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IN THE
SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,	)	
Petitioner,	)	Case No. 80,656
v.	)	
A.G.W.S. CORPORATION, DUNDEE DEVELOPMENT GROUP,	)	
Respondents.	)	

BRIEF OF NATIONAL AUDUBON SOCIETY AS AMICUS CURIAE

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INTRODUCTION

National Audubon Society ("Audubon") submits this brief amicus curiae in support of petitioner and urges the Court to answer the certified question in the negative. The Court's decision in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990), upon which the court below relied, is legally unsound and has resulted in extensive litigation that undermines public faith in the law and imposes useless, potentially major expense on the public. Audubon respectfully urges the Court to recede from its decision in Joint Ventures insofar as that decision holds that the map reservation statute, on its face, effects an unconstitutional taking. If the statute is subject to any colorable facial constitutional challenge,

we submit, that challenge must rest on the due process clauses of the Federal and State Constitutions.

INTEREST OF AMICUS

National Audubon Society is a non-profit, national conservation organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 500 local chapters, including over 32,000 members in the State of Florida. The mission of Audubon is to effect wise public policy for the environment, especially in major issues that bear on wildlife and wildlife habitat.

Judicial interpretation of the "takings" clauses of the Federal and State Constitutions is a matter of vital interest to Audubon and the accomplishment of its mission. The Court's decision in Joint Ventures, as interpreted by the lower courts in this State, represents, in our view, an extreme and misguided extension of prior existing law. Audubon also has an interest in this case because it will likely set an important precedent concerning the relationship between the due process and takings clauses. The Court's resolution of that issue will have great significance for future application of the "takings" clause to other important land use and environmental regulatory programs.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

National Audubon Society adopts the Statement of the Case and the Statement of the Facts of the Florida Department of Transportation.

SUMMARY OF ARGUMENT

The Court should recede from its decision in Joint Ventures to the extent the Court held that the map reservation statute constitutes, on its face, a "taking." We respectfully submit that the Court should reconsider its prior decision, both because it is unsound and because it has produced an illogical result that trivializes the law. Under established principles, the statute cannot be deemed to effect a facial taking because not every conceivable application of the statute would result in a taking.

Even if the Court declines to recede from its decision in Joint Ventures, we urge the Court to reconsider its rationale for the result in that case. Insofar as the Court in Joint Ventures appeared to conclude, and the respondents in this case contend, that the map reservation statute is not substantially related to a legitimate state interest, the claims in this case and in Joint Ventures should be viewed as arising under the due process clause, not the "takings" clause.

ARGUMENT

I. THE COURT SHOULD RECEDE FROM ITS CONCLUSION IN JOINT VENTURES THAT THE MAP RESERVATION STATUTE, ON ITS FACE, EFFECTS A "'TAKING" OF PRIVATE PROPERTY.

A. This Case Presents an Appropriate Occasion for the Court to Recede from One of its Prior Decisions.

It is well established that this Court has the authority to recede from one of its prior decisions if the Court is convinced that the

decision "is unsound, ill-advised, unjust, illogical, or inequitable." See Reed v. Fain, 145 So. 2d 858, 864 (Fla. 1962).

As we explain below, the Court's decision in Joint Ventures was legally unsound. On that basis alone the Court should reconsider the decision.

But a second, equally important consideration calls for reexamination of the decision in Joint Ventures. Insofar as can be determined from the opinions filed in that case, no member of this Court considered the practical consequences of the apparent conclusion that the map reservation law was, on its face, a taking. According to the Department of Transportation, since the Court's decision, "dozens" of other property owners have filed inverse condemnation claims seeking monetary compensation under Joint Ventures. All told, hundreds or even thousands of property owners could be entitled to sue. See Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 1992 WL 235303 (Fla. 2d DCA 1992) (Altenbernd, J., dissenting). On the theory that liability for a taking has been already been established in each of these cases by the decision in Joint Ventures, the plaintiffs are required only to demonstrate the amount of compensation, if any, to which they may be entitled. Nonsensically, the likelihood of suit is largely, if not totally, unrelated to the likelihood of a significant recovery, because plaintiffs' attorneys will be entitled to recover fees and costs from the State even if they make only a nominal recovery.

The most important information revealed by the post-Joint Ventures experience, however, is that many if not most of those claiming the benefit of the Joint Ventures decision have not, in fact,

suffered any "taking" under any plausible interpretation of the law. Indeed, in this case, it is impossible to determine what, if any, injury the respondents may have suffered as a result of the mapping. In some cases, the law has been applied to agricultural areas which were in use prior to the mapping, during the mapping, and after the Joint Ventures decision invalidating the maps. Mapped areas developed for commercial or residential purposes were likely completely unaffected by the law. Indeed, as observed by Judge Altenbernd, who dissented from the decision below, some property owners "may actually have benefitted from the map:"

> Before the map, the landowners knew a road was proposed but had little assurance where it would be built. Such uncertainty can affect one's ability to develop property. After the recording of a map, a landowner can predict the course of a roadway with greater certainty. In this case, for example, it is possible that the corridor prevented development of 20 acres, while allowing the remaining 185 acres to be developed with some assurance that a road would be built nearby. Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 1992 WL 235303 (Fla. 2d DCA 1992).

Under Joint Ventures, all of these different property owners, regardless of their particular circumstances, can allege that it has been definitively determined that their property has been "taken."

This state of affairs makes a mockery of the commonsense notions of justice and fairness that produce public confidence in the judicial system. It also imposes a potentially heavy and utterly unjustifiable financial burden on the public.

B. The Map Reservation Statute Does Not, on its Face, Effect a Taking Because the Mere Existence of the Law Does Not Effect a Taking in Every Conceivable Circumstance.

In order to conclude that a government regulation is, on its face, a taking, a court must determine that the regulation is unconstitutional "in every conceivable application." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); see also Eide v. Sarasota County, 908 F.2d 716, 724 n. 14 (11th Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991) (a facial takings challenge argues that "any application" of the regulation is unconstitutional); Glisson v. Alachua County, 558 So. 2d 1030, 1037 (Fla. 1st DCA). Stated differently, a facial challenge raises the claim that the "mere enactment" of the regulation constitutes a taking. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).[1]

In Hodel, the U.S. Supreme Court reversed a district court decision which found a taking in a facial challenge to the Surface Mining Control and Reclamation Act, and observed that the Act "easily survive[d] scrutiny" in that type of challenge. 452 U.S. at 296. The Court emphasized that takings claims are particularly ill-suited to resolution in a facial challenge, stating that the district court had "ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." "Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property," the

1. In contrast to a facial challenge, an "as applied" challenge to a regulation requires merely that the plaintiff show that the regulation is unconstitutional as applied to his specific property. See Eide, 908 F.2d at 724 n. 14.

Court observed, because takings jurisprudence lacks "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Id. at 295.

Similarly, in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987), the U.S. Supreme Court stated that a party challenging a Pennsylvania statute regulating coal mining as a facial taking confronted an "uphill battle." In that case, the Court concluded that the plaintiffs had failed to meet their "heavy burden" of demonstrating that the statute, on its face, effected a taking. Id. at 501.

Contrary to the apparent holding in Joint Ventures, it is simply not plausible to conclude that the Florida map reservation statute effects a taking in every one of its conceivable applications.

The U.S. Supreme Court has identified a few categories of regulatory actions that can give rise to a presumption of a taking: when regulation renders property "valueless," see Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992), or when it effects a permanent physical occupation of private property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-33 (1982). Other types of regulations are generally evaluated under a set of ad hoc factors, "such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." Kaiser Aetna v. United States, 444 U.S.164, 175 (1979); see Lucas, 112 S. Ct. at 2895 n. 8. See also Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.

1981) (listing six factors that "have been considered" in determining whether "a regulation is a valid exercise of the police power or a taking").

A landowner who, for example, continued his or her land in agricultural use while it was mapped could not establish that the land was thereby rendered valueless. See, e.g., Delaware v. Booker, No. 89C-NO-13 (Del. Super. Ct. Sept. 2, 1992) (post-Lucas decision finding no taking where farmers were prohibited from developing their property but continued to use property for agriculture). Nor could he or she establish that the mere regulation of the use of the property imposed any type of physical invasion. Even if certain landowners could establish that their property had been diminished in value, whether in a particular case such diminution might have gone so far as to constitute a taking cannot be determined in an abstract challenge to the law on its face. In various different contexts, the U.S. Supreme Court has upheld all manner of regulations despite very substantial diminutions in property value. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

When these types of considerations are multiplied across the hundreds, if not thousands of landowners affected by the maps, the conclusion is inescapable that the law simply cannot -- at least on its face -- be deemed an unconstitutional taking.[2]

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2. To underscore the obvious, the conclusion that the mapping law is not, on its face, a taking would not, of course, preclude aggrieved property owners who may have suffered substantial economic harm

C. There Is No Reason to Depart From The General Rule In This Case.

While respondents are likely to advance various arguments why these general principles should not be followed in this case, those we can specifically anticipate can be easily disposed of.

First, they may contend that these principles do not apply because they are relying on the theory that their property has been taken because the map law is "not substantially related to a legitimate state interest." As we discuss in Section II, that theory, as applied to this case, cannot establish a taking. In any event, it does not provide a basis for concluding that the statute is unconstitutional on its face.

In fact, the U.S. Supreme Court recently considered and rejected precisely the same argument. In Pennell v. City of San Jose, 485 U.S. 1 (1988), the Court rejected as "premature" a facial takings challenge to a rent control law. In dissent, Justice Scalia argued that because the plaintiffs were relying on the theory that the law failed to advance a legitimate state interest, "knowing the nature and

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as a result of the map law from pursuing an as applied taking claim. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 n. 40; compare Chacon v. Granata, 515 F.2d 922 (5th Cir.), cert. denied, 423 U.S. 930 (1975) (refusing to enjoin municipal annexation allegedly designed to reduce property values in anticipation of eminent domain proceedings, but stating that "[i]f the annexation serves no purpose other than to depress the value of the land, and if such loss of value is a legally cognizable injury, plaintiffs can seek compensation for the value of the land as determined at the time of the annexation").

character of the particular property in question, or the degree of its economic impairment, will in no way assist" the Court's inquiry. Therefore, he, argued, it was not premature to address the plaintiff's takings claim. The majority of the Court rejected that argument.

Second, it is entirely beside the point, in determining whether or not the law may effect a facial taking, that an aggrieved property owner has not received the benefit of an eminent domain proceeding yielding an award of just compensation. Compare Joint Ventures, 563 So. 2d at 627. While an award of just compensation, whether or not warranted, would certainly moot any potential taking claim, the lack of an offer of just compensation, by itself, is obviously not a valid criterion for determining whether or not a regulation has effected a taking.

Indeed, this argument turns "takings" doctrine upside down. As the U.S. Supreme Court explained in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985):

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government.'" Id. at 194-95 (citations omitted) .

In Williamson, the Court held that unless and until the property

owner had exhausted his inverse condemnation remedy in Tennessee State Court, he had no ripe taking claim. It would be strange indeed if the rule in federal courts were that a taking claim by a Florida property owner is not even ripe until he or she has pursued a State inverse condemnation action, but the rule in Florida courts were that a requirement that a property owner resort to an inverse condemnation supports the conclusion that a taking already has occurred!

Finally, the conclusion that the mapping law was designed in whole or in part to reduce the government's land acquisition costs does not, by itself, support the conclusion that there has been a facial taking. As we discuss in the next section, if indeed this represents an illegitimate governmental purpose, the law might for that reason be subject to review as a potential violation of the due process clause. That is a separate issue from whether the law effects a per se taking.

The conclusion that the ostensible goal of the law to "freeze" land value does not, by itself, make the law a facial taking is supported by a pair of the Court's decisions addressing the validity of a Miami street widening ordinance that prohibited the construction of any building within 25 feet of the designated center line of the street in anticipation of potential future City acquisition of a larger right-of-way. See City of Miami v. Romer (Romer II), 73 So. 2d 285 (Fla. 1954); City of Miami v. Romer (Romer I), 58 So. 2d 849 (Fla. 1952). In both decisions, the Court flatly rejected the notion that the government's desire to minimize land acquisition costs, by itself, rendered the ordinance a per se taking: "The fact that, as shown by

the testimony adduced at the trial, the city officials may have had in mind an eventual widening of the right-of-way on the particular street abutting appellees' property does not, in our opinion, constitute a 'taking' of the appellees' property for public use, within the meaning of Article XII of the Declaration of Rights." 73 So. 2d at 286; 58 So. 2d at 852. At the same time, the Court did not preclude the possibility that the ordinance had actually effected a taking. However, that determination rested on a separate inquiry as to "whether, as applied to this particular property, there has been such a denial of beneficial use as to amount to a 'taking' of the strip for which compensation must be paid." 73 So. 2d at 287 (emphasis added.). See also Dade County v. Still, 377 So. 2d 689 (Fla. 1979) (holding, based on Romer II, that mere enactment of a Dade County street widening ordinance did not effect a taking).[3]

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3. The Court in Joint Ventures cited a number of decisions condemning the use of regulatory authority to depress the value of land in order to reduce public acquisition costs. Joint Ventures, 563 So. 2d at 626. Even if freezing land values were the sole purpose of the map reservation statute, but see Joint Ventures, 563 So. 2d at 628 (Ehrlich, C.J., dissenting) (emphasis added) ("[t]he majority apparently acknowledges the goals of this statute to promote highway safety and to save the state money"), none of the decisions cited by the majority actually support the proposition that a statute adopted with this motive must be deemed, on its face, a taking, much less that the owner of property temporarily subject to such a law is automatically entitled to financial compensation whether or not he or she suffered any identifiable economic injury. San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266 (Tx. Civ. Apps. 1975), involved an as applied challenge to the discretionary actions of certain government officials taken specifically to depress the value of plaintiff's property. Other decisions cited support the proposition that, once property is acquired through eminent domain proceedings, landowners are entitled to just compensation calculated without

II. LANDOWNERS' CHALLENGES TO THE MAP RESERVATION STATUTE RAISE, AT MOST, A DUE PROCESS ISSUE.

Even if the Court declines to recede from its decision that the map reservation statute is unconstitutional on its face, we urge the Court to reconsider the basis for that conclusion. As we understand respondents' principal argument, they contend that the statute effects a taking because it allegedly is not substantially related to a legitimate state interest. While that argument can be contested on the merits, the key point is that respondents, by advancing this argument in this case, are making a due process rather than a takings argument.

The respondents' approach closely tracks the Court's analysis in the Joint Ventures decision itself. As the Court made clear, its

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regard to the unlawful regulation's effect on the value of their land. See, e.g., Board of Commissioners v. Tallahassee Bank & Trust Co., 108 So. 74, 78 (Fla. DCA 1958); Grand Trunk Western Ry. v. City of Detroit, 326 Mich. 387, ___, 40 N.W.2d 195, 200 (1949). It is one thing, when the government has actually acquired property through eminent domain, to say that compensation must be calculated based on the full value of the property without regard to the fact that an invalid regulation depressed the land's value; it would be another to conclude that the mere enactment of such a law with respect to an owner who remains in possession automatically constitutes a taking. Several of the other cited decisions declare the law void and enjoin its continued enforcement, apparently relying on the due process clause. See, e.g., Kissinger v. City of Los Angeles, 161 Cal. App.2d 454, 455, 461, 327 P.2d 10, 12, 16 (Cal. DCA 1958) (declaring zoning amendment "invalid and void" because it "arbitrarily" discriminated against plaintiffs); Robyns v. City of Dearborn, 341 Mich. 495, ___, 67 N.W.2d 718, 719 (1954) (enjoining zoning ordinance "because [it was] unreasonable and confiscatory as applied" to plaintiff's property).

primary concern in reviewing the map law was the apparent goal of freezing land values in order to facilitate subsequent government purchases of rights-of-ways at reasonable cost. The Court, we submit, was less concerned with the actual burden imposed by the law than with its questionable ends and the means selected to achieve those ends. That view, too, we suggest, is best viewed as raising a question under the due process clause rather than under the takings clause.

We frankly acknowledge that the precise relationship between the due process and taking clauses is obscure under U.S. Supreme Court and other precedents. Compare Conner v. Reed Bros., Inc., 567 So. 2d 515, 518 (Fla. 2d DCA 1990) (commenting on the "easily confused" relationship between the two clauses). Standards and issues once addressed exclusively under the rubric of due process have now been incorporated into takings doctrine. Contrary to the respondents' theory, however, the process of incorporation has not gone so far that a property owner can establish an entitlement to just compensation under the taking clause merely by demonstrating that a property regulation is not substantially related to a legitimate state interest. While such a demonstration would establish a violation of due process, and could also establish a unconstitutional taking is some contexts, it does not suffice in this case.

A. Claims Under the Takings Clause and the Due Process Clause Traditionally Raise Distinct Legal Issues.

Before describing the limited way in which due process standards may apply in a "takings" case, it will be useful to briefly

outline the essential distinctions between the due process and takings clauses.

First, and most importantly, the different language in the due process and takings clauses demonstrates that they have a different scope and meaning. The due process clause states that no person shall be "deprived of ... property, without due process of law." The takings clause states: "nor shall private property be taken for public use, without just compensation."

The takings clause, on its face, covers a narrower range of governmental action affecting property than the due process clause. Virtually any regulation could be said to "deprive" a person of property, or at least a portion of the value of a property interest; the word "deprivation" focuses simply on the effect of the regulation on the property owner. By contrast, the "takings" clause is obviously narrower in scope, triggered not merely by the owner's deprivation but also by some kind of appropriation of the property by the government as well. The requirement that the taking be for "public use" further circumscribes the type of government action covered by the "taking" clause.

The U.S. Supreme Court uttered its classic statement of the standard for evaluating challenges to government regulation under the due process clause in Lawton v. Steele, 152 U.S. 133, 137 (1894): "To justify the State in interposing its authority in behalf of the public, it must appear, first, that the interests of the public... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly

oppressive upon individuals." The U.S. Supreme Court continues to apply the same basic standard up to the present day.

The traditional remedy for a regulation that violates due process has been a declaration of invalidity or an injunction against its further implementation. See Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991). Furthermore, since the New Deal era, judicial review under the due process clause has included a presumption in favor of the validity of the legislation, at least in the arena of economic regulation. See e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). The plaintiff, the U.S. Supreme Court has repeatedly said, bears the burden of proof on the issue of "reasonableness." Salsburg v. Maryland, 346 U.S. 545, 553 (1954).

In Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922), the U.S. Supreme Court launched an alternative mode of analysis that focused on whether a regulation goes "too far" and therefore constitutes a "taking." While the meaning of the Court's "too far" formulation has spawned endless debate, it is clear, as a first approximation, that the Court's primary focus was on the magnitude of the burden that a regulatory program imposes on a property owner. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Supreme Court established that, at least where a regulation has already effected a taking, the landowner has a right to compensation.

The Court's early interpretations of the due process and takings clauses both included the onerousness of the regulation as a factor. Yet, apart from this obvious commonality, it is apparent that the

takings and due process inquiries were viewed, at least until recent years, as distinct. Whereas the Court in Lawton specifically addressed the reasonableness of the purposes of the regulatory program, the Court in Mahon assumed that the regulatory goals were valid. As the Court stated, "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be be taken for such use without compensation." Mahon, 260 U.S. at 415 (emphasis added). Thus, the Mahon Court did not closely scrutinize the public or private interests served by the Kohler Act. Instead, the Court simply "assume[d] ... that the statute was passed upon the conviction that an exigency existed that would warrant it." Id. at 416. "[T]he question at bottom" under the takings clause, the Court said, "is upon whom the loss of the desired changes should fall."

Similarly, the inquiry in Lawton concerning the closeness of the fit between the legislative ends and the means selected to achieve those ends had no place in the Mahon analysis. The Court in Mahon did not, for example, speculate as to whether some other, less burdensome approach might have achieved the goals of the Pennsylvania legislature as well as the Kohler Act.

The U.S. Supreme Court, in subsequent cases, has recognized the distinct character of the inquiries under the due process and takings clauses. For example, in 1962, in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Court considered a challenge to a municipal ordinance prohibiting the continued operation of a sand and gravel operation as both a violation of the due process clause and the takings clause. The Court, after only a brief discussion,

rejected the takings challenge on the ground that the plaintiff failed to show any reduction in the value of his property as a result of the ordinance's enactment. The Court also rejected the due process challenge, but based on a different set of standards, including "the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." Id. at 595.

Under these established precedents, it seems clear that respondents and other landowners can assert at least a colorable claim under the due process clause.[4] As discussed below, the U.S.

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4. While we believe the result in Joint Venture should be upheld, if at all, under the due process clause, we also submit that, at a minimum, it is debatable whether either the landowners in Joint Ventures or the respondents in this case have actually established a due process violation. While the courts have often questioned whether a desire to control acquisition costs is a legitimate use of the police power, see generally 36 A.L.R.3d 751, it is less than clear what other purposes may actually be served by this law, or whether, in the context of this particular regulatory program, pursuit of the goal of fiscal economy is actually unreasonable. As discussed, see page 4, supra, the map reservation statute, while restricting landowners' options, also apparently conferred benefits on at least some landowners. The Court can properly take judicial notice of the fact that construction of a major public highway often substantially increases the value of land traversed by the highway. It is unclear whether, and to what extent, it is even feasible for the government to map prospective roads without driving up land prices unless the government simultaneously takes regulatory action to maintain land values at their level prior to announcement of the road's planned alignment. We urge the Court to remand this case to the trial court for a full evaluation of the facts and legal issues bearing on the potential due process claim.

Supreme Court also has, to some degree, incorporated a means-ends rationality test into takings doctrine. Contrary to respondents' view, however, that process has not gone so as to support their claim of a taking in this case.

B. The Potential Invalidity of the Map Reservation Law Under Due Process Standards Does Not Create a Potential Taking Claim As Well.

Over the last ten years, the U.S. Supreme Court, for reasons that it has never explicitly explained, has gradually blurred the doctrinal distinctions between the takings and due process clauses. The Court has, in effect, incorporated due process standards, in part, into takings doctrine. Several relatively recent U.S. Supreme Court decisions baldly assert that a regulation that "fails to substantially advance a legitimate state interest" -- a standard inquiry under the due process clause -- constitutes an unconstitutional taking. The holdings and actual reasoning of the Court demonstrate, however, that this ostensible rule has a narrower scope than might first appear.

The Court took the first step, so far as we are aware, *toward* incorporating due process means-ends analysis into the takings inquiry in Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978). In his opinion for the Court, Justice Brennan

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Of course, even if it were ultimately determined that the map reservation law does not violate the due process clause, that would have no bearing on landowners' ability to pursue as applied takings claims. See Conner v. Reed Bros., Inc., 567 So.2d 515, 519 (Fla. 2d DCA 1990).

stated that "[i]t is, of course, implicit in Goldblatt that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, see Nectow v. City of Cambridge, 277 U.S. 183 (1928)." 438 U.S. at 127. In fact, neither Goldblatt nor Nectow supported the stated proposition.

As discussed above, Goldblatt involved a challenge to a regulation under both the due process and the takings clauses. The Court dealt with the due process and takings claims as wholly separate issues and, to the extent the Court addressed the reasonableness of the legislative program, it did so only in the context of the due process inquiry. Nothing in the Court's opinion suggested that the due process means-ends inquiry was related to, much less a part of the takings inquiry.

Similarly, the Court's decision in Nectow provided no support for the statement in Penn Central that a test of means-ends rationality is implicit in the takings inquiry. Nectow involved a straightforward due process challenge to a zoning ordinance, and contained no reference whatsoever to the taking clause, nor any support for the suggestion that due process analysis was somehow "implicit" in the takings inquiry.

Importantly, the Penn Central Court did not, at least explicitly, purport to rely on this novel statement of the law of takings, and ultimately upheld the application of the New York City landmarks law against the taking challenge. The Penn Central decision is most often cited as creating the three-part balancing test for takings analysis, see page 6, supra; that test does not include any type of

inquiry into the legitimacy of the government ends or the reasonableness of the means selected to achieve those ends. In short, it was, to say the least, unclear after Penn Central whether the Court actually intended by its rather offhand reference to a traditional aspect of the Court's due process analysis to make any change in the law of takings.

In several subsequent decisions, the Court reiterated the proposition announced in Penn Central, without, however, elaborating on why, if at all, this was an appropriate standard to apply in a taking case. In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see Nectow v. Cambridge." Id. at 260. Other than the fact that it followed Penn Central, upon which it did not specifically rely to support this proposition, the Court's statement in Agins had no better support in precedent than the Court had at the time it issued Penn Central. See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) ("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests....' Agins v. Tiburon, 447 U.S. 255 (1980); see also Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (citations omitted).").

Regardless of the recent, uncertain foundation for this novel proposition of takings doctrine, in 1987, Justice Scalia, speaking for the Court in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), boldly declared that "[w]e have long recognized that land-use

regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'" Id. at 834 (emphasis added).[5] For the first, and so far only time, the Court struck down a regulatory action relying on the proposition that it failed to advance a legitimate state interest. Upon examination, however, the precedent set in Nollan is actually a very narrow one.

The precise issue presented in Nollan was whether the government may require a private property owner to grant public access across his land as a condition of receiving a regulatory permit, where the condition is unrelated to the actual purposes of the regulatory program. The Court opened its discussion by observing: "Had California simply required the Nollans' to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach..., we have no doubt there would have been a taking." 483 U.S. at 831. In support of this assertion, the Court pointed to its repeated observation that "the right to exclude [others] 'is one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" see, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979), and to its holding in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-33 (1982), that "'[a] permanent physical occupation' of the property, by the government itself or by others," is a per se taking. 483 U.S. at 831.

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5. In support of this statement Justice Scalia cited only Agins and Penn Central.

At the same time, if the State had legitimate reasons for limiting coastal development, and therefore could properly deny the Nollans' development application, the Court concluded that there would be no ground for objection if the State simply conditioned approval on the Nollans' agreement to grant an easement. "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." 483 U.S. at 837. However, the logic of this position "disappears," the Court stated, if the condition substituted for the prohibition fails to further the end that would be advanced by the prohibition. While a prohibition on development arguably serves the State's stated objective of protecting the public's visual access to the sea, the Court ruled, a requirement of an easement allowing lateral passage along the beach does not. "The purpose then becomes, quite simply, the obtaining of an easement to serve some valid public purpose, but without payment of compensation." Id. Thus, the Court upheld the invalidation of the permit as an unconstitutional taking.

It is apparent from the Court's reasoning, and its emphasis on the invasive nature of the permit condition, that the nexus requirement in Nollan is limited to cases involving actual physical invasions of property. It is literally inconceivable that the Court, in the context of this specific case, intended to revolutionize takings jurisprudence by imposing a broad means-ends rationality test. A requirement that landowners park only green cars on their land does not serve a "legitimate state purpose", and a requirement that

property owners paint their cars green as a condition of receiving a wetland permit does not "substantially advance" any conceivable state interest, but these requirements could hardly be deemed "takings." Compare Orion Corporation v. State of Washington, 109 Wash.2d 621, ___ n.25, 747 P.2d 1062, 1080 n.25 (1987), cert. denied, 486 U.S. 1022 (1988) ("If, for example, the lack of the necessary nexus [in Nollan] resulted in a simple prohibition of some use, rather than an easement, would a taking still have occurred?").

In accord with this analysis, the overwhelming majority of courts that have considered the question have concluded that Nollan applies only to "possessory takings." As the Court of Appeals for the Ninth Circuit recently stated in Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992):

> Other circuits have considered the constitutionality of ordinances that placed burdens on land use after Nollan. None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. See, e.g., St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357 n. 6 (2d Cir. 1990), cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew Church v. Rector, 111 S.Ct. 1103 (1991); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988); Naegle Outdoor Advertising Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988).

State courts appear to have generally reached the same conclusion. See, e.g., Blue Jean Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Cal. App. 1992), cert. denied, 113 S. Ct. 191 (1992) ("In light of the above-quoted language in Nollan and in post-

Nollan case law, we hold that any heightened scrutiny test contained in Nollan is limited to possessory rather than regulatory takings cases."); Orion Corporation v. State of Washington, supra; see also Ellison v. County of Ventura, 217 Cal. App.3d 455, ___, 265 Cal.Rptr. 795, 797 (CA 2d Dist. 1990) ("[E]ven if a particular governmental regulation fails to 'substantially advance legitimate state interests,' there cannot be a taking of private property unless something -- a property right -- is taken.").[6]

Accordingly, assuming it is true that the map reservation statute is not substantially related to a legitimate State purpose, and assuming the Court actually reached that conclusion in Joint

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6. Even if the Nollan test were not limited to "possessory" takings, and even if the Court could properly have concluded that the map reservation statute effected a facial taking, it is questionable whether respondents and other landowners challenging the statute would be entitled to monetary compensation based on the theory that the statute is not substantially related to a legitimate state interest. In Nollan, the property owners did not seek to compel the California Coastal Council to pay compensation for the land subject to the easement, but instead sought and obtained an invalidation of the condition requiring the easement. Accordingly, the Supreme Court did not specifically address when, if ever, monetary compensation would be appropriate in a case raising a Nollan-type taking claim. However, the fact that the Court in Nollan did not even feel the need to address the remedy question plainly undercuts some of the more sweeping language in other U.S. Supreme Court decisions suggesting that a determination of a taking automatically leads to an award of compensation, see, e.g., First English, supra, 482 U.S. at 315 ("government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation."). See also Moore v. City of Costa Mesa, 886 F.2d 260, 264 (9th Cir. 1989), cert. denied, 496 U.S. 906 (1990) ("in Nollan the Court did not decide whether damages could be recovered for the time a conditional coastal development permit was in effect").

Ventures, the law cannot on that basis be deemed a taking. If anything, it raises an issue under the due process clause.

CONCLUSION

For the foregoing reasons, amicus curiae National Audubon Society respectfully urges the Court to recede from its prior decision in Joint Ventures and to answer the certified question in the negative.

Respectfully Submitted,

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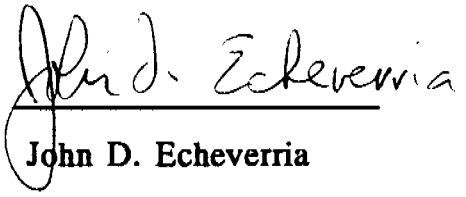
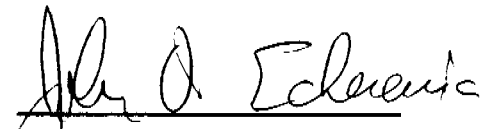
By: 

John D. Echeverria

December 30, 1992

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed by first-class mail, postage prepaid, and via Federal Express on this 30th day of December, 1992, to William C. McLean, Esquire, Tampa-Hillsborough County Expressway Authority, 707 N. Florida Avenue, Tampa, Florida, 33602; Thomas Capshew, Florida Department of Transportation, 605 Suwannee Street, Room 562, Tallahassee, Florida 32399; and Alan E. DeSerio, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster and Sachs, 777 South Harbour Island Blvd., Suite 900, Tampa, Florida 33602.

By: 

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