IN THE
SUPREME COURT OF FLORIDA

Case No. 80,656

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

(2d DCA Case No. 92-00065)

v.

A.G.W.S. CORPORATION,

Respondent,

_____/

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

(2d DCA Case No. 91-03263)

v.

DUNDEE DEVELOPMENT GROUP,
a Florida General Partnership,

Respondent.

_____/

INITIAL BRIEF OF AMICUS CURIAE, PALM BEACH COUNTY

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STATEMENT OF CASE AND FACTS

This is a brief filed regarding a question certified to the Florida Supreme Court as a question of great public importance in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 17 FLW D2232 (Fla. 2d DCA September 23, 1992). The certified question is as follows:

> WHETHER ALL LANDOWNERS WITH PROPERTY INSIDE THE BOUNDARIES OF INVALIDATED MAPS OF RESERVATION UNDER SUBSECTIONS 337.241(2) AND (3), FLORIDA STATUTES (1987), ARE LEGALLY ENTITLED TO RECEIVE PER SE DECLARATIONS OF TAKING AND JURY TRIALS TO DETERMINE JUST COMPENSATION.

The Court, while postponing the decision on jurisdiction, ordered that initial briefs be filed in an Order dated October 26, 1992. The Court on November 9, 1992 granted PALM BEACH COUNTY's motion for leave to appear as amicus curiae.

This brief addresses the policy implications of the certified question.

SUMMARY OF ARGUMENTS

I. The remedy when declaring a statute facially unconstitutional is to void the unconstitutional statute. To declare a per se taking of all property that is subject to the unconstitutional statute provides a damage remedy for property owners who may have suffered no actual injury and may not have been aware of the statute's existence. This per se taking rule would encourage inverse condemnation claims and discourage innovative land use regulations.

II. The proper remedy for a property owner seeking damages, based on the existence of an unconstitutional statute, is to require an as applied takings claim. This would limit a claim for damages to those instances where a property owner actually attempted to utilize the property subject to the unconstitutional regulation. By requiring claims for damages be raised in as applied takings claims, principles of ripeness and finality that have evolved in takings jurisprudence can be applied to damage claims. An as applied claim provides a constitutional remedy for property owners who have been truly damaged by an unconstitutional statute and discourages trivial takings actions.

ARGUMENT I

THERE IS NO PER SE TAKING OF PROPERTY SUBJECT TO AN UNCONSTITUTIONAL STATUTE.

The Fifth District Court of Appeal in Orlando/Orange County Expressway Authority v. W&F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991), rev. denied, 591 So. 2d 183 (Fla. 1991), held that any property subject to a map of reservation per Section 337.241(2) (Fla. Stat. 1987) has been taken to some extent and the property owner is entitled to a jury trial on the matter of full compensation. Id. at 792. The Fifth District reached this rule by observing that the recording of a map of reservation does not advance a legitimate state interest and "invades some property right" of a property owner subject to the map. A property owner is, based on Agrigrowth, entitled to a trial on the matter of full compensation whether or not there is any evidence of loss in market value of the property. Id. This requirement of compensation without proof of the diminution of economic value or the physical invasion of property by government, is the "per se declaration of taking" referred to in the certified question of A.G.W.S. Corporation, 17 F.L.W. at 2232.

The Agrigrowth holding has application far beyond maps of reservation established pursuant to Section 337.241, Fla. Stat. The per se taking rule in Agrigrowth would allow any property owner subject to a regulation found to be unconstitutional for failing to advance a legitimate state interest to bring an action for damages no matter what the actual effect of the regulation has been on the

subject property. This rule goes well beyond Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 625 (Fla. 1990), which while holding that Subsections 337.241(2) and (3), Fla. Stat. (1987) were facially unconstitutional, observed that "when compensation is claimed due to government regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use."

The Agrigrowth per se taking rule elevates the declaration of facial unconstitutionality for failure to advance a legitimate state interest to the equivalent status of an order of inverse condemnation. The only proceeding left after the finding of unconstitutionality is a jury trial directed at "full compensation." Agrigrowth, 582 So. 2d at 792.

The per se taking rule established in Agrigrowth goes beyond the grounds for a per se taking established by the United States Supreme Court - permanent physical invasion of property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S.Ct. 3164, 3175, 73 L.Ed. 2d 868 (1982). The permanent physical invasion of property requires compensation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it. . . ." Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893, 120 L.Ed 2d 798 (1992). The requirement of compensation without an analysis of the effect of the regulation on a particular property creates the per se taking. When declaring the map of reservation statute unconstitutional in Joint Ventures, there was no suggestion by the court that the map of reservation

statute physically invades property. Agrigrowth creates a second type of per se taking - any regulation stricken for failure to advance a legitimate state interest.

Monetary damages should not be awarded when a regulation is found to be arbitrary and capricious. See Eide v. Sarasota County, 908 F.2d 716, 721-722 (11th Cir. 1990), cert. denied, 111 S.Ct. 1073, 112 L.Ed 2d 1179 (U.S. 1991) which refers to a challenge to a regulation as arbitrary and capricious and an invalid exercise of the police power as an "arbitrary and capricious due process claim." Eide states that the remedy for such a challenge is to invalidate the regulation. Id. See also Weissman v. Fruchtman, 700 F.Supp. 746, 753 (S.D. N.Y. 1988). which explains that facial challenges to the constitutionality of a statute are for the benefit of the society and that the remedy is the striking of the unconstitutional statute from the statute books. A striking of the unconstitutional statute was the precise remedy in Joint Ventures where there was a declaration of the statute's unconstitutionality.

The effect of Joint Ventures was to void an unconstitutional statute. The effect of Agrigrowth is to declare a per se taking of all property subject to an unconstitutional statute with a jury trial to determine damages. Both the dissenting and specially concurring opinions in A.G.W.S. Corporation, 17 FLW D2232 (Fla. 2d DCA September 23, 1992) observed that Agrigrowth encourages litigation regarding land subject to maps of reservation even when actual damages would be non-existent or nominal due to the Florida law requiring governments to pay attorneys fees in inverse

condemnation actions. Palm Beach County's belief is that the per se taking rule established in Agrigrowth subjects governments to per se takings claims by property owners subject to any land use regulation invalidated by the courts for failure to advance a legitimate state interest. This has a chilling effect on land use regulation and goes considerably beyond the takings jurisprudence in any other jurisdiction in the United States. Indeed, Palm Beach County currently is appealing a circuit court order which cited Agrigrowth and Joint Ventures while ruling a provision of the Palm Beach County Comprehensive Plan a facial taking, and directing a jury trial for damages. Palm Beach County v. Wright, Fourth District Court Case No. 92-01912, LT Tribunal Case No. 91-7292-AF (consolidated).

Unless this Court clarifies Joint Ventures and rejects the per se taking rule of Agrigrowth, Palm Beach County fears that it will be the target of takings claims regarding any property subject to a regulation held unconstitutional by a court regardless of the extent of actual injury to the property caused by the regulation. Indeed, if governments are subject to damages for regulations that are found to be facially unconstitutional, a government could be subject to damages for the potential application of any unconstitutional regulation, not just land use regulations.

ARGUMENT II

THE PROPER REMEDY FOR A PROPERTY OWNER SEEKING DAMAGES BASED ON A STATUTE THAT HAS BEEN DECLARED UNCONSTITUTIONAL IS BY FILING AN "AS APPLIED" TAKINGS CLAIM.

By requiring damage claims be raised through as applied takings claims, governments will only be subject to damage claims based on the application of an unconstitutional regulation to property, when a property owner has actually attempted to develop the property subject to the unconstitutional regulation. This is in contrast to a facial challenge to a regulation which can be raised in the absence of any attempt to utilize the regulation in question. The United States Supreme Court explains this distinction in Yee v. City of Escondido, 112 S.Ct. 1522, 1532 118 L.Ed 2d 153 (1992). In Yee, owners of several mobile home parks raised a physical invasion takings claim and a regulatory takings claim regarding a provision in a rent control ordinance. Respondent argued that the regulatory takings claim was unripe as petitioners had not sought rent increases pursuant to the challenged ordinance provision. Id. at 1532. The Supreme Court held that an as applied takings claim would not be ripe citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186-197, 105 S.Ct. 3108, 3116-3122, 87 L.Ed 2d 126 (1985). A facial challenge based on failure of the ordinance to substantially advance a legitimate state interest was ripe as "this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property

or the extent to which these particular petitioners are compensated. . . ." Yee, 112 S. Ct. at 1532. As there is no evidence of injury required or concerns regarding compensation when determining the facial constitutionality of a statute, there should be no damage remedy based on a holding of facial unconstitutionality.

A facial challenge to a regulation can be found if an ordinance on its face denies a property owner the economically viable use of land. Lucas, 112 S.Ct. 2886, 2893 n.6 and citations therein; Glisson v. Alachua County, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990), rev. denied, 570 So. 2d 1304 (Fla. 1990). The Supreme Court, when invalidating the map of reservation statute in Joint Ventures, did not hold that the statute denied all economically viable use of all property subject to the statute. As there is no damage remedy for a statute found to be arbitrary and capricious, and there has been no finding that the map of reservation statute on its face denies all economic use of property, the proper remedy for a property owner seeking damages based on the effect of a map of reservation is an as applied takings claim.

By requiring damage claims be raised through as applied takings actions, the principles of ripeness established by the Florida and federal courts regarding takings actions can be applied to such claims. The concept of ripeness requires that a final decision be made regarding the type and intensity of development allowed on the property in question prior to a case being ripe.

MacDonald, Sommer and Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 2566, 91 L.Ed 2d 285 (1986) and Hamilton Bank, 105 S.Ct. 3108, 3118-3119. The Florida courts have adopted the requirement that a final determination be made regarding the use of property in order to raise a takings claim. See Glisson, 558 So. 2d at 1036, stating a final decision may be shown by: 1) rejection of a development plan; and 2) denial of a variance. See also Department of Environmental Regulation v. MacKay, 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) requiring application for a building permit and a request for a variance. By requiring that damage claims be as applied takings claims, only those property owners who sought and were denied development approval within a recorded map of reservation would have ripe takings claims.

To prevail in an as applied taking claim a property owner subject to a map of reservation would have to prove that the map as applied to a particular piece of property "deprives the owner of substantial economic use of the property." Joint Ventures, 563 So. 2d at 625. Only when a record is developed that establishes such proof can an as applied taking be found. See Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (requires factual findings and a detailed takings analysis in order to find a taking).

Respondent may argue that it would have been futile to apply for a development permit for property within the right-of-way of a recorded map of reservation. However, futility cannot be claimed until at least one meaningful development application has been

filed. Glisson, 558 So. 2d at 1036 and cases cited within.

The Florida courts prior to First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed 2d 250 (1987), refused to recognize a cause of action for damages based on imposition of a development regulation resulting in a taking. Dade County v. National Bulk Carriers, 450 So. 2d 213, 216 (Fla. 1984). The only remedy for a confiscatory development regulation in Florida prior to First English was the invalidation of the regulation. Id. Clearly, Florida is required to maintain damage remedies for takings based on First English. However, Florida should not accept the damage remedy into its takings jurisprudence without also utilizing the limitations placed on takings actions by the Federal courts. Thus, Florida should not allow causes of actions for takings which would not be considered ripe under Federal law. Only property owners who have been denied development approval based on the application of a regulation to their property should be able to seek monetary damages regarding the effect of the regulation to their property.

CONCLUSION

The certified question should be answered in the negative. Property owners with land inside the boundaries of maps of reservation are not entitled to per se declarations of takings. Property owners subject to a map of reservation should only be able to raise as applied takings claims regarding application of a map of reservation to their property.

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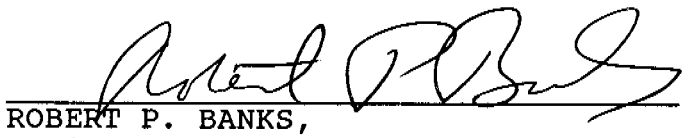

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