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

REPLY BRIEF ON THE MERITS

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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."

6. Citations to Respondent's Answer Brief on the Merits are cited as AB ____ with appropriate page.

ARGUMENT

I. THE STANDARD OF REVIEW ESTABLISHED IN EUCLID V. AMBLER REALTY IS APPROPRIATE FOR REVIEWING THE CONSTITUTIONALITY OF THE COUNTY'S COMPREHENSIVE PLAN

This is one of the most important cases in Florida planning and zoning juris prudence. It will determine the validity of an important aspect of Florida's statutory scheme for comprehensive planning. It is also an important case because it presents an opportunity to carefully distinguish between the general and specific unconstitutionality of a statutory scheme and to determine the appropriate standard of review when a facial challenge to general unconstitutionality is brought.

In the Answer Brief, Respondents understandably seek to blur the distinctions between general and specific unconstitutionality. Accordingly, at the outset, we must make clear those arguments asserted by Respondents which are **not** relevant in a facial challenge:

(A) Respondents appropriately concede that "no inquiry is necessary at this time as to the economic impact of the Thoroughfare Map on particular properties." (AB 9). Accordingly, Respondents' numerous arguments that the Thoroughfare Map "freezes" property values are not relevant in a facial challenge.

(B) The location of Respondents' properties on the north side of Southern Boulevard is likewise not relevant. In a challenge to the general constitutionality of the County's Comprehensive Plan, this case necessarily challenges the "face" of the plan itself. It does not concern the impact of the plan "on particular properties," regardless of where they are located (AB 9).

Similarly, when Respondents argue that the "Thoroughfare Map is quite specific as the same affects Respondents' properties and can be precisely shown by survey as to each individual property", such is an argument that is relevant only to an as applied challenge.

(C) The exhibits attached to the complaints are referenced by Respondents as examples of "provisions of the Thoroughfare Map (that) have in fact been precisely applied to specific properties." (AB 5). Random examples of how the plan might be applied in specific areas are irrelevant.

(D) In a facial challenge, whether or not a particular dedication of right-of-way in the future would be a valid exaction, would be reduced to measure only the proportional need for a roadway generated by a specific development, would be set aside in variance proceedings to allow construction, or would result in the clustering of increased densities on remaining land is at this juncture "blatant conjecture and speculation," just as Respondents submit (AB 7). It is precisely because of the need to avoid conjecture that the ripeness doctrine requires the full development of a factual record by Respondents with respect to these issues. It is the potential for the appropriate constitutional application of the map as a part of the County's overall development review process that defeats Respondents' facial challenge.

In Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622 (Fla. 1990), the application of Section 337.241(2) was not subject to speculation and conjecture. In that case, "particular properties" were involved. Specifically, Joint Ventures owned 8.3 acres;

and, a map of reservation was actually recorded on 6.49 acres thereof. Given recordation, Joint Ventures was immediately subject to a moratorium against the issuance of any development permits for a period of five to ten years. Under the facts of the Joint Ventures case, an as applied challenge was made to the specific unconstitutionality of Section 337.241(2). Joint Ventures exhausted its administrative remedies by pursuing the only and limited variance procedure available to lift the present impact of the moratorium. Joint Ventures' case became ripe when, following use of those procedures, the Department of Transportation (DOT) adopted a Final Order finding against Joint Ventures. Furthermore, the factual record before the Court in Joint Ventures as to the application of Section 337.241(2) revealed that DOT admitted that it had imposed a development moratorium solely for the purpose of decreasing acquisition costs. Id. at 625.

Clearly, Joint Ventures is an as applied challenge which is indistinguishable from cases such as Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In Nollan, the Nollan's sought a coastal development permit. The California Coastal Commission granted the permit subject to recordation of a deed restriction granting an easement to the public to pass across Nollans' property to gain access to a public beach area. Because the facts of the Nollan case had been fully developed, the Court could carefully assess whether or not the easement requirement was, on the one hand, an exercise of eminent domain power or, on the other hand, a reasonable exercise of the police power. Applying the "rational nexus" test to the facts developed in the record (and applying heightened scrutiny because the condition both affected title and allowed physical invasion), the U.S. Supreme Court found that the Commission's imposition of the permit

condition could not be treated as an exercise of its land use power. 483 U.S. at 839-840. Based upon the facts before it, the Supreme Court found that the nexus asserted by the Commission (eliminating a "psychological barrier" to "visual access") was a "made-up purpose of the regulation." Id. at 839, n. 6. Compare Joint Ventures, 563 So. 2d at 625, noting that DOT's preacquisition moratorium with respect to Joint Ventures' particular property was a "thinly veiled attempt to 'acquire' land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74."

We respectively request the Court to contrast Joint Ventures and Nollan (and their challenges to the specific unconstitutionality of a particular application of a statutory scheme) to the facial challenge involved here where a comprehensive plan has not been implemented.[1] Under such circumstances, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) clearly provides the appropriate standard of review.

In their Answer Brief at pages 10-11, Respondents' state:

> "Petitioner's further reliance on such cases as Village Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) and Nectow v. Cambridge, 277 U.S. 183 (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."

To the extent we can understand Respondents' somewhat clouded assertion, it is beyond doubt that our reliance on Euclid is not "misplaced." Respondents make abundantly

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[1]In addition, we ask the Court to distinguish the flexibility inherent in implementation of the County's Comprehensive Plan as compared to the futility of lifting the moratorium in Joint Ventures. See discussion infra, at 10-13.

clear that they are relying upon the standard of review set forth in Agins v. Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). (AB 10, 11, 17, 18, and 37). In relying on Agins, Respondents necessarily rely on Euclid.

Agins states:

> "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance a legitimate state interest, see Nectow v. Cambridge, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138, n.36 (1978)." Id. at 260. (Emphasis added).

In the same paragraph of its opinion, the Supreme Court then refers to the "seminal decision" in Village of Euclid, as illustrating the nature of a challenge to the facial unconstitutionality of an ordinance restricting commercial development. Id. at 261.

In Agins, plaintiff's property had been downzoned by the City of Tiburon, but the full application of downzoning ordinances to Agins' property had not been ascertained, because Agins' never sought approval for development under those ordinances. Id. at 257. In his opinion, Justice Powell confirmed the holding of the state court that the zoning ordinances "on their face" did not take Agins' property without just compensation. Id. at 255. Applying Euclid for guidance on how to weigh private and public interests when a regulation is challenged on its face, the Court held that the zoning ordinance substantially advanced legitimate governmental goals. Id. at 261; and, compare Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). Because the precise impact of the City's regulations was yet to be ascertained and because Agins had not pursued his reasonable investment-backed expectations by submitting a development plan to local officials, the specific constitutionality

of the City's regulations under the Taking Clause was not deemed ripe for consideration by the Court.[2]

The fairly debatable or rational basis test is the appropriate standard by which to review the constitutionality of a legislative enactment. State v. Bales, 343 So.2d 9 (Fla. 1977). See also Wolf v. Dade County, 370 So.2d 839, 841 (Fla. 3d DCA), cert. denied, 379 So.2d 211 (Fla. 1979). ("[A]ny legislative enactment carries a strong presumption of constitutionality and . . . if there is a rational basis for the exercise of the State's police power by the legislative authority such an enactment should not be reversed by the appellate court." (citations omitted)). Courts are obligated to construe a regulation in such a way as to render the regulation constitutional if there is any reasonable basis for doing so. Aldana v. Holub, 381 So.2d 231 (Fla. 1980). Fieldhouse v. Public Health Trust of Dade County, 374 So.2d 476 (Fla. 1979), cert denied, 444 U.S. 1062, 100 S.Ct. 1003, 62 L.Ed. 2d. 745. (1980).

II. IN A FACIAL CHALLENGE, RESPONDENTS CANNOT SHOW THE EXISTENCE OF A DE FACTO DEVELOPMENT MORATORIUM OF INDEFINITE DURATION WHICH "FREEZES" THEIR ABILITY TO DEVELOP THEIR PROPERTY.

In Argument I, Part Two, Respondents' only argument that the County's

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[2]Relying upon Agins, the Supreme Court in Hodel v. Virginia Surface Mining & Reclamation Ass., 452 U.S. 264, 101 S.Ct. 2532, 69 L.Ed.2d 1 (1981) held that challenges to the application of the Surface Mining and Reclamation Act of 1977 were premature and not ripe for judicial resolution. Id. at 296-97 & nn. 37-40. In so doing, Justice Marshall held that taking inquiry "suffers from a fatal deficiency" when a particular piece of property owned by a person claiming just compensation has not been identified as taken by application of a regulation. Absent such an identification, a court must necessarily inquire into the constitutionality of a law without the benefit of "an actual factual setting that makes such a decision necessary." Id. 294-95. Compare United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) ("[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking.")

Thoroughfare Map fails to advance a legitimate state purpose is because it "freezes for an indefinite period of time (Respondents') ability to develop a portion of their privately owned property in anticipation of ultimate eminent domain proceedings contemplated at such time as petitioner deems it necessary to widen a protected roadway corridor." (AB 13). Yet, in the same part of their argument, Respondents again emphasize that their facial challenge does not involve the factual determination as to whether they continue to enjoy an economically viable use of their properties (AB 17)[3]

Clearly, Respondents disavow any inquiry into economic impact by reason of the inevitable application of ripeness doctrine to that inquiry. However, they tender as the only reason that the map fails to advance a legitimate state interest precisely the same issue of economic impact (the map "freezes" economically viable use of their land during a "de facto development moratorium of indefinite duration.") The most obvious rebuttal to Respondent's argument in Part Two is that it is one that is prohibited in a facial challenge to the general unconstitutionality of the County's Comprehensive Plan.

Beyond the paradoxical nature of Respondents' argument, lurk other serious omissions in Respondents' assumptions. What evidence shows the existence of a de facto moratorium? What evidence shows the start of any freeze of indefinite duration on the economically viable use of any of Respondents' properties? What particular "portion of Respondents' properties" are involved here? What economic harm has resulted from the

[3]At pp. 8-9 of their Answer Brief, summarizing their first argument, Respondents likewise state that "no inquiry is necessary at this time as to the economic impact of the Thoroughfare Map on particular properties."

"de facto moratorium's" impact on Respondents' properties when the properties are viewed as a whole?

There is simply not one reference to facts in the record answering these questions as to any of the Respondents' properties. To the contrary, the Thoroughfare Map outlines only the general location and proposed widths of all arterial roads in the County. The roadway corridors located on the Map vary in width from 80 to 240 feet (Exhibit 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; and, the Comprehensive Plan contemplated that the Board of County Commissioners would adopt precise alignments after public hearings on each alignment. Only then would the alignment finally approved after each hearing be recorded in the public records (Exhibit G-5, Traffic Circulation Element at 15-TC). Further, the Plan stated 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, Ordinance No. 91-31 at 30). There are simply no facts in the record indicating precisely what "portion" of the Respondents' properties are involved and, no showing of the overall value of the entire parcel once a precise alignment is chosen.[4] The adoption of a generalized thoroughfare map does not, without additional

[4] Again, economic impact on "particular properties" is not relevant in a facial challenge. Therefore, all of these issues must await full development in an as applied challenge as to whether there is any taking in the first place. And, even if Respondents had shown impact upon a particular portion of their properties, such a showing would be irrelevant as to whether or not a taking has occurred. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (must consider value of the property as a whole, not separate element of unified property interest); Fitzgarrald v. City of Iowa

actions by a local government, vest ownership of property in the government or oust a property owner from control of her property. The Thoroughfare Map is an exercise of police power which provides a framework to regulate private property.

In sum, Respondents, merely by labeling the County's action adopting the Thoroughfare Map as the exercise of eminent domain, ask this Court to ignore a myriad of public purposes that the Thoroughfare Map serves. Respondents concede that the County has the power and obligation to plan for future development of Palm Beach County (AB 18) and that the potential setback conditions on development contemplated by the map are "planning tools" (AB 1). This Court has expressly found that setbacks along a road right-of-way are not facially unconstitutional, even if the government has in mind the eventual acquisition of property being setback (which Respondents have not established in the case at hand). City of Miami v. Romer, 58 So.2d 849 (Fla. 1952) (Romer I), 73 So.2d 285 (Fla. 1954) (Romer II).

Respondents attempt to distinguish Romer by arguing that there is a difference in degree between the City of Miami's setback ordinance and the Palm Beach County Thoroughfare Map (AB 19-20). The significance of Romer is not the width[5] of the right-of-

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City, 492 N.W.2d 659 (Iowa 1992), cert. denied. 113 S.Ct. 2343 (1993) (No taking where value for remaining property found); and Powers v. Skagit County, 835 P.2d 230 (Wash. Ct. App. 1992) (If regulation merely diminishes economic viability of property taken as a whole as applied balancing test used.)

[5] In other words, in a facial attack, if a setback of 25 feet is valid, then by what calculus can this Court determine when the amount of the setback has the "clear and onerous effect" that Respondents' assert?" (AB 19) Surely, where Respondents state that 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", then, likewise, it cannot be a case

way that was protected, but the analysis by this Court stating that building setback lines serve a valid public purpose and that a takings claim would require an as applied analysis. Romer II, 73 So.2d at 287. Similarly, the Supreme Court of Washington in Presbytery of Seattle v. King County, 787 P.2d 907 (Wash.), cert. denied, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990), expressly overruled a prior decision which had held a rear yard setback to be a facial partial taking; the court held that a taking must be determined reviewing the regulations effect on the entire parcel.

III. THE PALM BEACH COUNTY COMPREHENSIVE PLAN IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM SECTION 337.241, FLA. STAT.

Respondents attempt to compare the Thoroughfare Map with the provision of the map of reservation statute voided by Joint Ventures (AB 21-23). Comparing the Thoroughfare Map with Section 337.241 demonstrates the factual and legal distinctions between the Thoroughfare Map and a recorded Map of Reservation. Implementing Section 337.241, the DOT acquired an open space easement for a period of five to ten years. The Thoroughfare Map, on the other hand, does not have the effect of interfering with economically viable use of property until its provisions are applied with reference to a future, specific development application. The Thoroughfare Map is a long-range planning tool that attempts to predict the roadway network and to put landowners on notice as to

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in which the "clear and onerous effect" of the Thoroughfare Map can be determined as it pertains to "particular properties." In point of fact, a 220 foot setback on a particular property that is 2,000 feet in depth might have the effect of dramatically increasing the value of that property for commercial purposes. Conversely, if a parcel of land is only 30 feet in depth and used, for example, for a fruit stand, then a setback of 25 feet may destroy all economically viable use of that land. "Freezing" of property values can only be determined after development of a full record, not in a facial challenge.

where major road improvements are contemplated[6] in order to enhance future public and private decisions in the overall land development process. The Thoroughfare Map includes existing rights-of-way and estimates future rights-of-way needs in areas where the right-of-way does not exist (Exhibit G-12 at 27).

Respondents argue that the map of reservation statute has less severe restrictions on development within recorded maps of reservation than does the Palm Beach County Comprehensive Plan regarding development within thoroughfare corridors (AB 23). Yet, the map of reservation statute has existing, specific and detailed prohibitions regarding construction within recorded maps of reservations Section 337.241(2), Fla. Stat. (1987). The Palm Beach County Comprehensive Plan has generalized language regarding development within a future transportation corridor. The determination of how and when development would be allowed within the corridor of a future roadway is determined during the land development process. Thus, there are no blanket prohibitions on development in the Comprehensive Plan comparable to the map of reservation statute.

The map of reservation statute had as its sole purpose the lowering of condemnation costs, as distinguished from an overall planning process for the development of the entire region. It contained no development approval process in any form. It could not alter

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[6] As such, the Thoroughfare Map is a traditional land use planning device that has been approved at least since the 1800's. For example, in Baumann v. Ross, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1887) the United States Supreme Court upheld a map showing road alignments, even where that map had been recorded, because recordation did not interfere with the owner's use and enjoyment of his property. An historical footnote to the Baumann case is that it enabled the District of Columbia to preserve and extend the symmetrical arrangements of squares and lots, streets, avenues, circles and public reservations contained in the original plan of the City of Washington, established in 1791 under the direction of President Washington.

abutting uses, cluster density, give credits against impact fees and exactions, allow transfer of development rights, create bonus systems and incentives, or grant area variances from the application of ordinances that might destroy economically viable use. Conversely, the State's statutory scheme for comprehensive plans is a complex and flexible process that allows use of all of these techniques. Because of this flexibility, comprehensive plans can be implemented in some cases to actually create windfall profits to abutting owners benefitted by road improvements.

The applicable standard of review in facial challenges prohibits invalidation of an entire statutory scheme merely because it may in some individual case cause a taking. See Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 289, 104 S.Ct. 2118, 81 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"); and, Riverside Bayview Homes, 475 U.S. at 125 (rejecting lower court's holding of liability merely because a regulatory scheme might someday be applied to "in some instances result in the taking of individual pieces of property."). Yet, Respondents seek to have this Court focus on documents relating to the application of the Thoroughfare Map to several of the Respondents' properties which were attached as exhibits to three of the complaints at the trial court. While the application of the Thoroughfare Map regarding particular properties may be of relevance regarding as applied takings claims, the application of the Thoroughfare Map provisions of the Comprehensive Plan has no relevance when considering a facial challenge to a regulation. See Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 101 S.Ct. 2532, 2371, 69 L.Ed. 2d 1 (1981), stating that during a

facial challenge that "appellees cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the act have been or will be applied in specific circumstances, or about their effect on particular coal mining operations." In a facial challenge this Court must focus on whether the mere enactment of a regulation deprives a property owner of all economically viable use of her land. Keystone Bituminous Coal Association v DeBenedictus, 480 U.S. 470, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987). Whether and how the regulation might be applied regarding particular properties or property owners is irrelevant for purposes of the facial analysis.

IV. THERE IS NO COMPENSABLE TAKING WITHOUT A SHOWING OF A DENIAL OF ECONOMICALLY VIABLE USE OF PROPERTY

Respondents argue that First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987), mandates compensation for facially unconstitutional regulations (AB 38). Contrary to the argument of Respondents, First English suggests that there must be denial of all economic use of property in order for there to be a compensable taking. "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by government can relieve it of the duty to provide compensation for the period for which the taking was effective." First English, 107 S.Ct. at 2389 (emphasis added). The above language requires compensation for denial of all use of property, not for merely adopting a regulation that is later found to be unconstitutional.

Respondents argue that Yee v. City of Escondido, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), supports compensation for takings with no evidence required of economic injury. Yee recognizes that regulatory takings "entail complex factual assessments of the purposes

and economic effects of government actions." 112 S.Ct. at 1526 (emphasis added). Analysis of the purpose and economic effects of government actions requires as applied takings analysis.

Respondents conclude their brief by stating that numerous Florida cases require compensation for takings. This begs the question of whether any property owner who is subject to an unconstitutional regulation should be able to seek compensation by means of an inverse condemnation suit without demonstrating substantial injury to property. The Fifth District Court of Appeal in Department of Transportation v. Weisenfeld, 617 So. 2d 1071 (Fla. 5th DCA 1993) (en banc), provides a fair approach that mandates compensation for property owners who can demonstrate denial of all or substantial economic use of their property due to an unconstitutional regulation. Allowing inverse condemnation claims for all regulations determined to be arbitrary and capricious without requiring proof of injury to property, would have the potential of converting all zoning litigation into takings claims. This Court should not so trivialize the takings clauses of the Florida and United States Constitutions.

CONCLUSION

The question certified by the Fourth District Court of Appeal should be answered in the negative and the Fourth District's decision quashed. On remand the trial court should vacate the partial summary judgment in favor of Wright and enter a partial summary judgment in favor of Palm Beach County declaring the Thoroughfare Map facially constitutional.

Respectfully submitted,

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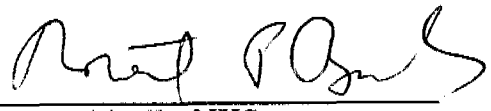

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