

**TRANSPORTATION PLANNING
WITHIN CONSTITUTIONAL CORRIDORS**

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I. INTRODUCTION

The demand for new and improved transportation facilities will increase as Florida's population grows into the 20th Century, making it imperative for both government and landowners' counsel to closely follow the law on right of way preservation and exactions. These materials will summarize current caselaw concerning the constitutional aspects of these two important transportation issues.

II. RIGHT OF WAY PRESERVATION IN FLORIDA

A. Preservation of rights of way for anticipated transportation needs is facially constitutional in Florida if done within certain parameters. An understanding of those parameters can be gained from an analysis of the Florida Supreme Court trilogy of *Joint Ventures*, *A.G.W.S.*, and *Wright*.

1. *Joint Ventures Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990):

The owner of an 8.3 acre tract in Tampa challenged the constitutionality of the state map of reservation statute, particularly 337.241(2) and (3) Florida Statutes (1987), when 6.49 acres of the property were reserved for a future highway project. The challenged statutory scheme allowed DOT to record maps depicting the limits of proposed future rights of way and establishing setback lines within which no development of any type could be permitted by any government entity for a period of 5 to 10 years.

The owner contended that the map statute constituted a taking. DOT contended that it merely regulated property as a valid exercise of the police power. The District Court of Appeal upheld the statute because the owner would have a

remedy in inverse condemnation. During that appeal, DOT condemned the land and the parties settled, but the District Court maintained jurisdiction and certified the question to the Supreme Court because of its great public importance.

The Florida Supreme Court found the challenged provisions of the map statute unconstitutional because they provided for "an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide an adequate remedy." The Court reasoned that the sole purpose of the statute was to reduce future acquisition costs and rejected DOT's contention that ensuring financial feasibility of future road projects was a legitimate police power exercise. The Court also rejected the notion that the availability of inverse condemnation to aggrieved owners was a sufficient remedy or substitute for the protections of the Eminent Domain code (Chapters 73 & 74, Florida Statutes). Similarly, the provision allowing an owner to bring an administrative challenge did not adequately ensure compensation for takings.

2. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994):

Several takings claims arose after *Joint Ventures* resulting in some conflicting appellate decisions. See *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield Ltd.*, 582 So.2d 790 (Fla. 5th DCA), *rev. den.* 591 So.2d 183 (Fla. 1991); *Department of Transportation v. Weisenfeld*, 617 So.2d 1071 (Fla. 5th DCA 1993); *Department of Transportation v. Lake Beulah*, 617 So.2d 1089 (Fla. 5th DCA 1993); *Department of Transportation v. Miccosukee Village Shopping Center*, 621 So.2d 516 (Fla. 1st DCA 1993). The essential conflict among these decisions was whether *Joint Ventures* established a *per se* taking claim for owners of property encumbered by maps of reservation filed pursuant to the unconstitutional statute. This issue reached the Florida Supreme Court on a certified question in *A.G.W.S.*

The genesis of *A.G.W.S.* is basically the same as the cases cited above. While the certified question in *Joint Ventures* was pending, the Authority filed a map of reservation which

encompassed portions of vacant land in Tampa. After the Florida Supreme Court invalidated the map of reservation provisions challenged in *Joint Ventures*, the owners of the encumbered property filed an inverse condemnation action claiming damages for a temporary taking. The trial court granted summary judgment on the legal issue of whether a taking had occurred, leaving the question of compensation for jury trial. The district court of appeal affirmed in a split decision and certified the question.

The *A.G.W.S.* opinion reviews the conflicting holdings of the preceding cases and then discusses distinctions between violations of the takings and due process clauses of the Fifth Amendment. The Court reached the conclusion that *Joint Ventures* did not create a *per se* taking because the invalidation of the reservation map statute had been on due process grounds. The Court explained that its references to the takings clause were to explain why the statute violated due process of law -- because its provisions "sanctioned situations which would permit the state to take property without just compensation." 640 So.2d 58. The Court made clear that its holding did not preclude takings claims based on maps of reservation, but that to prevail, an owner would have to prove a map of reservation denied "substantially all economically beneficial or productive use of land." From the context, it is clear that the Court meant to require the standard analysis for regulatory takings which focuses on the extent of economic deprivation for the owner's entire property, not just the land area within map boundaries. See also *Department of Transportation v. Zyderveld*, 647 So.2d 308 (Fla. 5th DCA 1994) and *Tampa Hillsborough County Expressway Authority v. Harrell*, 645 So.2d 1046 (Fla.2d DCA 1994).

3. *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994):

Owners of property along Southern Boulevard facially challenged provisions of Palm Beach County's comprehensive plan which provided that no land use activity which would be inconsistent with or impede future construction of roadways could be permitted in transportation corridors identified on the County's adopted Thoroughfare Right-of-Way Protection Map. Both the trial court and the 4th DCA invalidated the

thoroughfare map, finding it functionally equivalent to the provisions invalidated in *Joint Ventures*, and held the owners had suffered a compensable temporary taking. The Florida Supreme Court reversed on review of a certified question finding that the thoroughfare protection map and associated provisions in the comprehensive plan advanced the legitimate state interest of planning for future growth and did not constitute a taking *per se*.

Both the trial court and the 4th DCA majority found no meaningful distinction between the county's ordinance and the moratorium imposed by the statute in *Joint Ventures*, reasoning that it was difficult to conceive of any development which would not impede future roadway construction. However, the Supreme Court upheld the regulation, distinguishing it from the map of reservation statute as follows:

- ! the thoroughfare map was not an absolute bar on development, but rather, limited development in order to ensure compatibility with future land use;
- ! the thoroughfare map was not recorded, as were the statutory maps of reservation, and could be amended twice a year;
- ! the actual routes of future roads within the corridors had not been finally determined;
- ! as a permitting authority, the county had the flexibility to mitigate hardships on persons owning lands within mapped areas;
- ! the thoroughfare map was written as a planning tool, not solely a mechanism to reduce future acquisition costs.

4. Analysis :

Whether one believes the Florida Supreme Court effectively receded from its announced position in *Joint Ventures* or merely refined its position in subsequent cases, it appears that right of way protection regulations will be upheld so long as

they advance the general welfare and are not merely governmental attempts to depress land value in order to advantage subsequent acquisition or to circumvent eminent domain procedures all together. While adverse effect on land values may be a consistent by-product of right of way preservation, so long as freezing values is not the sole identifiable purpose of the regulation, it will most likely be considered valid. This sounds simple enough, but courts and lawyers have often struggled to identify the boundary between proper use of the police power and disguised takings.

Contrasting the facts of *Joint Ventures* and *Wright* suggests some factors which may assist in determining whether a regulation is a mere acquisition cost reduction mechanism or a legitimate police power regulation (planning tool).. A right of way preservation measure is more likely to be upheld if:

- ! the regulation was enacted by a governmental agency which regularly engages in land use planning and is wed to comprehensive land use planning scheme.
- ! the regulation is written to assist sensible planning and foster compatible development, advising owners / developers as well as government staff of potential future transportation needs and locations.
- ! the regulation is not an absolute ban on development, but allows some flexibility for individual determination and the agency having jurisdiction to enforce the regulation is empowered to make exceptions or grant variances. (This induces a more as applied analysis with the attendant "ripeness" requirements.)

While owners may lament that the constitutionality of right of way protection measures may turn on the sophistication of governmental draftsmanship, they may take some solace in the fact that nothing in the evolution from *Joint Ventures* to *Wright* altered the standing Florida precedent that full compensation must still be paid if protected future rights of way are ever actually acquired by eminent domain. Florida caselaw defines full compensation in this context to be the fair market value which the land area would have had but for the

future right of way designation. See *Dade County v. Still*, 377 So.2d 849 (Fla. 1979) and *South Miami Hospital District v. Dade County*, 371 So.2d 1067 (Fla. 3d DCA 1979).

5. Examples - takings analyses:
Zyderveld, Harrell, Palmer Expressway.

III. **RIGHT OF WAY EXACTIONS AFTER NOLLAN & DOLAN**

Two United States Supreme Court cases form what has become known as the *Nollan - Dolan* analysis for the constitutionality of exactions.

"Exactions" generally refer to government demands for conveyance of property rights (dedications, easements, etc.) or payment of money ("impact fees") as a condition for development approval.

- A. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

Owners of a California beachfront property sought a permit from the Coastal Commission to replace their existing bungalow with a larger house. The Commission would only grant the necessary permit if the owners agreed to dedicate an easement across their property for public access to the beach. The owners challenged this condition all the way to the U.S. Supreme Court.

The Commission contended that the easement advanced the legitimate purpose of preserving public views to the beach from the highway. The Court invalidated the condition requirement because it found no logical connection between that goal and an access easement which had nothing to do with visibility. The Commission could have properly imposed conditions such as height restrictions or bans on fencing to preserve public views, but the lack of any "nexus" between the easement condition and its asserted justification rendered the Commission's requirement "an out-and-out plan of extortion" and an attempt to obtain an easement for a public purpose without just compensation. Had the Commission demanded an easement from the Nollans without the occasion of their needing a permit, such a demand would have constituted a taking.

- B. Florida cases aligned with *Nollan*:

Florida caselaw (before and after *Nollan*) adheres to the principle that there must be an essential nexus between the exaction

demanded by government and the asserted justification for the exaction. Stated another way, there must be a logical connection between the impact of a proposed project and the conveyance of land or money required as a condition to its approval.

! *Paradyne Corp. v. Department of Transportation*, 528 So.2d 921 (Fla. 1st DCA 1988): held that conditioning the grant of a driveway permit on an owner's agreement to build a joint-use driveway for benefit of abutting private owners did not advance the alleged justification of improving the safety of the traveling public and therefore creating an uncompensated taking. See also *Luxembourg Group Inc. v. Snohomish County*, 887 P.2d. 446 (Wash. App. 1995) which held a required dedication of access road to neighboring landlocked parcel as condition for subdivision was unconstitutional for lack of nexus because the new subdivision was not the cause of the landlock. Compare *Reeves v. Clackamas County*, 887 P.2d 630 (Or. App. 1994).

! *Hernando County v. Budget Inns*, 555 So.2d 1319 (Fla. 5th DCA 1990): enjoined enforcement of a county ordinance requiring all property owners along major arterial roads to construct a frontage road on their property as a condition to any building permits because it was not related to the owner's application to build a motel and because there was no evidence of any connection between the demanded improvement and the burden by the motel on traffic.

! See also cases cited *infra* in section D. 2.

C. *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed. 304 (1994).

The owner of a 1.67 acre lot located in a central business district and improved with a plumbing store sought a permit to expand the store from 9,700 to 17,600 square feet. The city planning commission conditioned the grant of the permit upon the owner's agreement to dedicate 10% of the site. The area to be dedicated would purportedly consist of a public greenway to protect the floodplain of a nearby creek and a bicycle path to alleviate congestion in the business district. The owners challenged the

exaction condition, and lost, before the city land use board of appeals, the Oregon Court of Appeals and the Oregon Supreme Court. But in a split decision, the United States Supreme Court reversed, holding that the demanded dedication was unconstitutional as an uncompensated taking of property.

The high Court found an essential nexus (a la *Nollan*) existed between the purpose of flood prevention and limiting development within the floodplain. Similarly, there was a nexus between reducing traffic congestion and providing alternate means of transportation via the bike path. However, the dedications were unconstitutional under the Fifth Amendment because they lacked "rough proportionality" to the impact of the proposed development. The public greenway dedication was excessive because, while there was an arguable need for the floodplain protection because of the increase in impervious surface, a permanent public easement forfeited the owner's right to exclude others from her property where a mere ban on further development within that area would have sufficed to accomplish the desired flood protection. The city could not justify the quality of estate it had sought. Similarly, the city could not demonstrate how the number of projected traffic trips from the owner's development related to the bike path dedication.

From *Dolan*, it is now clear that the Fifth Amendment prohibition against uncompensated takings of property requires that exactions must correlate to the problems they allegedly address in both nature and degree. No precise mathematical calculation is required to establish "rough proportionality" but there must be an individualized determination that the extent of a demanded dedication relates to the impact of the proposed development, as opposed to mere conclusory statements to that effect.

Two other aspects of *Dolan* merit attention. It is no small thing that *Dolan* places the burden of proving "essential nexus" and "rough proportionality" on the government. Previously, owners had generally faced the burden of proving why dedications were not constitutional. The case also reversed a trend of jurisprudential decline for the Takings Clause of the Fifth Amendment. For decades, courts have more zealously protected First and Fourth Amendment rights while property rights have waned. The *Dolan* court affirmed that Takings Clause is as much a part of the Bill of Rights, not to be treated as "poor relation."

D. Florida cases aligned with *Dolan*:

1. Florida cases citing to *Dolan*.

! *Department of Transportation v. Heckman*, 644 So.2d 527 (Fla. 4th DCA 1994) (the only Florida case citing *Dolan* to date): owners of commercial property claimed inverse condemnation against DOT because of a previous right of way dedication obtained from them by the city in exchange for approval of a development which would have no impact on traffic congestion. (The city later conveyed the dedicated right of way to DOT.) While the appellate court cited *Dolan* in criticizing attempts by government to condition a benefit on an exaction which has no relationship to the benefit conferred, it reversed the trial court's finding that DOT was liable for the uncompensated taking because there was insufficient proof that the city was acting as DOT's agent when it obtained the dedication. Compare *Sarasota County v. Ex*, 645 So.2d 7 (Fla. 2d DCA 1994) which refused to consider an inverse claim based on a prior right of way dedication, holding the claim was really one for additional consideration for deed and thus barred by the statute of limitations. *Ex* is currently on appeal to the Florida Supreme Court on the basis of alleged conflict with *Heckman*.

2. Several Florida cases supported the notion of requiring proportionality to the new development before *Dolan*. (Indeed *Dolan* recognized that it was in furtherance of the "reasonable relationship" test already existing in the majority of states.)

! *Admiral Development v. City of Maitland*, 267 So.2d 860 (Fla. 5th DCA 1972: invalidated a city ordinance which required dedication of 5% of any lands to be subdivided for park purposes (or an impact fee equal to 5% of total value) because, among other reasons, the requirement was overbroad.

! *Hollywood Inc. v. Broward County*, 421 So.2d 606 (Fla. 4th DCA 1983) *rev. den.* 440 So.2d 352 (Fla. 1983): upheld county ordinance which required developers to dedicate land

or pay fees for expanding the county park system where county demonstrated a "rational nexus" and "reasonable connection" between the growth in population caused by the proposed new development and the amount of fees required.

- ! *Home Builders & Contractors Ass'n. v. County Commissioners*, 446 So.2d 140 (Fla. 4th DCA 1983) *rev. den.* 451 So.2d 848 (Fla.), *appeal dismissed*, 469 U.S. 976 (1984): use of impact fees for road has been previously upheld in Florida as long as they are designed to be spent on roads serving the developments that paid the fees.

- ! *Town of Longboat Key v. Lands End, Ltd.*, 433 So.2d 574 (Fla. 2d DCA 1983): struck down a dedication fee requirement which did not "guarantee that the funds collected will actually be used to promote development and acquisitions of open space and park land, the need for which is generated by the new development."

- ! *Lee County v. New Testament Baptist Church*, 507 So.2d 626 (Fla. 4th DCA 1987), *cert. den.* 515 So.2d 230 (1987): invalidated a county ordinance which required dedication of any land necessary to meet previously established minimum right-of-way widths for the street upon which new development is located, regardless of the size of the proposed development or the amount of traffic to be generated by it. The ordinance failed to meet the rational nexus test because it did not on its face require any consideration of the actual impact of the proposed development. See also *Hernando County v. Budget Inns, supra*.

- ! *St. Johns County v. Northeast Florida Builders*, 583 So.2d 635 (Fla. 1991): applied the two-pronged nexus test established in *Hollywood Inc.* to strike down a county ordinance which would assess impact fees for schools to all new residential development. The ordinance failed the second prong (requiring a reasonable connection between impact fees collected and benefits accruing to the new development) because the fees could be spent in areas of the county not subject to the ordinance.

E. Illustrative sampling of how *Dolan* has been applied to transportation issues in other jurisdictions:

1. Dedication cases:

! *Schultz v. City of Grants Pass*, 884 P.2d 569 (Ore.App. 1994): owners of approximately 4 acres sought to partition their property into two lots. The zoning on the original lot allowed 20 homes, and as subdivided, 17 homes could be built on the property. The city's attempt to condition approval of the subdivision on two right of way dedications failed for the lack of both nexus and proportionality. The court found significance in the fact that there would be no net increase in the burden on public facilities as a result of the subdivision and noted that the city's projection of 8 trips per day could not justify the dedication of almost a half acre of land.

! *Kottschade v. City of Rochester*, 537 N.W.2d 301 (Minn.App. 1995): the city denied an owner's application to convey portions of an old subdivision so that a shopping center could be built on a new outparcel because the owner refused to dedicate rights of way for a highway interchange shown on the city's official map. The court generally contrasted the redevelopment of a single store in *Dolan* to the development of a major shopping center in holding that the dedications met the nexus and rough proportionality tests. See also *Sullivan v. Planning Board of Acton*, 645 N.E.2d 703 (Mass.App. 1995).

2. Impact fee cases:

! *McCarthy v. City of Leawood*, 257 Kan 566, 894 P.2d 836 (Kan. 1995): owners challenged right-of-way impact fee ordinance on several grounds, including the claim that the fees were uncompensated takings under *Dolan*. The court dismissed the owner's constitutional argument, reasoning that the "rough proportionality" test of *Dolan* applies to dedications of land, not to payment of fees. (Note: it would have been interesting if the court had applied a rough proportionality analysis

because the required impact fees were calculated on the basis of projected trips generated as determined by an traffic engineering institute manual.) Compare *Home Builders Assoc. of Central Arizona v. City of Scottsdale*, 1995 WL 61490 (Ariz. App.Div. 1995).

! *Northern Illinois Home Builders Association, Inc. v. County of DuPage*, 165 Ill.2d 25, 649 N.E.2d 384 (Ill. 1995): the association sought a declaration that various state and county impact fee provisions were unconstitutional under the Takings Clause. The Illinois Supreme Court applied the *Dolan* tests along with its own strict "specifically and uniquely attributable" test in finding some of the provisions unconstitutional and others constitutional. Essentially, regulatory schemes which did not ensure fees would be calculated and spent based directly upon development impacts were facially invalid. Fees collected pursuant to the invalidated provisions had to be returned.