

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 06-SC1616  
3DCA Case No.: 5D05-2935

BREVARD COUNTY, FLORIDA, a  
political subdivision of the State  
of Florida

Petitioner,

vs.

CHARLES R. STACK, TRUSTEE, Trustee  
for and on behalf of MICHELLE  
HEADLEY, EUGENE KUBICKI, HAROLD  
BARKAS and CHARLES R. STACK, and  
each of the foregoing individually

Respondents

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RESPONDENTS= JURISDICTIONAL BRIEF

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Respectfully submitted,

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**STATEMENT OF THE CASE AND FACTS**<sup>1</sup>

Charles R. Stack (AStack@) is the Trustee of an investment group which includes Michelle Headley, Eugene Kubicki, Harold Barkas and himself (Athe Group@). (App. 2, n.2). The Group purchased two adjoining parcels of land for investment purposes in 1984 and 1987. (App. 3). The property consists of over 4 acres, including approximately one acre of wetlands in the center. (App. 3). It was zoned BU-1 (general retail commercial) under Brevard County Zoning Regulations at the time of purchase. (App. 3). Since August 2001, the property has been designated Acommunity commercial@ on the Future Land Use map. (App. 3).

In September 2000, or years after the property's purchase, Brevard County (Athe County@) adopted section 62-3691 et seq. of the Brevard County Code a/k/a the ABrevard County Wetlands Protection Act@ (Athe Ordinance@). Subsection 62-3694(c)(2) of the ordinance specifies that, with certain exceptions, commercial land development activities are prohibited in wetlands contained in properties designated on the Future Land Use map as commercial after February 23, 1996. (App. 3).

In March 2003, the Group executed a contract to sell the

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<sup>1</sup> The facts contained in the appendix are undisputed, and derived from the Fifth District's decision, Brevard County v. Stack, 932 So. 2d 1258 (Fla. 5<sup>th</sup> DCA 1006) (App. A).

property to a third party for \$1.1 million dollars. (App. 3). The third party intended to develop the property as a 10,000 square foot shopping plaza and a 6,000 square foot restaurant, with 170 parking spaces, 35 of which were to be located in the wetlands. (App. 3). Douglas Investment Group, Inc. (ADouglas@), the third party, had 90 days to investigate permitted uses of the property and cancel the contract. (App. 3).

Douglas= proposed site plan was in conformity with all County zoning and development requirements, except the ordinance. Douglas intended to mitigate the wetlands offsite, and received approval to do so from the St. John=s Water Management District (App. 3). However, when Douglas sought the County=s approval of its site plan, citing an ordinance exception, the County=s Office of Resource Management declined. It advised Douglas that the wetlands area could not be impacted by the proposed development, and that the Ordinance required a natural native upland buffer with wetlands ranging from fifteen to fifty feet. (App. 3). As a result, Douglas cancelled the contract. (App. 3).

The Group submitted a ANotice of Claim@ to the County under the ABert J. Harris, Jr. Private Property Rights Protection Act,@ section 70.001, Fla. Stat. (2004) (Athe Act@). Their ANotice of Claim,@ as increased, sought \$1,000,000. for reduction in the property=s value due to the Ordinance. (App. 3). This claim was

supported by a certified appraisal reflecting the property's diminution in value. (App. 3-4). The Ordinance required a reduction from 142,006 square feet of buildable land valued at \$1.7 million to only 98,446 square feet of buildable land, valued at only \$700,000, for a difference of \$1 million dollars. (App. 4).

The County responded with its **Aripening decision,** an alternative layout plan proposed by its staff. This plan reflected the same intensity of commercial development, but reduced parking from 170 to 102 spaces. It also requires construction of a bridge across the wetlands area for passage from one parcel to another. It included other county-approved waivers and modification. (App. 3).

The Group's appraiser found that the County's plan did not cure the problems created by the Ordinance. The diminution in property value remained the same, because inter alia the County's plan required the property to be bisected, did not provide for sufficient parking, and made no provision for a traffic signal.

All of these factors made the property less attractive to a developer. (App. 4).

The Group filed suit under the Act, and eventually filed a motion for summary judgment on the issue of liability. The Group asserted it had pre-existing property rights and **Areasonable investment-backed expectations** at the time of

purchase. In addition, the property suffered a significant diminution in value due to the Ordinance, and the Ordinance, as applied, denied them rights under the Act, including the ability to develop over the wetlands, and to mitigate off-site. The trial court agreed, and granted the property owners' motion. (App. 4).

The County appealed, contending inter alia that the Act was unconstitutional for a variety of reasons. The Fifth District rejected all of these. First, the state's broad police power authorizes the enactment of laws to protect the public. (App. 4). Second, the legislature has expressly determined there is an important state interest in protecting private property from inordinately burdensome regulation that does not amount to a taking. (App. 4). Third, where property is inordinately burdened, the Act provides various relief and remedies (including compensation) to the owner. (App. 4). This does not effect the inherent power of a governmental entity and does not lead to a due process violation. (App. 4).

Instead, the Act establishes a new cause of action which cannot legitimately be characterized as either a buy back of a government's inherent power or an illegal gift of public funds. (App. 5). It likewise did not violate separation of powers, or improperly delegate legislative powers to the courts. (App. 5).

In sum, the District Court found that all of the County's constitutional challenges had **no merit** and were not **aviable** (App. 6). However, it remanded the case to the trial court to make certain required statutory findings. (App. 6).

### **SUMMARY OF THE ARGUMENT**

This Court has discretionary jurisdiction to review district court decisions which expressly declare valid a state statute. Fla. Const. art V, '3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(i). The issue before this Court is whether it should exercise that discretion, where only one district court has addressed the County's constitutional arguments, and it expressly found these had **no merit** and were not **aviable**.

This Court has declined to exercise **avalidity** jurisdiction where an attack on a statute's constitutionality is colorable at best. That is precisely the case here. Nothing in the Florida Constitution forbids the state from deciding that it may require the compensation of property owners for the diminution in property value due to local land use regulation, short of a taking. The Fifth District's decision is eminently correct, and no further review is warranted.

### **ARGUMENT**

#### **THERE IS NO NEED TO ADDRESS THE **AVALIDITY** OF THE ACT**

The respondent property owners assume that this Court has

jurisdiction to review the district court's decision, because it expressly declares valid a state statute. Fla. Const. art V, §3(b)(3); Fla. R. App. Proc. 9.030(a)(2)(A)(i). They submit that the Court should nevertheless decline to exercise such jurisdiction because the Fifth District is the only district to address the County's constitutional arguments and it expressly found they had *no merit* and were simply not *available*.

The Bert Harris Jr. Private Property Rights Protection Act, §70.001, Fla. Stat. (2004), was enacted in 1995. Laws of Florida, Chap. 95-181, '1. Its enactment followed two years of research, study and investigation by the state legislature and then-Governor Lawton Chiles, who set up a property rights study commission, chaired by former Supreme Court Justice Alan Sundberg. Powell, Rhodes & Stengle, *A Measured Step to Protect Private Property Rights*, 23 FSU L. Rev. 255 (Fall 1995). The Act passed unanimously in the state house of representatives, and with only 1 dissent in the senate. Fla. H.R. Jour. 1052 (Reg. Sess. May 2, 1995); Fla. S. Jour. 698, 708 (Reg. Sess. May 3, 1995).

Florida's statute thus enjoyed broad-based, bipartisan support. It is generally considered one of the most innovative and comprehensive in the country. It involves the joint, cumulative efforts of the legislative and executive branches of government, after much deliberation, discussion, research and

investigation. Against this backdrop, the County has strung together a host of perceived constitutional threats. It offers no supporting legal analysis and its claims are devoid of merit.

All statutes come before this Court clothed with the presumption that they are constitutionally valid. See e.g. Sunset Harbour Condominiums Ass'n v. Robbins, 914 So. 2d 925, 929 (Fla. 2005) (and cases collected). A[where] a contention as to the constitutionality of a statute is obviously frivolous or, at most, mere colorable and is employed solely to provide some appearance of a basis for invoking this court's jurisdiction [this Court] will not retain jurisdiction...@. City of Miami v. Steckloff, 111 So. 2d 446, 447 (Fla. 1959). That is precisely the case here.

The County posits that the Act has a **Achilling effect**@ on the enactment of new police power regulations at the local level. (Initial Brief p. 8). However, it cannot and does not explain why the Fifth District's decision is wrong in its analysis of the Act's constitutionality.

In the analogous context of certified questions, this Court has discouraged certification of an issue of great public importance where the question **A**appeared to be more of a request for approval of the conclusion reached below.@ See Owens-Corning Fiberglas Corp. v. Ballard, 749 So. 2d 483, 485 n. 3 (Fla. 1999). Thus, the district court could not have legitimately

certified the question as one of Agreat public importance@ on the record presented. Certification would amount to a request for tacit approval of its decision.

On the merits, Florida=s constitution does not require compensation to individual who sustain a loss of property value as the result of inordinately burdensome land use regulation. However, nothing in the constitution forbids the state from enacting a statute requiring such compensation. The Act creates a new cause of action which is both rational and related to an important state objective, i.e., protecting private property owners from inordinately restrictive local regulation, which benefit the public entirely at their expense.

Here, the Fifth District carefully analyzed the statute and the underlying legislative intent. It addressed each of the perceived constitutional violations, and explained why none of the County=s arguments were viable. Simply stated, its decision is eminently correct and should not be disturbed.

#### CONCLUSION

For all of the foregoing reasons, the County=s petition should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail/fax this            day of September, 2006 to:

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**CERTIFICATE OF TYPE SIZE AND FONT**

I hereby certify that the Type Size and Font utilized in this brief is Courier New, 12pt.

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