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IN THE SUPREME COURT, STATE OF FLORIDA

PALM BEACH COUNTY,

Petitioner,

v.

SUPREME COURT OF FLORIDA
CASE NO. 81, 278

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

Respondents.

INITIAL BRIEF OF AMICUS CURIAE, 1000 FRIENDS OF FLORIDA

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I. STATEMENT OF JURISDICTION

1000 FRIENDS OF FLORIDA adopts the Statement of Jurisdiction in Palm Beach County's Initial Brief.

II. STATEMENT OF THE FACTS AND THE CASE

1000 FRIENDS OF FLORIDA adopts the Statement of Facts and the Case in Palm Beach County's Initial Brief.

III. SUMMARY OF ARGUMENT

The opinion below should be reversed because, unlike the statute which was invalidated in the Joint Ventures case, the County's Thoroughfare map is substantially related to a legitimate public purpose. That purpose is the planning and construction of a traffic circulation system which will benefit county landowners by facilitating more intensive and profitable uses of their land. The map is an implementing mechanism for a comprehensive, rational, long term county-wide planning effort, not an arbitrary and capricious attempt to avoid treating landowners fairly. Because the map's purpose is a valid one and because it may result in long term increases to the value of affected property, it is not facially invalid and courts should find that it results in a taking only when actually shown to do so in a specific application.

IV. ARGUMENT

ARGUMENT ONE:

THE FOURTH DISTRICT ERRED IN FINDING THAT THE INSTANT CASE IS CONTROLLED BY JOINT VENTURES INC. v. DEPARTMENT OF TRANSPORTATION. THE PURPOSE AND EFFECT OF THE ORDINANCE AT ISSUE ARE FUNDAMENTALLY DIFFERENT FROM THE REGULATION AT ISSUE IN JOINT VENTURES AND DO NOT CREATE A PER SE TAKING.

A.

The statute at issue in Joint Ventures was facially unconstitutional because it bore no substantial relationship to a legitimate public purpose.

The Fourth District found the County's thoroughfare map invalid expressly on the authority of Joint Ventures Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990); Orlando/Orange County Expressway Authority v. Orange North Associates, 590 So.2d 599 (Fla. 5th DCA 1991); and Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield Ltd., 582 So. 2d 790 (Fla. 5th DCA 1991). The Court thus erred in failing to understand the difference between the state statute which was invalidated in those cases and the local ordinance at issue in this case. Despite the superficial analogy that both sets of cases involve something labelled as a "right of way reservation", both the purpose and affect of the ordinance at issue in this case make this a fundamentally different case for purposes of "takings" analysis.

The express purpose of the statute which was invalidated in Joint Ventures was not a legitimate one and the statute did not provide a constitutionally acceptable approach to compensation. The statute in Joint Ventures created a taking because it was

expressly designed solely to reduce the value of lands which the Department of Transportation might desire to acquire on the future. The statute authorized the Department to record a reservation map for five years and extend the reservation for another five years. This recordation precluded the issuance of any permits authorizing development on the affected property. An exception was provided for improvements to private homes and renovations of commercial structures which did not raise the appraised value more than twenty percent. Id. at 623. The development moratorium could thus last up to ten years, "after which DOT could abandon its road building plans and forego condemnation proceedings" Id. at 627. The statutory scheme exhibited no valid public purpose underlying this approach. Instead,

[T]he legislative staff analysis candidly indicates that the statute's purpose is not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property. . . . We perceive no valid distinction between "freezing" property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited.

Joint Ventures, 563 So. 2d at 626 (citations omitted)

The Supreme Court found that the purpose of the statute, to "economize the expenditure of public funds", was an improper one. Id.

Joint Ventures is based essentially upon the substantial relationship test: a government action is a taking if it does not bear a substantial relationship to a legitimate government interest. See, Agins, 100 S. Ct. at 2141. Joint Ventures found

that, while the general interest in keeping roads affordable was legitimate, the lowering of land prices through regulation in order to facilitate their taking through eminent domain was not a legitimate interest, but rather a "thinly veiled effort to 'acquire' land" without compensating the owners. 563 So. 2d at 625. The statute therefore created a taking, without regard to the extent to which the value of a particular property was affected, because it violated substantive due process. The instant case is controlled by Joint Ventures only if the Thoroughfare Map also serves only an invalid public purpose.

B.

The comprehensive plan policies at issue bear a substantial relationship to valid governmental and public interests and thus are not facially unconstitutional.

The key fact relied on by the Court in Joint Ventures to find that the government interest was not valid was a staff comment that the purpose was to lessen the cost of acquisitions. To do this, the statute put severe restrictions on the use of property within the reservation area; restrictions for which the landowner received not only no direct compensation, but no "reciprocal advantage." The interest was not legitimate because the government was harming landowners significantly just to save money. That is not the case with the case of the policies at issue here.

- 1) Right of way reservations for new roads create value for the landowners.

Without roads, no significant development can occur. Under Florida's Growth Management Act, the County, through its comprehensive plan, is required to restrict development in areas not served by an adequate roadway system. §163.3177(10)(h), Fla.Stat. Managing the negative effects of haphazard growth is a legitimate public purpose. Agins v. City of Tiburan, 455 U.S. 255 (1980).

A local government acts within its police power if it plans and zones only those areas served by existing roadways for medium or high intensity development but allows only very low intensity development in all other areas. Thus, as long as the minimum use allowed was an economically viable one, no taking would exist, but the value of the affected properties would reflect only the minimal use allowed. An alternative approach by a local government would be to designate such properties in its comprehensive plan and zoning code for a higher intensity, and thus higher value, use, but to restrict that use to the temporal and spatial extent necessary to facilitate the provision of the roadway facility required to allow the realization of that use and the use of other properties that would be served by the roadway. In this manner, the long term value of the property is actually enhanced. For this reason alone, a planning tool like the Thoroughfare Map can not categorically be presumed to be a taking but must be analyzed for its specific impact when applied to a particular set of facts.

Landowners benefit from reservations designed to facilitate a higher use of their property, (unlike the DOT statute at issue in

Joint Ventures) because they allow the local government to allow higher land uses and therefore higher land values.

Corridor maps also allow 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. The stated intent in enacting the Thoroughfare Map is clearly distinguishable from Joint Ventures where the court found that the purpose of the reservation map was to depress land values artificially prior to condemnation. The County's Thoroughfare Map serves the valid public purpose of placing the public on general notice as to the possibility that a future road will be constructed in a particular location. The preparation and adoption of this general corridor map is a valid exercise of the police power, even though its eventual application may raise a taking issue concerning an individual parcel of property. However, the Thoroughfare Map's mere existence does not amount to a taking unless and until it is shown to deprive a particular landowner of all economic use of her property.

- 2) The Thoroughfare Map is a planning measure implemented as part of a comprehensive growth management plan that is mandated by State law.

Florida's Growth Management Act requires each of the state's local government's to adopt and enforce a comprehensive plan designed to promote orderly growth and development. See §163.3161, Fla. Stat., §163.3177, Fla. Stat. and §163.3167, Fla. Stat. Such plans are to include a number of elements, among them a Future Land

Use element and "a traffic circulation element consisting of the types, locations, and extent of existing and proposed major thoroughfares and transportation routes..." §163.3177(5)(b), Fla. Stat. (1991). The various plan elements must be consistent with each other, §163.3177(2), Fla. Stat., and specifically, the future traffic circulation system must be coordinated with the land uses proposed in the future land use element. Rule 9J-5.006(3)(b)(2), Fla. Admin. Code. The Act requires the identification of existing and proposed thoroughfares. §163.3177(6)(b), Fla. Stat. (1991). Local governments like Palm Beach County are specifically required by Rule 9J-5.007(3)(B)4. and (C)4. Fla. Admin. Code, to place measures in the Comprehensive Plan to protect existing and future rights-of-way from building encroachments and to preserve and acquire existing and future rights-of-way.

Finally, local governments provide public facilities and services that meet or exceed standards established in a comprehensive plan. §163.3202(2)(g), Fla. Stat. Roadways are among the facilities that development orders are measured against. Additionally, a plan must include a capital improvements element which projects the cost and completion date of all public facilities required by the plan. The ultimate purpose of this element is to ensure that facilities and services needed to serve development are available concurrent with the impacts of that development. This court has previously found the Act to serve a compelling legislative purpose. Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA 1990). Land use planning efforts which are

based upon duly adopted comprehensive plans are not arbitrary and capricious. Lee County v. Morales, 557 So. 2d 652 (Fla. 2nd DCA 1990).

The Thoroughfare Map is designed as a means for the County to identify the roads that will be necessary to meet the level of service standards established in the Comprehensive Plan at "buildout" of the County. This is consistent with the goal of the Traffic Circulation Element of the 1989 Comprehensive Plan which is "to provide a safe, efficient, convenient and economical traffic circulation network. The traffic circulation network must have sufficient capacity to efficiently and safely move people, goods and services throughout the County with minimal adverse impact to the natural environment." The Thoroughfare Map is also designed to place the property owners on notice as to the necessity and location of the future roads. The Plan states that this will "frequently alleviate the necessity for condemnation proceedings and allows land developers the opportunity to plan their developments with proper road interfacing requirements."

The stated purpose of the Thoroughfare Map is to make a reality the planned traffic circulation system for Palm Beach County. The Map is a long range planning tool to balance land uses and the need for access. The Map and Comprehensive Plan's purpose is to assure continuity of the transportation system, to anticipate future needs in areas where right-of-way does not exist, and to utilize existing right-of-way, among other things.

Roadway reservations based upon a comprehensive plan are clearly not for the sole purpose of lessening public land acquisition costs, but are intended to allow land use decisions that are beneficial to the landowners affected by the reservations. This, in contrast to the statute at issue in Joint Ventures, is a legitimate public purpose. Furthermore, requiring land owners to bear some of the cost of those benefits has been found to be legitimate in other contexts.

A century ago, zoning ordinances were viewed as repugnant to private property rights because they took away preexisting development rights without compensation. See generally, 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). However, 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), Justice Sutherland writing for the Court stated:

"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 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 386-87.

The concept of protection of future road rights-of-way has been upheld as a valid exercise of the police power in caselaw upholding the facial constitutionality of official map statutes which provide the statutory authority in several states for local governments to plan the future roadway network and prevent encroachment of development within the roadway network. In Headley v. City of Rochester, 272 N.Y. 197, 5 N.E. 2d 198, 199 (NY 1936) it was accurately stated that:

The mere adoption of a general plan or map showing streets and parks to be laid out or widened in the future, without acquisition by the city of title to the land in the bed of the street, can be of little benefit to the public if the development of the land abutting upon and in the bed of the proposed streets proceeds in a haphazard way, without taking into account the general plan adopted and, especially, if permanent buildings are erected on the land in the bed of the proposed street which would hamper its acquisition or use for its intended purpose.

C.

Because the regulation at issue bears a substantial relationship to a legitimate governmental interest, it does not constitute a per se taking and can properly be found to result in a taking only when shown to result in a taking as applied.

Per se violations of the takings clause are limited to "two discrete categories." Lucas v. South Carolina Coastal Council, 505 U.S. -----, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812 (1992).

These per se violations are restricted to regulations that mandate a physical invasion of all affected properties and those which necessarily take all economic use of all parcels of property affected by the regulation. Id. Through the application of the rule announced in Lucas to the facts of the instant case, Palm Beach County's preparation and adoption of this general corridor map is not a per se taking. The map may in fact cause a taking when applied in any individual case, but this calls for a case by case, factual analysis, not a presumption that its mere adoption causes damages and results in a taking of all property to which it applies.

An ordinance is facially unconstitutional only if every application of it would be unconstitutional. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 2124 (1984). In Hernando County v. Budget Inns of Florida, Inc., 555 So. 2d 1319 (Fla. 5th DCA 1990) the court found that an ordinance requiring a developer to show a frontage road on its building plans was unconstitutional as applied when there was no demonstrated need for the road. The court observed that there are appropriate cases where conditions can be placed on a building permit "if the condition furthers a public purpose related to the permit requirement." Id. at 1320, n.3.

A regulation results in a taking if it "denies an owner economically viable use of his land." Agins, 100 S. Ct. at 2141, citing Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 2666 (1978). In a facial challenge, the

test for determining economically viable use focuses on existence of permissible uses. Glisson, 558 So. 2d at 1036 . When analyzing a facial challenge to a regulation, courts do not look at the unique factual situation facing a particular property owner, but rather, view the regulations in the abstract, examining only the statute. To prevail, the landowners must show there is no available beneficial use of the property. Glisson, 558 So. 2d at 1036 . The burden is on the property owner to show that the regulation, on its face, denies beneficial uses.

Analyzing the Thoroughfare Map in terms of permissible uses, it is clear that no particular use is banned in the future right-of-way. The land use element states that "no land use or construction" is permitted within a future right-of-way that would "impede future construction of the roadway." The Traffic Circulation Element requires development to "be consistent and provide for transportation rights-of-way" shown on the map. The implementation of these provisions occurs on a case by case basis. There is no way to determine what particular use would be allowed without resorting to an as applied analysis. The Thoroughfare Map and the relevant portions of the Comprehensive Plan cannot, therefore, act as a facial taking of any of Appellees' property at issue in this case.

In order to determine if a taking has occurred regarding a parcel of land, analysis must be made of the effect of the regulation on property as a whole. In Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221, 226 (Fla. 1st DCA 1983),

the court stated that under Florida law, a taking will not be established merely because an agency denies a permit for a particular use of property or because the agency totally denies use of some portion of the property.

The difficulty in challenging a generalized roadway map in a comprehensive plan was recognized by the California Supreme Court in Selby Realty Company v. City of San Buenaventura, 514 P.2d 111, 115 (Cal. 1973) where the court stated:

The County has taken no action with respect to plaintiff's land except to enact a general plan describing proposed streets, as required by state law. ... The plan is by its very nature merely tentative and subject to change. Whether eventually any part of plaintiff's land will be taken for a street, depends upon unpredictable future events. If the plan is implemented by the County in the future in such a manner as to actually affect plaintiff's free use of his property, the validity of the county's action may be challenged at that time.

The Selby courts approach is the most intelligent, fair and realistic one. There is no facial taking which requires compensation when a general roadway corridor map is adopted. Should a landowner who has no development plans receive compensation for only a partial land use restriction which may be lifted prior to the initiation of any development and which thus impacted her to no extent, automatically receive compensation. Should the owner of a 100 acre parcel with a 100 foot frontage restriction be automatically compensated? Should any owner be compensated for a short term restriction that will ultimately increase their property value. As in the majority of takings cases, these decisions are fact-specific. Per se rules are wholly inappropriate.

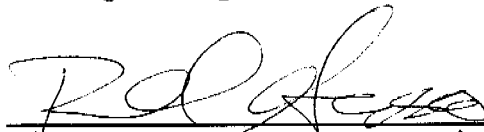
V. CONCLUSION

"Taking" cases, such as this one can not be viewed under a rigid framework which focuses only on one side of the relevant equation and which assumes that government action can only harm the interests of property owners. The Florida Supreme Court must, as it did in Glisson, acknowledge that Florida's Growth Management Act, and the local plans and regulations it results in, can result in the greatest good to both the public as a whole and individual landowners only if it's benefits and burdens are viewed together. The court's framework for deciding comprehensive planning cases must reflect the understanding that comprehensive, non-arbitrary planning schemes are to be viewed differently from actions which arbitrarily harm individuals with all the benefit going to the public at large. Property owners will substantially benefit as a result of roadway planning efforts like the one at issue here. This can only happen if the courts continue the tradition of granting relief when shown to be necessary but otherwise allowing a governmental measure to be implemented to the benefit both of the public at large and individual landowners.

A local government's attempt to plan for and build a roadway system that actually connects up in all the right places and is adequate to accommodate the impacts of land uses desired by land owners must be sustained facially. The Courts should step in, when and only when those efforts in fact deprive a specific landowner of his or her property rights. This Court must build upon the frame of reference begun in Glisson and view planning efforts in their

proper, long-term perspective. Under such a perspective, the lower court's decision should be reversed and Palm Beach County's Thoroughfare Map should be found to be facially valid, but subject to the constitutional "taking" limitation in all of its specific applications.

Respectfully submitted this 21st day of April, 1993.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this document has been furnished by U.S. Mail to the following on this 21st day of April, 1993.



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