IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC00-912

DAVID M. POMERANCE and RICHARD C. POMERANCE,
Plaintiffs/Appellants,

v.

THE HOMASASSA SPECIAL WATER DISTRICT,
a political subdivision of the State of Florida,
Defendant/Appellee.

After an Opinion by the District Court of Appeal,
Fifth District (Case No. 98-02504)

On Appeal from the Circuit Court, Fifth Judicial Circuit,
in and for Citrus County (Case No. 94-2070-CA)

CORRECTED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS DAVID M. AND RICHARD C. POMERANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization incorporated under the laws of the State of California for the purpose of litigating important matters of public interest. PLF has offices

in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Miami, Florida. PLF's Florida office, known as the Atlantic Center, is staffed by a full-time attorney who is a member of the Florida Bar. All parties have consented to participation by PLF in this case and written permission accompanies this brief in accordance with Florida Rule of Appellate Procedure 9.370.

PLF has previously participated before this Court in *Volusia County v. Aberdeen at Ormand Beach*, 760 So. 2d 126 (Fla. 2000), involving development impact fees. Attorneys for Pacific Legal Foundation have represented other property owners before the United States Supreme Court when regulatory agencies have taken rights in property without the payment of just compensation, *see*, *e.g.*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In addition, Pacific Legal Foundation attorneys are currently representing landowners before the United States Supreme Court in *Palazzolo v. State of Rhode Island,* 746 A.2d 707 (R.I.), *petition for writ of cert. granted*, No. 99-2047, 2000 U.S. LEXIS 6596 (Oct. 10, 2000), a case involving allegations of regulatory takings.

STATEMENT OF THE CASE

This case raises a question of growing concern to landowners throughout Florida: Is it appropriate to assess real property that has lost most or all of its use through the imposition of regulatory constraints and cannot, therefore, derive benefit from the assessment, and how can a landowner properly challenge a special assessment under these circumstances?

David and Richard Pomerance own nine acres in Citrus County that abut United States Highway 19 in the Homasassa area. Normally the construction of a water pipeline would be seen as a boon to a property owner; the infrastructure would tend to raise property values and it would be entirely appropriate to impose a special assessment on the property specially benefitted by the improvement. The Pomerances, however, allege that their property is virtually entirely a wetland. This, they believe, would make development problematic at best and, at worst (and most likely), impossible. The Pomerances allege that the potential benefit of the water pipeline to the property, therefore, is illusory, and they should be relieved from having to pay for a water pipeline that will not provide any benefit to their property.

With the dramatic rise of environmental, zoning, and other regulations on the use of real property, courts are wrestling for the first time with serious questions about the existence of "regulatory takings." This case is not, of course, a regulatory takings case. But it does raise a closely related issue: how should courts treat assertions that property has been rendered useless when determining whether a governmental agency has fairly assessed the affected property for a special benefit? Of particular import to this case is the question of what a landowner must do to prove that an assessment will not benefit the assessed property.

Here the trial court found dispositive the fact that the Pomerances "never applied for a permit to develop the property, and the evidence reflects that development may be possible." Final Judgment, August 21, 1998, at 4. The court of appeal upheld the trial court decision on the basis, among other things, that the Pomerances "did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it." *Pomerance v. Homasassa Special Water District*, 755 So. 2d 732, 734 (Fla. 5th DCA 2000).

Amicus will argue that the courts below raised the barrier too high

for landowners who challenge a special assessment on the ground that regulations have rendered the property unable to derive any significant benefit from the project financed by the assessment.

SUMMARY OF ARGUMENT

In situations where a landowner alleges that property has been made unusable because of onerous regulations, it would be unlawful to impose an assessment based on improvements that can render no benefit to the property. The courts below established and upheld a procedure whereby a landowner must apply for, and be denied, permits to develop the property as a prerequisite to proving that an assessment will not benefit a property under these circumstances. While this procedure mirrors the procedure imposed for regulatory takings claims, it is an inappropriate burden to impose on landowners attempting to show that their property will not be benefitted by an assessment.

ARGUMENT

I

FOR A SPECIAL ASSESSMENT TO BE VALID, THERE MUST BE A LOGICAL RELATIONSHIP BETWEEN THE SERVICES PROVIDED AND THE BENEFIT TO REAL PROPERTY

Unlike ordinary taxes, "special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement." *Illinois Central Railroad Company v. City of Decatur*, 147 U.S. 190, 198 (1893); *accord* Richard R. Powell, *Law of Real Property*, ch. 5, § 39.03[1] (rev'd 1997). The question, of course, is whether any particular improvement sufficiently enhances the property to justify a particular assessment. It is well established that a special assessment may not be imposed on property unless that property benefits in a particular way from the project or activity being paid for. Most recently, this Court held that "the test is whether there is a 'logical relationship' between the services provided and the benefit to real property." *Lake County v. Water Oak Management Corporation*, 695 So. 2d 667, 669 (Fla. 1997). If an improvement does not benefit a particular parcel of property, then a landowner might still have to share

the cost—but as a tax that is more equally spread among the entire community. Previous decisions of the Florida and United States courts have explored this standard in more detail.

For example, in *City of Fort Myers v. State*, 95 Fla. 704, 723, 117 So. 97, 105 (Fla. 1928), this Court noted that "it must appear that assessments are not in excess of the benefits conferred upon the land." It is important, therefore, that the courts examine and litigants be given a fair opportunity to address the particularities of each assessment and property. Thus, in *Fisher v. Board of County Commissioners of Dade County*, this Court noted that "to be 'specially benefited' by the [improvement of] paving depends upon a number of circumstances such as the use to which the property is put, whether it is devoted to business or residences and the reasonable cost of the improvement as related to the particular property." *Fisher v. Board of County Commissioners of Dade County*, 84 So. 2d 572, 576 (Fla. 1956) (emphasis omitted) (quoting *Atlantic Coast Line Railroad Co. v. City of Winter Haven*, 112 Fla. 807, 815, 151 So. 321, 324 (Fla. 1933)).

This Court has also been quick to note, however, that when an

assessment cannot be justified, a court must act to overturn it. Thus, in *Atlantic Coast Line Railroad Co.*, 112 Fla. at 814, 151 So. at 324, the Court found that it is

> well recognized that a local assessment may so transcend the limits of equality and reason that its exacting would cease to be a tax or contribution, and become extortion and confiscation, in which cases it then becomes the duty of the courts to protect the person or corporation assessed, from robbery under color of a better name.

Other courts, including the Eleventh Circuit and the United States Supreme Court, have recognized that there is a constitutional basis for overturning an assessment that cannot be justified on the basis of a benefit to the underlying property. In 1995, the Eleventh Circuit noted that "'a special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner, or "force[s] a landowner to make an improvement that, while valuable to others, is useless to him."'" *Zipperer v. City of Fort Myers*, 41 F.3d 619, 625 (11th Cir. 1995) (quoting *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986)). This doctrine was first articulated in *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898), where the United States Supreme Court

found that the

> guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country.

It concluded: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, *a taking . . . for public use without compensation*." *Id*. (emphasis added). *Accord Myles Salt Co. v. Board of Commissioners of the Iberia & St. Mary Drainage District*, 239 U.S. 478, 485 (1916) ("It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation.").

To avoid this specter of an assessment being so disproportionate as to fail constitutional muster, therefore, Florida courts have been careful to ensure that there is an adequate relationship between the assessment

and a benefit to the property. What the courts have not heretofore addressed, however, is the case where property is so heavily burdened by regulatory restrictions that its ultimate development is unlikely or impossible. Put another way, the Court in *Norwood* pointed out that an unjustifiable assessment could give rise to a claim for a taking. But what if the property may already be subject to a taking through confiscatory regulation?

The standard of proof is high for a regulatory takings claim. The question here is whether the standard should be equally high to overcome a presumption in favor of a special assessment? Since 1987, when the regulatory takings doctrine was first revived by the United States Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Nollan v. California Coastal Commission*, 483 U.S. 825, there have been some hard-won successful regulatory takings cases,[1] but many more attempts

[1] *See, e.g., Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (taking judgment upheld 15 years after litigation first commenced); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (wetland taking found after a decade of litigation); *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir.) ($60 million coal deposit takings award upheld), *cert. denied*, 502 U.S. 952 (1991). (The fourth and final trip to the appellate court in *Whitney Benefits* occurred in 1994,

that languish in an endless mire of litigation.[2] "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring).

In order to prove a taking, an applicant must first obtain a final agency decision that the regulation has actually denied the applicant economically beneficial or productive use of the property. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson Cit*y, 473 U.S. 172, 186-94 (1985). However, merely having a permit denied is not enough. Some courts have held that a single permit application is not enough if the proposal is not appropriate for the neighborhood or other uses might be available. *See, e.g., Del Monte Dunes*, (question of whether five permit applications are adequate); *Tinnerman v. Palm Beach County*, 641 So. 2d 523 (Fla. 4th DCA 1994)

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approximately 14 years after the taking, *Whitney Benefits, Inc. v. United States*, 31 Fed. Cl. 116 (1994).)

[2] *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (takings damage award upheld after over a decade of permit denials and litigation); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (case remanded eight years after permit denials); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (case remanded again after over a dozen years of litigation).

(no taking of 4.81-acre site for warehouse because alternative use of site for newsstand or nursery might be available); *Gil v. Inland Wetlands and Watercourses Agency of the Town of Greenwich*, 593 A.2d 1368 (Conn. 1991) (several applications to build home and driveway too grandiose). When multiple agencies are involved from different governments (such as local governments and the Corps of Engineers), the landowner can be faced with further procedural complexities. *See, e.g., Heck v. United States*, 134 F.3d 1468 (Fed. Cir. 1998) (no taking by federal government after wetlands permit denied because landowner had not obtained a state water quality permit). Most recently, the United States Supreme Court granted certiorari in *Palazzolo v. Rhode Island*, 746 A.2d 707, *cert. granted*, 2000 U.S. LEXIS 6596, a case where a landowner has been trying for four decades to develop his property. It is easy to see why a regulatory takings claim can easily consume a decade.

II

THE PROCEDURES FOR A LANDOWNER TO PROVE THAT REGULATIONS AFFECTING PROPERTY MAKE IT IMPOSSIBLE TO REALIZE A BENEFIT FROM AN IMPROVEMENT SHOULD NOT BE MADE TOO ONEROUS

The trial court below concluded that "Plaintiffs have never applied for a permit to develop the property, and the evidence reflects that development may be possible." Final Judgment, August 21, 1998, at 4. The court of appeals affirmed because, it said, the Pomerances "did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it." *Pomerance v. Homasassa Special Water Dist.*, 755 So. 2d at 734. This holding is quite clearly in conflict with the facts established at trial that: The Pomerance property is virtually all wetlands with only one-half acre of inaccessible upland, that the property has no available upland for "mitigation," and that there is no significant development potential in the property. *See* Petitioners' Statement of Case and Facts, *passim*. Moreover, this holding is unprecedented because no court has previously suggested that a person opposing the imposition of a benefit assessment must prove that the property cannot receive any benefit from the improvement by first going through an unsuccessful permit process. Under the trial court's procedure

that was upheld by the court of appeals, only a person who has been denied an application to use a parcel for a use that could receive a benefit from the improvement can argue that the assessment is unlawful. For all practical purposes, this is the same standard of proof required under a claim of a regulatory taking.

For example, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), landowners argued that restrictive zoning regulations took their property. However, the Court declined to reach the merits of the takings claim because the zoning did allow some uses for the property that may have been economically viable; until the owners actually applied for a permit, there was no way of telling whether any use was available and if a taking had occurred. In *Williamson County*, the Court turned back a takings case because the landowner had not applied for a variance from the challenged zoning regulations. The Court figured that the variance might have granted the landowner the ability to obtain an economically viable use of the property. It held that, until there was a final agency decision, it would be premature to pursue a takings claim. This makes sense in cases where litigants are asking the government to purchase their property through inverse condemnation and where it would not be futile to apply

for a regulation because of the availability of a permit or variance. But it is troubling where a landowner is not asking the government to take title to the property but is asking merely that the owner not be charged for an improvement that will not benefit the property because of government regulation. By imposing what is essentially a *Williamson County* takings ripeness requirement on a challenger to an assessment, the court has raised the bar impossibly high for many landowners of ordinary means to challenge a mere imposition of a benefit assessment.

In the case of the Pomerances, what if they had applied to use the property for commercial purposes and the permit was denied? Would they also have to try to apply for a residential use of the property—or indeed every use of the property that could potentially benefit from a water pipeline? What if the permit had been granted by the county but another required permit was denied by the Corps of Engineers? What if the Corps approved a wetlands fill permit with mitigation measures that exceeded the value of the property?

Reflection upon these questions should make it clear that, under the trial court's test, a benefit assessment could be imposed, upheld, and paid

for long before the landowner is able to meet a takings-like standard that the property cannot utilize the benefit because of existing regulatory constraints. That, of course, would sidestep entirely the Florida Supreme Court's admonition that there must be a sense of "proportion" or "logical relationship" between the benefit and assessment.

The question that a court must answer is whether an assessment is likely to benefit a particular property. Assuming that the government agency has met its initial burden,[3] what burden must a landowner carry to adequately demonstrate that environmental and other land use regulations have rendered a property incapable of receiving a benefit from an assessment? As the landowner is not seeking inverse condemnation damages, but merely relief from an inappropriate assessment, the standard of proof should not be as exacting and difficult to achieve as the standard in a regulatory takings case. A landowner should not have to apply for one or more permits to develop the property, Final Judgment at 4, and have those permits denied, in order to overcome a presumption that an

[3] Whether the Homasassa Special Water District met this burden is beyond the scope of this brief. Petitioners' brief, however, raises serious questions concerning whether the District met these standards and the standards of its charter.

assessment will not benefit the property. But that is the standard imposed by the trial court and upheld by the court of appeal. A more reasonable standard would be one in which the landowner demonstrates, based on expert evidence and opinion, that (1) the property is burdened by substantial regulatory constraints and (2) that these regulatory constraints on their face make it more likely than not that the property will not benefit from the proposed assessment. Under standards such as these, a court could readily find that the Pomerances met their burden of proving that the assessment in this case has no "logical relationship" to the benefits, does not "provide a special benefit to the assessed property," and that the assessment has not been "properly apportioned." *See Lake County*, 695 So. 2d at 669 and 670.

CONCLUSION

The Constitution forbids the imposition of an assessment for an improvement that will not benefit property. If such an assessment can be imposed and upheld long before a landowner can prove that property has been rendered useless by regulation, then the protection of the Constitution will be eviscerated. This Court must ensure that property owners are not required to pay irrevocably for improvements that in all

likelihood will provide no benefit whatsoever to the subject property.

DATED: October ___, 2000.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been formatted using 14-point, proportionately spaced Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to Karen Gaffney, 221 West Main Street, Suite D, Inverness, Florida 34460, Counsel for Appellants; Sidney F. Ansbacher, Upchurch, Bailey and Upchurch, P.O. Drawer 3007, St. Augustine, Florida 32085, and Jack A. Moring, Myers and Moring, P.A., 7655 West Golf to Lake Highway, Suite 12, Crystal River, Florida 34429, Counsel for Appellee; this ___rd day of October, 2000.

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