

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup> 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.

STATEMENT OF UNCONTESTED FACTS AND EXHIBITS

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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November 15, 2003

## UNCONTESTED FACTS

These material facts appear in the State's Complaint, defendants' Answers and Counter-claims, the exhibits attached thereto, and affidavits attached hereto. They are admitted or the State has denied knowledge thereof or, if denied, are established by exhibits or affidavits attached hereto, or by documents judicially noticed.

### A. The subject parcels and owners

#### 1. Parcel 1, the West-Freeman property

1. Parcel 1 has 21.2 acres of upland and 5.6 acres of submerged land. It is east of and adjacent to State Road S-905 and extends into the Atlantic Ocean. It is bordered on the north by Ocean Reef Shores and on the south by Gulfstream Shores, both platted subdivisions. *Exh. C.* Parcel 1 is owned by the heirs of Edison S. Freeman, who purchased the uplands on June 10, 1950 for \$3,300,<sup>1</sup> and the submerged land on November 29, 1961 for \$1,292.50. *Exh. F.*

#### 2. Parcel 7, the Richardson property

2. Parcel 7, Tract "C" of Largo Edmar Subdivision, has 4.3 acres of upland and 0.9 acre of submerged land. It is east of State Road S-905 and extends into the Atlantic Ocean. *Exh. D.* It was purchased for \$55,000<sup>2</sup> by Defendant Richardson and Michael Bryan. Bryan's interest was sold to UNCIA Trading Corporation, a dissolved foreign corporation.<sup>3</sup> *Petition, Sched. B.*

### B. Uses of subject property before September 15, 1986

#### 1. Parcel 1

3. Before September 15, 1986, Parcel 1 was zoned GU (General Use), a "holding" land use district designation.<sup>4</sup> The owner could have built one Dwelling Unit ("DU") per gross acre, *as-of-right*, regardless of habitat, or 21 single-family DU's. The owner could have constructed a 21 slip docking facility on the submerged land. *Craig Affidavit, Exh. B.*

4. From 1975 to September 15, 1986, Major Development Ordinance 21-1975 would have governed any *increased* development of Parcel 1. There were many major development approvals during that period. If the owner applied for major development approval during that period, it is likely the application would have been granted. *Craig Affidavit, Exh. B.*<sup>5</sup>

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<sup>1</sup> Calculated from the \$3.30 in documentary stamps on the deed. *Exh. F.* In 1978 that tax was \$0.10 per \$100.

<sup>2</sup> The deed shows documentary stamps of \$165.00. *Exh. F.* In 1978 that tax was \$0.30 per \$100.

<sup>3</sup> Two persons, Moises Martinez and Roberto Comptis, claim to own UNCIA's interest.

<sup>4</sup> See memo from DNR Appraiser Shadden, noting GU was a holding classification. *Exh. A at p. 32.*

<sup>5</sup> *Ibid.*, where Mr. Shadden states: "The [Monroe County Property] appraisers felt that *the highest and best use of all parcels was for maximum density multi-family development in the form of a P.U.D.*"

5. With major development approval, Parcel 1 would have been zoned RU-3, or the equivalent as a Planned Unit Development, with a density of 6 DU's per gross acre, or 126 DU's. As Parcel 1 has 8.9 acres of mangroves (*Weidener survey, Exh. C*), development would have been in the 11.4-acre non-mangrove area. 78 DU's would be the maximum number a developer would reasonably build in the 12.3 acres of non-mangrove upland. *Craig Affidavit, Exh. B.*

6. In addition to a pool, recreation center, and tennis courts, it would have a docking facility. While a 78-slip docking facility would provide one slip per DU, major developments of this type, in the Florida Keys, do well with one slip per four units. Access to the docking facility would have been allowed across the mangroves to the docks. *Craig Affidavit, Exh. B.*<sup>6</sup>

## **2. Parcel 7**

7. Before September 15, 1986, parcel 7 was also zoned GU. According to Robert Smith's biological analysis, Exh. B.2, that Affiant Craig accepted knowing Smith's skill in this field, Parcel 7 has 1.4 acres of saltmarsh habitat. The owner could have built 4 DU's, as-of-right, clustered in those 1.4 acres, and a 4-slip docking facility on the submerged land. Because of Parcel 7's mangrove habitat, it would not have been reasonable to seek approval to increase residential density on Parcel 7. *Craig Affidavit, Exh. B.*

### **C. Uses of subject property after September 14, 1986.**

8. Native zoning theoretically allocated Parcel 1 a density of 0.5 DU/acre of forested and disturbed land, 0.3 DU/acre in saltwater wetlands, and zero density for mangroves, or 6 DU's. However, Monroe County failed to implement the North Key Largo Habitat Conservation Plan (HCP) required by the September 15, 1986, Comprehensive Plan and prevented any development on the subject property. Although an HCP was prepared, it was blocked by the State and was never adopted. In retrospect, nothing could have been constructed on Parcels 1 or 7 after September 14, 1986. *Craig Affidavit, Exh. B.*

### **D. Diminution in value of subject property**

#### **1. Parcel 1**

9. If it could be used for the pre-September 15, 1986 uses described by Craig, Parcel 1 would have a fair market value (FMV) between \$2,000,000 and \$5,000,000 today. Given the inability to improve it, Parcel 1 has value only as investment acreage, no more than \$1,000 per acre or \$26,800. This is a diminution in value of 98.7% to 99.4%. *Gallaher Affidavit, Exh. E.*

#### **2. Parcel 7.**

10. If it could be used for the pre-September 15, 1986 uses described by Craig, Parcel 7 would have a FMV between \$200,000 and \$400,000 today. Given the inability to improve it,

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<sup>6</sup> Affiant Craig prepared site plans for both of the above scenarios, revised February 2002. Copies are made part of Craig's Affidavit as *Exh. B.3* and *B.4*.

Parcel 7 has value only as investment acreage, no more than \$1,000 per acre or \$5,250. This is a diminution in value of 97.4% to 98.7%. *Gallaher Affidavit, Exh. E.*

## **E. Actions that reduced the subject properties' value**

### ***1. ACSC designation***

11. In 1972, the Florida Legislature enacted the Florida Environmental Land and Water Management Act, Ch. 72-317, Laws of Fla., effective July 1, 1972. Section 380.05, Fla. Stat., is the enabling legislation for Areas of Critical State Concern ("ACSC").

12. On March 3, 1975, the Division of State Planning (Department of Community Affairs, or DCA) recommended, to the Administration Commission (Governor and Cabinet), the Florida Keys be designated an ACSC. *Askew v. Cross Key Waterways*, 372 So. 2d. 913, 917 (Fla. 1978). The Commission held two public meetings in Key West, in 1975, to receive comments on the proposal. On April 25, 1975, the Commission designated the Florida Keys ACSC.

13. The District Court of Appeal rescinded the 1975 ACSC designation in *Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. 1st DCA 1977). After the supreme court's decision was final, the Legislature created the Florida Keys ACSC by statute, effective July 1, 1979.

### ***2. The major development project ordinance and moratoria***

14. In 1975, Monroe County adopted Major Development Project Ordinance No. 21-1975 (MDPO). The MDPO defined a "Major Development" as any development application involving a parcel of land that had "5 acres or more of land and/or water." Both subject properties exceeded the 5-acre threshold. The MDPO remained in effect until September 15, 1986, when the County's new Comprehensive Plan and LDRs became effective. *Req. for Jud. Notice.*

15. Between February 9, 1982 and September 15, 1986, Monroe County adopted seven resolutions and ordinances that effectively prevented Major Development Project applications from being accepted or processed. *Req. for Jud. Notice.*

16. Despite the seven rolling moratoria, there were many major development approvals between 1975 and 1986 and, should the owner of Parcel 1 have applied for major development approval during that time period, it is highly probable the application would have been granted. *Craig Affidavit, Exh. B.*

### ***3. The State's decision to acquire North Key Largo***

17. In 1982, public attention was focused on major developments in North Key Largo. One example is the Miami Herald article entitled *North Key Largo: The Last Stand*, published July 25, 1982. The article criticizes the ACSC designation as "meaningless in controlling growth," and states that since the ACSC designation in 1975 "at least 51 major developments have been approved." *Exh. A, Doc. 1.*

18. By October 25, 1982, a proposal had been developed by the Department of Natural Resources (DNR) and DCA to designate North Key Largo for State acquisition under the Con-

servation and Recreation Lands program (CARL). The proposal was submitted to the CARL Selection Committee by the Bureau of Land Acquisition, Department of Natural Resources (DNR). The submittal stated.

In an attempt to secure an optimal portion of the remaining hammock on North Key Largo, *staff from the Bureau of Land and Water Management (DCA), and this office have developed the following C.A.R.L. acquisition project proposal.*

The memo refers to the July 25, 1982, Miami Herald article cited above. *Exh. A, Doc. 2.*

19. The North Key Largo CARL proposal was amended on December 16, 1982, and DNR submitted the following comments to the CARL Selection Committee.

Three CARL project proposals dealing with endangered tropical hammocks on North Key Largo were submitted in October. *These projects are co-sponsored by the Department of Community Affairs and the Department of Natural Resources.*

\* \* \* North Key Largo Hammocks is large enough to curb the “urban sprawl” now threatening destruction of most remaining tropical hammocks in the area. *Many existing hammocks are designated as sites for planned unit developments (e.g., condominiums), as is the case for Anchor Bay Hammock in the present proposal.*

*... Considering the successful advancing tide of development on North Key Largo, this acquisition would represent a move in the right direction. Exh. A, Doc. 3.*

20. On February 2, 1983, Paul Darst of the Department of Community Affairs disseminated a four-page memo that reads, in part, as follows

Although the Keys ACSC designation has been effective in some ways, it ... has not prevented destruction of the upland forests, called tropical hammocks, in the Keys. ... Nor do we believe that land development regulations that would do the job could be adopted. *After all, these hammocks occur on upland sites, on the best land for development. Upland plant communities on private lands are not protected anywhere in the state.*

\* \* \* We would argue (1) that the proposal consists of lands that cannot be adequately regulated under the Keys ACSC regulations ..., (2) that the proposal lands are of excellent quality ..., and (3) that therefore *the proposal is deserving of a high priority for acquisition by the CARL program. Exh. A, Doc. 4.*

#### ***4. Depriving North Key Largo property owners of water and electrical hookups***

21. In 1983 and 1984, pressures were being brought on the Florida Keys Aqueduct Authority (FKAA) and the Florida Keys Electric Cooperative (FKEC), to prohibit water and electrical service hookups to land on North Key Largo. On October 27, 1983, the Regional Director of the USF&WS wrote to the Rural Electrification Administration (REA) urging it to withhold funds unless FKEC prohibited new electrical hookups in North Key Largo. *Exh. A, Doc. 5.* The letter included Sections 28 and 29, T60S, R40E, where the subject properties lie. *Exh. A at p. 24.* FKEC succumbed and prohibited electrical hookups to obtain a loan from REA. *Exh. A, Doc. 6.* FKAA buckled under similar pressure, agreeing to prohibit water hookups to get a loan from the Farmers Home Administration. *Ibid.* These restrictions, however, appeared to have no effect on property values on North Key Largo. *Ibid.*

22. On March 28, 1984, K. P. Howell, Chief of the DNR Bureau of Appraisal, wrote to his supervisors that:

*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. Exh. A, Doc. 6.*

23. In the July 2, 1985, Annual Report of the CARL Selection Committee, the Committee commented on the cost of North Key Largo acquisitions with this statement:

*COST: The estimated project land value is minimized by the absence of water and electrical hookups. Exh. A, Doc. 14.*

24. On April 16, 1984, the Executive Director of DNR wrote to the chair of the Monroe County Commission, stating that the State did not want Monroe County approving development activities in the CARL areas, that would increase the State's acquisition costs, as follows.

... we are requesting your cooperation and communication regarding the project as it is processed for purchase.

*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. Exh. A, Doc. 7.*

25. A summary of the CARL proposal to acquire North Key Largo, dated September 1984, concludes with the following statements.

... acquisition of the proposed lands will protect a portion of the natural South Florida environment for the public and several endangered species. *Without the protection of public ownership much of the area would be lost to private development. Exh. A, Doc. 8.*

##### ***5. State creation of the Habitat Conservation Plan Study Commission***

26. On September 4, 1984, Florida Governor Bob Graham issued Executive Order 84-157, which states in part:

§ 1. The North Key Largo Habitat Conservation Plan Study Committee is hereby created.

§ 2. *The Committee's purpose shall be the formulation of an agreement between the participating entities and interests, concerning anticipated development in the North Key Largo area and a general environmental protection plan for the same area.*

§ 5. *The Committee shall recommend boundaries for a Habitat Conservation Plan and shall cooperate with all state and federal agencies to establish a Habitat Conservation Plan as contemplated by Section 10(a) of the Federal Endangered Species Act .... This plan shall address the conservation of habitat and species of concern under the Monroe County Comprehensive Plan and Land Development Regulations. Exh. A, Doc. 10.*

27. Two days later, the Miami Herald announced the Governor's formation of the HCP Study Committee. *Exh. A, Doc. 11.*

28. On August 16, 1985, Mr. Minasian sent a memo to James MacFarland, Director of DNR Division of State Lands, in which he objected to an HCP Study Committee draft plan called "Prototype C." Minasian also noted:

Attachments B and C show that *the area which the State is interested in acquiring lies east of County Road 905, and extends down to Gulf Stream Shores, about ¾ mile north of Port Bougainville. Exh. A, Doc. 15..*

Gulfstream Shores, the subdivision mentioned in Mr. Minasian's memo, borders Parcel 1 on the south side, and is about ½ mile south of Parcel 7, putting both of the subject properties within the North Key Largo CARL acquisition area. *Weidener Surveys, Exh. C, D.*

29. On February 14, 1986, the DNR Executive Director sent a letter to Wilhelmina Harvey, Chair of the Monroe County Commission, notifying her that the North Key Largo Hammocks Addition had been placed on the CARL list in July 1985. In his letter, 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 Trustees' continued interest in acquiring the property. In that regard, staff has been directed by the Trustees 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 [at the] time the project was placed on the acquisition list.*" *Exh. A, Doc. 17.*

## **6. State efforts to prevent adoption of the HCP**

30. On October 8, 1986, DNR's Assistant Executive Director wrote to Lee Einsweiler, an attorney whose firm was responsible for drafting the HCP Study Committee's proposals, with the following objections to the Study Committee's latest effort.

... the resulting plan 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.

1. Destruction of critically imperiled natural communities and endangered species located within an approved CARL acquisition project. 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.*

2. Possible increase in the cost for acquisition of an approved CARL acquisition project. 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.* Exh. A, Doc. 19.

31. On April 24, 1988, the Florida Game and Fresh Water Fish Commission wrote to the Chairman of the Monroe County Planning Commission, opposing even the limited development that was proposed in the “new” HCP. The FGFWFC recommended “that no further development be allowed in the hammocks on [North Key Largo] .... *Exh. A, Doc. 33.*

32. On June 6, 1990, Percy Mallison, Director, DNR Division of State Lands, sent the following request to the Monroe County Planning Commission.

*The Department of Natural Resources requests the Monroe County Planning Commission approve native zoning for [North Key Largo], rather than approving the HCP, except for those areas currently identified as Improved Subdivision.* Exh. A, Doc. 35.

### ***7. The inevitable shift from “willing sellers” to condemnation***

33. While the HCP was still being considered as late as May 16, 1990, Bruce Kuester, Chief, DNR Bureau of Land Acquisition, asserted in a memo to his deputy:

...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. *Exh. A, Doc. 34.*

34. On August 11, 1992, Dr. Greg Brock, DNR Environmental Administrator, wrote to Dr. Renate Skinner, a DNR biologist in Key Largo, in which he stated:

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).

Mr. Rhodes’ form letter, attached to Dr. Brock’s letter, makes the following statement: “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.” *Exh. A, Doc. 37.*

35. On January 8, 1996, Percy Mallison, Director, DNR Division of State Lands, expressed to the DNR Secretary the “dilemma” DNR was “struggling to overcome” in North Key Largo. He 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 num-

ber of purchases; in some cases, current FMV may be next to nothing which could provide visible evidence that comp plan amounts to a "taking."

2. Attempt to purchase property at an amount in excess of the current FMV. .... Disadvantages: ... could add fuel to the fire of the private property movement. \* \* \*

4. Seek a judicial determination of value by instituting one or more suits in eminent domain and then attempt to purchase property based on the court's opinion of how value should be determined. .... Disadvantages: could create a judicial forum to litigate comp plan issues; would be more expensive; would set a precedent for other CARL projects where disputes may exist on applicability of land use regulations; may be difficult to apply judicial rationale to other property. Exh. A, Doc. 38, pp. 182-83.



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#### **LIST OF EXHIBITS**

- A. Documents Produced by DEP in Response to Defendants' Requests for Production (190 pages plus Table of Contents).
- B. Affidavit of Donald L. Craig, AICP, with four attachments:
  - Attachment 1. Habitat Analysis & Buildability Assessment, Parcel 1, by Robert Smith, dated March 19, 1997.
  - Attachment 2. Buildability Assessment, Richardson parcel, by Robert Smith, dated June 1, 1996.
  - Attachment 3. Site Plan and Development Analysis, Pre-1986 GU Zoning, West-Freeman parcel, by The Craig Company, revised February 2002 (oversize document filed separately)
  - Attachment 4. Site Plan and Development Analysis, Pre-1986 RU-3 Zoning, West-Freeman parcel, by The Craig Company, revised February 2002 (oversize document filed separately)
- C. Boundary Survey, Parcel No. 1, Weidener Surveying and Mapping, PA, prepared for the Florida Department of Environmental Protection, and dated 3/16/95, 2 pages (oversize document filed separately).
- D. Boundary Survey, Parcel No. 7, Weidener Surveying and Mapping, PA, prepared for the Florida Department of Environmental Protection, and dated 2/9/95, 2 pages (oversize document filed separately).
- E. Affidavit of Robert E. Gallaher.
- F. Parcel 1 and 7 Deeds.

**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 6<sup>th</sup> St, 9<sup>th</sup> Fl, Ft. Lauderdale, FL, 33301, and by U.S. Mail to those parties and/or Counsel listed on the following service list, this 18<sup>th</sup> day of November 2003.

  
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