IN THE SUPREME COURT OF THE STATE OF FLORIDA

ORANGE COUNTY, a political Subdivision of the State of Florida,

Petitioner,

CASE NO: SC01-382
5DCA CASE NO: 5D00-1728

v.

COSTCO WHOLESALE CORPORATION, A Washington corporation,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, WILLIAM H. ADAMS, III

On Review from the District Court of Appeal, Fifth District State of Florida

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AUTHORITY TO FILE

Consents to the filing of this amicus curiae brief executed on behalf of Petitioner and Respondent, the only parties before this Court, have been furnished to the Clerk; therefore, Rule of Appellate Procedure 9.370 authorizes submission of this brief.

INTEREST OF AMICUS CURIAE

I have been a practicing lawyer in the State of Florida for more than fifty years. During that period, I have observed an enormous growth in the volume, detail and complexity of local ordinances controlling land use. Although planners argue that urbanization and the increasing complexity of life require this kind of detailed regulation, I am persuaded that the opposite is true. The more complex life becomes the more impossible it is for regulators to have the detailed knowledge of available alternatives and individual preferences that is required to enable them to regulate without imposing drastic costs that ultimately detract from the welfare, not merely of the targets of particular regulations, but of their supposed beneficiaries and of society in general.[1]

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[1] The ideal objective in developing land use regulations should be to create a system of reciprocal restrictions and benefits that improves the positions of *all* persons affected by them. Justice Holmes referred to this concept in another context as an "average reciprocity of advantage that has been recognized as a justification of various laws." Pennsylvania Coal Co. v. Mahon, 260 U.S. 394, 415 (1922).

The increase in the number and complexity of regulations poses policy issues that are beyond the jurisdiction of this Court, but at least one of the effects of that increase is relevant to this Court's work. The sheer volume of questionable regulations coupled with the widespread belief that, due to the standard of review that courts employ, almost any ordinance will be sustained discourages landowners from challenging more than a miniscule number of the blatantly bad ordinance provisions that ought to be examined by courts.

This perception also influences local government officials. They assume that property rights may freely be ignored and enact even more questionable regulations. All of this powers a regulatory cycle that makes constitutional principles increasingly irrelevant.

My interest is that of a citizen who hopes to persuade the Court that use of the traditional standard of rational basis review in reviewing local land use ordinances contributes to serious abuses which can be corrected only if courts begin to use a higher degree of scrutiny and announce that intention.

STATEMENT OF THE CASE

The question presented in this case is whether a section of the Orange County Code that prohibits a new or relocated package store from locating within a radius of 5,000 feet of an existing package store violates the Florida Constitution. In Costco Wholesale Corporation v. Orange County, 780 So.2d 198 (Fla. 5th DCA 2001), the District of Appeal held the section in question invalid. This Court granted Orange County's petition for review of that decision. Orange County v. Costco Wholesale Corporation, 2001Fla. Lexis 1540 (Fla. July 13, 2001).

The question of what standard the Court should use in reviewing the validity of the ordinance is a threshold question that the Court must consider in deciding this case. This brief addresses that question.

SUMMARY OF THE ARGUMENT

An owner's use of property may be regulated under the police power in order to protect other owners and the public against harm; however, regulations that restrict the use of property *in order to confer benefits on other property owners* are beyond the scope of the police power unless they provide substantial reciprocal benefits that flow back to the restricted property.

When a landowner introduces evidence that an ordinance appears to have been enacted for an unlawful end or that, to reach a lawful end, it uses means that are not reasonably designed to accomplish its purpose and thus imposes burdens that substantially exceed any reasonably expected benefits, a court should employ a heightened degree of scrutiny in deciding whether the ordinance passes constitutional muster.

INTRODUCTION

In the real world, members of local government boards and other local government officials have fewer constraints on their ability to act arbitrarily than do officials at any other level of government. Their actions should be subject to greater scrutiny.

Board members are usually laymen with only a superficial understanding of the principles of due process. They are often subject to intense political pressure. When the pressure is to enact an ordinance that affects only a particular business or neighborhood, the debate attracts little interest from members of the public who are not directly affected. Thus, business special interests, small groups that promote self-interested legislation, and vocal activists often wield far greater influence than individual landowners whose property rights they threaten.

It is only human for local officials to respond to political pressures of this kind, but if constitutional rights are to have any meaning, courts must be willing to step in when the political responses of local officials threaten those rights.

In reviewing local government legislation, courts have used the traditional standard that they developed for use in reviewing acts of state legislatures and have accorded great deference to legislative decisions. Use of this standard has left local boards relatively free from supervision and encouraged abuses that have eroded the legitimate property rights of many landowners.

In Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993), this Court took note of the problems that often afflict local government decision making and held that many rezoning decisions formerly regarded as legislative are quasi judicial and therefore subject to strict scrutiny.[2]

In Snyder, the Court took judicial notice of specific factors that often degrade the legitimacy of local government actions:

> Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and

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[2] The Court noted that the "strict scrutiny" required by its decision arises from the need to comply strictly with the comprehensive plan. Thus it must be distinguished from the type of strict scrutiny review afforded in some constitutional cases. Board of County Commissioners of Brevard County v. Snyder, 627 So.2d at 475.

> practitioners have been critical of the local zoning system. Richard Babcock deplored the effect of "neighborhoodism" and rank political influence on the local decision-making process. Richard F. Babcock, The Zoning Game (1966). Mandelker and Tarlock recently stated that "*zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits*." Daniel R. Mandelker and A. Dan Tarlock, Shifting the Presumption of Constitutionality in Land-Use Law, 24 Urb.Law. 1, 2 (1992).[3] (Emphasis added)

The characteristics of local government decision-making that led this Court to increase the degree of scrutiny to be employed in reviewing narrow-area rezonings also affect the legitimacy of many local government decisions that are unquestionably legislative.[4] Yet the Court held that when a local board acts in its legislative capacity, its actions will be sustained if the ordinance is fairly debatable.

This brief argues that property rights are fundamental constitutional rights and that when the constitutional validity of a local land use ordinance is at issue and evidence is introduced that the ordinance was motivated by bias or special interest pressure or that it imposes a *disproportionate* burden

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[3] Board of County Commissioners of Brevard County v. Snyder, 627 So.2d at 472- 3.

[4] In many cases the resulting problems cannot be resolved by reference to a comprehensive plan.

on a landowner or class of landowners for the benefit of others, a court should examine the ordinance and its effects with a higher degree of scrutiny than courts have traditionally used.

HISTORICALLY, PROPERTY RIGHTS WERE REGARDED AS FUNDAMENTAL CIVIL RIGHTS

Until the rise of the regulatory state, economic liberty was regarded as an essential component of constitutionalism.[5] The English constitutional tradition and the philosophy of John Locke had heavily influenced the framers of the United States Constitution[6] and provided the intellectual foundation for Sir William Blackstone's Commentaries on the Laws of England, (1765), the primary text used by early American lawyers and law students.

Blackstone had described the "free use, enjoyment and disposal" of property as the "third absolute right, inherent in every Englishman."[7]

Locke regarded government as a social compact in which individuals joined in order to gain greater protection for their persons and property. He

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[5] James E. Ely, Jr., The Guardian of Every Other Right - A Constitutional History of Property Rights, Second Edition, p. 3.

[6] "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition." Pauline Maier, American Scripture: Making the Declaration of Independence, p. 87, quoted in Steven J. Eagle, "The Birth of the Property Rights Movement," Policy Analysis No. 404," Cato Institute (June 26, 2001), p. 5.

[7] W. Blackstone, Commentaries, p. 2.

held that, because the state's power came from individuals who delegated it to the state, it could not exceed the collective power of the individuals from whom it was acquired:

> The supreme power cannot take away from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it, to gross an absurdity for any man to own.[8]

Despite differences among the framers' of the Constitution over particular economic issues, they were united in the belief that the right to acquire and own property is a fundamental right. John Rutledge of South Carolina told the convention that "Property was . . . the principal object of Society." Alexander Hamilton echoed his view: "One great objt.[sic] of government is personal protection and the security of Property." John Adams recognized that property rights protection has an even broader significance, "Property must be secured, or liberty cannot exist."[9]

The framers of the Constitution and Bill of Rights sought to secure property rights against the federal government by narrowly restricting the powers of the federal government and setting out in detail the specific limitations

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[8] John Locke, Of Civil Government, ¶ 138.

[9] Ely, n. 6, p. 42.

on federal government action contained in the Bill of Rights. The post-Civil War constitutional amendments extended most of the guarantees in the Bill of Rights to protect against actions by the states.

The fundamental importance attributed to property-rights protection by those involved in the process of ratification is illustrated by an opinion of Supreme Court Justice William Paterson written only six years after the Constitution was adopted. He described the close connection between liberty, government by consent, and property rights:

> It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.[10]

Most states followed the lead of the federal government by adopting

[10] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 309.1795).

constitutions pledging protection of property as one of the basic rights of persons.

PROPERTY RIGHTS ARE NO LESS FUNDAMENTAL THAN OTHER CONSTITUTIONAL RIGHTS THAT ARE PROTECTED THROUGH HEIGHTENED SCRUTINY

Unless rights that provide economic security are enforced, other fundamental rights have little value.[11] Property stands as a bulwark against state power. It disperses power throughout society and shields individuals from coercion by others. It enables citizens to build a solid economic foundation that reduces the natural concern that, if persons exercise their political rights by taking unpopular positions, government (or fellow citizens) will find a way to retaliate and leave them destitute.[12] . Personal rights, including both property rights and political rights, depend on each other. One cannot easily divorce property rights or subordinate them to other constitutional rights without seriously degrading all of the rights protected by the Bill of Rights and its state counterparts.

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[11] " . . .[T]here are four great blessings that cannot easily be realized in a society that lacks the secure, decentralized, private ownership of goods. These are: liberty, justice, peace and prosperity. . . .[P]rivate property is a necessary (but not a sufficient) condition for these highly desirable social outcomes." Tom Bethel, The Noblest Triumph – Property and Prosperity through the Ages, St. Martin's Griffin Press (1998), n.11, p.9.

[12] "Leon Trotsky long ago pointed out that where there is no private ownership, individuals can be bent to the will of the state." Id. (quoting, from Leon Trotski, The Revolution Betrayed, Doubleday, Doran & Co. (1937)).

Well-defined property rights promote justice.

> . . . [A] private property regime makes people responsible for their own actions in the realm of material goods. Such a system therefore ensures that people experience the consequences of their own acts. Property sets up fences, but it also surrounds us with mirrors, reflecting back upon us the consequences of our own behavior. Both the prudent and the profligate will tend to experience their deserts. Therefore, a society of private property goes some way toward institutionalizing justice. As Professor James Q. Wilson has said, property is a "powerful antidote to unfettered selfishness."[13]

In short, property rights are no less fundamental than other fundamental rights, including political rights. Without property rights protection, other rights are hollow and theoretical. All rights vitally depend upon the extent to which property rights are appropriately protected.[14]

As the Supreme Court wrote in Lynch v. Household Finance Co. 405 U.S. 538 (1971):

> . . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question

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[13] Bethel, n. 12, p. 12.

[14] "Property enables people to satisfy life's material needs without becoming dependent on the state. Secure property rights provide individuals with the confidence needed to invest their labor and capital in productive activity today, knowing that success will benefit them and their families tomorrow. Private property is thus the vehicle by which individual freedom and the enrichment of society are joined in a virtuous circle to enhance the welfare of all." Eagle, n. 7, p. 4.

> be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries.

FLORIDA LAW RECOGNITION THAT PROPERTY RIGHTS ARE FUNDAMENTAL

The Florida Constitution and decisions of this Court have recognized that property rights are of fundamental importance.

> Basic rights. All natural persons . . . are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . .

Florida Constitution, Art. 1, sec.2.

It is significant that both the Fifth Amendment of the United States Constitution and Article 1, sec. 2, of the Florida Constitution unite together in a single section the rights of persons to liberty and property. The Florida Constitution unites them in a single sentence under the heading "Basic rights."

In Corn v. State, 352 So.2d 4 (Fla. 1976), this Court described private property rights as "fundamental" and quoted with approval the following language from Spann v. City of Dallas, 235 S.W. 513 (1921):

> To secure their property was one of the great ends for which men entered into society. The right to acquire and own

property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty - an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.

It is not a right, therefore, over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.

It is a right which takes into account the equal rights of others, for it is qualified by the obligation that the use of the property shall not be to the prejudice of others. But if subject alone to that qualification the citizen is not free to use his lands and his goods as he chooses, it is difficult to perceive wherein his right of property has any existence.

The ancient and established maxims of Anglo-Saxon law which protects these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history - the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.

THE TWILIGHT OF PROPERTY RIGHTS AND ITS AFTERMATH

In the eighteenth century, property rights were so highly regarded that Adam Smith and other political economists hardly thought to mention them. They must have assumed that defending rights that were so well established was superfluous.[15] This assumption turned out to be a grave mistake.

The publication of the Communist Manifesto became a declaration of war against property, and within a short time, criticism of property rights became intellectually fashionable.[16] For many decades, the right to property was disparaged by academics and neglected by courts. With the rise of the regulatory state in the Progressive Era, judicial decisions at both the federal and state levels gradually compromised property rights protection, ultimately reduced the status of property or economic rights as compared to personal and political rights, and, in the process, vested immense power in the hands of government.

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[15] Bethel, n. 12, pp. 8–9. "Private property was deemed "sacred." The English economists of the classical period did not analyze the legal institutions upon which their reasoning was predicated. It is hardly an exaggeration to say that by the time property came under attack, in the mid-nineteenth century, economists had written very little in its defense. 'Private property was assumed and taken for granted, without investigation, by the nineteenth-century economists,' wrote John R. Commons in The Legal Foundations of Capitalism*."* Id*."*

[16] Bethel, n. 12, p. 7.

Many principles of constitutional interpretation now used were developed during the decades when property rights were disparaged, and development of those principles was influenced by the prevailing intellectual climate. Application of those principles often leaves many landowners to overcome long delays and expensive procedural and substantive hurdles in seeking permits and other permissions to use their own property.[17] In many cases, the regulations creating these hurdles are overbroad, oppressive and not reasonably designed to protect against the evils they are designed to address. In other instances, they impose undue and disproportionate burdens on landowners, not for the purpose of preventing harm to others, but to confer benefits on other landowners or on society in general. Yet courts often refuse to examine these cases on the theory that a court must sustain economic legislation *if it can conceive of any state of facts under which it may be justified*.[18]

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[17] Eagle, n. 7, p. 1.

[18] This result should not be required by either the rational basis or fairly debatable test. As applied to local government enactments, they ought to mean that: If a court, after examining all of the available facts, believes that the issues of (a) whether the purpose of the ordinance is permissible and (b) whether it is reasonably designed to achieve that purpose are fairly debatable, it must give the legislative body the benefit of the doubt and uphold the ordinance.

THE RE-BIRTH OF PROPERTY

In recent years, property has been rediscovered and has become a new field of economic study. In fact, a significant part of Law and Economics scholarship is devoted to understanding its functions and considering how, with clearly defined property rights, markets can solve (and have in the past have solved) problems that everyone formerly believed demanded regulatory solutions.[19]

DEFERENTIAL REVIEW HAS CONTRIBUTED TO A PROLIFERATION OF ORDINANCES THAT VIOLATE THE PROPERTY RIGHTS OF LANDOWNERS

The widespread belief that courts will be highly deferential in reviewing questionable ordinance provisions has discouraged litigation attacking many invalid ordinances. Of course, deference is not the only factor. Developers who expect to have repeated dealings with local governments are loath, for obvious reasons, to bring suits challenging ordinances -- no matter how egregious they may be. But individual property owners who do not expect to have repeated dealings also acquiesce and comply with ordinances that they believe are unlawful because they view the odds of winning a case in which

[19] Bethel, n. 12, ch. 20, "The Rediscovery of Property."

review will be excessively deferential as too small to make mounting a challenge worthwhile.[20]

Emboldened by a perceived likelihood that no one can or will challenge their decisions, many local officials give little or no consideration to constitutional principles and continue to expand the envelope of questionable regulations and practices, producing an even greater number of measures that clearly infringe on protected rights. Few of these infringements are challenged, and in virtually every community their volume is increasing every day.

THE LIMITS OF THE POLICE POWER

I believe that the author of Spann v. City of Dallas, the Texas opinion quoted in Corn v. State went too far in suggesting that property rights are not subject to regulation under the police power. His statement is true only if one does not recognize that property rights themselves are shaped and limited by considerations that underlie the police power. Property rights are violated when landowners use their property in ways that significantly interfere with the property rights of others. They have never entitled one landowner to use his or her land in a way that substantially interferes with another person's use of his or her land.

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[20] Litigation is necessary for the growth of a principled body of law. Such development is a public good that few property owners are willing or have the means to pay for.

> Legal rules have been developed through court decisions based on the maxim *sic utere tuo ut alienum non laedas* –-"Each one must so use his own as not to injure his neighbor." They have produced the common law of nuisance. Conceptually, a state, in exercising its police power, is exercising authority that citizens have delegated to it to define and prevent nuisances. When the state asserts that the police power authorizes a particular action, it is claiming, "not that it has an independent right, but merely that it may protect the existing rights of the numerous victims who otherwise might be stymied by the difficulty and expense of bringing individual lawsuits. *When thus viewed, not only is the police power not antithetical to property rights, it is a principal tool for their defense*. [21]

But the government's police power is not unlimited. Its purpose is to carry out government's essential function of protecting citizens against harm. It should not be construed to empower government to seize or restrict the use of property or to impose disproportionate burdens on property owners who are causing no harm in order to provide benefits to other property owners or even to society in general. A local government may impose disproportionate burdens on some in order to confer benefits on society, but, to confer benefits, it must use the tax system or exercise its power of eminent domain and pay compensation.[22] When an ordinance that purports to be an exercise of the police power imposes disproportionate burdens on some property owners in

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[21] Eagle, n. 7, pp. 10-11. (Emphasis added)

[22] Cf. Volusia County v. Aberdeen at Ormond Beach, 760 So.2d 126 (Fla. 2000).

order to confer benefits that in all fairness should be paid for by others, it becomes a taking.

> . . . [M]any government acts that are rationalized as exercises of the police power are in fact unjustified by it. The police power is not a license, for example, for government to take property from some for the benefit of others, or for the purpose of adjusting or harmonizing or maximizing its own view of the "well-being" of society. Nor can government invoke the police power to interfere with property rights where the exercise of those rights has not harmed others. Indeed, to invoke the police power to protect "the community" from conduct that does not violate the rights of any of its individual members is to invest government with "rights" not derived from its members. Individuals would then be subject to a government more powerful than the people had a right to make it. The evil implicit in governmental overreaching through the police power was recognized in Justice Holmes's declaration in Pennsylvania Coal Co. v. Mahon (1922)[23] that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24] [25]
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> The purpose of the police power is to secure rights by prohibiting harms. The purpose of the eminent domain power is to provide public goods by taking private property, but only after paying the owner just compensation. *In Ernst Freund's classic words of a century ago, "[I]t may be said that the state takes property by eminent domain because it is useful to*

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[23] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[24] Eagle, n. 7, p. 11, citing Richard A. Epstein, Takings -- Private Property and the Power of Eminent Domain, Harvard University Press (1985), pp. 107-46.

[25] Of course, government *does* have power to take or restrict the use of one person's property in order to enhance the general welfare of the community, but it derives this power from the takings clause, not its police power.

the public, and under the police power because it is harmful." [26]

The distinction between government actions under the police power to prevent or remedy harm (which government may take without paying compensation) and government actions that restrict the use of property in order to promote the general welfare (which government may take if it pays compensation) [27] underlies the Supreme Court's statement in Armstrong v. United States, 364 U.S. 40, 49 (1960) that:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

The principles this Court has adopted for deciding the validity of ordinances imposing exactions; i.e., requiring developers to dedicate property or to make payments in order to offset needs created by their developments, reflect the Court's recognition that a local government has not power to impose on property owners disproportionate burdens to finance improvements unless roughly proportional benefits flow back to the owner's property. This is the

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[26] Eagle, n. 7, p. 11, citing Ernst Freund, The Police Power: Public Policy and Constitutional Rights (1904) as quoted in Zev Trachtenberg, "Introduction: How Can Property Be Political," 50 Oklahoma Law Rev. 304 (1997).

[27] Compensation may be paid in the form of benefits that flow back to property that is restricted but the benefits should be roughly proportional to the detriments.

underlying essence of the dual rational nexus test that this Court approved in St. Johns County v. Northeast Florida Builders Association, 583 So.2d 635 (Fla. 1991) and clarified in Volusia County v. Aberdeen at Ormond Beach, 760 So.2d 126 (Fla. 2000).

In deciding whether a local government enactment is appropriate under the police power, two questions must be considered: (1) Whether the government may use the police power to achieve the end sought, and (2) Whether, assuming the end is proper, the government has chosen means that are reasonably designed to attain that end.

In selecting particular means, a local government ought to balance the harm to persons that the proposed action is intended to reduce or eliminate against harm that the proposed action will inflict on persons whose property it restricts. In assessing the validity of a local government action, a court should focus on both kinds of harms and declare invalid ordinance provisions that impose harms that are substantially greater than those they alleviate.

In deciding the validity of an objective that a local government has chosen to achieve, a court should also consider not only the terms of the ordinance but whether it was enacted through legislative incompetence, bias or improper motive.

Assessing and comparing harms (the harm to be remedied and the harm caused by the remedy) involves uncertainty at both ends. Because a perfect solution is seldom possible, some judicial deference to the legislative body's decision is required. However, to date courts have come down too strongly on the side of local government power. The rational basis test *in its traditional form* has precluded a close examination of these issues.

NEEDED: A HEIGHTENED STANDARD OF REVIEW

What is needed is an intermediate standard of review under which the local government cannot successfully defend a questionable enactment merely by asserting that it relates to the public health or welfare and advancing hypothetical facts to describe some harm it could possibly diminish. When a property owner introduces evidence that an ordinance is directed at an improper end or that the means chosen to achieve a proper end are not justified by facts, the local government should be required to respond with evidence demonstrating that the ends and means are indeed appropriate.

In reaching a decision on the evidence, a court should defer to the legislative judgment if it believes that the legislature's judgment is likely to be more accurate than its own or that the additional cost of making a better judgment will not be justified by any improvement that is likely to result.

HEIGHTENED REVIEW WOULD REDUCE ABUSES AND, ULTIMATELY, JUDICIAL LABOR

The Court may be concerned that conducting more searching reviews would require courts to resolve issues that go beyond their competence, place courts in unseemly conflict with local legislative bodies or inordinately increase judicial labor. I do not believe that any of these concerns should carry the day.

Judicial efforts may not always succeed. No amount of effort can hope to eliminate all legislative abuse. But an effort is not mistaken solely because it may not always be successful. It is worth the effort if it reduces the level of abuse below the level that would have existed if it had not acted.

The assumption that using greater scrutiny will invite conflict assumes that local government bodies will continue to do business as usual and that their output will not be affected by court decisions. That assumption is mistaken. Governments, like private parties, change their behavior in response to court decisions they can understand. If this Court decides substantive constitutional questions in principled terms and local governments gain a clear view of the limits on their powers and if they know that legislation they enact will be subject to heightened judicial scrutiny, they will accord more respect to constitutional rights. The volume of questionable legislation they enact will drop.

Additional scrutiny *will* increase judicial labor *in the short run*, but, if the Court makes clear that heightened review is required, its action will send a message to local governments that failure to take constitutional rights into account is much riskier than it has been. In the long run, added scrutiny will reduce the output of unconstitutional ordinances, protect property rights and reduce, not increase, judicial labor.

CONCLUSION

In the exaction cases, this Court has mandated use of the dual rational nexus test. In applying that test, courts now engage in the kind of heightened scrutiny suggested in this brief. The facts in this case and many other cases involving local land use regulations raise issues that are quite analogous to those in the exaction cases. Courts should resolve them using a similar process.

A decision to use a heightened degree of scrutiny would not change substantive law. It would change only the strength of the presumption of constitutional validity. The rational basis test could still be applied but, in applying it, courts would look more closely at whether the end the local government has sought to achieve is permissible and whether the means are reasonably fit to achieve that purpose without imposing harm that is even greater than the harm to be remedied. If, after looking at these issues more closely, a

court is in genuine doubt about the validity of the measure, the presumption of validity should carry the day.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this ___ day of August, 2001, I served a copy of the foregoing brief by U.S. Mail on Scott A Glass, Schutts & Bowen, LLP, 300 South Orange Avenue, Suite 1000, Orlando, FL 32801; Mark Fisher, Meininger, Fisher & Mangum, P.A., P. O. Box 1946, Orlando, FL 32802-1946; John F. Bennett, Fishback, Dominick, et al., 170 Washington Street, Orlando, FL 32801; and James F. Page, Jr., Gray, Harrison & Robinson, P.A., P.O. Box 3068, Orlando, FL 32802-3068.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is composed in Times Roman, 14 point.

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