IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No. 98-3337

ST JOHNS RIVER WATER MANAGEMENT DISTRICT
Defendant, Appellant
vs.
JAMES R. AND KATHY R. SABOFF
Plaintiffs, Appellees.

On Appeal from the United States District Court
Middle District of Florida, Orlando Division
Case No. 96-1223-CIV-ORL-18

BRIEF OF AMICUS CURIAE FLORIDA AUDUBON SOCIETY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Florida Audubon Society is a non-shareholder, not-for-profit, tax-exempt organization.

Pursuant to Rule 26-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned, Counsel of record for amicus curiae certifies to the best of her knowledge that the following is a full and complete list of the parties in this action:

- Florida Audubon Society
- Michael D. Jones, Esq.
- James R. and Kathy. R. Saboff
- St. Johns River Water Management District
- South Florida Water Management District
- Suwannee River Water Management District
- Southwest Florida Water Management District
- Northwest Florida Water Management District
- Florida Department of Environmental Protection
- Honorable G. Kendall Sharp, U. S. District Judge, Middle District of Florida, Orlando Division

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1984)
Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992)
Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992)
New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (1996), *cert denied*, 117 S.Ct. 2514 (1997)
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)
Palm Beach Isle v. United States, WL 784551 Fed.Cl. (1998)
Penn Central Transp. Co. v. New York City, 438 US 104 (1978)
Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert. denied*, 514 U.S. 1064 (1995)
Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993)
Texas Manufactured Housing Ass'n, Inc. v. Nederland, 101 F.3d 1095 (5th Cir. 1995),*cert. denied*, 117 S.Ct. 2497 (1997)
United States v. *Bayview Homes, Inc.*, 474 U.S. 121(1985)
United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998)
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, (1976)
Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610 (11th Cir. 1997)

State Cases:

K&K Constr., Inc. v. Michigan Dep't of Natural Resources, 575 N.W.2d 531 (Mich.), *cert. denied*, 119 S.Ct. 60 (1998)
State Dept. of Envtl. Regulation v. Schindler, 604 So.2d 565 (Fla. 2d DCA), *rev. denied*, 613 So. 2d 8 (Fla. 1992)
Zealy v. City of Waukesha, 548 N.W.2d 528 (Wisc.1996)

Federal Statutes:

28 U.S.C. § 1738

State Statutes:

Florida Statute § 704.04(1)
Florida Statute § 704.04(4)
Florida Statute § 373.415

Other Authorities:

Hart, John J., *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harvard Law Review 1252 (1996).
Bork, Robert, *The Tempting of America: The Political Seduction of the Law* (1990)
Epstein, Richard, *Takings, Private Property and the Power of Eminent Domain* (1985)
Fried, Charles, *Protecting Property-Law & Politics*, 13 Harvard Journal of Law and Public Policy 44 (1990)
Laitos, Jan G., *Law of Property Right Protection* (1999)
Treanor, William Michael, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia Law Review 782 (1995)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Florida Audubon Society ("Florida Audubon") respectfully submits this brief *amicus curiae* in support of the appeal by the St. John's River Water Management District ("District"), and urges the Court to reverse the erroneous judgment entered by the court below.

Amicus Florida Audubon seeks to assist the Court by addressing several issues not addressed at all by the District in its brief, including the District Court's erroneous theory of "partial" regulatory takings and its erroneous submission of the substantive due process claim to the jury. In addition, Florida Audubon will address more comprehensively several issues addressed only in part by the District, including the multiple errors in the District Court's "physical exactions" theory and the District Court's apparent disregard of the "parcel as a whole" rule of regulatory takings doctrine.

Most fundamentally, this constitutional challenge to the District's permitting decision should fail because appellees have realized their reasonable investment expectations in connection with this property. Appellees purchased a seven-tenths of an acre building lot for the purpose of building a single-family residence, the use authorized under the local zoning code. Appellees sought -- and were granted -- authorization by the District to construct a residence, as well as various ancillary structures, including a swimming pool, a driveway and an elevated walkway. Indeed, appellees have already completed the development of their lot.

Notwithstanding the fact that they successfully achieved their planned use of the property, appellees challenge certain District restrictions against clearing vegetation and erecting structures on the remaining portion of the property fronting on the Little Wekiva River, which the State of Florida has recently designated as one of the "Outstanding Florida Waters." These limitations, which the District adopted in accordance with guidelines prepared pursuant to comprehensive State legislation, *see* Florida Statute §373.415, serve to maintain water quality and protect river-dependent wildlife.

These guidelines, which are being systematically applied to new development up and down the Little Wekiva River, confer substantial benefits both on appellees and other property owners who enjoy living along the Little Wekiva River. In addition, they provide valuable protection against development and other private activity that endangers this public waterway and threatens publicly owned wildlife.

While appellees are apparently content to enjoy the benefits conferred on them by other riparian owners' compliance with these guidelines, appellees now seek a financial windfall for the imposition of these conditions on them. Furthermore, appellees seek this "compensation" notwithstanding the fact that, at the time they acquired the property, appellees accepted an existing subdivision restriction on the property which prohibited the building of structures within 100 feet of the 100 year flood plain. The area subject to this pre-existing restriction is essentially the same area of the lot which appellees now claim has been unconstitutionally taken.

While there are numerous independent grounds for reversing the District Court judgment, this brief *amicus curiae* focuses on only a few issues. First, the District Court erred in concluding, based on the decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that this case involves a physical exaction which automatically entitles appellees to financial compensation. The record demonstrates that the District did not impose a physical exaction on appellees, much less the type of intrusive physical exaction which triggered heightened judicial scrutiny in *Nollan*.

Therefore, the physical exactions category of takings doctrine is irrelevant to the resolution of this case. Furthermore, even if *Nollan* did apply in this case, the District Court erred as a matter of law in finding a taking because the court failed to determine, as mandated by *Nollan*, whether there was in fact a logical "nexus" between the limitations imposed by the District and the District's legitimate regulatory objectives. In fact, the record evidence amply demonstrates that the *Nollan* "nexus" requirement (assuming it were applicable) was fully satisfied in this case.

Florida Audubon also will address the District Court's error in concluding that the District's restrictions effected a regulatory-type taking. Unfortunately, the precise basis for the court's ruling

is difficult to discern. The court's order can be read to mean that the District's regulations effected a taking of the four-tenths of an acre of appellees' property, regardless of the fact that they were permitted to construct a residence and other structures on the remainder of the lot. To the extent the District Court so ruled, that ruling was inconsistent with the established "parcel as a whole" rule and the court's finding of a regulatory taking must be reversed.

In addition, or perhaps in the alternative, the District Court's order can be read as acknowledging the parcel as a whole rule, but nonetheless finding a taking based on a so-called "partial takings" theory. To the extent the court ruled in favor of appellees on that basis, the court's order must be reversed because there is, in fact, no valid or coherent doctrine of "partial" regulatory takings, as demonstrated by the takings decisions of the U.S. Supreme Court, this Court, and the overwhelming weight of judicial authority elsewhere.

Finally, Florida Audubon will address the point that the District Court erred as a matter of law in submitting the substantive due process issue to the jury. This claim presented an issue of law which had to be resolved by the court.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING A TAKING BASED ON A PHYSICAL EXACTION THEORY.

The District Court erred in concluding, based on *Nollan v. California Coastal Commission*, *supra*, that the limitations imposed by the District represented a type of physical exaction automatically entitling the appellees to financial compensation under the takings clause of the Fifth Amendment. *Nollan* does not govern this case. Even if *Nollan* were relevant, that decision does not support the conclusion that the District's permitting decision automatically effected a taking. If the District were required to meet the requirements of *Nollan*, it could easily do so based on the evidence introduced at trial.

The intermediate scrutiny test developed by the U.S. Supreme Court in *Nollan* -- and in a later companion case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) -- applies only to that narrow class of cases where a regulatory condition constitutes a physical invasion of property. In both *Nollan* and *Dolan*, the government attached as a condition to a regulatory approval a requirement that the permittee grant public access to the property. Standing alone, these requirements indisputably would have effected a taking requiring payment of just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. The issue the Court faced in both these cases was whether a taking could be avoided because the requirements, rather than being imposed as free-standing mandates, were attached as conditions to discretionary permits which the government had no constitutional obligation to grant.

The Court ruled that a finding of a taking could be avoided, provided that the conditions were sufficiently closely related to the legitimate purposes of the regulatory process itself. More specifically, the Court ruled that attaching conditions that effect a physical occupation to regulatory permits does not effect a taking if (1) there is an essential "nexus" between the conditions and the government's regulatory purposes, *Nollan*, 483 U.S. at 837, and (2) there is a "rough proportionality" between what the owner surrendered and the impacts of the proposed development, *Dolan*, 512 U.S. at 391. Thus, *Nollan* and *Dolan* established a special standard of takings analysis to address a special situation. This standard does not apply to traditional regulatory programs which do not involve conditions effecting physical invasions, *Dolan* 512 U.S. at 385, *Nollan*, 483 U.S. at 831, and which therefore are entitled to the usual deference accorded local land use decision-making.

Consistent with the holdings and reasoning in *Dolan* and *Nollan*, this Court, in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (1996), *cert. denied* 117 S.Ct. 2514 (1997), recognized that the *Nollan/Dolan* test is limited to the physical exactions context. In that case, the plaintiff claimed that a county re-zoning from residential to private airport use resulted in a taking under the Fifth Amendment. Invoking *Nollan* and *Dolan*, the land owner argued that the county re-zoning forced it to use its land as an airport and therefore deprived it of its right to exclude others. *Id.* at 1087-8. The Court rejected that argument, and observed that in both *Nollan* and *Dolan* the "state had demanded that a person open his or her property to public traffic ... without compensation." The Court concluded:

That fact distinguishes [plaintiff's] situation: the regulation in this case told [plaintiff] how it could use the property for profit, but did nothing to require [plaintiff] to open its property to the public for use just as the public wished.
Id. at 1088.
Thus, because no physical occupation was involved, the Court concluded that *Nollan* and *Dolan* were irrelevant to the resolution of the case.

Other courts have likewise interpreted *Nollan* and *Dolan* as being applicable only to permitting actions involving actual physical occupations. *See e.g. Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure."); *Texas Manufactured Housing Ass'n, Inc. v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1995), *cert. denied*, 117 S.Ct. 2497 (1997) (*Nollan* is not applicable where there is no exaction of land).

As established by the District at trial, the purpose of the District's permit restrictions was to maintain water quality and protect wildlife, not to compel the appellees to grant either the government or the general public access to their land. The permit condition at issue explicitly required the appellees to comply with Florida Statute § 704.04(1), which describes the limits on permitted uses of areas subject to conservation easements. While a separate provision of Florida law contains a general authorization to the holder of a conservation easement to "enter the land in a reasonable manner and at reasonable times to assure compliance," § 704.04(4), that provision was not referenced in the permit the District issued to appellees.

Instead, the appellees' permit merely provided that the easement shall contain "provisions indicating that the permit's terms "may be enforced by the District and may not be amended without District approval." *See* Recommended Order, p. 22. The District presented uncontradicted testimony that the permit did not require appellees to grant District employees access to the land, and, if appellees wished, the appellees' conservation easement could be filed containing explicit language to that effect. Thus, far from being a *Nollan/Dolan* exaction involving physical occupation, the permit conditions in the present case are "simply a limit on the use" appellees can make of their property. *Dolan*, 512 U.S. at 385. Accordingly, the District Court erred as a matter of law in concluding that *Nollan* (and *Dolan*) applied to this case. The District Court's order must be reversed on this basis alone.

Second, even if the Court were to conclude that the District permitting decision had the effect of compelling appellees to permit actual physical inspection of their lot, such an inspection requirement would not rise to the level of interference with possessory rights necessary to trigger the *Nollan/Dolan* analysis. *Nollan* involved a permit condition requiring the owner to allow the general public to pass to and fro on the dry sand beach immediately in front of his ocean side home. *Dolan* involved a permit requirement that the landowner provide a public bike path and a recreational greenway across her land. Thus, as the Court emphasized in *New Port Largo*, both *Nollan* and *Dolan* involved the extraordinary circumstance where a land owner was required to open his or her property up to "public traffic" to do "just as the public wished."

In the present case, even if the District had demanded the access rights alleged by appellees, the physical intrusion is decisively different in character and extent. Assuming the District had compelled appellees to comply with Florida Statute § 704.04(4), as appellees contend, the access rights only would have extended to public inspectors, who merely would be authorized to "enter in a *reasonable* manner and at *reasonable* times to ensure compliance." *Id.* (Emphasis added). This type of limited right of inspection to ensure compliance with valid regulatory restrictions is simply not comparable to the type of physical intrusion which the Supreme Court believed triggered the need for heightened scrutiny in *Nollan* and *Dolan*. As the Supreme Court said in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 US. 419, 436 n. 12 (1982), "not every physical invasion is a taking," because "temporary limitations on the right to exclude" simply are not comparable to permanent or continuous physical occupations. *See also Hendler v. United Sates*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("governmental activities which involve an occupancy that is transient and relatively inconsequential" are not takings). For this additional reason, the District Court erred in concluding that *Nolan/Dolan* applied in this case.

Finally, assuming for the sake of argument that the District's permit conditions did properly trigger review under the *Nollan/Dolan* standard, the District Court plainly misapplied the *Nollan/Dolan* analysis. As discussed above, *Nollan* and *Dolan* establish a two-part test for determining if a physical exaction results in a taking. The District Court did not undertake either prong of this analysis. Rather, the District Court apparently believed that once it determined that this case was governed by *Nollan*, the conclusion automatically followed that the District's conditions constituted a taking. This approach was wrong as a matter of law. Thus, for this third, independent reason, the District Court's order must be reversed.

Had the District Court properly applied the *Nollan/Dolan* analysis, the court could have reached no conclusion other than that the District's permit decision fully complied with these standards. The *Nollan* essential nexus test was easily met, because a public right of inspection for enforcement purposes would plainly be closely related to the District's regulatory objectives, including protection of water quality and protection of wetland dependant species. Similarly, the "rough proportionality" test would easily be met in this case. *See Dolan*, 512 U.S. 391 ("[n]o precise mathematical calculation is required," but there must be "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."). The modest, narrowly tailored public right of access alleged in this case would plainly be "roughly proportional" to the threats presented by possible noncompliance with the environmental restrictions in the permit. Furthermore, as explained at length by the District, the conservation restrictions in the permit satisfy both the nexus and rough proportionality standards based on the evidence of the likely effects of appellees' development activity.

II. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE PARCEL AS A WHOLE RULE.

As discussed in the introduction, it is ambiguous from the District Court's order how the court defined the relevant "parcel" for the purpose of conducting the regulatory taking analysis in this case. It appears that the District Court may have treated the four-tenths of an acre subject to the District's restrictions, rather than the full seven-tenths of an acre which comprises appellees' lot, as the relevant unit of property. If so, the District Court was wrong as a matter of law.

It is virtually black letter law that a regulatory taking claim must be analyzed in relation to the claimant's parcel as a whole. This principle has been repeatedly applied and reaffirmed by the U.S. Supreme Court. As the Court explained in *Penn Central Transportation Co. v. New York City*, 428 U.S. 104 (1978):

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on the character of the action and on the nature and extent of the interference with rights in the *parcel as*

a whole.
Id. at 130-31 (emphasis added).

See also Andrus v. Allard, 444 U.S. 51, 66 (1979) (no taking where only one "stick" in the claimant's "bundle of rights" was adversely affected by the regulatory action, because "the aggregate must be viewed in its entirety"); *Keystone Bituminous Coal Assn v. DeBenedictis*, 480 U.S. 470 (1987) (applying parcel as a whole rule to justify rejection of takings challenge to restrictions on coal mining).

The parcel as a whole rule is central to a sensible regulatory takings doctrine. After all, every type of regulation completely eliminates the economic use of some stick in the bundle of rights. Thus, absent the parcel as a whole rule, every regulatory action could be defined as a taking. That radical result obviously bears no relationship to the wide scope that the U.S. Constitution and the Florida Constitution accord our elected representatives in promulgating regulations designed to protect and advance the public welfare.

Thus, recently, in *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the U.S. Supreme Court unanimously rejected the idea that a taking claim should be analyzed by focusing on the restricted portion of the property rather than on the property as a whole:

We rejected [the proposed] analysis years ago in *Penn Central*..., where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question. *Id.* at 644.

This Court has faithfully and repeatedly applied the parcel as a whole rule. For example, in *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (1996), *cert. denied*, 118 S.Ct. 441 (1997), the Court stated that a taking is not established "simply by showing that a landowner has been denied the ability to exploit a particular property interest," but rather a court must consider the "'nature and interference with rights in the parcel as a whole.'" *Id.* at 1074, citing *Penn Central*, 428 U.S. at 130-31. *See also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) ("Any constitutional claim challenging the regulatory deprivation of a single use of real property alleged to be vested under state law must be considered in light of the remaining use of the property as a whole."); *Hubschman Associates, Ltd. v. Collier County*,WL 761342, 2 (M.D. Fla. 1993), *aff'd*, 37 F.3d 636 (11th Cir. 1994) (noting that "[i]t is now well established that a court must consider the impact of the allegedly offending regulations on the parcel, taken as a whole, in order to determine whether an unconstitutional taking has occurred").

Numerous other federal and state courts, relying on the parcel as a whole principle, have rejected takings challenges to development restrictions which affected only a portion of the property. For Federal court decisions, *see*, *e.g.*, *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (citing *Penn Central* and *Concrete Pipe*, and holding that "clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. It that were true, the... protection of wetlands via a permit system would constitute a taking in every case...."); *Palm Beach Isle v. United States*, WL 784551 Fed.Cl. (1998) (parcel to be evaluated includes not just 50 acres affected by permit denial, but additional 250 contiguous acres sold 20 years before permit denial).

For recent, representative state court opinions, *see e.g., K&K Construction, Inc. v. Michigan Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert denied*, 119 S.Ct. 60 (1998) (holding that lower court erred in applying takings analysis to only one of three contiguous parcels of land); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wisc.1996) (economic impact of restrictive

zoning of 8.2 acres should be evaluated based on entire 10.4 acres held by plaintiff); *State Dept. of Envtl. Regulation v. Schindler*, 604 So.2d 565 (Fla. 2d DCA), *rev. denied*, 613 So. 2d 8 (Fla. 1992) (parcel to be evaluated is entire 3.5 acre lot, not merely 1.85 acres effected by regulation).

The primary precedent cited by the District Court, *Loveladies Harbor, Inc. v. United States*, 28 F3d 1171, 1181 (Fed. Cir. 1984), is inconsistent with the U.S. Supreme Court decisions and other precedents discussed above, including the decisions from this Circuit. In that case, the court held that the plaintiffs, who had originally purchased 250 acres of wetlands, could treat 12.5 acres of the parcel slated for development as the relevant parcel, where 199 acres had previously been developed and sold off, and where the State had demanded that 38.5 acres of wetlands be placed under conservation restrictions as a condition of its approval of development of the remaining 12.5 acres. This analysis is simply irreconcilable with the Supreme Court's and this Court's established parcel as a whole rule, and this Court should reject it.

In any event, *Loveladies Harbor* is plainly distinguishable from this case. In that case most of the land had been developed and sold off before plaintiff sought to develop the remaining the 12.5 acres. Furthermore, the regulatory restrictions which limited development opportunities for the 12.5 acres were put in place only after the other portions of the property had been sold off. None of these factors is present in this case, which involves a single development application covering a single building lot.

Properly applying the parcel as a whole rule, the District Court should have defined the relevant parcel as the entire seven-tenths of an acre comprising the appellees' building lot.

III. THE DISTRICT COURT ERRED IN FINDING A REGULATORY TAKING BASED ON A SO-CALLED "PARTIAL TAKING" THEORY.

Ultimately, the District Court's finding of a taking rests on the court's conclusion that, even if appellees realized their intended use of the property, they were entitled to financial compensation at taxpayer expense for any reduction in the economic value of the property as a result of the District's permitting decision. However, the District Court's "partial" taking theory has no foundation in existing takings doctrine. Furthermore, as a matter of first principles, the partial takings theory must be rejected because it is contrary to the language and original understanding of the taking clause, would create a totally unmanageable legal standard, and would confer massive, unjustified financial windfalls on landowners at taxpayer expense.

A. The Partial Takings Theory Is Contrary to Existing Takings Doctrine.

Takings doctrine starts with the recognition that the public, acting through its democratically elected representatives, has broad authority to adopt and enforce reasonable regulations without offending the takings clause of the Fifth Amendment. As stated by Justice Scalia in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1993), "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in the legitimate exercise of its police powers." *Id.* at 1027. *See also Concrete Pipe*, 508 U.S. at 637, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.... even though the effect of the legislation is to impose a new duty or liability based on past acts"); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130 (1978) (rejecting as "quite simply untenable" the argument that property owners "may establish a 'taking' simply be showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development").

In accord with this basic principle, the established test for determining whether a use restriction effects a taking is whether the restriction deprives the owner of substantially all economic use of

the property. As the Supreme Court said in *Keystone Bituminous,* 480 U.S. at 495, a regulation effects a taking if it "denies an owner economically viable use of his land." *See also Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance.... denies an owner economically viable use of his land.").

This Court and other lower federal and state courts have consistently followed this standard. *See, e.g.*, *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992), *cert. denied*, 514 U.S. 1064 (1995) (overturning a finding of a taking where rezoning permitted construction of only one residence on 40 acres, observing that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property"); *Texas Manufactured Housing Association, Inc. v. Nederland*, 101 F.3d at 1105 (no taking where no showing of deprivation of all beneficial use); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 677 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992) (no taking where court could not "conclude[] that the alleged diminution in the value of the properties deprived appellees of all economically viable use of them"); *Zealy v. City of Waukesha*, 548 N.W.2d at 534 ("the rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the owner all or substantially all practical use of a property in order to be considered a taking for which compensation is required").

Accordingly, the Supreme Court and lower courts have routinely rejected regulatory takings challenges, despite sometimes substantial "partial" reductions in the property's economic value. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (rejecting takings challenge to zoning restrictions which allegedly reduced property value by 85%); *Euclid v. Ambler Co.*, 272 U.S. 365, 384 (1926) (75% reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% reduction in value); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting takings challenge where regulation caused "only" 50% diminution in value, because "a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless'"); *Jengten v. United States*, 657 F.2d 1210 (Ct.Cl. 1981), *cert denied* 455 U.S. 1017 (1982) (rejecting takings challenge where regulation prohibited development on 75% of land); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (rejecting takings challenge where only one quarter of land could be developed).

These authorities refute the District Court's notion that a regulatory taking can be established by demonstrating a mere partial reduction in the value of private property. Because appellees clearly were not deprived of substantially all of the economic value of their property, there was no taking in this case.

B. The Partial Taking Theory Is Inconsistent with the Language and Original Understanding of the Takings Clause, Would Compel Courts to Use An Unmanageable Legal Standard, and Would Confer Unjustified Financial Windfalls on Property Owners at Taxpayer Expense.

Furthermore, even assuming the issue were open to reconsideration, the theory of partial regulatory takings should be rejected based on first principles.

First, the theory of partial takings is contrary to the language and original understanding of the takings clause. The clause provides that "private property [shall not] be taken for public use, without just compensation." Government "takes," in the literal sense, when it devotes private property to some public use, such as for a road or a school, and even when it regulates private property so heavily that it eliminates substantially all economically viable use. On the other hand, when regulation simply restricts the permissible uses of land, and thus reduces the property's economic value, the government's action cannot easily be characterized as a type of "taking."

This reading of the taking clause is supported by the available historical evidence of the original understanding of the drafters of the Bill of Rights. By general scholarly consensus, the takings clause was originally intended to apply only to direct appropriations of property, and was not intended to apply to regulations under any circumstances. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia Law Review 782 (1995); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harvard Law Review 1252 (1996). Significantly, with some notable exceptions, *see* Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* (1985), scholars on all sides of the ideological spectrum agree with this reading of history. *See* Robert Bork, *The Tempting of America: The Political Seduction of the Law* 230 (1990) ("My difficulty is not that [Richard] Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state, but rather that these conclusions are not plausibly related to the original understanding of the taking clause); Charles Fried, *Protecting Property-Law & Politics*, 13 Harvard Journal of Law and Public Policy 44 (1990). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. at 1114 (acknowledging that, prior to the early twentieth century, "it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession.") (Scalia, J.)

Modern regulatory takings doctrine respects the original understanding of the takings clause by basically confining regulatory takings claims to those "extreme circumstances" where regulation imposes severe economic burdens analogous to direct physical appropriations. *United States* v. *Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). By contrast the District Court's "partial" regulatory taking theory would expand takings doctrine beyond any discernible link with the drafters' original understanding.

Second, the proposed "partial" takings theory offers no manageable, predictable legal test. Unlike the test of whether a regulation eliminates substantially all economic value, which defines a reasonably well defined set of government actions, a partial taking theory is completely unpredictable in application. Assuming that *some* regulation must be accepted as simply "adjusting the benefits and burdens of economic life," *Penn Central*, 438 U.S. at 124, how would the courts draw the line? Would a 75% reduction in value constitute a taking? 50%? 25%? *See* Jan G. Laitos, *Law of Property Right Protection*, § 11.02 (1999) (noting that proposed tests for determining whether a regulation has effected a taking based on the degree of economic harm are "so imprecise as to be virtually useless"). And should a property owner whose property value drops from $1,000 to $500 receive compensation whereas a property owner whose property value drops from $1,000,000 to $90,000 should not? Or should it be the other way around? In the absence of discernible standards, the "partial" takings theory is an invitation to *ad hoc* judicial decision-making, and a prescription for legal confusion.

Finally, the "partial" taking theory's myopic focus on the reductions in value incurred by a particular claimant ignore the substantial benefits a landowner receives from regulation, and therefore would confer totally unjustified windfalls on land owners at taxpayer expense. As the Supreme Court stated in *Keystone Bituminous:*

"Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship." 480 U.S. at 490.

The shared burdens and benefits of regulation are illustrated in a variety of different contexts, including zoning regulations, wetlands protection rules, or, as in this case, rules protecting the health and integrity of a river corridor for the benefit of all the residents of the corridor. Regulations which restrict environmentally harmful development commonly add to the value of developed and undeveloped land alike, by increasing the environmental health and attractiveness

of the community as a whole. Restrictions which limit development opportunities may tend to reduce property values somewhat, but they also may tend to increase property values by increasing the value of the remaining development opportunities.

The proposed partial takings rule, which ignores all these complexities, would simply encourage landowners to seek financial recompense at taxpayer expense for the burdens of regulations, while simultaneously allowing them to reap the benefits of regulation and other public actions. Such a legal doctrine has nothing to recommend it as a matter of either fairness or common sense.

IV. THE DISTRICT COURT COMMITTED PLAIN ERROR IN SUBMITTING THE SUBSTANTIVE DUE PROCESS ISSUE TO THE JURY.

Finally, the damages award based on the substantive due process claim must, at a minimum, be vacated because the District Court committed plain error in submitting this claim to the jury. *See United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998). Under binding precedent established by this Court, the question whether a land use permitting decision violates substantive due process is an issue of law which must be resolved by the court, and which cannot be submitted to the jury. *See New Port Largo*, 95 F.3d at 1091 (the "ultimate issue of whether a zoning decision is arbitrary and capricious, [and therefore violates the due process clause,] is a question of law to be determined by the court"), quoting *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989).

CONCLUSION

For the forgoing reasons, the Court should reverse the judgment entered by the District Court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B). This brief contains 5,919 words.

Carole Joy Barice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing brief *amicus curiae* have been furnished by mail this 16th day of February, 1999, to William H. Congdon, Esq., attorney for Defendant-Appellant, Post Office Box 1429, Palatka, Florida 32178-1429 and Michael D. Jones, Attorney for Plaintiffs-Appellees, Atrium II Building, 301 W. State Road 434, Suite 317, Winter Springs, FL 32708.

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