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SUPREME COURT OF FLORIDA

JAMES A. FOWLER, ETC.,

Petitioner,

vs. **Case No. 82,329**

DEPARTMENT OF TRANSPORTATION,

Respondent.

REPLY BRIEF OF PETITIONER JAMES A. FOWLER, TRUSTEE

Alan E. DeSerio, Esquire
Florida Bar No. 155394
BRIGHAM, MOORE, GAYLORD, SCHUSTER & MERLIN
777 S. Harbour Island Blvd.
Suite 900
Tampa, FL 33602
813/229-8811

Jay Small, Esquire
Florida Bar No. 562890
WILSON, LEAVITT & SMALL
111 N. Orange Ave., Suite 1575
Orlando, Florida 32801
(407) 843-4321
Attorneys for Petitioner

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

The most difficult task the DOT faces in this appeal is overcoming the clear and concise analysis contained in the Joint Ventures, Inc. v. Department of Transportation [1] majority opinion, which determined that the map of reservation provisions were nothing more than a "thinly veiled attempt to `acquire' land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74." Id. at 625. Simply stated, this Court found that the enactment of the map of reservation statute amounted to an attempted exercise of the power of **eminent domain.** The DOT's attempts to characterize the statutory provisions as "regulatory" in character were totally rejected. Yet, in the face of the clear holding of Joint Ventures, Inc. finding that "subsections 337.241(2) and (3), Florida Statutes(1987), unconstitutionally permit the state to take private property without just compensation," (Id. at 623) the DOT proceeds on as if this cause involved a "regulatory" taking, and that the decision in Joint Ventures, Inc. never occurred. In pursuing this unique approach, the DOT has offered absolutely no response to the position that the imposition of a map of reservation upon private property, pursuant to sections 337.241(2) and (3), Florida Statutes, constituted an exercise of the power of eminent domain, for which compensation is **mandated.** Apparently it has been unable

[1] 563 So. 2d 622 (Fla. 1990).

to conceive of a way to circumvent the concise language of the majority opinion, and has opted instead to employ the "ignore it and maybe it will go away" approach to the issue presented.

While such an approach is a disservice to this Court, it does serve to establish several "truths." The first of these is that the DOT has no viable defense to the fact that this Court found the map of reservation provisions to be an attempted exercise of the power of **eminent domain**, rather than the police power. When the map was imposed pursuant to the statutory provisions, the exercise of the power of eminent domain was completed. The very purpose for which the statute was enacted was fulfilled, and the right to claim compensation and damages, if any, vested in the owner. Compensation is mandated once the exercise of eminent domain takes place. "In the event of a taking, the compensation remedy is **required** by the Constitution." Dept. of Agric. v. Mid-Florida Growers,Inc., 521 So. 2d 101, 103-104, n.2 (Fla. 1988). The second "truth" revealed in the DOT's inability to respond to the fact that the imposition of the map of reservation constituted an exercise of the power of eminent domain, is that there is absolutely no need for this Court to enter the muddle of regulatory takings law. If, as this Court found in Joint Ventures, Inc., the map of reservation provisions permitted the government to "acquire" private property for public use (an act of eminent domain), then the issue of whether the owner has been denied the substantial beneficial use of the property is totally irrelevant. That factor, which is one of two considered when determining if a **"regulatory"**

taking has occurred, has no relevance at all when the power of eminent domain has been exercised, except that it may affect the amount of compensation due to the owner as a result of the taking. Once a determination is made that the power of eminent domain has been exercised, none of the considerations relating to the determination of a "regulatory" taking should enter the picture.

If the government had formally condemned an interest in the subject property (whether described as an option, a leasehold or a negative easement) in order to prevent the owner from developing the property for up to ten years, or until the DOT made up its mind whether or not it would take the property in fee simple, there is absolutely no doubt that it would have to pay the owner for the fair market value of that interest. The constitution would not permit the government to do otherwise. Florida Dept. of Revenue v. Orange County, 18 Fla.L.Weekly S336 (Fla. 1993). How then can the right to claim compensation be denied where, as in this and every other case where a map of reservation has been imposed upon private property, the government has already exercised the power of eminent domain, but did so without utilizing the legal requirements for the exercise of that power found in Chapters 73 and 74, Florida Statutes? In both instances the property "interest" (option, leasehold, easement) was acquired by the government for public use, but in the second scenario the government contends it does not have to pay for the "use" it made of the private property. Only if the constitution is cast aside can this position be adopted. Having previously rejected the DOT's regulatory characterization of the

map statute (Joint Ventures, Inc., 563 So.2d at 625), this Court must likewise reject DOT's renewed effort to apply regulatory taking principles to a non-regulatory taking case.

Contending that it is "significant," the DOT cites that portion of the opinion where this Court stated that it was not dealing "with a claim for compensation." Id. at 625. [2] But, true to form, in attributing significance to this excerpt, the DOT ignores the fact that this Court had previously recognized that the DOT and the owner had entered into a "monetary settlement," and that the case was being decided because it involved issues of great public importance, which were likely to recur in other cases. Id. at 624, n. 5. Thus, the only reason no "claim for compensation" was pending before this Court when the decision in Joint Ventures, Inc. was rendered, was the undisputed fact that compensation had already been paid for the "taking" resulting from the imposition of the map of reservation upon the Joint Ventures, Inc. property. The comment clearly does not carry the significance attributed to it by the DOT.

The reliance upon the majority opinion in Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th DCA 1993), by the DOT is to be expected. Although, unlike the DOT, the majority in **Weisenfeld** clearly acknowledge that this Court in **Joint Ventures, Inc.** found that the map of reservation statute "provided

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[2] The dissenting opinion in Tampa-Hillsborough County v. A.G.W.S. Corporation, 608 So. 2d 52, 55 (Fla. 2d DCA 1992) also reflects a misplaced reliance upon the significance of this Court's comment.

for an impermissible taking of private property without just compensation" and that the statute was not a proper regulation under the police power, but was "merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain," like the DOT, it literally ignores the significance of these pronouncements. The fundamental error apparent in the **Weisenfeld** majority opinion, and one which dominates the DOT's presentation in its Answer Brief, was the consideration of the matter as a "regulatory" taking, rather than an exercise of the power of eminent domain.[3] This fundamental mistake is discussed in greater detail at pages 8 through 12 of the Petitioner's Initial Brief and will not be repeated here. Clearly, however, there is little reason to rely upon a lower court opinion which refuses to distinguish, as this Court did in Joint Ventures, Inc., between the distinct power of eminent domain (acquisition) and the police power (regulation). Indeed, the mischaracterization of the Weisenfeld case as involving a "regulatory" taking, and the failure to follow the analytically correct holding of this Court in **Joint Ventures, Inc.**, provide more than sufficient justification for quashing the **Weisenfeld** decision, as well as the per curiam decision entered in this cause, which is founded upon **Weisenfeld**.

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[3] The dissent in A.G.W.S. Corporation, 608 So. 2d at 52, likewise glides over, without comment, the very clear and concise analysis of the majority opinion in Joint Ventures,Inc. in an attempted rewriting of the opinion.

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

The malady of ignoring the arguments presented in the Petitioner's Initial Brief continues. The government, as well as the dissent in A.G.W.S. Corporation, 608 So. 2d at 58, have suggested that every owner impacted by a map of reservation "will risk little or nothing in bringing suit" and "[e]ven if the damages are minimal or speculative, virtually every landowner will have an incentive to file suit." Id. at 58.

In response, the procedural safeguards present in Chapter 73, which permit the DOT to file an offer of judgment long before the matter reaches the trial stage, were cited by the Petitioner as an effective deterrent to the filing of a spurious or frivolous claim. Section 73.032, Florida Statutes, permits the government to file the offer of judgment. Section 73.092(6), Florida Statutes, provides that if the offer is rejected, and the verdict is less than or equal to the government's previous offer, "**no attorney fees or costs shall be awarded for time spent by the attorney or cost incurred after the time of rejection of the offer.**" Contrary to the position taken by the DOT and the dissent in A.G.W.S. Corporation, there is no incentive to filing a "minimal or speculative" claim. Rather, pursuing such a claim undeniably puts a party at risk that they will be paying, out of their own pocket, the costs and fees incurred in the pursuit of such a claim. "Section 73.092(7)-(9) offers the landowner the incentive to realistically assess his claim, and **discourages the landowner from**

litigating a meritless claim." Criggler v. State of Fla., D.O.T., 535 So. 2d 329 (Fla. 1st DCA 1988).

DOT offers absolutely no response to this position. The lack of such a response can only be considered a concession by the government that, in light of the offer of judgment provision, the threat of a flood of "minimal or spurious" claims is an empty one arising from a groundless concern.

In addition to the presence of the offer of judgment provision as a disincentive to the filing of a meritless claim, the Petitioner has also demonstrated that the concern over the award of attorneys fees "regardless" of the results obtained is equally groundless in light of the specific statutory provision addressing the award of fees in eminent domain proceedings. Section 73.092, Florida Statutes, clearly provides that the **results obtained** for an owner will be the controlling consideration in the determination of the amount of fees to be awarded. Subsection (1) provides that "the court **shall** give the **greatest weight to the benefits resulting to the client from the services rendered.**" Subsection (2) permits the government to make a written offer to the client before counsel is hired. This "offer" will define the benefits obtained by a comparison of the written offer to the compensation awarded by the final judgment or settlement. Thus, the contention that exorbitant fees can be awarded **regardless of the results** is clearly unfounded and amounts to a blatant attempt by the government to mislead this Court.

Each of the so-called "practical considerations" voiced by the dissent in A.G.W.S. Corporation are matters that can be addressed by this Court in its opinion simply by warning those who would consider filing a spurious claim that certain procedural devices exist which will make such practice unrewarding for both the claimant and his attorney.

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

DOT continues its practice of "ignore it and maybe it will go away" in its presentation of the law relating to the establishment of a "regulatory" taking. While, as stated earlier, it is totally unnecessary for this Court to give any consideration the criteria for establishing a "regulatory" taking, assuming, arguendo, the cause is to be considered as a regulatory taking case, summary judgment on the issue of liability would be mandated in every instance where a map of reservation was actually placed over private property, thereby placing any development in "deep freeze" for up to ten years.

DOT contends that there is only one standard for establishing a regulatory taking: denial of all beneficial use of the property as a result of the regulation. This is also the position of the majority in Weisenfeld and the dissent in A.G.W.S. Corporation. Yet, on no less than six separate occasions the United States Supreme Court has announced two separate and alternate standards for establishing for establishing a "taking" under the 5th Amendment. "[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a

substantial public purpose." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). Four years after Penn Central, the United States Supreme Court held in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), that a regulation "effects a **taking** if the ordinance does not substantially advance legitimate state interest, ... or denies an owner economically viable use of his land." Five years later, in United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455, 459 (1985), the Court stated that its "general approach" to the regulatory taking issue was "summed up" in Agins "where we stated that the application of land-use regulations to a particular piece of property is a **taking** only `if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land." Two years after Riverside the Supreme Court twice reiterated the same standard. First in Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S.Ct. 1232 (1987): "The two factors that the [lower] court considered relevant, have become **integral** parts of our **taking** analysis. We have held that land use regulation can effect a **taking** if it 'does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land." Id. at 1242, citing both Agins and Penn Central Transp. Co. Next, in Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987): "We have long recognized that land-use regulation does not effect a **taking** if it 'substantially advance[s] legitimate state interests and does not 'den[y] an owner economically viable use of his land," citing Agins and Penn Central. In Nollan the court made it quite clear that

there are two standards under which a "taking" may be determined. If a provision must meet both of these standards in order to "not effect a taking," then logically a violation of either will result in a "taking." The two independent standards for establishing a regulatory taking were reiterated again by the Supreme Court in 1992. "As we have said on **numerous occasions**, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" **Lucas v. South Carolina Coastal Comm'n**, 112 S.Ct. 2886, 2893-94 (1992). That same year the Supreme Court, in **Yee v. City of Escondido**, 112 S.Ct. 1522, 1526 (1992), stated that, with regard to a regulatory taking, "compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole," citing **Penn Central**.

How many times must the Supreme Court of the United States state that there are **two** independent standards for the determination of a regulatory taking. This Court specifically recognized those two standards in **Joint Ventures, Inc.** Yet, the majority in **Weisenfeld** dismisses one of those decisions (**Agins**), and ignores all the rest. It then criticizes the panel in **Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.**, 582 So. 2d 790 (Fla. 5th DCA 1990) for relying upon a standard that has been reiterated time and time again as the

law of the land. Clearly, the criticism was unwarranted and unfounded as a matter of law. W & F Agrigrowth was not an "unfortunate" decision, but rather one that correctly applied the law to reach a proper result where the use of the map of reservation provisions was carried well beyond a mere "attempt" to exercise the power of eminent domain.

DOT cites Nollan v. California Coastal Commission, 483 U.S. 825 (1987), as an example of where the court found that a taking occurred because the regulation failed to advance any legitimate state interest, "yet **refused** to award compensation." (Answer Brief, page 10). DOT plays loose and fast with the facts of Nollan, which involved a coercive exaction (dedication of an easement to cross the beach area of their residential parcel) imposed as a condition to the issuance of a building permit for their new home. The problem with DOT's representation is that the **Nollan** case never reached the stage where compensation would have been appropriate. While the appeal was pending at the state court level, the Nollans refused to grant the dedication, tore down the old structure and built the new house without complying with the dedication requirement. Nollan, 483 U.S. at 829-830. The Supreme Court did not refuse to award compensation. It simply was not at issue when the cause was resolved by the Supreme Court's holding that a "taking" had occurred because the regulation failed to substantially advance any legitimate state interest. [4]

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[4] The court in Nollan confirmed **again** that the "substantially advances legitimate state interest" test was part of the "takings" analysis and not "due process," as contended by the government and

DOT's contention that invalidation is the sole remedy available in this cause loses all credibility when it attempts to rely upon the holding of the California Supreme Court in **Agins v. City of Tiburon**, 24 Cal. 3d 266, 598 P. 2d 25 (Cal. 1979), aff'd on other grounds, 447 U.S. 255 (1980). (Answer Brief, page 15). The "no compensation - invalidation only" rule of the California Supreme Court was expressly rejected by the United States Supreme Court in **First English Evangelican Lutheran Church v. County of Los Angeles**, 482 U.S. 304 (1987), when the Court ruled that "the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." Id. at 310-311. The Court went on to find that "...government action that works a taking of property rights necessarily implicates the `constitutional obligation to pay just compensation.'" Id. at 315. It continued by noting that "the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution" (Id. at 316), and that the California

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the dissent in **A.G.W.S. Corporation. Nollan**, 483 U.S. at 834, n.3. Significantly, the Supreme Court in Nollan did **not** state that invalidation was the sole remedy when a determination was made that a regulation failed to substantially advance any legitimate state interest. Decisions cited by the DOT, including Reahard v. Lee County, 968 F. 2d 1131 (11th Cir. 1992) and Eide v. Sarasota County, 908 F. 2d 716 (11th Cir. 1990), which appear to limit the remedy to invalidation only, are simply wrong. It was clearly pronounced by the United States Supreme Court in First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) that finding a regulation to be invalid does not excuse the duty to pay for the "taking" during the time the unlawful regulation was in effect. As the Court held: "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary` one, is **not** a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 319.

Supreme Court had "truncated [this] rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation." Id. at 317. Finally the Court concluded that: "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a `temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." Id. at 319. The DOT's attempt to resurrect the past must be rejected as legally unsound and contrary to current Supreme court precedent, which is binding upon this Court.

The DOT's rendition of what took place in **Ellison v. County of Ventura**, 217 Cal.App. 3d 455, 265 Cal. Rptr. 795 (Cal.Ct.App. 1990) slides over significant portions of that opinion. To begin with, the Court recognized, as the Petitioner has contended throughout this cause, that a "taking" occurs if a regulation "denies an owner the `economically viable use' of the land, or if the governments action does not `substantially advance legitimate state interests.'" 265 Cal. Rptr. at 797. The government contended, as the DOT does in this cause, that even though the claimant was "arguing the legitimate state interest prong of **Agins**, he must show the property has lost some, if not all, of its economic value." Id. at 797. The court rejected this position stating that "[t]he owner need not show that the government's action has stripped the land of all its economic value or possible uses." Id. The court continued by describing the "legitimate state interest" prong of **Agins** as "an

alternative, non-economic test for when there is a taking." The court also noted that,

> even if a particular government regulation fails to `substantially advance legitimate state interests,' there cannot be a taking of private property unless something - a property right - is taken. There must be an injury to some strand of the owner's `bundle of property rights, (citation omitted), whether that injury be an adverse economic impact, a restriction on use, or physical invasion (citation omitted). Id. at 797.

Ellison did not require, as the DOT contends, that the owner establish a loss in economic value, but rather, that there be an injury to the owner's property rights, including "a restriction on use." This is entirely consistent with the holding in W & F Agrigrowth, 582 So. 2d at 792, where, after holding that the recording of a map of reservation did not advance a legitimate state interest, the court ruled that it was "not necessary to establish a taking by showing a loss in market value of the property," and that the owner "need only show that the [government's] action in recording the reservation map invaded some property right of [the owner]. Id. at 792. The court found the restrictions on use of the property arising from the imposition of the map of reservation more than meet this requirement. Id. The same would be true of any time a map of reservation is laid across private property. In each instance the owner's right to the undisturbed use of his private property has been invaded by the

governments "use" of the property for a public purpose. Whether that property right invaded or "taken" by the government is described as an option, a leasehold or an easement, some interest in the property was transferred to the government for public use. The determination of the fair market value of that property right taken is the function of the jury.

CONCLUSION

The trial court properly granted summary judgment on the issue of liability where the record established that the DOT had imposed a map of reservation upon the subject property pursuant to a statutory provision which, according to this Court's ruling, permitted the state to take private property without full compensation, in violation of the compensation clauses of the Florida and United States Constitution. The District Court erroneously reversed that summary judgment based upon a misinterpretation of this Court's decision in **Joint Ventures, Inc.** and the misapplication of United States Supreme Court precedent relating to regulatory takings. The decision of the District Court should be quashed and the summary judgment reinstated.

Respectfully submitted,

ALAN E. DeSERIO, ESQUIRE
Florida Bar No. 155394
Brigham, Moore, Gaylord,
Schuster & MERLIN
777 S. Harbour Island Blvd.
Suite 900
Tampa, FL 33602
813/229-8811

JAY SMALL, ESQUIRE
Florida Bar No. 562890
Wilson, Leavitt & Small
111 N. Orange Avenue
Suite 1575
Orlando, Florida 32801
(407) 843-4321
Attorneys for Petitioner

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 16th day of November, 1993, to MARIANNE A. TRUSSELL, ESQ., Assistant General Counsel, Florida Department of Transportation, 605 Suwannee Street, MS 58, Tallahassee, Florida 32399-0458.

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ALAN E. DeSERIO, ESQUIRE