

**FILED**

SID J. WHITE

APR 23 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA

PALM BEACH COUNTY,

Petitioner,

CASE NO. 81,278

vs.

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

Respondents.

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Brief of Amicus Curiae  
Florida Chapter of the American Planning Association  
on Behalf of the Petitioner

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Chapter of the American Planning Association 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

Palm Beach County's Thoroughfare Map meets constitutional requirements because it represents a legitimate exercise of a local government's planning authority and does not eliminate the value of land it affects. In invalidating the map, the Fourth District Court of Appeal erred by applying an "eminent domain" takings test while reviewing the map. The Thoroughfare Map is a legitimate planning tool that should be analyzed in a regulatory context.

The Thoroughfare Map differs in several ways from right-of-way reservation maps used in eminent domain proceedings. The Thoroughfare Map only limits development to the extent necessary to ensure compatibility with future land uses. The right-of-way reservation maps typically prohibit all development. The Thoroughfare Map can be amended twice a year and is not recorded in the public record. Right-of-way reservation maps are more rigid and are recorded to control land uses.

Despite the trial court's ruling, the Thoroughfare Map does not prohibit all development within the proposed roadway corridor. Some beneficial use of the property is allowed. Also, landowners near the new road receive a reciprocal benefit from the planning effort and may receive a direct benefit when the road is built.

The Court should acknowledge the increasing importance of planning in Florida and should avoid analogies to eminent domain proceedings. Local governments are planning in an attempt to keep pace with the state's rapid growth. The courts of this state

should keep pace with planning by embracing an analysis that accurately measures its constitutional implications.

ARGUMENT

A THOROUGHFARE MAP THAT IS USED FOR PLANNING  
BUT WHICH HAS THE INCIDENTAL EFFECT OF REDUCING  
DEVELOPMENT IN FUTURE TRANSPORTATION CORRIDORS IS NOT  
FACIALLY UNCONSTITUTIONAL.

A. PALM BEACH COUNTY'S THOROUGHFARE MAP IS A  
PRODUCT OF FLORIDA'S GROWTH MANAGEMENT LAWS THAT  
SHOULD NOT BE EVALUATED UNDER AN "EMINENT DOMAIN" ANALYSIS.

In concluding that Palm Beach County's Thoroughfare Map is invalid, the Fourth District Court of Appeal relied upon a line of cases addressing government's impermissible use of pre-acquisition measures to depress the value of land in anticipation of the exercise of eminent domain.<sup>1</sup> However, the analogy drawn by the District Court of Appeal is flawed. A review of the relevant statutory and decisional law indicates the primary purpose and effect of the Thoroughfare Map reviewed by the Fourth District Court of Appeal was not to "freeze" land values in anticipation of acquisition. Rather, the Thoroughfare Map finds its roots in the

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<sup>1</sup>The Fourth District Court of Appeal based its decision in large part on this Court's invalidation of a right-of-way reservation statute in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990). In Joint Ventures, the challenged statute allowed the Department of Transportation to record a right-of-way reservation map in order to prohibit development in the road corridor in anticipation of an eminent domain proceeding to purchase the property.

requirements of Florida's growth management laws and represents the exercise of a valid transportation planning tool. When Florida's unique planning laws --rather than a discussion of eminent domain--inform the legal analysis, Palm Beach County's Thoroughfare Map is seen as a valid exercise of the police power of local government.

Planning is vitally important to the citizens of Florida. Florida is the fastest growing large state, and the state's population increases by almost a thousand people each day. Spurred by a series of environmental disasters and the effects of increasingly overburdened infrastructure, the Florida Legislature created the Local Comprehensive Planning and Land Development Regulation Act ("the Act"). See Chapter 163, Part II, Fla. Stat. (1991). The Act embodies an ambitious program that requires each local government to adopt a comprehensive plan so that growth could be directed to appropriate areas. Fundamentally, the Act requires that local governments estimate future growth, designate land uses (such as residential and commercial uses) to accommodate the growth, and plan the infrastructure that will service the designated land uses. To make this information accessible to the public, each comprehensive plan must contain maps that graphically depict the location of the future land uses and the infrastructure that will support them. See Fla. Admin. Code R. 9J-5.007(4).

The Thoroughfare Map that is the subject of this appeal manifests Palm Beach County's obeisance to the requirements of the Act and its implementing rules. Specifically, the Act requires the depiction of the general location of planned roads. See Fla.



Admin. Code R. 9J-5.007(4). Thus, the future transportation corridors depicted on the Thoroughfare Map show the general location of as-yet-unbuilt roads needed to accommodate as-yet-unbuilt developments. The Thoroughfare Map is comprehensive planning in its truest sense; an estimate of infrastructure needs in graphic form based on a local government's careful analysis of the magnitude and effects of population growth.

Courts have usually recognized the distinction between anticipating future infrastructure needs for purposes of land use planning and engaging in pre-condemnation activities in preparation for exercising the power of eminent domain. The Palm Beach County Thoroughfare Map is based on the former precept, the statute invalidated in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622, (Fla. 1990), is based on the latter. The trial court below (and later the Fourth District Court of Appeal) erred in finding them "legally indistinguishable."

Given the commonality in the subject matter addressed by planning and eminent domain proceedings, it is understandable that confusion may exist. Both comprehensive planning and eminent domain affect the use of land in future roadway corridors in anticipation of roads being constructed. However, comprehensive planning differs from condemnations in its purpose and effects and in the legal analysis that should be applied in evaluating each approach.

The planning and designation of land uses within a future transportation corridor occurs to ensure compatibility between

development activities and to serve (and increase the value of) adjoining property. For example, from a planning perspective it would make little sense to allow construction of high-rise office buildings in a future transportation corridor if the use of the corridor (the construction of a road) was obviously incompatible with the existence of office buildings in the same location.<sup>2</sup> Importantly, the delineation of the transportation corridor is not done for the purpose of lowering land acquisition costs for condemnation.

The effects of comprehensive planning differ markedly from the effects of pre-condemnation activities authorized under right-of-way reservation statutes. The Act makes comprehensive planning a fluid process. A local government may amend its comprehensive plan twice a year, and it is common to alter the location and configuration of planned-but-unbuilt roads. For example, the Palm Beach County Comprehensive Plan calls for an "Urban Form Study" that will reevaluate the infrastructure needs of the northern portion of the County. The study is ongoing, and it is very likely that the Thoroughfare Map will change as a result. Indeed, the Act requires that each local comprehensive plan periodically undergo a complete review and anticipates wholesale revision of the plans. It

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<sup>2</sup>It is important to note that Palm Beach County's Thoroughfare Map and attendant comprehensive plan provisions only diminish development potential in roadway corridors to the extent necessary to ensure future uses will be compatible. Despite the lower court's ruling, it is inaccurate to say that the Thoroughfare Map and plan policies *prohibit* development in corridors. For example, less permanent forms of development such as parking, roadside stands, and landscaping would probably be allowed.

is quite possible that a local government may shift the location of transportation corridors in its comprehensive plan, leaving the landowners' property undisturbed and unaffected in the future.

In contrast, the statute invalidated in Joint Ventures called for the creation of right-of-way reservation maps that were much less subject to change. The maps were recorded in the public record, were valid for five years, and could be extended for five more years. Unlike the local comprehensive planning process, there was no opportunity to seek an amendment of the maps twice a year before a body of popularly elected officials.

The comprehensive planning process results in a generalized treatment of land uses. The Act simply requires that the local governments adopt generalized land use maps. See Fla. Admin. Code R. 9J-5.007(4). In this case, the County's Thoroughfare Map depicts the approximate location of the planned roadway corridor. Specific roadway alignments are determined following the completion of alignment studies on a case-by-case basis. It is unclear how the Thoroughfare Map will specifically affect a parcel until an alignment study is done or the landowner applies for development approval near the planned corridor. With this generalized approach, the local government and the developer are given flexibility to address specific development proposals. This flexibility is lacking in the pre-condemnation proceedings contemplated in Joint Ventures.

The courts have recognized the distinction between planning and pre-condemnation activities. City of Miami v. Romer, 73 So.2d

285 (Fla. 1954), is illustrative of this point. In that case, this Court held that "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." Id. at 286-87. The Court also noted that its analysis did not change "even though the ordinance prevents the development of the property in a manner not conforming to the plan." Id. at 287. Palm Beach County's Thoroughfare Map has a similar purpose and effect and, like the map in Romer, should be upheld. Otherwise, "the whole purpose of planning and zoning, which look to the future, would be frustrated." Krieger v. Planning Commission of Howard County, 167 A.2d 885 (Ct. App. Md. 1961) at 886.

The legal distinction between legitimate planning and impermissible pre-condemnation maneuvering becomes even more obvious in the post-Romer era of comprehensive planning in Florida. It is vitally important that this Court recognize the distinction. The implications of the Court's decision in this case extend well beyond the mapping of transportation corridors. The Act requires that local governments plan many forms of public infrastructure, including solid waste facilities, stormwater facilities, and sewage facilities. It is often appropriate to vary development densities to accommodate these facilities. The Act also requires that comprehensive plans address the protection of native vegetative communities and wildlife habitat. Frequently, these areas are mapped in corridors in order to address the protection of an

ecosystem that crosses private property lines. A common method of ensuring protection is to lower densities so development will be compatible with the continued functioning of the natural systems. These common and important planning practices would be threatened if the opinion below were upheld.

B. PALM BEACH COUNTY'S THOROUGHFARE MAP  
PROBABLY INCREASES THE VALUE OF NEARBY PROPERTY.

In this case, the trial court concluded that "the adoption and implementation of the Thoroughfare Map by Palm Beach County results in the imposition of a development moratorium." Again, the trial court has failed to adequately consider the role of planning under Florida's growth management program. A review of the plan policies underlying the Thoroughfare Map reveal that only development that would *impede* the construction of roads is prohibited in mapped corridors and, as discussed earlier, many types of development exist that are compatible with road construction. Perhaps more important, the trial court fails to point out that unless roads are built in Palm Beach County all development may cease. The developers most likely to benefit from road construction are those whose projects are adjacent to newly built roads.

Section 163.3177(h), Fla. Stat. (1991), requires that roads to accommodate development must "be available concurrent with the impacts of such development." The "concurrency" requirement thus imposes a development moratorium when infrastructure capacity is not available to accommodate additional development. Typically, the closer a project is to a road that has excess capacity, the

more likely it is that a concurrency moratorium will not occur. Therefore, projects closest to new roads benefit the most from construction of roads.

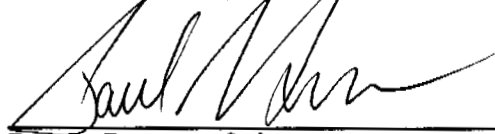
Like most urban counties in Florida, Palm Beach County is struggling to build enough roads to meet the requirements of concurrency. Development moratoria occur. Land bordering the proposed roadway corridors in Palm Beach County will benefit from the construction of the roads shown on the Thoroughfare Map. It is likely that the construction of the roads will significantly increase the value of nearby property.

The reciprocal benefits from comprehensive planning should be closely considered and given appropriate weight in this Court's analysis. Where a challenged provision is a component of a comprehensive regulatory approach, courts are often more inclined to uphold the validity of the land use control. See Gardner v. New Jersey Pinelands Commission, 593 A.2d 251 (N.J. 1991). As Justice Stevens noted in his dissent in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2923 (1992), "[a] diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan."

CONCLUSION

The Thoroughfare Map furthers an important and legitimate governmental interest and does not deprive landowners within the transportation corridors of all beneficial use of their property. Accordingly, the map passes constitutional muster. The Florida Chapter of the American Planning Association requests that this Court reverse the decision of the Fourth District Court of Appeal and uphold the constitutionality of the Thoroughfare Map and its attendant comprehensive plan policies.

Respectfully submitted,



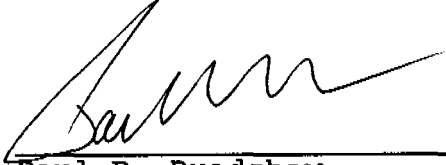
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents was served by U.S. Mail on the following individuals this 21st day of April, 1993.

  
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