motion for summary judgment to attack the legal sufficiency of the DEPARTMENT's affirmative defenses. (PA 131-133)

A hearing was held on May 20, 1992 before Judge Singletary, who had previously denied DAVIDUKE's motion for summary judgment. After argument of counsel, in which counsel for DAVIDUKE admitted that the argument was the same as the one rejected in his first motion for summary judgment hearing (PA 139), the trial court took the matter under advisement. (PA 150) This time Judge Singletary

granted DAVIDUKE's motion for summary judgment finding that the map of reservation constituted a temporary taking of DAVIDUKE's property beginning June 22, 1989, and continuing until May 29, 1990. (PA 157) The court directed a jury trial be held to determine the amount of full compensation. (PA 157) That order was appealed to the Fifth District Court of Appeal.

On appeal the Fifth District Court of Appeal reversed (PA 158) and remanded for further proceedings consistent with its recent en banc decision in Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th DCA 1993), wherein a split court receded from its prior decision in Orlando/Orange County Expressway Authority v. W & F Agrigrowth Fernfield Ltd., 582 So. 2d 790 (Fla. 5th DCA 1981). On rehearing the district court granted DAVIDUKE's request to certify that the DAVIDUKE decision was in conflict with Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992). (PA 158) DAVIDUKE timely filed a Notice to Invoke Discretionary Jurisdiction based upon the district court's certification of conflict.

SUMMARY OF ARGUMENT

The Legislature enacted the map of reservation statute as a planning tool and numerous maps were filed pursuant to the presumptively valid statute. This Court found the statute facially unconstitutional for failing to substantially advance a legitimate state interest. Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990).("Joint Ventures II") All maps in the state were invalidated by the decision.

Some of the district courts of appeal initially construed this Court's decision in Joint Ventures II as establishing a per se "taking" rule for all maps of reservation. To the contrary, no case in regulatory takings jurisprudence (including Joint Ventures II) has adopted a per se rule of compensation for cases where the regulation is stricken for failing to substantially advance a legitimate state interest. A per se approach is only applied in cases of a physical invasion or denial of all economically viable use. The first of such decisions was Orlando/Orange County Expressway Authority v. W & F Agrigrowth, 582 So. 2d 790 (Fla. 5th DCA 1991). Recognizing that it had overshot the mark in its attempt to fashion a remedy for unconstitutional maps of reservation it was not long before the Fifth District Court of Appeal receded from its "unfortunate opinion". Department of Transportation v. Joseph Weisenfeld, 617 So. 2d 1071, 1073-1074 (Fla. 5th DCA 1993). Unfortunately, Agrigrowth had condoned a per se rule of law equating the mere filing of a map of reservation with a "temporary taking" of any property covered by that map. In other words, Agrigrowth and its unfortunate followers were holding

the filing of a map of reservation to be synonymous with "taking of property."

Those days are over. Property owners in several districts must once again meet their burden of proof and present sufficient evidence to sustain a factual determination that they suffered a substantial deprivation of the use of their property before a taking will be found. Weisenfeld, 617 So. 2d 1071. Through its opinion in Weisenfeld the fifth district commendably corrected the mistakes it made in Agrigrowth. Having done so, it found its opinion in conflict with Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So. 2d 52 (Fla. 2d DCA 1992), which was heard by this Court on October 8, 1993. However, precedent in the fifth district is Weisenfeld which was properly followed by the district court of appeal in this case.[1]

[1] Since Weisenfeld had not yet been decided, the trial court did not have the benefit of the court's better reasoned opinion therein and its recognition that Agrigrowth was an "unfortunate opinion in several respects". Weisenfeld, 617 So. 2d at 1074.

ARGUMENT

THE DISTRICT COURT OF APPEAL PROPERLY DETERMINED THAT ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE NOT ENTITLED TO RECEIVE PER SE DECLARATIONS OF "TAKING" AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

I. INTRODUCTION.

In the early 1980's, the Florida Legislature provided the DEPARTMENT with a planning tool for future highway construction by enacting the map of reservation statute codified at §337.241, Fla. Stat. (1985). The statute allowed the DEPARTMENT to file a map in the public records that delineated future transportation corridors. Upon the filing of a map, local governments were prohibited from issuing development orders for construction within the boundaries of the designated corridor for a period of five years. §337.241(2), Fla. Stat. (1985). The map was effective for five years, unless withdrawn. The statute made provision for an administrative challenge. §337.241(3), Fla. Stat. (1985).

Even in its earliest form, the map of reservation statute provided for two exemptions from its restrictions, renovations of existing commercial structures of less than 20% of the appraised value of the structure and renovation or improvement of existing residential structures as long as used as private residences. §337.241(2), Fla. Stat. (1985).

In 1985, the legislature amended the map of reservation statute to allow expressway authorities created under Chapter 348 to file maps of reservation. Chapter 85-149, §2, Laws of Florida. After numerous maps were filed by both the DEPARTMENT and the expressway authorities pursuant to the statute, this Court addressed the constitutionality of the statute in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). ("Joint Ventures II")

Finding that the map of reservation statute constituted an unconstitutional exercise of the state's police power "with a mind toward property acquisition," the Court stated:

> We do not question the reasonableness of the state's goal to facilitate the general welfare. Rather we are concerned here with the means by which the legislature attempts to achieve that goal. Here, the means are not consistent with the constitution.

Id. at 627. Thus, Joint Ventures II had the affect of voiding all maps of reservation filed in the State of Florida as of July 27, 1990, the date this Court's opinion became final.[2] Significantly, since the case did "not deal with a claim for compensation, but with a constitutional challenge to a statutory mechanism," the opinion does not address the issue of entitlement. Id. at 625.

Joint Ventures II, has been relied upon by numerous property owners in convincing trial courts to grant summary judgment on the

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[2] The legislature has repealed the map of reservation statute in Chapter 92-152, §108, Laws of Florida.

issue of entitlement to compensation in inverse condemnation actions. The first appellate case addressing an inverse condemnation compensation claim based on Joint Ventures II, was Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991). Although the Fifth District Court of Appeal subsequently receded from that opinion as being "unfortunate in several respects" it was not before other trial courts and districts improvidently relied upon it. See Seminole County Expressway Authority v. Bullet, 595 So. 2d 105 (Fla. 5th DCA 1992)(trial court's granting of summary judgment for a "taking" of residential property was affirmed); Tampa/Hillsborough County Expressway Authority v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2d DCA 1992).

As recognized in Weisenfeld this Court's ruling in Joint Ventures II does not entitle property owners to an automatic finding that a "taking" of their property occurred during the effective dates of the map of reservation without any further inquiry or to a jury trial to determine damages, whether substantial or nominal. Presently, only the second district continues to interpret Joint Ventures II in a manner that not only violates the express holding of Joint Ventures II but is wholly unsupported by regulatory takings caselaw from any state or federal jurisdiction.[3] No court, including this Court and the United States Supreme Court, has adopted a per se entitlement to compensation for

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[3] The First District Court of Appeal has recently reversed a trial court's granting of summary judgment citing Weisenfeld. Department of Transportation v. Miccosukee Village Shopping Center, 621 So. 2d 516 (Fla. 1st DCA 1993).

regulations invalidated for failing to substantially advance a legitimate state interest. This Court left no doubt that "[a] use restriction which fails to substantially advance a legitimate state interest may result in a "taking." Joint Ventures II, 563 So. 2d at 625, n. 9. (emphasis supplied) The United States Supreme Court has said the same thing: "...[a] use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose...." Penn Central Transportation Co. v. City of New York, 438 U.S. 108, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (emphasis supplied). This Court should affirm the decision in this case by upholding the fifth district opinion in Weisenfeld and quashing the opinion of the second district in A.G.W.S..

II. COMPENSATION CAN BE AWARDED ONLY WHEN SUFFICIENT FACTS ARE ESTABLISHED THAT THERE HAS BEEN A DEPRIVATION OF SUBSTANTIAL ECONOMIC USE.

The number of cases pending before this Court and in the various circuits substantiates the DEPARTMENT's position that property owners are expecting "taking" damages by merely claiming that a map of reservation has been filed on their property. There is simply no reason and none has been advanced by DAVIDUKE why the standard already adopted by the courts that no judicial determination of a "taking" be made until the property owner has proven denial of a substantial economic use of the property is inappropriate.

Because of the fifth district's "unfortunate" opinion in Agrigrowth even in situations where a map crossed a small portion of a landowner's property (even one foot) for a short period of time (only two days) a "taking" is irrebuttably presumed for purposes of inverse condemnation. However, the legal definition of a "taking" has clearly not been met. Nevertheless, in such instances the plaintiffs in such lawsuits are entitled to payment of all attorney's fees and all costs associated with the litigation regardless of actual damages (if any) proven.

Judge Altenbernd, in his well-reasoned dissent in Agrigrowth implied that the majority's ruling amounted to a full employment act for attorneys. It is widely known that attorney's fees in eminent domain cases are among the highest in the state regardless of the results obtained. It is not unusual for attorney's fees in these cases to exceed the damages to the landowner's property. Consequently, the incentive to file a claim even where minimal damage may have been incurred is almost irresistible under the Agrigrowth rule. Not long after Judge Alternbernd's dissent in Agrigrowth, the fifth district sitting en banc agreed with him and adopted the standard enunciated by this Court in Joint Ventures. Joint Ventures, 563 So. 2d at 625. It is respectfully submitted that the standard already established by this Court (and numerous other courts) compensates those who have suffered actual adverse economic impact and does not waste judicial resources on the nominal damages claims that may be brought but would be truncated

by the procedural safeguards suggested by DAVIDUKE.[4]

III. ENTITLEMENT MUST BE PROVEN BEFORE COMPENSATION CAN BE AWARDED

A. NO COURT HAS EVER AWARDED COMPENSATION UNDER A PER SE RULE SIMPLY BECAUSE THE REGULATION FAILS TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST.

Time after time the courts of this nation have found a regulation failed to advance a legitimate state interest yet refused to award compensation. See, e.g., Nollan v. California Costal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987). Like this Court in Joint Ventures II, the Nollan court found that the regulation challenged had the purpose of "avoidance of the compensation requirement rather than the stated police power objective." Nollan, 483 U.S. at 841. Finding that the regulation did not advance a legitimate state interest, the United States Supreme Court struck the regulation and ruled that if the government wanted the property interest "it must pay for it." Id. at 842. No compensation was awarded the Nollans. Id.

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[4] DAVIDUKE suggests the use of directed verdict against a claim for compensation. DAVIDUKE Initial Brief pg. 15. Surely there can be no viability to a motion of directed verdict when the circuit courts of this state have been entering summary judgment on the issue of liability even before the governmental entity is provided the opportunity of filing an answer. The success of a motion for directed verdict on the amount of compensation is doubtful when the trial court has already determined that the property owner is entitled to some compensation, even if nominal.

Every property owner with similar restrictions to the one in Nollan that has sought compensation has been similarly unsuccessful for various reasons. California Costal Commission v. Superior Court, 210 Cal.App.3d 1488, 258 Cal. Rptr. 567 (Cal.Ct.App. 1989)(barred by res judicata); Antoine v. California Costal Commission, 8 Cal.App. 4th 641, 10 Cal. Rptr.2d 471 (Cal.Ct.App. 1992)(condition permissible if sea wall encroaches on public land). See also Patrick Media Group, Inc. v. California Costal Commission, Cal. App.4th 592, 11 Cal. Rptr.2d 824 (Cal.Ct.App. 1992) (inverse condemnation action for compelled removal of billboards barred by res judicata).

The United States Supreme Court has adopted a per se entitlement to compensation only when there is a physical invasion of the property or when the property owner has been denied all beneficial use of the property. Lucas v. South Carolina Coastal Council, 505 U.S. ____, 112 S.Ct. _____, 120 L. Ed. 2d 798, 814 (1992). Every other case is decided on a case by case basis: "In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in...essentially ad hoc, factual inquires....'" Id., at 812.[5]

The regulatory takings jurisprudence of the federal circuit

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[5] In a case subsequent to Agrigrowth, the Fifth District Court of Appeal correctly cited to this standard. Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223, 1228 (Fla. 5th DCA 1992) ("The inquiry into whether a taking has occurred is done on a case by case basis.")

encompassing Florida is consistent with the holding of this Court and the United States Supreme Court. "If the regulation does not substantially advance a legitimate state interest, it can be declared invalid." Reahard v. Lee County, 968 F. 2d 1131, 1135 (11th Cir. 1992). A just compensation claim does not seek invalidation of the regulation, but seeks monetary compensation. Id. "Just compensation claims admit and assume that the subject regulation substantially advances a legitimate state interest...the only issue...is whether an owner has been denied all or substantially all economically viable use of its property." Id. at 1136. In resolving the issue of whether the property owner has been denied all or substantially all economically viable use, "the fact finder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations." Id.

Clearly a facial challenge to a regulation as an invalid exercise of the police power has as its remedy the striking down of the regulation and nothing more. Eide v. Sarasota County, 908 F. 2d 716, 721-722 (11th Cir. 1990), cert denied ____ U.S. ____, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991). Two reasons have been advanced for the rule of law that successful facial challenges to a regulation as an invalid exercise of the police power results in invalidation of the regulation rather than compensation. First, compensation claims admit and assume that the regulation is valid. Reahard, 968 F. 2d at 1136. Second, a facial challenge to a regulation as an invalid exercise of the police power has a broader

benefit to the society rather than to a particular property owner:

> Consistent with the view that facial challenges are allowed primarily for the benefit of society, rather than for the benefit of the litigant, a victory by the plaintiff in such cases normally results in an injunction or a declaratory judgment, which serves the broad societal purpose of striking an unconstitutional statute from the books.

Weissman v. Fruchtman, 700 F. Supp. 746, 753 (S.D.N.Y. 1988). The broad societal purpose is borne out by the remedy awarded by this Court in Joint Ventures II. Once the map of reservation statute was determined to be an invalid exercise of the police power, the statute was declared unconstitutional and was invalidated. Every property owner affected by a map of reservation was freed from any restrictions imposed by the invalidated maps of reservation. If the property owner wants compensation for the affect of the invalidated map on his property, the question of whether any particular property owner is entitled to compensation for the period the maps were in effect should be decided on a case by case basis by inquiring into the extent of deprivation of economic use. Joint Ventures II, 563 So. 2d at 625; Reahard, 968 F. 2d at 1136.

These cases are in a similar posture to the case of Moore v. City of Costa Mesa, 886 F. 2d 260 (9th Cir. 1989), cert. denied 496 U.S. 906, 110 S. Ct. 2588, 110 L. Ed. 2d 269 (1990). In Moore, the California courts had declared invalid a conditional variance that required part of Moore's property be deeded to the City of Costa Mesa. Id. at 261. Moore sued claiming that he was entitled to compensation for the partial temporary taking caused by the previously invalidated conditional variance. The district court's

dismissal with prejudice of Moore's complaint for failure to state a claim was upheld an appeal. The court held that Moore must allege and prove that he was denied all use of his property prior to being awarded compensation. Id. at 263. The allegations of the complaint were simply "insufficient to state a claim for unconstitutional regulatory taking for which compensation is due, and there is no case law that supports his position." Id. at 264.

A similar claim was rejected in the California state courts in Ellison v. County of Ventura, 217 Cal. App. 3d 455, 463, 265 Cal. Rptr. 795 (Cal.Ct.App. 1990). In Ellison, the court rejected the landowner's argument that if he proves the regulation fails to substantially advance a legitimate state interest he is entitled to compensation. The court ruled "that in order to show the government has taken private property by a regulation which does not substantially advance a legitimate state interest, the landowner must show more than the invalidity of the government's action. The landowner must also show that something of value was taken." Id. The court rejected Ellison's claim for compensation, noting that Ellison conceded that the regulation had not deprived him of all beneficial uses of the property. Id. at 797.

B. AGINS COMMANDS A SIMILAR RESULT.

DAVIDUKE's reliance on Agins for the proposition that a declaration of the unconstitutionality of a statute for failure to advance a legitimate state interest ipso facto entitles an aggrieved party to compensation is misplaced. In Agins the owner of a five acre parcel of unimproved land asked the court to declare zone ordinances limiting its development to between one and five single-family residences were unconstitutional and constituted a taking in inverse condemnation. Agins v. City of Tiburon, 447 U. S. 225, 257, 258, 65 L. Ed. 2d 106, 110 (1980). In sustaining the city's demurrer that the complaint failed to state a cause of action, the California Supreme Court held:

> A landowner who challenges the constitutionality of a zoning ordinance may not 'sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain.' (citation omitted) The sole remedies for such a taking, are mandamus and declaratory judgment...[and the ordinance at issue have] not deprived the appellants of their property in that compensation in violation of the Fifth Amendment.

Id. at 259, 65 L. Ed. 2d at 111. Citing to Nectow v. Cambridge, the court went on to say that "[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests. Id. at 260. However, the complaint in Nectow was for a mandatory injunction directing the city to grant Nectow's permit to build without regard to the restrictions of the ordinance. Nectow v. Cambridge, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed 842

(1928). Moreover, although the court agreed with the finding of the master below that the districting of Nectow's land as a residential district did not promote the health, safety, convenience and general welfare of the city, the court did not find a taking had occurred nor did it award compensation. Id. at 186-189. Thus, Agins and Nectow and the cases cited therein fail to support DAVIDUKE's theory that a taking occurs when a regulatory provision fails to advance a legitimate state interest.

IV. COMPENSATION IS DUE ONLY TO THOSE PROPERTY OWNERS WHO PROVE DEPRIVATION OF SUBSTANTIAL ECONOMIC USE OF THE PROPERTY.

Contrary to the tenure and implication of DAVIDUKE's Initial Brief, the DEPARTMENT does not suggest that invalidation is the only remedy available to every property owner affected by a map of reservation. The DEPARTMENT's position is that compensation is not due every property owner affected by a map of reservation. Rather, compensation is only due those property owners who meet the traditional test of a compensable taking: when the regulation deprives the owner of substantial economic use of his/or property. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 413 (1922). An "as applied" analysis will provide compensation to those whose property was taken in the traditional sense of the word. The cases relied upon by DAVIDUKE to the contrary simply do not support his position. For example, DAVIDUKE

quotes extensively from the United States Supreme Court's opinion in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987). In First English the property owner argued (and the United States Supreme Court assumed for purposes of the opinion) that the regulation deprived the property owner of all beneficial use of the property. Id. at 321-322.[6] Upon remand, the lower court determined that no "taking" had occurred and no compensation was required. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 211 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (Cal. App. 2d Dist. 1989). The DEPARTMENT seeks nothing more; it simply asks that this Court reaffirm the long standing procedure that only those land owners who prove their property was actually "taken" in the traditional sense of the word are entitled to compensation. See Nollan, 483 U.S. at 841 (regulation struck as not advancing a legitimate state interest; no compensation awarded).

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[6] This Court recognized the crucial limitation in the court's holding that "where the government's activities have already worked a taking of all use of property, no subsequent action by government can relieve it of the duty to provide compensation for the period during which the taking was effective" in Joint Ventures II. Joint Ventures, 563 So. 2d at 627, n. 11. Thus, this Court reasoned "First English offers no guidance to our resolution of the constitutional challenge" to the statute. Id.

V. POLICY CONSIDERATIONS SUPPORT COMPENSATION BE AWARDED ONLY UPON PROOF OF DEPRIVATION OF SUBSTANTIAL ECONOMIC USE OF THE PROPERTY.

A. THERE IS NO PROOF THAT DAVIDUKE MUST BEAR A PUBLIC BURDEN.

DAVIDUKE asks this Court to believe that he must be compensated because he has been "asked to assume more than a fair share of the public burden" (Initial Brief pg. 15), quoting San Diego Gas & Electric Co. v. City of San Diego, 101 S. Ct. 1287, 1306 (1981). DAVIDUKE bears no such burden and this sympathetic ploy is without basis in law or fact. Without explaining how his situation is analogous to those cases, DAVIDUKE simply reiterates out of context phrases and half sentences and claims they support his position. They do not. If, in fact, DAVIDUKE has had to bear some unnatural burden by the imposition of the map of reservation, all he has to do is prove it. If he can prove there has been a deprivation of substantial economic use of his property he will the be entitled to prove his damages. By asserting error in the district court's decision DAVIDUKE wants to avoid having to prove entitlement and asks to go directly to the issue of damages. The cases to which he cites simply do not support that position.

B. A TAKING MUST BE PROVEN.

It goes without saying that the United States and Florida Constitutions require payment of just compensation when a taking has occurred. However, neither the constitutions nor the cases cited by DAVIDUKE require compensation be paid without proof that there has been a taking in the traditional meaning of the word. The protection afforded in our constitutions are even handed, "[d]ue process required that no one shall be personally bound until he has had his 'day in court'". Scholastic Systems, Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974). It is not only DAVIDUKE who is entitled to his day in court. DAVIDUKE asks this Court to enforce his constitutional rights and deny those same rights to the DEPARTMENT by denying the DEPARTMENT's access to the courts enjoyed by every other litigant in Florida to defend itself. The DEPARTMENT will not have its day in court if a per se rule is adopted by this Court. If a landowner has truly been deprived of substantial economic benefit by a map of reservation, then he/she should be fully compensated for the loss. However, the DEPARTMENT would be precluded from defending itself against such claims if a per se rule is established.

C. ONLY THOSE WHO WOULD PURSUE SPURIOUS CLAIMS WILL BE DISCOURAGED IF A TAKING MUST BE PROVEN.

DAVIDUKE claims if the remedy for a declaration that a statute is unconstitutional is its striking then government will merely enact another unconstitutional regulation to take its place. The only support offered for this proposition is the rhetoric of commentators Berger and Kenner. (Initial Brief pg. 15) The map of reservation statute was not declared unconstitutional until 1990 when the first district concluded that the challenged subsections were constitutional because the land owner had a remedy by way of an action for inverse condemnation. Joint Ventures II, 563 So. 2d at 624. No regulation has replaced it notwithstanding DAVIDUKE claims that government can somehow keep enacting unconstitutional statutes merely to deprive property owners of their just compensation. He goes on to say that without the option of monetary compensation there will be "disincentive to unconstitutional conduct". This implies bad faith not only on the part of the government for lobbying for such legislation but also of the entire legislature for continuing to enact so-called unconstitutional legislation. Our system of checks and balances would simply not allow such bad faith attempts to enact unconstitutional legislation.

DAVIDUKE directs this Court to the government's action after Joint Ventures I to support his claim that the government will do anything it can to keep from paying property owners and to continue to harass them using invalid regulations. (Initial Brief p. 15)

A clear reading of Joint Ventures II reveals that DAVIDUKE's statements are disingenuous, misleading, and plain wrong. First of all, the first district did not find the statute constitutional - it found to the contrary. Joint Ventures, Inc. V. Department of Transportation, 519 So. 2d 1069 (Fla. 1st DCA 1988). During the pendency of the appeal, the DOT condemned the land and the parties entered into a monetary settlement. Nevertheless, the "district court decided that the great public importance and the likely recurrence of the issues preserved its jurisdiction despite the settlement." Joint Ventures II, 563 So. 2d at 624, n. 5. Thus there is no basis for DAVIDUKE's claim that during the pendency of the appeal from the first district the DEPARTMENT continued to file maps under an unconstitutional statute. They were not unconstitutional until this Court said so in 1990.

The DEPARTMENT does not claim that it is "unfair" to make it pay property owners who have been deprived of substantial economic use of their property. The DEPARTMENT asks only that property owners be required to prove the deprivation; DAVIDUKE wants to be paid without such proof.

CONCLUSION

The decision in this case should be affirmed with a reiteration by this Court that a property owner is only entitled to a ruling that a taking has occurred when he/she has proven by competent substantial evidence that the affect of the map of reservation was to deprive him/her of substantial economic use of his/her property as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail on this 26th day of October, 1993 to J. CHRISTY WILSON, III, ESQUIRE and JAY W. SMALL, ESQUIRE, 111 North Orange Avenue, Suite 1575, Orlando, Florida 32801 and ALAN E. DESERIO, ESQUIRE, 777 South Harbour Island Blvd., Suite 900, Tampa, Florida 33602.

Marianne A. Trussell
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IN THE SUPREME COURT OF FLORIDA

RICHARD M. DAVIDUKE

Petitioner,

vs. CASE NO. 82,314

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

Respondent.

_____/

APPENDIX TO
ANSWER BRIEF ON THE MERITS OF RESPONDENT
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

INDEX TO APPENDIX