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In The
SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

JOSEPH DIGERLANDO,

Respondent.
_____/

Case No. 81,046

BRIEF OF AMICUS CURIAE
Orlando-Orange County Expressway Authority

In Support of Petitioner
(Upon Certified Question of District
Court of Appeal, Second District of Florida)

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STATEMENT OF THE CASE AND FACTS

Amicus curiae, Orlando/Orange County Expressway Authority, accepts the Statement of the Case and Facts as set forth in the briefs of the parties.

SUMMARY OF ARGUMENT

A road reservation map recorded pursuant to § 337.241, Florida Statutes (1987), does not constitute a per se taking of property. Whether a map operated to effectuate a taking in a particular case can only be determined after a factual inquiry into the extent economically viable use of the property was impaired. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), opinion supplemented 978 F.2d 1212 (11th Cir. 1992).

The decision in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), should be clarified. The Court should make it clear that § 337.241 was stricken because it did not provide a meaningful due process mechanism for landowners who were denied economically viable use of their property. Unless Joint Ventures is clarified, Florida's Growth Management Act cannot be effectively implemented. Proper planning for population growth and future development necessitates planning for the roadways of tomorrow. Planning regulations providing for future roads are a proper subject of land use regulation under the police power. As with zoning laws, meaningful relief must be available for those particular cases where economic use is denied by a regulation, but effective planning tools must be available to government if Florida is to meet the challenge of managing its growth.

ARGUMENT

Introduction

At the very moment in Florida history when the need for growth management regulation and planning is universally recognized, the decision in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), and its progeny are inhibiting sound transportation planning by governments throughout Florida. The decision in Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., 582 So.2d 790 (Fla. 5th DCA), rev. denied 591 So.2d 183 (Fla. 1991), and decisions following it, have created mammoth contingent liabilities for state and local governments. The liabilities are indeterminant, could exceed the financial capacity of some government bodies and clearly impact the bonding capacity of all affected entities. Many land use regulations related to growth management planning have been placed in question. The result has been to significantly affect planning efforts, not only for roads but other public facilities.

The Orlando/Orange County Expressway Authority submitted a brief as amicus curiae in Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation, Case No. 80,656 (Fla. S.Ct.), addressing the Taking Clause issues directly involved in the question certified by the Second District Court of Appeal. The

substance of that brief will not be repeated here. In this brief, amicus requests the Court to clarify its decision in Joint Ventures so that the citizenry of Florida can enjoy the enhanced quality of life bestowed by planning for future needs.

I.

THE COURT SHOULD CLARIFY THE DECISION IN JOINT VENTURES TO ALLOW HIGHWAY RESERVATION MAPS AS PLANNING TOOLS.

In Joint Ventures, the Court struck down the Florida highway reservation statute, § 337.241(2) and (3), Florida Statutes (1987). The Court carefully emphasized that it was not addressing a claim for compensation, but was instead dealing with "a constitutional challenge to the statutory mechanism." Id. at 625. The statute had been administratively applied to give no relief from the prohibition on land development in the reserved corridor unless it was both (i) unreasonable for the particular property to be designated for future roadway use and (ii) there was substantial denial of economic use. The First District Court of Appeal also construed the statute to like effect. See, Joint Ventures, Inc. v. Department of Transportation, 519 So.2d 1069 (Fla. 1st DCA 1988), opinion quashed 563 So.2d 622 (Fla. 1990). As the Court observed in its Joint Ventures decision, "the remedial protections of subsection 337.241(3) are illusory." 563 So.2d at 628. Since designation of a particular property for a future road project would generally be reasonable, no

administrative relief was available, even when all beneficial use was denied. Given this construction, it can be readily understood why the Court viewed § 337.241(2) as being indistinguishable from fraudulent zoning actions and other actions deliberately depressing land values in anticipation of condemnation. Unfortunately, by placing emphasis on the potential for abuse, the Court's opinion in Joint Ventures has been interpreted by lower courts in a manner which inhibits use of street map planning techniques long used across the country.

Following the decision in Joint Ventures, but before that decision was construed by district courts of appeal as mandating a finding that a reservation map constituted a taking of property per se, the Florida Legislature enacted § 337.243, Florida Statutes. This statute authorizes the recording of roadway corridor maps by expressway authorities and the Department of Transportation. A person seeking to develop property within a mapped corridor must give 60 days' notice before obtaining a development permit. Upon receipt of such a notice, government is allowed 45 days to decide whether to purchase the property needed for a future road project. If no decision is made within the 45-day period, the landowner can proceed with obtaining development permits. If it decides to acquire the property, government is allowed 120 days to negotiate a voluntary acquisition or initiate condemnation proceedings. The maximum delay prior to initiation of condemnation proceedings is 165 days.

This procedure is modeled on an Illinois statute, Ill. Ann. Stat., ch. 121, par. 4-510 (Smith-Hurd Supp. 1991). Similar statutes exist in other states. For example, Nev. Rev. Stat., § 39-1311 et seq. (1988); N.J. Stat. Ann., § 27:7-66 et seq. (West Supp. 1991). The procedure contemplated by the Florida statute gives the public the opportunity to acquire land before development occurs, thereby avoiding the waste of resources and unnecessary costs inherent in razing useful improvements. In the process, landowners, government officials at all levels, developers and prospective purchasers are all able to make better informed decisions.

In the wake of Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd., supra, however, utilization of the limited planning device of § 337.243 has been fraught with too many questions for public servants to risk public funds. Faced with a potential financial catastrophe from reservation maps, there is little willingness to take a chance on what the next court decision might rule. New concerns have been recently highlighted by the decision in Palm Beach County v. Wright, 18 F.L.W. D425, ___So.2d___ (Fla. 4th DCA January 27, 1993), holding transportation corridors in a comprehensive county land use plan to be unconstitutional under Joint Ventures and a per se taking of property, thereby opening the door to huge liabilities for local governments throughout Florida. Unless the Court clarifies

Joint Ventures, growth management in Florida will be set back and transportation planning will come to a standstill.

The Court should make clear that: (i) Joint Ventures concerned a statute which violated Due Process because there were no meaningful remedial provisions, and (ii) the Joint Ventures decision was not intended to apply to regulations which do provide meaningful remedial procedures for landowners in those instances where the effect of the regulation is to deny economically viable use of property.

In the late 1800s, as modern urban planning began, the use of official street and highway maps became a useful tool for guiding the urbanization of America. So long as they did not substantially and demonstrably deny use of property, street maps were upheld. In Bauman v. Ross, 167 U.S. 548 (1897), the United States Supreme Court held constitutional an Act of Congress providing for the recording of official street maps for the District of Columbia outside the limits of the City of Washington. New streets were to be consistent with the maps. In upholding the Act, the Court held:

> "The object of the recording of the map is to give notice to all persons of the system of highways proposed to be established by subsequent proceedings of condemnation. It does not restrict in any way the use or improvement of lands by their owners before the commencement of proceedings for condemnation of lands for such highways, nor does it limit the damages to be awarded in such proceedings. The recording of the map,

therefore, did not of itself entitle the owners of lands to any compensation or damages." 167 U.S. at 697.[1]

In the early 20th century, mapping procedures were adopted in many jurisdictions, often prohibiting development on reserved land unless a variance was obtained. These laws have generally been upheld. For example, Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); Kingston East Realty Co. v. State Commissioner of Transportation, 133 N.J.Super. 234, 336 A.2d 40 (App. Div. 1975); State ex rel. Miller v. Manders, 2 Wis.2d 365, 86 N.W.2d 469 (1957).[2]

The benefits of planning maps as regulatory tools were highlighted in Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920). In upholding the validity of a mapping regulation

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[1]In so holding, the Supreme Court cited to several earlier decisions, including the decisions in Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), and In Re: Furman Street, 17 Wend. 649 (N.Y. 1836). In Furman an early mapping statute which prohibited payment of compensation for any structure erected within a mapped street was upheld. At the end of the 19th century, the Forster court invalidated such an imposition on the landowner. The Supreme Court in Bauman clearly upheld the planning use of official maps which did not prohibit landowners from utilizing their property, but did mandate the location of future streets to be consistent with the plan.

[2]In those instances when such statutes have been found to result in a taking of property as applied to a particular tract, the courts have so held without invalidating the statute as a whole. For example, Jensen v. City of New York, 42 N.Y.2d 1079, 369 N.E.2d 1179 (1977)(map designation held invalid as applied); Grosso v. Board of Adjustment, 137 N.J.L. 630 61 A.2d 167 (N.J. Super. 1948)(map having effect of prohibiting any use held invalid as applied).

setting forth a system of streets in an undeveloped area, the Connecticut court reviewed the chaotic conditions which preceded planning for future roads. Streets had been built which were not properly aligned with other streets. Streets were built as narrowly as a developer could make do.

> "Our large communities all have their examples of the unregulated layout of streets and building lines and buildings; of instances of land development so as to yield the last penny to its promoters regardless of the public welfare; of community eyesores; of streets made over, whole sections changed because at the beginning no reasonable provision was made for the safety, health or welfare of the community." Id. at 355.

The Connecticut court approved the use of the police power to regulate use of private property. It found the orderly provision for future growth an appropriate application of the police power.

> "In such a plan each street will be properly related to every other street. Building lines will be established where the demands of the public require. Adequate space for light and air will be given. Such a plan is wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings." Id. at 355.

The oratorical tone of the opinion in Windsor may be archaic, and the idea of waxing poetic about streets lining up seems strange. It is a fact, however, that from a public welfare perspective, land was often developed irrationally prior to regulation limiting land use. Such development benefitted developers at the

expense of society. "The sordid selfishness which would insist upon making the street a mere alley, upon getting houses upon land without regard to reasonable provision for air and light, must be restrained if the public welfare is to be preserved." Id. at 356.

The concerns of the Connecticut court in 1920 were also the concerns of the Wisconsin court in 1957 in State ex rel. Miller v. Manders, supra. The statute at issue prohibited building permits for any structure in the bed of a mapped street, but provided for variances. A variance could be obtained if the land within the mapped street was not yielding a fair return. In obtaining a variance, the proposed development would be reviewed to minimize construction of structures in the mapped right-of-way to the extent practicable. When the effect of the map would be to deny economically beneficial use, a permit for construction had to be granted, but actual development would be as consistent with future road needs as was practical without eliminating beneficial use.[3] When the time came for government to build the road, compensation for the property would have to be paid. The Wisconsin court observed:

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[3]Similarly, in Rochester Business Institute, Inc. v. City of Rochester, 267 N.Y.S.2d 274 (App. Div. 1966), the landowner had to revise construction plans so that a proposed structure would not be within the path of a planned future street widening. The modified building would contain the same amount of rental space and be as valuable. The effect of the permitting process was to render the proposed new building compatible with needed roadway improvements. The court upheld the regulation and found there was no taking of property.

> "One of the objectives of the statute is to promote orderly city growth and development so as to prevent the haphazard erection of buildings, and the installation of service facilities, which bear no relationship to future streets. There are practical reasons why municipalities, such as cities, should have the right to enforce such planning in advance of the actual acquiring title to the land underlying proposed streets in areas undergoing improvement and development....There would seem to be little doubt that an objective which seeks to achieve better city planning is embraced within the concept of promoting the general welfare." 86 N.W.2d at 472.

Florida now finds itself in a situation not unlike the haphazard development which confronted cities in earlier times. Florida confronts haphazard development on a regional and statewide basis. A dozen years ago the Legislature recognized that the "problems of growth and development often transcend the boundaries of individual units of local" government. § 186.502, Florida Statutes. In modern Florida, the planning focus is not on street grids in urban areas, but on providing, over large regions, the whole panoply of government infrastructure and services essential to contemporary life. Enactment of the Florida Regional Planning Council Act, § 186.501 et seq., Florida Statutes, was only a first step in meeting the needs of a state confronted with a greater volume of growth than existing governmental structures could handle. Historical experience taught that much more was needed. Florida could not wait for development to happen before regulating where it would occur and how it would occur.

Enactment of the Florida Local Government Comprehensive Planning and Land Development Regulation Act (commonly referred to as the Growth Management Act), § 163.3161 et seq., Florida Statutes, was the Legislature's answer to Florida's desperate need for managing growth. The idea behind the Growth Management Act was simple, though the task great. Every community in Florida was mandated to develop and maintain local comprehensive plans spelling out the future development of every local community. Through coordination with other local governments, and regional planning councils, common problems would be identified. Common solutions could be found. The issue is no longer making sure residential streets line up. Rather, it is assuring that one community's recreational resource is not another's preferred route for an expressway, a rapid transit system or waste water discharge. A coastal community might plan to tap the Florida Aquifer at an inland location, but that location could be another community's future landfill site.

The aggregation of these local comprehensive plans, with the further coordination of the Department of Community Affairs, constitutes the detailed planning of the entirety of Florida. By reviewing the comprehensive plans, one can determine where it has been decided to encourage future growth, where growth will be discouraged, and where growth will be limited.

Fundamental to the required comprehensive plans is the planning of streets and highways. The plans must contain a

transportation element, which projects over the planning horizon the road systems required to accommodate the growth estimated for an area. § 163.3177(6)(b), Florida Statutes. Sewage transmission lines, electrical utilities, telephone and other communication links follow the path of roads. Sewage treatment plants, electrical substations and like facilities are planned accordingly as part of the required capital improvements plan. Without roadways being planned, it is not possible to plan intelligently for all of the other public facilities necessary to serve new development. Land uses also "follow" road plans. Obviously, development will not occur unless the transportation system exists to serve new development. If the people cannot get to an area, they will not be the customers for new development. Thus, planned future uses are consistent with planned future roads.

A community may have a vision of its future as a dynamic urban center, or a region might have decided to encourage multiple small rural communities preserving a quiet, bucolic way of life. Whichever vision a particular community has, there must be careful planning or the vision will become a nightmare of uncontrolled development and urban sprawl.

Use of a reservation map to reduce eminent domain awards smacks of fraudulent zoning to depreciate land values, as the court observed in Joint Ventures. Any such subterfuge should be

condemned.[4] However, corridor reservations can serve a far more important and legitimate purpose. Corridor reservations require planning to focus on future development locations and allow landowners, developers and local governments to make better informed decisions by knowing where new roads are likely to be constructed in the future.

In the Orlando area, for example, a beltway encircling the metropolitan area has been in the process of planning and construction for over a decade. It may be another decade (or more) before it is finally completed. However, the route of the beltway inherently affects and is a part of the local comprehensive plans for Orange County, Seminole County, Lake County, the City of Orlando and virtually every small Central Florida municipality surrounding Orlando. Adjoining counties consider the beltway in their planning, and are opening rural areas to development in anticipation of a beltway transportation system to serve their respective populations. Future interchanges are planned to align with urban service centers planned by local governments, and stretches of beltway without interchanges are planned in accordance with the rural character sought to be preserved in other areas. For the last decade, land use decisions have been made by local governments and landowners

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[4]Of course, at such time as regulated property is acquired for road use, valuation should be without regard to the existence of road corridor plans. The Court so ruled in City of Miami v. Romer, 73 So.2d 285 (Fla. 1954).

taking into account future beltway construction. Land use approvals have been given for major new developments in what were inaccessible hinterlands, and are today within minutes of employment centers due to completion of specific portions of the beltway. The Orlando beltway project exemplifies the coordinated provision of infrastructure to meet the needs of many different communities in realizing their own visions of how to create a better tomorrow for their families and neighborhoods.

A century ago, zoning ordinances were viewed as repugnant to private property rights because they, in effect, took away preexisting development rights without compensation.[5] It was eventually realized, however, that while zoning which denied all reasonable use of land could constitute a taking, the mutual benefits derived from zoning by all members of society supported the regulation of development. Zoning of property is so common today that it is hard to imagine a time when zoning did not exist. When the United States Supreme Court decided Euclid v. Ambler Realty Company, 272 U.S. 365 (1926), however, Justice Sutherland wrote for the Court:

> "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase in concentration of population, problems have developed, and constantly are

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[5]See, for example, Goldman v. Crowther, 147 Md. 282, 128 A. 50 (1925) Spann v. Dallas, 111 Tex. 350, 235 S.W. 513 (1921); State ex rel. Roerig v. Minneapolis, 136 Minn. 479, 162 N.W. 477 (1917).

> developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." 272 U.S. at 386-387.

The need to regulate land use in urban areas has now expanded to include the need to regulate land use in undeveloped areas. The United States Supreme Court has recognized that the same principles underlying Euclid are applicable to open space zoning which prevents urbanization. Agins v. City of Tiburon, 447 U.S. 255 (1980)(Open space zoning upheld since all economic use of property not denied). The reciprocity of benefit enjoyed by society as a whole justifies such limitations on land use. Unless all reasonable economic use is denied, no taking occurs within the contemplation of the Constitution. Id.

Today, communities throughout Florida have set upon a course of planned development. The Growth Management Act requires no

less. Those plans are dependent upon coordinated transportation facilities linking the communities to the greater society. It is not possible to meet the statutory requirements of Chapter 163 without comprehensive transportation planning. Such planning cannot effectively occur over the 20-year planning period unless the roadway systems are located and capital facility plans implemented. These essential tasks cannot occur in a vacuum. The Court must permit some lawful regulatory mechanism to exist and evolve to meet the planning needs of Florida and our local communities. If the means do not exist for effective planning, the 21st century will find Florida an undesirable place to live.

The Court should make clear that planning regulations providing for future roads, and transmission routes for water, sewerage, electric utilities and other power and communication facilities are within the police power, and are a proper subject of land use regulation. The Court should make clear that such regulations do not constitute a taking of property unless the effect is to deny all economically viable use of the property. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992)(Reversing determination that a county comprehensive plan effectuated a taking by reducing land value and remanding for full factual inquiry) opinion supplemented 978 F.2d 1212 (11th Cir. 1992). The Court should make clear that Joint Ventures condemned a particular statute because it provided no meaningful due process

relief for a landowner denied all economically viable use of property. The Court should clarify Joint Ventures so that Florida can continue to plan for a bright future for all of its people.

If effective planning through corridor identification and land use regulation constitutes per se takings, growth management in Florida is doomed. The proper issue is whether due process is made available to relieve those who suffer a loss of economically viable use of their property.

The concluding observation of Justice Sutherland in Euclid is decisive in the case under consideration:

> "And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters." 272 U.S. at 396-397.

As in Euclid, there is no factual record in the case upon which to conclude what actual impact the landowner experienced from the reservation map. The judgment below should be reversed and the case remanded for a full factual inquiry as to whether the effect of the reservation map on the DiGerlando property was so great as to deny economically viable use.

CONCLUSION

For the reasons stated above, the Court should answer the certified question of the Second District Court of Appeal in the negative, and should quash the opinion of the district court. The Court should clarify Joint Ventures to make it clear that the Court there dealt with a statute which provided no meaningful process for relief from the burdens imposed on landowners denied all economically viable use of their property, and that a very different case would be presented by a corridor reservation statute providing meaningful due process relief to such landowners. This case should be remanded with directions that the partial summary judgment entered by the circuit court be reversed, and the case remanded to the circuit court for a full factual inquiry into whether there was a compensable taking of property in the circumstances of this particular case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail this 23rd day of February, 1993, to the following persons:

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