SUPREME COURT OF FLORIDA

RICHARD M. DAVIDUKE,

Petitioner,

vs. **Case No. 82,314**

DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONERS (DAVIDUKE, LYNCH, STUMM & WELCH)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PRELIMINARY STATEMENT

For the purposes of this Initial Brief the Petitioner will utilize the following symbols: "A" shall refer to the Appendix accompanying the Initial Brief of the Petitioner. "TR" shall refer to the transcript of the hearing on the Motion for Summary Judgment.

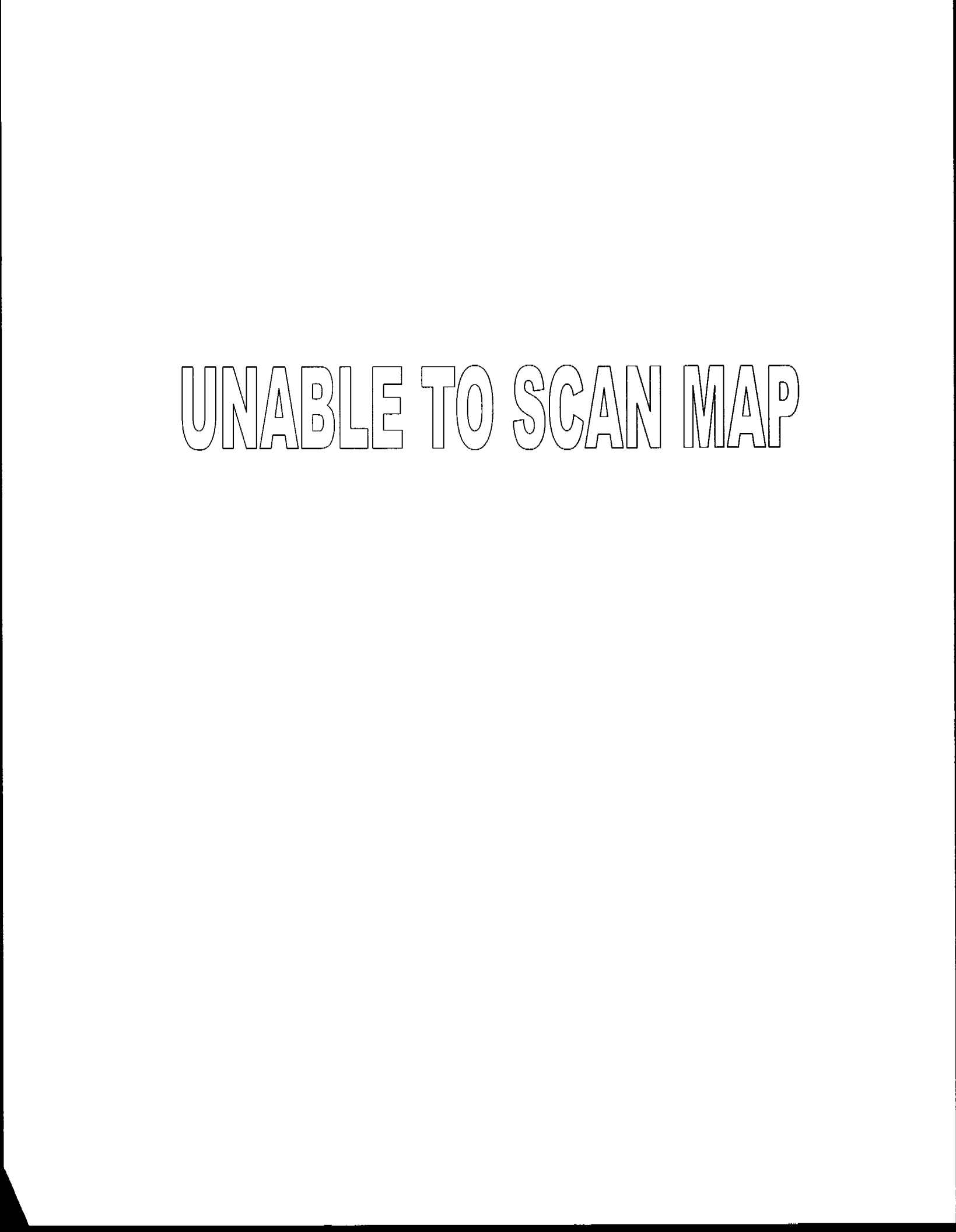
While the facts vary somewhat, the legal issues presented in this appeal are basically the same as those addressed in ***Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*** and ***Dundee Development Group***, **Supreme Court Case No. 80,656.** As such, the Petitioners intend to adopt, for purposes of this Initial Brief, the Argument presented in the **Answer Brief of the Respondents A.G.W.S. Corporation and Dundee Development Group, Case No. 80,656.** The Argument portion of the Daviduke Initial Brief will include a general statement of the "point on appeal," followed by several sub-categories of argument. As these are set forth, reference to that portion of the A.G.W.S. Corporation Answer Brief addressing those matters will be provided.

STATEMENT OF THE CASE AND FACTS

The inverse condemnation complaint filed in this cause (A: 1-21) alleged that the plaintiffs (Daviduke, Lynch, Stumm & Welch) had assembled, between September, 1985 and December, 1986, three parcels of property in Lake County, for the purpose of constructing a convenience store. It further alleged that on June 22, 1989, the

DOT filed a map of reservation, pursuant to Sec. 337.241 (1), Florida Statutes (1987), which encompassed the majority of the plaintiffs' property. An amended map of reservation was filed on March 7, 1990. Copies of the maps of reservation were attached as Exhibits D and E to the complaint. (A: 19;20). In April, 1990 the plaintiffs sought approval from the County for a site plan developed for the construction of a convenience store on the property. The site plan was attached to the complaint as Exhibit F. (A: 21). That exhibit also reflected the map of reservation as imposed upon the property. (See diagram on following page. Property lines are outlined in red and the map of reservation boundaries are highlighted in yellow.) On April 26, 1990, the site plan request was denied because the proposed building was located within the right of way reservation for the proposed roadway. (Complaint, paragraphs 3, 4, 5 & 6)

The complaint further alleged that Section 337.241, Fla.Stat. prohibited any construction, or the issuance of any development permits for a period of five years, which could be extended for an additional five years; that the statute imposed a development moratorium on the property so that the property could be acquired during the ten year period at a substantially reduced or depressed price; that the statute placed no burden or obligation upon the DOT to acquire the property during this time period; and that the plaintiff's have been unable to proceed with the development or marketing of the property as a result of the filing of the map of reservation. (Complaint, paragraphs 7, 8, 9 & 10). The complaint


UNABLE TO SCAN MAP

also alleged that the imposition of the map of reservation left the property with no utility or reasonable economic use and denied the owners' investment backed expectations with regard to the property. (Complaint, paragraph 11).

Paragraphs 12, 13, 14 and 15 of the Complaint alleged that the imposition of the map of reservation constituted a "taking" without the payment of compensation in that: (1) the filing constituted a physical invasion of the owners' property in the nature of an involuntary easement or lease, which gave the DOT control over the property for up to ten years; and (2) that by precluding any economically viable use of the property, the map depressed the value of the property and unfairly imposed a burden upon the plaintiffs to provide for a future public need. The filing of the map of reservation was described as an exercise of the power of "eminent domain", rather than the police power, because it conferred upon the public a "benefit," in that, through the use of the map, a "land bank" of private property had been created. By the filing of the map of reservation, the DOT had effectively appropriated property for the purpose of constructing the Northwest Beltway.

The complaint continued by noting that the Florida Supreme Court had declared the right-of way reservation provisions of Section 337.241(2) and (3), Florida Statutes, unconstitutional, and that on May 29, 1992, the DOT withdrew the maps of reservation. (Complaint, paragraphs 16, 17). The prayer of the complaint asked that the court declare that the property encompassed by the map of

reservation had been "taken" without the payment of full compensation. It also requested a jury trial on the issue of compensation.

Accompanying the complaint was an affidavit of Richard M.Daviduke, which essentially verified the allegations of the complaint. (A: 22-30). Attached as Exhibit A was a letter, dated May 18, 1990, from the Lake County planning department indicating that the site plan had been reviewed and approval denied "due to the fact that your proposed building is located within the right of way reservation for the proposed belt way." Also attached were minutes of the Site Plan Advisory Committee reflecting comments from various county staff concerning the proposed site plan. Concerns about the zoning of the property, the need for a full set of construction plans, that the property was in the Wekiva River Protection Area, and that the site plan did not reflect the right of way reservation going across the property, were expressed. The minutes also stated that "no permits from Lake County will be issued for development purposes in the beltway reservation."

Plaintiffs' moved for summary judgment, alleging that the "taking" issue had been resolved as a matter of law in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), when the Court declared that Section 337.241(2) and (3), Fla. Stat. unconstitutionally permitted the state to take private property without just compensation, in violation of the "compensation" clause of the Florida and United States Constitutions. (A: 31-36). The DOT moved to dismiss contending

that the allegations of the complaint were insufficient to state a cause of action. This motion was denied. (A: 37-39).

The deposition of Gregory Stubbs, Director of Current Planning for Lake County, (A: 70-107) was filed with the lower court as an attachment to DOT's memorandum in opposition to the motion for summary judgment. (A: 51-107). Stubbs stated that the owners' site plan application submitted in April 1990, was in substantial compliance with all the development ordinances, except that the CP (planned commercial) zoning on the property had to be amended to reflect whatever specific commercial use the owner intended to make of the property. (A: 80;83) (Depo. pp. 11;14). With regard to the zoning amendment, the owner would have been required to submit an application requesting that the CP commercial zoning be amended to CP with C1 or C2 uses, which would include the convenience store planned for the site. (A: 90-91) (Depo., pp.21-22). The witness stated that his department would have approved the convenience store use and that "...we would have no real objection to establishing that [use] within that zoning category." (A: 92) (Depo.,p.23). Regarding the fact that the property was located within the Wekiva River protection area, the witness stated that he believed that the property was located at one of five intersections in the protected area that held vested rights to utilize the property according to planned commercial zoning. (A: 94-95) (Depo., pp. 25-26). Regarding whether the property's location in the Wekiva River area would have affected development, Stubbs stated, "Could have. I don't know in what way or how it would."

(A: 95-96) (Depo., pp. 26-27). Regarding the need to submit detailed building plans, Stubbs stated that this was necessary to insure that the structure met building code requirements. (A: 96-97) (Depo., pp. 27-28). Even if the plans had been submitted the site plan approval would have been denied due to the presence of the map of reservation. (A: 100-101) (Depo., pp. 31-32). Stubbs first indicated that the reason the site plan for the subject property was denied was the presence of the map of reservation. (A: 84) (Depo. p.15). Subsequently, after reviewing minutes of certain meetings, Stubbs "assumed" that the site plan denial was not based solely upon the map of reservation. (A: 100-101) (Depo. pp.30-31).

After a hearing on Plaintiffs' Motion for Summary Judgment, the trial court entered an order denying the motion and ruling that the Plaintiffs must show more than the fact that the map of reservation was filed over the property. (A: 113-114). Subsequently, the Plaintiffs moved for a summary judgment with regard to the affirmative defenses raised by the DOT. (A: 115-120). The motion cited the then recent decision of *Orlando/Orange County Expressway Authority v. W. & F. Agrigrowth-Fernfield*, 582 So. 2d 790 (Fla. 5th DCA 1991), as the basis for granting the motion as to two of DOT's defenses. After hearing, the trial court granted the motion for summary judgment as to the affirmative defenses. The trial court also rescinded the previous order denying the Plaintiffs' original motion for summary judgment, and

then granted that motion on the issue of liability for the "taking." (A: 155-157).

On appeal the Fifth District Court of Appeal reversed (A: 158) and remanded for further proceedings consistent with that court's recent en banc decision of *Department of Transportation v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th DCA 1992), wherein a split court receded from its prior decision of *W. & F. Agrigrowth-Fernfield, Ltd.*, 582 So. 2d at 790. On rehearing the District Court granted the Plaintiffs' request to certify that the Daviduke decision was in conflict with *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 608 So. 2d 52 (Fla. 2d DCA 1992). (A: 159).

The Plaintiffs/Petitioners timely filed a Notice to Invoke Discretionary Jurisdiction, based upon the lower court's certification of conflict.

SUMMARY OF ARGUMENT

This is not a "regulatory takings" case. The imposition of a map of reservation which freezes property in its current state for ten (10) years is an act of "**eminent domain.**" Government acquisition of private property interests for the purpose of furthering a public project or enterprise is an exercise of the power of eminent domain requiring full compensation therefor. Art. X, Sec. 6(a), Fla. Const.; Fifth Amendment, U.S. Const.

Regulatory takings cases assume a valid exercise of the police power. When such a regulation affects private property, the usual inquiry is the economic effect of the regulation. Does it "go too far"? An extensive body of case law has been developed by this Court and the United States Supreme Court which analyzes the economic effect of valid regulations on an *ad hoc* basis to determine if a regulatory "taking" has occurred. These cases are constitutionally and analytically distinct from "freezing" cases. Traditionally, our common law decisions unmask regulatory freezing schemes, exposing them as guileful attempts to acquire private property by legislation without paying for that property.

The *Joint Ventures* decision, *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990) (*Joint Ventures, Inc. "II"*), carefully analyzed the state's map of reservation statute, Sec. 337.241(2)(3), *Fla. Stat.* (1988), for what it actually was. This Court took pains to express the important distinction between acts of the police power (regulatory) and actions in the nature of eminent domain (*de facto* condemnation). The map of reservation was clearly exposed as an acquisition by government for a public project. Such an acquisition of private property interests must entail the payment of full compensation to the owner singled out thereby.

The instant case involves the imposition of an identical map of reservation onto the private land of the Petitioners by freezing development on the property. The Respondent sought to use the map of reservation legislation as a device to hold down future

acquisition costs of the proposed Beltway project. A separate *ad hoc* determination need not be made in every case where the legislation has been **implemented** since this Court has expressly held the identical legislative device to be an exercise of eminent domain, that, when **actually implemented** as here, will give rise to a claim for compensation.

Assuming arguendo, the implementation of this map of reservation was not an act of eminent domain as held in *Joint Ventures, Inc. "II"*, the imposition of this legislative freeze would still be a "taking" requiring compensation. The United States Supreme Court has held repeatedly that legislation is void on its face as an uncompensated taking, without an *ad hoc* economic inquiry, if the regulation either fails to substantially advance a legitimate state interest or, by its terms, denies the affected landowner all reasonable economic use of his or her property.

This Court found in *Joint Ventures, Inc. "II"*, that the act of reserving private property for public use, in the guise of a mere regulation, was not legislation in the furtherance of a "legitimate state interest." An uncompensated seizure of a private property interest for a public enterprise by means of legislation or regulation is also recognized by the United States Supreme Court as not a "legitimate" state interest. Thus, by definition, a taking has occurred with the implementation of an admittedly "illegitimate" act upon the property of these landowners. Once a "taking" has been found by the court, compensation must be paid, at least for the duration of the invalid act.

Policy reasons advanced to withhold the right to compensation, such as the possibility of windfalls to affected citizens or the specter of payment of attorneys' fees to nominally successful litigants, are irrational and ineffective. Irrational, because the existing law in Florida protects the government from spurious, non-meritorious claims and penalizes landowners and their attorneys for litigating nominal claims. Ineffective, because the constitutional protection of the Fifth Amendment and Article X, Section 6(a) of Florida's organic law cannot be avoided or evaded by arguments that violations of such protection will cost the government money.

The policy reasons requiring compensation for temporary, illegal takings are strong, however. In addition to the unambiguous language of both State and Federal Constitutions mandating compensation for the public's seizure of private property, government must have some economic disincentive to avoid enacting such "guises" as the map of reservation statute herein. Otherwise, the government simply plays a game of enactment-litigation-invalidation-amendment and then further litigation. Our citizenry and our constitutions cannot be so abused.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE ORDER GRANTING SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY. THE RELIANCE OF THE DISTRICT COURT UPON THE WEISENFELD DECISION AS A BASIS FOR REVERSAL OF THE SUMMARY JUDGMENT ON LIABILITY WAS ERROR BECAUSE: (1) THE WEISENFELD DECISION HAS INCORRECTLY CONSTRUED AND APPLIED THE DECISION OF JOINT VENTURES, INC. v. DEPARTMENT OF TRANSPORTATION; (2) THE WEISENFELD DECISION FAILS TO RECOGNIZE THE DISTINCTION BETWEEN THE EXERCISE OF EMINENT DOMAIN AND THE EXERCISE OF THE POLICE POWER; (3) THE WEISENFELD DECISION HAS MISCONSTRUED AND FAILED TO PROPERLY APPLY EXISTING PRECEDENT OF THE UNITED STATES SUPREME COURT ON THE ISSUE OF WHEN A REGULATORY "TAKING" OCCURS.

I. NATURE OF THE CASE: EMINENT DOMAIN OR REGULATORY TAKING.

The Petitioner would adopt the argument set forth at pages 9 through 22 of the Answer Brief of Respondents, A.G.W.S. Corporation and Dundee Development Group, Case No. 80-656. In addition, the Petitioners would submit the following additional comments concerning the majority opinion in *Department of Transportation v. Weisenfeld*, 617 So. 2d 1071 (Fla. 5th DCA 1993).

A. THE HOLDING OF DOT v. JOINT VENTURES, INC.

The majority in *Weisenfeld* clearly recognized that the Supreme Court in *Joint Ventures, Inc.*, found that the map of reservation provisions were definitely not "regulatory" in character, but merely a veiled "attempt" to acquire property without utilizing the

provisions of Chapters 73 and 74. In summarizing the holding of *Joint Ventures, Inc.*, the majority in *Weisenfeld* stated:

> In *Joint Ventures* the Florida Supreme court affirmatively answered the certified question whether subsections 337.241(2) and (3), Florida Statutes (1987) unconstitutionally provided for an impermissible taking of private property without just compensation. It held that the statute in question was not an appropriate regulation under the police power but was "merely an attempt to circumvent the constitutional and statutory protection afforded private property ownership under the principles of eminent domain." *Weisenfeld*, at 1072. (Emphasis Supplied)

So far, so good. The opinion in *Weisenfeld* seems clear enough in its recognition that the map of reservation provisions struck down by this Court in *Joint Ventures* were nothing more than a "thinly veiled attempt to 'acquire' land" without the formal exercise of eminent domain under Chapters 73 and 74. Suddenly, however, the opinion begins to leave the "real" world, sliding into a fictitious realm that ignores accomplished fact. The first signs of this divergence appear when the majority in *Weisenfeld* describes the "statutory mechanism" of the map of reservation provisions. There the majority states:

> The mere **"attempt" embodied in the mechanism** to improperly acquire land in the guise of police regulation, thereby circumventing the procedural and substantive safeguards of Chapter 73 and 74, does not automatically equate with a compensable taking." *Id.* at 1073.

Superficially, this statement seems acceptable enough. After all, the mere enactment of a provision which authorizes the government to do something that is tantamount to an exercise of eminent domain, foregoing all the constitutional niceties generally associated with condemnation actions, could be viewed simply as an

"attempt" or a mere temptation to do something that which is generally considered to be constitutionally prohibited. Without delving into the law which permits a statutory provision to be declared facially unconstitutional as a "taking" in violation of the state and federal constitutions by its mere "enactment", [1] let's accept the premise that the "mere enactment" of the map of reservation provisions constituted only an attempt to exercise the power of eminent domain. With this assumption in mind, consider the very next sentence in the majority opinion:

> Therefore, *Joint Ventures* does not support the conclusion, as contended by *Weisenfeld*, **that the mere filing of a reservation map** by DOT creates a cause of action on his part. *Id.* at 1073.

It is at this point that the opinion takes a quantum leap over fact and simple logic to land in a place where an accomplished feat is equated to a mere "attempt." It is a place where the government is permitted, with impunity, to actually fulfill the very purpose for which the statute was enacted, without consequence.

B. ATTEMPT VS. ACCOMPLISHED FACT

The majority in *Weisenfeld* is clearly blinded to the realization that in the case before it, as in all other cases where the government has utilized the map of reservation statute by actually "filing" the map, thereby invoking the restrictive provisions of the statute, the scenario presented is no longer a mere "attempt," but the fulfillment of what the statute was enacted

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[1] *Agins v. City of Tiburon*, 447 U.S. 255 (1980)

to accomplish. If the enactment of the map of reservation provisions is appropriately described as a mere "attempt" to exercise the power of eminent domain, without utilizing Chapters 73 and 74, then simple common sense dictates that the actual **filing** of a map of reservation, pursuant to the map statute, is "in fact" the completion of that "attempt." That being the case, what possible justification can be given for the denial of the opportunity to claim just or full compensation? Clearly, the answer is none! The constitution of Florida mandates that if the power of eminent domain is exercised, then the opportunity to claim compensation **must** be provided. "In every eminent domain case the Florida Constitution expressly requires the condemning authority to pay the property owner 'full compensation' for the condemned property." *Florida Dept. of Revenue v. Orange County*, 18 Fla. L.Weekly S336 (Fla. June 17, 1993).

C. REGULATION vs. EMINENT DOMAIN

If, as recognized by the majority in *Weisenfeld*, this Court in *Joint Ventures* held that the map of reservation provision was **not** "an appropriate **regulation** under the police power," why then does the *Weisenfeld* majority proceed to analyze the case as if it involved a "regulatory" taking? Why did the *Weisenfeld* majority and the concurring opinions, reiterate and utilize principles applicable **only** to the determination of a "regulatory" taking in a setting that it has declared to be **non-regulatory** in nature? When the power of eminent domain is exercised, it matters not whether

the owner has been denied the economically beneficial or productive use of the land. Economic impact is relevant only to the issue of compensation to be paid for the exercise of that power.

II. "PRACTICAL (BUT NOT PROBABLE) CONSIDERATIONS" - THE SPECTER OF WINDFALL RECOVERIES AND UNJUSTIFIED PAYMENT OF FEES AND COSTS.

The Petitioners would adopt the argument set forth at pages 22 through 28 of the Answer Brief of Respondents, A.G.W.S. Corporation and Dundee Development Group, Case No. 80-656.

III. VIEWED AS A REGULATORY TAKING - LIABILITY IN EVERY INSTANCE.

The Petitioners would adopt the argument set forth at pages 28 through 37 of the A.G.W.S. Corporation Answer Brief.

IV. IF A "TAKING" HAS OCCURRED THEN COMPENSATION IS REQUIRED.

The Petitioners would adopt the argument set forth at pages 37 through 42 of the A.G.W.S. Corporation Answer Brief.

V. SOUND POLICY CONSIDERATIONS REQUIRING COMPENSATION.

The Petitioners would adopt the argument set forth at pages 43 through 50 of the A.G.W.S. Corporation Answer Brief.

CONCLUSION

In *Joint Ventures, Inc.*, this Court accurately described the map of reservation provisions as a "thinly veiled" attempt to acquire private property, by-passing the statutory procedures provided for the taking of private property for public use. With the actual filing of the map of reservation, the "attempt" at the

exercise of eminent domain was completed. That which was constitutionally prohibited took place as a matter of "fact," the purpose of the map of reservation provisions was fulfilled and the government gained the "use" of private property for a "uniquely public function." With the power of eminent domain having been exercised, summary judgment of the issue of liability for the "taking" cannot be denied. Equally true, is the fact that since the power of eminent domain has been exercised, the opportunity to claim compensation cannot be denied.

The era of the map of reservation seemingly has passed away. With the provisions being declared unconstitutional as a taking of property without payment of compensation, the government made one effort to amend the provisions before repealing Section 337.241 entirely in 1992. [sec.108, ch. 92-152] However, true to form, the government does not wish to compensate the limited group of private property owners that were victimized by the map provisions in order to provide a "benefit" to the public as a whole. Contrary to the ruling by the *Weisenfeld* majority, that is exactly what the compensation clauses of the Florida and United States constitutions were "designed" to do. The government, for nearly **two years**, has gained the benefit of **using** the Daviduke property in the furtherance of its uniquely public function. It is now obligated to pay for that "**use.**" To rule otherwise would be tantamount to deleting the compensation clause from the constitution. Recently, this Court confirmed its resolve to enforce the payment of compensation when the power of eminent domain has been exercised.

Florida Dep't of Rev. v. Orange County, 18 Fla.L.Weekly at S336. That being the case, the resolution of this cause is quite simple - the majority opinion in *Weisenfeld* must be quashed as contrary to the law and the "fact" that **the power of eminent domain has been exercised** in this cause. The decision reversing the order of the trial court, on the basis of *Weisenfeld* must, likewise, be reversed and the cause remanded for a determination of full and just compensation for the temporary taking of the owners' property.

Respectfully submitted,

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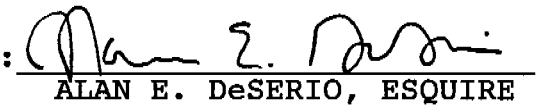
By: 
ALAN E. DeSERIO, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 28th day of September, 1993, to THOMAS F. CAPSHEW, ESQ., Assistant General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458.

ALAN E. DeSERIO, ESQUIRE

APPENDIX

INDEX TO APPENDIX