

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

CASE NO. CA-P-95-165

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, on behalf of
THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,
State of Florida,

Petitioner,

vs.

EVERETT G. WEST, et al.,

Defendants.

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AND
FOR ORDER OF TAKING ON INVERSE CONDEMNATION COUNTERCLAIM, AND
FOR DETERMINATION OF DATE OF VALUATION ON EMINENT DOMAIN CLAIM

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DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants file their *Motion for Partial Summary Judgment on Liability and for Order of Taking on Inverse Condemnation Counterclaim, and for Determination of Date of Valuation on Eminent Domain Claim* pursuant to Rule 1.510. The pleadings, discovery on file, documents judicially noticed, and affidavits attached hereto show that there is no genuine issue as to any material fact, and defendants are entitled to Partial Summary Judgment as a matter of law. Defendants have separately filed their Statement of Uncontested Facts and Exhibits.

I. ISSUES RAISED IN THIS MOTION

1. In the eminent domain action, defendants contend the fair market values of the subject parcels have been decreased by non-market, pre-condemnation, government actions that amount to “condemnation blight,” as that term is defined in binding Florida Supreme Court precedent, and said parcels must be valued for compensation purposes as if those actions had not occurred.

2. Defendants claim the Florida Administration Commission and Monroe County, acting in concert, deprived defendants of substantially all beneficial use of the subject properties by adopting the September 15, 1986 Comprehensive Plan and Land Development Regulations and actions subsequent thereto, “taking” said properties without compensation.

II. ANALYSIS

A. Condemnation blight

The leading Florida case on condemnation blight is *State Road Department v. Chicone*, 158 So. 2d 753 (Fla. 1963) (“*Chicone*”), wherein the Florida Supreme Court held:

The rule advocated by the Department and followed in the trial in the instant case, would permit a condemnor to depreciate property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value.

This would amount to a confiscation of the owner’s property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.

** * * we conclude that the value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for measure of compensation for the property taken.*

Effect can easily be given to this conclusion ... by holding simply, as we do here, that *compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken.*

* * * There can be no doubt that the threat of condemnation restricts the owner's economic use of property in the interim leading to the actual taking, as it did in this case. It prevents the owner from putting his property to the highest and best use. It would be neither fair, equitable or just to compensate him for value of his property as established by such limited and restricted use.

Compliance with the announcements we have made here requires that evidence as to value of the property involved represent the value as it would be without the threat of condemnation and as it would be if it had been put and were being put to its highest and best use. It requires that evidence of depression or depreciation in value due to the prospect of condemnation not be admitted.

158 So. 2d at 757-58. [Emphasis added.]

Petitioner argues, in its defenses to Defendants' inverse condemnation claims, that a statute of limitations prevents the Court from "reaching back" more than four years from the date of filing its Petition and Notice of Lis Pendens. However, no statute of limitations applies to Defendants' condemnation blight claim. Even "intermediate markdowns," i.e., actions that did not deprive the owner of *all* beneficial use, fall under the *Chicone* rule. Defendants cite *Dade County v. Still*, 377 So. 2d 689 (Fla. 1979) ("*Still*"), where the condemning authority was not allowed to use a current market value that reflected the depreciating effect of an ordinance adopted *thirty-nine years* earlier. The supreme court held:

The county urged that it was error to exclude from the jury testimony concerning the effect of these ordinances on the market value of the subject property. The district court rejected this contention on the basis of our decision in *City of Miami v. Romer*, 73 So. 2d 285 (Fla. 1954), and affirmed the action of the trial court, saying: "*(T)he principle must be adhered to that no action of the government can constitutionally deprive an individual of his property without full compensation for the taking. Article X, Section 6(a), Fla. Const.*" 370 So. 2d at 66.....

The appraisal evidence in the instant case clearly reflects that the [39-year-old] ordinance depressed the value of the property. Since the owner received no compensation at the time the ordinance was passed, the county cannot now seek to have the owner's compensation reduced by reason of its own governmental action.

377 So. 2d at 690. [Emphasis added.]

Nor is it necessary for Defendants to sue all the government entities that caused the condemnation blight through their regulatory and non-regulatory activities. In *Grandpa's Park, Inc.*

v. Dept. of Transportation, 726 So. 2d 789 (Fla. 1st DCA 1998), the DOT condemned a small parcel of land for a highway extension. The condemnee contended the city had downzoned the parcel following DOT's announcement that it was extending the highway. The condemnee argued that *Chicone* entitled him to compensation based on the prior zoning. The trial court found "that the partial taking did not cause the city to redesignate the land," but also found "there had been no collusion" between DOT and the city. The entire District Court panel agreed that: "*a finding of collusion between the agencies involved would not have been necessary.*" Judge Booth went further in his dissenting opinion.

The trial court apparently accepted Appellee's interpretation of the rule of *Chicone* and *Gefen* that the devaluation must be caused by the actual filing of condemnation. However, the cases do not support that interpretation. *It is the effect of the announcement of intent to condemn that is critical.* The actual taking of the land comes later, sometimes many years later, as in *Chicone, supra*, and *Still, supra*. The supreme court noted in the *Chicone* case, 158 So. 2d at 755:

Once selected for condemnation the marketability, both sale and rental, and to some extent the use, of property is sterilized and its value, either as determined by market value or use by the owner, is decreased.

The trial court was also apparently of the view that in order to apply the *Chicone* rule, the property owner must establish that the governmental entities involved acted in collaboration with each other to achieve the devaluation. *Although Appellee has stated that view in its brief here, there are no cases so holding.*

726 So. 2d at 792, Booth, J., dissenting. [Emphasis added.]

In *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345 (CA 1972), an oft-cited decision on condemnation blight, the California Supreme Court held:

While expert witnesses testifying on behalf of the public authority and those on behalf of the property owner may differ widely on their opinion as to the value of the property taken, this difference usually reflects the elusive nature of the fair market value concept and not the appropriate date on which valuation should be based. However, a variety of circumstances may actually becloud the proper valuation date. While in California this date is set by statute at the time the summons is issued (Code Civ. Proc., § 1249), depending on the nature of those activities occurring prior to the issuance of summons a different date may be required in order to effectuate the constitutional requirement of just compensation. [Citations omitted.] * * *

Thus, under some circumstances an announcement that an undesignated parcel or parcels of land may be appropriated at some future time for a generally unappealing project may tend to decrease land values in the vicinity. [Citation omitted.] For example, publicity that a refuse dump will be located somewhere within a 10-square-mile area may tend to

depress the value of all land within that area because of the adverse impact a dump might have on other property in close proximity.

In the case at bar, however, the precondemnation publicity complained of consisted of announcements directly aimed at plaintiffs' properties and not at an undesignated area. [fn 1 follows] ... *it would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel* located in that area. [Citations omitted.] The length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or for other oppressive acts by the public authority designed to depress market value. [Citations omitted.] * * *

1. The State's role in North Key Largo development restrictions

The Florida Keys became a ward of the State on April 25, 1975, when the Governor and Cabinet, sitting as the Administration Commission, designated the Florida Keys Area of Critical State Concern (ACSC), on the recommendation of the Division of State Planning (now the Department of Community Affairs). *Fact 12*. When the Florida Supreme Court invalidated the ACSC designation, the Legislature re-created the Florida Keys ACSC by statute, effective July 1, 1979. Ch. 79-73, § 6, Laws of Fla., codified at § 380.0552, Fla. Stat. (2003). *Fact 13*.

One of the requirements of an ACSC is the preparation of a new Comprehensive Plan (ComPlan) and Land Development Regulations (LDRs). If the local government fails to submit a ComPlan and/or LDRs, DCA will do it for them. § 380.05(8), Fla. Stat. (2003). § 380.0552(9) prescribes the State's role in drafting Monroe County's ComPlan and LDRs as follows.

MODIFICATION TO PLANS AND REGULATIONS. – Any land development regulation or element of a local comprehensive plan in the Florida Keys Area may be enacted, amended, or rescinded by a local government, but the *enactment, amendment, or rescission shall become effective only upon the approval thereof by the state land planning agency*. The state land planning agency shall review the proposed change to determine if it is in compliance with the principles for guiding development set forth in chapter 27F-8, Florida Administrative Code, as amended effective August 23, 1984, and shall either approve or reject the requested changes within 60 days of receipt thereof. Further, *the state land planning agency, after consulting with the appropriate local government, may, no more often than once a year, recommend to the Administration Commission the enactment, amendment, or rescission of a land development regulation or element of a local comprehensive plan*. Within 45 days following the receipt of such recommendation by the state land planning agency, *the commission shall reject the recommendation, or accept it with or without modification* and adopt it, by rule, including any changes. Any such local development regulation or plan shall be in compliance with the principles for guiding development.

In *Ambrose, et al. v. Monroe County, et al.*, Chief Judge Richard Payne described the State's role in drafting Monroe County's September 15, 1986, ComPlan and LDRs as follows.¹

From 1979 to 1986, DCA provided technical assistance to Monroe County's local governments, as mandated by § 380.05(7), to help draft § 380.0552-compliant Comprehensive Plans and LDRs ("380 Plans"). In February 1986, by Resolution 49-1986, Monroe County submitted a 380 Plan to DCA for approval, or rejection, pursuant to § 380.05(6), Fla. Stat. In response, DCA approved portions of the County's 380 Plan and rejected others. Ch. 9J-14.003-.004, FAC (1986). After rejecting portions of the 380 Plan, Ch. 9J-14.003, FAC, DCA recommended a large number of 380 Plan amendments to the Commission, for adoption pursuant to its authority at § 380.05(8), Fla. Stat. DCA's amendments were approved, Ch. 28-20.019-.021, FAC, and the 380 Plan became effective September 15, 1986.

Judge Payne described the extensive State oversight process under Chapter 380, and the actions of DCA and the Administration Commission after September 15, 1986, as follows.²

Administration Commission's Continuing 380 Oversight. Following its initial amendments in 1986, the Commission promulgated additional amendments to Monroe County's 380 Plan on October 5, 1989 and August 12, 1992. Ch. 28-20.022, -.023, and -.024, FAC. On January 2, 1996, July 17, 1997, and July 26, 1999, the Commission amended the Monroe County Year 2010 Comprehensive Plan and LDRs (2010 Plan). Ch. 28-20.025 and 20.100, FAC (1996). The State's 2010 Plan amendments alone, promulgated under the DCA's and Administration Commission's Chapter 380 authorities, take up thirty-three fine print pages of the Florida Administrative Code.

The Court concludes that the continuing oversight by DCA and the Administration Commission flows exclusively from the designation of the Florida Keys as an ACSC. *The Court finds that there are no LDRs or Comprehensive Plan provisions in effect in the Florida Keys that did not go through the oversight process of Chapter 380....*

In October 1982, DCA and DNR asked the Governor and Cabinet acting as Trustees of the Internal Improvement Fund (TIIF), to buy the hammock lands on North Key Largo ("NKL") under the CARL program, citing a Miami Herald article that objected to development of these privately-owned lands. *Fact 18*. In February 1983, DCA defended its NKL CARL proposal, stating: "these hammocks occur on upland sites, on the *best land for development*," and "*upland plant communities on private lands are not protected anywhere in the state.*" *Fact 20*.

¹ *Ambrose, et al. v. Monroe County, the Department of Community Affairs, and the Village of Islamorada*, (16th Jud Cir. Fla., Case No. 97-20-636-CA-18 (Payne, J.), Final Summary Judgment, May 28, 2002), *appeal pending* (Fla. 3d DCA, Case No. 3D02-1754), at pp. 12, 16. *Request for Judicial Notice*.

² *Ibid.*, at pp. 10, 12, *emphasis added*.

In 1983-84, political pressures on the Florida Keys Electric Cooperative and the Florida Keys Aqueduct Authority resulted in prohibiting electric and water connections on NKL. *Fact 21*. The Chief of DNR's Bureau of Appraisal expressed concern for the constitutionality of these actions, *Fact 22*, stating:

In my opinion, the water and electrical hookup prohibitions are, in essence, a taking of the property without compensation; and, in my opinion and in the opinion of several others both in Monroe County government as well as in this Bureau of Appraisal, if the facts were presented to a judicial hearing, the court would rule in favor of the property owners.

When DCA and DNR succeeded in getting NKL on the CARL acquisition list, the State began putting pressure on Monroe County to halt development approvals there. In April 1984, DNR's Executive Director wrote to the Monroe County BOCC, *Fact 24*, stating:

Actions of special concern include such issues as annexation, extension of services (water, sewer, etc.), change in zoning, developments of regional impact, and any other proposed change which is likely to preclude public use or increase the potential cost to the state.

On September 4, 1984, Governor Graham established the North Key Largo Habitat Conservation Plan ("HCP") Study Committee. *Fact 26*. Within two days, the Miami Herald "heralded" the Governor's action, *Fact 27*, stating:

Gov. Bob Graham Wednesday created a committee to draw a plan for North Key Largo that will be designed to set aside preservation areas for endangered species and still leave room for development. ... Completion of the plan is expected to take more than a year.

By August 16, 1985, it was clear that the subject properties were included within the boundaries of the State's NKL acquisition plan, *Fact 28*. In February 1986, DNR's Executive Director sent another warning to the BOCC, *Fact 29*, in which he stated:

Once a project is placed on the acquisition list, decisions made by local governmental authorities, such as rezoning, annexation, extension of water/sewer services, etc., may have an effect upon the [TIIF] continued interest in acquiring the property. In that regard, staff has been directed by the [TIIF] as follows:

If by government action subsequent to the time a parcel is placed on a State acquisition list, a project is given an enhanced highest and best use which would result in a governmentally derived higher value, *the staff will terminate further acquisition activities unless the owner agrees that the appraisal will be done at the highest and best use time the project was placed on the acquisition list.*

There can be no doubt that DNR's February 1986, letter to the BOCC was intended to discourage the issuance of permits, PUD approvals, plat approvals, and even the provision of water and electric service, to properties on the CARL acquisition list, *for the sole purpose of reducing the price the State would have to pay* when it acquired those properties.

The County's September 15, 1986 LDRs, *drafted by Monroe County and the Administration Commission*, designated NKL as an ACCC. The specific provision referred to the HCP Study Committee and required the County to incorporate the HCP into the Comprehensive Plan *upon completion of the HCP*. This provision is in the County Code today, as § 9.5-477, and reads, in part, as follows. *Req. for Jud. Notice*.

Sec. 9.5-477. North Key Largo Area of Critical County Concern.

(a) *North Key Largo Area of Critical County Concern*: The North Key Largo Area of Critical County Concern is hereby established for that portion of Key Largo located between the junction of State Road 905 and U.S. Route 1 and the Dade County boundary at Angel Fish Creek.

(b) *Purpose*: The North Key Largo Area of Critical County Concern is established for the purpose of reconciling the reasonable investment-backed development expectations of North Key Largo landowners with the need to preserve the habitat of four (4) species of animals that are listed as endangered under the Endangered Species Act

(c) *Habitat Conservation Plan for North Key Largo*: A gubernatorial study committee established by Executive Order Number 84-157 is preparing a habitat conservation plan for North Key Largo that will be consistent with the principles established in subsection (d) of this section and is to be submitted to Monroe County for consideration and adoption as a part of the Monroe County Comprehensive Plan.

(d) *Principles for Guiding the Preparation of the Habitat Conservation Plan*: The habitat conservation plan ("HCP") for North Key Largo shall be prepared in accordance with the following principles:

(1) At a minimum, the lands which are designated as conserved habitat within the North Key Largo Area of Critical County Concern shall be preserved by the fee acquisition, use of transferable development rights or any other means that provides for the preservation of the lands in perpetuity.

(2) The lands designated for possible future development within the North Key Largo Area of Critical County Concern may be suitable for on-site development.

(3) *An intensive land acquisition effort, including at a minimum all conserved habitat within the North Key Largo Area of Critical County Concern should be undertaken by the State of Florida. It may also be desirable for the state to acquire all or a part of the areas designated for possible future development within the North Key Largo Area of Critical County Concern.*

(4) No development shall be carried out within the areas designated for possible future development within the North Key Largo Area of Critical County Concern prior to August 1, 1988, *in order to provide a reasonable period of time for a major land acquisition effort to be undertaken*, except for possible minor exceptions for single-family dwellings units in existing improved subdivisions.

(5) Residential dwelling units shall be allocated on an equitable basis to all lands, including lands owned by the State of Florida in the North Key Largo Area of Critical County Concern which lie outside of the Crocodile Lakes National Wildlife Refuge, between the Ocean Reef Club and the Port Bougainville Development of Regional Impact (DRI) on the basis of thirty-five hundred (3,500) residential units. The allocation shall first provide for existing legally vested rights, including improved subdivisions, and then allocate the remainder of the thirty-five hundred (3,500) units to undeveloped lands. *It shall be assumed that the dwelling units allocated to lands currently in state ownership, or lands acquired in the future by the state, will not be developed and that therefore the number of dwelling units actually developed will be substantially less than the allocated number of dwelling units.*

(6) No development within the areas designated for possible development shall be carried out unless and until a section 10(a) incidental taking permit authorizing such development has been issued by the United States Secretary of the Interior and a comparable authorization has been granted by the Florida Game and Freshwater Fish Commission.

* * *

On or before October 1, 1987, the board of county commissioners shall consider and initiate adoption procedures for a Habitat Conservation Plan for the North Key Largo Area of Critical County Concern; and no development shall be carried on any lands within the area of critical county concern prior to October 1, 1987, or the effective date of the HCP except for lands located within the Ocean Reef Club, the Angler's Club and the Port Bougainville and Garden Cove DRI's and subdivisions designated by the board of county commissioners as Improved Subdivision (IS).

After the State-County ComPlan and LDRs became effective September 15, 1986, the State began lobbying the County, and individuals drafting the HCP, to kill the HCP. In October 1986, DNR's Assistant Executive Director wrote to an attorney at Siemon, Larsen and Purdy, the firm drafting the HCP, *Fact 30*, expressing the State's strong interest in "freezing" the rights of the NKL property owners in order to keep the costs of acquisition down.

... the [HCP] remains inconsistent with this Department's ongoing programs which serve to protect the natural environment of Key Largo. The following broad issues, most of which were stated in our July 21, 1986, letter, continue to be problematic.

... Since these are the primary environmental resource values which serve as the basis for the North Key Largo Hammocks land acquisition project, *we would be in possible conflict with the intent of the Land Acquisition selection Committee and Governor and Cabinet, if we simultaneously pursued acquisition and development within this area.*

The allocation of additional development rights in accordance with the HCP could increase cost to the State. Additionally, *the HCP recommendation that the [FKAA] and [FKEC] rescind moratoria on services to areas of critical habitat, within CARL project boundaries, could be expected to inflate property values, and cost to the State.*

In April 1988, the Florida Game and Fresh Water Fish Commission formally opposed any development in the NKL Hammocks CARL acquisition area. *Fact 31.* In June 1990, the Director of DNR's Division of State Lands wrote to the Monroe County Planning Commission, which was considering adoption of the HCP, urging the Planning Commission to reject the Habitat Conservation Plan and leave NKL in legal limbo. *Fact 32.*

Monroe County, DCA, and the Administration Commission had committed to adopting the HCP no later than October 1, 1987. Section 9.5-477, MCC. Yet, as of the date of this Motion for Partial Summary Judgment, *more than 15 years after the deadline*, the County and State have neither adopted the HCP nor amended the County Code to eliminate the requirement that it do so. It also has not allocated to the NKL property owners the 3,500 dwelling units referred to in § 9.5-477. As a result, Defendants could not have developed their property between September 15, 1986 and today because, due to State opposition, the County failed to adopt the HCP.

2. Application of the law to the facts

The TIIF is empowered with the State of Florida's power of eminent domain. When the TIIF acquires property for CARL purposes, it tries to acquire parcels from "willing sellers" before exercising its eminent domain power. Like an iron fist in a velvet glove, that condemnation power is omnipresent and can be employed on a moment's notice. Just as a property owner whose land is located within the boundaries of a CARL acquisition project, knows that the TIIF can take his land by eminent domain whenever it wishes, so do the potential buyers of that land. Describing CARL property owners as "willing sellers" is an oxymoron. It is the threat of condemnation that causes them to sell, and at prices far below what they would receive without that threat.

As early as 1990, State CARL acquisition personnel were considering using eminent domain on NKL parcels. In May 1990, the Chief of DNR's Bureau of Land Acquisition stated:

... the funding of the balance of Key Largo may not present a problem; but, the number of parcels remaining and the potential *need for condemnation* would dictate the phasing of the acquisition over a two to three year period. *Fact 33*.

In August 11, 1992, DNR's Environmental Administrator sent a letter to a DNR biologist in Key Largo, *Fact 34*, stating:

Attached is a copy of the form letter sent to most of the remaining [North Key Largo] property owners. The last two paragraphs set the stage for condemnation if they are still unwilling sellers. Roy [Rhodes] indicated to me that *they are serious about using eminent domain on these parcels, if necessary, in the very near future* (before the end of the year).

The form letter states: "*In the event you are not willing to sell at this time, we will place your property on the condemnation list which will be presented to the Cabinet in the near future.*"

The values of NKL lands dropped so much that the Director of DNR's Division of State Lands, in an October 1996 memo to the DNR Secretary, *Fact 35*, stated:

... the implementation of development restrictions typically reduces the current fair market value of the land we are trying to buy. Among the desired outcomes of this whole exercise, of course, is that we should accelerate our acquisition efforts. *This outcome is being impeded by reductions in land value.*

My staff and I have met on several occasions to discuss the issue and the purpose of this memo is to set out the various alternatives ...

1. Attempt to purchase property at current fair market value – i.e., subject to new development restrictions. Disadvantages: less willing sellers resulting in a decline in number of purchases; in some cases, *current FMV may be next to nothing which could provide visible evidence that comp plan amounts to a "taking."*

The Craig and Gallaher Affidavits establish that the subject properties' fair market values (FMV) have dropped to practically nothing, a fact that is supported by Percy Mallison's statement seven years ago that "current FMV may be next to nothing which could provide visible evidence that comp plan amounts to a "taking." The facts lead to the conclusion that the State has depreciated the value of the subject properties by a threat of condemnation, and now seeks to pay the landowners the depreciated value. This is the inequity addressed by the supreme court in *Chicone*, where the court held:

This would amount to a confiscation of the owner's property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.

There can be no doubt that the threat of condemnation restricts the owner's economic use of property in the interim leading to the actual taking, as it did in this case. It prevents the owner from putting his property to the highest and best use. It would be neither fair,

equitable or just to compensate him for value of his property as established by such limited and restricted use.

As the supreme court said in *Still*, quoting the Third District Court of Appeal:

the principle must be adhered to that *no action of the government* can constitutionally deprive an individual of his property without full compensation for the taking. Article X, Section 6(a), Fla. Const.

3. Relief to which Defendants are entitled

This court must order the State to pay *full compensation* to Defendants. This will not occur unless the parties are required to use a “valuation date” that pre-dates the threat of condemnation, and the properties are appraised as if, on the date of the jury verdict, the uses of the property are those that existed before the designation of the NKL Hammocks CARL acquisition project. That date was July 1985. *Fact 29*. The court must also order the parties to disregard the County’s series of “rolling,” temporary moratoria from 1982 to September 15, 1986.

B. Defendants’ inverse condemnation claim

This court must make three findings and render a Taking Order before on Defendants’ inverse condemnation claim before this case can proceed to a valuation trial under Chapters 73 and 74, Fla. Stat. The binding precedent is *Foster v. City of Gainesville*, 579 So. 2d 774 (Fla. 4th DCA 1991), where the Fourth District panel described the court’s function as follows.

Generally, the only issues decided by the court in an inverse condemnation proceeding are: (1) *whether the governmental agency has effected a taking*; (2) *the nature and extent of the property rights taken*; and (3) *the date of the taking, which is used for valuation purposes*. If the court determines that a taking has occurred, a jury trial is held wherein the jury determines the amount of compensation to which the property owner is entitled. The valuation proceeding is to be held in accordance with chapters 73 and 74, Florida Statutes, and the process is the same as if the cause were a statutory eminent domain action.

Foster v. City of Gainesville, 579 So. 2d at 776. [Emphasis added.]³ All affirmative defenses raised by the government must be resolved before a Taking Order can be rendered.⁴

³ See also, FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE, § 13.39 (5th Ed. 1996, 2000 Supp), Florida Bar CLE, Tallahassee, FL.

⁴ *Florida Dept. of Agriculture v. Go Bungee, Inc.*, 678 So. 2d 920 (Fla. 5th DCA 1996); FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE, *op. cit.*, § 13.37.

Both the United States and the Florida Constitutions provide that private property shall not be taken for public use without just compensation. 5th and 14th Amendments, U. S. Cons.; Art. X, § 6(a)⁵ and Art. I, § 9,⁶ Fla. Const. The purpose of the Takings Clauses is to prevent government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554. (1960). Property rights are, however, defined by state law. *Webb’s Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980), citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Furthermore, states are free to interpret their constitutions independently of the United States Constitution *so long as that interpretation affords, as a minimum, the same protection as its federal counterpart.*⁷ The only difference between the Florida Constitution and the U.S. Constitution taking clauses is that Florida requires the government to pay *full* compensation, while the federal constitution requires *just* compensation.

Justice Holmes first recognized that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322. It was not until 1978 that the U.S. Supreme Court formulated a test to determine when a regulation “goes too far.” *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (“*Penn Central*”). “*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.” *Palazzo v. Rhode Island*, 533 U.S. 606, 634, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (“*Palazzo*”), O’Connor, J., concurring. The three criteria that *Penn Central* approved in a regulatory taking claim are:

⁵ Art. X, § 6(a) – “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”

⁶ Art. I, § 9 – “No person shall be deprived of ... property without due process of law.”

⁷ *R.T.G., Inc., v. State of Ohio*, 780 N.E. 2d 998 (Ohio 2002) [Emphasis added.]. See *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293, 102 S. Ct. 1070, 1077, 71 L. Ed. 2d 152, 162 (1982).

(1) the nature of the governmental regulation, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations.

438 U.S. at 124. *Penn Central* provides the proper taking test when the regulation deprives the property of less than 100 percent of its economically beneficial use. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 1483, 152 L. Ed. 2d 517, 545 (2002) (“*Tahoe-Sierra*”); *Palazzolo*, 533 U.S. at 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592

In 1992, the Supreme Court revisited regulatory takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (“*Lucas*”). The Court acknowledged the *Penn Central* ad hoc balancing test, but recognized two situations in which a regulation results in a taking “without case-specific inquiry into the public interest advanced in support of the restraint.” *Lucas*, 505 U.S. at 1015. The first is where a regulation involves a physical invasion of property.⁸ The second is “where regulation denies all economically beneficial or productive use of the land,” a “categorical taking.” *Lucas*, 505 U.S. at 1015. However, even if a regulation results in categorical taking, no compensation is due if the claimant’s use of the land violates “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” *Lucas*, 505 U.S. at 1029.

Lucas’ categorical takings rule applies “when a regulation deprives an owner of ‘all economically beneficial uses’ of his land.” (Emphasis in *Lucas*.) *Tahoe-Sierra*, 122 S. Ct. at 1483, quoting *Lucas*, 505 U.S. at 1019. Thus, if a regulation deprives the property of *all* economic value, there is no need to examine the policy behind the regulation, and a compensable taking results unless the regulation prevents use of the property in a manner that creates a nuisance under state law. The Court has created a dichotomy in regulatory takings; *Lucas* applies where the regulation has deprived the property of *all* economic value, and *Penn Central* applies where the regulation deprives the property of *less than all* economic value.

⁸ E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

1. Interpreting the Florida Constitution's taking clause

Florida case law requires full compensation when the government “*substantially interferes*” with an owner’s use of property.⁹ In *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) (“AGWS.”), the supreme court held:

A taking occurs where regulation denies *substantially all* economically beneficial or productive use of land. Moreover, a temporary deprivation may constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

640 So. 2d at 58 [emphasis added].

In *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), an opinion that relied on *Lucas*, the supreme court acknowledged the Supreme Court’s line of regulatory taking cases.

Those regulations which fall short of effecting a categorical taking are appropriately analyzed under the ad-hoc factual inquiry outlined in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). [Citations omitted.] The *Penn Central* analysis is an ad-hoc factual inquiry requiring the examination of several factors in the consideration of a takings claim; keenly relevant in that analysis is “the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations.” *Lucas*, 505 U.S. at 1019 n.8 (quoting *Penn Central*, 438 U.S. at 124).

801 So. 2d at 871 n.12. [Emphasis added.]

2. Application of Penn Central to this case

Defendants’ expert appraiser concluded that the subject properties could be sold only as “investment acreage,” a use for which there is little or no demand, and that the fair market value of the subject parcels has been reduced to \$1,000 per acre, a reduction in value of 97.4% to 99.4%. *Gallaher Affidavit*. Although retaining 0.6% to 2.6% of value is small, Defendants’ case does not qualify for a *Lucas* “categorical taking” analysis, and must be evaluated according to the less-than-total-wipeout *Penn Central* criteria.

3. The nature of the government regulation

This *Penn Central* factor has received little attention since the Supreme Court fashioned it in 1978. It originated from a view in vogue at the time, called the benefit/harm principle, which

⁹ See, e.g., *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So. 2d 622 (Fla. 1990); *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990).

was utilized in reviewing the effect of regulations on property. The theory was that a regulation that “conferred a public benefit” was a taking, while one that “prevented a harmful use” was not. In *Lucas*, the Court discarded the benefit/harm principle for good.

... that the “harmful or noxious use” principle was merely this Court’s early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis.

Lucas, supra, at syllabus. The majority opinion dismissed the benefit/harm theory as follows.

In Justice Blackmun’s view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. See *post*, 505 U.S. at 1039, 1040-1041, 1047-1051. *Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.* We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; *it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings” – which require compensation – from regulatory deprivations that do not require compensation.*

112 S. Ct. at 2898-99. [Emphasis added.]

In the case at bar, the government regulations that deprived Defendants of *substantially all* beneficial use of the subject properties are the September 15, 1986, Comprehensive Plan and Land Development Regulations, as adopted by Monroe County and the Administration Commission, and specifically § 9.5-477, Monroe County Code. Under the nuisance rationale of *Lucas* and *Keshbro*, the 1986 ComPlan and LDRs were *not* adopted to prevent a common-law nuisance. As the Florida Supreme Court stated in *Keshbro v. City of Miami, supra*:

Under *Lucas*, the cities can resist compensation only if they can identify “background principles of nuisance and property law that the prohibit the uses” proscribed by the orders. *Lucas*, 505 U.S. at 1031. *A regulation so restricting the use of property can “do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.” Id.* at 1029

801 So. 2d at 875-76. [Emphasis added.] Therefore, Defendants meet the first *Penn Central* test, and Petitioner cannot avoid paying full compensation under a nuisance theory.

4. The economic impact of the regulation on the claimant

The fair market value of the subject parcels has been reduced from the \$2,000,000 to \$5,000,000 Parcel 1 would have absent the offending regulations, and the \$200,000 to \$400,000 Parcel 7 would have, to \$1,000 per acre, a reduction in value of 98.7% to 99.4% on Parcel 1, and of 97.4% to 98.7% on Parcel 7. *Gallaher Affidavit*. There are no other uses available on the subject property. Therefore, Defendants have been deprived of substantially all economically beneficial use on the subject property, and they meet the “substantial deprivation” test of *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp, supra*, and the second prong of the *Penn Central* test.

5. The extent to which the regulation interfered with distinct investment-backed expectations

The owners of Parcel 1 inherited the property from Edison Freeman, who bought the upland in 1950 for \$3,300 and the submerged land in 1961 for \$1,292.50. The owners of Parcel 7 paid \$55,000 in 1978 for their property. *Facts 1 and 2*. The Court can take judicial notice that, in 1950, air conditioning had yet to arrive in Florida, and the Keys was hardly paradise. Yet, if one uses an average rate-of-return of 8% over the past 53 years, for sound investments, one can calculate what Freeman’s heirs could have today if their predecessor had made a sound investment. The results are shown in the following Table.

Present Value Calculator			
	Parcel 1a	Parcel 1b	Parcel 7
Amount Invested	\$3,300	\$1,293	\$55,000
Year Invested	1950	1961	1978
Average Interest Rate	8%	8%	8%
Log (1 + interest rate)	0.033424	0.033424	0.033424
Years Elapsed	53	42	25
Years x Log (1 + interest rate)	1.771459	1.403798	0.835594
Value of each \$1 invested	\$59.08	\$25.34	\$6.85
2003 Value of Investment	\$194,972	\$32,751	\$376,666

The present value of the investment in Parcel 1 would be \$227,723, and the present value of \$55,000 invested in 1978 would be \$376,666 today. No facts exist that would show that the 1950, 1961, and 1978 investments in buildable Florida Keys upland was anything other than reasonable and prudent. In fact, Mr. Darst of DCA stated, in 1983 – *after all, these hammocks occur on upland sites, on the best land for development. Fact 20.*

Reducing the FV of the subject properties to \$1,000 per acre today has deprived Defendants of their reasonable, investment backed expectations. The Parcel 1 owners have seen an investment that could be worth \$227,723 today and, according to Robert Gallaher would actually be worth between two and five million dollars today, reduced to \$26,800. Similarly, the owners of Parcel 7, worth only about \$5,250 today, have realized an actual loss of 90.5% of the \$55,000 they invested in 1978, and a 98.6% reduction in its what it would be worth without the offending regulation. Defendants’ reasonable, investment-backed expectations have been dashed to pieces, and they satisfy the third prong of the *Penn Central* test.

III. RELIEF TO WHICH DEFENDANTS ARE ENTITLED

Monroe County adopted a series of local moratoria beginning February 9, 1982, and ending September 15, 1986. Defendants have not yet been able to determine, as of the date of this motion, what role the State played in the pre-September 15, 1986, moratoria, and are not asserting a temporary taking *by the State* before September 15, 1986. However, The subject properties were temporarily taken *by the State and Monroe County*, without full compensation required by the Florida and U.S. Constitutions, on September 15, 1986.

Defendants cite to *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 797 (Fla. 1962), and to the 2002 decision in *Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores*, 838 So. 2d 561 (Fla. 4th DCA 2002), where the court held that two governmental entities can both be liable for an inverse condemnation claim where the governmental units together deprived the owners of substantially all beneficial use, as follows.

Lost Tree’s takings claims, both facial and applied, rely upon the combined effect of the City’s “no bridgehead” ordinance with the Town’s “no development without bridge” ordinance, which effect deprives it from using its property in an economically viable

manner. *The City and Town each argues that because their respective regulations do not solely deprive Lost Tree from using its property, neither can be liable for payment of compensation. We reject that reasoning.*

The Constitutions of the United States and the State of Florida both provide that no private property shall be taken except for a public purpose and with just compensation. U.S. Const. amend. V; Art. X, § 6, Fla. Const. *Both Constitutional provisions emphasize the taking of the property, not the governmental unit responsible for the taking.* As was stated in *Ciampetti v. United States*, 18 Cl. Ct. 548, 556 (Cl. Ct. 1989), “assuming that no economically viable use remains for the property, *the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking.*” Multi-government action, of which the combined effect deprives a landowner, constitutes a taking: “As a general principle, *two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights.* ... Government decisions are not produced in a vacuum.”

Charles E. Harris, *Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 U. Fla. L. Rev. 635, 683 (1973). See also *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 797 (Fla. 1962) (holding *multiple governmental units engaged in a cooperative effort to obtain property can all be liable for the taking of property*). While there may be issues of damage apportionment in such a case, that does not bar the claim and permit the taking without compensation. The Constitution entitles the landowner to a remedy.

Defendants have demonstrated that their properties have been temporarily taken by the State of Florida continuously since September 15, 1986. This temporary taking will continue until the jury verdict is approved in a trial on full compensation. At that time, the temporary taking will end and the properties will have been permanently taken by eminent domain. Defendants, therefore, ask this court to enter an Order of Taking on Defendants’ inverse condemnation counterclaim, with the temporary taking beginning on September 15, 1986, and with a valuation date of July 1985.

IV. NATURE AND EXTENT OF PROPERTY RIGHTS TAKEN

Plaintiffs submit that the Comprehensive Plan and Land Development Regulations adopted by Monroe County and the Florida Administration Commission effected a temporary regulatory taking of the fee simple interest in 100% of the subject property on the effective date, September 15, 1986. A permanent taking of the fee simple interest in the subject property will occur on the effective date of the jury verdict on compensation.

V. DATE OF VALUATION

The Date of Valuation is used by the parties and their experts to appraise the subject property based upon its highest and best use as it existed on the Date of Valuation, at the fair market value the subject property would have if that highest and best use could be realized on the date of the jury verdict. Plaintiffs submit that the Date of Taking for valuation purposes is July 1986, when the subject properties were approved for acquisition by the Trustees of the Internal Improvement Fund.

VI. AFFIRMATIVE DEFENSES

An affirmative defense admits the allegations in the Complaint, and sets up some bar that prevents the plaintiff from recovering. Affirmative defenses must be plead with certainty; pleading conclusions of law is legally insufficient. *Zito v. Washington Federal Savings & Loan Ass'n of Miami Beach*, 318 So. 2d 175 (Fla. 3d DCA 1975), *cert. denied*, 330 So. 2d 23 (Fla. 1976); *Bliss v. Carmona*, 418 So. 2d 1017 (Fla. 3d DCA 1982).

Petitioner raises five defenses in its *Reply, Answer, and Affirmative Defenses*. These are (i) failure to exhaust administrative remedies, (ii) statutes of limitations, (iii) sovereign immunity, (iv) failure to join an indispensable party, and (v) failure to state a cause of action. Petitioner's first, fourth, and fifth defenses are not "affirmative" defenses, and its second and third defenses, while qualifying as "affirmative defenses," are unsustainable.

A. Statute of limitations

Petitioner states "This action is barred by the statutes of limitations" There is no explanation of what claim(s) are barred by what statute, or any reasoning supplied for this statement and, for that reason alone, this statement is insufficient to state an affirmative defense. Furthermore, a statute of limitations on an inverse condemnation claim cannot begin to run until the "taking" is complete, or the offending regulation has been repealed or declared invalid by a court of competent jurisdiction. An inverse condemnation claim is often compared to a tort claim, and usually borrows a State's tort statute of limitations. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), where Justice

Scalia explains that a taking without compensation is a “constitutional tort.” Just as in tort law, a taking claim matures when the final element of the claim is complete. In this case, Statute of Limitations will not begin to run until the temporary taking ends, on the day the compensation jury returns its verdict.

B. Sovereign immunity

Petitioner suggests that Florida’s sovereign immunity bars an inverse condemnation claim. Inverse condemnation is a claim based on the Florida Constitution, and requires no additional waiver of sovereign immunity.

C. Other defenses

Failure to exhaust administrative remedies is neither a defense, Fla. R. Civ. P. 1.140(b), nor an affirmative defense, Fla. R. Civ. P. 1.110(d). An affirmative defense admits the allegations in the complaint, but sets out facts that would allow the defendant to avoid liability, such as accord and satisfaction, estoppel, and other avoidances. *Failure to exhaust administrative remedies* is *not* a form of the Rule 1.140(b) defense of *lack of jurisdiction*. It is a tool of judicial policy, employed by courts to avoid premature litigation of an issue that could be resolved in an appropriate administrative forum.

There is a tendency to confuse “ripeness” or “finality” with “exhaustion of administrative remedies.” The Supreme Court, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), went to great lengths to explain that “finality/ripeness” is not the same as “exhaustion of administrative remedies.” The doctrine of exhaustion of administrative remedies is one of judicial policy. It does not extend to so-called “administrative” remedies that do not provide *adequate or timely relief*. *Warner v. City of Miami*, 490 So. 2d 1045 (Fla. 3d DCA 1986).¹⁰ No exhaustion is required where the administrative remedy cannot provide “full and adequate” relief. *Northeast*

¹⁰ See also *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 695 (Fla. 1978); *School Board of Leon County v. Mitchell*, 346 So. 2d 562, 568 (Fla. 1st DCA 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978).

Airlines, Inc. v. Weiss, 113 So. 2d 884 (Fla. 3d DCA), *cert. denied*, 116 So. 2d 772 (Fla. 1959). Where there has been no showing that an administrative remedy exists that can grant plaintiff the relief requested from the Circuit Court, no exhaustion requirement applies. *Monroe County v. Gonzales*, 593 So. 2d 1143 (Fla. 3d DCA 1992) (no requirement to exhaust administrative remedy where remedy is futile act); *Hill v. Monroe County and DCA*, 581 So. 2d 225 (Fla. 3d DCA 1991) (no requirement to exhaust administrative remedy against state agency when County would not be bound thereby); *Deseret Ranches of Florida, Inc. v. State Dept. of Agriculture & Consumer Services, Div. of Animal Industry*, 392 So. 2d 1016 (Fla. 5th DCA 1981). “The law does not require one to pursue administrative remedies before resorting to the courts where such remedy would be of no avail.” 42 AM. JUR. PUBLIC ADMINISTRATIVE LAW § 200, 1 FLA. JUR. ADMINISTRATIVE LAW § 176.¹¹

Petitioner raises the defense of failure to join indispensable parties. This does not state an affirmative defense. This is the defense numbered “7” in Fla. R. Civ. P. 1.140(b), and has been waived by Petitioner by failing to include it in its Motion to Dismiss Second Amended Complaint. *See* Fla. R. Civ. P. 1.140(b), where the rule states:

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. ... Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction [Emphasis added.]

If a motion to dismiss is made and *failure to join indispensable parties* is not raised, it is waived and cannot be raised in the answer.

Defendants rely on *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 797 (Fla. 1962) (holding multiple governmental units engaged in a cooperative effort to obtain property *can all be liable* for the taking of property) and *Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores, supra*, for the proposition that, like any tort claim where the actors are jointly and severally liable, Defendants do not have to join all the actors together as defendants

¹¹ *See also* *City of Holly Hill v. State ex rel. Gem Enterprises, Inc.*, 132 So. 2d 29, 31 (Fla. 1st DCA 1961); *Cook v. Di Domenico*, 135 So. 2d 245 (Fla. 3d DCA 1961); *Mayflower Property, Inc. v. City of Fort Lauderdale*, 137 So. 2d 849 (Fla. 2d DCA 1962), all cited by the Third DCA in *Hill v. Monroe County and DCA, supra*.


in an inverse condemnation proceeding. As counter-defendants herein, the State had every opportunity to bring a third-party complaint against Monroe County, for contribution or indemnity, and it elected not to do so.

Failure to state a cause of action is not an affirmative defense.

VII. RELIEF SOUGHT

Plaintiffs pray that this Court enter an Order of Taking that sets forth the following:

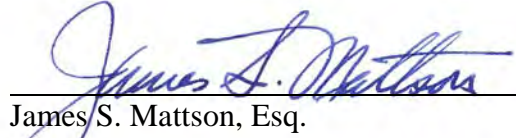
1. The property owners are as shown on Schedule A to the Petition in Eminent Domain.
2. The property taken consists of the lands described in Schedule B to the petition I Eminent Domain.
3. The quality of the estate taken is fee simple.
4. The Date of Valuation for both the eminent domain and the temporary taking claims shall be July 1985, when the property taken was placed on the CARL acquisition list. The parties shall determine the current fair market value of the properties taken without regard to the 1982-86 temporary moratoria or the Monroe County Comprehensive Plan and Land Development Regulations effective September 15, 1986, as amended.
5. The effective date of the temporary taking is September 15, 1986, and of the permanent taking will be the date of the jury verdict.
6. The responsible government entity is the State of Florida.
7. The State of Florida is liable to pay full compensation to the property owners under the United States and Florida Constitutions and the provisions of Chapters 73 and 74, Florida Statutes, and all defenses raised by the State are dismissed by the Court.
8. This Court shall order a jury trial on the issue of valuation, pursuant to Chapters 73 and 74, Florida Statutes, at the earliest available date.
9. The State of Florida is liable to pay reasonable costs and attorneys' fees for this entire proceeding after conclusion of the valuation trial, as required by Chapters 73 and 74, Florida Statutes.


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VIII. CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by overnight courier on Elaine Asad, Esq., Senior Assistant Attorney General, 110 SE 6th St, 9th Fl, Ft. Lauderdale, FL, 33301, and by U.S. Mail to those parties and/or Counsel listed on the following service list, this 18th day of November 2003.


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