IN THE SUPREME COURT OF FLORIDA

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

vs.

A.G.W.S. CORPORATION,

Respondent.
_____/ CASE NO.: 80,656

TAMPA-HILLSBOROUGH COUNTY
EXPRESSWAY AUTHORITY,

Petitioner,

vs.

DUNDEE DEVELOPMENT GROUP,
a Florida General Partnership,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

THE TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY, the defendant below and petitioner here, will be referred to as the "EXPRESSWAY AUTHORITY". A.G.W.S. CORPORATION, a plaintiff below and respondent here, will be referred to as "A.G.W.S.". DUNDEE DEVELOPMENT GROUP, a plaintiff below and respondent here, will be referred to as "DUNDEE". A.G.W.S. and DUNDEE will be referred to collectively as "A.G.W.S." STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, will be referred to as "DEPARTMENT".

Citations to the Appendix to the Initial Brief will be indicated parenthetically as "A" with the appropriate page number(s).

ARGUMENT

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.

A. The Police Power vs. Eminent Domain distinction.

In its Answer Brief, A.G.W.S. attempts to tell this Court that its opinion in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990) found that the governmental action is really an exercise in eminent domain rather than an exercise of the police power. (AB pp. 9-22) Counsel for the EXPRESSWAY AUTHORITY will not presume to tell this Court what it held in Joint Ventures, but would point out that this Court repeatedly referred to the action condemned in Joint Ventures as an exercise of the police power: "The state may not use its police power in such a manner." Id., at 626. See also Id., at 625, fn. 9, and 627.

The Legislature's enactment of the map of reservation statute clearly falls within this Court's historical definition of an exercise of the police power. Hunter v. Green, 142 Fla. 104, 194 So. 379 (1940). "The expression 'police power', in a broad sense, included all legislation and almost every function of civil government." Id., at 380. This Court went on to define "police power" as the power vested in the legislature by the Constitution

to make reasonable laws not repugnant to the Constitution "as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." Id. The state's police power to regulate "is limited only by the requirements of fundamental law that the regulations shall not invade private rights secured by the Constitution." Carroll v. State, 361 So.2d 144, 147 (Fla. 1978). When an attempted exercise of the police power passes the bounds of reason it will be stricken down and declared void. Id., at 146. Striking of the statute is the remedy provided by this Court in Joint Ventures.

The Department of Transportation was the governmental entity involved in Joint Ventures. There can be no question that the Department of Transportation has both the duty to plan proposed transportation facilities (§334.044(12)&(13), Florida Statutes (1991)), and the power to exercise eminent domain to provide for the transportation needs of the State of Florida. §334.044(6), Florida Statutes (1991). Had this Court determined that the map of reservation statute was in actuality an exercise of eminent domain, the appropriate remedy would have been that the DEPARTMENT condemn the interest "acquired" by the filing of the maps of reservation rather than striking the regulation as an exercise of a power the Department of Transportation clearly has.[1] There is no question in

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[1] This Court stated that the state could facilitate the general welfare by economizing the expenditure of public funds, citing to Department of Transportation v. Fortune Federal Savings and Loan Association, 532 So.2d 1267 (Fla. 1988). However, the use of the police power to achieve that goal is "not consistent with the constitution." Joint Ventures, 563 So.2d at 626.

these cases now before this Court that the property owners have admitted that any restriction imposed by the map of reservation was invalidated when this Court's opinion in Joint Ventures became final. (A 22, 66)

A.G.W.S. then spends several pages (AB pp. 11-22) discussing the difference between the police power and the eminent domain power[2] as a difference between prevention of harm verses creation of public benefit and "neutral arbiter verses public enterprise." What counsel for A.G.W.S. fails to inform this Court is that the prevention of harm verses creation of public benefit analysis was specifically rejected by the United States Supreme Court last term and that the neutral arbiter verses public enterprise distinction was later rejected by its originator.

The Supreme Court in Lucas v. South Carolina Coastal Council, 120 L.Ed.2d 798 (1992), expressly rejected the "harm preventing verses benefit conferring" distinction as "often in the eye of the beholder." Id., at 818. The distinction "is difficult, if not impossible, to discern on an objective, value free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone" to determine which regulations require compensation.

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[2] A.G.W.S.'s own "authorities" cite with approval to commentators who call the distinction between police power and eminent domain "circular reasoning and empty rhetoric." Berger & Kanner, Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loy.L.A.L.Rev. 685, 704 (1986).

Id., at 819. [3]

The neutral arbiter verses public enterprise distinction originated by Joseph Sax in his "frequently cited" (AB pg. 13) article Takings and the Police Power, 74 Yale L.J. 36 (1964) was expressly rejected by Professor Sax in a subsequent article by Professor Sax revisiting the issue: Joseph Sax, Takings, Private Property and Public Rights 81 Yale L.J. 149 (1971):

> I am compelled, however, to disown the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid. I now view the problem as considerably more complex. The pages that follow are an extended commentary on why and how my views have changed on this point.

Id., at 150, fn.5.

Professor Sax went on to say in his article that absent from his earlier equation was the factor of public rights, that property does not exist in isolation and it is "naive to think the consequences of one property user's activities are confined to his property." Id., at 152. Compelled compensation may deter a legislature from enacting a restriction, and requiring payment for the impairment of private rights while not requiring payment for the impairment of public rights ("diffuse interest-holders") "inevitably skews the political resolution of conflicts over

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[3] The United States Supreme Court has found the "public use" requirement of the takings clause to be "conterminous with the scope of a sovereign's police powers." Hawaii Housing Authority v. Midkiff, 467 So.2d 229, 240 (1984). See also Berger & Kanner, supra note 2, at 720-728.

resource use and discriminates against public rights." Id., at 160. Professor Sax summarizes as follows:

> As was noted earlier, the current "taking" scheme introduces an irrationality by requiring compensation when the conflict resolution system imposes extreme economic harm on discrete users but not when analogous harm is placed on diffuse users. The proposed scheme has the advantage of making competing interests doctrinally equal, leaving their accommodation to be decided as a matter of public policy rather than of inflexible legal rules.

Id., at 172. A.G.W.S.'s brief and the supporting Amici advance an inflexible legal rule that would require compensation even if the damages to the property owner are nominal.

B. No cases directly support A.G.W.S.'s position and the cases addressing the issue expressly reject A.G.W.S.'s position.

A.G.W.S. and its supporting Amici attempt to argue that its assertion that every property owner affected by the map of reservation is entitled to compensation is consistent with United States Supreme Court precedent and that the position advanced by the EXPRESSWAY AUTHORITY is "a new theory of takings law."[4]

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[4] The time for arguing what level of scrutiny is appropriate under the first prong of the Agins v. City of Tiburon, 447 U.S. 255 (1980)test (Amicus Brief of National Association of Home Builders, pp. 16-18) appears to be long passed as it relates to the map of reservation issue. Whatever level of scrutiny was applied by this Court to the map of reservation statute in Joint Ventures, the statute was found to have failed. In any event, the heightened scrutiny standard advanced by A.G.W.S. and its Amici suffers from a fatal flaw: the separation of powers doctrine. "Subject to specific constitutional limitations, when the legislature has spoken, the

Curiae Brief of Pacific Legal Foundation, page 3). What is "a new theory of takings law" is the argument advanced by A.G.W.S. and its Amici that once a regulation is found to be facially unconstitutional, every property owner affected by the regulation is entitled to compensation. Ten judges from three of the five District Courts of Appeal in Florida have either rejected that argument or expressed concern over the practical and legal ramifications of such a rule.[5] At least two of these Judges have suggested this Court actually performed a due process analysis in Joint Ventures.[6] In Joint Ventures, the due process issue was clearly included in the question certified by the First District Court of Appeal. Joint Ventures, 563 So.2d at 623, fn.1. Such an interpretation of Joint Ventures would be consistent with this Court's prior decisions.[7]

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conclusive." Berman v. Parker, 348 U.S. 26, 31 (1954) [quoted in Midkiff, 467 U.S. at 239]. See also Carroll, 361 So.2d at 147.

[5] Department of Transportation v. Weisenfeld, Case No. 91-2234 (Fla. 5th DCA March 26, 1993) [18 Fla. L. Weekly D803] [Judges Cobb, Dauksch, Sharp, Harris (specially concurring), and Griffin (specially concurring)]; Department of Transportation v. Miccosukee Village, Case No. 92-989 (Fla. 1st DCA March 22, 1993) [18 Fla. L. Weekly D827] [Judges Wigginton, Kahn, and Mickle] (motion for rehearing pending); and Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, 608 So.2d 52 (Fla. 2nd DCA 1992) [Judges Campbell (specially concurring), and Altenbernd (dissenting)].

[6] Weisenfeld, 18 Fla. L. Weekly at D807 [Griffin, J., concurring specially]; A.G.W.S., 608 So.2d at 52. [Altenbernd, J., dissenting].

[7] See IB pp. 20-23, and City of Miami v. Romer, 73 So.2d 285, 286-87 (Fla. 1954). See also Lee County v. New Testament Baptist Church, 507 So.2d 626 (Fla. 2nd DCA), cert. denied 515 So.2d 230 (1987). [where an ordinance was found facially unconstitutional and an inverse condemnation claim rejected in the same opinion].

The only United States Supreme Court case utilizing the first prong of the Agins test is Nollan v. California Coastal Commission, 483 U.S. 825 (1987). The regulation in Nollan was the exaction of a lateral easement across Nollan's beachfront property to allow the public to walk on the beach. Id. at 828. Even though the application of this restriction amounted to a physical occupation of Nollans' property by the public (i.e. right to walk across), and the Court found the regulation to be a facially unconstitutional "taking", no compensation was awarded. As noted by Amicus Curiae National Audubon Society, both state and federal courts have read Nollan to be limited to "possessory takings." Brief of National Audubon Society, pp. 23-25. See also Weisenfeld, 18 Fla. L. Weekly at D809, fn. 5 [Griffin, J., specially concurring]. Even if the United States Supreme Court did not intend to limit the first prong of the Agins test to "possessory takings," it is clear that the first prong of the Agins test arises from a due process origin and has not been extended to require compensation under a per se taking analysis. A.G.W.S. and its amici have not provided any compelling reason why the "remarkably broad generalization" (Weisenfeld, 18 Fla. L. Weekly at D804) contained in the first prong of the Agins test should be so extended.[8] As argued in the Initial Brief, an "as applied" analysis will provide compensation to those whose property

[8] In fact, A.G.W.S. and its Amici fail to even address the cases cited in the Initial Brief (IB pp. 26-29) that reject their broad inflexible legal rule except for a perfunctory assertion that the Eleventh Circuit Court of Appeals used an "incorrect" term in Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990), cert. denied 111 S.Ct. 1073 (1991)(AB pg. 32, fn. 13).

was actually "taken" in the traditional since of the word.

A.G.W.S. cites to Yee v. City of Escondido, 112 S.Ct. 1522 (1992) as confirming the Agins two independent tests. (A.G.W.S. Answer Brief pg. 40). Contrary to A.G.W.S.'s assertions, the property owner in Yee made a physical occupation claim which the Court rejected and the Court expressly declined to rule on a regulatory taking issue. Id., 118 L.Ed.2d at 171-172. The map of reservation statute in these cases only affected the exercise of development rights: it did not permit physical occupation of any land and did not affect the current use of the property. §337.241(2), Florida Statutes (1987). Therefore, the Supreme Court's opinion in Yee, is of no benefit to A.G.W.S. and DUNDEE.

A.G.W.S. has relied heavily upon Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981).[9] A.G.W.S. Answer Brief pp. 43-47. A.G.W.S. has failed to inform this Court that Justice Brennan was discussing regulations "where the effects completely deprive the owner of all or most of his interest in the property." Id., at 653. In fact, Justice Brennan stated in a footnote that the government entity "may not be forced to pay just compensation under the Fifth Amendment" where the police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare. Id., at 656, fn. 23. This Court's decision in Joint Ventures falls under the

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[9] A.G.W.S. also cites to statements made in the dissenting opinion in Pennell v. City of San Jose, 485 U.S.1 (1988) without attributing the statement to the dissenting opinion (A.G.W.S. Answer Brief p. 30, fn. 12).

category of cases described by Justice Brennan in footnote 23 rather than the category of cases where the regulation completely deprives the owner of all or most of his interest in the property.[10]

A.G.W.S. then cites extensively from the United States Supreme Court's opinion in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987) in support of its position. The First English case was not an inquiry under the "first prong" of the Agins test. The property owner argued (and the United States Supreme Court assumed for purposes of the opinion) that the regulation deprived the property owner of all beneficial use of the property. Id., at 321-322. Joint Ventures, 563 So.2d at 627, fn. 11. Upon remand, the lower court determined that no "taking" had occurred and no compensation was required. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 211 Cal. App. 3rd 1353, 258 Cal. Rptr. 893, 902 (Cal. App. 2nd Dist. 1989).

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[10] Surely, counsel for A.G.W.S. (who was also counsel for the property owner in Joint Ventures) is aware that the property owner in Joint Ventures argued to the District Court of Appeal that the moratorium imposed by the map of reservation statute "amounted to a taking because the statute deprived it of substantial beneficial use of its property." Joint Ventures,563 So.2d at 624. Even if the issue before this Court had remained the same as the issue before the First District Court of Appeal, there is no logic to the argument that a finding that the application of a map of reservation to Joint Venture's property resulted in a deprivation of substantial beneficial use of Joint Venture's property could somehow be a rule of law that every property owner in the State of Florida affected by a map of reservation has been deprived of substantial beneficial use of its property.

Finally, A.G.W.S. asserts that development moratoria have been consistenly struck down. A.G.W.S. Answer Brief pp. 17-19. A Minnesota court of appeal has recently reversed a trial court's ruling that a two-year development moratorium resulted in a facial taking. Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992). Even though several states have enacted highway reservation statutes, only one was found to be facially unconstitutional prior to Joint Ventures. See Alan W. Roddy, Note, Takings - Isn't There a Better Approach to Planned Condemnation? - Joint Ventures, Inc. v. Department of Transportation,563 So.2d 622 625 (Fla. 1990), 19 Fla.St.U.L. Rev. 1169, 1177-79 (1992).

C. "Procedural safeguards" are unnecessary if a reasonable rule of law is adopted that only finds a compensable taking upon proof of deprivation of substantial economic use.

Counsel for A.G.W.S. argues that the problem of a windfall recovery for the property owner and unjustified payment of attorney fees and costs will not occur if the "procedural safeguards" available in eminent domain actions are used. A.G.W.S. Answer Brief pp. 22-27. A.G.W.S. argues that the Court should adopt a per se taking rule of law and then allow procedural safeguards to police the filing of frivolous or nominal claims. The essence of A.G.W.S.'s request is to suggest that this Court should adopt an unreasonable standard and then let procedural safeguards take care of the over-inclusive aspect of it. No argument is advanced why the standard already adopted by the courts (as set forth in the

EXPRESSWAY AUTHORITY's Initial Brief) of no judicial determination of a "taking" until the property owner has proven denial of substantial economic use of the property is inappropriate or even that the standard is under-inclusive. In fact, the Fifth District Court of Appeal has receded from the Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, LTD, 582 So.2d 790 (Fla. 5th DCA 1991) opinion and has, en banc, adopted the standard enunciated by this Court in Joint Ventures at page 625 and urged by the EXPRESSWAY AUTHORITY in the Initial Brief. Weisenfeld, 18 Fla.L.Weekly at D804. It is respectfully submitted that the standard already established by this Court and other courts compensates those who have suffered actual adverse economic impacts and does not waste judicial resources on the nominal damages claims that may be brought but would be truncated by procedural safeguards.[11] Rather than providing this Court with any good reasons why every property owner in the state affected by an invalidated map of reservation is entitled to compensation, A.G.W.S. resorts to exercises in semantics and recitations of platitudes.

The essence of A.G.W.S.'s argument and its supporting Amici is

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[11] A.G.W.S. suggests the use of directed verdict against a claim for compensation. A.G.W.S. Answer Brief pg. 24. Surely there can be no viability to a Motion for Directed Verdict when the circuit courts of this state have been entering summary judgment on the issue of liability even before the governmental entity is provided the opportunity of filing an Answer. In any event, it does not appear that a Motion for Directed Verdict would be successful on the amount of compensation when the trial court has already determined that the property owner is entitled to some compensation, even if nominal.

that every property owner affected by the map of reservation is entitled to a ruling that a taking has occurred irrespective of the effect the map had on the economic use of the property. A.G.W.S. acknowledges that the alleged right taken in this case is the "right to build on one's own property." A.G.W.S. Answer Brief at pg. 21. Surely a threshold determination of whether the effect of the map of reservation on a particular property constituted a taking of that owner's right to develop the property is whether the owner had an extant right to develop that the map of reservation affected. Prior to categorically ruling that every property owner is entitled to compensation, shouldn't the courts of this state first determine that something of value was taken? The statute's effect was to restrict a property owner's exercise of his right to develop his property. Perhaps he had already exercised that right. Perhaps he had been precluded from developing the property due to some pre-existing, valid (or already compensated) regulation.

A.G.W.S.'s categorical rule provides a jury trial and right to compensation in these cases even when there is no right to develop for the Constitution to protect. For example, the facts of these cases are so undeveloped at this stage that it is unknown whether the property alleged to be encompassed by the map of reservation is actually wetlands, or that development is restricted by valid local ordinances (such as setback requirements), or that the property owner's development rights have already been exercised. If a particular property owner has no property right that needs constitutional protection, then A.G.W.S.'s inflexible legal rule

finding every case to be a taking of a property interest is over-inclusive and should therefore be rejected.

Contrary to the tenure and implication of the Answer brief, the EXPRESSWAY AUTHORITY is not arguing that invalidation is the only remedy available to every property owner affected by a map of reservation: The EXPRESSWAY AUTHORITY is advancing a position that compensation is not due every property owner affected by a map of reservation. Compensation is only due those property owners who meet the traditional test of a compensable taking: when the regulation deprives the owner of substantial economic use of his property. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 413 (1922). Even the self-acknowledged "polemical reply" cited extensively by counsel for A.G.W.S. recognizes that sometimes invalidation of a regulation may be a sufficient remedy in a takings case. Berger & Kanner, supra note 2, at 704.

Contrary to the pre-eminence of private property rights argument advanced in the Answer Brief and its supporting Amici, each property owner is not a sovereign, able to do with his property whatever he wishes without regard to the rights or interests of other property owners or the public. Freedom is not free. Inextricably joined to a property owner's freedoms protected by the Bill of Rights is the responsibility to consent to the democratic form of government that harbors those freedoms. The

freedoms expressed in the Bill of Rights are balanced with our form of collective government. In a perfect world, they are balanced equally: excessive government regulation is repugnant to our Constitution just as is excessive individual freedom.

CONCLUSION

The question certified by the Second District Court of Appeal should be answered in the negative and the Second District's decision quashed. The trial court's order finding a "taking" has occurred should be reversed and the cause remanded with instructions that a finding of a "taking" should only be entered after the property owner has proven that the map of reservation deprived him of substantial economic use of his property as a whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 6th day of April, 1993 to S. CARY GAYLORD, ESQUIRE, MARC I. SACHS, ESQUIRE, and ALAN E. DESERIO, ESQUIRE, Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, 777 S. Harbor Island Blvd., #900, Tampa, FL 33602-5701.

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