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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,278

PALM BEACH COUNTY,

Petitioner,

v.

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

Respondents.

RESPONDENT(S) ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

1. The Thoroughfare Right-of-Way Protection Map of the Palm Beach County Comprehensive Plan is referred to herein as "Thoroughfare Map" or "Map."
2. Citations to the Record are to the Exhibits in the Appendix to Initial Brief filed at the Fourth District Court of Appeal and are cited as Exhibit _____ with appropriate letter. In addition, Exhibits G-4, G-5, G-6 and G-12 are specifically included in Petitioner's Appendix to Initial Brief herein. Respondents have also filed an Appendix to Answer Brief which specifically includes Exhibits A-1, A-2, A-5, G-1, G-2, G-7, L and P.
3. Petitioner, Palm Beach County, is herein referred to as "Palm Beach County", "County."
4. Respondents are herein referred to as "Plaintiffs," "Respondents," or by the individual Respondent's name.
5. References to Petitioner's Initial Brief are cited as PB -- with appropriate page number.

STATEMENT OF THE FACTS

Appellee(s) set forth the following Statement of Facts to add certain facts which are pertinent to this appeal which have been omitted from Petitioner's Statement of Facts and further to illustrate areas of disagreement as to Petitioner's Statement of Facts. Petitioner begins its Statement of Facts by describing the "Thoroughfare Map" as a planning tool adopted in compliance with the Local Government Comprehensive Planning and Land Development Act, §163.3177(6)(b) Fla. Stat., (1991) (PB-2). This statement is accurate but incomplete in that the Thoroughfare Map is far more than a planning tool or line on a map generally showing future potential right-of-way corridors. The Trial Court's revised Order on Cross-Motions for Partial Summary Judgment (Exhibit P), succinctly summarizes the facts in this cause as follows:

A) There are no genuine issues as to any material fact, and Plaintiff(s) are entitled to a judgment as a matter of law.

B) Plaintiff(s) are the owners of six (6) separate parcels of land located in unincorporated Palm Beach County. Each of Plaintiff(s)'s properties are on the north side of and abut Southern Boulevard (State Road 80).

C) The Thoroughfare Map was adopted by Defendant as part of its 1989 Comprehensive Plan by Ordinance No. 89-17. The Thoroughfare Map defines certain protected transportation corridors along specified roadways throughout Palm Beach County, as well as in other certain locations where Defendant intends to construct or extend new roadways in the future. The Thoroughfare Map protects a corridor two hundred twenty (220') feet in width along Southern

Boulevard. Pursuant to Defendant's Comprehensive Plan, since Southern Boulevard is bounded on the south by a physical barrier (C-51 Canal), the protected corridor is measured northward from the existing south right-of-way line of Southern Boulevard.

D) Defendant's traffic circulation element of its Comprehensive Plan provides that the "County shall provide for protection and acquisition of existing and future right-of-way consistent with the adopted Thoroughfare Right-of-Way Protection Map." The traffic circulation element continues by providing that the "Map is designed to protect identified transportation corridors from encroachment by other land use activities." The Thoroughfare Map applies to all land development activities within unincorporated Palm Beach County. Land development activities are defined as including, but not limited to, residential, commercial, institutional or industrial purposes. All development is required to be consistent with and provide for the transportation right-of-way shown on the Thoroughfare map.

E) The land use element of Defendant's 1989 Comprehensive Plan provides that no land use activity may be permitted within any roadway designated on the Thoroughfare Map that would impede future construction of the roadway. The land use element further provides that all development approvals and actions by Defendant must be consistent with the provisions contained in the Comprehensive Plan.

F) The 1989 Comprehensive Plan provisions, as the same apply to the Thoroughfare Map, are substantially the same as the Thoroughfare Map provisions and restrictions contained in

Defendant's 1980 Comprehensive Plan (as adopted by Ordinance No. 80-8).

Petitioner's Statement of Facts continues by noting that "The Map outlines the general location and proposed width of all arterial roads in the County." Petitioner next contends that the "Map does not indicate precise locations of roadways . . ." (PB-2). This statement is inaccurate in that provisions of the 1980 and 1989 Comprehensive Plans are quite specific in locating the lands subject to the protection of the Thoroughfare Map. Ordinance No. 80-8 (Exhibit G-4) adopted Petitioner's Comprehensive Plan, which in turn adopted the Thoroughfare Map. Section 3: Right-of-Way Location, of this portion of the 1980 Comprehensive Plan provides as follows:

Section 3: Right-of-Way Location

The center line of the rights-of-way shown on the Thoroughfare Right-of-Way Protection Map normally coincides with land division lines, such as township lines, section lines, quarter section lines and other normal sectional division lines. The center line of a corridor shall be the center line of existing right-of-way, or the center line as shown on the recorded thoroughfare right-of-way protection map, or as shown on precise alignment ordinances established as prescribed in Section 4 or shown on subdivision plats and right-of-way maps recorded after adoption of the Traffic Circulation Element (except where a right-of-way cannot be established symmetrically along a normal sectional division line due to physical barriers such as lakes, waterways, canals, railroad, expressways, electrical transmission facilities and structures) the right-of-way shall be located adjacent to and compatible with the barrier. The center line for rights-of-way which do not incorporate existing rights-of-way shall be the center line of the existing right-of-way projected through the extended right-of-way, unless otherwise

established by precise alignment. (Emphasis added) (Exhibit G-4, page 5, Section 3).

Thus, pursuant to Petitioner's Comprehensive Plan, the center line of the thoroughfare corridor is very precisely located and is measured from the center line of existing rights-of-way or in the instance of a roadway like Southern Boulevard (SR 80) with a canal (C-51, West Palm Beach Canal) running alongside and abutting existing right-of-way, the corridor shall be adjacent to and compatible with the barrier. Petitioner's 1989 Comprehensive Plan adopted substantially the same provisions pertaining to the specific locations of protected right-of-way.

Petitioner is correct that in 1991 it amended its Comprehensive Plan by Ordinance 91-31 (Exhibit G-10), to provide that "the centerline of a corridor shall generally be the centerline of existing right-of-way of their extensions . . ." This amendment continues to state that "Except where a right-of-way cannot be established symmetrically along a normal division line due to impediments such as, but not limited to, physical barriers . . ., the right-of-way may be located to be compatible with the impediment." All provisions noted above from the 1989 Comprehensive Plan (Exhibit G-5) pertaining to the prohibition of all land development activity within the protected corridor remained in effect despite the 1991 amendment. Further, Petitioner's zoning code which has been in effect at all times pertinent to the appeal contains the following definitions (Exhibit G-7):

Base Building Line - A line measured at right angles running parallel to the centerline of a street from which front yard, corner side

yard, and lot requirements are measured, unless waived by the county engineering department as provided below. The base building lines for all streets is established as follows:

- 1) Collector and Arterial Streets:
The base building line for all collector and arterial streets shall be forty (40) feet beyond the existing right-of-way or the right-of-way line as required by the Palm Beach County Thoroughfare Plan, when adopted, whichever is greater. (Emphasis added).

Setback - A line running a certain distance back from and parallel with the base building line or front property line whichever provides the greater separation wherein no building, structure or portion thereof shall be permitted, erected, constructed, or placed unless specifically permitted by this Code.

Thus, although Petitioner now contends that its Thoroughfare Map outlines only the general location and proposed width of all arterial roads in Palm Beach County, its own zoning code used precise locations of the right-of-way line as established by the Thoroughfare Map to measure base building lines and building setback provisions.

Further, Petitioner's Thoroughfare Map is quite specific as the same affects Respondents' properties and can be precisely shown by survey as to each individual property. As shown in the exhibits attached to the Complaints filed in this cause by Appellee, Osiris Ramos, and Appellee, JDK Industries, Inc., (Exhibits A-2 and A-5), the provisions of the Thoroughfare Map have in fact been precisely applied to specific properties.

Petitioner continues its Statement of Facts (PB, pages 5 and 6) by entering into Argument into the following areas:

1) Petitioner states that no determination has been made as to whether the dedication of right-of-way, even if to the full extent of 220 feet, would be a valid exaction, or as applied, a taking. This statement is factually correct, but clearly illustrates the actual effect of Petitioner's Thoroughfare Map, i.e., all land development activities within the protected area are prohibited with absolutely no analysis by Petitioner and regardless of whether there exists a rational nexus between proposed development, if any, and the extent of any exaction. As will be explained below, this blanket prohibition is unlawful.

2) Petitioner states that no determination has been made as to whether the right-of-way dedication would be reduced to measure only the proportional need for roadway generated by the specific developments. This statement is again factually correct but misses the entire issue in this lawsuit. The Thoroughfare Map provision requires absolutely no rational nexus between the impact of proposed development and roadway needs but mandates that no land development activity shall occur within the protected corridor regardless of the impact, if any, of the development. The extent, if any, of a dedication required in the future is irrelevant to this cause.

3) Petitioner next contends that no determination has been made as to whether a variance might be granted. This is again factually correct but Petitioner's comprehensive plan, unlike the provisions of §337.241(2)(b), Fla. Stat. which were found unconstitutional by this Court in Jt. Ventures, supra, contains no variance provisions or procedures. Should it be assumed that

Petitioner will violate its comprehensive plan and grant a variance from the Thoroughfare Map to Respondents or other affected landowners?

4) Petitioner continues by stating that a landowner may be able to cluster or increase densities on remaining land, obtain rezoning, or be granted additional credits for right-of-way dedication against impact fees or environmental mitigation payments. This again is factually correct and expresses a nice sentiment that could conceivably save Petitioner's Thoroughfare Map from constituting a taking, but none of these suggestions or remedies are contained in Petitioner's comprehensive plan or zoning code and constitute blatant conjecture and speculation.

SUMMARY OF ARGUMENT

Summary of Argument I

The Palm Beach County Thoroughfare Map fails to substantially advance a legitimate state interest and is facially unconstitutional as a taking of property without payment of just compensation. The Thoroughfare Map defines certain protected transportation corridors along specified roadways throughout Palm Beach County. The Map is designed to protect the identified corridors from encroachment by other land development activities. All development is required to be consistent with and provide for the right-of-way shown on the Thoroughfare Map. No land development activity is permitted within any roadway designated on the Thoroughfare Map which would impede future construction of the roadway.

The development moratorium imposed by the Thoroughfare Map is in reality an exercise of eminent domain and is not a valid exercise of the County's police power. As found by this Court in Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), in declaring the map of reservation scheme of §337.241, Fla. Stat., to be unconstitutional, Petitioner's Thoroughfare Map provisions are a "thinly veiled attempt to acquire private property by avoiding legislatively mandated procedures and substantive protections of Chapters 73 and 74, Fla. Stat." There is no valid distinction between "freezing" property prior to eminent domain proceedings and deliberately attempting to depress land values prior to acquisition. Since the Thoroughfare Map fails to substantially advance a legitimate state interest and is a

taking, no inquiry is necessary at this time as to the economic impact of the Thoroughfare Map on particular properties. The matter of economic impact is properly an issue of damages in this inverse condemnation proceeding.

While Petitioner may legitimately plan for growth in Palm Beach County, it may not deliberately prohibit the lawful use of private property under a defacto use of the power of eminent domain before commencement of condemnation proceedings without the payment of just compensation.

Summary of Argument II

The Thoroughfare Map is factually and legally indistinguishable from the map of reservation provisions of §337.241, Fla. Stat found unconstitutional in Jt. Ventures, supra. This was the specific finding of both the Trial Court and Fourth District Court of Appeal. The map of reservation provisions of §337.241, Fla. Stat. could extend for a maximum of ten (10) years while the Thoroughfare Map has been in effect since 1980 and extends indefinitely with no specified expiration date. Section 337.241, Fla. Stat. permitted minor renovations of existing nonresidential structures and no restrictions on renovation of existing residences. The Thoroughfare Map prohibits all land development activity within the corridor which would impede future construction of the roadway. Section 337.241, Fla. Stat., contained a variance and administrative hearing procedure whereby an affected landowner could challenge the reasonableness of the map or show that its effect was to deny a substantial portion of the beneficial use of the property. The Thoroughfare Map and the Palm

Beach County comprehensive plan contain no variance or administrative hearing procedure.

The Thoroughfare Map is far more than a planning tool and "Agreements" attached to the complaints in Wright (Exhibit A-2) and Ramos (Exhibit A-5) demonstrate that Petitioner's true purpose in enacting the Thoroughfare Map is to reduce the cost of acquiring right-of-way in future eminent domain proceedings. Although Petitioner contends that the Thoroughfare Map is merely a "generalized roadway map," the text of the 1980 and 1989 comprehensive plans reveal otherwise as do zoning code definitions of "base building line" and "setback" which utilize the precise future right-of-way line established by the Thoroughfare Map in restricting present and future development.

Summary of Argument III

Since the Thoroughfare Map fails to advance a substantial legitimate state interest, under the test for a taking established in Jt. Ventures, supra and Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the economic effect or impact of the Thoroughfare Map on Respondents' properties are irrelevant. Neither is "ripeness" a defense to a facial challenge to the Thoroughfare Map. In the event the Thoroughfare Map is declared invalid as an unlawful taking, the payment of just compensation is constitutionally mandated.

ARGUMENT I

Part One

THE CORRECT STANDARD OF REVIEW IN THIS CAUSE IS WHETHER PETITIONER'S THOROUGHFARE MAP SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST.

Petitioner commences its brief by addressing the issues of "Standard of Review, Separation of Powers and Burden of Proof." (PB - 10, 11). Since Respondents are challenging the constitutionality of the Thoroughfare Map, there is no doubt that Respondents have the burden of proof in this cause. However, Petitioner relies on a series of general Florida zoning decisions cited on page 11 of its brief to assert that the standard of review in this cause is a "fairly debatable" standard. This line of zoning cases is totally irrelevant in this cause and the issue in this matter is whether Petitioner's Thoroughfare Map substantially advances a legitimate state interest. See Jt. Ventures, supra, and Agin's, supra. As will be discussed in detail below, in order to be a proper subject of the County's police power, the Thoroughfare Map must substantially advance a legitimate state interest. As will also be shown below, since the Thoroughfare Map fails to substantially advance a legitimate state interest, the Thoroughfare Map is an unconstitutional taking of property in violation of the Fifth Amendment to the United States Constitution. Petitioner's further reliance on such cases as Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, L.Ed. 576 (1926) and Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), is equally misplaced in that these cases concluded that the ordinances in question were in fact a valid exercise of authority

or police power, and only then it became necessary to consider the impact of the subject ordinances as applied to a particular property.

ARGUMENT I

Part Two

PETITIONER'S THOROUGHFARE MAP FAILS TO ADVANCE A LEGITIMATE STATE INTEREST, IMPOSES A DE FACTO DEVELOPMENT MORATORIUM OF INDEFINITE DURATION ON A PORTION OF RESPONDENTS' PROPERTIES, AND CONSTITUTES A TAKING WITHOUT PAYMENT OF JUST OR FULL COMPENSATION.

Petitioner, and the amicus curiae briefs filed in support of Petitioner's position, uniformly approach this lawsuit on the basis that it is a legitimate exercise of Palm Beach County's police power to plan for future growth and development. Petitioner's Thoroughfare Map is then portrayed as merely another growth management regulation or planning tool which may in fact result in a taking as applied to a particular individual's property, but which is facially constitutional because Petitioner is mandated by the provisions of §163.3177, Fla. Stat., to plan for future growth in Palm Beach County. Petitioner then launches into a discussion of numerous state and federal regulatory taking cases in support of its contentions.

However, it must be stressed at the outset that this is not a typical regulatory taking case and such an analysis misses the entire thrust of this Court's opinion in Jt. Ventures, supra, in which this Court found the statutory map of reservation provisions of §337.241, Fla. Stat., to be unconstitutional because the development moratorium or freeze imposed thereby was in reality an exercise in eminent domain and not a valid exercise of the

police power. Further, this is not a typical regulatory taking case because such cases usually assume the valid exercise of police power and the issue then becomes the economic effect of the regulation. See e.g. Lucas v. South Carolina Coastal Council, _____ U.S. _____, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). However, as this Court noted in Jt. Ventures, supra, at page 625, there is a distinction between the state's police power (which might lead to a regulatory taking claim) and the power of eminent domain. Eminent domain involves the taking of property because of its need for public use while the police power involves the regulation of property to prevent its use in a manner that is detrimental to the public interest. In reviewing the map of reservation provisions of §337.241, Fla. Stat., this Court concluded in Jt. Ventures, supra, that the State's "thinly veiled attempt to acquire land by avoiding the legislatively mandated procedures and substantive protections of Chapters 73 and 74" is unconstitutional because a development moratorium, in anticipation of the ultimate acquisition of lands by government, in reality an exercise of the power of eminent domain and not of the police power. This, likewise, is precisely the constitutional defect or flaw in Petitioner's Thoroughfare Map, i.e., it freezes for an indefinite period of time Appellee's ability to develop a portion of their privately owned property in anticipation of ultimate eminent domain proceedings contemplated at such time Petitioner deems it necessary to widen a protected roadway corridor. This Court expounded upon the eminent domain/police power dichotomy in Jt. Ventures, supra, by citing San Antonio River Authority v. Garrett Brothers, 528 SW 2d, 266 (Tex.

Ct. App., 1975), as follows:

"In exercising the police power, the governmental agency is acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. This is the role in which government acts when it adopts zoning ordinances, enacts health measures, adopts building codes, abates nuisances, or adopts a host of other regulations . . . But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different. Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer an impartial weigher of the merits of competing interest among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor . . . To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community.

Just as DOT attempted to freeze development by imposition of its Maps of Reservation pursuant to §337.241, Fla. Stat., Petitioner, Palm Beach County, has prohibited development within the areas shown within its Thoroughfare Map. Petitioner is not regulating the use of property to prevent its use in a manner that is detrimental to the public interest. Neither is Petitioner acting as an arbiter of disputes among groups and individuals for the purpose of resolving conflicts among competing interests. Rather, Petitioner, through adoption and implementation of its Thoroughfare Map, has prohibited development on private property for its own benefit, i.e., to reduce its costs of acquisition in

the event that at some future, unspecified date, it desires to proceed to acquire the property by eminent domain.

As this Court noted in Graham v. Estuary Properties, 399 So.2d 1374 (Fla. 1981), one of the considerations in determining whether a taking has occurred is whether the regulation confers a public benefit or prevents a public harm. It was noted that "if the regulation creates a public benefit it is more likely an exercise of eminent domain." Graham, supra, at page 1381. In the case at bar, the benefit of the Thoroughfare Map is purely public and is applicable to a purely governmental function, i.e., the ultimate construction or widening of roadways. However, the burden of the Thoroughfare Map is purely private and borne by those who are unfortunate enough to own property within a protected corridor.

Further, Petitioner has quite simply singled out those who own property along protected corridors, such as Respondents, to bear the burden of future growth in Palm Beach County rather than distributing the burden impartially among members of the community. One of the principal purposes of the Fifth Amendment Takings Clause is to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) at page 3147, fn 4. Just as the United States Supreme Court noted in discussing the applicable California legislation in Nollan, Supra, at page 3150, Petitioner's Thoroughfare Map may well be a good idea, but that does not establish that Respondents (and other owners of property along protected corridors) alone should be compelled to bear the

burden of future road needs in Palm Beach County. Petitioner is free to pursue this program of thoroughfare protection if it wishes, by using its power of eminent domain for this "public purpose," but if it wants to reserve Respondents' properties for future road construction, Petitioner must constitutionally pay for it. As this Court stated in Jt. Ventures , supra, at page 626: "we perceive no valid distinction between 'freezing' property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings." (Citations omitted). Florida Courts have uniformly prohibited the down-zoning of property in anticipation of eminent domain proceedings. See e.g., Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Company. 108 So.2d 74 (Fla. 1st DCA, 1958).

Other states have noted the inherent unfairness and ultimate illegality in government reserving or freezing the use of property for future government acquisition. In the case of Miller v. City of Beaver Falls, 82 A 2d, 34 (PA, 1951), the local government plotted privately owned property for future use as a park or playground and prohibited development thereon for a period of three (3) years: In holding the governmental activity unconstitutional, the Pennsylvania Supreme Court noted as follows:

The injustice to property owners of permitting a municipal body to tie up an owner's property for three years must be apparent to everyone. The city can change its mind and abandon or refuse to take property at the end of three years; but in the meantime the owner has been, to all intents and purposes, deprived of his property and its use and the land is practically unsalable . . .

The action of the City of Beaver Falls in plotting this ground for a park or playground

and freezing it for three years is in reality a taking of property by possibility, contingency, blockade, and subterfuge, in violation of the clear mandate of our constitution that property cannot be taken or injured or applied to public use without just compensation having been first made and secured.

The city is not without a remedy, but it cannot eat its cake and have its penny too. If it desires plaintiff's land for a park or playground which it considers desirable or necessary for its future progress, it can readily and lawfully obtain this land in accordance with the Constitution . . . All that is required is that just compensation be paid therefor. (emphasis in original) Miller v. City of Beaver Falls, 82 A2d 34 (Penn. 1951).

See also Grosso v. Board of Adjustment, 61 A2d 167, 169 (NJ 1948) in which the Supreme Court of New Jersey held that a municipality in exercising the police power may not dedicate a tract of land to highway uses on an "official map" and thereby depriving the owner of all use of the property without payment of compensation until the municipality was prepared to lay out the street. See also, Hager v. Louisville and Jefferson County Planning and Zoning Commission, 261 SW 2d 619 (KY Ct. App 1953) and Forster v. Scott, 32 NE 976 (NY 1893).

As will be discussed in Argument III, The United States Supreme Court decision of Agin's, supra, found that a zoning law effects a taking if the ordinance does not advance a legitimate state interest or denies an owner the economically viable use of his land. (Emphasis added). It is the first prong of the Agin's, supra test which is violated by Petitioner's Thoroughfare Map, i.e., the Thoroughfare Map fails to advance a legitimate state interest. This is the holding in Jt. Ventures, supra. This

takings analysis was confirmed by the United State Supreme Court in Nolan, supra, (1987) when it was noted (at page 3146):

We have long recognized that land use regulation does not effect a taking if it "substantially advance(s) legitimate state interest" and does not "deny an owner economically viable use of his land." (Emphasis added). Citing Agins, supra and Penn Central Transportation Co. v. New York City, 98 S. Ct. 2646, 2660.

Since Petitioner's Thoroughfare Map fails to advance a legitimate state interest, it is a taking under Agin's, supra, supra, and no further analysis of the economic impact of the regulation on the property is necessary. Petitioner apparently concedes this point on page 43 of its brief in discussing the Yee v. City of Escondido decision, _____ U.S. _____, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992). Petitioner's citation and discussion of numerous federal regulatory 'takings' cases are inapposite. This is not a case in which the issue is whether the Petitioner has physically occupied or invaded Respondents' properties. While each of the Respondents have raised the issue that the Thoroughfare Map results in an "as applied" taking of their respective properties, this issue has not yet been litigated and is not an issue in this appeal. Further, this is not a case where this Court must analyze Respondents investment-backed expectations, balancing tests, or which "strand" of the bundle of sticks has been taken.

Petitioner next spends 12 pages in its brief discussing the public purpose of planning in general and the transportation and infrastructure needs of government. Respondents do not dispute that Petitioner has the authority and duty to zone property and plan for future growth in Palm Beach County. However, it is the

means by which Petitioner attempts to achieve its planning goals that runs afoul of the constitution. Petitioner may not deliberately prohibit the lawful use of land under a defacto use of the power of eminent domain before the commencement of condemnation proceedings without the payment of compensation. As stated by Judge Anstead in discussing the effect of the Thoroughfare Map in his specially concurring opinion in this cause:

While the County has a legitimate interest in planning, including the location and development of roadways, under Jt. Ventures, the county cannot "deliberately restrict land use under its police power before the commencement of condemnation proceedings without the duty of compensation." Planning for the future is one thing. However, prohibiting the beneficial use of property without compensation is another. (Emphasis in original). Wright v. Palm Beach County, 612 So.2d 709 (Fla. 4th DCA, 1993), at page 712.

Despite the clear and onerous effect of Petitioner's Thoroughfare Map, Petitioner compares its regulations to those found constitutional in City of Miami v. Romer, 68 So.2d 849 (Fla. 1952). In this 1952 decision, the Florida Supreme Court upheld a City-wide ordinance which provided that "no building shall be erected on any City street in the City of Miami closer than twenty-five (25) feet to the center line of said street." This regulation is a standard building setback provision that applied uniformly throughout the City of Miami, and Petitioner makes no claim in this litigation that its Thoroughfare Map is a typical building setback provision. Further, it is not Respondents' contention that Palm Beach County may not enact valid, reasonable and uniform building setback provisions. Petitioner's Thoroughfare Map itself, which protects varying widths of right-of-way depending on proposed

future road widenings, is factually distinguishable from a valid building setback provision. Further, the scope of the required setback in Romer, supra, clearly distinguishes it from the County's Thoroughfare Map provisions, i.e., in Romer, supra, the City of Miami required a setback of only twenty-five (25) feet from the centerline of an existing roadway, whereas Palm Beach County attempts to protect corridors of up to two hundred forty (240) feet in its Thoroughfare Map, targeting these areas for a future public project, i.e., roadways.

ARGUMENT II

THE PALM BEACH COUNTY THOROUGHFARE MAP IS FACTUALLY AND LEGALLY INDISTINGUISHABLE FROM THE MAP OF RESERVATION PROVISIONS OF §337.241, FLA. STAT., FOUND UNCONSTITUTIONAL BY THIS COURT IN JT. VENTURES, SUPRA.

As noted previously, this Court in the Jt. Ventures, (supra,) decision found the Map of Reservation provisions of §337.241, Fla. Stat., to be unconstitutional. The Trial Court in this matter specifically found that Petitioner's adoption and implementation of its Thoroughfare Map to be legally and factually indistinguishable from the maps of reservation of Jt. Ventures, supra. (See Exhibit P, Paragraph 3). Likewise, the opinion of the 4th DCA (Judge Farmer) in this case specifically noted that "The County has failed to show how its Thoroughfare Map is functionally distinguishable from the reservation map in Jt. Ventures, supra, especially as its own comprehensive plan requires that any development in the area of the Thoroughfare Map be consistent with and provide for future rights-of-way. Wright, supra, at page 710. In Argument II of its Initial Brief, Petitioner attempts to distinguish its Thoroughfare Map provisions from the maps of reservation found invalid in Jt. Ventures, supra. However, a careful review and comparison of the two schemes to preclude the development of privately owned property prior to the institution of eminent domain proceedings quite clearly shows that Petitioner's Thoroughfare Map provisions are even more onerous than the provisions of §337.241, Fla. Stat.

A) Length of Prohibition on Development.

Section 337.241(2), Fla. Stat., provided that upon

recording a map of reservation, no development permit (with some exceptions which will be discussed below), shall be granted by any governmental entity for a period of five (5) years from the recording of the map. Pursuant to §337.241(2)(a), Fla. Stat., the initial five year period could be extended for an additional five (5) year period.

In contrast, Petitioner's Thoroughfare Map extends indefinitely into the future with no specified termination date. Petitioner's 1980 Comprehensive Plan which was adopted by Ordinance 80-8 (effective August 4, 1980) identified the protected corridors for facilities which may be necessary beyond the needs identified for the year 2000. (See Exhibit G-4). Petitioner's 1989 Comprehensive Plan which was adopted by Ordinance No. 89-17 (effective September 11, 1989) which reimposed the Thoroughfare Map, identifies potential highway corridors for facilities that may be necessary beyond the needs identified for the year 2010. (Exhibit G-5, page 14, Thoroughfare Map). In addition, as long ago as 1956, Petitioner adopted special setback requirements for properties along State Road 80 (Southern Boulevard) which is the roadway that abuts each of Respondents' properties. (See Exhibits G-1 and G-2). In 1956, the required setbacks were to provide right-of-way "for the ultimate construction of a four-lane rural road." Quite simply, §337.241, Fla. Stat., established a development freeze for no more than ten (10) years while the freeze created by Petitioner's Thoroughfare Map extends indefinitely and, in fact, properties along Southern Boulevard (State Road 80) in Palm Beach County have been encumbered for nearly thirty (30) years

because of Petitioner's plans to widen this roadway at some undetermined future date.

B) Extent of Prohibition on Development.

Section 337.241(2), Fla. Stat., provided that no development permits, as defined by §380.031(4) Fla. Stat. shall be granted by any governmental entity within the reserved area for new construction of any type or for renovation of an existing nonresidential structure that would exceed 20 percent of the appraised value of the structure. No restriction shall be placed on the renovation or improvement of existing residential structures within the limits shown on such map, as long as such structures continue to be used exclusively as private residences.

Paragraphs C, D and E of the Trial Court's Revised Order on Cross-Motions for Summary Judgment (pages 1 & 2 herein), succinctly sets forth the extent of the Thoroughfare Map's prohibition on development as set forth in Respondents' statement of Facts. In essence, the Thoroughfare Map defines a protected corridor and all land development activities are prohibited within the corridor that would impede future construction of the roadway.

The Map of Reservation provisions thus permitted some minor renovation and repair work while the Thoroughfare Map prohibits all land use activities within the protected corridor. As noted in Judge Anstead's specially concurring opinion, "It is difficult to envision any development that would not impede such future construction." Wright, supra, at page 712.

C) Procedural Safeguards.

Section 337.241(2)(b), Fla. Stat. established a variance procedure for unnecessary hardship. Section 337.241(3), Fla. Stat., established an administrative hearing procedure pursuant to Chapter 120, Fla. Stat., in which an affected landowner could contest the reasonableness or arbitrariness of the map or that the effect of the map was to deny a substantial portion of the beneficial use of his property. In the event a hearing resulted in an order finding in favor of the property owner, the State Department of Transportation was provided 180 days to acquire the property or to amend or withdraw its map of reservation. Either party could seek appellate review of these Chapter 120 proceedings. It should be noted that this Court specifically found in Jt. Ventures, supra, that the administrative hearing procedure established in Subsection 337.241(3) did not provide a procedural cure for the constitutional shortcomings of the statute itself. The remedial protections of Subsection 337.241(3) were declared to be illusory. Jt. Ventures, supra, at page 628.

Petitioner's Thoroughfare Map provides no variance procedure, no method of administrative appeal and no other manner to challenge the Thoroughfare Map short of an inverse condemnation lawsuit. As stated by this Court in Jt. Ventures, supra, at page 627:

Although the right to seek relief through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation, see First English, that remedy is not equivalent to a property owner's remedy under the doctrine of eminent domain. Inverse condemnation affords

the affected property owner an after-the-fact remedy, when there has already been a "taking" by regulation, and it is not a substitute for eminent domain protection facilitated by chapters 73 and 74.

The property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is "taken" through formal condemnation proceedings. The former has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee.

D) The Problem.

Despite the obvious factual similarities between a §337.241, Fla. Stat., map of reservation and Petitioner's Thoroughfare Map provisions, Petitioner continues to defend its Thoroughfare Map as merely a "planning tool." Petitioner notes that "Importantly, §337.241 bore no relationship whatsoever to the land development process or to making developers pay their fair share of infrastructure costs in appropriate cases." (PB 32). Despite this off hand comment, Petitioner's Thoroughfare Map has absolutely nothing at all to do with fair share impact fees or those cases requiring a "rational nexus" in order to justify exactions from landowners. Petitioner's Thoroughfare Map makes no distinction on any basis between any and all landowners subject to the Map. Further, Petitioner claims that "Nowhere in the Plan is there an intent or attempt to freeze land values." (PB 33). Despite this self-serving declaration, it is suggested that Petitioner more candidly sets forth the purpose of the Thoroughfare Map in that Agreement Restricting Use of Land Targeted For Future Right-of-Way attached to Appellee/Plaintiff, JDK Industries, Inc.'s Complaint (Exhibit A-2). As part of this Agreement executed in

1981, Petitioner while reserving certain right-of-ways, graciously permitted Appellee's, JDK Industries, Inc., predecessor in title to develop a portion of their property along State Road 80 under the following conditions:

1) The landowners could develop their land that was north of 160' of the guardrail situated at the southern edge of State Road 80.

2) In consideration for the landowner being able to build on a portion of their privately-owned property, in the event of future eminent domain proceedings, the landowners were required to waive any claim to just compensation for improvements on the property; waive their claim for severance damages; and waive their claim for business damages.

This Agreement, which was prepared by Assistant County Attorney, D.M. Wolpin, recites that the above provisions "shall serve to ensure that the purpose of the Right-of-Way Protection Plan, to wit: That the public cost of acquiring future right-of-way parcels be mitigated, . . ." In 1990, Appellee, Osiris Ramos, was likewise required to execute a similar Agreement in consideration for his being able to develop his privately owned property on Southern Boulevard. (See Exhibit A-5). In this agreement entitled Restrictive Covenant for Southern Boulevard Right-of-way, Appellee, Ramos, was required to waive any claim for value of improvements placed on his property and to waive his claim to any potential business damages. In any subsequent eminent domain proceedings, Appellee was required to waive his right to tax "costs, fees, engineering fees, appraisal fees, architect fees,

surveyor fees, attorneys' fees, and any and all other fees and costs in connection with the aforementioned condemnation of the right-of-way."

Yet, Petitioner flatly contends that its Thoroughfare Map is not an attempt to depress or freeze property values in anticipation of ultimate eminent domain proceedings and "the comprehensive planning involved in the case at hand, if it ever reduces the costs of acquisition does so only in cases where a development exaction bears a rational nexus with specific development proposals." (PB-41) Does Petitioner seriously contend that is not less expensive to condemn vacant land than improved properties with ongoing businesses? If Petitioner is merely engaging in long-range planning for the benefit of all residents of Palm Beach County, why are landowners being required to waive both statutorily and constitutionally protected rights to just compensation as part of the implementation of Petitioner's Thoroughfare Map? This inconsistency in Petitioner's stated purpose of its Thoroughfare Map and its thinly disguised motives were noted by the trial court in considering Petitioner's true purpose in adopting its Thoroughfare Map. (Exhibit L, pages 5 and 6).

Petitioner next contends that "development orders are specifically permitted as long as they are consistent with the Thoroughfare Map." (PB 35) This is a rather illusory permission given the following specific provisions contained in Petitioner's comprehensive plan:

- 1) The Traffic Circulation Element of the Comprehensive

Plan (Exhibit G-5, page 3-TC) provides that the "County shall provide for protection and acquisition of existing and future right-of-way consistent with the adopted Thoroughfare Right-of-Way Protection Map."

2) Policy 2-a provides that the "County shall protect transportation corridors by using the Thoroughfare Right-of-Way Protection Map." (Exhibit G-5, page 3-TC).

3) The Traffic Circulation Element continues by providing that the "Map is designed to protect identified transportation corridors from encroachment by other land use activities." (Exhibit G-5, page 26-TC).

4) Land development activities including, but not limited to, residential, commercial, institutional and industrial purposes are required to be consistent with and provide for the transportation right-of-way shown on the Thoroughfare Right-of-Way Protection Map, (See Exhibit G-5, page 26-TC).

5) The Land Use Element of the 1989 Comprehensive Plan, (Exhibit G-5, page 48-LU), provides that "no land use activity may be permitted within any roadway designated on the County's Thoroughfare Right-of-Way Protection Map that would impede future construction of the roadway."

6) The Land Use Element also provides that all development approvals and actions by Palm Beach County must be consistent with the provisions contained within the Comprehensive Plan. (Exhibit G-5, page 24-LU). This provision, in fact, is mandated by the provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, Section

163.3194(1)(a), Fla. Stat., which requires that following adoption of a comprehensive plan, or element thereof, all development and development orders shall be consistent with such plan or element as adopted.

7) Additionally, Petitioner's zoning code, through its base building line and setback provisions, noted at pages 4 & 5 above, continues to preclude all development within the area protected by the Palm Beach County Thoroughfare Right-of-Way Protection Map. (See Exhibit G-7, pages 3655 and 3670).

As noted by Judge Anstead in his specially concurring opinion herein, "While arguably the county ordinance is not as confiscatory as the complete and express bar to development contained in the statute involved in Jt. Ventures, supra, it is substantially the same in barring any land use activity that is inconsistent with, or would impede future construction of, the planned roadway. It is difficult to envision any development that would not impede such future construction." Wright, supra, at page 712.

As this Court noted in Jt. Ventures, supra. at page 626, there is no distinction between "freezing" property by preventing development thereon and deliberately attempting to depress land values in anticipation of eminent domain proceedings. See Board of Commissioners of State Institutions, supra. Further, as noted by the Trial Court herein, Petitioner's mere intention to widen or extend roadways or condemn property therefore in the indefinite future, may not operate to prevent a landowner from using his property for a lawful purpose. (See Exhibit P, Paragraph 7, citing

Division of Administration, State of Florida Department of Transportation v. Frenchman's, Inc., 476 So.2d 224 (Fla. 4th DCA, 1985).

Petitioner continues its Argument by stating that "Even when or if the right-of-way is needed by the County, dedication of all or a portion of the right-of-way can be required as a valid exaction under the 'rational nexus test.'" (PB 35). This is a remarkable statement for at least two reasons:

1) Petitioner apparently concedes it does not know when or if it will need the protected corridor, but all land development activities should be prohibited on the protected portion of Appellee's privately own-owned property in the meantime. This assertion runs precisely contrary to the 4th DCA opinion of Frenchman's, Inc., supra, in which it is stated:

But a public entity's mere future intention to condemn land may not operate to prevent the landholder from using the land for a lawful purpose. To say otherwise is to confer on an indefinite and uncertain public plan, which may or may not be carried out in the foreseeable future, essential attributes of an actual taking, which the landowner remains uncompensated for the damage until the taking actually occurs, if it does.

2) Apparently because Petitioner believes that since there may at some time in the future exist a "rational nexus" to require an exaction of road right-of-way, it may legally prohibit current development of the protected property. This assertion finds no support in the law and directly violates the holding in Lee County v. New Testament Baptist Church, 507 So.2d 626 (Fla. 2d DCA, 1987), in which it is stated:

In short, for the nexus test to apply, thus

making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements - not for the purpose of "banking" the land for use in a projected but unscheduled possible future use. (Emphasis added).

While Petitioner, through implementation and enforcement of its Thoroughfare Map, does not in all instances require compulsory dedication of right-of-way, it does, through its prohibition on land development, mandate a compulsory building moratorium on all lands within its protected corridors. Petitioner meets none of the criteria for a rational nexus in that its Comprehensive Plan provisions require no showing that the proposed development will, in the demonstrably immediate future, so burden the abutting roadway as to require its accelerated improvement. The provisions of the Thoroughfare Map are imposed on all land development activities and properties, regardless of their impact on the abutting roadway. Further, the Thoroughfare Map is truly a case of "long term" planning in that it is intended to identify roadway needs beyond the year 2010. (Exhibit G-5, Traffic Circulation Element, 14-TC). In the interim, Palm Beach County has made absolutely no commitment to widen the roadways in the protected corridors.

Petitioner's reliance on Hernando County v. Budget Inns of Florida, Inc., 555 So.2d 1319 (Fla. 5th DCA, 1990), is also misplaced. In Hernando County, supra, Hernando County refused to

issue a building permit to Budget Inns unless Budget, at its own expense, provided a frontage road across their property, as required by local ordinance. The Fifth District Court of Appeal found that the Hernando County ordinance was unconstitutional as applied to Budget Inns' property. At page 1320, the Court noted:

Hernando County's requirement that Budget show the frontage road on its building plans as a precondition to the issuance of a building permit, where admittedly no present need for the road exists and without any showing that there will be a need in the reasonably immediate future, constitutes an impermissible attempt to "bank" Budget's land without compensation. Presumably this obligation would continue in perpetuity. (Emphasis added).

The Court concluded by finding a temporary taking of the Budget Inns' property by unlawfully denying its use of its land. Again, Florida courts have consistently prohibited government from landbanking property without the payment of compensation.

Likewise, Petitioner, by adopting and implementing its Thoroughfare Map, is simply landbanking privately owned lands by imposing a development moratorium of indefinite duration on private property without compensating in any fashion the affected landowners. This policy, of course, has the effect of preventing the construction of improvements on privately owned property and depressing land values, thereby reducing costs to Petitioner at the time of future eminent domain proceedings.

Petitioner again returns to its assertion that its Thoroughfare Map outlines "corridor needs only" and that there is no way an undefined corridor can result in a facial taking". As noted previously, Respondents strongly disagree with this

characterization of the Thoroughfare Map as being a general, undefined protected corridor. Again, while Petitioner makes this assertion, its conduct and actions reveal otherwise. The Palm Beach County Zoning Code measures "base building line" on collector and arterial streets as a line 40' beyond existing right-of-way or the right-of-way line as required by the Palm Beach County Thoroughfare Plan, when adopted, whichever is greater. (Emphasis added). (Exhibit G-7, Page 3655). "Building setbacks" are then measured from the base building line. (Exhibit G-7, Page 3670). Apparently, the lines and corridors established by Petitioners Thoroughfare Map are specific enough for measuring base building lines and building setback lines in its zoning code and Petitioner finds the protected corridors to be adequately defined so as to require the Agreement and Restrictive Covenants as shown in Exhibits A-2 and A-5, but Petitioners now contend that the Thoroughfare Map is simply an undefined future corridor. Moreover, Exhibit A to the Wright Complaint in this cause (Exhibit A-1) is a clear example of Petitioner's ability to specifically locate the protected corridor and the manner with which Petitioner dealt with attempts by landowners to build within the protected area. This letter is from Andrew S. Hertel, Engineering Assistant III with Palm Beach County to William Wright, one of the co-owners of the properties involved in this appeal. Mr. Hertel specifically advised that the Thoroughfare Map "requires that a corridor, 220 feet wide, be preserved for the future widening of State Road 80. This corridor would be measured from the existing south right-of-way line, northward. "Mr. Hertel then advised the landowner that

"this site would be unbuildable in the absence of conditions which would provide for construction within the ultimate right-of-way for State Road 80." The landowner was then invited to execute a Agreement or Restrictive Covenant such as those described on pages 25-27 so that he could build on his property.

Petitioner relies on Selby Realty Company v. City of San Buenaventura, 514 P 2d 111 (Cal. 1973) for the proposition that Respondents herein may not easily challenge a "generalized roadway map." However, the portion of Selby, supra, recited and relied upon by Petitioner states that "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." (Emphasis added) (PB-40). This is precisely the problem with Petitioner's Thoroughfare Map. The Thoroughfare Map is not simply general lines on a map providing notice to all that a roadway may be widened or located in a specific location at some future date. The Thoroughfare Map presently affects Respondents free use of their property by prohibiting all land development activity in the protected area.

ARGUMENT III

RIPENESS IS NOT A DEFENSE TO A CLAIM THAT A
STATUTE OR ORDINANCE IS FACIALLY
UNCONSTITUTIONAL.

Petitioner begins this argument by contending that it is "premature to review the Palm Beach County Thoroughfare Map as applied to Plaintiffs' property". This is a rather strange issue or point on appeal since the trial court in this matter found that the subject Thoroughfare Map was facially unconstitutional, and admittedly, the issue of an "as applied" challenge to the ordinance, while raised in the pleadings, has not yet been litigated in this cause. Further as conceded by Petitioner at page 43 of its brief, the United State Supreme Court has ruled in Yee, supra, that a facial challenge to a regulation may be raised based on a failure of a regulation to advance a legitimate state interest and that such a challenge was "ripe" without concern for the economic impact to the property. Petitioner's raising of Argument III that "It is premature to review the Palm Beach County Thoroughfare Map as applied to Plaintiffs' property" seems incongruous.

However, in making this argument, Petitioners are apparently relying on the 5th DCA decision of DOT v. Weisenfeld, 18 FLW D803 (5 DCA, 1993). As Petitioner notes, the 5th DCA in Weisenfeld, supra, receded from its prior opinion in Orlando/Orange County Expressway Authority v. W & F Agrigrowth - Fernfield, Ltd., 582 So.2d 790 (Fla. 5th DCA, 1991), decision in considering a map of reservation takings case, and concluded that to prove a compensable taking, a court must find that the regulation deprives

the owner of the economically viable use of his property. The problem with the Weisenfeld, supra, decision, however, is that it misapplies both Florida and United State Supreme Court precedents and the 5th DCA fails to distinguish between a governmental act of eminent domain as compared to the police power as discussed in Argument I.

The Court in Weisenfeld misconstrues this Court's decision in Jt. Ventures, supra. In relying on Jt. Ventures, supra, the 5th DCA noted that generally government must pay property owners under two circumstances, i.e., when it confiscates private property for common use under the power of eminent domain or when a state regulation effectively deprives an owner of the economical use of his property. This is precisely where the 5th DCA gets off track. This Court held in Jt. Ventures, supra, that the statutory map of reservation provisions of §337.241, Fla. Stat. are in reality an act of eminent domain. As this Court stated at page 625; in discussing §337.241, Fla. Stat.:

Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of Chapter 73 and 74.

This is precisely the defect with Petitioner's Thoroughfare Map provisions. Rather than lawfully regulating the use of private property, the Thoroughfare Map reserves indefinitely private property for future acquisition by government without the payment of compensation.

As also noted previously, the legal basis in this cause for not requiring each individual landowner to prove the economic

impact of the Thoroughfare Map on his or her property is found in United State Supreme Court precedents. The test for a compensable taking set forth in Agins, supra, is fully applicable here. A regulation "effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." Agins, supra, at page 2141. The test is clearly in the alternative and since the Thoroughfare Map clearly fails to substantially advance a legitimate state interest, there is a taking. This standard was reconfirmed in the Nollan, supra, decision in which it was noted that "we have long recognized that a land use regulation does not effect a taking if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." Nollan, supra, at page 3146. Since the first prong of test is violated, there is no necessity for proof of the economic impact of the Thoroughfare Map or Respondents' properties. In an inverse condemnation proceeding, this issue (the economic impact) is properly an issue of damages recoverable by Respondents as a result of the taking herein and other than an element of whether, in fact, a taking has occurred.

Petitioner relies upon Glisson v. Alachua County, 558 So.2d 1030 (Fla. 1st DCA, 1990), for the proposition that to obtain compensation, a landowner must show there is no available beneficial use of the property (PB 44), but this assertion is incorrect. In Glisson, supra, at page 1037, the 1st DCA pointed out that the first part of the analysis of a facial taking was whether the regulations substantially advance a legitimate state

interest. The Court in Glisson, supra, found a legitimate state interest since the contested regulations were directed toward protection of the environment and preservation of historic areas. Since the regulations advanced a legitimate state interest, the Court then proceeded to the next analysis of whether the regulations denied all economically viable uses of the subject property. Glisson, supra, at page 1037.

Petitioner next goes on to argue and cites several federal decisions in support of the proposition, that even if the Thoroughfare Map is stricken as unconstitutional, Respondents' sole remedy is to invalidate or strike the regulation. In other words, Petitioner believes it is constitutionally acceptable for it to have "taken" Respondents' property for some period of time and there is no requirement for the payment of compensation.

Petitioner's argument and analysis directly conflicts with the United State Supreme Court decision of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 107 S. Ct. 2378, 482 U.S. 304, 96 L.Ed.2d 250 (1987), where precisely this issue was decided. In First English, supra, the United State Supreme Court reviewed a California Court of Appeal decision which "held that a landowner who claims that his property has been 'taken' by a land use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking of his property.'" The United State Supreme Court reversed and concluded that the Fifth Amendment to the United State Constitution requires compensation for the period of taking. Invalidation of the ordinance though converting

the taking to a temporary one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. First English, supra, US 319 at page 2388.

Although Petitioner relies on the recent Yee, supra, decision for the proposition that the United States Supreme Court does not contemplate compensation based on a facial invalidation of a regulation (PB-9 and 43), a careful reading of this case reveals otherwise. In Yee, supra, the issue before the Supreme Court was whether a local rent control ordinance amounted to a physical invasion of property as contended by the landowner. The Court rejected this contention but noted, at page 1526, that most cases interpreting the Fifth Amendment Takings Clause fall within two distinct classes, i.e., physical occupation or regulation of use of property. The Court noted that where government occupies (or actually takes title to property), compensation is generally required. Concerning the class of cases regulating the use of land, the Court stated:

But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.

Thus, according to the United States Supreme Court, compensation is in fact required where the purpose of the regulation, (i.e., where the regulation fails to substantially advance a legitimate state interest), unfairly places the burden on a particular landowner that should be borne by the public as a whole. Numerous Florida

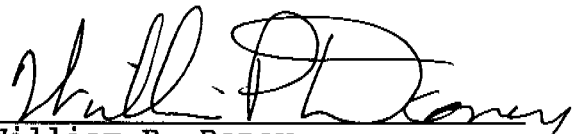
cases have followed the general rule that in the event of a taking, the compensation remedy is required by the Constitution. See e.g., Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101, 103, 104 (Fla. 1988), and Glisson, supra, where it was noted that in the event the "government's activities effected a taking, subsequent action, such as invalidating the ordinance, will not relieve the government of its duty to provide compensation for the period that the ordinance was in effect."

CONCLUSION

The question certified by the Fourth District Court of Appeal should be answered in the affirmative and the decision of the Fourth District Court of Appeal should be affirmed. This matter should be remanded to the Trial Court for a determination of the date the taking began and should be set for a jury trial to determine the just compensation due each Appellee herein.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Robert Banks, Assistant County Attorney, P.O. Box 1989, West Palm Beach, FL 33402-1989 and to Robert H. Freilich, Esquire, 4600 Madison Avenue, Suite 1000, Kansas City, MO 64112-3012, this 16th day of June, 1993.

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