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THE SUPREME COURT OF FLORIDA

PALM BEACH COUNTY,

Petitioner,

vs.

CASE NO. 81,278

WILLIAM WRIGHT, RICHARD
ELLIOT, THOMAS J. KAMIDE,
HERBERT G. ELLIOTT, and
EDWARD L. CONNOP,

Respondents.

First Amended Brief of Amicus Curiae
Florida Department of Community Affairs
on Behalf of Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

The Department of Community Affairs adopts by reference the statement of the case and of the facts contained in the initial brief filed by Palm Beach County.

SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeal expanded this Court's holding in Joint Ventures, Inc. v Department of Transportation, 563 So2d 622 (Fla. 1990). The lower court concluded that Palm Beach County's Thoroughfare Map and Traffic Circulation Element was the equivalent of the system utilized by the DOT, which system of reservation maps prevented all development within right-of-ways prior to condemnation. It was invalidated because it did not advance a legitimate state interest and because it was landbanking for future acquisition. This unwarranted extension of Joint Ventures into the realm of local planning is fundamentally wrong for two reasons.

First, unlike the motivation behind Section 337.241, Fla. Stat. (1987), which was to save money on right of way acquisition, the local government's map and plan serves a higher, more important public purpose; planning for future development. As an integral part of the state's growth management system, transportation planning serves a legitimate state interest upon which to uphold the ordinance now on review.

Secondly, the Thoroughfare Map and Traffic Circulation Element is not a moratorium on development. Unlike the absolute prohibition on all development invalidated in Joint Ventures, the system envisioned in the Palm Beach County plan and map only regulates land use by requiring development to be consistent with the plan. It does not prohibit all development. Since the ordinance does not on its face prohibit all development, and there

is no evidence in this record that it has this effect as applied to Respondents property, the ordinance must support a facial challenge

Behind the backdrop of this particular case is an established statewide system of comprehensive planning, in which transportation planning for the future is an integral part. Traffic planning and thoroughfare maps in particular are based on statutory mandates contained in Chapter 163 Part II, the Local Government Comprehensive and Land Development Regulation Act. The Department of Community Affairs has adopted a rule, F.A.C. Rule 9J-5, which requires all local governments in the state to prepare and implement a future transportation plan similar to that utilized by Palm Beach County.

If this Court were to uphold the lower court's ruling in this case, and expand the holding in Joint Ventures to local planning, this state's growth management system would suffer the loss of a major tool to accomplish land use planning.

ARGUMENT I

**THE PALM BEACH COUNTY THOROUGHFARE PLAN IS NOT
FACIALLY UNCONSTITUTIONAL UNDER JOINT VENTURES, INC. V DEPARTMENT
OF TRANSPORTATION, 563 SO.2D 622 (FLA. 1990).**

A. THE THOROUGHFARE PLAN

SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST.

In his concurring opinion, Judge Anstead cited from the trial court's judgment, which concluded as a matter of law that the Palm Beach County Thoroughfare Map, as adopted and implemented by the land use element and traffic circulation element, "does not substantially advance a legitimate state interest". This is one of the two fundamental errors in the lower court's ruling.

This holding ignores the crucial importance of transportation planning in Florida as a legislatively mandated tool of growth management. If affirmed, the unwarranted expansion of Joint Ventures by the lower court would strike a serious blow to comprehensive planning, and would open the floodgates to similar attacks against local governments which attempt to restrict land use to advance legitimate public purposes.

A brief review of growth management legislation as it applies to transportation planning is necessary to understand the Department's position that the Palm Beach County Thoroughfare Map and Traffic Circulation Element are valid. Since 1975, all local governments in Florida have been required to adopt and implement comprehensive plans. Section 163.3161 Fla. Stat. (1975). A

traffic circulation element "consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes" was specifically mandated. Section 163.3177(6)(b) Fla. Stat. (1975) (emphasis added). This requirement to plan for the future, to manage growth by addressing the needs for additional roadways, remains a major component of the Local Government and Land Development Regulation Act of 1985, Section 163.3161 Fla. Stat. (1991). (Chapter 163, Part II)

The Department of Community Affairs has been given the duty to review local comprehensive plans to ensure compliance with Chapter 163, Part II.¹ To this end, the Department has adopted an administrative rule to guide in this process.² The rule specifically requires local governments to adopt a transportation circulation element to, in part, establish "the desired and projected transportation system".³ One of the specific requirements of the transportation element is to "provide for the protection of existing and future rights of way from building encroachment".⁴ The rule mandates that local governments prepare a "Future Traffic Circulation Map", which shall be coordinated with the Future Land Use Map.⁵ It was Palm Beach County's attempt at

¹Section 163.3184, Fla. Stat.(1991).

²F.A.C. Rule 9J-5.007. This rule was specifically reviewed and approved by the Legislature. Section 163.3174(10), Fla. Stat.(1991).

³F.A.C. Rule 9J-5.007.

⁴F.A.C. Rule 9J-5.007(3)(b)(4).

⁵F.A.C. Rule 9J-5.007(4).

compliance with this requirement that the lower court invalidated.

In requiring the local government to adopt and implement a comprehensive plan, the Legislature was not attempting to circumvent the application of the eminent domain statutes, Chapters 73 and 74. On the contrary, unlike the rather blatant economic motivations behind the statutory provisions invalidated in Joint Ventures⁶, it is the stated purpose of Chapter 163, Part II, that the comprehensive plan, with its attendant transportation element and thoroughfare map, "guide and control future development." Section 163.3161(2), Fla. Stat. (1975). Comprehensive planning is intended to "encourage the most appropriate use of land, water, and resources". This goal is achieved, in part, by the requirement that local governments plan to "facilitate the adequate and efficient provision of transportation".⁷ In stark contrast to Joint Ventures, the Thoroughfare Map and Traffic Element is not a mere ruse to save money on right-of-way acquisition.

The local comprehensive plan is required to be consistent with and further the State Comprehensive Plan,⁸ which also contains a Transportation Element. This provision of the State's plan reads in part as follow:

⁶DOT argued in Joint Ventures that Section 337.241 was necessary for economic reasons to reduce the cost of land acquisition. Joint Ventures, Id. at 625.

⁷Section 163.3161(3), Fla. Stat.(1975).

⁸Section 163.3177(10)(a), Fla. Stat. (1991).

(20) TRANSPORTATION

(a) Goal. Florida shall direct future transportation improvements to aid in the management of growth and shall have a state transportation system that integrates highway, air, mass transit, and other transportation modes.⁹ Emphasis added.

Policies to implement this goal include the requirement to plan for major transportation corridors in order to enhance system efficiency and minimize adverse environmental impacts.¹⁰

Internal coordination of the transportation element with the other elements of the comprehensive plan, such as with the land use and conservation element, is another important aspect of the state's growth management system.¹¹ This is how it should be, for roads are a necessary precondition for development to occur. Planning for the location of future roadways simultaneously assists the local government in planning for future land use and development precisely because development requires access. Limit or provide road access or improvements and a local government can effectively control the timing and location of future development. This interrelationship between transportation planning and land use planning is especially important to protect environmentally sensitive areas, such as barrier islands. This connection between transportation planning and land use planning provides this Court with a valid basis upon which to uphold Palm Beach County's system

⁹Section 187.201, Fla. Stat. (1991).

¹⁰Section 187.201(20), Fla. Stat.(1991).

¹¹Section 163.3177(2), Fla. Stat.(1991).

of traffic planning.¹²

Another critical aspect of the state's planning statute involves the idea of concurrency. Section 163.3177(10)(h), Fla. Stat. (1991) requires that "public facilities [roads] and services needed to support development shall be available concurrent with the impacts of such development." (Emphasis added) The provision of an adequate roadway system to serve new development is required by law. Obviously, to accomplish this end, the local government must decide where to build the roads.

By planning for the provision of future roadways, local governments simultaneously direct the future patterns of growth and development. This is a major difference between the purpose behind the Palm Beach County Thoroughfare Plan and the State's practice of reserving right of way invalidated in Joint Ventures.

Who pays for these new roads at the local level is entirely different from the system of eminent domain utilized by the State Department of Transportation to acquire right of way. Eminent domain is only one option under the concurrency doctrine for a local government to ensure that adequate roadways are in place to handle new development. In fact, it was this concurrency provision of the Act which has given rise to the increased use of impact fees.¹³ It is also quite common for local governments to impose,

¹²This Court specifically recognized the local government's legal responsibility to engage in transportation planning in the case of Department of Transportation v Lopez-Torez, 526 So.2d 674 (Fla. 1988).

¹³An impact fee is where a developer would be required to pay for the roadways needed to serve the new development. See, Home Builders and Contractors Association of Palm Beach County v Board

at the permitting phase, exactions requiring developers to improve the road frontage themselves prior to developing the land. This is another crucial distinction in the case at hand with the state system addressed in Joint Ventures. Palm Beach County was not necessarily motivated by a desire to save money when mapping future thoroughfares.

Through the vehicle of the comprehensive plan, including its thoroughfare map, the Legislature sought to improve this State's patterns of development, which had heretofore proceeded in a haphazard fashion. Admittedly, a thoroughfare map may ultimately reduce the cost of road construction if, for example, a shopping center is not constructed in an area where a road is ultimately expanded. The critical question here is whether or not this is the prime motivation behind the Thoroughfare Map. If not, if there is another valid public purpose behind the map and plan, this Court is bound to uphold it on a facial challenge.¹⁴

Transportation planning has long been held to be a valid public purpose. Many courts have ruled that a local government's planning for future roadways on comprehensive plans does not rise to the level of a taking where it is not also coupled with an expressed intention to initiate condemnation proceedings. See,

of County Commissioners of Palm Beach County, 446 So.2d 140, (Fla. 4th DCA 1983) cert denied 451 So.2d 848, appeal dismissed, 469 US 976, 105 Sct 376, 83 L.Ed.2d 311.

¹⁴ See, Miami Dolphins, Ltd. v Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). If the ordinance works a taking as applied, the landowner would have a claim for inverse condemnation. Graham v Estuary Property, Inc., 399 So.2d 1374 (Fla. 1981).

Guinnane v. City and County of San Francisco, 197 Cal.App.3d 862, 241 Cal.Rptr. 787 (Nov. 1987), citing, Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 109 Cal.Rptr.799, 514 P.2d 111,120 (Cal.1973), which reasoned as follows:

If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.

As can be seen from this brief review of the state's growth management laws, transportation planning serves a valid and important public purpose. As a major component of the state's growth management system, the Thoroughfare Map and Transportation Element is necessary to enable local government's to direct and control the pace and location of future development. The Palm Beach County Thoroughfare Map and Comprehensive Plan is an appropriate regulation designed to further the important, valid public purpose of planning for future growth and development. It is not a mere attempt to circumvent the procedural safeguards of the condemnation proceedings, and to rule otherwise, would seriously hamper the state's growth management system.

To conclude, because the map and plan are a valid exercise of the police powers, and because there is no evidence in this record that they deprived the Respondents of all economically viable use, the opinion of the District Court should be reversed.

B. THE THOROUGHFARE PLAN IS NOT A MORATORIUM ON DEVELOPMENT.

The District Court cited with approval the trial court's conclusion of law that the Thoroughfare Map and Traffic Circulation Element "prohibits development on private property". The court reasoned that the plan and map constituted a "development moratorium" and a scheme to "landbank private property in an attempt to reduce the cost of acquisition". It was apparently the requirement that development be consistent with the comprehensive plan that lead to this erroneous conclusion. On the contrary, unlike the clear moratorium invalidated in Joint Ventures on all development as defined in Section 380.031(4), Fla. Stat. (1991), the Palm Beach County plan only requires proposed development to be "consistent" with the plan. It does not prohibit all development.

The consistency mandate is found in Section 163.3194(1)(a), Fla. Stat. (1991).¹⁵ This provision requires that all development be consistent with the comprehensive plan. What is important for this Court to realize is that unlike Section 337.241(2), Fla. Stat. (1987) the plan did not on its face prohibit all development within the area mapped as a future thoroughfare and there is no evidence in this record that it did.

¹⁵The consistency mandate is discussed in depth in the case of Musgrove v Machado, 519 So.2d 629 (Fla. 1st DCA). See also, Arline, "The Consistency Mandate of the Local Governmental Comprehensive Planning Act," 55 Fla.B.J. 661 (Oct 1981); McPherson, "Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans, 61 Fla.B.J. 71 (1987).

Development is a term of art and is broadly defined at Section 380.04, Fla. Stat. (1991) as follows:

(1) The term "development" means, the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

(2) The following activities or uses shall be taken for the purposes of this chapter to involve "development," as defined in this section.

(a) A reconstruction, alteration of the size, or material change in the external appearance of a structure on land.

(b) A change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices, of dwelling units in a structure or on land.

(c) Alteration of a shore or bank or a seacoast, river stream, leak, pond, or canal, including any "coastal construction" as defined in s. 161.021.

(d) Commencement of drilling, except to obtain soil samples, mining, or excavation on a parcel of land.

(e) Demolition of a structure.

(f) Clearing of land as an adjunct of construction.

(g) Deposit of refuse, solid or liquid waste, or fill on a parcel of land.

Moreover, it is beyond dispute that under the Palm Beach County Thoroughfare Map and plan there could be uses of land allowed, i.e. development, which would be consistent with the plan. Temporary uses such as roadside sales, nurseries, landscaping and parking in excess of the code requirements, curb cuts for ingress and egress, agricultural, existing and grandfathered uses are

examples.¹⁶

The lower courts' characterization of the Thoroughfare Map as a moratorium is sorely misplaced. Typically, a moratorium is an interim holding devise, or stop gap measure to halt the process of development review pending the adoption of a new comprehensive plan or land use ordinance.¹⁷ Nothing in the Thoroughfare Map and Comprehensive Plan stops the process of development review. No property owner with land fronting on a future corridor is prohibited from filing an application to develop. Although the proposal must be consistent with the plan, especially as it applies to the land in the corridor, this limitation does not amount to a moratorium under any circumstance. To characterize the application of the consistency mandate with a moratorium would be a serious and unwarranted extension of the law and one which would create chaos among our local governments.

The law in this country has long held that local governments are authorized to establish set back lines, which have the clear effect of prohibiting all development in the set back area. See, Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228, 53 A.L.R. 1210. Aside from the typical front, side or rear yard setbacks, this Court has specifically ruled that set back limitations on development from roads do not constitute a taking. City of Miami

¹⁶ There are exceptions to the definition of development. Section 380.04 Fla. Stat. (1991).

¹⁷ See, Franklin County v. Leisure Properties, Ltd., 413 So.2d 770 (Fla. 1st DCA 1982).

v Romer, 58 So.2d 849 (Fla. 1952).

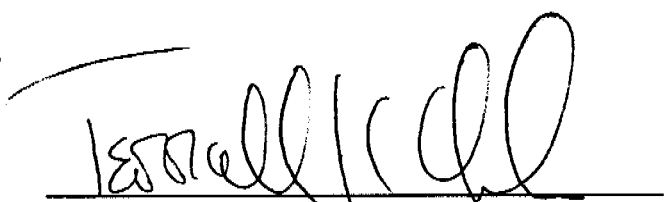
Justice Roberts opined in the second case to arise between these parties, City of Miami v Romer, 73 So.2d 285, 287 (Fla. 1954), as follows:

The mere plotting of a street upon a city plan without anything more does not constitute a taking of land in a constitutional sense so as to give an abutting owner the right to have damages assessed... And this is so, even though the ordinance prevents the development of the property in a manner not conforming to the plan. In such a case, payment of compensation must await the actual "taking" of the property by the City, or such actual deprivation of a beneficial use as to amount to a compensable "taking." (Emphasis added).¹⁸

When the lower court equated the absolute bar to all development contained in the provisions of Section 337.241(2), Fla. Stat. (1987) with the Thoroughfare Map of Palm Beach County, it took a great leap beyond reason. The statute invalidated in Joint Ventures, on its face, prohibited all development within the reserved right of way. The comprehensive plan and thoroughfare map does not go this far. It is for this reason alone that the opinion of the lower court should be reversed.

¹⁸Extrajurisdictional cases have upheld ordinances intended to plan for future public services even when they prohibited construction of new structures. Hermann v. North Pennsylvania R.Co., 270 Pa 551, 113 A 828 (Pa. 1921); Houston v Biggers, 380 SW2d 700, (Tex.Civ.App. 1964), cert. den., 380 US 962, 85 Sct 1105, 14 L.Ed.2d 153,. See for a general discussion of this issue, Annotation, "Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected", 37 A.L.R.3d 127 (1971); Mandelker, Daniel R., "Interim Development Controls in Highway Programs: The Taking Issue", Fla. St. Jour. of Land Use and Environmental Law, Vol. 4, Number 2. (Winter 1989).

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 22nd day of April, 1993 to the parties listed below.


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