

Third District Court of Appeal

State of Florida, January Term, A.D. 2009

Opinion filed February 25, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-1400
Lower Tribunal No. 07-352 AP

Richard Road Estates, LLC,
Petitioner,

vs.

Miami-Dade County Board of County Commissioners,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Appellate Division, Jeri Beth Cohen, Roger Silver, and Valerie Manno Schurr, Judges.

Greenberg Traurig and Elliot H. Scherker, for petitioner.

R. A. Cuevas, Jr., Miami-Dade County Attorney, and Eduardo I. Sanchez, Assistant Miami-Dade County Attorney, for respondent.

Before WELLS and SHEPHERD, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

Richard Road Estates, the owner of real property in southwest Miami-Dade County, seeks second tier certiorari review of a circuit court appellate division

decision affirming the refusal of the Miami-Dade County Commission to grant a change in zoning of the petitioner's property from AU (agricultural zoning permitting one residence per five acres) to EU ("estate" zoning permitting one residence per one acre). We find the ruling a departure from the essential requirements of the law resulting in a miscarriage of justice to the petitioner, see *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995), and therefore grant relief.

The indisputable evidence is that (a) the previous agricultural nature of the area no longer prevails, so that (b) the surrounding property is now used as permitted either by EU or, if anything, even more liberal zoning.¹ In these

¹ The record contains the following exchange between a commissioner and a County official:

COMMISSIONER SORENSON: . . . Let me just look at the surrounding properties. Mr. Basu, the surrounding – the property in the north is agriculture. Is that one house per five acres?

ACTING DIRECTOR BASU: No, that's an acre, acre.

COMMISSIONER SORENSON: It's an acre. And the property to the east?

ACTING DIRECTOR BASU: East is one acre.

COMMISSIONER SORENSON: And the property to the south?

ACTING DIRECTOR BASU: South is AU right now.

COMMISSIONER SORENSON: It's AU. So it's one house per five acres on the south?

ACTING DIRECTOR BASU: Yes. And caddy corner southeast is EU-1.

circumstances, it is obvious that continuing the AU designation results in an instance of impermissible “reverse spot zoning,” which cannot be sustained. *Miami-Dade County v. Valdes*, 34 Fla. L. Weekly D194 (Fla. 3d DCA Jan. 21, 2009), and cases cited; *Debes v. City of Key West*, 690 So. 2d 700 (Fla. 3d DCA 1997), and cases cited. See also *Tollius v. City of Miami*, 96 So. 2d 122 (Fla. 1957).

The County’s justification for the contrary result, which was accepted by the appellate division notwithstanding its acknowledgement that the outcome “seems unfair,”² was the desire to preserve the property’s present status as an area into

COMMISSIONER SORENSON: EU-1. So most of the area surrounding it is an acre?

ACTING DIRECTOR BASU: Yes . . .

² The lower court said:

While it seems unfair to deny the Petitioner’s application based on the illegal conduct of neighboring landowners who, under earlier regulations, were not required to fill or grade their land, flooding in the absence of infrastructure to contain the flooding presents a valid public policy concern. Petitioner argues that denying their petition because of inadequate existing infrastructure or because of flooding in the area amounts to a taking under the law. Accordingly, the Commission’s resolution is unreasonable, arbitrary and confiscatory. As applied to its property, Petitioner argues that the resolution deprives them of equal protection of the laws and constitutes a taking of their property without due process of law contrary to the guarantees of our State Constitution . . . While the Commission’s decision appears unfair, a delay

which excess rain water which would otherwise accumulate on the surrounding land is drained onto the petitioner's. Richard Road's property is thus forced to act, as it were, as an uncompensated storm sewer for the neighborhood. As a matter of constitutional law, however, a policy such as this one, which is unrelated to appropriate zoning principles, cannot support the action below. As we said in Debes, concerning a restriction of land use for a much worthier purpose – keeping property available for affordable public housing:³

. . . [W]hile this aim may represent a desirable public policy-which might support, for example, the condemnation of property for that use, see *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla.1980)-it emphatically may *not* be promoted on the back of a private landowner by depriving him of the constitutionally protected use of his property. As the estimable Judge Cowart correctly and succinctly stated:

A property owner is entitled to have his property properly zoned based on proper zoning concepts without regard to the one particular use which the owner might then intend to make of the various uses permitted under a proper

in the development of an applicant's property does not constitute a compensable temporary taking under the law.

But see *CNL Resort Hotel, L.P. v. City of Doral*, 991 So. 2d 417, 421 (Fla. 3d DCA 2008) (“CNL did not assert that the City took its property without just compensation. CNL merely wanted the City to properly consider its private property rights before enacting its plan.”).

It may be observed that in this case, as probably in every case, what seems (because it is) unfair also turns out to be wrong.

³ Because, as a County official testified, “the surrounding properties . . . don't have drainage rights to drain into this property.”, Debes, in which the use sought to be promoted was perfectly lawful, is applicable in spades.

zoning classification. A zoning authority's insistence on considering the owner's specific use of a parcel of land constitutes not zoning but direct governmental control of the actual use of each parcel of land which is inconsistent with constitutionally guaranteed private property rights.

Porpoise Point Partnership v. St. Johns County, 470 So.2d 850, 851 (Fla. 5th DCA 1985); accord ABG Real Estate Dev. Co. v. St. Johns County, 608 So.2d 59, 63 (Fla. 5th DCA 1992), cause dismissed, 613 So.2d 8 (Fla. 1993).

Debes, 690 So. 2d at 700. See also CNL Resort Hotel, L.P. v. City of Doral, 991 So. 2d 417 (Fla. 3d DCA 2008).

For these reasons, the decision of the appellate division is quashed. The cause is remanded with directions to quash the zoning resolutions in question.

Certiorari granted.