

IN THE SUPREME COURT, STATE OF FLORIDA

HOULIHAN'S RESTAURANTS, INC.,
D/B/A DARRYL'S,

Petitioner,

v.

CASE NO. SC05-1964
CASE NO. 1D03-4755

APAC-FLORIDA, INC., A DELAWARE
CORP., ET AL.,

Respondent.

**CNL APF PARTNERS, L.P.'S RESPONSE TO
JURISDICTIONAL BRIEF OF PETITIONER,
HOULIHAN'S RESTAURANTS, INC.**

ON PETITION FOR REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA
CASE NO. 1D03-4755

John T. Wettach, Jr.
Florida Bar No. 857122
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
Post Office Box 2809
Orlando, Florida 32802-2809
Telephone: (407) 418-6266
Facsimile: (407) 843-4444
E-mail: john.wettach@lowndes-law.com
Attorneys for CNL APF PARTNERS, L.P.

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PRELIMINARY STATEMENT

For purposes of Respondent CNL APF Partners, LP's "Response to Jurisdictional Brief of Houlihan's Restaurants, Inc.," the following symbols will be utilized: "A" shall refer to the Appendix accompanying the "Response to Jurisdictional Brief of Houlihan's Restaurants, Inc." "R" shall refer to the Record on Appeal. Reference shall be made to the record volume and appropriate page number. Example: R-V3:135 refers to volume 3, page 135.

The Petitioner, HOULIHAN'S RESTAURANTS, INC., shall be referred to as the Petitioner or Houlihans. The Respondent, CNL APF PARTNERS, INC., shall be referred to as the Respondent or CNL.

The decision of the lower tribunal is reported as Houlihan's Restaurants, Inc. v. APAC-Florida, Inc., et al., 911 So.2d 816 (Fla. 1st DCA 2005).

All emphasis and bracketed insertions are provided unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

In its Jurisdictional Brief, Petitioner improperly recites facts that are not contained in the opinion of the lower tribunal. The facts that are set out in the lower tribunal's opinion are those upon which this Court should base its decision as to whether or not to grant jurisdiction in this matter.

SUMMARY OF ARGUMENT

The opinion of the lower tribunal does not conflict with the decisions of any other district courts of appeal. The district court majority opinion recognized and gave effect to the important provisions of the lease agreement in its reasoning for affirming the trial court. The method for apportioning the condemnation proceeds that was affirmed by the lower tribunal used the value of the sublease to the tenant before the taking as a means of determining a value for the tenant's leasehold interest. This methodology is consistent with the lease language dealing both with condemnation and with the tenant's right to sublease. It is, therefore, consistent with case law in this area and provides no basis for conflict jurisdiction in this Court.

The trial court opinion that was affirmed by the district court included CNL's reversionary interest in its apportionment calculation. The district court opinion misstates the holding of the trial court in that regard. Counsel for Petitioner appears to be trying to create conflict jurisdiction from a mistake contained in the District Court's opinion. The lower tribunal's affirmation of the trial court's opinion is consistent with Florida law regarding apportionment and is consistent with the case cited as a conflict in Petitioner's brief.

ARGUMENT

THE OPINION OF THE LOWER TRIBUNAL IS CONSISTENT WITH FLORIDA LAW ON APPORTIONMENT IN EMINENT DOMAIN CASES AND DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER DISTRICT COURTS OF APPEAL.

I. Consistent with the cases cited in Petitioner's Jurisdictional Brief, the lower tribunal recognized and gave effect to the important provisions of the lease agreement and, in fact, quoted those provisions as a significant portion of its reasoning for affirming the trial court. See Mullis v. Department of Transportation, 390 So.2d 473 (Fla. 5th DCA 1980); Simpson v. Fillichio, 560 So.2d 331 (Fla. 4th DCA 1990); Elmore v. Broward County, 507 So.2d 1220 (Fla. 4th DCA 1987); K-Mart Corporation v. Department of Transportation, 636 So.2d 131 (Fla. 2d DCA 1994). The majority opinion in the lower tribunal correctly stated that the consideration of the value of the sublease is consistent with the lease language which states that the interests of landlord and tenant must be determined "as their interests appear immediately prior to the time of such taking."

It is clear from the facts of this case that any method which utilizes the value of the tenant's sublease rights would necessarily be viewing the interests of landlord and tenant prior to the taking. As noted by the District Court, in this case the tenant exercised its option to terminate the lease immediately after the taking. Therefore, on the facts of the case at bar, any determination of the value of the

tenant's right to sublease would have to come at a time prior to the taking. In this regard, it appears that Judge Benton's dissent misapprehends the methodology used by the trial court and approved by the majority.

The method adopted by the trial court and affirmed by the District Court of Appeal utilized the value of the sublease to the tenant before the taking and compared this value to comparable market rent rates in order to determine a value for the tenant's leasehold interest. This methodology is consistent with the case language dealing both with condemnation and with the tenant's right to sublease.

II. The trial court opinion which was affirmed by the District Court specifically included CNL's reversionary interest in its calculation of the apportionment of the condemnation proceeds. Footnote 2 of the District Court opinion actually misstates the holding of the trial court with regard to CNL's reversionary interest. The trial court in paragraph 12 of its judgment specifically **included** CNL's reversionary interest in its apportionment analysis even though CNL's expert had not done so.

Counsel for Petitioner is well aware that the judgment which was affirmed by the District Court specifically included in its analysis CNL's reversionary interest. In a cynical and somewhat underhanded manner, counsel for Petitioner is attempting to create conflict jurisdiction from a mistake contained in the District Court's opinion. In fact, the judgment affirmed by the District Court is entirely

consistent with the Trump Enterprises case. Trump Enterprises, Inc. v. Publix Supermarkets, Inc., 682 So.2d 168 (Fla. 4th DCA 1996).

CONCLUSION

The majority opinion of the lower tribunal is consistent with the principles of eminent domain law in the state of Florida and does not conflict with any decisions of other District Courts of Appeal. For that reason, this Court should refuse to exercise its jurisdiction in this matter.

Respectfully submitted,

John T. Wettach, Jr.
Florida Bar No. 857122
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, Florida 32802-2809
Telephone: (407) 418-6266
Facsimile: (407) 843-4444
Attorneys for Respondent,
CNL APF PARTNERS, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Charles S. Stratton, Esquire, and Gino Luzietti, Esquire, Broad and Cassel, 215 South Monroe Street, Suite 400, Post Office Drawer 11300, Tallahassee, Florida 32302; and Alan E. DeSerio, Esquire, Post Office Box 1485, Brandon, Florida 33509-1485 on this _____ day of _____, 2005.

John T. Wettach, Jr.

CERTIFICATE OF TYPEFACE COMPLIANCE

This pleading uses 14 point Times New Roman type, a font that is proportionately spaced, and which is in compliance with Fla. R. App. P. 9.210.

John T. Wettach, Jr.

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APPENDIX

TO

**CNL APF PARTNERS, L.P.'S RESPONSE TO
JURISDICTIONAL BRIEF OF PETITIONER,
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