

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

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

Plaintiff,

NO: 95-20-165-CA-18

vs.

EVERETT G. WEST, et al.,

Defendant.

\_\_\_\_\_ /

Motion in Limine

The above entitled cause came on for hearing  
before the Honorable LUIS GARCIA Circuit Court Judge,  
pursuant to Notice.

Upper Keys Govt. Center  
88820 Overseas Highway  
Tavernier, FL 33070  
Wednesday, August 2, 2006  
8:55 a.m. - 10:00 a.m.

## APPEARANCES:

Appearing on behalf of Plaintiff:

PAUL A. LEHRMAN, Assistant Attorney General  
MICHAEL G. TAKAC, Assistant Attorney General  
Office of the Attorney General  
PL-01 the Capitol  
Tallahassee, FL 32399-1050

For the Defendant:

JAMES S. MATTSON, ESQ.  
99198 Overseas Highway  
Key Largo, FL 33037

ANDREW M. TOBIN, ESQ.  
P.O. Box 620  
Tavernier, FL 33070

1 THE COURT: Let's go on the record. Florida  
2 Department of Environmental Protection versus Everett  
3 West. Announce your presence for the record, please.

4 MR. TOBIN: Andy Tobin on behalf of the  
5 plaintiff -- I'm sorry on behalf of the defendants.

6 MR. MATTSON: Jim Mattson on behalf of the  
7 defendants.

8 MR. LEHRMAN: Paul Lehrman, assistant attorney  
9 general for the Florida Department of Transportation.

10 MR. TAKAC: Michael Takac also.

11 MR. LEHRMAN: I'm sorry, I said DOT -- I represent  
12 the DOT. -- Department of Environmental Protection.

13 THE COURT: That makes more sense.

14 MR. LEHRMAN: Not necessarily but for this case it  
15 does.

16 MR. TOBIN: I guess we are used to being the  
17 plaintiffs on inverse cases, judge and they are used to  
18 being the defendant. But in any event we have a third  
19 request for compulsory judicial notice. We found -- as  
20 the court knows the issue in this case has to do with  
21 condemnation blight. And we found some resolutions and  
22 minutes of the Monroe County Commission meetings. So  
23 I'm going to go and give this to the court.

24 THE COURT: Just a few.

25 MR. TOBIN: Just a few. And give counsel a copy.

1           MR. MATTSON: We need to say, while we are passing  
2 this out, we are not going to use those today. We have  
3 had to -- we are going to have to bifurcate today's  
4 hearing because we had planned to call two witnesses who  
5 are former county commissioners. We could not get their  
6 schedules to match the court's schedule. And when we  
7 tried to set depositions it was too late and opposing  
8 counsel couldn't make the depositions. So we did get a  
9 little bit of time on your calendar on September 15th.  
10 Hopefully we'll be able to take these two witnesses'  
11 depositions and not have to bring them into court. It  
12 is just a matter of scheduling our time and their time.  
13 One of them is Ken Sorensen, our state representative.  
14 The other is Ed Swift, who owns Key West so to speak.  
15 So --

16           THE COURT: Are we going to be using this in the  
17 September hearing?

18           MR. MATTSON: We'll be using those in their  
19 depositions -- they probably won't show up in the  
20 September hearing. We wanted counsel to have those  
21 before the depositions.

22           THE COURT: Thank you.

23           MR. MATTSON: It is not that we are trying to  
24 sneak something in for today, not that we wouldn't try  
25 that, but we are not going to do that today. We get

1           caught too often.

2           MR. LEHRMAN: Your Honor, just further  
3 housekeeping to tell the court where we are on this.  
4 The trial is set for the end of September. As Your  
5 Honor knows, regardless of what the rulings are going to  
6 be on these motions, the trial is going to be on the  
7 issue of valuation which is going to hinge upon, in  
8 essence, the appraisals. Under these circumstances, and  
9 I was just thinking about this on the way down here last  
10 night and so I haven't had a chance to run this by  
11 opposing counsel, but where we are going to be having,  
12 instead of a ruling today, it's now going to be in the  
13 middle of September just a week or so before the trial.  
14 Neither side whoever is the -- well even the winning  
15 side, but definitely the losing side is not going to  
16 have an opportunity to instruct and get an appraisal.  
17 So I would request that under these circumstances that  
18 we be removed from the trial calendar, which the weather  
19 may do in any event because we are right in the middle  
20 of hurricane season, and reset it so that whichever side  
21 is the loser in this thing can adjust their appraisals  
22 accordingly.

23           THE COURT: Mr. Mattson.

24           MR. MATTSON: We have actually thought about the  
25 same thing. We tried to figure out some other

1 alternative. If we are in here on the 15th for a  
2 decision on the valuation date, there is only two ways  
3 we can resolve it. One is a continuance of the trial.  
4 So we would ask that the trial be continued to November  
5 if that's feasible. And the other would be having each  
6 of our appraisers do two appraisals which is going to  
7 cost twice as much money for both of us based on one  
8 date and one based on another date. And our appraiser  
9 is not too excited about that. I would imagine their's  
10 isn't either.

11 MR. LEHRMAN: We would be double unexcited because  
12 not only that, we have to do that, we have to pay for  
13 them all under Florida law.

14 MR. MATTSON: We concur.

15 THE COURT: I'll take you off my September trial  
16 calendar. I don't know what month I will put you on. I  
17 have to look at my trial calenders. But I will take you  
18 off September.

19 MR. MATTSON: I'm not available the last two weeks  
20 of October. I'm supposed to be traveling with my wife  
21 to some meetings she is going to. I get to be the day  
22 person in France.

23 THE COURT: Good.

24 MR. LEHRMAN: What a nice situation.

25 MR. MATTSON: I get to wander around with all the

1 other day people.

2 MR. LEHRMAN: What a good wife. Marrying one is  
3 half the issue.

4 THE COURT: My issue is I don't think November  
5 looks good I know December looks pretty bad. So it may  
6 be January.

7 MR. LEHRMAN: Also judge the other housekeeping  
8 measure, which isn't really going to require much  
9 action, just to put on the record that we'll be filing,  
10 we do object to the court taking compulsory judicial  
11 notice of their second and it appears to be, since I  
12 haven't looked at it, probably their third request for  
13 judicial notice. While they are not proper subjects for  
14 judicial notice, they don't fall into any of the  
15 categories which compulsory judicial notice, in which  
16 that is proper, they are not necessarily common  
17 knowledge, they are not admissible in any event even if  
18 they are judicial --

19 THE COURT: They are not scheduled for today,  
20 correct?

21 MR. LEHRMAN: No, it is not scheduled for today  
22 but I wanted to let the court know we do not accept  
23 these --

24 THE COURT: Which ones are they? So the record is  
25 clear.

1           MR. LEHRMAN: The record should reflect the second  
2 and third judicial notices which we object to those.  
3 The first one is a ruling by Your Honor in a Monroe  
4 County case which appears, at least arguably, to fall  
5 within one of the exceptions and we would -- I need to  
6 research that more but right now we don't have an  
7 objection to that.

8           MR. MATTSON: Your Honor, a bunch of them are  
9 certified copies of ordinances which are judicially  
10 noticed.

11          MR. LEHRMAN: I hadn't seen those. We withdraw  
12 any objections if they are within this jurisdiction and  
13 certified copies of ordinances.

14          MR. MATTSON: There are also certified copies of  
15 resolutions and certified copies of the minutes of the  
16 Board of County Commissioners. I think they are all  
17 proper.

18          MR. LEHRMAN: Those we would like an opportunity  
19 to argue.

20          MR. MATTSON: That is all they are.

21          THE COURT: Today is not the argument. You don't  
22 need a decision from me today.

23          MR. LEHRMAN: That's right.

24          MR. MATTSON: The only other one they are talking  
25 about is the Shaddek decision, your decision.

1           THE COURT: We are addressing for the record a  
2 motion in limine. I have reviewed the motion. I've  
3 reviewed the previous portion for partial summary  
4 judgment and the response by the state. So as soon as  
5 you are ready.

6           MR. MATTSON: I think I'm just about ready.

7           THE COURT: You do have a witness here from The  
8 Reporter?

9           MR. MATTSON: Yes.

10          MR. TOBIN: Judge perhaps we can get through some  
11 of that. We have located numerous newspaper articles  
12 from 1982 and 1980 not only from the Miami Herald that  
13 have previously been introduced and support our motions  
14 but articles from the Upper Keys Reporter. I have not  
15 had a chance to make copies of all these articles and --  
16 actually I made copies of them but I haven't had a  
17 chance to give copies to the other side. Because of the  
18 way these books are bound, they are oversized books and  
19 in leather binding they don't open real easily to put on  
20 a copy machine. So it was my intent to ask the business  
21 manager of The Reporter, who is here today, to bring the  
22 volumes to court today so if we needed to Your Honor  
23 could look at them and counsel could look at them.  
24 I got a call yesterday from the attorney that represents  
25 the Miami Herald and they don't like their archives

1 leaving their business address. And we tried to figure  
2 out an affidavit, that they could do an index and dates  
3 and everything and we sort of just ran out of time.  
4 So Margie is here today, she can authenticate these  
5 documents or we can try to work with counsel to come to  
6 some arrangement. If there is an affidavit certifying  
7 these are true and correct copies of their volumes that  
8 may be sufficient because it is difficult to get all of  
9 those volumes here today. I don't know if counsel has  
10 an objection to the authenticity, not necessarily the  
11 relevancy, or some other objection?

12 MR. LEHRMAN: No, it's not my job to make it  
13 difficult on counsel. I wouldn't have an objection to  
14 authenticity but we do have an objection to relevance,  
15 to hearsay. I haven't seen the articles so I don't know  
16 what other objections there would be. Certainly with  
17 any types of newspaper articles there is always a  
18 hearsay issue. There is a relevance issue they are not  
19 proper to be judicially noticed and respectfully I  
20 believe that opposing counsel has mischaracterized, and  
21 I don't think intentionally, that these have been  
22 admitted into evidence, that they have been introduced.  
23 They are in fact not. They are attached to the motion  
24 but nothing introduced into evidence.

25 THE COURT: As far as the articles, you have, as

1 far as having the witness take the stand and go through  
2 the whole business record exemption you have no  
3 objection to the authentication reserving as to  
4 relevance so we can release the witness?

5 MR. LEHRMAN: Absolutely. There is no reason for  
6 the witness to sit.

7 MR. TOBIN: Thank you. We couldn't figure out a  
8 way to do it.

9 MR. MATTSON: Does that mean you are going to do  
10 it by affidavit?

11 MR. TOBIN: Yeah, by affidavit.

12 MR. MATTSON: The authenticity.

13 MR. LEHRMAN: Or we can stipulate.

14 THE COURT: It sounds like you are stipulating.

15 MR. LEHRMAN: I would like a chance to look at  
16 them first but I don't think that will be a problem.

17 MR. TOBIN: I will make copies of what I have.  
18 I'll provide them to counsel. If he has an objection he  
19 can notify me promptly and we can get an affidavit of  
20 authenticity if in fact he has a concern about them.

21 THE COURT: These newspaper articles are not for  
22 today but for the September hearing?

23 MR. TOBIN: Correct.

24 THE COURT: Then you have an opportunity to go  
25 through them.

1 MR. MATTSON: Quite frankly the two witnesses'  
2 memories aren't perfect about things 25 years ago. The  
3 newspaper articles, although admitted, will be used in  
4 their deposition to get their brains going. So they  
5 probably won't come back into the courtroom.

6 MR. TOBIN: Thanks Paul.

7 MR. LEHRMAN: Sure.

8 MR. MATTSON: I just have to have get this going  
9 and set the computer in that box -- or on the box. It  
10 will just take me another minute, I guess.

11 MR. TOBIN: Judge, we had previously filed some  
12 minutes and resolutions with the court and at the time  
13 we did not have certified copies. We downloaded them  
14 off the internet, copy them and send a copy to counsel.  
15 To avoid an objection we got certified copies of all  
16 these documents that, I don't know, from the clerks  
17 office. These have also been filed with the court.

18 THE COURT: How would you identify them for the  
19 record?

20 MR. LEHRMAN: Second judicial notice.

21 MR. TOBIN: So we were going to substitute or  
22 introduce the certified copies. I hate to burden the  
23 court's file with another two inches of paper. Counsel  
24 has basically agreed that the lack of certification in  
25 our second judicial notice is not fatal, of course

1           reserving whatever other objections he has as to  
2           relevance and admissibility.

3           THE COURT: Stipulation as to authentication,  
4           correct?

5           MR. LEHRMAN: Yes. I'll object to the stuff that  
6           matters not that.

7           THE COURT: Okay.

8           MR. TOBIN: Thank you.

9           THE COURT: Thank you.

10                                 (Short pause)

11           THE COURT: Is this the same presentation for the  
12           motion for summary judgment that I have a hard copy of?

13           MR. MATTSON: It's a revision of it.

14           THE COURT: Do you have a hard copy?

15           MR. MATTSON: I sure do. I have hard copies for  
16           everybody. I have a hard copy as well as copies of the  
17           cases, the principal cases that are mentioned in there.

18                                 (Short Pause)

19           MR. MATTSON: Now it seems to be working. Now we  
20           can have the lights. This is really just to remind the  
21           court where we are going. And the power point  
22           presentation is actually a lot faster than my mumbling  
23           through it and trying to figure out what I want to  
24           remember. So I don't think I'm going to take up too  
25           much time.

1 As I showed you in November this is an aerial photograph  
2 of North Key Largo. North Key Largo is really defined  
3 in the Monroe County code as starting here at the  
4 junction of US 1 and 905 and ending at Angel Fish Creek,  
5 north of Ocean Reef Club. This is another aerial view  
6 of the subject properties. This is the larger parcel  
7 the West-Freeman parcel that is over 20 acres. This is  
8 the Richardson-UNCIA parcel that is three or four acres.  
9 This is a vertical aerial photograph taken in 2004,  
10 gives you a better picture of the scale of the two  
11 parcels.

12 As we mentioned before in November condemnation  
13 blight is a relatively straightforward concept in  
14 eminent domain. And most cases start out by citing US  
15 versus Virginia Electric and Power which in 1961 made  
16 this statement about the scope of the project rule. And  
17 the scope of the project rule, while I don't think is  
18 the same as condemnation blight, it's very similar. It  
19 basically means that it's something the government has  
20 done, has diminished the value of the property prior to  
21 the actual transfer of title then the government has to  
22 pay the value of the property as appraised without  
23 consideration of whatever diminished value. It could be  
24 the project. It could be a regulation.

25 Our leading case in Florida is State Road

1 Department versus Chicone which cited US versus Virginia  
2 Electrical Power.

3 The leading case really on condemnation blight is  
4 City of Buffalo versus J.W. Clement Company which it  
5 turns out was the publisher of the Readers Digest. So  
6 they probably had a substantial operation in New York.  
7 And there was a situation where it wasn't a scope of the  
8 project issue, it was the fact that everybody knew the  
9 property was going to be condemned and the value of the  
10 property went down.

11 Sometimes condemnation blight is referred to in  
12 various -- in some courts as a defacto taking. But a  
13 defacto taking really in Florida, and I think if you pay  
14 attention to what it is, involves occupation and ouster.  
15 Dade County versus Still is a 1979 Florida Supreme Court  
16 case which went back 37 years to a resolution of Dade  
17 County widening the streets in the county or at least in  
18 the area of Mr. Still's property. And when the county  
19 sought to condemn the property in 1977 the county had to  
20 value the property as if they still owned and had use of  
21 that street easement that was expanded in 1938. So you  
22 can go back a long way with condemnation blight.

23 Florida DOT versus Gefen, citing Chicone and Still, I  
24 really put this in there just to show the principal  
25 story remains alive. This is a '94 case. There is also

1 a 2005 case that I had mentioned in November, the Fourth  
2 DCA, which I didn't include with this -- what was that  
3 case out of the Fourth DCA with the engineer?

4 MR. TOBIN: Savage.

5 MR. MATTSON: Savage. I didn't put Savage in here  
6 because Savage was just a question of whether or not the  
7 expert could testify about condemnation blight. There  
8 was no real decision on the blight question. Here is a  
9 2004 decision, same thing. Now what we are arguing in  
10 this case is that while there is no question but that  
11 North Key Largo was under a moratorium from February of  
12 1982 till today, the question is do we tag the state,  
13 who is the condemnor, for condemnation blight based on  
14 those moratoriums or were they solely the county's idea.  
15 So the case law really is that if the condemnor and the  
16 regulator are different then you can only tag the  
17 condemnor with the regulations if they had a role -- and  
18 the word usually used is pressure -- they pressured the  
19 other entity into adopting value reducing regulations.  
20 And clearly this is, without asking, this is going to be  
21 the state's defense, we didn't do it Monroe County did  
22 it.

23 THE COURT: Doesn't at least the court, my  
24 previous Shaddek opinion address this?

25 MR. MATTSON: No. In your Shaddek opinion you

1 address the moratorium very completely but the state  
2 wasn't a party.

3 THE COURT: In the history of it and at least what  
4 I learned from the history of it, because I wasn't  
5 around at that time that this issue came up and was  
6 addressed. It may not have been addressed in my Final  
7 Judgment. Certainly was addressed in the order and in  
8 the witnesses I thought.

9 MR. MATTSON: Well I looked through your order  
10 again a couple of weeks ago when I filed the request for  
11 judicial notice. And since the state wasn't a party, it  
12 wasn't really an issue. And if you did discuss it it  
13 was peripheral. I mean the real issue there was was  
14 Monroe County liable for a temporary taking. There is a  
15 California case that I'm going to flash up here in a  
16 minute, and I have given you a copy of it, where the  
17 California appellate court says if there is no  
18 connection between the condemnor and the regulator then  
19 you have an action against the regulator for inverse  
20 condemnation. I'm not sure that I even agree with that.  
21 But we'll get to the Tallahassee Bank case where that  
22 issue is fleshed out a tiny bit in Florida.

23 The Tallahassee Bank case is really -- it's the  
24 leading case in the country -- it's the leading state  
25 case in the country on this condemnation blight using a

1 proxy. In Tallahassee Bank, which has been cited by a  
2 number of state courts as I list there on the top of the  
3 slide, California, Connecticut, Delaware -- and you can  
4 type the rest later -- in Tallahassee Bank we had the  
5 state, many state agencies pressuring the city of  
6 Tallahassee not to rezone land that it wanted to buy for  
7 the capitol center from residential to commercial, even  
8 though there was little residential use of the property.

9 Tallahassee did that. And for years the value of  
10 that property was held down. And it's really an  
11 excellent decision. It's something worth reading five  
12 or six times because it has a lot of the features that  
13 we have in this case. And one of them which I want to  
14 point out is an option in this case. It's not an option  
15 that I think is something that we need to consider but  
16 we could. In the Tallahassee Bank case the city of  
17 Tallahassee was a party. It was a party because they  
18 had named the city tax collector as a party, as a  
19 defendant, the state had. So Tallahassee Bank asked for  
20 leave to file a crossclaim against the city of  
21 Tallahassee to declare its zoning regulations invalid,  
22 which was a -- kind of a strange thing because that  
23 never went anywhere. They filed the crossclaim but then  
24 the court never declared the zoning regulations invalid.  
25 All the court did was it decided that the zoning

1 regulations were put there at the behest of the state.  
2 And the first -- the real decision is the one by the  
3 First District Court of Appeal. There was an appeal to  
4 the Florida Supreme Court but it was on conflict and the  
5 Supreme Court didn't really say very much about the  
6 First DCA except that they approved it. So in  
7 Tallahassee Bank the trial judge and the First DCA  
8 affirmed, said Well we had city councilmen from the city  
9 of Tallahassee came in here and said these folks from  
10 the state were constantly urging us not to zone this  
11 property commercial because they would put valuable  
12 buildings on it and it would increase the cost to the  
13 state. They shared a planner.

14 The state institution -- institute -- I forgot  
15 what it was, Board of Commissioners of State Institutions  
16 which I guess was the entity assembling the property for  
17 the capitol center and the city shared a planner. There  
18 are statements in there made by the planner that he  
19 recommended the city not up-zone the property because it  
20 would increase the cost to the state to acquire the  
21 property. And the bank also introduced evidence of  
22 pressure by many state agencies not just the Board of  
23 Commissioners of State Institutions. Also defense I  
24 expect the state to raise, I could be wrong, is the  
25 plaintiff in this case which is the Trustees of the

1 Internal Improvement Fund by way of the DEP didn't  
2 pressure Monroe County to adopt those regulations, DCA  
3 did. So it goes through DCA.

4 Our position there is only one State of Florida  
5 and DCA is a state actor just like the trustees. The  
6 Administration Commission is a state actor. The  
7 Administration Commission actually adopted Monroe County  
8 regulations. And the Administration Commission and the  
9 Trustees of the Internal Improvement Fund are the same  
10 people, it's the governor and cabinet. Besides that the  
11 governor is the chief land planner of the State of  
12 Florida. There is only one State of Florida.

13 A case that I threw in here, federal case, where  
14 the Tennessee Valley Authority sued the states, the  
15 Tennessee Valley Authority is an executive branch agency  
16 of the United States. So the question is obvious, how  
17 can the United States sue the United States? And that  
18 is a claims court decision, really discusses how you  
19 decide if they are independent. I'll get to that in a  
20 minute.

21 Another really good case is the District of  
22 Massachusetts in '79 where congress was establishing a  
23 natural seashore, Cape Cod, and they in their statute  
24 they said that if the six towns that were going to be  
25 affected by this park would enact zoning provisions that

1 limited homes to one house per three acres then they  
2 wouldn't immediately condemn the developed parcels.  
3 They would allow people to maintain a life estate in  
4 those parcels. Federal officials went to those towns,  
5 wrote to those towns and said you need to change your  
6 zoning. In Truro it was half acre zoning. You need to  
7 change your zoning to three acre zoning or we are going  
8 to condemn everything. And it was, as the federal court  
9 said, it was an offer Truro did not refuse. So what  
10 they did they changed their zoning.

11 In the condemnation case the district court said  
12 sure we are going to throw that out. We are going to  
13 value these as if they were half acre zoning because the  
14 federal government was the condemnor and the federal  
15 government is the pressuring agency. San Diego versus  
16 Rancho Penasquitos is the California case I was  
17 mentioning where they talk about what happens when you  
18 can't tie the two, the condemnor and the regulator,  
19 together. And they suggest that you have to go sue the  
20 regulator separately. Well in the San Diego case it was  
21 clear that the city of San Diego was the regulator and  
22 it was the condemnor. But what I find interesting about  
23 the San Diego case is they cited the Tallahassee Bank  
24 case as their authority for tagging the city of San  
25 Diego with earlier zoning in the condemnation. So the

1 Tallahassee Bank case fits the San Diego -- whoops. All  
2 right back up -- fits the San Diego decision right here  
3 where the same entity is the condemnor and the authority  
4 responsible for the restriction. What we are saying  
5 here is Monroe County wouldn't impose these restrictions  
6 absent the pressure from the State of Florida.

7 As far as the defense that we didn't do it DCA did  
8 it, this was one of the tests in the TVA versus US case  
9 where the heads of both agencies serve at the pleasure  
10 of the President, then the agencies are merely  
11 manifestations of a single real party in interest, the  
12 United States. Well the real party in interest in this  
13 proceeding is the State of Florida. And I don't think  
14 it makes any difference which state agency brings the  
15 condemnation proceeding. I think for the convenience of  
16 the state the TIIF is bringing the condemnation  
17 proceeding because they are the ones buying all the  
18 property on North Key Largo. A lot of it, not all but a  
19 huge amount is owned by the Trustees of the Internal  
20 Improvement Fund. So they basically take title to  
21 property on behalf of the state.

22 Now we had this little list of dates in the earlier  
23 presentation and I just refined it a little bit just so  
24 I could show you what we are going to be going over with  
25 the two former county commissioners. This whole process

1 started in 1979. There was a false start when the  
2 Administration Commission designated the Keys as an area  
3 of critical state concern in '75 or '76. That was  
4 overturned by the Florida Supreme Court on a delegation  
5 doctrine issue. And within five months after it was  
6 overturned the legislature simply adopted the same  
7 principles for guiding development that the  
8 Administration Commission had adopted and they just  
9 readopted it and redesignated the Keys. But an  
10 important thing to focus on is in the area of critical  
11 state concern statute 380.05 the state, once the  
12 designation was made, was absolutely prohibited from  
13 imposing moratorium in any area of critical state  
14 concern.

15 So you could designate an area but you couldn't  
16 impose a moratorium. Not only that but also within the  
17 same statute I think in sub part 14, 380.05 (14) until  
18 there was a state approved comprehensive plan and a  
19 state approved -- actually in the '79 statute, state  
20 approved land development regulations. In '83 that was  
21 amended to state land regulations and the comprehensive  
22 plan. The local government was free to issue  
23 development orders under its pre-ACSC regulations. So  
24 Monroe County was free, even though they were an area of  
25 critical state concern, to issue development orders

1 every day on North Key Largo. And the state could not  
2 impose a moratorium. So why did the county compose a  
3 moratorium? Not because they wanted to but because the  
4 state did have the option of taking over the drafting of  
5 the land development regulations. And in fact under the  
6 statute, if the local government didn't produce land  
7 development regulations within 180 days, the state, it  
8 says "shall" the state land planning agency shall submit  
9 a proposed set of regulations to the Administration  
10 Commission. They didn't do that. Even though it says  
11 shall, they didn't do that.

12 I wasn't here at the time. You weren't here at  
13 the time. I don't think anybody in the room was here at  
14 the time. He was here at the time, that's right. This  
15 gentleman practiced in Key West at the time. He has  
16 quite a history.

17 MR. LEHRMAN: I wouldn't say quite a history.

18 MR. MATTSON: His clients had quite a history in  
19 the early '80s. So Monroe County did not do anything to  
20 stop development in North Key Largo, which is where the  
21 pressure was, until it became headlines in the Miami  
22 Herald in 1982. Monroe County did in February of '82 as  
23 you mentioned in your order in the Shaddek case, Monroe  
24 County did adopt a moratorium by resolution without  
25 notice and hearing, but they adopted a moratorium. But

1 it was only on accepting applications for development  
2 approval for major developments. As you also noted in  
3 your order, the major development ordinance was adopted  
4 by Monroe County in 1975, August 21, 1975 and it applied  
5 for any project more than five acres or I think it was  
6 more than 50 or 100 homes or platted lots or something.  
7 But the five acre issue was the big one. Property  
8 owners on North Key Largo were falling all over each  
9 other trying to get in proposals for development of  
10 North Key Largo. The goal being to imitate Miami Beach,  
11 I assume. So the county said we are going to impose a  
12 90 day moratorium on accepting applications. And that  
13 was in February of '82. That expired in 90 days. But  
14 then what they did, they started rolling it over by  
15 voice vote at the county commission meetings, again  
16 without notice and hearing. All of it was illegal. But  
17 since nobody challenged it, to me it's like any statute  
18 that is unconstitutional but nobody challenged it, you  
19 have to abide by it so everybody abided by it.

20 We actually had a case in '90 where the county did  
21 exactly the same thing. They were trying to get the  
22 ROGO in place, the rate of growth ordinance, and they  
23 had a -- they met in Key West and without notice and  
24 hearing ordered the building and planning departments to  
25 cease accepting applications for residential development

1 as of 5 p.m. that day, no notice of hearing. But that  
2 was challenged because yours truly and Andy flew to the  
3 rescue with 50 contractors as clients. And within 10  
4 days Judge Payne had issued a temporary injunction  
5 enjoining the county from implementing its notice of  
6 reaction. And the county actually appealed that to the  
7 Third DCA which told them to go pound sand. Got to have  
8 notice and hearing.

9 So the county did this thing kind of ad hoc,  
10 started out with the resolution, kept rolling it over  
11 with votes, not even formal resolution anymore, just  
12 voting to extend it and extend it and extend it. Off  
13 course in the end they started chopping things out of  
14 it. At one point they said we are not going to consider  
15 RU-3 and RU-1 parcels they are not subject to the  
16 moratorium. It is not that you can't develop, it is  
17 just that we are not going to process your applications.  
18 The excuse for the first one was we don't have enough  
19 staff to process the flood of applications that we have  
20 now. At that point, and this is something I can't --  
21 this is something I cannot prove from paper, what was  
22 the pressure from the county? We have both Ed Swift and  
23 Ken Sorensen prepared to give depositions discussing  
24 what was going on at the time. And that will happen.  
25 And it's my plan to just get together with counsel, take

1 the depositions and file them with the court and we have  
2 a date on February 15th should we need it.

3 MR. LEHRMAN: September.

4 MR. MATTSON: September, is that okay?

5 MR. LEHRMAN: You said February.

6 MR. MATTSON: Our date for when we are going to do  
7 depositions and come in here. But we have time on  
8 September 15th in the courtroom.

9 MR. LEHRMAN: Yes.

10 MR. MATTSON: I only got a half hour. We might  
11 want to stretch it to an hour if it is still available.  
12 Once the county got over the resolution process in '83  
13 they started doing these moratoriums by ordinance with  
14 notice and hearing. And so from about October of '83  
15 until almost the date that the comp plan came into  
16 effect they had these moratoria established by  
17 ordinance. There was a little gap at the end which is  
18 kind of humorous. The moratorium ran out July 15th I  
19 believe and the plan wasn't in place yet. So they  
20 adopted another resolution without notice and hearing  
21 extending the previous ordinance. But this is Monroe  
22 County. We have strange ways of doing things.  
23 But since that time the state and federal government  
24 have acquired about 98 percent of North Key Largo. I  
25 don't have the exact numbers but I have some slides

1 here. I put these slides together using the property  
2 appraiser's January 1, 2006 tax roll. And I freely  
3 admit that I did this. But what I have done here is I  
4 have cross hatched in yellow the property which is owned  
5 by the state, municipal, county or federal government.  
6 Now the Fed's have been very active buying up land and  
7 that sort of thing for a long time. The property  
8 appraiser's database does not have dates when a lot of  
9 this acquisition took place. I think it is because it  
10 was earlier than the '90s but they do have some dates  
11 and I have a little slide at the end that gives you a  
12 feel for when the acquisitions took place.

13 This is the part of Key Largo which is between Card  
14 Sound Road and Ocean Reef Club and Anglers Club. This  
15 is the Anglers Club over here. Outside of Ocean Reef  
16 Club and the Anglers Club there was only one parcel  
17 still in quasi private ownership and that's owned by the  
18 Florida Audubon Society. This is the middle part of  
19 North Key Largo. Here is Card Sound Road. There isn't  
20 much here either. There is a little parcel over here as  
21 you get on the Card Sound bridge, that is all mangroves.  
22 Another Nature Conservancy parcel. Here is a little  
23 parcel that is 12 acres. I've been kind of wondering  
24 whether that is subject to a condemnation suit right  
25 now. I haven't looked. Over here in Madeira Village

1           there are four homes excluded but everything else is  
2           owned by government. Down here is a little three acre  
3           piece. Here is a five acre but this is on the bayside.  
4           This is the southern part of North Key Largo. Faye  
5           Barnett owns 71 acres, the largest parcel, and that's  
6           probably wetlands. I'm not sure -- you see a pond and  
7           see water here. If you know what this area is like,  
8           that is very likely wetland. Here is property that is  
9           the subject of this case, the West case, 22 acres,  
10          upland. And Richardson close to five acres. Bunch of  
11          vacant lots in the subdivision privately owned. Three  
12          acres in that subdivision and that. There is three  
13          subdivisions down here that have 27 vacant lots. That's  
14          what is left that the government doesn't own. It's  
15          pretty clear that they were intending to buy North Key  
16          Largo because they bought North Key Largo.

17                 This is left over from something else, not  
18                 necessarily -- these are our key dates. These are the  
19                 dates that I had provided before but I filled in some of  
20                 the missing pieces, ordinances and that sort of thing.  
21                 But it is not anything we need to take time on right  
22                 now. This is pretty much the end, September 15, '86  
23                 comp plan and LDRs went into effect. There was a one  
24                 year moratorium on development in North Key Largo from  
25                 '86 to 2006 has been stretched to 20 years.

1           This I just did out of curiosity. That data was  
2           the property appraiser's database and I just sorted it  
3           by year to see when the purchases were taking place.  
4           And of course these are purchases not just by the state  
5           but also by county and by federal government but they  
6           are all in North Key Largo. And you see a big spike  
7           right in here in '83, '84. Big spike in the number of  
8           parcels. Big spike in acreage and then it trickles off.  
9           Then they come back in force. So I think what we are  
10          seeing here, there were a lot of voluntary sales back in  
11          here because people wanted to get out. There were fewer  
12          and fewer volunteers as we get into 1990. This was the  
13          giant spike '74 (sic). I haven't looked to see who is  
14          in that 1974. There were a lot of voluntary sales.  
15          It's the largest chunk of acreage and also the largest  
16          number of parcels in the last 20 years. And then that  
17          has tapered off although we have 2000 and 2001 with 50  
18          parcels each. Yeah, we have 52 number of parcels but  
19          not much acreage. Now you are getting into buying up  
20          lots. You are not getting much acreage and not much  
21          action the last few years. There is not much left in  
22          North Key Largo. This is probably the largest remaining  
23          upland parcel to be purchased. And that's the end of  
24          the story.

25                THE COURT: You are reserving the remainder of

1 time to come back in September, correct, after your  
2 depositions?

3 MR. MATTSON: Yes, sir, we don't have the whole  
4 story yet.

5 THE COURT: My question to the state, that's not  
6 going to leave you much time. I'm assuming you are  
7 going to have an argument and some presentation?

8 MR. LEHRMAN: Yes, I was going to suggest that.  
9 There are a number of issues that have been raised.  
10 Some are going to require more extensive legal argument  
11 than has been reserved. And in addition after hearing  
12 what their witnesses have to say we may have some  
13 witnesses of our own if we feel that is appropriate as  
14 well. So we are going to need more time than what is  
15 reserved.

16 THE COURT: How much time? So I can start looking  
17 for it now.

18 MR. MATTSON: There was a two hour block on  
19 September 15th a couple of days ago. That may still all  
20 be there.

21 MR. LEHRMAN: Judge, I don't think two hours is  
22 really enough. Initially we had three hours reserved  
23 for the argument. And after hearing Mr. Mattson's  
24 well-presented argument we want to do at least as good a  
25 job, maybe not as long, but I would say we probably need

1 four hours total. I don't want to have to come back a  
2 third time. I don't think that would do your argument  
3 justice.

4 MR. MATTSON: You're right.

5 MR. LEHRMAN: It's hard to get the time.

6 MR. MATTSON: It's hard to get the time.

7 (Short pause)

8 THE COURT: September 15th, 1:00 to 5:00.

9 MR. LEHRMAN: Thank you, judge.

10 (Proceedings concluded at 10:00 a.m.)  
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## CERTIFICATE

I, KATHLEEN A. FEGERS, Florida Professional Reporter and Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

Dated August 3, 2006.

KATHLEEN A. FEGERS, FPR, RPR