Jane Burman-Holtom
Submitted 12/10/01
002084

City Clerk

KIRKWOOD ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC.

The Neighborhood Organization for Kirkwood

December 10, 2001

City Commission
City of Gainesville
P.O. Box 490
Gainesville, FL 32602-0490

Re: SW 13th Street Corridor Temporary Moratorium -- Ordinance No. 0-01-71

Dear Commissioners:

We in Kirkwood are greatly concerned about the current and future stability of our historic neighborhood. You know well the problems associated with the fallout from the deterioration of the SW 13th Street Corridor from Archer Road south to the city limits and beyond to Williston Road. Neither I nor anyone else needs to make you aware of the problems our neighborhood has faced because of prostitution, drug activity, and transients who spill over into our neighborhood from the SW 13th Street corridor. Now residents and businesses along the corridor are faced with a sex boutique immediately adjacent to the Bivens Arm neighborhood, an adult entertainment club with exotic dancers, transient/transitional housing behind Dominoes and the prospect of a bus station which will most likely attract more transient elements and heavy traffic through and around our neighborhood.

In response to our concerns and to the concerns of the legitimate business owners along the corridor and from the other neighborhoods along the corridor, you are considering a moratorium on building and zoning over approximately the next year. During this time my neighbors and I hope that you will instruct the city staff to study this area in conjunction with the property owners and residents of the corridor area.

My neighbors and I are here tonight to urge the city commission to adopt the moratorium. However, because of the wording of the proposed ordinance enacting the moratorium, we are concerned that the moratorium will not in effect keep some of the most objectionable uses from locating along the SW 13th Street Corridor.

We are most concerned with the provision of the moratorium ordinance {Section 4. (a)(2)} which will permit anyone who has been to see the city planning staff or the building division staff in a "first step" meeting prior to Monday, November 13, 2001 to develop within the moratorium area. My neighbors and I are of the opinion that this will set a very bad precedent for the city as a whole as well as spell disaster for Kirkwood, and other residential neighborhoods and legitimate businesses along the SW 13th Street Corridor. **In land use cases over the last 20 years, the Courts have determined the issue of vested rights - rights for those people or entities that have received a permit for construction or a development order for their property. However, a "first step" meeting does not convey such vested rights.** The people in my neighborhood, as well as the people in the other neighborhoods along the SW 13th Street

corridor, urge you to modify the language on the issue of who is affected by the moratorium. We understand the courts have already addressed the issue of vesting rights for those people or entities which have received a permit for construction or a development order for their property. For the Gainesville City Commission to say that someone or some entity which appears to be for the "first step" process is vested sets a terrible precedent which affects not only our neighborhood, but future neighborhoods. **An exemption for a "first step" meeting means that the City Commission is granting development rights where they do not exist.**

In my opinion, the ordinance provision {Section 4. (a)(2) which exempts "first step" meetings is bad public policy. When you adopted the ordinance to take a "time out" to study Industrial zoning, you did not exempt "first step" meetings. Thus, on behalf of the Kirkwood Neighborhood, as well as the many other neighborhoods and businesses along the SW 13th Street corridor, I urge you tonight to amend this ordinance by deleting the exemption for "first step" meetings. Having recently reviewed many ordinances by cities and counties throughout Florida and elsewhere, exemptions are typically only granted for an "application" which implies vested interest. **The proposed exemption of "first step" creates a precedent for future moratoria which may not be in the best interest of the community.**

We ask you, collectively and individually, to discuss the pros and cons of setting the point of vesting rights for purposes of development at the "first step" stage of the development process. It is our understanding that the vesting threshold has been set by various court cases in Florida and by the United States Supreme Court in its various land use decisions over the past 20 years.

We in Kirkwood understand your desire to protect the community from a potential lawsuit challenging a temporary moratorium on land development. However, you must balance the real and present dangers of an inter-city bus station, additional sexually oriented businesses, etc. and the community-wide affects of continued deterioration on the SW 13th Street corridor with your concern of a possible lawsuit.

The City and County have sponsored two publicly advertised "SW 13th Street Vision Workshops" on April 7, 2001 and November 1, 2001 stating "The overall intent is to establish a more vibrant, attractive, safe, inviting gateway rich in healthy residences and thriving businesses." The corridor is also part of the Comprehensive Plan. Residents, City and County Staff and concerned citizens participated and spent time, money and energy on creating a "vision". We can all concur that our joint "vision" did not include a sex shop in the county by Bivens Arm Lake or a proposed bus station at the entrance to an affluent neighborhood. The momentum and positive direction of the "vision" workshops should be recognized and take precedent over any proposed projects which are detrimental to the area. Anyone with plans for commercial development has had access to information on the "Vision Workshops" and the Comprehensive Plan and adequate warning and notice to file an "application" prior to the recommendation to create a moratorium ordinance. The temporary moratorium (to allow time for charettes and in-depth "visioning") is beneficial to all parties and will result in a "planning overlay" which will enhance all property values all along the corridor.

Attached is a memorandum of law, prepared for our neighborhood, concerning the issues outlined in this letter. **If you do anything tonight, we ask that you amend this ordinance by deleting the exemption for a "first step" meeting.**

If the City Commission is unwilling, then we ask that you amend the effective date and the type of development order/building permit required to show actual investment in the purchase or lease of property, as well as the expenditure of funds for plans that have been approved according to the Gainesville Land Development Code.

Please, do not allow any person or entity to say that they have "thought of development and contacted the city staff", and thus exempt that person or entity from the proposed SW 13th Street corridor moratorium, or from any future moratoria the City may contemplate.

Sincerely,

Jane Burman-Holtom
Board Member, Kirkwood Environmental Improvement Association, (KEIA) Inc.
Property Owner and Resident, Kirkwood
Captain, Kirkwood Neighborhood Crime Watch

MEMORANDUM OF LAW

Question 1: May a local government impose a temporary moratorium on zoning within its jurisdictional limits and does this amount to a taking under the Fifth Amendment?

It has been determined in Florida and in other states that temporary moratoria on land use actions is in fact a proper use of the police powers of a local government. Courts do not generally interfere with local regulatory bodies in matters, including land use regulation, simply because legislation or regulation may be unwise or economically unsound. Courts constrain such bodies only where regulations are illegal or unconstitutional as the Supreme Court indicated in *Lucas*, the situations are "relatively rare" where the government deprives a land owner of "all economically beneficial uses." *Bradfordville Phipps Limited Partnership v. Leon County*, Florida, No. 1D01-541, Nov. 26, 2001, *quoting from Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S.Ct. 2886, 120L.Ed.2d 798 (1992).

In Florida, local governments must enact ordinances declaring building moratoria with the same formality required for ordinances which rezone property. This same formality is required by other state courts. *State ex rel. Brodie v. Powers*, 168 Conn. 147, 362 A.2d 884 (1975); *Lancaster Development, Ltd. v. Village of River Forest*, 84 Ill.App.2d 396, 228 N.E.2d 526 91967); *State ex rel. State ex rel. Kramer v. Schwartz*, 336 Mo.932, 82 S.W.2d 63 91935); *State ex rel. Christian, Spring, Sielbach & Associates v. Miller*, 169 Mont. 242, 545 P.2d 660 (1976); *State ex rel. Fairmount Center Co. v. Arnold*, 138 Ohio St. 259, 34 N.E.2d 777 (1941). If an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning. To entirely prohibit a person from building upon his property even temporarily is a substantial restriction upon land use. We understand it is not too much to ask that you, the city commission, follow the same procedures with respect to notice and hearing before you put such a moratorium into effect along SW 13th Street.

1. Development Permits. Notwithstanding any provision of the Land Development Regulations to the contrary, no development permit shall be issued and no Application For Land Use Approval shall be approved in the Bradfordville Study Area during the term of this Ordinance, except as provided in paragraph 4, below.

* * *

4. Type of Uses and Development Permits Affected. This Ordinance shall apply, as and to the extent set forth herein, to all applications for land use approval submitted after the Effective Date of this Ordinance not otherwise excepted by the Court Orders being the Injunction Order dated December 15, 1998, the Interim Settlement Agreement of January 12, 1999, and the modified Injunction Order dated January 13, 1999.

The First District Court of Appeals found that the trial court properly concluded the Partnership had not shown it was deprived of all or substantially all economically beneficial use of its property such that a temporary regulatory taking had occurred under the test set forth in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798

(1992). In *Lucas,* the United States Supreme Court explained that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *505 U.S. at 1019*. The Court indicated, however, that the situations are "relatively rare" where the government deprives a landowner of "all economically beneficial uses." *Id.* at 1018. We note that the Partnership has proceeded in its temporary regulatory taking claim only on the theory that a temporary taking occurred under the *Lucas* test, arguing that the injunction effectively deprived it of all economically beneficial use of its property. *Bradfordville Phipps Limited Partnership v. Leon County*, Florida, No. 1D01-541, Nov. 26, 2001, *quoting from Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S.Ct. 2886, 120L.Ed.2d 798 (1992).

Question 2: If a moratorium is permitted, at what point is a person or entity exempt from the restrictions the moratorium places on development?

Under Florida law, vesting is determined by the amount of work and investment that have gone into a project or a parcel of property to determine whether or not the property is "vested as to a moratorium."

What the City of Gainesville must determine is whether or not there is any type of a taking involved in the implementation of the moratorium. "[A] temporary deprivation may constitute a taking." *Tampa Hillsborough County Expressway Auth. v. A.G.W.S. Corp.,* 640 So.2d 54, 58 (Fla.1994); *see First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). *See also Keshbro, Inc. v. City of Miami,* 26 Fla. L. Weekly S469, S470 (Fla. July 12, 2001). In analyzing temporary takings, many courts look to the United States Supreme Court's decision in *First English. See Keshbro,* 26 Fla. L. Weekly at S470. Reliance upon *First English* for the threshold determination of whether a taking has occurred is, however, suspect.

In *First English,* a church alleged that a regulatory taking had occurred when, because of flooding, the County of Los Angeles adopted an ordinance prohibiting building or rebuilding on certain land, which included land owned by the church. *See* 482 U.S. at 307-08. Because of the posture of the case, the United States Supreme Court assumed that the regulation at issue resulted in a taking and considered only the question of an appropriate remedy. *See id.* at 311-13. The church's complaint alleged that the ordinance had denied it all use of the affected property and the church sought damages for this deprivation. *See id.* at 312. Citing the California Supreme Court's decision in *Agins v. City of Tiburon,* 157 Cal.Rptr. 372, 598 P.2d 25 (Cal.1979), *aff'd,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), the trial court granted the defendants' motion to strike the allegation that the church had been denied all use of the subject property. *See id.* at 308-09. The Court explained that in *Agins,* "the California Supreme Court decided that a landowner may not maintain an inverse condemnation suit in the courts of that State based upon a 'regulatory' taking." *Id.* at 308. The Court further explained the *Agins* decision:

> In the court's view, maintenance of such a suit would allow a landowner to force the legislature to exercise its power of eminent domain. Under this decision, then, compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and

> the government has nevertheless decided to continue the regulation in effect.

Id. at 308-09. The California Court of Appeal also relied on *Agins* and affirmed the trial court's decision to strike the allegation concerning the ordinance. *See id.* at 309. The California Supreme Court denied review. *See id.* The United States Supreme Court thus explained the constitutional issue before it:

> Appellant asks us to hold that the California Supreme Court erred in *Agins v. Tiburon* in determining that the Fifth Amendment, as made applicable to the States through the Fourteenth Amendment, does not require compensation as a remedy for "temporary" regulatory takings--those regulatory takings which are ultimately invalidated by the courts.

Id. at 310. In particular, the Court pointed out that "the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property." *Id.* at 321. The Court explained that " 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318. The Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. Importantly, the Court noted, "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.*

The *First English* discussion of temporary takings referred to "retrospectively temporary takings," that is, "the Court used the term 'temporary taking' to refer to the period before a regulatory taking is invalidated...." *Keshbro,* 26 Fla. L. Weekly at S471. Indeed, as explained above, "*First English* really involved a question of remedies...." *Id.*

In *Keshbro,* however, the Florida Supreme Court had before it the threshold issue of whether a compensable taking could occur under *Lucas* when nuisance abatement boards ordered, prospectively, temporary closures of certain buildings. *Id.* at S469. The court declined to distinguish "retrospectively temporary takings" from "prospectively temporary takings" for purposes of applying the *Lucas* analysis to nuisance cases. *Id.* at S471. Nevertheless, the court noted that, in cases involving land use and planning concerns, courts have refused to extend *First English* beyond a situation involving retrospectively temporary takings:

> [T]he courts refusing to extend *First English* beyond its remedial genesis to prospectively temporary regulations have done so in the land use and planning arena, where an entirely different set of considerations are implicated from those in the context of nuisance abatement where a landowner is being deprived of a property's dedicated use. The concerns specific to the regulation of land use and planning were noted by the Ninth Circuit in declining to apply *Lucas* 's categorical takings analysis to the temporary takings claims of landowners in the Lake Tahoe region with regard to a temporary moratorium on development

instituted in an effort to stem the environmental degradation of Lake Tahoe:

> The widespread invalidation of temporary planning moratoria would deprive state and local governments of an important land-use planning tool with a well-established tradition. Land-use planning is necessarily a complex, time-consuming undertaking for a community, especially in a situation as unique as this. In several ways, temporary development moratoria promote effective planning. First, by preserving the status quo during the planning process, temporary moratoria ensure that a community's problems are not exacerbated during the time it takes to formulate a regulatory scheme. Relatedly, temporary development moratoria prevent developers and landowners from racing to carry out development that is destructive of the community's interests before a new plan goes into effect. Such a race-to-development would permit property owners to evade the land-use plan and undermine its goals. Finally, the breathing room provided by temporary moratoria helps ensure that the planning process is responsive to the property owners and citizens who will be affected by the resulting land-use regulations.

Id. (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 777 (9th Cir.2000) (citations and footnote omitted), *cert. granted in part,* --- U.S. ----, 121 S.Ct. 2589, 150 L.Ed.2d 749 (2001) (granting certiorari petition on the following question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?")). The reference to land planning moratoria is more helpful in the present case than is *Keshbro.* We acknowledge the *Keshbro* rule allowing a prospective taking, but note that the factual impetuses for that case--nuisance abatement boards' actions in temporarily closing motels and apartments where criminal activity had occurred--are far removed from those now before us.

In *Tahoe-Sierra,* the U.S. Ninth Circuit Court of Appeals held that a temporary moratorium on development did not amount to a categorical taking under *Lucas* because it did not result in the deprivation of all of the value or use of the property. *See* 216 F.3d at 782. Under the *Tahoe-Sierra* analysis, no temporary taking is wrought by virtue of a development moratorium where the future use of property has a substantial present value. 216 F.3d at 781. In that case, the moratorium lasted thirty-two months. *See id.* Here, the injunction lasted twenty-two months. In light of *Lucas,* we agree with the reasoning of the Ninth Circuit that a temporary land use regulation could rarely, if ever, completely deprive the owner of all economically beneficial use:

> Of course, were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, we might be compelled to conclude that a categorical taking had occurred. We doubt, however, that a true temporary moratorium would ever be designed to last for so long a period. *Id.* at 781. Like the situation in *Tahoe Sierra,* the injunction here was designed to suspend certain development only until the County completed the stormwater study required by the Comprehensive Plan. *See id.* Even though a moratorium

> may restrict or delay temporarily the use of property for development purposes, it can hardly be said that a moratorium that was temporary from the outset destroys the economic value of the property. Indeed, nothing in the present record suggests that the property owned by the Partnership completely, or even substantially, lost its present value by virtue of the temporary injunction. Thus, our conclusion, similar to the result in *Tahoe Sierra,* does not conflict with *Lucas.*

A truly temporary land use injunction or moratorium looks more like a permitting delay than a compensable regulatory taking. Many communities have, through state and local elected officials, expressed a preference for strict land use control. In such locales, a developer may labor months or years to obtain all necessary approval for a substantial development. This is essentially what the circuit judge observed in his order when he noted "the general restrictive environment for commercial development in Leon County." In such an environment, the timetable established by a commercial developer must anticipate delays, whether occasioned by holdups in the permitting process, litigation by neighboring land owners, or a temporary development injunction or moratorium.

Our decision here, as well as that of the trial court, reflects the role of courts versus the role of local bodies in these types of disputes. Courts do not generally interfere with local regulatory bodies in matters, including land use regulation, simply because legislation or regulation may be unwise or economically unsound. Courts constrain such bodies only where regulations are illegal or unconstitutional. As the Court indicated in *Lucas,* the situations are "relatively rare" where the government deprives a landowner of "all economically beneficial uses." 505 U.S. at 1018. Close regulation by local government that is merely expensive or time consuming for developers does not arise to a taking. Such regulation presumably expresses the will of local citizens who have elected governing boards such as county and city commissions. Thus, the question of regulation in situations such as the one now before us, presents a political rather than a justiciable issue. The regulatory taking analysis of *Lucas* is consistent with this view.

In considering whether a property owner has standing because its interests have been adversely affected, a court is to consider "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood, ... and the type of change proposed." *Renard,* 261 So.2d at 837; *see Paragon Group, Inc. v. Hoeksema,* 475 So.2d 244, 246 (Fla. 2d DCA 1985), *review denied,* 486 So.2d 597 (Fla.1986) (although revocable license confers no vested rights in a constitutional sense, it does amount to property in a commercial sense), it would have established that it had standing to pursue its suit. *Cf. Renard,* 261 So.2d at 832.

Thus, we can clearly state that there is no taking as long as the moratorium is temporary and the length of that temporary moratorium is not so long as to completely deprive the owner of the property of its value. The moratorium considered by the City of Gainesville for the SW 13th Street corridor is of such a length as not to constitute a taking according to the case law found in Florida and the United States.

Question 3: What are the standards in Florida for granting relief to anyone who is subject to a moratorium?

The standards found in the ordinance imposing the moratorium on SW 13th Street are the appropriate standards for the alleviation of hardship in Florida. The criteria for the alleviation of a hardship begins in Section 5, Page 7, Line 4 of draft Ordinance No. 0-01-71. Clearly, the city attorney has done the appropriate investigation of the standards.

CONCLUSION

The City Commission enact Ordinance 0-01-71 as drafted. The City Commission should not consider including a presentation before "First Step" as a means to vest a development which would enable a developer to go forward based upon just a discussion with a proposed project on SW 13th Street.

I specifically request that the language in Section 4(2) on lines 16, 17, 18, and 19 referring to "First Step" be removed from the language of this draft Ordinance. This language is not only bad, for the SW 13th Street corridor, but also sets a bad precedent for other portions of the city that the City Commission may wish to place under moratorium in the future.

Respectfully submitted,

Jane Burman-Holtom