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.
_____/

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

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PRELIMINARY STATEMENT

For purposes of the "Jurisdictional Brief of Petitioner," the following symbols will be utilized: "A" shall refer to the Appendix accompanying the "Jurisdictional Brief of Petitioner." "R" shall refer to the Record on Appeal. Reference shall be made to the record volume and appropriate page number. Example: R-V4: 355 refers to volume 4, page 355.

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

The decision of the lower tribunal is currently reported as **HOULIHAN'S RESTAURANTS, INC., D/B/A DARRYL'S V. APAC-FLORIDA, INC., 30 Fla. L. Weekly D1920 (Fla. 1st DCA August 11, 2005).**

All emphasis and bracketed insertions are provided unless otherwise noted.

STATEMENT OF CASE AND FACTS

As the Opinion (A: 1-2) reflects, Houlihan's Restaurants, Inc. appealed a final judgment apportioning the proceeds of a condemnation award between Houlihan's and CNL. "Houlihan's leased premises owned by CNL and on those premises operated a restaurant." (Opinion, 30 Fla. L. Weekly at D1920)(A: 1) The restaurant was owned and operated by Houlihan's for fifteen years, when, in May 1997, it entered into a sale / leaseback of the property with CNL. (R-V5: 695-696)(R-V4: 543-544). Houlihan's sold the property to CNL for approximately ***one-half*** the appraised value of the property [$1,028,100.00], and then leased back the property from CNL for twenty years at about ***half the market rent*** for similar property. (R-V4: 496-533).

"The lease provided that, in the event of a complete or partial eminent domain taking, Houlihan's had the option to terminate the lease." (Opinion, 30 Fla. L. Weekly at D1920)(A: 1) The lease provision referred to by the district court [**Section 6a**] is set out in the Opinion, 30 Fla. L. Weekly D1921, n.1. (A: 2) **Section 6** of the Lease Agreement contained the "CONDEMNATION" clause of the Agreement and consisted of several sections, including [a], referred to above, and [d], quoted by the Opinion, footnote 3: "**Section 6[d]** of the subject lease [the CONDEMNATION clause] provides: If this Lease is terminated by reason of a

taking, all damages awarded or sums paid in respect of a taking will become the property of Landlord [CNL] and tenant [Houlihan's], respectively, as their interests appear **immediately prior to the taking.**" (Opinion, 30 Fla. L. Weekly D1921, n.3)(A: 2).

The Opinion correctly notes that "although section 17 of the lease addresses subleasing generally," nothing within that separate provision requires consideration of Houlihan's right to sublease within the context of apportioning eminent domain damages. (Opinion, 30 Fla. L. Weekly at D1920). Nothing within that provision required Houlihan's to sublease the property. Nothing within section 17 suggested it was in any fashion applicable to the apportionment of a condemnation award contemplated by section 6[d] of the CONDEMNATION clause of the Lease Agreement. As the Opinion acknowledges, Houlihan's contended that it was speculative to interject the sub-leasing issue since that event never happened. (Opinion, 30 Fla. L. Weekly at D1920)(A: 1). Further, because the Lease Agreement was terminated, section 6[d] required that the interests of the CNL and Houlihan's be determined as they appeared "**immediately prior**" to the time of the taking by DOT. "**Immediately prior**" to the taking, Houlihan's had **not** subleased the remainder property and had never sought to do so. Notwithstanding that Section 17 of the Lease Agreement had not come into effect, and was not part of

the CONDEMNATION clause, the apportionment order incorrectly assumed that the property had been subleased, that it would take Houlihan's six months to find a new tenant [during which time it would receive no rental income], and that Houlihan's would be required to expend $400,000.00 to refurbish the property for the new sub-lessee. This sum was used to reduce the value of Houlihan's interest in the property. The Opinion of the lower tribunal sustained this misapplication of section 17 of the Lease Agreement.

In its Opinion, 30 Fla. L. Weekly at D1920 (A: 1), the district court acknowledged a partial taking of the restaurant parking by the Florida Department of Transportation (DOT), and that Houlihan's then exercised its option to terminate the lease. Following mediation with the DOT, CNL obtained a condemnation award of $1,100,000. Thereafter, an action ensued to apportion the award between Houlihan's and CNL. The trial court apportioned Houlihan's $167,618.99 of the award, with the remainder of the condemnation award [$932,381.01] apportioned to CNL. Id. at D1920). Significantly, the Opinion also acknowledges that in determining the apportionment award, which the district court sustained on appeal, the trial court "**excluded** any consideration of CNL's reversionary interest in the property." (Opinion, 30 Fla. L. Weekly at D1921, n.2)(A: 2). Although "immediately prior" to the "taking" Houlihan's had 186

months [15 ½ years] remaining on the twenty year lease, and CNL held only a reversionary interest that would not ripen until expiration of the Lease Agreement, 15 ½ years down the road, CNL was awarded 85% of the compensation paid.

The district court opinion acknowledged that with regard to the standard of review:

> Houlihan's submits that we should apply a *de novo* standard since the issues raised on appeal relate predominantly to the trial court's failure to interpret correctly the provisions of the lease and failure to apply principles of law relating to apportionment of condemnation proceeds. CNL, on the other hand, argues that abuse of discretion is the appropriate standard of review. We do not agree with either position. The rulings of the trial court consist primarily of factual findings relating to the value of the two parties' economic interests in the property. We review those findings under the competent substantial evidence standard." (Opinion, 30 Fla. L. Weekly at D1920)(A: 1).

Although the trial court's interpretation and application of the Lease Agreement served as the basis for the apportionment award, the district court declined to review the matter *de novo*. Instead the district court found substantial competent evidence supported the finding that Section 17, which related to Houlihan's right to sublease the property, and which was not part of the CONDEMNATION clause of the Lease Agreement, was properly considered in arriving at the value of

Houlihan's interest in the condemnation award. The final judgment of apportionment was affirmed by a majority of the district court. (Opinion, 30 Fla. L. Weekly D1921)(A: 2).

Judge Benton dissented, stating:

> Under the terms of the parties' lease, because the lease was "terminated by reason of the taking . . . sums paid in respect of the taking w[ere to have] become the property of Landlord and Tenant, respectively, as there interests appear[ed] ***immediately prior to the time of such taking."*** **(**Emphasis by the court**)** The trial court's analysis adopted a methodology that required speculation about the costs the tenant would incur if it subleased ***after the taking***. (Emphasis by the court) The fundamental difficulty with this approach was its failure to honor the governing provision of the lease. (Opinion, 30 Fla. L. Weekly D1921)(A: 2)

Houlihan's timely Motion for Rehearing and Rehearing En Banc was denied by order of the district court dated September 26, 2005. Houlihan's has timely filed its notice seeking to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

The decision of the lower tribunal conflicts with certain basic apportionment rules of law applied in an eminent domain proceedings when the tenant and landowner disagree as to how the compensation awarded for the "taking" of

private property should be divided. Paramount among those legal principles is that which recognizes that when the lessee and lessor provide a "condemnation clause" directing the distribution of condemnation proceeds, the terms of that provision control. The opinion of the lower tribunal, while acknowledging the provisions of the CONDEMNATION clause, specifically section 6[d] of the Lease Agreement, declined to apply the clear and unambiguous language of that provision. Instead, it sustained the application of a provision of the Lease Agreement that was not part of the CONDEMNATION clause, and which addressed an event that **never** occurred. In so doing, the lower tribunal's decision created an express and direct conflict with decisions of the Second, Fourth and Fifth District Courts of Appeal.

An equally important apportionment rule of law is that during the term of the lease, the lessee, in this case Houlihan's, holds a leasehold estate which, for all practical purposes, is the equivalent to absolute ownership. The lessor, in this cause CNL, during the term of the lease, holds an estate that is limited to its **reversionary interest**, which ripens into perfect title at the expiration of the lease. The foregoing describes the respective interests of Houlihan's and CNL prior to the "taking" by the DOT. The foregoing is exactly what was contemplated and described in the CONDEMNATION clause of the Lease Agreement - section 6[d]

- with regard to division of the condemnation proceeds if Houlihan's terminated the Lease Agreement as a result of the "taking." In direct conflict with the rule stated in a Fourth District Court of Appeal apportionment decision, the lower tribunal in the majority Opinion admitted that the apportionment order sustained by the Opinion, specifically "excluded **any** consideration of CNL's reversionary interest." (Opinion, 30 Fla. L. Weekly at D1921, n. 3)

The Petitioner contends that the Opinion of the lower tribunal has taken a position that directly and expressly conflicts with the rules of law relating to apportionment of condemnation proceeds between a lessor and landlord, as set forth in the decisions of other district courts of appeal. Left unaddressed, the Opinion will certainly cause confusion in the field of eminent domain as to the correct principles to be applied in apportionment proceedings. The Petitioner respectfully requests this Court to exercise jurisdiction over this cause and quash the majority Opinion.

ARGUMENT

THE DECISION OF THE LOWER TRIBUNAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND, FOURTH AND FIFTH DISTRICT COURTS OF APPEAL ON THE SAME ISSUES OF LAW SETTING FORTH THE PRINCIPLES APPLICABLE TO APPORTIONMENT OF EMINENT DOMAIN PROCEEDS BETWEEN A LESSEE AND LANDLORD.

1. It is a long standing apportionment principle in eminent domain that where a tenant and landlord have agreed to the manner in which condemnation proceeds are to be divided, the terms of the agreement will govern and are controlling. This rule applies regardless of whether its application seems fair under the circumstances, or results in what appears, in retrospect, to be a "bad bargain." The rule was recognized and applied in 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); and K-Mart Corporation v. Department of Transportation, 636 So. 2d 131 (Fla. 2d DCA 1994). In this cause, the lower court effectively refused to give effect to the controlling provisions of the Lease Agreement. Section 6[d] of the CONDEMNATION clause plainly stated that the respective interests of Houlihan's and CNL were to be determined "as their interests appear[ed] **immediately prior** to the time" of the taking. Instead, as appears in the majority

Opinion, and as recognized in Judge Benton's dissent, the district court upheld an apportionment order "that required speculation about costs the tenant would incur if it subleased ***after the taking***." By failing to apply the controlling CONDEMNATION clause of the Lease Agreement, specifically section 6[d], the decision expressly and directly conflicts with the decisions cited above .

2. "During the life of the lease, the lessee [in this cause Houlihan's] holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership. The estate of the lessor [in this case CNL] during such time is **limited to his reversionary interest**, which ripens into perfect title at the expiration of the lease." *See* Trump Enterprises, Inc. v. Publix Supermarkets, Inc., 682 So.2d 168, 169 (Fla. 4th DCA 1996). The rule in Trump describes the respective interests of Houlihan's and CNL as they existed "**immediately prior**" to the time the property was taken by DOT. That is what section 6[d] of the CONDEMNATION clause required in unambiguous terms. In express and direct conflict with this principle of law set forth in Trump, the lower tribunal in this cause sustained the apportionment order even though it specifically "excluded **any** consideration of CNL's reversionary interest." (Opinion, 30 Fla. L. Weekly at D1921, n.3) By excluding consideration of CNL's [the lessor's] "reversionary interest," which was all the lessor was entitled to "immediately

prior" to the taking [see section 6[d] of the CONDEMNATION clause], the decision of the lower tribunal expressly and directly conflicts with Trump on the same issue of law.

CONCLUSION

The majority Opinion of the lower tribunal expressly and directly conflicts with established principles of law relating to apportionment of condemnation proceeds between a lessee and landlord, as set forth in decisions of other district courts of appeal. This Court should exercise its jurisdiction in this cause, quash the majority decision and render a decision that properly recognizes and applies those apportionment principles of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Jurisdictional Brief of Petitioner, Houlihan's Restaurants, Inc., has been furnished via United States mail to John T. Wettach, Esq. 215 North Eola Drive, Orlando, Fl. 32802, this _____ day of November, 2005.

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the font used in this Jurisdictional Brief is Times New Roman 14 point, in compliance with Fla. R. App. P., 9.210(a)(2).

Respectfully submitted,

_____

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