

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.

PETITIONER, PALM BEACH COUNTY'S

INITIAL BRIEF ON THE MERITS

ROBERT P. BANKS
Assistant County Attorney
Florida Bar No. 0557961
Palm Beach County Attorney's Office
301 N. Olive Ave., Suite 601
West Palm Beach, FL 33401-4791
(407) 355-2225

ROBERT H. FREILICH, ESQ.
Missouri Bar No. 22314
Freilich, Leitner & Carlisle
4600 Madison, Suite 1000
Kansas City, MO 64112-3012
(816) 561-4414

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NOTES

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. The 1989 Palm Beach County Comprehensive Plan is referred to herein as the "Comprehensive Plan" or "Plan."
3. 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.
4. Petitioner, Palm Beach County, is herein referred to as "Palm Beach County" or "County."
5. Respondents, William Wright, et al., are herein referred to as "Plaintiffs," "Wright" or as "Respondents."

STATEMENT OF CASE

This appeal involves six consolidated cases. The six complaints allege that the adoption of Palm Beach County's Comprehensive Plan containing a Thoroughfare Map, pursuant to Section 163.3177(6)(b), Fla. Stat. (1991), results in a facial taking of Respondent's properties. (Exhibits A-1 - A-6). The six cases were consolidated for purposes of considering cross-motions for summary judgment on the facial constitutionality of the Plan's Thoroughfare Map. (Exhibit C).

After a hearing on the cross-motions for summary judgment, the Circuit Court granted Plaintiffs' Motion for Partial Summary Judgment, declared the Thoroughfare Map facially unconstitutional in violation of the Fifth Amendment to the United States Constitution and Art. X §6 of the Florida Constitution for failing to substantially advance a legitimate state interest and denied Defendant Palm Beach County's Motion for Partial Summary Judgment. (Exhibits O and P). An appeal was timely taken to the Fourth District Court of Appeal.

The Fourth District Court of Appeal, with three separate opinions, (Stone, J., dissenting) affirmed the invalidation of the Palm Beach County Thoroughfare Map. However, because this case involves "a question of great public importance," all three members of the panel certified the following question to this court:

IS A COUNTY THOROUGHFARE MAP DESIGNATING
CORRIDORS FOR FUTURE ROADWAYS, AND WHICH
FORBIDS LAND USE ACTIVITY THAT WOULD IMPEDE
FUTURE CONSTRUCTION OF A ROADWAY, ADOPTED
INCIDENT TO A COMPREHENSIVE COUNTY LAND USE
PLAN ENACTED UNDER THE LOCAL GOVERNMENT

COMPREHENSIVE PLANNING AND LAND DEVELOPMENT
REGULATION ACT, FACIALLY UNCONSTITUTIONAL
UNDER Joint Ventures, Inc. v. Department of
Transportation, 563 So. 2d 622 (Fla. 1990)?

Palm Beach County filed a notice to invoke the discretionary jurisdiction of this court. This court in an order dated February 17, 1993, postponed its decision on jurisdiction and ordered the filing of briefs.

Similar issues are presently before this Court in the following cases: Department of Transportation v. Weisenfeld, 18 FLW D803 (Fla. 5th DCA, March 26, 1993); Department of Transportation v. DiGerlando, 609 So.2d 165 (Fla. 2d DCA 1992) (S.Ct. Case No. 81,046); and Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 608 So. 2d 52 (Fla. 2nd DCA Sept. 23, 1992) (S.Ct. Case No. 80,656).¹

STATEMENT OF FACTS

The Thoroughfare Map is a portion of the Traffic Circulation Element of the Palm Beach County Comprehensive Plan. The County is mandated by the Local Government Comprehensive Planning and Land Development Regulation Act, §163.3177(6)(b), Fla. Stat. (1991), to prepare a Comprehensive Plan, which must include a Traffic Circulation Element "consisting of the types, locations and extent of existing and proposed major thoroughfares and transportation

¹ The First District Court of Appeal has also certified a related legal issue to this court. See State Department of Transportation v. Miccosukee Village Shopping Center, 18 FLW D827 (Fla. 1st DCA March 22, 1993) (motion for rehearing pending).

routes. . . ." Fla. Admin. Code Rule 9J-5.007(4) requires that the Traffic Circulation Element contain a future traffic circulation map including collector roads, arterial roads, and limited access facilities. Palm Beach County complied with these statutory mandates by adoption of a Thoroughfare Right-of-Way Protection Map as a part of the Traffic Circulation Element of the Plan.

The Map outlines the general location and proposed width of all arterial roads in the County. The roadway corridors located on the Map vary in width from 80 to 240 feet. (Exhibit G-6). The Map does not indicate precise locations of roadways and includes a note stating: "Proposed facilities indicate corridor needs only. Locations to be determined by specific corridor and design studies." The Map was not recorded. Instead, the Map is a part of an overall comprehensive planning process, consisting of materials that are "appropriate to the prescription of principles, guidelines and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of Palm Beach County. §163.3177(1), Fla. Stat. The County's Comprehensive Plan, including the Map, is implemented through a comprehensive system of land development regulations including zoning, rezoning, subdivision, building construction, sign regulations, and other development approval regulations which are applied on a case-by-case basis to the future development of land in response to each development proposal. §163.3202, Fla. Stat. The Map was first adopted as part of the 1980 Comprehensive Plan of Palm Beach County. (Exhibit G-4).

The Comprehensive Plan provides that the Map shall "apply to land development activities within the unincorporated areas of Palm Beach County" and states that future development "shall be consistent with and provide for transportation right-of-ways shown on the Thoroughfare Right-of-Way Protection Map." (Exhibit G-4 1980 Comprehensive Plan at 41). The Plan describes the Thoroughfare Map as a "long range planning tool which identifies potential highway corridors for facilities which may be necessary beyond the needs identified for the year 2000...." Id. at 42.

The Land Use Element of the Comprehensive Plan provides, that when applied to a future development proposal, "no land use or 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." (Exhibit G-5 at 48-LU). Neither the Thoroughfare Map nor the County's land development regulations, if applied to a future development proposal, limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact or the rights of any person who has a vested right to develop. §163.3167(8), Fla. Stat. The Comprehensive Plan requires dedication of future right-of-way to future development proposals "unless dedication shall be contrary to law and constitute a taking." (Exhibit G-5 at 14-TC). Ordinance 89-17 adopting the 1989 Comprehensive Plan likewise requires that the Comprehensive Plan be interpreted in a manner that does not result in a taking or abrogation of vested rights:

Nothing in this Comprehensive Plan, or in the land use regulations adopted consistent with its requirements, shall be construed or applied so as to result in an unconstitutional temporary or permanent taking of private property or the abrogation of existing vested rights.

(Exhibit G-5 Ordinance 89-17 §2(C)).

The Traffic Circulation Element provides general criteria for the location of rights-of-way and required the County Engineer to conduct future alignment studies. Prior to 1991, the Plan contemplated that the Board of County Commissioners would adopt precise alignments after public hearings on each alignment. The alignment finally approved after each hearing was required to be recorded in the public records. (Exhibit G-5 at 15-TC). However, the criteria for determining right-of-way alignments was modified in Ordinance No. 91-31 deleting provisions requiring preparation and recording of alignment studies. Language was added to the Plan in 1991 requiring that transportation corridors through vacant land "be compatible with the proposed development and that the exact alignment shall have flexibility." (Exhibit G-10 - Exhibit C to Ordinance No. 91-31 at 29-30).

The six Plaintiffs in these cases own property fronting and on the north side of Southern Boulevard, a 220' right-of-way corridor shown on the Thoroughfare Map. (Exhibits A-1 - A-6). As Southern Boulevard is bounded on the south by the L-51 Canal, the future alignment of right-of-way corridor may be measured northward from the existing south property line of Southern Boulevard; however, no alignment study has been performed and no alignment proposal has been established. No map of reservation has been recorded. No

determination has been made as to whether the dedication of right-of-way, even if to the full extent of the 220', would be a valid exaction or, on the other hand, would as applied, constitute a taking. Nor has there been any determination at zoning, subdivision or development approval as to whether:

- (a) the right-of-way dedication would be reduced to measure only the proportional need for roadway generated by the specific developments;
- (b) any variance might be granted;
- (c) clustering or increasing density on the remaining portion of the land will be granted taking into account the totality of the tract;
- (d) rezoning will be granted for alternative and higher yielding uses or densities;
- (e) additional credits for right-of-way dedication against required impact fees or environmental mitigation payments would be authorized.

Plaintiffs challenge both the general constitutionality of that part of the statutory scheme requiring thoroughfare maps and raise as applied taking claims based on the thoroughfare map. The as applied takings claims have not yet been considered by the trial court. The record is silent as to whether or not Plaintiffs have exhausted any administrative remedies or had the Plan provision applied to their properties so as to present ripe, as applied cases.

SUMMARY OF ARGUMENTS

SUMMARY OF ARGUMENT I

Given the limited nature of a facial attack on ordinances and the deference required to such ordinances by the separation of powers doctrine, the only question which should be addressed in these consolidated cases is whether the statutory scheme requiring thoroughfare maps is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Realty Co., 272 U.S. 365, 395; 47 S.Ct. 114, 71 L.Ed 114 (1926) (citations omitted). If any legitimate state interest is advanced, further challenges must await final application of the regulations so that a full factual record is available. Town of Indialantic v. McNulty, 400 So. 2d 1227, 1233 (Fla. 5th DCA 1981).

The Comprehensive Plan's Thoroughfare Map advances multiple legitimate state interests in transportation planning. It also serves a valid public purpose as a mechanism to encourage rational development, to promote long-range planning, and to put property owners on notice of the potential location of roads well in advance of development. In an analogous situation, it has long been established in Florida that setbacks to protect the right-of-way of roadways are a valid exercise in police power. City of Miami v. Romer, 58 So. 2d 849, 852 (Fla. 1952) (Romer I); 73 So. 2d 285 (Fla. 1954) (Romer II); and see also, Gorieb v. Fox, 274 U.S. 603, 475 S.Ct. 675, 71 L.Ed. 1228 (1926) (fixed setback valid, especially where potential for exceptions existed). The language in the

Comprehensive Plan requiring protection of future roadway corridors is a valid exercise of the police power consistent with the holding in Romer. The planning for and protection of future transportation corridors serves a public purpose of promoting rational development and discouraging future congestion and overcrowding. While the application of the language in the Comprehensive Plan regarding the Thoroughfare Map may raise constitutional issues in specific cases, the Map and the language implementing the Map in the Comprehensive Plan are clearly a valid exercise of the police power, especially where they recognize the potential for exceptions in specific cases.

SUMMARY OF ARGUMENT II

The Thoroughfare Map is distinguishable from the Section 337.241, Fla. Stat. (1987) recorded map of reservation discussed in Joint Ventures v. Department of Transportation, 563 So. 2d 622 (Fla. 1990). Section 337.241 created a process designed to halt any construction of improvements on right-of-way after a map of reservation for specific surveyed property was recorded. The map of reservation statute was found by the court to serve a primary purpose of attempting to reduce future acquisition costs of roads. By contrast, the Thoroughfare Map is a long-range planning tool tied to a Comprehensive Plan that outlines general roadway corridors and does not on its face delineate the exact routes of future roadways. The map of reservation statute at issue in Joint Ventures prohibited future development within a recorded map of

reservation. The Comprehensive Plan requires that development be consistent with the Thoroughfare Map but provides for flexibility in determining the routes of future roads and allows construction in the future right-of-way that will not impede future development of roads. As a long-range planning tool, the Thoroughfare Map of the Palm Beach County Comprehensive Plan is legally and factually distinguishable from the map of reservation statute struck down by the Florida Supreme Court in Joint Ventures.

SUMMARY OF ARGUMENT III

Just compensation cannot be determined unless a final and authoritative determination of development has been made by a public body and the case is ripe for review. To establish a compensable taking, evidence must be introduced to the court "to sustain a factual determination that [the property owner] suffered a substantial deprivation of the use of his property." Department of Transportation v. Weisenfeld, 18 FLW D803, 804 (Fla. 5th DCA March 26, 1993). In the case of a facial challenge, no evidence of injury is required; therefore, it is clear that the United States Supreme Court does not contemplate compensation based on the facial invalidation of a regulation. Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

ARGUMENT I

I. THE FACIAL CHALLENGE TO THE COMPREHENSIVE PLAN THOROUGHFARE REQUIREMENT MUST FAIL BECAUSE THE PLAN MEETS THE RATIONAL AND FAIRLY DEBATABLE STANDARD AND IS SUPPORTED BY ABUNDANT PUBLIC POLICIES.

A. Standard of Review

Whether the County's Comprehensive Plan, Traffic Circulation Element, and Thoroughfare Map constitute a facial taking presents a question of law which this Court reviews de novo. Jacobellis v. State of Ohio, 378 U.S. 184, 189, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (where constitutional question is involved, the appellate court is obliged to "apply the applicable rules of law upon the basis of an independent review of the facts of each case.") Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA), review denied, 570 So. 2d 1304 (Fla. 1990) (facial taking). See also Connick v. Myers, 461 U.S. 138, 150 n.10, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (the court must make "an independent constitutional judgment on the facts"). A reviewing court is not bound by and need not give deference to the lower court's determinations of a legal question. Mayer v. Dade County, 82 So. 2d 513, 517 (Fla. 1955). The application of law to facts is purely a matter of law to be reviewed and determined de novo by this Court. Connick, 461 U.S. at 150. Especially where zoning decisions are involved, this Court must make an independent examination of the taking issue without according any special deference to the same review conducted by lower courts. Mayer, 82 So. 2d at 517.

B. Separation of Powers and Burden of Proof

The County's Comprehensive Plan, Traffic Circulation Element, and Thoroughfare Map are presumed valid and reasonable. Grant v. Seminole County, 817 F.2d 731 (11th Cir. 1987). See also Naples Airport Authority v. Collier Development Corporation, 513 So. 2d 247 (Fla. 2d DCA 1987). To overcome this presumption, Plaintiffs bear the extraordinary burden of showing that the County's adoption of the Thoroughfare Map as part of the Comprehensive Plan was such a deliberate, arbitrary and capricious abuse of power as to be irrational. See also Town of Bay Harbor Islands v. Driggs, 522 So. 2d 912, 914 (Fla. 3d DCA 1988); Renard v. Dade County, 261 So. 2d 832, 837 (Fla. 1972). In other words, a "rational basis" test is applied. The County has broad discretion in legislative matters, and so long as the County's decision is even debatable, there is a rational basis for what it does and the courts should not interfere. State ex rel. Harkow v. McCarthy, 171 So. 314, 316 (Fla. 1936). See also Norwood-Norland Homeowners Association v. Dade County, 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987) (court should sustain local authority's zoning decision if decision is fairly debatable, scope of review recognizes zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare).

C. The Nature of Facial Challenges to Comprehensive Plans

Each of the six Plaintiffs in this case have alleged that the Thoroughfare Map, contained within its Comprehensive Plan and

not as a separate legal document, on its face violates the Florida and United States Constitutions in that it deprives Plaintiffs of property without due process and without payment of just compensation. They allege that thoroughfare maps even if contained only in a flexible comprehensive plan do not substantially advance a legitimate state interest no matter how rationally they are applied. Accordingly, this case provides no occasion to consider how the statutory scheme for comprehensive planning or its subsequent implementation, or the thoroughfare maps authorized by those statutes, have been applied to the individual Plaintiffs' property.

At least since the Supreme Court's decision in Euclid v. Ambler Realty Company, 272 U.S. 365, 397, 47 S.Ct. 114, 71 L.Ed. 303 (1926), such facial challenges to the general constitutionality of laws or ordinances have been extremely limited:

Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted.

In upholding Euclid's comprehensive zoning plan, Justice Sutherland described the nature of an inquiry into the facial constitutionality of an ordinance, namely whether or not the provisions of an ordinance "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 395 (citations omitted). Justice Sutherland differentiated such an inquiry from situations where the provisions of an ordinance "come to be concretely applied to particular premises . . . or to particular conditions, or to be considered in connection with specific complaints" Id. In situations where the actual application of a law is challenged, the Court observed that it could scrutinize the provisions of that law much more closely to ascertain whether or not they withstand the test of constitutionality. Id.

The Euclid approach to facial challenges is to leave questions of specific unconstitutionality, and economic injury to particular property, for later inquiry as facts develop and evidence is proffered with respect to the application of the regulation to a particular parcel. Compare Nectow v. City of Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928) (the impact of the regulation on Nectow's property was fully realized; therefore, that impact could be balanced against the public's need for inclusion of her property in a residential district).

Only two, discrete governmental activities have been held to result in per se as applied takings. First, the permanent physical occupation of private property is a per se taking under Loretto v.

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). Second, the final and definitive application of legislation which permanently extinguishes all property rights is an as applied per se taking under Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Obviously, the case at hand does not involve any permanent physical occupation of land. And, the case does not involve application of legislation which permanently extinguishes all uses, value and property rights. Even if the case at hand involved (and it does not) any present impact on property rights or compensation for such impact, the record is completely silent as to the permanence of such impact in time or the spatial impact on any particular piece of property. Thus, even if this were an as applied case, the record would not show the totality of impact necessary to find an as applied taking even under the balancing test of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 1249; 94 L.Ed.2d 472 (1987) ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property."); Andrus v. Allard, 444 U.S. 51, 66; 100 S.Ct. 318, 327; 62 L.Ed.2d 210 (1979) ("the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety"); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382, cert. denied, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (U.S. Fla. 1981) (taking not established merely

because property owner was allowed to build a development only half the size of the original proposal); Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221, 226 (Fla. 1st DCA 1983) (taking not established merely because agency totally denies use of some portion of the property); see also the following post-Lucas cases: Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) (damages for partial taking not measured by value of portion taken but by diminution in value to original tract; no taking); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. App. 1992) (taking rejected based upon Supreme Court's "inclination to measure the economic burden against the value of the property as a whole, rather than against discrete segments"); Powers v. Skagit County, 835 P.2d 230 (Wash. Ct. App. 1992) (where restriction only denies some use of property, court must determine whether there is reasonable beneficial use remaining for property viewed as a whole).

In Penn Central, the court identified the factors which are determinative of as applied taking cases applying a balancing test. 438 U.S. at 124. These include the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation interferes with distinct investment-backed expectations are, of course, relevant considerations." Penn Central, 438 U.S. at 124. Also important is the "character" of the challenged governmental action. When the challenged regulation "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," no taking can be

found. Id. Penn Central, however, does not apply to facial challenges.

In a facial challenge involving the reasonableness of the public purpose, it must be assumed that there is no physical invasion, no total economic deprivation of use or value, and that none of the Penn Central factors weigh against the County. Because the Plaintiffs' claim is that the mere enactment of the regulation constituted a taking, it must be assumed that the Plaintiffs enjoy the totality of use of their property.² Additionally, it must be assumed that the character of the challenged governmental action arose solely from some public program adjusting the benefits and burdens of economic life to promote the public good. See William C. Haas Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977, 981 (9th Cir. 1987). See also Town of Indialantic, 400 So. 2d at 1233 (analysis of constitutionality of regulation as applied to a particular property involves balancing or weighing of harm intended to be prevented for the public good against property owner's rights). Obviously, speculation can exist as to whether or not comprehensive planning, as applied, would result in these factual findings. However, in the absence of application of the Plan to the Plaintiffs' property these inferences are mandatory. See Agins v. City of Tiburon, 447 U.S. 255, 260-262, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980). In a facial taking claim, economic impact is irrelevant. Glisson v. Alachua County, 558 So. 2d 1030,

² See supra, pgs. 14-15.

1037 (Fla. 1st DCA 1990), rev. denied, 570 So. 2d 1304. If economic impact or interference with investment-backed expectations cannot be measured, just compensation cannot be determined. If just compensation cannot be determined, only a Euclid type inquiry into the general proposition of whether or not an ordinance advances a legitimate state interest is possible. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. at 495; Agins, 447 U.S. at 260; Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 1532; 118 L.Ed.2d 153 (1992).

Cases following Euclid and Nectow thus have required final and definitive application of an ordinance to a particular piece of property before an as applied challenge would lie.³ Town of Indialantic, 400 So. 2d at 1233 (showing that regulation prevented Plaintiff from building on oceanfront land insufficient to make prima facie showing of unconstitutional taking where available variance procedure would necessarily involve consideration of complex set of facts relating to particular property). See e.g., Williamson County Regional Planning Commission v. Hamilton Bank of

³ Because of this ripeness doctrine, care must be taken not to allow a facial challenge where a landowner merely offers partial or tentative proof as to how a regulation might be applied. For example, to argue, in a given case, that potential right-of-way will be located with a particular footprint, or to assert that there exists no rational nexus between a dedication requirement and the needs created by or benefits conferred on a particular development, clearly involves the application of regulations to a particular piece of property. Once specific facts are offered as to partial or tentative application, ripeness doctrine requires ad hoc factual inquiries to be completed to ascertain all facts relevant to final and definitive application.

Johnson City, 473 U.S. 172, 186-197, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). In Yolo, the Court held:

It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. As Justice Holmes emphasized throughout his opinion for the Court in Pennsylvania Coal v. Mahon, "this is a question of degree--and therefore cannot be disposed of by general propositions.

477 U.S. at 348.

The ad hoc factual inquiries required by Penn Central into the economic impact of regulation (diminution in value of land), the character of governmental action and the extent to which the regulation has interfered with distinct investment-backed expectations are not possible with a facial challenge. It is impossible to determine the date of the take. Compare United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1946) (date of take exists where economic impact could no longer be in controversy). The extent of actual dominion and control over a particular parcel of ground, contact with government officials, the acquisitive intent of government, relevant contractual arrangements, remaining uses of property, the causal relationship between application of a governmental regulation and economic impact, and so forth are all inquiries that are, by definition, not possible when a facial attack is made on a regulatory scheme by all

property owners who are potentially affected by such regulation. A particular case or justiciable controversy involving the final application of an ordinance must exist before such ad hoc factual inquiries can be made. Yolo, 477 U.S. at 348 ("A court cannot determine whether a regulation has gone 'too far' until it knows how far the regulation goes.") The impact of development regulations which are applied on a case-by-case basis to actual development proposals will always be uniquely applicable only to one specific parcel of property. United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958) ("question properly turning upon the particular circumstances of each case").

A successful facial attack, on the other hand, by its very nature, results in invalidation of an entire statutory scheme which may allow hundreds, or thousands of people affected by regulations to automatically have a cause of action given the mere enactment of legislation. For this reason, Justice Stevens in Keystone recognized that the "uphill battle of making a facial attack on legislation" is "especially steep" because a Plaintiff does not point to a specific parcel of property that was allegedly taken. 480 U.S. at 495. See State ex rel. Harkow v. McCarthy, 171 So. 314, 317 (Fla. 1936) (power of court to declare ordinance void as unreasonable must be carefully exercised).

D. The Comprehensive Plan and Thoroughfare Map Serve a Multitude of Legitimate Public Purposes and Therefore A Facial Taking Must Fail

States and their political subdivisions are authorized to regulate conduct for the promotion of the public health, safety and general welfare, a power commonly referred to as the "police power". Mugler v. Kansas, 123 U.S. 623, 665, 85 S.Ct. 273, 3 L.Ed. 205 (1887) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"). Government is not required to "regulate by purchase." Andrus v. Allard, 444 U.S. 51, 65 (1979) (emphasis in original). Instead, state and local legislatures are guided by the requirement that their actions must "substantially advance legitimate state interests." Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); Agins, 447 U.S. 255 (1980).

One of the earliest tests of public purpose is found in Lawton v. Steele, 152 U.S. 133, 140, 14 S.Ct. 499, 38 L.Ed. 385 (1894), where the Court required that the exercise of the police power must employ a reasonable means to a lawful end. This requirement expanded over time, particularly following the decision in Berman v. Parker, 348 U.S. 26, 32-33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) where the Court held:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . Public safety, public health, morality, peace and quiet, law and order - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.

Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive.

Accordingly, an entire range of local government police power actions have been found to be premised upon a legitimate public purpose, including: traffic circulation (Harkow, 171 So. 314); growth management planning (Coffey v. Maryland-National Capital Park & Planning Commission, 441 A.2d 1041 (Md. 1982)); rural and agricultural preservation (Glenview v. Franklin Township, 397 A.2d 384 (N.J. 1978)); environmental protection (Graham v. Estuary Properties, 399 So. 2d 1374 (Fla. 1981); United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)); urban renewal (Berman v. Parker, 348 U.S. 26 (1954)); and historic preservation through development rights transfer (Penn Central, 438 U.S. 104). The role of the courts in reviewing these actions is severely constrained, and has been identified by the Supreme Court as "an extremely narrow one." Berman, 348 U.S. at 32.

The definition of public purpose is identical whether the governmental action takes the form of police power or eminent domain. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) ("The 'public use' requirement [for eminent domain] is thus coterminous with the scope of a sovereign's police powers.") In either case, a court must not substitute its judgment for that of a legislative body unless the legislative decision "is palpably without reasonable foundation." United States v. Gettysburg Electric Railway Co., 160 U.S. 668, 680, 16 S.Ct. 27, 40 L.Ed. 576 (1896). See also Town of

Indialantic, 400 So. 2d at 1230 (rationale for rules and limitations on judicial review of zoning decisions stems from doctrine of "separation of powers"); Broward County v. Capeletti Brothers, Inc., 375 So. 2d 313, 316 (Fla. 4th DCA 1979) (where question of public interests to be served remains fairly debatable, courts are not empowered to substitute their judgment for that of legislative and administrative bodies exercising legitimate objectives).

Planning and zoning to encourage rational development and discourage the ill effects of urbanization have long been recognized as legitimate public purposes. Agins, 447 U.S. at 260. See also Nollan v. California Coastal Commission, 483 U.S. at 833.

The basis for enacting the Thoroughfare Map is stated in the intent and purpose section of Chapter 163, Fla. Stat. (1991) which states in part:

Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention and general welfare; prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services;
. . . .

§163.3161(3), Fla. Stat. (1991).

Section 2 of Ordinance No. 89-17 which adopted the 1989 Comprehensive Plan reiterates and restates the purpose and intent provisions of Chapter 163. (Exhibit G-5).

One of the required elements of a Comprehensive Plan prepared pursuant to Chapter 163 is "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). Included in the Traffic Circulation Element is the Thoroughfare Map. (Exhibit G-6).

Palm Beach County was further required by Fla. Admin. Code Rule 9J-5.007(3)(B)4. and (c)4., promulgated by the Department of Community Affairs and approved by the Florida legislature in Section 163.3177(10), Fla. Stat. (1991), 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.

Among the requirements in Chapter 163 are that 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. The Traffic Circulation Element sets level of service standards for roadways. 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. (Exhibit G-5 at 14-TC). 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...." (Exhibit G-5 at 2-TC).

The Thoroughfare Map is also designed to place the property owners on notice as to the necessity and location of future roads. (Exhibit G-5 at TC-14). This "will allow land developers the opportunity to plan their developments with proper road interfacing requirements." Id. Clearly, all of the above described provisions in the Palm Beach County Comprehensive Plan are attempts to promote rational development and are valid exercises of the police power; and, the Palm Beach County Comprehensive Plan only requires dedication of future right-of-way during the development process and only when the dedication is allowed by law and does not constitute a taking. Id.

Ordinance 89-17 adopting the 1989 Comprehensive Plan also requires that the Comprehensive Plan be interpreted in a manner that does not result in a taking:

Nothing in this Comprehensive Plan, or in the land use regulations adopted consistent with its requirements shall be construed or applied so as to result in an unconstitutional temporary or permanent taking of private property or the abrogation of [validly] existing vested rights.

(Exhibit G-5 Ordinance 89-17, Section 2(C)).

The requirement that the Comprehensive Plan be interpreted in a manner that does not result in a temporary or permanent taking of private property mandates that the County recognize and consider the constitutional rights of property owners when implementing the Comprehensive Plan. This language coupled with the language in the Comprehensive Plan limiting dedications to those allowed by law demonstrates that the Comprehensive Plan is a document that recognizes and respects private property rights.

As Palm Beach County's Thoroughfare Map can be implemented in a constitutional manner, it is not facially unconstitutional. See Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984) (statute can only be found to be facially unconstitutional if the statute "could never be applied in a valid manner").⁴

The public purposes to be achieved through comprehensive planning are myriad.

Since the infrastructure of many of America's cities demands extensive redevelopment along sewer and transportation networks, the opportunity arises for a comprehensive integration of land use and transportation planning. Where mass and rapid transit is envisioned, the area from one-quarter to one-half of a mile in radius from stops should be planned for redevelopment. These areas should be developed at densities sufficient to sustain the planned transportation facility....

Additionally, commercial and industrial siting should follow this pattern so that sites may be concentrated along transportation corridors and thus facilitate access to employment and decreased energy consumption and automobile

⁴ It is also extremely important to note that the Court's decision in this case will also have a dramatic effect on the plotting or planning of public improvements other than roads including parks, school sites, open space, view corridors, sewer and water lines, and other public improvements that are the very fabric of the statutory scheme for comprehensive planning. Also implicated are environmental regulations which cut back on development rights that might exist in the absence of such regulations. While it is always true that the actual application of such plotting or planning may result in a taking, the mere anticipation of a public improvement has never been held to constitute a taking or damaging of property affected. Romer II, 73 So.2d at 286 (mere plotting of street upon a city plan not a taking). See also, a case very close on its facts to the case at hand, Fifth Avenue Corporation v. Washington County, 581 P.2d 50, 61 (Ore. 1978).

usage. The resulting pattern of community development would allow transit and other aspects of the infrastructure to take advantage of economics of scale.

J. Kushner, Urban Transportation Planning, 4 Urb. L. & Pol. 161, 173 (1981). The importance of planning was recognized by the Florida legislature through the adoption of the Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Fla. Stat. (1991). The Traffic Circulation Element in particular is supported by no less than seven essential and identifiable public purposes, including: (1) the control and management of transportation congestion; (2) planning for the improvement of air quality; (3) promotion of mandated federal transportation goals and policies; (4) assistance with the fulfillment of other state comprehensive planning act goals such as urban form, infill, and revitalization of existing areas; (5) achievement of level of service standards and concurrency requirements; (6) containment of the growing state and federal infrastructure crisis; and (7) increasing the value and zoning densities available to land adjacent to the corridors.

In contradistinction to the taking of property, transportation planning creates value:

The fuel crisis, increased federal funding, and center city development and redevelopment suggest an increased need for the construction and operation of fixed-guideway rapid transit systems in urban areas. As a result, privately-owned land near transit stations and stops will probably increase in value due to the enhanced commercial, industrial and residential development potential created by superior access and the concurrent generation of intense local activity.

D. Callies & C. Duerksen, Value Recapture as a Source of Funds to Finance Public Projects, 8 Urb. L. Ann. 73, 74 (1974).

Each of the public purposes referenced in the Traffic Circulation Element of the Comprehensive Plan (Exhibit G-12) incorporates equally important additional purposes at the Federal, state and regional levels as well:

- Transportation Congestion. (Objective 3: Consistency with State, Regional and Other Agency Plans; Objective 4 Level of Service Standards, pgs. 4-TC, 3-TC.) The relationship between economic growth and development and transportation congestion has been well documented. See F. Chapin & E. Kaiser, Urban Land Use Planning, 545-57 (3d ed. 1979); National Commission on Urban Problems, Building the American City, 231 (1968)); Real Estate Research Corp., The Cost of Sprawl: Detailed Cost Analysis, 4 (1974). Transportation congestion management, including the contemplation of transportation corridors, can serve as an organizational framework for solving the congestion problem and eliminating urban sprawl which consumes natural resources and environmentally sensitive lands.
- Air Quality. (Objective 6: Air, Water and Environmental Concerns, pg. 12-TC; Objective 5 Integration of All Modes of Transportation, pg. 11-TC; Objective 11: Bicycle Transportation, pg. 15-TC.) Without adequate and wide corridors, traffic congestion is a major contributor to air pollution. Automobile emissions resulting from traffic congestion emit air pollutants such as ozone, carbon monoxide,

and PM-10 that threaten health and safety. See generally, United States Environmental Protection Agency, 1992 Transportation & Air Quality Planning Guidelines (July 1992); Senate Report No. 101-228 (Dec. 20, 1989) at 6-7.

- Federal Planning Requirements. (Objective 6: Air, Water, and Environmental Concerns, pg. 12-TC; Objective 3: Consistency with State, Regional, and Other Agency Plans, pg. 3-TC.) Recent federal legislation, including the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-388, 106 Stat. 1520, and the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 42 U.S.C. §7401 et seq., impose new requirements for transportation planning on local governments such as Palm Beach County. Under ISTEA, federally-funded transportation improvements must conform to state and regional transportation plans that include, *inter alia*, methods to increase the efficiency of existing transportation facilities, right-of-way preservation, traffic congestion management, the effect of transportation systems on land use and development, consistency of transportation policies with land use plans; and the social, economic, energy, and environmental effects of transportation decisions. ISTEA §1024(a) (codified at 23 U.S.C. §134(f)) (metropolitan transportation plans); *Id.* §1025 (codified at 23 U.S.C. §135(c)) (statewide transportation plans); 58 Fed.Reg. 12064, 12077 (March 2, 1993) (proposed Federal Highway Administration/Federal Transit Administration rule on metropolitan plans); 58 Fed.Reg. 12084, 12090-91

(March 2, 1993) (proposed Federal Highway Administration/Federal Transit Administration rule on statewide plans).

- Growth Management Goals. (Objective 1: Access Control, pg. 2-TC; Objective 5: Integration of All Modes of Transportation, pg. 11-TC; Objective 7: Citizen Participation, pg. 13-TC.) The Traffic Circulation Element is one piece in the overall scheme of the County comprehensive planning efforts. A safe and efficient traffic circulation system coincides with the provision of existing urbanized and infill development (Exhibit G-5, 1-LU - Palm Beach County 1989 Comprehensive Plan, Land Use Element, County Direction #3); Home Builders and Contractors Association of Brevard, Inc. v. Department of Community Affairs, 585 So. 2d 965 (Fla.App. 1 Dist. 1991) (upholding "anti-sprawl" rules of Department of Community Affairs)); serves as a basis for growth management planning (Plan, County Direction #3); helps ensure appropriate jobs/housing balance (Plan, County Direction #5); provides locations for economic activity centers (Plan, County Direction #8); and, planning, reduces externalities (fiscal and energy costs of sprawl) (Plan, County Direction #12).
- Level of Service and Concurrency. (Objective 4: Level of Service Standards, pg. 4-TC.) The Level of Service ("LOS") Standards and Concurrency requirements of the Florida Comprehensive Planning Act, as incorporated in the Palm Beach County Comprehensive Plan, tie the traffic circulation element

to the capital improvements element requirements of the Plan and development permitting activity, thereby furthering the public purposes of that element. §163.3177(10(h) and §163.3202(g), Fla. Stat., Fla. Admin. Code Rules 9J-5.0007(3)(a)-(b) and 9J-5.0055. The capital improvements element contains the County's fundamental legislative policies governing the construction and extension of public facilities. The concurrency requirement of the Plan coordinates the provision of the public services, requiring necessary transportation facilities to be available concurrent with the impacts of new development.

- Infrastructure Crisis. (Objective 4: Level of Service Standards, pg. 4-TC; Objective 8: Transportation Funding pg. 13-TC.) The failure to plan adequately for traffic related needs and traffic congestion has created our monumental infrastructure deficiencies which exceed three trillion combined dollars at every level of government. M. Kaplan, Hard Choices, A Summary Report of the National Infrastructure Study Prepared for the Joint Economic Committee of the United States Congress 1, 2-3 (1984); Fragile Foundations: A Report on America's Public Works, A Summary Report of the National Infrastructure Study Prepared for the Joint Economic Committee of the United States Congress (1988); U.S. Department of Transportation, Moving America 5, 24 (Feb. 1990). These reports highlight that it is critical to assure that new growth pay for its fair share of the cost of facilities, the

need for which it generates so that the general fund can be used to rectify these extraordinary infrastructure deficiencies.

By using the Comprehensive Plan to lay out an urban form, the County carries out multiple public purposes and policies. The Plan offers the flexibility to achieve these results without resorting to taking or eminent domain through simplistic "official mapping."

The Plan can succeed by working with development through zoning, subdivision and capital improvements techniques to:

- (a) assure the best routes through land that maximizes development potential;
- (b) offer development opportunities for clustering the increasing densities at key nodes and parcels off of the corridors;
- (c) grant alternative and more valuable uses;
- (d) avoid loss of value and hence taking by using development rights transfer and credit for impact fees;
- (e) finally, it can alter or change the road pattern if needed.

All of this points out that there can be no "facial taking" until the actual application of the Plan through the development approval process.

ARGUMENT II

II. SECTION 163.3177(6)(b), FLA. STAT. (1991) AND THE PALM BEACH COUNTY TRAFFIC CIRCULATION ELEMENT ARE DISTINGUISHABLE FROM SECTION 337.241, FLA. STAT. (1987) AND RECORDED RIGHT-OF-WAY RESERVATIONS.

In Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622 (Fla. 1990), this court reviewed Section 337.241, Fla. Stat. (1987) and found that section to be invalid and unconstitutional as applied to 6.49 acres of vacant land specifically reserved on a parcel of land owned by Joint Ventures, Inc. The action was brought after Joint Ventures exhausted its administrative remedies.

As provided by §337.241, the Department of Transportation had recorded a reservation map of specific right-of-way in the public land records of a county. Once the map was recorded, under no circumstances could development permits for new construction be issued for five years, which development prohibition could be extended for an additional five years.

Importantly, §337.241 bore no relationship whatsoever to the overall land development process or to making developers pay their fair share of infrastructure costs in appropriate cases. In contrast to the recorded map of Joint Ventures, the Comprehensive Plan, the Traffic Circulation Element, and the Thoroughfare Map are long range planning tools which are integral parts of the state's land development process and are inextricably linked with making such development pay its fair share of infrastructure costs. 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, to utilize existing right-of-way to develop a roadway rational network that will provide for existing and future needs of the public and to "establish harmonious, orderly and progressive development of Palm Beach County that would assure safe and more convenient transportation circulation." (Exhibit G-5 at 14-TC). Nowhere in the Plan is there an intent or attempt to freeze land values.

The exercise of police power evident by comprehensive planning is for the purpose of planning and ensuring the safety of the citizens of Palm Beach County. The purpose of §337.241 was likened in Joint Ventures, 563 So. 2d at 625, to the illegal freezing of property values in an attempt to depress land values in anticipation of eminent domain proceedings (citing Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, 108 So. 2d 74 (Fla. 1st DCA 1958)).

In Tallahassee Bank and Trust Company, the court concluded that where property had been downzoned from commercial to a residential zoning district for the sole purpose of reducing the cost of future acquisition by the State, evidence regarding the highest and best use of the property for commercial purposes, was admissible in the eminent domain trial. Clearly, the existence of the Palm Beach County Thoroughfare Map cannot be used at trial by the County to reduce the value paid for right-of-way shown on the map in eminent domain proceedings. See Dade County v. Still, 370 So. 2d 64 (Fla. 3d DCA 1979) ("future intent to take property cannot be presented to jury as a basis for a price less than that

which would have existed without the declaration of future taking").

The statutory scheme in Joint Ventures was based upon a recorded map of reservation setting the exact location for future road rights-of-way without regard to the timing or nature of future development proposals. The recording of the map of reservation in the land records of the county created an existing, legal impediment to development of surveyed, specific property subject to the reservation.

The Thoroughfare Map, as set forth in the Comprehensive Plan, is a generalized corridor map. There is no mechanism under the Comprehensive Plan to record a precise alignment in the public records in a manner similar to the map of reservation statute. (Exhibit G-12 at 27-28-TC). The Comprehensive Plan provided for establishment of precise alignments to be recorded in the public records of Palm Beach County only after approval by the Board of County Commissioners at a public hearing. (Exhibit G-5 at 15-TC). There are no allegations in the complaints of these consolidated cases that the properties in question were subject to a recorded precise alignment map. (Exhibits A-1 - A-6).

Because the consolidated cases present only a facial challenge, there is no identifiable location for the future right-of-way corridors of the Thoroughfare Map. (Exhibit G-5 at 14-TC). By contrast, section 337.241 contained an absolute prohibition against development of a specific parcel of property for 5 years at a minimum, with provision for an additional 5 year extension of the

development prohibition. The Thoroughfare Map allows land developers the opportunity to identify corridors and to plan their development with proper road interfacing requirements. Development orders are specifically permitted as long as they are consistent with the Thoroughfare Map. By recordation of a section 337.241 reservation, the Department of Transportation acquired an existing interest in a specific parcel in the nature of an easement or option to purchase, without the payment of compensation. Section 163.3177(6)(b), Fla. Stat., on the other hand, merely contemplates future acquisition of real estate during the land development process.

The Thoroughfare Right-of-Way Protection Map is designed to be utilized as a long-range planning tool that identifies potential corridors for facilities that may be necessary beyond the needs identified for the year 2010. The Map is also intended to give both property owners and public officials an understanding of the general location of potential future roads to meet traffic demands at build-out of the County . (Exhibit G-12- at 26-TC and 27-TC). The Plan states that this will allow land developers adequate opportunity to plan their developments with proper road interfacing requirements. (Id. at 26-TC).

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 text." In Homebuilders and Contractors' Association of Palm Beach v. Palm Beach County, 446 So. 2d 140 (Fla. App. 1983), cert. denied, 451

So. 2d 848 (Fla. 1984), appeal dismissed, 105 S.Ct. 376 (1984) exactions for roads were upheld as a valid police power regulation under County Home Rule Powers. The ordinance there involved a formula established to calculate a fair share of the cost of expanding new roads. The court applied the "rational nexus test," under which it evaluated exactions in light of whether new development creates a need for new road construction and whether or not exactions were proportionate to the needs created. See also Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (holding that exactions substantially advanced legitimate state interest where a nexus existed between the exaction and the purpose it served); Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (refusing to discuss whether or not an exaction ordinance was unconstitutional until the city was given an opportunity to adopt or facially apply its regulations providing a nexus between exactions and the impact of development).

The County's Comprehensive Plan contemplates dedication of right-of-way only when development proposals are processed and only, in those cases where such an exaction would be a part of a developers' fair share of the cost of expanding new roads. An exaction for road right-of-way is unconstitutional, only where there is an existing requirement that a developer dedicate right-of-way based on a particular development proposal and there is no reasonable relationship to the developers' need for a road or benefits conferred on the development. And, importantly, in such

case the challenge is as applied, not facial. See Hernando County v. Budget Inns of Florida, Inc., 555 So. 2d 1319, 1320 (Fla. 5th DCA 1990). Conversely, the Hernando court also observed that there are appropriate cases where a local government can place conditions on a development permit "if the condition furthers a public purpose related to the permit requirement." Id. at 1320 n.3.

It is also abundantly clear under the County's Traffic Circulation Element, that the Comprehensive Plan contemplates future dedication, only at the time development is proposed, because procedures exist under both the statutory scheme and County ordinances to remove even the requirement of future dedication in the event that it might effectuate a taking of private property or the abrogation of existing vested rights. Section 163.3167(8), Fla. Stat. states:

Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to Chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.

Likewise, Ordinance 89-17 adopting the 1989 Comprehensive Plan requires that the Comprehensive Plan be interpreted in a manner that does not result in a taking or abrogation of vested rights:

Nothing in this Comprehensive Plan, or in the land use regulations adopted consistent with its requirements shall be construed or applied so as to result in an unconstitutional temporary or permanent taking of private property or the abrogation of [validly] existing vested rights.

(Exhibit G-5).

Section 163.3194(4)(a), Fla. Stat. requires that courts, when reviewing actions or development regulations taken pursuant to a Comprehensive Plan, consider that "private property shall not be taken without due process of law and the payment of just compensation."

The Comprehensive Plan states that dedication of future right-of-way during the land development process can occur only if dedication is not "contrary to law" and does not "constitute a taking". The Traffic Circulation Element requires that road corridors through vacant land "be compatible with the proposed development and that the exact alignment shall have flexibility" (Exhibit G-12 at 28-TC).

All of these provisions demonstrate clearly that the Traffic Circulation Element is a part of a comprehensive planning process which identifies traffic circulation issues, while retaining flexibility in the development order process, first, to establish road alignments, and thereafter, for determinations of when acquisition must be by condemnation, on the one hand, or valid development exaction on the other.

Additional local government development regulations are required to be consistent with the adopted comprehensive plan. §163.3202, Fla. Stat. (1991). Therefore, Palm Beach County is required in its development codes and ordinances to maintain the flexibility as outlined above that is contained in the Comprehensive Plan.

Whether acquisition will be by one method or the other cannot be determined from the face of the Comprehensive Plan. It is only when the Traffic Circulation Element of that Plan is applied to a particular piece of property that the determination can be made. Accordingly, the Comprehensive Plan, the Traffic Circulation Element and the Thoroughfare Map are planning tools which contrast with, and are distinct from, the immediate "freezing" effectuated by the statute stuck down in Joint Ventures.

The Map itself indicates that it merely outlines "corridor needs only." (Exhibit G-6). The note on the Map also states: "[l]ocations to be determined by specific corridors and design studies." There is no way that such an undefined corridor can result in a facial taking because there is no way, as a matter of law, to determine what property interest in a particular property is affected by the undefined corridor.

As Judge Altenbernd stated in his dissent in A.G.W.S Corp., 608 So. 2d at 58:

In contrast, the majority's opinion does not discuss whether every parcel within the corridor was rendered economically useless. Such a discussion would be required for a finding of facial invalidity under a just compensation theory. . . .

The two landowners in this case have not obtained a judicial declaration of taking on a due process theory, nor have they proven that the statutes resulted in a just compensation taking as applied to their land. I recognize that these statutory subsections may indeed have had substantial impact upon specific parcels within the reserved land. Such substantially affected landowners have the right to file inverse condemnation actions challenging the subsections as applied and to

receive damages if successful. There are, however, important practical distinctions between litigation on an "as applied" takings theory and a per se just compensation takings theory.

See also the plurality and concurring opinions in Weisenfeld, 18 at FLW D803, 805, 807.

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.

Indeed, it is difficult to imagine a comprehensive planning process that does not contain both text and maps showing the possible location of future roads, parks, and other public facilities. Developers, as well as the general public, must order their affairs on the basis of such maps; and, in a very real sense, no one benefits more from careful comprehensive planning than landowners seeking to develop their property. Infrastructure, after all, is nothing less than the backbone of the land development process. Aside from the obvious public purposes of transportation management discussed herein, developers themselves,

as well as the public in general, would suffer by a lack of ground transportation planning. This is true because such planning, in addition to holding out the potential of regulatory burdens, also contains a promise of benefit. Fortunes are gained by developers fortunate enough to own property in an expanding transportation corridor. Improved access increases traffic counts; and, increased traffic counts bring more customers and often result in increased property values as property changes from less dense to more intensive development. As Justice Holmes stated in Pennsylvania Coal v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), such an "average reciprocity of advantage" must be recognized as a justification for the public purpose behind laws. In other words, what may be an unreasonable burden upon one landowner requiring condemnation may, as applied to another landowner, allow a developer to enjoy huge windfalls.

A statutory scheme that allows the condemnation/development exaction decision to be made at the time of development thus carries with it a public purpose, standing alone, which distinguishes comprehensive planning from the regulatory scheme in Joint Ventures, which only existed to reduce the costs of acquisition. 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. Otherwise, the public body must condemn.

ARGUMENT III

III. IT IS PREMATURE TO REVIEW THE PALM BEACH COUNTY THOROUGHFARE MAP AS APPLIED TO THE PLAINTIFFS' PROPERTY

The Palm Beach County Thoroughfare Map could not result in the taking of property requiring compensation without a fact specific inquiry regarding the impact the regulation on specific property.

The Fourth District Court in this case relies on two Fifth District Court cases: Orlando/Orange County Expressway Authority v. W&F Agrigrowth-Fernfield, Ltd., 582 So. 2d 790 (Fla. 5th DCA 1977); Orlando/Orange County Expressway Authority v. Orange North Associates, 590 So. 2d 1099 (Fla. 5th DCA 1991). In Weisenfeld, 18 FLW at D804, the Fifth District Court retreats from the position stated in Agrigrowth that a taking results if a regulation does not substantially advance a legitimate state interest. The court explained that the finding of unconstitutionality in Joint Ventures does not necessarily result in a compensable taking:

The mere "attempt" embodied in the mechanism to improperly acquire land in the guise of police regulation, thereby circumventing the procedural and substantive safeguards of Chapters 73 and 74, does not automatically equate with a compensable taking.

18 FLW at D804.

The court in Weisenfeld states that a compensable taking must be established by finding an interference with all economic use of property, viewing the property as a whole. Id. The court found that there was "no evidence whatsoever adduced before the trial court to sustain a factual determination that Weisenfeld suffered such a substantial deprivation of the use of his property." Id.

The procedural status of Weisenfeld is strikingly similar to the instant case. In Weisenfeld:

[t]his summary adjudication by the trial court that compensation is due the plaintiff was not based upon a scintilla of proof in regard to damages supporting the motion -- no deposition, no affidavits, no interrogatories, no sworn pleadings.

18 FLW at D803.

As in Weisenfeld, the finding of a taking in this case was made without a record regarding the impact of the Thoroughfare Map on any of the individual plaintiff's properties. The finding of a compensable taking without fact specific inquiry into the denial of beneficial use of property is an unnecessary expansion of taking jurisprudence.

The United States Supreme Court in Yee v. City of Escondido, ___ U.S. ___, 112 S.Ct. 1522, 1532 (1992) recognized that a facial challenge to a regulation may be raised based on failure of the regulation to advance a legitimate state interest. A facial challenge based on failure to advance a legitimate state interest was ripe without application of an ordinance to the property owner since the case does not depend upon the economic impact to the property nor to any compensation due. Yee, 112 S.Ct. at 1532. As there is no required evidence of injury to a property when raising a facial challenge based on failure to advance a legitimate state interest and no concern regarding compensation of a property owner, it is clear that the United States Supreme Court does not contemplate compensation based on the facial invalidation of a regulation for failure to advance a legitimate state interest. See

also Lucas, 112 S.Ct. at 2894; Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 861, 99 L.Ed.2d 1, (1988); Nollan, 107 S.Ct. at 3147; Keystone, 107 S.Ct. at 1242.

The Federal courts have rejected compensation based on the takings clause of the Fifth Amendment when a regulation is stricken as arbitrary and capricious. Eide v. Sarasota County, 908 F.2d 716, 721-722 (11th Cir. 1990), ___ U.S. ___, cert. denied, 111 S.Ct. 1073, 112 L.Ed 2d 1179 (1991) states that the remedy for such a challenge is to invalidate the regulation. Weissman v. Fruchtman, 700 F.Supp. 746, 753 (S.D. N.Y. 1988) explains that facial challenges to the constitutionality of a statute are for the benefit of society and that the remedy is the striking of the unconstitutional statute from the statute books. A striking of the unconstitutional statute was the precise remedy in Joint Ventures where there was a declaration of the statute's unconstitutionality.

There must be an injury to property in order for just compensation to be determined. See Moore v. City of Costa Mesa, 886 F.2d 260, 267 (9th Cir. 1989) (taking requires deprivation of substantially all reasonable use of property); Ellison v. County of Ventura, 265 Cal. Rptr. 795, 798 (Cal. App. 2d Dist. 1990) (there must be injury to some property right in order for there to be a taking). There is no evidence in the record of this case establishing that the property owners in question have been injured by the Thoroughfare Map.

To obtain compensation, the landowners must show there is no available beneficial use of the property. Glisson, 558 So. 2d at

1036 (citing Lake Nacimiento, 830 F.2d at 982). The burden is on the property owner to show that the regulation, on its face, denies beneficial uses. Lake Nacimiento, 830 F.2d at 982. 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." (Exhibit G-5 at 48-LU). The Traffic Circulation Element requires development "be consistent and provide for transportation rights-of-way" shown on the map. (Exhibit G-5 at 14-TC). 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. Until allowed uses are determined, the compensation remedy is premature. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

In order to determine compensation, analysis must be made of the effect of the regulation on property taken as a whole. In Penn Central the property owner alleged that an historic preservation regulation had taken a particular strand from a bundle of property rights, that strand being air rights. Penn Central, 98 S.Ct. at 2662. The court rejected a focus on an analysis of a single strand from the bundle of property rights:

'Taking' jurisprudence does not divide a single parcel into discreet segments in an attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the

interference with rights in the parcel as a whole. . . .

Id.

When analyzing the Thoroughfare Map, a determination of compensation must focus on a property owner's entire property and the effect of the Thoroughfare Map on that property. While one property may be substantially affected by a regulation, other property may be only marginally impacted or, in fact, enhanced by the location of a future roadway.

The Fourth District Court of Appeal's holding that the Thoroughfare Map constitutes a facial taking results in the anomalous situation, that any property owner fronting an arterial in Palm Beach County is able to make a claim for damages based on the mere fact of ownership of property that might be affected by the Thoroughfare Map. Damages may be awarded without the County being given the opportunity to determine whether or not a property owner would be allowed to build in the future right-of-way, whether development approval results in the clustering of right-of-way densities on adjacent portions of the property, or where the right-of-way will actually be located.

This creates the possibility of trials on damages regarding the Thoroughfare Map where actual injury would be slight or non-existent. This is especially true since attorneys fees and costs are taxable against the government in inverse condemnation litigation. See Volusia County v. Pickens, 435 So. 2d 247, rev. denied, 433 So. 2d 980 (Fla. 5th DCA 1983).

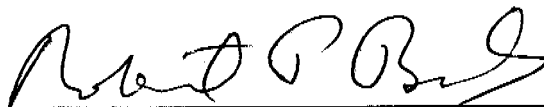
Property owners seeking damages based on the taking of property that was subject to the Thoroughfare Map must be required to raise as applied taking claims. As applied takings claims are subject to requirements of ripeness. The concept of ripeness requires that a final decision be made regarding the type and intensity of development allowed on the property in question prior to a case being ripe. Yolo, 106 S.Ct. at 2566, and Hamilton Bank, 105 S.Ct. at 3118-3119. By requiring that damage claims be as applied takings claims, only those property owners who formally applied for and were denied development approval due to the Thoroughfare Map would have a ripe claim to compensation.

CONCLUSION

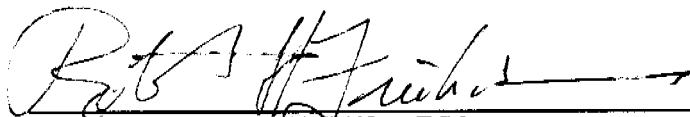
The question certified by the Fourth District Court of Appeal should be answered in the negative and the Fourth District's decision quashed.

This matter should be remanded to the trial court to vacate the partial summary judgment in favor of Wright and to enter partial summary judgment in favor of Palm Beach County declaring the Thoroughfare Map facially constitutional. The trial court should be instructed that a finding of a "taking" should only be entered when a property owner has a "ripe" takings claim and can demonstrate that the thoroughfare map has deprived the property owner of substantially all economic use of the property in question, when considering the property as a whole.

Respectfully submitted,



ROBERT P. BANKS
Assistant County Attorney
Florida Bar No. 0557961
Palm Beach County Attorney's Office
301 N. Olive Ave., Suite 601
West Palm Beach, FL 33401-4791
(407) 355-2225



ROBERT H. FREILICH, ESQ.
Freilich, Leitner & Carlisle
1000 Plaza West, 4600 Madison
Kansas City, MO 64112-3012
(816) 561-4414

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 21st day of April, 1993 to:

William P. Doney, Esq.
Vance & Doney, P.A.
1615 Forum Place, Suite 200
Barristers Building
West Palm Beach, FL 33401

Richard Grosso, Esq.
1000 Friends of Florida
P.O. Box 5948
Tallahassee, FL 32314-5948

Thomas Capshew, Esq.
Florida Department of Transportation
605 Suwannee St., MS 58
Tallahassee, FL 32399-0458



ROBERT P. BANKS
Assistant County Attorney
Florida Bar No. 0557961
Palm Beach County Attorney's Office
301 N. Olive Ave., Suite 601
West Palm Beach, FL 33401-4791
(407) 355-2225

(4/21/93 BRIEF.WRI)