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Takings—Isn’t There a Better Approach to Planned Condemnations?—Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990)

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I. THE RESERVATION ISSUE

Is a government agency that restricts development on land slated for public acquisition unconstitutionally depriving its owner of property without compensation? In Joint Ventures, Inc. v. Department of Transportation,1 the Florida Supreme Court answered this question in the affirmative,2 invalidating Florida’s right-of-way reservation statute as a wholly improper use of the police power to take private property without compensation.3 In doing so, the court may have exposed the state to enormous liability.4 Although the statute, as it existed in 1987, lacked an adequate remediation mechanism for owners deprived of all use of their property, the court’s categorical attack on this application of the police power raises questions about any attempt by state or local governments to keep conflicting development out of the path of public acquisition. Because Joint Ventures’s broad limitation on the power of public entities threatens to aggravate the problem of Florida’s lagging infrastructure development by increasing the cost of public improvements,5 this Note explores both the legal and economic ramifications of the decision. The Note also discusses some alternative approaches to the dilemma of balancing private rights and public needs in planning for future condemnation of property.

1. 563 So. 2d 622 (Fla. 1990).
2. Id. at 623.
3. Id. at 626.
4. See infra notes 136-40 and accompanying text.
5. At present, right-of-way acquisition costs consume approximately 30% of Florida’s roadway construction dollar. STATE COMPREHENSIVE PLAN COMMITTEE, KEYS TO FLORIDA’S FUTURE: WINNING IN A COMPETITIVE WORLD 35 (1987). Coupled with a recent district court decision in Hernando County v. Budget Inns of Florida, Inc., 555 So. 2d 1319 (Fla. 5th DCA 1990), which restricts a local government’s ability to use development exactions to “bank” rights-of-way for future road widening projects, the Joint Ventures decision will make it more difficult for local authorities to provide the public facilities needed to stay concurrent with new development. Under Florida’s landmark growth management act, new development is generally not to be permitted until the required infrastructure is available to serve it. See Fla. STAT. § 163.3177(10)(h) (1991).
A. The Florida Reservation Statute

Florida’s highway reservation law\(^6\) was intended to reduce new construction on private lands the State plans to acquire for right-of-way.\(^7\) Although the sovereign has the inherent right to take private property through eminent domain to advance a legitimate state interest, the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, requires that the private owner be paid for whatever is taken,\(^8\) including any new construction. Consequently, the Department of Transportation (DOT) and local expressway authorities are obligated to pay for all improvements on condemned properties, even those permitted or otherwise approved by local governments during negotiations for purchase of rights-of-way.\(^9\)

Rather than an exercise of eminent domain power, Florida’s highway reservation statute functioned as a police power regulation. Upon deciding to widen a road or to construct a new one, DOT\(^10\) would draft a map of the right-of-way needed for the project, then, after providing direct mail notice to the affected owners and local governments, hold a public hearing on the new alignment.\(^11\) After the hearing, DOT would file the final document as a “map of reservation” in the county land records.\(^12\) Local authorities were then prohibited from issuing permits for any development within the reserved area for five years, except for improvements to private homes and renovations of commercial structures that did not raise the appraised value more than twenty percent.\(^13\) DOT could extend the restrictions for another five years by repeating the procedure, but the agency was not obligated to purchase the property at any time.\(^14\) Owners claiming that the develop-

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6. FLA. STAT. § 337.241 (1987). This was the version of the statute invalidated by the Florida Supreme Court in Joint Ventures.
9. In one notorious example, an owner of unimproved land valued at $645,000, after receiving notice of impending public condemnation for Interstate 595 in Broward County, began construction of a commercial complex. DOT finally paid $2.34 million for the property, plus an additional $72,600 in relocation expenses, before tearing down the new building. Telephone interview with Kevin Szatmary, 4th District Right-of-Way Administrator, DOT (Aug. 15, 1991) (notes available at Fla. Dep’t of State, Div. of Archives, Tallahassee, Fla.).
10. Although the reservation statute gave both DOT and local expressway authorities the right to file maps of reservation, see FLA. STAT. § 337.241(1) (1987), for the sake of simplicity, this Note will refer to “DOT” or “State” only.
12. Id.
13. Id. § 337.241(2).
14. Id. § 337.241(2), (4).
ment restrictions were "unreasonable or arbitrary" and that they were denied "a substantial portion" of the property's "beneficial use" were entitled to challenge the restrictions in the state administrative hearing process, then to appeal an unfavorable result in the appellate courts. The facts of Joint Ventures illustrate the operation of the statute.

B. The Joint Ventures Case

Joint Ventures, Inc. bought an 8.3-acre parcel next to busy Dale Mabry Highway near Tampa in 1969. In 1985, DOT, following the statutory procedure, filed a map of reservation with the clerk of court in Hillsborough County, identifying 6.49 acres of Joint Ventures' property as a site for a future storm drainage area for the improved highway. Joint Ventures, Inc. appealed the designation in an administrative action and then contracted to sell the site to a third party for $800,000, contingent upon the new owner being able to develop it. The hearing officer refused to grant any relief on grounds that the designation was not unreasonable or arbitrary. During the process of appeal to the First District Court, the owners and DOT settled the claim, and the State purchased the property. The district court, however, retained jurisdiction and upheld the statute on the basis that owners whose properties are taken without compensation by the reservation restrictions have "an appropriate avenue of relief" through an inverse condemnation action. The court then certified the following question to the supreme court: "[w]hether subsections 337.241(2) and (3) are unconstitutional in that they provide for an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide an adequate remedy."
In an opinion written by Justice Barkett, a narrow majority of the supreme court struck down the statute, holding that suppressing the value of private property to reduce the cost of public acquisition was not a proper use of the police power, but rather a "thinly veiled attempt to 'acquire' land" without compensating the owners. In the majority's view, neither the inverse condemnation remedy, which lacked the procedural and substantive protections of eminent domain proceedings, nor the statute's administrative appeal procedure provided sufficient relief to affected property owners to cure the statute's constitutional infirmity. The three dissenters, however, led by former Chief Justice Ehrlich, agreed with the district court that the omnipresent right to file an inverse condemnation action against the State would protect affected owners, so there was no need to invalidate the statute as a whole. Although the dissent did not challenge the majority's assessment of the police power issue, Justice Barkett's novel analysis of the propriety of using the police power in this manner merits further exploration before a discussion of the owners' available remedies.

C. The Tests for Takings

The U.S. Supreme Court has long upheld land use regulations that are substantially related to the public health, safety, welfare, or morals, which are not unreasonable or arbitrary, and which do not go too far in restricting private rights. Regulations that fail these standards, however, are "takings" that invoke the Fifth Amendment's compensation requirement. According to a more recent decision of the Court, even a temporary deprivation of all use of a property, beyond normal permitting delays, may constitute a compensable taking.

23. *Joint Ventures*, 563 So. 2d at 625.
24. The U.S. Supreme Court described the differences between the two actions in Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980). "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Id.* (citation omitted).
25. *Joint Ventures*, 563 So. 2d at 627.
26. *Id.*
27. *Id.* at 628-30 (Ehrlich, C.J., dissenting).
30. *Executive 100*, 922 F.2d at 1540.
When a court determines that a compensable taking has occurred, it may hold the offending restriction to be either unconstitutional as applied to particular properties or facially unconstitutional and therefore void in all applications.\textsuperscript{32} The \textit{Joint Ventures} owners argued for the latter approach to the Florida reservation law, attacking the very purpose of the statute rather than its effects on their own property.\textsuperscript{33} In doing so, the owners converted what likely would have been a strong "as applied" claim\textsuperscript{34} into a facial challenge.

Facial attacks on land use regulations are rarely successful. To overcome a strong judicial reluctance to interfere with legislative prerogatives in this area, a claimant must show that the offending regulation is invalid in every conceivable application.\textsuperscript{35} Once a regulation is deemed to be based on an improper police power purpose, however, it violates substantive due process and cannot have a valid application. The \textit{Joint Ventures} majority's reasoning in concluding that the statutory motive was improper is therefore the cornerstone of this unusual decision and critical to interpreting it.

\section*{II. The \textit{Joint Ventures} Police Power Inquiry}

Rather than consulting prior case law on the constitutionality of reservation laws, the majority instead relied heavily on a 1975 Texas case involving a municipality's refusal to provide public utilities to a development project,\textsuperscript{36} on a 1958 zoning decision of the First District Court of Appeal in \textit{Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co.},\textsuperscript{37} and on a battery of zoning cases from other states cited in \textit{Tallahassee Bank.} These decisions fit a common pattern, invalidating extreme, arbitrary, and discriminatory development restrictions placed on individual properties coveted by municipal authorities. The most commonly abused device was the zoning power. In the majority's view, "no valid distinction" separated the motives behind these deliberate attempts to depress property values and those driving the reservation statute.\textsuperscript{38} As the following sec-

\textsuperscript{32} Id.
\textsuperscript{33} Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 624-25 (Fla. 1990).
\textsuperscript{34} In this case the reservation prevented the owners from using 6.49 of 8.3 acres, or 78\% of the property. \textit{Id.} at 623. Although other factors must be considered in an as-applied taking claim, 78\% is a substantial portion of the beneficial use of the property.
\textsuperscript{37} 108 So. 2d 74 (Fla. 1st DCA 1958), \textit{writ quashed}, 116 So. 2d 762 (Fla. 1959).
\textsuperscript{38} Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622, 626 (Fla. 1990).
tions show, however, these municipal actions suffered from a constitutional malady distinct from the one diagnosed by the Joint Ventures majority.

A. The Reverse Spot Zoning Cases

The Tallahassee Bank decision and the cases it cited from other states all involved invalidation of municipal zoning designations arbitrarily applied to individual parcels or small areas lacking physical characteristics that justified discriminatory treatment. Such treatment is commonly called “spot zoning” when the owners of the isolated parcels benefit from the designation and “reverse spot zoning” when they suffer a special burden from it.9 Whether of the ordinary or “reverse” variety, creation of isolated zoning districts raises the specter of unfair discrimination,40 the common theme in these decisions.

In Tallahassee Bank, owners of five parcels next to the Florida capitol complex challenged the valuations given their properties in eminent domain proceedings.41 They argued that the properties had been held in a restrictive zoning classification because the City of Tallahassee was trying to help the State to expand the complex by reducing the cost of property acquisition.42 The court held that the ordinance was “arbitrary and unreasonable . . . as applied to the property,”43 a conclusion “supported by the many decisions which condemn the arbitrary adoption of a zoning ordinance for the sole purpose of depressing land values preliminary to eminent domain proceedings.”44

Factually, Tallahassee Bank and the reverse spot zoning decisions it cited from other states were all similar. In State ex rel. Tingley v. Gurda,45 a case that inspired the others,46 the City of Milwaukee had rezoned a newly annexed block within a larger industrial area from an industrial to a residential designation. The result was a decrease in value, from more than $15,000, to about $3,000.47 Emphasizing the unreasonableness of a residential category for this parcel, and finding “suggestions in the record” that the city also wanted the property for

40. Id.
41. 108 So. 2d at 76-77.
42. Id. at 77.
43. Id. at 85.
44. Id. at 86.
45. 243 N.W. 317 (Wis. 1932).
47. Gurda, 243 N.W. at 320.
a road corridor, the court held the rezoning ordinance to be an abuse of zoning power.\textsuperscript{48} In the view of the court, zoning could be used only to protect areas set aside for specific uses from encroachment of incompatible uses.\textsuperscript{49}

Similarly, in \textit{Grand Trunk Western Railroad Co. v. City of Detroit},\textsuperscript{50} the Michigan Supreme Court, relying on \textit{Gurda}, invalidated an attempt by Detroit to downzone thirteen undeveloped blocks along an industrial rail corridor to a residential category. The court held the rezoning action, based on a desire to make condemnation for low-cost housing development cheaper, to be "unreasonable and confiscatory."\textsuperscript{51} One year later, the same court, citing \textit{Grand Trunk}, again invalidated a residential zoning designation in \textit{Long v. City of Highland Park}\textsuperscript{52} because it had been unreasonably applied to a lone parcel that the local school board was negotiating to buy, reducing the value of the property from $40,000 to only $5,000. Four years later, in \textit{Robyns v. City of Dearborn},\textsuperscript{53} the Michigan court again refused to uphold a longstanding zoning classification on eight adjacent narrow lots rendered virtually useless by setback requirements that left no building space. The city was planning to condemn these parcels for use as a park.\textsuperscript{54} Finding the restrictions to be "unreasonable and confiscatory," and relying on its two preceding decisions in \textit{Grand Trunk} and \textit{Long}, the court held them to be "invalid as applied."\textsuperscript{55}

Likewise, in \textit{Kissinger v. City of Los Angeles},\textsuperscript{56} the California Second District Court of Appeal voided a single-family residential zoning category that was hurriedly placed on a property the city wanted for airport expansion only days after the owner acquired permits to build apartments on it. The court found the city's action to be a spot zoning, which was arbitrary and discriminatory.\textsuperscript{57} According to the court, it was also a clear attempt to "depress the value of the... property in order that it might be acquired for airport purposes" at a reduced rate.\textsuperscript{58} The rezoning was therefore "an attempt on the part of the city

\begin{itemize}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} 40 N.W.2d 195 (Mich. 1949).
\item \textsuperscript{51} Id. at 200.
\item \textsuperscript{52} 45 N.W.2d 10 (Mich. 1950).
\item \textsuperscript{53} 67 N.W.2d 718 (Mich. 1954).
\item \textsuperscript{54} Id. at 720.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} 327 P.2d 10, 15 (Cal. Ct. App. 1958).
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Id. at 16.
\end{itemize}
to use its police power to take . . . property without due process of law and without payment of compensation for that taking."

B. Garrett Brothers

In addition to the reverse spot zoning cases, the Joint Ventures majority also relied extensively on the Texas appeals court decision of San Antonio River Authority v. Garrett Brothers for the proposition that the police power is a mechanism limited to actions in which "the government agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests." According to the Texas court, however, the government abandons the role of the "neutral arbiter" when it attempts to reduce the cost of future property acquisitions by preventing development on private land. In such cases, the court held, the government:

is no longer an impartial weigher of the merits of competing interest among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor.

In Garrett Brothers, the City of San Antonio, colluding with the local river authority, had tried to stop a large development project it had already approved by denying the developers the permits necessary to install utilities on the site. The court found that this use of the police power to reduce the costs of public acquisition placed an unfair burden on the owners whose property rights were restricted. In the opinion of the court, these costs were most appropriately borne by the public as a whole, and transferring them to individuals therefore constituted a taking.

C. Analysis of the Majority's Police Power Treatment

The Tallahassee Bank decision and its antecedents from other states share a number of common elements. They all involved attempts by

59. Id. at 15.
60. 528 S.W.2d 266 (Tex. Ct. App. 1975).
61. Id. at 273-74. This narrow view of the police power, similar to the one espoused in State ex rel. Tingley v. Gurda, 243 N.W. 317, 320 (Wis. 1932), seems to leave no room for protecting the public as a whole from the acts of an individual.
62. Garrett Bros., 528 S.W.2d at 274.
63. Id. at 268-70.
64. Id.
65. Id. Some caution is warranted in applying the Texas takings cases in other jurisdictions because that state's constitution mandates compensation for property taken or damaged. See City of Austin v. Teague, 570 S.W.2d 389, 393 (Tex. 1978).
municipalities, through the abuse of the zoning power, to legislatively single out individual tracts or small areas. These actions caused, and were intended to cause, drastic reductions in property value and carried no time limit. Hence, they not only treated similarly situated properties differently, raising equal protection concerns, but also went too far by placing extraordinary burdens on one or more property owners.

Except for Garrett Brothers, which also dealt with selective treatment of an individual property, these cases involved classic "reverse spot zoning."66 None of these decisions cited Nectow v. City of Cambridge,67 in which the U.S. Supreme Court originally attacked spot zoning as invalid for having "no foundation in reason . . . a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare . . . ."68 Nevertheless, the influence of the Nectow prohibition on spot zoning is obvious. The principal problem with the municipal actions in these cases did not lie in the lack of relationship to public welfare, but rather in the arbitrary and unreasonable application of severe restrictions against selected owners. Consequently, they are of limited application to the judicial review of a statewide program which, in many cases, placed little burden on individual property owners.69 A review of the status of reservation law in other jurisdictions would have been more pertinent.

D. Reservation Programs in Other States

The Joint Ventures majority curiously failed to consider other states' treatment or use of highway reservation laws or the very similar "official map" statutes. A number of other states have enacted highway reservation statutes, only one of which has been facially invalidated.70 These statutes either restrict the issuance of development permits on lands designated for future public acquisition or simply

66. Kissinger and Garrett Bros. also involved hasty attempts to stave off developments already underway and so more directly damaged the private owners involved.
67. 277 U.S. 183 (1928).
68. Id. at 187-88 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).
refuse to compensate the owners for the new buildings. They vary, however, in the duration of the restriction and in the remedy provided to substantially affected owners. Montana law, for example, provides for "no compensation" reservations lasting only one year, but grants no remediation.71 California, on the other hand, prohibits all permits for construction costing more than $500 in mapped rights-of-way for an indefinite period,72 but grants an appeals board review of any permit denial.73 The board is to consider whether there has been substantial damage to the owner's rights, whether it denies the owner a fair return, and whether, in justice and equity, a permit should be granted.74

In addition, several other states use the permit-or-buy approach, where the existence of a reservation map gives the state a delay of several months after receiving notice of a building permit application to either condemn the property or approve the permit.75 These reservation programs may have avoided legal challenges because any properties in contention were simply purchased by the state through eminent domain proceedings before a challenge could arise.76

Before the Joint Ventures decision, only one other highway reservation statute has been declared unconstitutional on its face. In Lackman v. Hall,77 a Delaware chancellor found fault with that state's limited relief mechanism for aggrieved owners. Instead of providing them a variance or administrative hearing procedure, the offending statute provided a permit-or-buy provision as its only remediation.78 The court held that such a provision authorized the state's Highway Department to improperly "accelerate the taking of presently unneeded property as a virtual punishment to a private owner who dared

73. Id. § 741.2.
74. Id. § 741.4.
75. See, e.g., NEB. REV. STAT. §§ 39-1311 to -1311.05 (1988) (state has 60 days from permit request to notify permitting officer of intent to negotiate, then six months to purchase or bring suit); N.J. STAT. ANN. §§ 27:7-66, -68 (West Supp. 1991) (state has 45 days to make recommendation on permit, then six months to purchase or bring suit); ILL. ANN. STAT. ch. 121, para. 4-510 (Smith-Hurd Supp. 1991) (owner must give state 60 days notice of permit application, state then has 45 days to notify owner of intent to acquire and 120 days to take action). A Delaware court, however, invalidated that state's reservation law because it provided no other relief mechanism and authorized the state to purchase land it effectively had admitted it did not yet need. See infra notes 77-79.
76. In the aftermath of the Joint Ventures decision, the Florida Legislature used such a permit-or-buy provision in its hastily adopted alternative reservation procedure. See infra note 131.
77. 364 A.2d 1244 (Del. Ch. 1976).
78. Id. at 1248.
to improve his land" and therefore effectively extorted the private owner. As another commentator has observed, however, this conclusion is based on the erroneous assumption that the owner has the right to withhold his or her property from a condemning authority. Although the Lackman case is of limited application in other jurisdictions, it illustrates the general principle that a reservation statute must provide a variance procedure or other remediation for owners of severely affected properties.

Reservations have also been invalidated in specific instances where they went too far in terms of either duration or extent of coverage of a particular property. For example, the First Circuit Court of Appeals found an unconstitutional deprivation of property rights in Urbanizadora Versalles, Inc. v. Rivera Rios, where the government of Puerto Rico had frozen a thirty-two-acre tract for fourteen years by designating it for use as a highway interchange. The court noted with approval, however, that the statute had recently been amended to specify a maximum reservation period of only eight years. In Maryland-National Capital Park & Planning Commission v. Chadwick, Maryland's highest court held unconstitutional as applied a three-year reservation of an entire 104-acre tract. The court refused to condone the deprivation of all use of a property for parkland, but distinguished roadway reservation cases:

[W]e recognize the need to promote intelligent planning by placing reasonable restrictions on the improvement of land scheduled to be acquired for public use. We do not, therefore, condemn as beyond the police power the enactment of reservation statutes which are reasonable in their application both as to duration and severity.

Courts reviewing highway reservation programs that operate by restriction, rather than by triggered acquisition, therefore look at the specific effect of the program on the individual owners in deciding their constitutionality.

79. Id. at 1252-53.
80. Mandelker, supra note 70, at 208-09. This article contains a more comprehensive review of state court reservation decisions.
81. 701 F.2d 993, 998-99 (1st Cir. 1983).
82. Id. at 997.
83. 405 A.2d 241 (Md. 1979).
84. Id. at 250. The typical reservation for parkland, by the very nature of the intended use, must ordinarily encompass a larger portion of a private property than the average highway reservation. Courts may also view the public need for parks as less pressing than the need for roadways.
E. Official Map Statutes

The official map ordinances have a much longer history in this country than highway reservation statutes, going back as far as William Penn's early plans for Philadelphia. These ordinances, usually municipal regulations enacted under state enabling legislation, authorize city authorities to designate private lands for future acquisition. In this century, municipal authorities have used them to restrict development on lands to be acquired by the public. Like their state reservation counterparts, they generally have fared well in the courts as exercises of the police power to control reckless construction.

In Headley v. City of Rochester, the most famous of the official map cases, New York's highest court took a deferential approach to Rochester's ordinance in dismissing one owner's challenge on the grounds that he had failed to prove damages. The court saw no sinister motive behind the ordinance.

So long as the owners of parcels of land which lie partly in the bed of streets shown on such a map are free to place permanent buildings in the bed of a proposed street and to provide private ways and approaches which have no relation to the proposed system of public streets, the integrity of the plan may be destroyed by the haphazard or even malicious development of one parcel or tract to the injury of other owners who may have developed their own tracts in a manner which conforms to the general map or plan.

The court found "quite illusory" any connection between this statute and a New York City ordinance it had invalidated four decades earlier.

87. 5 N.E.2d 198 (N.Y. 1936).
89. Indicating the court's view that the ordinance's overall intrusion on property rights was minimal, the court observed:

It is perhaps not without significance that during these years [since the state enabling legislation was enacted] no owner has claimed that the statute has actually interfered with his enjoyment of the land, or has prevented him from obtaining a permit to improve the land in a manner which he deemed desirable.

5 N.E.2d at 200-01.
90. Id. at 199.
for providing no compensation to owners who constructed buildings in reserved areas.\textsuperscript{91}

Thirty years later, in \textit{Rochester Business Institute v. City of Rochester},\textsuperscript{92} the Appellate Division was even more emphatic:

There is little doubt that an objective which seeks to achieve better city planning falls fully within the concept of promoting the general welfare. . . . If the minimal damage to plaintiffs involved here by enforcement of the setback restriction renders the specific application of the Rochester Plan unconstitutional, then the public is in grave danger of being deprived of the very valuable tool of city planning for the future.\textsuperscript{93}

When such restrictions go too far, however, covering all or most of a particular property, this deferential attitude evaporates, resulting in an as-applied invalidation, while leaving the statute intact.\textsuperscript{94}

More important to the \textit{Joint Ventures} analysis is a 1957 decision of the Wisconsin Supreme Court upholding that state's official map law against a police power challenge. In \textit{State ex rel. Miller v. Manders},\textsuperscript{95} the court, which had disapproved of the discriminatory rezoning of an industrial tract in \textit{Gurda} and thereby inspired the cases underpinning the influential \textit{Tallahassee Bank} decision, distinguished \textit{Gurda} as involving a bare taking of existing value.

We consider that the zoning restriction in \textit{State ex rel. Tingley v. Gurda}, supra, is readily distinguishable from those imposed by [the Wisconsin official map statute]. We cannot spell out of the latter statute any legislative motive to depress existing property values. Furthermore, the saving clause [providing a variance procedure] protects a property owner against any substantial damage that might be inflicted on him in the future operation of the statute by denial of a building permit.\textsuperscript{96}

\textsuperscript{91} \textit{Id.} at 202-03, 206-08 (distinguishing \textit{Forster v. Scott}, 32 N.E. 976 (N.Y. 1896)). A provision that denies compensation for property taken in eminent domain proceedings runs broadside into the Fifth Amendment's mandate. For the same reason, the Pennsylvania Supreme Court invalidated a similar three-year reservation for parkland in \textit{Miller v. City of Beaver Falls}, 82 A.2d 34 (Pa. 1951). Arguably, though, such a provision would have the advantage of giving the owner the most flexibility to use the property productively in the interim.


\textsuperscript{93} \textit{Id.} at 279-80 (citation omitted).

\textsuperscript{94} \textit{See, e.g.}, \textit{Jensen v. City of New York}, 369 N.E.2d 1179 (N.Y. 1977) (official map statute invalid as applied where it rendered 78\% of owner's property unusable).

\textsuperscript{95} 86 N.W.2d 469 (Wis. 1957).

\textsuperscript{96} \textit{Id.} at 475.
Thus, the very court that had led the charge against arbitrary rezonings to destroy private property value saw nothing to attack in the official map statute. Instead it endorsed the program as a valid means of promoting the public welfare by encouraging better city planning and protecting the interests of the taxpayers.97

In sum, courts of other states have not held either reservation or official map laws to be facially improper uses of the police power unless they provided no remediation procedure for severely affected properties or simply denied compensation for new buildings at the time of public acquisition. Precondemnation property restrictions have not been held invalid in individual cases unless they were applied in a discriminatory fashion or were taken too far.98 This type of restriction, as part of a roadway construction program, will ultimately result in a direct benefit to many of the same private owners by way of improved accessibility. Traditional zoning regulations, on the other hand, generally confer no more than a general social benefit to the property owner restricted. The U.S. Supreme Court has sanctioned the inclusion of even these general benefits back to the owner as a part of the calculus of whether a regulatory taking has occurred.99 There-

97. Id. at 472-73.
98. These factors account for the overwhelming majority of the judicial invalidations of reservation actions.

Some critics of reservations have clouded the issue of the validity of these programs by citing a mixed bag of "as applied" invalidations of reservation, official map, and zoning restrictions as support for the proposition that reservation or official map laws are facially unconstitutional. See Brief for Appellant at 22, Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (invalidation is "uniform" result of court decisions); S. Cary Gaylord & Kimbel L. Merlin, Status of Right-of-Way Reservations: How Far Can the Government Go?, 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN § 7.03, at 7-22 to 7-35 ("majority" view is that official map and reservation laws are unconstitutional). Some of the cases cited include: Urbanizadora Ver- salles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (14-year reservation of 32-acre tract for highway interchange invalid as applied); Grosso v. Board of Adjustment, 61 A.2d 167 (N.J. 1948) (official map statute invalid as applied where it covered entire lot, prohibiting any use); Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977) (official map designation of nearly 80% of property invalid as applied); Roer Constr. Corp. v. City of New Rochelle, 136 N.Y.S.2d 414 (N.Y. Sup. Ct. 1954) (official map designation preventing all use of a property invalid as applied); Henle v. City of Euclid, 125 N.E.2d 355 (Ohio Ct. App.), appeal dismissed, 122 N.E.2d 792 (Ohio 1954) (restrictive zoning designation singling out one lot until city decides whether or not to buy it invalid as applied). Following the same line of reasoning, one might also conclude that, because many courts have held traditional zoning designations placed on particular properties to be unconstitutional as applied, all zoning restrictions must therefore be facially invalid.


The plaintiffs' "Compensation [sic] for such interference with and restriction in the
fore, viewing the program as a whole, it seems difficult to conclude that the reservation statute would effect a taking in every conceivable case. However, because the Joint Ventures majority came to this conclusion, it had to consider whether the express or implied remedies available to owners of reserved properties could rescue the statute from invalidation. The following section tracks the majority's disposition of the remediation issue.

III. THE SUFFICIENCY OF THE OWNERS' REMEDIES

After finding the reservation provisions of the statute violative of the Due Process Clause, the Joint Ventures majority then rejected as insufficient the two methods by which an affected owner could seek relief. First, the court declared that the remedy of inverse condemnation was an inadequate substitute for direct compensation. It then dismissed the statutory right to an administrative hearing as not providing relief for all types of takings. A closer look at these rejections shows the majority's apparent disinclination to uphold the statute.

A. Inverse Condemnation

The thrust of the majority's rejection of inverse condemnation as a compensatory remedy was that it affords less substantive and procedural protection to the property owner than actions governed by the Florida eminent domain statutes. The State could not, therefore, rely on this constitutionally "implied" cause of action to save the statute from facial invalidation. One filing such a claim "has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee." Quoting State Road Department v. Forehand, the court recited these procedural safeguards, including the right to counsel, notice, and the testimony of witnesses before the property is taken.

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use of [their] property is [not only] found in the share that the owner enjoys in the common benefit secured to all... but also in the case at bar in the fact that reasonable and profitable use of the property... can be made.


101. Id. at 627.
102. Id. at 627-28.
103. Id. at 627.
104. Id.
105. 56 So. 2d 901, 903 (Fla. 1952).
In *United States v. Clarke*, cited by the *Joint Ventures* majority for the proposition that the two types of actions are distinguished by "important legal and practical differences," the U.S. Supreme Court refused to read a right of inverse condemnation into a 1901 statute allowing "condemnation" of Native American trust lands. The Court instead forced municipal authorities to use eminent domain to purchase the right-of-way for an existing road illegally placed across Indian land twenty-two years before it rendered the *Clarke* decision. The only prejudicial differences between the two proceedings identified by the majority were the shifted burden of discovering the intrusion and filing suit, as well as a different timing of valuation for compensation purposes. Justice Blackmun, in dissent, however, suggested that the timing factor was the condemnee's principal concern. In an inverse condemnation action, the value of the land would be determined as of the time of the initial intrusion. Because the land in question in *Clarke* had been physically appropriated so long before, the original Native American owners could suffer a loss in total compensation if forced to sue in inverse condemnation. Justice Blackmun opined that the condemnees therefore preferred to force an eminent domain proceeding because it would afford a later and more lucrative date of valuation.

**B. Administrative Appeal**

The *Joint Ventures* majority also dismissed the administrative appeal provided in subsection 337.241(3) as an incomplete remedy to takings challenges. Although it allowed appeals of "unreasonable or arbitrary" designations that *also* denied the owner "a substantial portion of the beneficial use" of property, this subsection, as it was worded when the suit began, failed to provide a remedy for "reasonable regulations" that "amount to a ‘taking.’" It therefore provided only illusory protection to property owners and rendered the highway reservation statute a taking without compensation.
C. Analysis of the Court's Rejection of the Owners' Remedies

The salient differences between the inverse condemnation and eminent domain proceedings cited by the Joint Ventures and Clarke majorities are the shifted burden of initiating action and the timing of the valuation. In the context of the Florida reservation program, the notice provisions of the statute should have mooted the concerns expressed by the court in Clarke that allowing a taking before determining its value would allow physical intrusions to occur unnoticed. In addition, although property in Florida commonly appreciates in value, the timing of the "taking" for valuation purposes is unlikely to cause owners much hardship, especially because the delay is for only a few years and most properties are unlikely to be so substantially impaired as to be "taken" anyway. Inverse condemnation, as former Chief Justice Ehrlich indicated in his dissent, is a widely used and accepted technique for assessing the costs of a taking after it has occurred and generally suffers from no greater due process scrutiny than does eminent domain.

The administrative appeal procedure's shortcomings are similarly difficult to discern, especially considering the amendments to the statute enacted the year before the supreme court delivered the Joint Ventures decision. In 1989, the Legislature changed the requirement that an appealing owner establish both unreasonable or arbitrary application of the restrictions and substantial deprivation of property rights. After July 1 of that year, an owner could appeal if either had occurred. The 1989 Legislature also added a variance procedure that allowed for local appeals of permit denials in cases where the reservation restrictions "would constitute an unnecessary hardship" to use of the property. Hence the court, which passed judgment on section 337.241 as it existed when the Joint Ventures appeal began, invalidated a statute that had been substantially amended in a critical area.

118. An unmentioned but possible concern may also have been the owner's hurdle in proving damages in the absence of the actual conveyance of the property, which is more likely to occur in an eminent domain action.

119. Joint Ventures, 563 So. 2d 622, 628-29 (Ehrlich, C.J., dissenting). The U.S. Supreme Court has seemed even to encourage inverse condemnation as an owner's remedy. See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (owners are constitutionally entitled to an action in inverse condemnation when the public takes property); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-97 (1985) (owner must exhaust state compensatory remedies, including inverse condemnation, before asserting a claim for taking without compensation).

120. Ch. 89-232, § 9, 1989 Fla. Laws 971, 975-76 (amending Fla. Stat. § 337.241(3)).

121. Id.

122. Although the wording of the statute in 1987 would be relevant to its effect on the owners of Joint Ventures, Inc., their claim against DOT was settled in 1988.
The court's failure to consider the effects of the subsequent legislation leaves the status of the current reservation law in doubt. Is the amended statute still constitutionally infirm? If so, could it be cured by any remedy short of mandatory direct compensation to all owners of reserved lands? Unfortunately, the majority opinion left these important questions for another day.

IV. An Economic View of Planned Condemnations

Although the majority's treatment of the reservation statute raises a number of legal and jurisprudential questions, the primary effect of the Joint Ventures decision will be economic: the public will pay more to acquire property. This impact raises an additional question: What rule or approach to condemnations planned in advance would produce the greatest overall social benefit or minimize economic waste? A review of the dilemma of planned condemnations from an economic standpoint reveals some of the costs and benefits of the various alternatives, as well as reasons why maintaining some development restrictions on properties to be acquired in the near future promotes the public welfare.

A. The Dilemma

A public body contending with rapid economic growth in a highway corridor faces a quandary: It needs to plan for future expansion of the facility, in this case a roadway, yet it has no use for land acquired years in advance. Such land would sit idle until that body could, using the most recent information available, lay out the exact boundaries of the right-of-way needed. Such land is more productively held by private owners, in whose hands it can be used as before. Conversely, if left in private hands without restrictions, this same property could be the site of substantial construction, which would force the public to choose between altering the project or buying the buildings and tearing them down.

Such restrictions, of course, could work substantial hardship on a private owner if his or her use of the overall property is significantly impaired without any compensation. Hence, a rule that categorically prohibits construction and denies compensation is unfair and unproductive, while one that forces the public to choose between blind acquisition in advance and buying new and useless buildings is wasteful.

B. The Coase Analogy

The dilemma just described is analogous to the one illustrated by R.H. Coase in his classic essay The Problem of Social Cost. Coase

sought to expose the flaws in economist A.C. Pigou's position that mandatory compensation for all damages to others is always the most socially desirable rule. His example, taken from a book by Pigou,\textsuperscript{124} dealt with the problem of England's compensation rules for damage to farmlands from fires ignited by random sparks from steam engines.\textsuperscript{125} Pigou had argued that mandatory compensation was more desirable than the existing "no liability" rule, because a compensation requirement would encourage the railroads to adopt the technology and operating practices that minimized collateral damage to farms adjacent to the tracks.\textsuperscript{126} Coase responded that, although appealing on its surface, such a categorical requirement would also have the undesirable effect of encouraging farmers, who would then bear none of the risk of fire, to cultivate the very lands most vulnerable to damage.\textsuperscript{127} Simultaneously, such a rule would decrease the marginal advantage to the railroad of running more trains.\textsuperscript{128} In other words, mandatory compensation would remove the farmers' incentive to avoid the danger and would discourage the railroad from increasing its production. Therefore, such a rule would not in all cases produce the most efficient or productive result.\textsuperscript{129}

The difference between cases where the mandatory compensation rule would produce the most efficient result and those where it would not, of course, depends on other factors, such as the probability and cost of crop damage and the relative productivity of the other lands available for cultivation. In the context of the reservation law, the relative productivity factor appears in terms of the alternatives available to private owners of lands adjacent to or in highway corridors. Because in all likelihood the majority of such owners stand to lose the use of only a strip of frontage along the roadway, the remainder of the property will in most cases provide an alternative building site.

The risk factor complicates the reservation problem in two important ways. Because the Florida statute provides for up to ten years of reservation with no requirement that DOT ever acquire the property, DOT bears almost none of the cost of a reservation and, therefore, has little incentive to restrain itself. On the other hand, in the absence of restrictions, the private owner negotiating with DOT has no incentive to avoid the risk of having to turn the new building over to the condemnor, except for the risk that the ultimate compensation for it

\begin{thebibliography}{99}
\bibitem{125} Coase, \textit{supra} note 123.
\bibitem{126} \textit{Id.} at 31-32.
\bibitem{127} \textit{Id.} at 32-33.
\bibitem{128} \textit{Id.}
\bibitem{129} \textit{Id.} at 34.
\end{thebibliography}
will be inadequate. If an owner prefers to take such risks or can find a way to gain a premium over costs for that building by, for example, claiming business damages or using the increasing value of the building under construction to extort the State, then he or she will be inclined to begin construction, whether intending to complete it or not.

C. Alternative Provisions

The reservation rule that would promote the most efficient use of social and natural resources would prevent or discourage reckless construction of buildings in areas where condemnation is highly likely, yet discourage DOT from reserving more land than it really intends to acquire. As it existed in 1987, Florida's reservation program left the private owner of wholly reserved land few opportunities to use his or her property more productively. On the other hand, the alternative chosen by the supreme court leaves all owners of properties to be condemned in a position to increase their remuneration under eminent domain through wasteful construction. Both choices encourage unproductive behavior. What remedial measures, then, would permit a reservation statute to limit such behavior, yet still allow for productive use of the lands in question?

The permit-or-buy approach, \(^{130}\) used in some other states and now enacted in Florida, \(^{131}\) encourages owners of reserved lands who have no current use for their property to force the state to acquire it in advance by applying for a building permit. This alternative would have the advantage of allowing the private owner to deploy his or her investment elsewhere. It would also, however, likely leave the state owning an asset it has no current use for, yet must maintain.

In contrast, the variance clause \(^{132}\) gives private owners of properties incurring "unnecessary hardship" an opportunity to make productive use of their land in the interim. Consequently, although it is likely to increase the cost of public acquisition, such a provision, if applied in a

\(^{130}\) See supra notes 75-76 and accompanying text.

\(^{131}\) In the wake of Joint Ventures, the Legislature created Fla. Stat. § 337.243, titled as a separate "Roadway corridor official map procedure." Ch 90-227, § 17, 1990 Fla. Laws 1656, 1675. This new mechanism, which provides for direct notice to owners only after DOT files the map, uses a permit-or-buy clause as its sole remediation. See Scott J. Johnson & Sally E. Bond, Landmark Decision Advances Litigation Rights of Florida Property Owners, 64 Fla. B.J. 52, 54 (Oct. 1990). Combined, these two differences would seem to make the new statute even less likely than section 337.241 to survive judicial review. Though it resembles the Delaware statutory program invalidated in Lackman v. Hall, 364 A.2d 1244 (Del. Ch. 1976), this new provision has not yet been challenged in court, apparently because DOT has not used it. See supra notes 77-79 and accompanying text.

prudent manner, may provide relief in cases where the characteristics of the property in question leave the owner no productive alternative. The administrative appeal clause, as amended in 1989, should have a similar effect.

The variance and appeal procedures, combined with the possibility of an outright suit in inverse condemnation, also act as checks against any tendency of the State to reserve large swaths of individual properties. Neither of these remedies, however, discourage DOT from reserving many more miles of total future right-of-way than it is likely to use in a planning period short enough to assure that its projections of need are reasonably accurate. The best prevention for this potential abuse may therefore be to place a statewide cap on the amount of right-of-way reserved, expressed either in terms of acreage or in terms of the total funding available in the normal highway planning and funding interval.

These efficiency considerations therefore warrant two changes to the statute as it existed at the end of 1990. First, the alternative reservation provision featuring the permit-or-buy clause should be scrapped as promoting premature and haphazard transfer of property to public ownership. Second, the Legislature should cap the overall amount of land covered by reservation restrictions to conform with the funding available for right-of-way acquisition within DOT's five-year planning horizon. With this amendment, section 337.241 should still be able to inhibit wasteful construction, yet survive a second facial challenge.

V. CONCLUSION

The Florida Supreme Court held the state's highway reservation law unconstitutional as an improper use of the police power to take private property without compensation. The court, however, could have found ample justification for indicating approval of the amended statute as addressing a legitimate public welfare concern in a state struggling to keep public facilities concurrent with rapid growth, while reserving the right to invalidate specific reservations for arbitrary or unreasonable application, for lasting too long, or for enveloping too much of a particular property. Although it condemned the very pur-
pose of the statute and thereby cast doubt on the validity of any restrictions placed on lands slated for public acquisition, the history of this area of the law shows that other courts making such broad declarations have reacted favorably to properly designed reservation programs in subsequent cases.\(^\text{135}\) These courts have correctly distinguished development regulations that preclude any reasonable use of a property and thereby constitute a taking from those restrictions that merely alter the configuration of a reasonable use to protect the public as a whole. The latter are exercises in sound and reasonable public planning.

Until the issue is revisited, the \textit{Joint Ventures} decision will encourage not only wasteful construction, but also unproductive litigation concerning compensation for "temporary takings." In his dissent to the \textit{First Lutheran} decision, which declared that even temporary deprivations of all property rights can constitute takings and therefore require compensation, Justice Stevens began: "One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive."\(^\text{136}\) By declaring that all of DOT's reservations effected unconstitutional takings no matter how little of the property they enveloped, the \textit{Joint Ventures} decision itself seeded a crop of lawsuits seeking damages for temporary deprivations of property rights during the period when the reservations were in effect. In \textit{Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.},\(^\text{137}\) for example, \textit{Joint Ventures} was cited as justification for a summary judgment holding that compensation is due every owner of lands reserved under the program.\(^\text{138}\) Because Florida courts award attorney's fees and costs to all plaintiffs who can establish a taking in inverse condemnation,\(^\text{139}\) each such owner is now free to sue the State for damages, at the State's expense.\(^\text{140}\) Further, he

\(^{135}\) \textit{See, e.g.,} State ex rel. Miller v. Manders, 86 N.W.2d 469 (Wis. 1957); Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936); \textit{supra} notes 87-97 and accompanying text.


\(^{137}\) 582 So. 2d 790 (Fla. 5th DCA), \textit{review denied}, 591 So. 2d 183 (Fla. 1991).

\(^{138}\) \textit{Id.} at 792. Although DOT, and presumably the local expressway authorities, withdrew all maps of reservation immediately after the \textit{Joint Ventures} decision was announced, \textit{see} Dep't of Transp., Topic No. 575-010-010-a, Directive, Withdrawal of Right of Way Reservation Maps (May 2, 1990), the court ordered DOT to pay damages for its temporary impairment of the property's use during the period the reservation restrictions were in effect.

\(^{139}\) \textit{See} State Road Dep't v. Lewis, 190 So. 2d 598, 600 (Fla. 1st DCA), \textit{cert. dismissed}, 192 So. 2d 499 (Fla. 1966).

\(^{140}\) At the time the \textit{Joint Ventures} decision was announced, an internal DOT memo estimated that approximately 4200 parcels were affected by reservations. Memorandum from Robert I. Scanlan, Interim General Counsel, Dep't of Transp., to Ben G. Watts, Secretary, Dep't of Transp. (May 1, 1990) (Fiscal Impact of Unconstitutionality of Map of Reservation Statute) (available at the Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).
or she may keep the property until the State pays again to condemn it. The dimensions of the potential public liability are staggering.

A more productive approach would have been to condone limited development restrictions on such lands, so long as the statute provided for remediation in cases of severe deprivation. Had the majority expressed its approval for the amended reservation statute, it would have left the State of Florida better able to provide for the welfare of the citizenry as a whole, yet it would have still protected individual property owners from confiscatory regulation without just compensation.