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SUPREME COURT OF FLORIDA

PALM BEACH COUNTY,

Petitioner,

vs.

CASE NO.: 81,278

WILLIAM WRIGHT, et al.,

Respondent.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION'S
AMICUS CURIAE BRIEF IN SUPPORT OF
PALM BEACH COUNTY'S INITIAL BRIEF

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PRELIMINARY STATEMENT

For the purposes of this brief, Petitioner PALM BEACH COUNTY shall be referred to as "PALM BEACH COUNTY". Respondents, WILLIAM WRIGHT et al. shall be referred to collectively as "WRIGHT." Reference to the documents in the Appendix of PALM BEACH COUNTY'S Initial Brief shall be shown as (A), with the appropriate page numbers inserted.

STATEMENT OF CASE AND FACTS

The DEPARTMENT as Amicus Curiae accepts the Statement of the Case and Facts contained in PALM BEACH COUNTY's Initial Brief.

SUMMARY OF ARGUMENT

The state's exercise of its police power should be left undisturbed by this Court unless the exercise clearly violates a specific provision of the Constitution. Local government's exercise of its police power to plan for public improvements has repeatedly been found to be constitutional. Specifically, setback requirements for future road expansion have been found to be a valid exercise of the police power and a property owner must prove denial of substantial economic use of his property prior to a finding of a taking.

This Court found the map of reservation statute primarily advanced an economic purpose. In contrast, the thoroughfare map has an overwhelming legitimate public purpose in the planning for managed growth. A claim that the regulation is facially unconstitutional requires a showing either that the statute does not substantially advance a legitimate state interest or that the statute deprives every affected property owner of substantial economic use. The thoroughfare map in this case does neither.

In the alternative, the trial court's order in this case is overbroad in that the map itself is a proper police power regulation, but the limitation on development of property within the corridor may not be. The proper ruling under this finding is a striking of the restrictions, not of the map. To hold that the "adoption of the Thoroughfare Map is not a valid police power

regulation...." is to invalidate §163.3177(6) (b), Florida Statutes (1991).

ARGUMENT

IS A COUNTY THOROUGHFARE MAP DESIGNATING CORRIDORS FOR FUTURE ROADWAYS, AND WHICH FORBIDS LAND USE ACTIVITY THAT WOULD IMPEDE FUTURE CONSTRUCTION OF A ROADWAY, ADOPTED INCIDENT TO A COMPREHENSIVE COUNTY LAND USE PLAN ENACTED UNDER THE LOCAL GOVERNMENT COMPREHENSIVE PLANNING AND LAND DEVELOPMENT REGULATION ACT, FACIALLY UNCONSTITUTIONAL UNDER JOINT VENTURES, INC. V. DEPARTMENT OF TRANSPORTATION, 563 So. 2d 622 (FLA. 1990)?

A. Standard of Review.

PALM BEACH COUNTY'S thoroughfare map was adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act ("Comprehensive Plan Act") codified at §§163.3161 - 163.3243, Florida Statutes (1991) and the administrative rules promulgated thereunder. Over the years, this Court has set forth its standard of review in ruling on the constitutionality of legislative enactments and other exercises of police power:

In passing upon the constitutionality of an Act by this Court, the law seems to be well settled that, no matter from what standpoint the assault thereon is made, it is a cardinal or fundamental rule that nothing but a clear violation of the Constitution will justify the court in overruling the legislative will, and where there is a reasonable doubt as to the constitutionality of an Act, it is the duty of this Court to resolve the doubt in favor of the Act and sustain its constitutionality.

Haddock v. State, 141 Fla. 132, 192 So. 802, 809 (1939). More recently, this Court has stated "Legislative declarations of public purpose are assumed valid and are to be considered correct unless patently erroneous." State v. Div. of Bond Finance, 495 So. 2d 183,

184 (Fla. 1986). If a constitutional interpretation is available to the court, this Court has found itself constrained to adopt the constitutional interpretation. Dept. of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815, 820 (Fla. 1983), appeal dismissed 466 U.S. 901 (1984). This Court has stated "it is not our duty to envision theoretical combinations of factors which, if present, might render a statute unconstitutional." Fieldhouse v. Public Health Trust of Dade County, 374 So. 2d 476, 478 (Fla. 1979), cert. denied 444 U.S. 1062 (1980). Rather than look for a constitutional interpretation of the actions taken by PALM BEACH COUNTY in this case, both the circuit court and the district court of appeal have simply found that the thoroughfare map to be "indistinguishable" from the actions found unconstitutional by this Court in Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). It is respectfully submitted that the controlling factor in this Court's determination that §337.241, Florida Statutes (1987) was unconstitutional was the fact the primary purpose of §337.241 was economic: to save the state money for acquisition of future rights-of-way.

B. The thoroughfare map substantially advances a legitimate state interest.

Unlike the map of reservation statute found to be facially unconstitutional in Joint Ventures, a local government's planning activities in the form of set back requirements have a long history of being found to be a constitutional exercise of the state's

police power. . Gorieb v. Fox, 274 U.S. 603 (1927); City of Miami v. Romer, 73 So. 2d 285 (Fla. 1954). In upholding the City of Miami's exercise of its police power to enact a setback requirement that "prevents the development of the property in a matter not conforming to the plan," this Court held that a "taking" only occurs if the property is condemned or the setback amounts to actual deprivation of a beneficial use as to amount to a compensable "taking". Id., at 287.

The Comprehensive Plan Act was enacted by the Legislature to strengthen the role of local government in the establishment and implementation of a comprehensive planning process. S.A. Healy Co. v. Town of Highland Beach, 355 So. 2d 813, 815 (Fla. 4th DCA 1978). This Court recognized the Comprehensive Plan Act's purpose of coordinating, planning and addressing existing and proposed transportation routes. Department of Transportation v. Lopez-Torres, 526 So. 2d 674, 676 (Fla. 1988). The Comprehensive Plan Act's express legislative intent includes the facilitation of "the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services...." §163.3161(3), Florida Statutes (1991). The Comprehensive Plan Act requires a county's comprehensive plan to contain a "traffic circulation element consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes, including bicycle and pedestrian ways." §163.3177(6)(b), Florida Statutes

(1991). [emphasis supplied]

PALM BEACH COUNTY'S thoroughfare map was included in the Palm Beach County Comprehensive Plan pursuant to the rules promulgated by the Department of Community Affairs ("DCA") which require that the traffic circulation element contain goals, objectives, and policies including those which "provide for the protection of existing and future rights-of-way from building encroachment." Fla. Admin. Code R. 9J-5.007(3)(b)4. The DCA Rules also require a county's comprehensive plan to address implementation activities for the "establishment of measures for the acquisition and preservation of existing and future rights-of-way...." Fla. Admin. Code R. 9J-5.007(3)(c)4. The Legislature has given its imprimatur to the DCA's rules. §163.3177(10), Florida Statutes (1991).

This Court long ago recognized the interplay between individual property rights and the government's exercise of its police power:

The provisions of the organic law that no person shall be deprived of life, liberty, or property without due process of law, nor denied the equal protection of the laws, are not intended to hamper the states in the discretionary exercise of any of their appropriate sovereign governmental powers unless substantial private rights are arbitrarily invaded by illegal or palpably unjust, hostile, and oppressive exactions, burdens, discriminations or deprivations.

Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282, 284 (1914). In Dutton Phosphate, this Court held that all property

rights are held and enjoyed subject to the fair exercise of the state's police power and that the wisdom and necessity of a statute are authoritatively determined by the Legislature. Id., at 284-285. This Court's inquiry is into the power of the Legislature to lawfully enact a particular statute, resolving all doubts in favor of constitutionality. Id., at 285. In holding that individual property rights are subject to the exercise of the regulating powers of government, this Court held:

The organic provisions, requiring due process and equal protection of the laws in depriving individuals of life, liberty, or property expressly recognizes that the right to protect life, liberty, and property is not absolute but that it is subject to restrictions that must necessarily be imposed by the law-making power "in order to secure the blessing of constitutional liberty" in "maintaining public order," to "insure domestic tranquility," and "to promote the general welfare."

Whitaker v. Parsons, 80 Fla. 352, 86 So. 247, 251 (1920). The purpose behind the adoption of the thoroughfare map pursuant to the Comprehensive Plan Act and rules promulgated thereunder is clearly much more than the economic purpose of the map of reservation statute found by this Court in Joint Ventures to be a "thinly veiled attempt" to acquire land. The purposes behind the thoroughfare map and PALM BEACH COUNTY'S Comprehensive Plan clearly fall within a legitimate exercise of the state's police power and are therefore not facially unconstitutional under the first prong of the test enunciated in Agins v. City of Tiburon, 447 U.S. 255

(1980).¹

C. The thoroughfare map does not deprive every property owner of substantial economic use of their property as a whole.

The United States Supreme Court has noted that a property owner faces an "uphill battle" in attempting to prove a regulation is facially unconstitutional. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 495 (1987). PALM BEACH COUNTY'S thoroughfare map can only be declared unconstitutional on its face if it is unconstitutional in every conceivable application. See e.g. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).

Both federal law and Florida law are clear that when a property owner claims that the regulation deprives the property owner of substantial economic use of his property, the property interest must be viewed as a whole. The United States Supreme Court has twice rejected a property owner's attempt to segment his

¹ In addressing a property owner's claim that Lee County's Comprehensive Plan amounts to a taking of the property owner's property for which compensation is due, the Eleventh Circuit Court of Appeals has noted that just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest. Reahard v. Lee County, 968 F. 2d 1131, 1136 (11th Cir. 1992). Under the Federal Circuit Court of Appeals' opinion, WRIGHT's claims in this case are inconsistent: WRIGHT cannot claim that the thoroughfare map is facially unconstitutional for failing to substantially advance a legitimate state interest while, at the same time, claim entitlement to compensation for the application of the thoroughfare map to the property.

property by either defining the property taken as a segment of the entire ownership interest (Keystone, 480 U.S. at 497-498), or a specific segment of the property's unexercised development rights. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).²

This Court has impliedly rejected segmentation of a property owner's interest to determine a regulatory taking issue by finding a taking did not occur even though the property owner would be required to reduce his proposed development in half. Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981). The Fifth District Court of Appeal has recently reiterated the standard that a property owner's interest must be viewed as a whole in determining whether the regulation deprives the property owner of substantial economic use of his or her property. Department of Transportation v. Joseph Weisenfeld, Case No. 91-2234 (Fla. 5th DCA March 26, 1993) [18 Fla. L. Weekly D803]; Department of Transportation v. James A. Fowler, Case No. 91-1426 (Fla. 5th DCA April 16, 1993). See also, Daniel R. Mandelker, Interim Development Controls and Highway Programs: The Taking Issue, 4 J. Land Use & Envtl. L. 167, 187 fn. 118 (1989) [suggesting that a court applying the doctrine of viewing the parcel as a whole would

² The court specifically distinguished between regulatory takings and physical appropriations. When faced with a physical invasion, the constitution requires compensation no matter how small the area invaded. See Keystone, 480 U.S. at 488, fn. 18, citing to Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). See also, Lucas v. South Carolina Coastal Council, 120 L. Ed. 2d 798, 813, fn. 7 (1992).

not find a taking if the area unaffected by a map is available for a reasonable use.]

In a facial challenge to a regulation asserting that the regulation deprives every property owner affected of substantial economic use of his property as a whole, the court should look for examples where the application of the regulation does not result in a taking. See Fieldhouse, 374 So. 2d 478. It is entirely possible that the thoroughfare map affects a property owner who owns a very large tract of undeveloped land. This property owner, under concurrency requirements, would not even be able to develop his property without an improved road system. In such scenario, the thoroughfare map would not amount to a taking and the exaction of property would be a valid exercise of the police power. See Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Hernando County v. Budget Inns, 555 So.2d 1319 (Fla. 5th DCA 1990); Lee County v. New Testament Baptist Church, 507 So.2d 626 (Fla. 2nd DCA), cert. denied 515 So.2d 230 (1987).

D. In the alternative, if this Court determines that the provision in the thoroughfare map that requires that any development within the designated area be consistent with the thoroughfare map is facially unconstitutional, the trial court's order is overbroad and should be narrowed.

The property owners in this case asked the trial court to find the thoroughfare map and the supporting Comprehensive Plan Act and Zoning Code provisions facially unconstitutional. See Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, pg. 15. The trial court's order finding the thoroughfare map to be facially unconstitutional is overbroad in that it is not the thoroughfare map itself that impinges upon the property owner's constitutional rights but the limitation of development within the area encompassed by the thoroughfare map.

The United States Supreme Court has stated as a "cardinal rule" of deciding constitutional questions that the courts should never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985). If this Court finds the limitation of development within the designated corridors to be a violation of the property owner's constitutional rights, then the appropriate remedy would be to sever out the provisions that limit the developability of the area contained within the map, rather than a complete striking of the thoroughfare map.

This Court has stated that it is bound to avoid constitutional questions concerning a statute by severing objectional phraseology where necessary. County of Palm Beach v. State, 342 So. 2d 56, 58 (Fla. 1976). This Court has severed parts of a legislative enactment to allow the remaining portion to stand as a valid expression of the legislative will even without a specific severability clause in the act. State v. Calhoun County, 126 Fla. 376, 170 So. 883, 886 (1936). Federal courts apply a similar standard. Scheinberg v. Smith, 659 F. 2d 476, 481 (5th Cir. 1981). Should this Court determine that the limitation of development rights contained in the PALM BEACH COUNTY Comprehensive Plan violates the property owner's constitutional rights, the valid public purpose for planning for the future transportation needs of PALM BEACH COUNTY would allow for striking the unconstitutional provisions and allowing the balance of the map and the traffic circulation element contained in the Comprehensive Plan to remain. To affirm the trial court's ruling that the "adoption of the Thoroughfare Map is not a valid police power regulation" would be to invalidate a legitimate planning tool and find the statute requiring the traffic circulation element unconstitutional. Doing so would give more relief than necessary and hamstring the government in the provision of services and facilities.

CONCLUSION

PALM BEACH COUNTY's thoroughfare map substantially advances a legitimate state interest and is therefore constitutional on its face. In the alternative, should this Court determine that the limitation on development within the transportation corridors violates the Constitution, those provisions of the thoroughfare map and comprehensive plan should be struck while leaving the remainder of the thoroughfare map and comprehensive plan in effect.

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 on this 21st day of April, 1993 to ROBERT P. BANKS, ESQUIRE, Assistant County Attorney, PALM BEACH COUNTY, 301 N. Olive Avenue, #601, West Palm Beach, Florida 33402 and WILLIAM P. DONEY, ESQUIRE, Vance & Doney, P.A., 1615 Forum Place, Suite 200, Barristers Building, West Palm Beach, Florida 33401.



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