

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

FLORIDA DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
on behalf of the BOARD OF)
TRUSTEES OF THE INTERNAL)
IMPROVEMENT FUND,)

Plaintiff,)

vs.) Case Number CAP95-165

EVERETT G. WEST, et al.,)
Defendants.)

Monroe County Courthouse
Plantation Key, Florida
January 31, 2007
10:30 a.m. - 1:30 p.m.

The above-styled cause came on for hearing
before the Honorable Luis Garcia, Presiding Judge, at
the Monroe County Courthouse, 88820 Overseas Highway,
Plantation Key, Florida, on the 31st day of January,
2007.

1 APPEARANCES:

2 Behalf of the Plaintiff
3 PAUL A. LEHRMAN, ESQ.,
4 Assitastant Attorney General
5 Eminent Domain Division
6 Office of the Attorney General
7 PL-01 The Capitol
8 Tallhassee, Florida 32399-1050
9 850-414-3300

6 Behalf of Defendants
7 JAMES S. MATTSON, PH.D.
8 P.O. Box 586
9 Key Largo, Florida 33037-0586
305-451-3951
and

10 ANDREW TOBIN, ESQ.
11 88101 Overseas Highway
12 Islamorada, Florida 33036
13 305-852-3388

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1 THE COURT: All right. Florida D.E.P. versus
2 West. Announce your presence for the record,
3 please.

4 MR. MATTSON: Jim Mattson and Andy Tobin for
5 the land owners.

6 MR. LEHRMAN: I'm Paul Lehrman, Assistant
7 Attorney General for the State of Florida
8 representing the Florida Department of
9 Environmental Protection.

10 THE COURT: All right. I have a couple of
11 TROs set at 11:00 that will take me approximately
12 five minutes. So we can start now, we'll have to
13 take a break at about 11:00.

14 MR. MATTSON: Okay.

15 THE COURT: Well, a brief break.

16 MR. MATTSON: We have a motion to reconsider
17 pending. And Mr. Tobin discussed it with
18 Mr. Lehrman this morning.

19 The last time we met, September 15th, we
20 ended when I was inquiring of Donald Craig, our
21 expert planner, about a document that was dated
22 slightly after he had left the County's employ.
23 Mr. Lehrman objected to the introduction of the
24 document and the hearing stopped there. You
25 sustained his objection.

1 THE COURT: Okay.

2 MR. MATTSON: However, what we didn't get to
3 because I had forgotten it at the time was that
4 that document was part of Exhibit A which was
5 attached to our motion for partial summary
6 judgment filed a couple years earlier, and the
7 State had already in response to a request to
8 admit had admitted that 27 of these documents were
9 public documents. And that document, the one that
10 Mr. Craig was questioned about -- why are you
11 lurking?

12 THE COURT: Is part of an admission?

13 MR. TOBIN: Correct. Yes.

14 THE COURT: Okay.

15 MR. MATTSON: And Mr. Lehrman has agreed that
16 the document they admitted to, the 27 documents,
17 are admissible. There was one document which they
18 did not admit. There were several that they did
19 not admit that I'm not going to pursue. But there
20 was one document which they did not admit which
21 was the executive order of the governor of the
22 State of Florida dated September 4, 1984, which
23 established the habitat conservation plan study
24 committee for Monroe County, and we would submit
25 that that's introducible as a public document

1 because on its face it is a public document. And
2 Mr. Lehrman has, I believe, no objection.

3 MR. LEHRMAN: Your Honor, I have no objection
4 to the document coming in as a public document. I
5 do have questions as to its relevance, though.

6 THE COURT: Okay. But as to its
7 admissibility, any other argument? The court will
8 then overrule the previous objection and will
9 allow the document in.

10 MR. MATTSON: Okay.

11 MR. TOBIN: Judge, I've got a copy of the
12 last motion in limine hearing for Your Honor to
13 review. I don't know if the court, if the court
14 reporter actually filed an original or not with
15 the court. Sometimes they do, sometimes they
16 don't.

17 THE COURT: I don't see one in this volume,
18 so thank you.

19 All right. Are we ready to commence with --

20 MR. MATTSON: Our argument.

21 THE COURT: All right. Liz, are we ready?

22 (Discussion held off the record and a recess
23 was taken, after which the following was heard:)

24 THE COURT: All right, gentlemen. Back on
25 F.D.E.P. versus West. Argument?

1 MR. MATTSON: Who's going to go first?

2 MR. LEHRMAN: It's your motion.

3 MR. MATTSON: Okay.

4 THE COURT: Okay, now this is on the motion
5 in limine.

6 MR. MATTSON: Your Honor, I'm going to start
7 by refreshing I hope your recollection of the case
8 law that I went through back in August of this
9 year when we first started this motion in limine
10 process. I also have four additional -- actually
11 five additional cases; One Florida Supreme Court
12 case and four from other jurisdictions that I
13 provided to Mr. Lehrman and I'd like to provide to
14 the court at this time. Now I have provided you
15 with the cases that I'm going to discuss, but I'm
16 going to -- so they're probably in the file
17 someplace, but I'm going to go through them fairly
18 quickly.

19 THE COURT: All right.

20 MR. MATTSON: And those cases were also the
21 subject of my PowerPoint presentation, so it
22 should be fairly straightforward.

23 THE COURT: All right.

24 MR. MATTSON: The concept of condemnation
25 blight really was established in Florida by the

1 First District Court of Appeal in the Tallahassee
2 Bank case. And the Tallahassee Bank case was
3 appealed by certiorari at the supreme court, which
4 granted certiorari and then later on withdrew its
5 grant of the certiorari. So it is a First D.C.A.
6 case, not a Florida Supreme Court case.

7 And the whole concept in Tallahassee Bank is
8 the concept that we're dealing with today, and
9 that is the relationship between the condemning
10 authority and the regulating authority.

11 And the question that comes up over and over
12 again in the case law is does there have to be
13 unity? Does the regulating authority have to be
14 the condemning authority? So it's the unity
15 question.

16 In Tallahassee Bank the regulatory authority
17 was the City of Tallahassee. The condemning
18 authority was the State of Florida. The First
19 District Court of Appeal characterized the effort
20 of the plaintiffs to disregard the zoning of their
21 property as a constitutional attack on zoning.
22 And it sort of ran around this little track of Can
23 you challenge the constitutionality of the zoning
24 ordinance, the condemnation proceeding, and the
25 State argued you cannot. But the evidence was

1 convincing that the city council had been urged
2 over and over again by the State not to upzone
3 these properties from residential to commercial.
4 And the city council had done that. They had
5 declined to upzone the properties. The trial
6 court then decided that these properties would be
7 appraised for condemnation purposes as if they
8 were upzoned to commercial, in a sense dealing
9 with the constitution issue, whether you can
10 challenge the constitutionality of a zoning
11 ordinance in spite of them really never doing
12 that. The First D.C.A. said, Well as applied to
13 the facts in this case, they can raise it in the
14 condemnation proceeding.

15 There's a similar, there's a very similar
16 process, and I'm not convinced that it's actually
17 different except by name, and that's the scope of
18 the project rule. And I gave Your Honor the case
19 of United States versus Virginia Electric and
20 Power, 1961 U.S. Supreme Court case. Florida has
21 put the scope of the project rule into statute.
22 Many states have adopted the scope of the project
23 rule by statute. And in essence the statute says
24 that in a condemnation proceeding neither the
25 condemnor nor the land owner should benefit

1 because of presence of the project.

2 So when they announce that there's a highway
3 going through and your property happens to be
4 right where the interchange is with the turnpike
5 and the property value skyrockets, you don't get
6 to benefit from the scope of the project. But
7 similarly when the project causes your property to
8 devalue, you don't, the State doesn't benefit,
9 they don't get to buy it for a cheaper price.

10 So scope of the project rule is by statute.
11 The unity issue is really governed by case law.

12 One way, one way to look at the unity issue
13 is to question to what extent did the condemning
14 authority influence the regulating authority where
15 they tied together at the hip, so to speak. Was
16 there pressure applied of any sort? And in
17 Tallahassee Bank there was -- there wasn't
18 pressure or coercion, but there was a strong
19 indication that the State didn't want to have to
20 pay too much to build this big building when they
21 finally raised the money. It's not necessarily a
22 pressure issue. But in another case I gave you, a
23 Federal District Court decision called U.S. versus
24 Certain Lands In Truro, this was a Massachusetts
25 case from 1979, the federal government had just

1 created the Cape Cod National Seashore and they
2 gave, congress gave condemning authority to
3 federal agencies to condemn the land that would
4 become the Cape Cod National Seashore. The state
5 -- it wasn't the state. There were approximately
6 six communities whose lands were going to be
7 condemned, or some of their lands were going to be
8 condemned. And in these communities they had
9 fairly high density zoning, one house, two house
10 per acre. The Feds came into the states, into the
11 cities, each city and said, If you will downzone
12 these residential areas from two houses per acre
13 to one house per three acres, we will allow the
14 existing homes to stay there and those owners will
15 have a life estate. If you don't, we're
16 condemning everything.

17 The district court judge in U.S. versus
18 Certain Lands In Truro considered that to be an
19 offer that the cities couldn't refuse. The cities
20 all took it. They all went ahead and downzoned
21 the property. But then when they started
22 condemning the land, the land owners came in and
23 said we want to be appraised at what would be if
24 they hadn't pressured the cities, and the federal
25 judge said that's fine, that's the way it's going

1 to be, they're going to be appraised as two houses
2 per acre.

3 There is a case from California that I gave
4 you, San Diego versus Rancho Penasquitos, a 2003
5 case where the California Court of Appeal insisted
6 that there would be unity, that the regulating
7 authority be the same as the condemning authority,
8 and it cited Tallahassee Bank. Why it cited the
9 Tallahassee Bank for the, you know, for the
10 reverse of the Tallahassee Bank decision is
11 unclear. But in Rancho Penasquitos the California
12 court said that if there was a Tallahassee Bank
13 sort of situation in California, then the land
14 owner would have to sue the regulating authority
15 for whatever damages it didn't get from the
16 condemning authority. I submit that in Florida
17 we're governed by the Tallahassee Bank case.

18 Now, I have, I have another Florida case that
19 I gave you as Joint Ventures versus D.O.T. Joint
20 Ventures is important because of the occasional
21 use of the word constitution or unconstitutional
22 zoning ordinance in these cases. And in Joint
23 Ventures the Florida D.O.T. was the beneficiary of
24 a Florida statute that allowed D.O.T. to reserve
25 areas within a local jurisdiction, within a county

1 or a city for future highway construction. The
2 Florida Supreme Court said you can't do that, you
3 cannot by regulation or by ordinance or statute
4 suppress the development of property in order to
5 keep your acquisition costs down. And what they
6 did in joint ventures, what they, what they
7 declared the statute unconstitutional.

8 There then were a series of cases, there were
9 a flood of cases that is followed that which I
10 won't bother you with, but the most significant
11 one was AGWS versus I think the Tampa
12 Redevelopment Authority or something, but in
13 essence the Florida Supreme Court said, Wait a
14 minute, we can't have thousands of people suing
15 for takings for the temporary freezing of their
16 property unless they were actually damaged in some
17 fashion. But the notion of using the regulatory
18 power of the government to freeze land for
19 acquisition, to freeze the price of land for
20 acquisition, really gives an opportunity for the
21 land owner to either do a Tallahassee Bank thing
22 in a condemnation proceeding, or come into court
23 and ask that the ordinance or statute be struck
24 down as unconstitutional. In Joint Ventures,
25 Joint Ventures chose the latter, they chose to

1 strike down the statute. And they were
2 successful.

3 I have these four non-Florida cases that I've
4 provided to Your Honor. This may be for you. And
5 what I'll do is I'll take them oldest first. The
6 oldest one is from the Court of Appeals from
7 Maryland, Carl Freeman Associates versus State
8 Roads Commission. It's a 1969 case which relies
9 on Tallahassee Bank. And in the Freeman case
10 there was a freezing ordinance. Monroe County --
11 excuse me. Slip of the tongue. Montgomery County
12 decided to withhold zoning on some land in order
13 to make it cheaper to purchase later. And the
14 highest court of Maryland on Page 3 of the copy
15 that I gave you states,

16 "We must squarely face up to the
17 confrontation of the ordinance which has at
18 its purpose the freezing of the zoning
19 classification where property is to be
20 taken."

21 The, on the bottom of that page and on the
22 next page the court relies on Tallahassee Bank.
23 There's a long quote from Tallahassee Bank. And
24 on the right-hand side of Page 4 you see the
25 conclusion that,

1 "The property owner must be protected from
2 prejudicial evidence as to value based on
3 restrictions on the use of his property
4 unconstitutionally impressed as part of a
5 design to freeze or suppress its value."

6 And then there's a part of a passage on
7 Page 5 that I highlighted which says,

8 "The control of the issuance of building
9 permits does not have the effect of denying
10 to the property owner the right to introduce
11 into evidence testimony as to the value of
12 the land based on its highest and best use
13 within the framework of the zoning
14 classification of the property on which the
15 street bed is a part."

16 So that was the 1969 decision of the highest
17 court of the state of Maryland following
18 Tallahassee Bank.

19 The next oldest one is Raleigh-Durham Airport
20 Authority. This is a 1985 case by the Court of
21 Appeals of North Carolina. And I'm sorry, I don't
22 know if that's the highest court of North Carolina
23 or not. But this is, as you can see right on the
24 top right-hand side of Page 1, it says,

25 "The Plaintiff's first assignment of error"

1 -- the plaintiff being the Airport Authority
2 -- "was an objection to the admission into
3 evidence of expert testimony that market
4 values in the project area had been chilled
5 as a result of the proposed airport
6 expansion."

7 Now this, there's no language in here about
8 the purposeful freezing of values. But on the
9 second page you see on the bottom of the left-hand
10 side, you see that there was testimony from the
11 airport director that the airport has been
12 involved in this expansion project for 20 to 22
13 years. Very similar to our situation here in
14 Monroe County. On the right-hand side of Page 2
15 is the usual scope of the project language.

16 But then on Page 3, the passages that I've
17 highlighted is interesting, and I think it's
18 applicable to the case we have here where the
19 court says,

20 "The concept of highest and best use requires
21 an expert to determine what the subject
22 property's fair market value would
23 realistically be if the owner were
24 hypothetically allowed to adapt his property
25 to its most advantageious and valuable use."

1 That's what we're asking for from this court.
2 We're asking that the appraisers be directed to
3 use the regulations in effect before the series of
4 rolling moratoria started as the basis for their
5 appraisal of this property on the date that it was
6 taken in 2004.

7 And back in 1982 this property was zoned
8 general use which allowed one unit per acre. They
9 also got to count their wetland acres. And it's
10 possible that our appraiser with expert witness
11 help may choose to even value the property at
12 higher than one unit per acre if the evidence from
13 what was going on at the time of the early '80s
14 suggests that upzonings were reasonably possible.
15 So we are in essence asking the court to simply
16 strip away all the restrictive changes and
17 moratoria that have occurred, I don't know the
18 exact date, but I'm going to say since 1982, 20,
19 25 years ago.

20 The third case of my four out-of-state
21 decisions comes from Boulder, Colorado. This is
22 City of Boulder versus Fowler Irrevocable Trust.
23 This is a 2002 decision. And the issue here was
24 the unity of the condemnor and the regulator.

25 FEMA had designated land in Boulder as a

1 flood plane. Boulder thereafter had decided it
2 was going to build a road through the flood plane,
3 and so it condemned the defendant's property. And
4 Boulder argued that it wasn't, it wasn't
5 responsible for the flood plane designation and
6 that it should, it should be able to take the
7 flood plane designation into consideration in
8 valuing the property, thereby reducing the value
9 dramatically. And on the third page, area that I
10 highlighted on the left-hand side, the Boulder
11 argument is summarized.

12 "Boulder argues that the trial court's
13 application of the project influence rule was
14 legally erroneous because a project must be
15 limited to construction or acquisition of
16 property and cannot include regulatory
17 actions taken by a public entity, even if
18 such actions address the same public need.
19 We disagree.

20 We are aware of no authority supporting the
21 proposition that, as a matter of law, a
22 project cannot be comprised of both physical
23 activities on the land and related regulatory
24 efforts to address the same problem. The
25 trial court's determination of the project at

1 issue here encompassed both kinds of efforts
2 is, as the court observed, consistent with
3 the principle that just compensation is
4 essentially a matter of fairness. Fairness
5 is not served by narrow interpretation of
6 project."

7 The fourth case and the last case is Piedmont
8 Triad Regional Water Authority versus Unger, a
9 2002 case again from the Court of Appeals of North
10 Carolina. This was a situation where Triad
11 Regional Water Authority condemned the property.
12 And the, the project at issue was a dam reservoir
13 project that split, as in Boulder, split the
14 regulating entity from the condemnor.

15 On the bottom of Page 2, Section V,
16 "Unity of Condemnor and Zoning Authority: The
17 trial court concluded that there is identity
18 or unity between Guilford County as the
19 zoning authority and PTWRA as the condemnor."

20 And on the top of the next page they cite the
21 North Carolina scope of the project statute. It's
22 very similar to Florida's.

23 "Does not require unity between the condemnor
24 and the entity adopting the regulation in
25 order for the statute to apply. Prior cases

1 addressing the statute did not reach the
2 question of unity because the increases or
3 decreases in value did not result from zoning
4 changes."

5 So they choose to review extra jurisdictional
6 case law in search of support for the trial
7 court's rationale. And they cite to a series of
8 cases, including some Masheter versus Kebe in
9 Ohio, and then they cite to City of Boulder.

10 In this case the plaintiff, the condemning
11 authority, cited Nichols on eminent domain which
12 suggests or at least says,

13 "The sole exception to collaterally attacking
14 the zoning ordinance is when the condemnor
15 and the zoning authority are identical."

16 Then the court goes on to say,

17 "Expert testimony shows that the Randleman
18 dam project had been active for at least 25
19 years. Although plaintiff is the sole
20 condemning authority for the Randleman dam
21 project, other government entities have been
22 deeply involved in the planning, approval and
23 funding process. The unity rule could defeat
24 the purpose of the statute and allow the
25 condemnor to use the actions of another

1 authority as a proxy to affect the value of
2 the property through restrictions and permit
3 the condemnor to take the property at a
4 potentially reduced value. We hold that the
5 statute does not require unity of the
6 condemning entity and the zoning entity for
7 its application."

8 So that brings me to my discussion of the
9 evidence. You heard the evidence presented by Don
10 Craig and by Bob Gallaher, our appraiser, about
11 the process which started with a series of rolling
12 moratoria back in 1982 that ran right up to
13 September 15, 1986, the adoption of the 1986
14 what's called the comprehensive plan. This is the
15 '86 comprehensive plan. In reality it wasn't the
16 comprehensive plan. In reality it was a set of
17 land development regulations. Back in '86 the,
18 the requirement of Chapter 163 of the
19 comprehensive plan had not taken effect yet.
20 Statute had only been adopted in '85. So Monroe
21 County only did a, they called it a comprehensive
22 plan, but it was a set of new land development
23 regulations.

24 We also -- Your Honor has just admitted the
25 documents that were admitted to by the State in

1 Exhibit A of our motion for summary judgment,
2 which is in the court file. I did not, did not
3 make a separate copy of it for Your Honor. I know
4 it's in the file. I don't know if you want to ask
5 the clerk to get it out or not.

6 THE COURT: Madam clerk, the exhibits?

7 COURT CLERK: I'm not sure what exhibits he's
8 talking about.

9 MR. MATTSON: These were filed as part of the
10 defendant's motion for summary judgment.

11 COURT CLERK: When was that filed? Because
12 there's like a handful of volumes for the case. I
13 gave him the last two. Do you know?

14 MR. MATTSON: When was it filed?

15 COURT CLERK: Do you have an idea?

16 MR. MATTSON: Yeah. Yeah, I do. Mainly
17 because I keep a copy of the docket sheet.

18 MR. LEHRMAN: Your Honor, while that's being
19 looked for I want to clarify one point to which I
20 object, which is that we had admitted to these
21 documents. In fact, we have admitted that these
22 documents are admissible but not that the
23 information contained therein is reliable or
24 truthful.

25 THE COURT: They're admitted. The weight I

1 give them is I'll leave that up to your closing
2 arguments.

3 MR. LEHRMAN: Thank you, Judge.

4 THE COURT: Your final arguments. 2-16?

5 MR. MATTSON: I believe it was filed
6 November 18 of 2003.

7 THE COURT: I don't have that volume.

8 COURT CLERK: You don't have that volume.

9 THE COURT: Defendant's motion partial
10 summary judgment on liability?

11 MR. MATTSON: Right.

12 THE COURT: I do have them.

13 MR. MATTSON: There was a motion and an
14 appendix.

15 MR. TOBIN: It's got 39 documents in it,
16 Judge.

17 MR. MATTSON: The appendix looks something
18 like this. It's about an inch thick.

19 THE COURT: I don't have the appendix. I
20 have a motion, not the appendix. Wait, could it
21 be this? Let me see that again. No. Sorry,
22 gentlemen. Do you need it? Do we need to have
23 the clerk bring it in?

24 COURT CLERK: Was it attached or was it
25 separate like that in a binder?

1 MR. MATTSON: It would have been separate
2 like this.

3 COURT CLERK: Then I need to go get it.

4 THE COURT: Can we continue?

5 MR. MATTSON: Yeah, we can continue while she
6 gets it, because we don't need the clerk for our
7 argument.

8 THE COURT: All right.

9 MR. MATTSON: All right. I'm going to
10 touch --

11 THE COURT: Let me interrupt you for one
12 second. I'm sorry. Let's take care of that one
13 TRO we have left and then I can clear the
14 courtroom. I apologize for this.

15 (Whereupon a recess was taken from 11:21 a.m.
16 through 11:25 a.m.)

17 THE COURT: Mr. Mattson, I apologize for the
18 interruption.

19 MR. MATTSON: No problem. So while she goes
20 and looks for it, I'm just going to go through
21 these, the key documents. There are several
22 documents, there are 27 documents that they've
23 admitted to and I'm going to mention three or four
24 of them.

25 First one is -- and these are all in

1 chronological order -- April 16, '84, Elkin
2 Gissendanner, the executive director of the
3 Department of Natural Resources, in a letter to
4 Wilamena Harvey, chairman of the BOC in Monroe
5 County explains to Mrs. Harvey that there are
6 these acquisition projects that the CARL program
7 is, has approved for Monroe County. Four of them,
8 New Mahogany Hammock, North Key Largo Hammock,
9 Windley Key Court, and Lower Keys Tract are in
10 Monroe County.

11 There's a paragraph in here that recurs year
12 in and year out, and this letter's from the State
13 to the County. So I'm going to read this first
14 one in detail, in total.

15 "Actions of special concern include such
16 issues as annexation, extension of services,
17 water, sewer, et cetera, change in zoning,
18 developments of regional impact, and any
19 other proposed change which is likely to
20 preclude public use or increase the potential
21 cost to the state. Although we only deal in
22 voluntary negotiated acquisitions except as
23 may be provided by the legislature, decisions
24 at the local level have a tremendous effect
25 on our interest in the property. Critical

1 changes could play an important part in
2 ultimate approval or rejection of any
3 purchase agreement by the governor and cabinet
4 that serves as the board of trustees for the
5 CARL trust fund. As a result, we would
6 greatly appreciate you informing my office of
7 any such actions which may be proposed or
8 which are contemplated. Thank you for your
9 consideration of this request."

10 That was April of '84.

11 Now, there is a document which the State
12 declined to admit to, which is executive order
13 number 84-157, which is dated September 4, 1984.
14 It's the governor's executive order. And I would
15 like to actually ask the Court to take judicial
16 notice of that order since it is -- well, it's in
17 here and it is, it has named the State of Florida
18 and then has the seal on it, so it would be
19 admissible as a public document.

20 THE COURT: Comment from the Attorney
21 General? Any objection?

22 MR. LEHRMAN: We have no objection to the
23 document itself. However, since the evidence is
24 closed, we raise that objection. But other than
25 that, it would come in as a public record. It's

1 the Court's discretion

2 THE COURT: I'll allow you to reopen and
3 allow the exhibit to come in, the executive order
4 issued on September 4, 1994. Court will take
5 judicial notice of that order.

6 MR. MATTSON: Okay. Your Honor, this, this
7 document, skipping the whereas clauses, says,

8 "Now therefore I, Bob Graham, as governor of
9 the State of Florida, pursuant to the
10 constitution and laws of the State of Florida
11 do hereby promulgate the following executive
12 order effective immediately.

13 Section 1, the North Key Largo habitat
14 conservation plan study committee is hereby
15 created. The committee shall continue in
16 existence until its objectives are achieved,
17 but not later than July 30, 1986."

18 Then I will skip down to Section 6.

19 "The composition and number of committee
20 members shall be determined by the governor.
21 Committee members including the chairperson
22 shall be appointed by the governor and shall
23 serve at the pleasure of the governor. The
24 committee shall be comprised of
25 representatives of the land owners in the

1 area, Monroe County, the office of the
2 governor, the departments of Community
3 Affairs, Natural Resources, and Environmental
4 Regulation, the Florida Game and Fresh Water
5 Fish Commission, the Florida Keys Aquaduct
6 Authority, the Florida Audubon Society and
7 other interested individuals or agencies.
8 The United States Fish and Wildlife Service
9 will be invited to appoint representatives."

10 Now, the process that was instituted by the
11 governor to create a habitat conservation plan,
12 the habitat conservation plan is something which
13 is mentioned under Section 10 of the Endangered
14 Species Act of 1972. Actually it was an amendment
15 after the dam fiasco. And under Section 10 of the
16 Endangered Species Act a land owner may -- not
17 must -- may apply for what's called the incidental
18 take permit. An incidental take permit would then
19 allow the land owner to conduct some project,
20 whatever that project may be, from a single family
21 home to a dam, and should he inadvertently injure
22 an endangered species, he could not be prosecuted.
23 One of the things that you have to submit if you
24 want an incidental take permit is a habitat
25 conservation plan. That's where the phrase comes

1 from. But the key here is that habitat
2 conservation plans are to a land owner voluntary.
3 They are to the government voluntary. Governor
4 Graham established a committee to establish the
5 ACP. He appointed the members of the committee.
6 They served at his pleasure.

7 Now, moving on to the next --

8 COURT CLERK: Here's everything, in case you
9 need something. It should be in there someplace.

10 THE COURT: All right.

11 MR. MATTSON: That's it. Okay. The first
12 letter that I read from, the document is paginated
13 in the lower right-hand corner.

14 THE COURT: Right. What number is it?

15 MR. MATTSON: The first one is on Page 41.

16 THE COURT: Thank you.

17 MR. MATTSON: That was the April 16, '84
18 letter. The second document, which is the
19 govenor's executive order begins on Page 35.

20 THE COURT: Page 35?

21 MR. MATTSON: Uh-huh. That's the executive
22 order.

23 THE COURT: My Page 35 is the middle of a
24 memorandum from James McFarland.

25 MR. MATTSON: Okay, it's 55.

1 THE COURT: 55?

2 MR. MATTSON: Yeah.

3 THE COURT: 55, executive order.

4 MR. MATTSON: Okay. Kind of hard to read
5 these numbers. So I'm now referring to the
6 document that starts on Page 82.

7 On Page 82 there's a letter to Willamina
8 Harvey, chairperson, Monroe County commission,
9 from Elton Gissendanner, the executive director of
10 the DNR. And it's about Windley Key quarry, North
11 Key Largo hammocks, and so on, and other CARL
12 projects.

13 Now, the bottom of his first page there's,
14 there's an interesting statement that's made.
15 Says,

16 "Once a project is placed on the acquisition
17 list, decisions made by local governmental
18 authority such as rezoning, annexation,
19 extension of water/sewer services, et cetera,
20 may have an effect upon the trustees'
21 continued interest in acquiring the property.
22 In that regard staff has been directed by the
23 trustees as follows: Quote, if by government
24 action subsequent to the time a parcel is
25 placed on a state acquisition list, a project

1 is given an enhanced highest and best use
2 which would result in a governmentally
3 derived higher value. The staff will
4 terminate further acquisition activities
5 unless the owner agrees that the appraisal
6 will be done at the highest and best use" --
7 and there's obviously a typo here -- "time
8 the project was placed on the acquisition
9 list. Therefore I would greatly appreciate
10 you informing my office immediately of any
11 such actions which have been taken by your
12 governing body and which potentially affect
13 these projects."

14 It's significant that this document is dated
15 February 14, 1986, because the county commission
16 adopted the 1986 comprehensive plan which wasn't
17 really a comprehensive plan on February 28, 1986.

18 Now, see, our land development regulations
19 from that day forward, from February 28, 1986, to
20 today as we stand here, contain a provision for a
21 North Key Largo area of critical county concern.
22 And I'm actually looking at the version that was
23 adopted in '86, but they all say the same. The
24 numbering system has changed. This was a section
25 11-107, North Key Largo area critical county

1 concern. It has description of the area, purpose,
2 and then the purpose was briefly,

3 "The North Key Largo area of critical county
4 concern is established for the purpose of
5 reconciling the reasonable investment
6 development expectations of North Key Largo
7 land owners with the need to preserve the
8 habitat of four species of animals that are
9 listed as endangered under the Endangered
10 Species Act. Those are the American
11 crocodile, the Key Largo wood rat, the Key
12 Largo cotton mouse, and the -- butterfly."

13 The next section, C, is titled Habitat
14 Conservation Plan for North Key Largo, and it
15 reads,

16 "A gubernatorial study committee established
17 by executive order number 84157 is preparing
18 a habitat conservation plan for North Key
19 Largo that will be consistent with the
20 principles established in Section D of this
21 designation and is to be submitted to Monroe
22 County for consideration and adoption as a
23 part of the Monroe County comprehensive
24 plan."

25 And then it lists after that the principles

1 that were supposedly going to be in the HCP.

2 Well Your Honor knows that the HCP was never
3 adopted. But let me go on to the next relevant
4 document in this list. The next document is dated
5 October 8, 1986. Now the plan --

6 THE COURT: Page number?

7 MR. MATTSON: 97.

8 MR. MATTSON: The '86 plan went into effect
9 on September 15, '86. So this is dated three
10 weeks later. This is a letter from Don Duden,
11 assistant executive director of DNR, to Lee
12 Einsweiler of Simon, Leeson & Purdy law offices in
13 Chicago. Now why is Simon, Leeson and Purdy
14 relevant? Because Charlie Seemon was a partner in
15 that law firm was the head of the committee
16 drafting the HCP. Charlie Seemon was also a
17 consultant to Monroe County.

18 MR. LEHRMAN: Your Honor, never mind. It's
19 argument.

20 MR. MATTSON: The letter to Einsweiler says,
21 "Thank you for the oppportunity to review the
22 draft of the final report of the North Key
23 Largo HCP."

24 And in the second paragraph, this is the DNR
25 speaking now,

1 "Notwithstanding the accomplishments of the
2 North Key Largo HCP study committee, the
3 resulting plan remains inconsistent with this
4 department's ongoing programs which serve to
5 protect the natural environment of Key
6 Largo."

7 And he goes on and describes his objections to
8 the HCP.

9 The second one, which is on Page 2, Item
10 Number 2, is very telling. It doesn't get any
11 more telling than this one.

12 "Possible increase in the cost for
13 acquisition of an approved CARL acquisition
14 project."

15 That's what DNR cared about, keeping the
16 price down.

17 "The department is under instruction from the
18 governor and cabinet to terminate acquisition
19 activity on any approved CARL project for
20 which local governmental action increases
21 costs to the state and to inform all
22 appropriate local governments of this policy.
23 The February 14, 1986 letter to Monroe
24 County, attachment B, it's the other one I
25 read, further elaborates on this policy. The

1 allocation of additional development rights
2 in accordance with the HCP could increase
3 costs to the state. Additionally, the HCP
4 recommendation that the Florida Keys Aqueduct
5 Authority and Florida Keys Electric
6 Cooperative rescind moratoria on services to
7 areas of critical habitat within CARL project
8 boundaries could be expected to inflate
9 property values and costs to the State. It
10 is disappointing to us that the transfer
11 development rights was not more fully
12 explored as an alternative to habitat
13 destruction."

14 I find it a little bit strange that the DNR
15 is writing to the law firm drafting the HCP when
16 all of those people working on the HCP were
17 appointed by the governor.

18 Finally at the bottom of the Page 3 on this
19 letter, Mr. Duden writes,

20 "These criticisms of the HCP should be viewed
21 in light of this department's current role
22 and the successive state land acquisition and
23 management programs in the Florida Keys. If
24 the State lacked the programs or acquisition
25 dollars to purchase lands in furtherance of

1 its resource protection goals, then the HCP
2 might be a necessary recourse to existing
3 state programs. However, as the state -- as
4 the facts stand today, we fully anticipate
5 receiving an additional adequate funding to
6 purchase and manage lands on North Key Largo
7 in fulfilling our environmental protection
8 goals."

9 Turning to the next document of interest is
10 on Page 113. Page 113 is a letter from Tom
11 Gardner, executive director of DNR, dated October
12 27, 1987, and it's addressed to the Monroe County
13 Commission. This letter in the middle two
14 paragraphs basically restates the positions in the
15 previous two letters to the Monroe County
16 Commission. If you change the highest and best
17 use on a property and it raises the value, we're
18 not going to buy unless the owner accepts a number
19 based on an earlier more restrictive zoning.

20 The next letter that I want to call your
21 attention to is on the next page, Page 114. This
22 is a memorandum from within DNR to Tom Gardner,
23 the executive director. And this is a memorandum
24 that was apparently generated by what's in the
25 first paragraph.

1 "In February of '81 the Monroe County zoning
2 board preliminarily approved the development
3 of the 33 and a half upland acres of the Key
4 Largo land trust, part of the Egone ownership
5 east of the C905 as a planned unit
6 development known as Anchor Bay. The
7 approved development plan for the property
8 provides for 80 multi-family units, 30
9 townhouses, 49 single family residences, as
10 well as commercial acreage fronting C905. In
11 1984 the property was placed on the CARL
12 acquisition list. November 5, 1985, the
13 governor and cabinet passed the following
14 motion."

15 This is that same language that we've just
16 seen in the last two letters. Governor Graham's
17 motion basically says that if local government
18 rezones the property in a way that would because
19 of the rezoning result in an increase in its
20 appraised value, the position of the State should
21 be either, A, that it terminates its interest in
22 acquisition, or B, the owner agrees that prior to
23 the State expending any money for survey
24 appraisals or other acquisition, that the
25 appraisal be done on its value prior to the

1 rezoning.

2 And the next page, Page 115 in the appendix,
3 it says,

4 "On May 20, '86, the policy stated above was
5 expanded as follows: When DNR staff
6 determines that government action may have
7 enhanced the highest and best use of a parcel
8 subsequent to when a parcel was placed on the
9 state acquisition list, staff shall formally
10 advise the governor and cabinet of the
11 governmental prior to terminating activities
12 for acquiring that parcel. DNR staff shall
13 also advise the governor and cabinet of the
14 owner's willingness to discount the
15 appraisals and negotiations any value
16 attributable to the enhanced highest and best
17 use."

18 I'm going to skip now all the way down to
19 Page 172. Page 172 is an internal DNR memorandum
20 dated May 16, 1990, from the chief of the Bureau
21 of Land Acquisition to the assistant chief. On
22 the second page, which is Page 173 in the
23 appendix, first full paragraph, first full
24 paragraph is very telling.

25 "The impact of the Monroe County HCP on

1 appraised values was discussed, but Mr. Hardy
2 said" -- and here's some kind of a typo --
3 "the we should expect to see anything final
4 on it for sometime. If it is adopted, a
5 lawsuit will probably follow. However, we
6 need to be cognizant of its potential
7 adoption and would need to suspend
8 negotiations on all effective parcels until
9 the properties were reappraised. Certain
10 properties identified previously as
11 development nodes would probably not be
12 affected and negotiation could continue.
13 This would need to be confirmed."

14 So in 1990 this HCP had still not been
15 approved by Monroe County, but Monroe County had
16 been continually told that if they were to, if
17 they were to upzone properties, which the HCP
18 would have done, then the State's not going to buy
19 them.

20 I then want to go to Page 177, and this is
21 the letter I was questioning Mr. Craig about when
22 we ran out of time in September. On June 6th of
23 1990, Percy Mallison the director of division of
24 state lands at DNR wrote to Milt Rappick, chairman
25 of the planning commission, and he states,

1 "I am writing to" --

2 MR. LEHRMAN: Hold on just a second, sir.
3 Your Honor, I'm unclear as to whether or not this
4 was something we stipulated in or was this the
5 letter that we objected to coming in?

6 MR. MATTSON: It's both. You stipulated, you
7 objected to it.

8 MR. LEHRMAN: Yes.

9 MR. MATTSON: And it's also the one you
10 stipulated to.

11 THE COURT: This morning, first thing in the
12 morning.

13 MR. LEHRMAN: Oh, okay. All right. I just
14 got a little lost as to where we were.

15 THE COURT: That's all right.

16 MR. MATTSON: Just trust me.

17 MR. LEHRMAN: Well that's, those are two
18 words that I haven't believed in a long time from
19 anyone.

20 MR. MATTSON: Especially a lawyer. All
21 right.

22 MR. LEHRMAN: And as long as -- we're off the
23 record for a second.

24 (Discussion held off the record.)

25 MR. MATTSON: All right. Percy Mallison

1 writes to the chairman of the planning commission,
2 "I am writing to you regarding the proposed
3 habitat conservation planning HCP for North
4 Key Largo. As you are aware, the State is a
5 major land owner within the area proposed for
6 the by HCP."

7 Well by 1990 do you remember how much the
8 land had been acquired by the State? This was
9 in --

10 THE COURT: I have it here.

11 MR. MATTSON: This was in Bob Gallaher's
12 figure. This figure from the last hearing. It's
13 a big chart. It wasn't in, it wasn't in my
14 PowerPoint presentation.

15 THE COURT: Oh, okay.

16 MR. TOBIN: It was either Exhibit 1 or 2 that
17 was introduced.

18 MR. MATTSON: It was either 1 or 2 right in
19 September. But this blue represents State
20 ownership in percent. By 1990 State ownership was
21 just under 90 percent. And if you remember his
22 analysis, there hadn't been a private sale of
23 property since 1986 in North Key Largo, that
24 market was dead. It was deader than a doornail.
25 Percy Mallison after noting that the state is a

1 major land owner within the area proposed for the
2 HCP states,

3 "The Department of Natural Resources requests
4 the Monroe County Planning Commission
5 approved native zoning for the area rather
6 than approving the HCP except for those areas
7 currently identified as improved subdivision.
8 The Department also recommends that the IS
9 designated areas remain as they currently
10 exist."

11 By the way, Your Honor, they still are IS.
12 There are a handful of little subdivisions up
13 there. And then on the next page, 178, there is
14 a, this is one of those annual -- this is sort of
15 like a Christmas letter from DNR to Monroe County.
16 On March 16, 1992, two years later, Don Duden,
17 assistant executive director, writes to the Monroe
18 County planning and zoning department. And he
19 gives them the same speech they've been giving to
20 them since 1984.

21 "If by government actions subsequent" -- so
22 and so and so and so on.

23 In other words, if upzone anything, we're not
24 going to buy it.

25 THE COURT: What's left to buy?

1 MR. TOBIN: Our property.

2 MR. MATTSON: Yeah. The property that we're
3 talking about.

4 Then Page 180, August 11, 1992, Greg Brock,
5 environmental administrator at DNR writes to
6 Renotta Skinner at DNR, and he says:

7 "Dear Renotta, attached is a copy of the
8 form letter recently sent to most of the remaining
9 property owners. The last two paragraphs set the
10 stage for condemnation if they are still unwilling
11 sellers. Roy indicates to me that they're serious
12 -- eminent domain on these parcels if necessary in
13 the very near future."

14 Now, in my copy of the appendix, the next
15 page is upside down. I don't know if that's true
16 in all of them or not. Page 181 is upside down.
17 This is the copy attached to the letter to Renotta
18 Skinner. And I just direct the Court's attention
19 to the last paragraph above the signature block.

20 "I thank each of you who has expressed a
21 willingness to work with the State of Florida
22 in its efforts to preserve this land. Please
23 give this offer your utmost consideration.
24 In the event you are not willing to sell at
25 this time, we will place your property on the

1 condemnation list which will be presented to
2 the Cabinet in the near future."

3 And last but not least I direct the Court's
4 attention to the document that starts on Page 182.
5 This document is dated after this lawsuit was
6 filed. This lawsuit was filed in '95. This
7 document is dated January 8, '96. It's from Percy
8 Mallison, director of state lands, to the
9 secretary of D.E.P. By that time DNR had merged
10 with D.E.P. -- had merged with somebody.

11 Anyway, they had a new super department
12 called D.E.P. And just the subject of this memo
13 from Percy Mallison to Virginia Wetherall is land
14 acquisition and the Monroe County.

15 Now, Your Honor also should note that
16 January 8, 1996, was two or three days after the
17 1996 comp plan came into existence. And the 1996
18 comp plan really was a comp plan and a set of land
19 development regulations. The 1996 comp plan is in
20 part what this memo is about, but it's in part
21 about the fact that they have not been able to
22 acquire all of the land.

23 Mr. Mallison says, "My staff and I have met
24 on several occasions to discuss this issue."
25 Basically that development restrictions were

1 reducing the fair market value of the land they're
2 trying to buy.

3 "And the purpose of this memo is to set up
4 the various alternatives we thought of."

5 Just briefly, alternative one, attempt to
6 purchase -- this is my briefly. Attempt to
7 purchase property at current fair market value,
8 i.e., subject to new development restrictions.
9 Advantages, maintains purity of approach.
10 Disadvantages, less willing sellers resulted in a
11 decline of number of purchases. In some cases
12 current fair market value may be next to nothing
13 which could provide visible evidence the comp plan
14 amounts to a taking.

15 Second option, attempt to purchase property
16 at an amount in excess of the current fair market
17 value. Advantages, may avert some takings claims
18 by those to sell. Disadvantages, would add fuel
19 to the fire of the property, of the private
20 property movement.

21 Option number 3, I won't -- I'll skip option
22 number 3. I'll skip 5 and 6, but I'll read
23 Number 4.

24 "Seek a judicial determination of value by
25 instituting one or more suits in eminent domain

1 and then attempt to purchase property based on the
2 court's opinion of how value should be determined.

3 So that's, that is the sum and substance of
4 the suggestions.

5 THE COURT: Mr. Mattson, I want to ask you
6 since we're coming up on twelve o'clock, and I
7 want to give equal time to the State, and we're
8 scheduled until 12:30, how much more time do you
9 think you'll need?

10 MR. MATTSON: None.

11 THE COURT: None? Okay.

12 MR. MATTSON: According to my note here. I
13 was going to -- I have one other point and that is
14 that we had tendered the depositions of Ed Swift
15 and Ken Sorenson who were commissioners from '84
16 to '86. Mr. Tobin has appeared to read from those
17 depos, but -- I mean they're there. He can read
18 from them. We can take five minutes.

19 THE COURT: Okay.

20 MR. MATTSON: Okay.

21 MR. TOBIN: Judge, both of these depositions
22 are fairly brief. And I don't know if the Court
23 is going to take a break and maybe wants to read
24 them, you know. I can summarize both Ed Swift and
25 Ken Sorenson basically confirm that the State was

1 exerting a tremendous amount of pressure on the
2 County. I don't think there's any argument to
3 that effect. And to read it into the record in
4 their words, I don't think it will be helpful to
5 Your Honor and I don't want to shortchange any
6 more than I have to Mr. Lehrman's turn. So I will
7 leave it up to the Court. They're real brief.

8 THE COURT: I can review them.

9 MR. TOBIN: Okay.

10 THE COURT: On my own time. Is there any
11 objection from the State?

12 MR. LEHRMAN: No, sir.

13 MR. TOBIN: And the other thing I just wanted
14 to remind the Court that at the earlier hearing we
15 did introduce the adcom minutes. It was
16 Exhibit 4, and that was the February 1st, 1983,
17 where the Department of Community Affairs actually
18 threatened Monroe County and went before the
19 governor and the cabinet and said that if the --
20 they wanted to take over the zoning function.
21 They wanted to go to circuit court. They wanted
22 to get an injunction against Monroe County. And
23 the pressure, you know, when we first started
24 researching this, we thought we really had to
25 prove pressure, deep involvement, planning,

1 funding. But it doesn't appear to be that we're
2 required that that is our burden. But I think we
3 have established the deep involvement, the unity
4 in our complaint. I take a lot of time in
5 structuring how the governor of the cabinet, the
6 governor's the chief land planning officer of the
7 State of Florida, and how the administration
8 commission actually not only gets to veto our
9 regulations, but they actually get to adopt
10 regulations on our behalf and make them our
11 regulations. So I think there is unity here.
12 There is deep involvement. And the smoking gun,
13 if you will, is the minutes from the
14 administration commission on February 1st, 1983,
15 which is in evidence.

16 So I'm going to go ahead and not read these
17 depositions into the record at this time.

18 Judge, can we also, we marked the exhibit,
19 -- the Exhibit A to the motion for summary
20 judgment has been marked for identification as
21 Exhibit B. I'd like to go ahead just to clean up
22 the record and move into evidence those documents
23 that have been identified in Exhibit B for
24 identification Mr. Lehrman, actually his
25 predecessor, in the response to admissions

1 actually identifies every single one of the
2 documents which are admitted.

3 THE COURT: Are you seeking to admit only the
4 ones that Mr. Mattson discussed?

5 MR. TOBIN: No, sir. There's 27 -- there's
6 39 documents, 27 the State has actually -- where
7 is that motion?

8 MR. MATTSON: I think I did that already.

9 MR. TOBIN: Well it didn't get numbered,
10 that's the point.

11 MR. MATTSON: All we need is a number.

12 THE COURT: But how am I going to -- what are
13 the 27 out of the 39?

14 MR. MATTSON: The 27 are listed in the motion
15 that Andy filed for reconsideration.

16 MR. TOBIN: Judge, it's actually the response
17 that was filed by the State. And this is the
18 petitioner's response. And you can see it's in my
19 motion to reconsider but it's actually identified,
20 the documents which are admitted are on that list.
21 Now we can either read it into the record or we
22 can make a copy of that and number it as a
23 composite exhibit. I'm open to any suggestion.
24 But just so the record clear, those documents need
25 to be probably numbered or -- well, as a composite

1 or as individual exhibits.

2 THE COURT: The problem with the list that
3 you have, it doesn't follow the same list you have
4 in the exhibit. So you have to hunt around for
5 these documents.

6 MR. MATTSON: We could, we could go to take,
7 we could go take a copy and reproduce it with just
8 the ones that are on the list, bring that back
9 here.

10 THE COURT: Is the State aware of the
11 documents you're not agreeing to? That would be a
12 smaller number and easier.

13 MR. LEHRMAN: I do not have a list of the
14 ones we're not agreeing to, Judge. But Mr.
15 Mattson's suggestion would be fine with me if
16 another, or just a package could be reproduced for
17 Your Honor and for counsel as to those that the
18 court has ruled inadmissible.

19 THE COURT: All right. So these 27 documents
20 are coming in as admissible and we're going to
21 treat them as a composite?

22 MR. MATTSON: Yes.

23 THE COURT: Exhibit number?

24 COURT CLERK: Are we starting a new number?

25 THE COURT: No.

1 MR. TOBIN: The transcript shows I think we
2 went to 4 or 5.

3 THE COURT: You don't have your --

4 COURT CLERK: That's in the file with my
5 court minutes from last time.

6 THE COURT: We need that.

7 MR. TOBIN: Exhibit 5 was the last one, so
8 this would be 6.

9 THE COURT: Exhibit 6 would be the 27
10 documents.

11 MR. MATTSON: And then 7 would be the
12 executive order, which you also admitted

13 THE COURT: Isn't the executive order one of
14 the 27?

15 MR. MATTSON: No. They wouldn't admit to
16 that one.

17 MR. TOBIN: Did I just give you my motion,
18 Judge?

19 THE COURT: Yes

20 MR. TOBIN: Let me just identify for the
21 court reporter that those documents are listed in
22 Petitioner's Response to Defendant West Freeman's
23 Third Request for Admissions, and the documents
24 are identified. And we will put together a
25 package after the hearing and give it to the clerk

1 if that's acceptable.

2 THE COURT: Thank you. Any objection from
3 the State?

4 MR. LEHRMAN: No, that's a good suggestion,
5 Your Honor.

6 MR. MATTSON: I would just like to conclude,
7 if I may, with a couple sentences. And that is
8 that I believe that as counsel for the property
9 owner we have, we've met the burden of showing the
10 relationship between the State and the County in
11 depressing the value of this property. And urge
12 the Court to grant our motion in limine and to
13 require both parties to determine to appraise
14 these properties as if there had been no changes
15 in regulations since 1982. Now I think that's it.

16 THE COURT: Thank you.

17 MR. LEHRMAN: If it please the Court and
18 counsel. I'll try to be as brief as possible. I
19 may run over just a few minutes.

20 THE COURT: That's all right. Whatever time
21 you need.

22 MR. LEHRMAN: Thank, Judge. You should never
23 say that to a lawyer, by the way.

24 THE COURT: Until I get really hungry.

25 MR. LEHRMAN: All right. What the property

1 owner's arguing is that as a matter of law the
2 appraisers have to be unequivocally instructed to
3 do their appraisals based upon as if nothing had
4 happened to this property since 1982. And in fact
5 that the jury would then only be able to consider
6 that very narrow appraisal which would strip away
7 the reality of everything which has happened since
8 1982 to the present. They want the jury to arrive
9 at a value by ignoring the value of the property
10 on the ground as of the date of the taking. They
11 also want the jury to imagine that there were
12 optimal development conditions in existence as of
13 the date of the taking. And in addition, these
14 optimal conditions have to be assumed to have been
15 arrived at through a series of further rulings by
16 the planning and zoning department of Monroe
17 County which may or may not have been made based
18 upon the absence of what really happened. In
19 other words, if nothing had really happened since
20 1982, what would, what would the planning and
21 zoning department have done in the intervening
22 20-plus years with this property? And that's what
23 they're going to be asking the appraisers to first
24 of all restrict themselves, both sides, and then
25 ask the jury to start guessing as to what had,

1 what would have happened to this property and how
2 it would have been developed.

3 And furthermore, they want all of the actions
4 of Monroe County in this case imputed to the, not
5 only the Department of Community Affairs, which
6 passed the ultimately and enforces the
7 comprehensive plan, but also to then directly
8 impute those actions to the Florida Department of
9 Environmental Protection.

10 It's a very convoluted analysis. It's a very
11 Law Review-ish type of presentation of what-if
12 scenarios. It can be summed up really in three
13 words, three words that the defendants have a
14 serious problem with. Those words are statute of
15 limitations.

16 All of the claims in the other cases that
17 have come before the Monroe County courts,
18 including those ruled upon by Judge Payne, finding
19 takings -- not blight, by the way -- finding
20 takings, and we're going to get into a little bit
21 of the distinction why there in fact is a
22 distinction between blight and takings.

23 Counsel for the defendant, for the
24 defendants, property owners, are quite able
25 counsel, and I think they recognize what the

1 problem would be in going forward with a takings
2 claim which we note has been, has been virtually
3 abandoned in arguments before the court. And the
4 reason is that in fact it is barred by the statute
5 of limitations. If in fact in 1982 all these
6 actions occurred with the four-year statute of
7 limitations, there's no way that they could make a
8 viable taking claim. Even if they were to move it
9 forward to 1986 or '87, there still could be no
10 taking claim.

11 And additionally, even if not time barred the
12 date of taking would have been way too early.
13 Even if they could have claimed this taking back
14 in 1982 and said this is when the taking was, then
15 unlike with a, with a claim for condemnation
16 blight, they couldn't start what if we had done
17 this, what if we had done that. The date of
18 taking would have been fixed in 1982, they would
19 have been entitled to the value of the property
20 plus statutory interest, which would come nowhere
21 near the many millions of dollars that are being
22 claimed now by this defendant.

23 Now I don't believe that the defendant would
24 be very happy with the State's 1982 value of the
25 property either for the purposes of the taking.

1 That being the case, we have this novel and
2 outside-the-box thinking by opposing counsel.
3 They were faced with two mutually destructive
4 concepts, neither of which can live in the face of
5 the other. One is an inverse condemnation taking,
6 and the other is the concept of condemnation
7 blight. They both are very distinct and they have
8 distinct legal elements. If they pressed on with
9 the taking issue, there would have been unwinnable
10 statute of limitations issue. And even worse than
11 that, since they were aware of all the property
12 damages back to 1982, their right to sue having
13 expired let's say for the sake of argument in
14 1986, in order to have a takings claim, they would
15 have had to argue that the property was virtually
16 worthless. Therefore when our taking occurred
17 years later, the legal argument could be made that
18 the FDEP has in fact taken property which could
19 not be built upon which is virtually worthless and
20 we shouldn't have to pay them very much at all.
21 Very harsh type of an argument. One that is not
22 being made by the Florida Department of
23 Environmental Protection. But I believe this is
24 the situation that defense counsel is faced with.
25 If in fact they pressed on with this taking claim

1 and it was in fact time barred, the property would
2 have been worthless but with no remedy. And by
3 the time we came along to take it, we took in
4 essence worthless property.

5 So in reassessing the problem, what they've
6 come up with is to ask the Court to direct the
7 jury to value their property at a point in time
8 that predates all of these actions which they
9 claim constitute blight.

10 They're saying but for the State actions,
11 that they would not have vacant land now. What
12 their appraiser wants to do is to say, Well, we
13 would have an extensive development. There would
14 be perhaps a marina, some dry storage, highest and
15 best use would be a beautifully developed, rather
16 large North Key Largo development worth many, many
17 millions of dollars.

18 Now the issue of blight is very well defined
19 in Florida law. It appears that the arguments
20 that have been directed at blight by the
21 defendants are not in fact blight cases in the
22 main. They are takings cases. And it's a
23 different legal issue.

24 Additionally, what the owner wants the jury
25 to require them to do, and it's a daunting enough

1 task for them just to come up in a regular
2 condemnation case with two conflicting appraisers,
3 maybe land planners as well, with what this
4 property is worth as of the date of the taking.
5 But to assume all of these uncertain market forces
6 from the 1980s what would have happened, what
7 would have happened with imaginary competing
8 properties if all these other properties had been
9 allowed to develop and compete with them, and
10 these properties now would be magically somehow
11 freed of any developmental restraint from the
12 1980s. They would have to deal with imaginary
13 investor demand for this property which has now
14 suddenly gone back in time and been able to be
15 developed. Plus speculative sales figures from
16 sales which didn't occur on buildings which had
17 not been permitted, planned or designed.
18 Remember, there has never even been a plan or an
19 application made for development of this property.

20 The roads and infrastructure which would
21 serve these properties is not in. The jury would
22 be asked to be, to consider that. Minus the costs
23 of putting in all this infrastructure and a
24 development approach to come up with what would be
25 the value of the property as of the date of the

1 taking. And they'd be required to use 1986 prices
2 or 1984 or 1982 prices for development costs minus
3 what it could have been sold for sometime in the
4 future.

5 And to top it all off, what the defendants
6 want to do is to make this un rebuttable by the
7 State of Florida by instructing our appraiser to
8 do exactly the same thing and nothing else.

9 The Yoder case, which I believe has been
10 filed with the Court, --

11 THE COURT: Do you have an additional copy?

12 MR. LEHRMAN: I do in fact have copies of all
13 these cases, Judge. And in case counsel's not
14 familiar, I do have copies for counsel as well.

15 This case goes back, Your Honor, to 1955. In
16 essence what this case says, what Yoder says for
17 us, what value it has for us, is it says that the
18 value of property has to be determined in light of
19 the time of the lawful appropriation.

20 I'm looking at Page 1. If you look on the
21 right side of the page, last paragraph, and what
22 it says is, "It is not proper" -- and this
23 language has been used over and over and over
24 again.

25 "It is not proper to speculate on what could

1 be done to the land or what might be done to
2 it to make it more valuable and then solicit
3 evidence on what it might be worth with such
4 speculative improvements at some future
5 unannounced future date. To permit such
6 evidence would open a flood gate of
7 speculation and conjecture that would convert
8 an eminent domain proceeding into a guessing
9 contest."

10 If the defendants have their way on this
11 ruling, it wouldn't even be a contest because the
12 State wouldn't even be allowed to rebut it with
13 their own testimony.

14 The appellate courts in this state, in this
15 state, in Florida, and I'm not familiar with what
16 the appellate courts have done in every state.
17 But the appellate courts in Florida have never
18 once ever gone into this type of territory to
19 allow this type of speculation to the degree
20 that's being requested by the defendants. And I'm
21 going to get into Tallahassee Bank in a moment.

22 THE COURT: What is the date of the valuation
23 that the State of Florida is --

24 MR. LEHRMAN: The date of valuation is the
25 date that Your Honor entered the order, stipulated

1 order of taking. I don't have that in front of
2 me. What year was that?

3 MR. MATTSON: Two years ago.

4 MR. LEHRMAN: Yes, sir, it was two years ago.
5 The statute itself, the eminent domain statute
6 also mandates that that's the date upon which the
7 taking -- the value -- the property must be
8 valued.

9 Condemnation blight under the Tallahassee
10 Bank case and Chicone and its progeny have allowed
11 valuations earlier, but never ever to allow the
12 type of extreme speculation which is being
13 requested that the defendants have requested here.
14 It's never ever been made unrebuttable.

15 THE COURT: But using the State's proposed
16 valuation date -- I understand your argument as to
17 why we're opening up a can of worms as speculation
18 in using the 1982 date.

19 MR. LEHRMAN: Yes, sir.

20 THE COURT: But I also understand the
21 position that using the valuation two years ago is
22 also rather unfair under the circumstances in
23 North Key Largo.

24 MR. LEHRMAN: Yes, sir.

25 THE COURT: So is there another suggestion

1 that the State has as an alternative, Plan B for
2 valuation?

3 MR. LEHRMAN: I do have a Plan B, of course.
4 I always have a Plan B.

5 THE COURT: I thought you did.

6 MR. LEHRMAN: I always have a Plan B. But
7 just so the record's clear, this is a Plan B in
8 the event that Your Honor is so inclined.

9 THE COURT: I am so inclined, to be quite
10 frank with you.

11 MR. LEHRMAN: And I understand from Your
12 Honor's comments earlier that you had not made up
13 your mind but that you were aware of property
14 values in North Key Largo and that it would be in
15 fact a fairness argument to use the property so
16 far in the future.

17 What I would suggest is if Your Honor at the
18 close of my argument and considering all the
19 testimony, just so our record is clear, that Your
20 Honor is going to rule that the defendants are
21 correct, that you don't take that extra step and
22 require the State to do exactly the same thing.
23 And I'm going to get to the Armadillo case in a
24 moment which allows Your Honor to do such a thing.

25 Now I think that if Your Honor wants to allow

1 the defendants to value this property on their
2 what-if scenario, that it's improper, that it
3 should not be allowed. However, if the court does
4 allow it, what we would request without waiving
5 that argument that it's not proper, what we
6 request is that you not take that extra step and
7 require us to do the same thing. Allow our
8 appraisers some latitude in valuation.

9 Let me just get to the Armadillo case. It
10 really tells you pretty much what to do. Gives us
11 a little bit of judgment in the opposite direction
12 here.

13 Actually only have one copy of the law. I do
14 apologize.

15 MR. MATTSON: It's memorized.

16 MR. LEHRMAN: You have Armadillo memorized?
17 Your Honor, this is the Armadillo case that
18 Mr. Mattson has memorized fortunately.

19 What Armadillo says is that where you have a
20 date of taking, that is a clear legal instruction
21 that can't be ignored. Use of a wrong date of
22 taking will render an opinion of an appraiser
23 worthless. As being contrary to law. On the
24 contrary, the issue of blight is a matter of
25 opinion of the expert and it should be permitted,

1 and should be permitted if otherwise competent and
2 relevant.

3 In the instant case what we're talking about
4 is an issue of blight, which is opinion, rather
5 than the issue of the date of taking which is a
6 matter of law. And that's in Chicone.

7 And now I'm going to quote the part of
8 Armadillo to which I was referring earlier as far
9 as what the court may want to do. And again, just
10 for the record, I don't want to keep repeating
11 myself, but we're not agreeing that the court
12 should rule for the defendants in this case and
13 allow them to do their what-if scenario. It's
14 still speculative. It's still an improper
15 condemnation blight analysis. However, here's the
16 quote.

17 "As the Rochelle opinion makes an appraiser's
18 opinion may be subject to impeachment" --

19 THE COURT: I'm sorry, where are you reading
20 from? I have it. I have it.

21 MR. LEHRMAN: You have it? Okay. I think I
22 had it highlighted.

23 THE COURT: You did.

24 MR. LEHRMAN: Okay. "As the Rochelle opinion
25 makes clear, an appraiser's opinion may be

1 subject to impeachment or to having its
2 weight reduced because of its failure to
3 properly consider one of the many factors
4 that may influence an opinion of value. But
5 that failure should not prevent the opinion's
6 admission nor cause its complete exclusion
7 from the jury's consideration."

8 That would allow the Court some latitude.

9 You know, nothing of course is absolute, but that
10 would in my opinion allow the Court some latitude
11 if you were so inclined to be swayed by the
12 defendant's argument but not to lock in FDEP to
13 the same type of approach.

14 THE COURT: Weight versus admissibility here.

15 MR. LEHRMAN: Yes, sir. That's exactly what
16 it is. However, we are not asking that the Court
17 allow both sides including the defendants to enter
18 into this fact-free free-for-all as to what may or
19 may not have happened.

20 The defendant in the opinion of the FDEP, we
21 are urging the Court that the defendant be
22 required to show this court by way of competent
23 evidence that their blight argument has enough
24 merit -- and I'm about to address that now -- as
25 to whether or not their blight argument should be

1 allowed before the jury as well to overcome the
2 statutory mandate of utilization of the date of
3 the taking, which was several years ago.

4 We say number one that it's speculative, that
5 it is not, it is certainly not for consideration
6 by the jury. We also point out the fact that
7 these defendants took no steps whatsoever to vest
8 this property for development, to make any
9 applications for any type of development, to take
10 any steps at all in fact towards development of
11 this property.

12 In the Namon case, which I think is before
13 Your Honor, and I can quote that in a moment, but
14 what the court said is that,

15 "A subjective expectation that the land could
16 be developed is no more than an expectancy
17 and does not translate into a vested right to
18 develop the property."

19 I'm sorry, Judge, I didn't bring Namon with
20 me. I think that that had been attached. If not,
21 I can get Your Honor the quote for that.

22 The issue of blight and the issue of the date
23 of valuation has somehow been merged into an
24 argument which has been unprecedented in Florida
25 law.

1 And here is where we get to the Chicone case.
2 In the Chicome case -- this is also black letter
3 law, Your Honor. It goes back to 1963. In the
4 Chicone case the date of valuation where you have
5 a blight is not moved back. This tells the Court
6 what to do in the event of a blight. The date of
7 valuation isn't moved back. You still have to use
8 the statutory date of valuation. However, the
9 evidence of the market value as of the date of the
10 taking must ignore any devaluation that was caused
11 by the threat of the condemnation. And those are
12 the key words there. The threat of the
13 condemnation. Because when we get to the evidence
14 in this case, I don't think we're looking at a
15 threat of condemnation until many years later.
16 What we're looking at is voluntary acquisitions
17 for the CARL program.

18 THE COURT: When was the property purchased
19 by client, by the client, by West?

20 MR. TOBIN: In the '50s, Judge.

21 THE COURT: '50s, okay. Thank you.

22 MR. LEHRMAN: What the defendants are saying
23 is that Chicone, although they haven't mentioned
24 it, I think they have it in some of their written
25 argument, but that Chicone condemnation blight

1 should be applied to our case based upon what I
2 have as seven factors. And in fact, in Chicone
3 number one, the condemning authority was the same
4 actor that had devalued the real estate. That is
5 number one, that is number one on the reasons why
6 this is not condemnation blight in our case.

7 The land had been marked for condemnation.
8 Definitely marked for it. And that was the intent
9 and that was the reason that all of these laws
10 were passed in Chicone, all of the land
11 development regulations were passed in order to
12 cheapen this land for a future condemnation.

13 Now I haven't heard the exact words, but the
14 implication would be that if that were to be
15 applied in this case, that the comprehensive plan,
16 the statewide comprehensive plan was in fact had
17 its intent and purpose, because that's what
18 Chicone and all these other cases I'm going to
19 cite for you, the intent and purpose of cheapen
20 that land for a later condemnation. That that's
21 the purpose of the statewide comprehensive plan.

22 THE COURT: That argument can be made.

23 MR. LEHRMAN: Well it has in fact been made,
24 although it has not been stated in those words.

25 THE COURT: All right.

1 MR. LEHRMAN: But what they're saying is when
2 the legislature enacted it, they were thinking,
3 Well let's see, we gotta take this North Key Largo
4 land on the cheap or we have to take land around
5 the state on the cheap, and so this isn't really a
6 conservation statute, this is not a development
7 statute, it's a condemnation statute. And that's
8 when we get to the Tallahassee Bank case. But
9 before we do that, let's take a look at the
10 evidence, the actual evidence that has been
11 produced in this case. And I think I got it all.
12 I think I have all of them.

13 First of all, they say that Craig and
14 Gallaher had testified that since 1982 Monroe
15 County -- not the State yet, okay? -- Monroe
16 County had been passing a series of rolling
17 moratoria up to the 1986 comp plan which wasn't
18 really a comp plan, it was really land development
19 regulations until the next year when the comp plan
20 went in adopted by Monroe County, approved by the
21 State of Florida. This is the premise.

22 The key documents that they show -- and
23 remember that under the Tallahassee State Bank --
24 I'm about to get into that case in more detail.
25 But let's assume for the moment that the

1 Tallahassee Bank case says that these actions have
2 to be taken with the intention of reducing
3 property values for the property that's being
4 taken. Okay? So let's just assume that for now.
5 Taking a look at these key documents, these key 27
6 documents, defendants have pulled out a number.
7 The first one is the April 16th, 1984, letter from
8 Elton Gissendanner to the Board of County
9 Commissioners, Monroe County. It explains the
10 CARL acquisition project targets: which properties
11 basically CARL wants to acquire. These are areas
12 of concern. Note that what was not mentioned but
13 what you read in these letters and what we know
14 about the CARL program is that these are -- and
15 it's actually in these letters, that these are for
16 voluntary acquisitions. Condemnation has never
17 been mentioned in 1984. There was no intention
18 for any of these things to affect condemnation.
19 These were voluntary acquisitions. Property
20 owners had to apply to put their properties on the
21 CARL program, on the CARL list for purchase by the
22 State. So they didn't say anything. These
23 letters, this, this paragraph, this smoking gun
24 paragraph doesn't say anything except to Monroe
25 County, which is if you do anything which raises

1 the highest and best use of this property, let us
2 know because we're, that's going to take, we have
3 to take that into account in voluntarily, you
4 know, coming up with a value for these people. If
5 it gets to be too much and busts our budget, we
6 could no longer acquire it. CARL program is
7 legislatively funded. It has a specific budget.
8 It's not open-ended.

9 They said if anything happens to change these
10 things, zoning changes, LDRs, anything like that,
11 that changes the highest and best use, i.e., price
12 that we're going to have to pay for this property
13 -- sorry. Are you catching all that? Sometimes
14 I'm a little fast.

15 The price, if the price is going to be going
16 up, we may not be able to afford it, so let us
17 know. That's what it all said. Every single
18 thing.

19 The executive order number on September 14,
20 1984, likewise didn't say anything about
21 condemnation. It has nothing to do with
22 condemnation. It establishes a North Key Largo
23 study area to go from 1984 to 1986. And what will
24 this study area study? Well, it's supposed to
25 study which properties can be voluntarily acquired

1 from the property owners that want to sell them
2 and can agree upon a price between the State and
3 the property owners in order to acquire this
4 property. So these are all voluntary sales, not
5 condemnations. That's what that piece of evidence
6 talks about.

7 THE COURT: But during this time there's a
8 moratorium.

9 MR. LEHRMAN: There is in fact a moratorium.

10 THE COURT: All right. And the property
11 owners in North Key Largo are being told there's
12 going to be an HCP approved.

13 MR. LEHRMAN: Yes.

14 THE COURT: And there's going to be some
15 development. And as of yet there's no HCP ever
16 been approved for North Key Largo.

17 MR. LEHRMAN: Right.

18 THE COURT: And at the same time Tallahassee
19 is telling Monroe County that if you approve any
20 sort of development, we're not going to purchase
21 this property.

22 MR. LEHRMAN: We may not purchase this
23 property. They did not know if they were going to
24 have the funds to do it as of this date which
25 we're talking about is 1984.

1 THE COURT: Okay.

2 MR. LEHRMAN: In addition to that, these
3 being all voluntary sales, there was no pressure
4 on the property owners to sell, they were
5 voluntary sales. If there was pressure on the
6 property owners for not being able to develop it,
7 it was from Monroe County.

8 THE COURT: Do you think there was pressure
9 from the State to Monroe County not to --

10 MR. LEHRMAN: Absolutely not.

11 THE COURT: Then how do you address the
12 deposition testimony of Ken Sorenson and the other
13 officials?

14 MR. LEHRMAN: Because what they're talking
15 about is they're saying is that they were forced
16 to comply with the comprehensive plan. I think we
17 can agree with that. They're talking about later
18 than 1984. They're talking about '86, '87. And
19 what they're saying is that the county commission
20 was required to comply with the comprehensive plan
21 and perhaps other environmental regulations. We
22 have the deposition of Nancy Linnan which is
23 before Your Honor. Nancy Linnan, she's with
24 Carlton Fields now, but she was the attorney for
25 DNR and then later for the governor. She was

1 basically the attorney in charge of marshaling
2 through the comprehensive plan and making sure
3 that all the counties of the state complied,
4 including Monroe County. Monroe County was not
5 singled out for the comp plan. Comp plan had
6 statewide application.

7 And what she says here is, the question on
8 Page 12 -- and all throughout her deposition, I
9 just pulled out a few.

10 "Was there ever any discussion at the time
11 which you overheard about making a property
12 or an area in an area critical state concern
13 in order to allow the property to be acquired
14 via eminent domain for a lower price?"

15 Her answer is: "No, there was no such, there
16 was no such either official or even unoffical
17 discussion I was involved in."

18 I'm just cutting some of these short. And
19 the statute. I'm looking at Page 18.

20 "The statute areas of critical state concern
21 statute, who had primary responsibility for
22 acting in compliance with that?"

23 Answer: The local governments were the
24 primary actors in terms of their land
25 development decisions and the department of

1 community affairs basically only looked at
2 those development decisions to see if they
3 met the principles for guiding development
4 and exercised its right to appeal those
5 decisions and then the governor and cabinet
6 would kind of be the umbrella group that
7 looked at those appeals if they were taken."

8 "Okay. Did the State of Florida D.C.A.,
9 Department of Community Affairs, ever impose
10 a moratorium on growth in Monroe County?"

11 "Answer: I don't think it had the authority
12 to impose a moratorium," which of course is
13 clear, they don't.

14 And here, this addresses Your Honor's
15 question about testimony. This is in fact the
16 only testimony before Your Honor regarding the
17 intent of the comprehensive plan.

18 "Was the purpose of comprehensive plan" --
19 Page 23 -- "have anything to do with
20 attempting to drive down prices in
21 contemplation of acquiring property for State
22 purposes?"

23 "Absolutely."

24 Then there was a legal objection. Calls for
25 a legal conclusion from the attorney. The witness

1 then said, "Absolutely not. Absolutely not."

2 She goes on to explain. I say, "Explain why
3 you say absolutely not." And it's rather
4 self-evident.

5 "If anything, the purpose of the
6 comprehensive plan and that plan in
7 particular but the later comprehensive plans
8 and it has not always been met as you know,
9 you would like it to have been, but the
10 purpose was to provide a context for decision
11 and to kind of lay out some general
12 guidelines that the County would follow in
13 adopting zoning ordinances and adopting and
14 making development decisions."

15 Not a thing about -- and there's nothing in
16 legislative history, nothing which shows that
17 there was an intention by the Florida legislature
18 in passing the comprehensive plan to ever -- they
19 intended that the counties comply for development
20 purposes, but they never intended, ever, that the
21 comprehensive plan was a statute designed or a
22 regulation designed to drive down prices in
23 contemplation of condemnation.

24 And now we get to the Tallahassee Bank case,
25 because that's the crux of the defendant's case is

1 Tallahassee Bank.

2 Oh, let me just briefly go over the rest of
3 their evidence. We have a letter in 1986 from
4 Gissendanner to the Board of County Commissioners.
5 Says that once the property is on the acquisition
6 list, rezoning may affect our decision to continue
7 the acquisitions. These are voluntary
8 acquisitions again.

9 There was never anything talking about the
10 CARL project being in somehow enacted in concert
11 with the comprehensive plan as some sort of a
12 grand stage scheme to 20 or 30 years later acquire
13 properties --

14 Habitat Conservation Plan likewise is an
15 environmental act. It's an environmental plan
16 that was not passed. In October 8, 1986, when
17 they talked about the Habitat Conservation Plan
18 they, this is a letter from Don Duden, DNR, to an
19 attorney's office in Chicago, not to the Board of
20 County Commissioners. Maybe they got it, maybe
21 they didn't. There's no evidence that they were
22 ever influenced by this letter.

23 What it says is, "Thanks for the opportunity
24 to review the HCP. The plan is inconsistent
25 with our plans to protect North Key Largo's

1 environment."

2 Item Number 2, "It may possibly increase the
3 costs of our acquisition."

4 But note that these acquisitions again were
5 the voluntary acquisitions of the CARL program.
6 There was never any talk about increasing the
7 price of an involuntary acquisition of this
8 property 20 years later. And I'm sure without
9 having looked at it, that the legislature had
10 never considered this particular property nor
11 North Key Largo, nor even Monroe County. And
12 specifically when they were passing the
13 comprehensive plan, vis-a-vis, taking property on
14 the cheap in 20 or 30 years. It just didn't
15 occur.

16 Letter, October 27, 1987, from DNR's looks
17 like Gardner to Board of County Commission.
18 Again, they want to be informed of the highest and
19 best use changes for voluntary acquisition for
20 CARL purposes.

21 A memo in 1986 was cited. They said that
22 highly developed property costs more for a
23 voluntary acquisition, so we can't acquire it
24 unless the owner voluntarily agrees to sell it to
25 us at either a lower price or some other

1 arrangement is made. That's what the 1986 memo
2 says.

3 Again, May 20th of 1986, where the memorandum
4 which was, which was proposed to have some
5 relation of this case, says that where you have,
6 where we have our government's action enhancing
7 the price, the owner needs to be told about it and
8 needs to consider, this needs to be considered in
9 light of our budgetary actions, whether it's going
10 to fit into our budget for voluntary acquisition.
11 '86.

12 Once again, no pressure on the BOCC of Monroe
13 County. No pressure on the owners to sell
14 involuntarily. No mention or intent of a 20-plus
15 year or later condemnation of this defendant's
16 property.

17 1990, May 16th memorandum, impact of the
18 Monroe County's land development. This is a
19 memorandum internally with land acquisition of
20 DNR, which says that we should be aware of any
21 impact, of any ordinances or approvals that Monroe
22 County makes on these properties because we want
23 to be able to continue our voluntary acquisitions.
24 If it's going to cost a lot more, we may not be
25 able to buy it. That's what that memorandum says.

1 Once again, nothing about raising -- or
2 lowering rather, the highest and best use of any
3 property anywhere, and specifically not the
4 defendant's property.

5 THE COURT: The fact that all the property in
6 North Key Largo was devalued is really the
7 County's fault?

8 MR. LEHRMAN: The rolling -- well, no, not
9 necessarily. And I'm going to -- and here's part
10 of the issue. Is that there may have been
11 devalued at a certain point in time which the
12 appraisers need to develop, neither of which have
13 developed, that after a certain period of time,
14 not having anything to do with land development
15 regulations or moratoria that were passed by
16 Monroe County, but that once 90 percent, if in
17 fact this turns out to be true, if 90 percent of
18 the property in North Key Largo in fact was owned
19 by the State of Florida, that would indicate to me
20 the possibility -- in fact probably the
21 probability, but I'm no appraiser -- of an
22 abnormal market.

23 If that occurs, if in fact there is an
24 abnormal market, certainly the appraisers would
25 have to go outside of the taking area and perhaps

1 outside of time in the taking area. But certainly
2 geographically in order to find comparable
3 properties and comparable sales that were not
4 affected by an abnormal market.

5 So that may be, you know, something the
6 appraisers need to do. It hasn't really been
7 addressed here. What we're talking about is
8 imposing some sort of a view upon both appraisers
9 in the case regarding the impact of the
10 moratorium, not the impact of the State's
11 acquisition of properties.

12 So while I would tend to agree, and I say
13 this partially talking through my hat in a way
14 because I'm not an appraiser, but I would think if
15 there's an abnormal market due to the fact that
16 the State owns 90 percent of the property in that
17 area, that the appraisers would be advised to go
18 look elsewhere for their comparables. That, of
19 course an appraiser who would go within an area
20 where 90 percent of the sales were with the State
21 and tries to make those comparable sales, I think
22 would do that at his peril. The jury, unless you
23 have some convincing argument, the jury isn't
24 going to really believe him.

25 THE COURT: Right.

1 MR. LEHRMAN: So that's the distinction,
2 though, is that we're talking about apples and
3 oranges. One is, yeah, whether these moratoria can
4 be imputed to the State of Florida, and the other
5 is whether or not there's an abnormal market due
6 to the state's ownership.

7 Let me go -- the rest of these letters
8 similarly. I'm not going to go through each one.
9 But not a single one talks about pressuring the
10 State or intent of the State to pressure, I'm
11 sorry, Monroe County into doing anything
12 specifically to lower properties. If in fact
13 there was pressure on Monroe County -- and this
14 answers your question directly, Judge -- if in
15 fact there was pressure on Monroe County, it was
16 pressured to comply with the comprehensive plan.
17 But not specifically for takings because
18 comprehensive plan is not a takings statute. But
19 to comply with it for environmental protection.

20 Now here's where we get to the Tallahassee
21 Bank case. Does Your Honor have a copy of that?

22 THE COURT: Yes.

23 MR. LEHRMAN: Okay. This is the most
24 important case to this, to this argument, both for
25 the defendants and for us. Tallahassee Bank

1 requires that for condemnation blight to occur
2 there has to be an intent on the part of the
3 condemning authority to take the property at a
4 depressed value. And as a matter of fact, what
5 Tallahassee Bank says specifically, their words
6 are, quote, prime objective, end quote, of the
7 city ordinances was to lower the value for
8 subsequent takings. You have to remember what was
9 going on. This wasn't just one property.
10 Tallhassee Bank was five, but there were many
11 other properties involved as well.

12 Tallahassee wanted to -- well, they wanted to
13 keep the capitol in Tallahassee. And they wanted
14 to build an area, a capitol complex area with lots
15 of state buildings in it in order to maintain
16 Tallahassee's preeminence as the seat of
17 government. City of Tallahassee had no problem
18 with that proposition, and in fact they jointly
19 employed a land planner named Mr. Skinner. And he
20 went, he used, he proposed zoning regulations to
21 the City of Tallahassee. He worked for both of
22 them which the court found to be the measures
23 themselves were, quote, arbitrary, capricious,
24 unreasonable and confiscatory.

25 Now, I don't believe that those words can be

1 applied to the comprehensive plan which the State
2 of Florida's supreme court has already approved as
3 not being arbitrary, capricious, unreasonable nor
4 confiscatory. But besides that, in that case both
5 sides were allowed to plead their version of what
6 the appraisals were to the jury, just like in
7 Armadillo. Mr. Taylor, not Mr. Skinner. His
8 name's Taylor. He worked for both of them and he
9 was a planner for the capitol center authority as
10 well, so there was clear -- the same guy making
11 the decisions for the City, for the County, for
12 the capitol center. Same guy, Taylor.

13 And what the court says is that the
14 ordinance, this confiscatory, arbitrary,
15 capricious and unreasonable ordinance was
16 specifically targeted, quote, primary design, end
17 quote, was to bring down property values so the
18 State could take them at a lower price. And the
19 court called that evidence unequivocal.

20 Two things, ordinance has to be arbitrary,
21 capricious, unreasonable and confiscatory; the
22 second thing it has to do is have the specific
23 intent, the primary design to bring down property
24 values so the State can take them at a lower
25 price.

1 There is no evidence presented in this case
2 that Monroe County ceased to be a sovereign
3 authority with independent authority over its
4 decisions. It has been shown that the County was
5 required through state arm twisting -- in the best
6 light of the defendants -- that the State twisted
7 Monroe County's arm, applied pressure to Monroe
8 County to comply with the comprehensive plan. And
9 if Monroe County felt that the comprehensive plan
10 was unlawful, capricious, arbitrary, and
11 confiscatory, they could have taken that issue
12 before the courts, but they did not. The County
13 felt that it had to comply with the state law,
14 which was the comprehensive plan which was not
15 specifically designed or targeted to lower prices
16 in North Key Largo. It was not according to Nancy
17 Linnan and certainly the inference from all the
18 evidence is that it is not specifically
19 targeted --

20 THE COURT: I agree that the CARL program was
21 not intended as a condemnation. I understand
22 that.

23 MR. LEHRMAN: Okay. Comprehensive plan is
24 what I'm talking about.

25 THE COURT: All right.

1 MR. LEHRMAN: All right. Now, we have two
2 cases here. We have the Galleon Bay case, which
3 is before Your Honor as being judicially noticed,
4 circuit court case. In that case the State of
5 Florida was a party along with Monroe County. But
6 if you take a look at what the liability was --
7 well, these arguments were made there. But this
8 was a takings case, not a blight case. But Monroe
9 County was found to be the actor, the, quote, bad,
10 unquote, actor in the case. And Monroe County was
11 found liable for a taking. Not the State, even
12 though the State was a party. Take a look at the
13 findings in the case, it was Monroe County. So
14 it's already been decided in this case county.

15 So if the Court is so inclined to be
16 influenced --

17 MR. MATTSON: Your Honor, I object to his
18 characterization of my case, the Galleon Bay case.
19 First of all, --

20 MR. LEHRMAN: Excuse me, Your Honor.

21 MR. MATTSON: The case is on appeal.

22 THE COURT: Wait. Mr. Mattson, what is your
23 legal objection to this argument?

24 MR. MATTSON: It has nothing to do with this
25 case. It's not -- it's a regulatory taking case.

1 THE COURT: You can address that. I'll give
2 you a chance to rebut, but this is argument.

3 MR. LEHRMAN: Your Honor, I may be mistaken,
4 but I believe that Mr. Mattson -- and I may be
5 mistaken -- requested that the Court take judicial
6 notice of Galleon.

7 So that certainly was one issue. That was
8 the final judgment was that Monroe County was
9 liable party, not the State of Florida, even
10 though they were both there.

11 And I stated before, this is not a takings
12 case. If it were, that issue ran a long time ago.
13 It's not an issue where the date of taking can be
14 moved because by statute it has to stay where it
15 is. And we have a stipulated O.T. as to the date
16 of taking. And I don't believe the tenants are
17 arguing that either.

18 What we're talking about is whether or not
19 the State should have to -- or whether the
20 defendants can present evidence that this property
21 could have, would have, might have been developed
22 without any sort of restrictions other than those
23 that were on it which were very minimal prior to
24 1982, or up to 1982.

25 So what we have here is in fact just a

1 question of blight, not a question of takings.
2 The Shaddock case, which also -- and I may be
3 wrong on this too, but again, it's argument, and
4 the best of my recollection Mr. Mattson also
5 requested that this case, the Shaddock case be
6 judicially noticed as well. And that again was
7 against Monroe County and not the State. So...

8 If any governmental agency devalued this
9 property, it was in fact Monroe County. Monroe
10 County may have been forced to obey the
11 comprehensive plan and to go along with it, but
12 Monroe County is the county -- is the actor in
13 this case. If in fact there is anything which has
14 devalued the property, it would be Monroe County.
15 What the State did was require them to comply with
16 a valid nonarbitrary, noncapricious,
17 nonconfiscatory state law.

18 THE COURT: The problem is is that it's like
19 the Godfather coming up to you saying I need you
20 to do me a favor.

21 MR. LEHRMAN: Right. It is.

22 THE COURT: And how do you say no to the
23 Godfather?

24 MR. LEHRMAN: Okay. Well, I don't
25 necessarily -- I take back my it is. It's not

1 necessarily, you know, it's Luca Brasi's going to
2 come and, you know, sign the, you know, sign the
3 document and either your signature or your brains
4 will be on the paper. It's not, it's not like
5 that.

6 What it really is is it's a question for the
7 legislature is what it comes down to. If Monroe
8 County had not, you know, didn't like what the
9 legislature was doing, they had options.

10 THE COURT: They didn't buckle.

11 MR. LEHRMAN: Well, that may be one way of
12 saying it. They didn't buckle. They went down
13 kicking and screaming. But it's the legislature
14 that said we're going to have laws that govern in
15 a uniform way the development of the state of
16 Florida and we're going to take into account
17 environmental concerns and we're going to take
18 into account now where the schools are and we're
19 going to take into account police and fire
20 protection, we're going to take into account who's
21 going to build and maintain the roads, how are
22 people going to get to and from. All these things
23 need to be taken into account in the comprehensive
24 plan. That's what was passed way back in 1987.
25 County by county, some counties had to be dragged

1 kicking and screaming into it. Some of them
2 thought it was a great idea. But I don't know of
3 any that did offhand.

4 But the fact of the matter is that the
5 comprehensive plan that Monroe County, you know,
6 didn't buckle under, and I'm not saying that that
7 was a good or a bad thing, but they were forced by
8 the State of Florida to comply with the
9 comprehensive plan which had nowhere in its plan
10 an intent or a design or the other language from
11 Tallahassee Bank an intent, a design, an objective
12 of reducing prices for the purposes of
13 condemnation. Many things will reduce prices of
14 property which are beyond the control of the
15 owner. And a lot of them had to do with
16 regulation of land and a lot of them have to do
17 with simple market forces. Perhaps regulation of
18 interest rates by the federal government has an
19 awful lot to do with it. There's a lot of things
20 happening with market forces which are beyond the
21 control of the owner which make the real estate
22 more valuable or less valuable. This again is
23 something which causes the real estate to be more
24 valuable or less valuable, just like anything
25 else, any other market force. Just because the

1 owner wishes that this had not occurred and they
2 can have more money for the property and could
3 have developed it in 1982 and did some beautiful
4 marina and mixed use development, that doesn't
5 make it so. And it certainly doesn't -- there's
6 never been a case before, and I hope not this one
7 either, but there's never been a case where a
8 valid exercise of state law where a county has
9 been forced to comply with the valid exercise of
10 state law has been considered to be blight. May
11 have been a taking. Maybe it was a taking. I'm
12 not saying it was or it wasn't. Actually I am
13 saying it probably wasn't. But the courts in
14 Monroe County don't agree with me on that. We
15 have the Shaddock case. We have the Galleon Bay
16 case. They both say it was a taking. Yeah, okay,
17 so maybe these regulations rose to the point where
18 it was a taking. But was it blight? That's a
19 totally different issue. Can't blend them.
20 Blight requires a specific objective, an arbitrary
21 -- I don't want to get into it over and over
22 again, but that's the Tallahassee Bank
23 requirements are not met.

24 So here's what we have. We have no inverse
25 claim. We have a request that the jury or that

1 the, that our appraisers as well as their
2 appraiser be allowed to speculate impermissibly
3 under the Yoder case as to what may or may not
4 have been done with the property. In other words,
5 say this could have been improved on here, you
6 know, this could have been done here, this could
7 have been done here, and make the property more
8 valuable and then say well now it's been taken.

9 THE COURT: Well let me --

10 MR. MATTSON: That's not our position.

11 THE COURT: Let me ask you a couple
12 questions, and I don't know which way I'm going to
13 go with this. But let's assume I find blight and
14 I'm looking at the Yoder case.

15 MR. LEHRMAN: Yes, sir.

16 THE COURT: And I agree with you that, again,
17 thinking logistically how do you possibly have
18 this testimony presented to a jury?

19 MR. LEHRMAN: Okay.

20 THE COURT: And I understand the language as
21 to speculation and there it is. If I found a
22 valuation, start valuing the property in 1982,
23 that would open a whole can of worms as to
24 speculation as to what's going to happen with the
25 property.

1 MR. LEHRMAN: Right.

2 THE COURT: But at the same time if I use the
3 State's recommendation, that's also in my eyes is
4 an injustice because frankly the State was very
5 heavily involved in pressuring the County so that
6 they could acquire property at a suppressed value.

7 MR. LEHRMAN: Okay.

8 THE COURT: My problem is where, you know,
9 where do I kind of draw the boundaries?

10 MR. LEHRMAN: Practical advice, in other
11 words?

12 THE COURT: Yes.

13 MR. LEHRMAN: Okay. Practical advice from an
14 attorney, not a judge, who is a partisan in the
15 case. Here it comes. And this of course is
16 assuming that Your Honor is not totally buying my
17 argument that they should not be permitted to
18 testify at all as to a value other than the date
19 of taking in this case.

20 THE COURT: Correct. Let's assume that.

21 MR. LEHRMAN: Okay. Assuming that, you have
22 Yoder but you also have Armadillo. I think that,
23 my practical advice would be to direct the parties
24 to go back and produce what they would -- I'm
25 putting myself in your chair perhaps presumably --

1 telling the parties to go back and produce their
2 appraiser appraisals under Armadillo. In other
3 words, without restriction, and going towards
4 weight instead of admissibility.

5 THE COURT: And let the jury determine the
6 weight.

7 MR. LEHRMAN: Well, now wait. There's still
8 a step. If the defendants come back in and have a
9 1982 appraisal that still violates Yoder, or if we
10 have some sort of a wild appraisal that's in outer
11 space which violates speculation as well, Your
12 Honor needs to revisit that issue. But I think
13 for the purposes of this hearing, if Your Honor
14 believes, as you have expressed, that the State
15 has in fact violated or devalued the property in
16 line with the Tallahassee Bank case, then, you
17 know, while I do take exception to that, what I
18 would suggest that the Court do is also follow
19 Armadillo and direct us to come back with our
20 appraisals without foreclosing a motion in limine
21 based on those appraisals or perhaps being
22 speculative or otherwise violative of state law.

23 Thank you, Judge.

24 THE COURT: Mr. Mattson, same question.

25 MR. MATTSON: Well I think there have been a

1 lot of misunderstandings by Mr. Lehrman. And I
2 will explain how I understand this should work,
3 and I think it's pretty straightforward.

4 First of all, the subject of speculation that
5 Mr. Lehrman raised, that is -- there is a part of
6 eminent domain law where appraisers are allowed
7 not to speculate. You know, and Yoder says you
8 can't speculate as to the future. But they can --
9 and we haven't said that we would or we wouldn't
10 -- an appraiser may consider the possibility of an
11 upzoning on unparceled property. Let's -- you
12 have one acre of land in the middle of town and
13 it's a highly developed town, and it's zoned
14 single family residential. They've been around,
15 it's been zoned commercial. So you can -- an
16 appraiser or a planner could testify that there is
17 a better than 50/50 chance that it would, if asked
18 it could be upzoned to commercial. You don't
19 appraise as if it was upzoned to commercial, but
20 the appraiser can then take into consideration of
21 what a willing buyer would pay based on the
22 probability that it could be upzoned. So that's
23 not speculation. It's based on actual testimony
24 as to what has happened to surrounding properties
25 and what would likely happen if you applied for an

1 upzoning. And you don't appraise it for single
2 family homes and then also appraise it for, you
3 know, a giant 700-condo building. You say, Well,
4 if it could have been upzoned it could be a giant
5 condo building, here's what that raw land would
6 have been worth. So I want to take that issue of
7 speculation out of the picture.

8 What would actually be done, and I note that
9 contrary to counsel's statement, in Tallahassee
10 Bank the trial judge ordered both sides to
11 disregard the current zoning. You didn't have one
12 appraiser saying residential and one appraiser
13 saying commercial. And that's why we're here.
14 Because if you present something like that to a
15 jury, you're asking for a quotient verdict. We
16 got a quotient verdict in Galleon Bay. I didn't
17 ask you to take judicial notice. But we appraised
18 it as if it could be used for single family homes,
19 which is what Judge Payne found was its highest
20 and best use, and which was the law in the case.
21 And the County put on an appraiser who appraised
22 it as trap storage. The jury took the two
23 numbers, added them up and divided by two. And
24 the judge threw out the verdict and granted a new
25 trial without their appraiser. Because basically

1 in a motion in limine we tried to kick him out and
2 he didn't get kicked out. So now when it goes
3 back to the new trial, we're going to go to trial
4 with one appraiser, our appraiser. You don't put
5 like two widely divergent highest and best uses
6 before the jury.

7 So this, the jury, there's no way the jury
8 can handle the question of the pressure and the
9 this and the that. Those are legal questions.
10 The judge answers the legal questions, the jury
11 just picks a number. So we would, what we would
12 do is both appraisers would be instructed to use
13 the regulations in effect as of a particular day.
14 I don't know what that day is, but it's sometime
15 in 1982. And it would be a day before the
16 moratoria started.

17 Because North Key Largo's been under
18 moratorium since that day. It's in front of that
19 moratorium today. And you would apply those
20 regulations to the property when it was purchased
21 by the State two years ago. So the date of taking
22 remains the same, but what you're doing is you're
23 disregarding all the intervening changes in the
24 zoning and the ability to use the property. Andy
25 and I'd like to call that interim markdowns. You

1 can't have 35 interim markdowns on a piece of
2 property and expect that you're going to pay what
3 it was worth on the second to last markdown.
4 Condemnation says you back up until you find where
5 there was no regulatory inhibition on the use of
6 the property. And intent or lack of intent really
7 isn't an issue.

8 In the Piedmont Triad case -- no, not
9 Piedmont Triad case. In the, in the case of North
10 Carolina involving the airport, airport had been
11 under construction for 22 years. Airport wasn't
12 trying to reduce the property values in the
13 vicinity, but the land could only be used for
14 airport uses. And prior to that it could be used
15 for other uses. So again, the judge ordered the
16 appraisers to consider other uses. You don't have
17 to consider it being usable only for airport uses.
18 It's not good just for runways. So it really
19 isn't -- it's not going to be difficult. You
20 simply substitute a previous set of regulations
21 for the 2004 regulations when the property was
22 purchased and then you appraise it by looking at
23 properties that were not hindered by these
24 regulations. You have to go outside of North Key
25 Largo to find comparable sales in whatever that

1 date was in 2004. And that's relatively easy
2 because those sales already exist, they're on the
3 books.

4 THE COURT: 2004 you said?

5 MR. MATTSON: It was in 2004. Yeah, sometime
6 in 2004.

7 THE COURT: Okay.

8 MR. MATTSON: That's even, that's actually
9 even easier than doing, doing a slow take
10 appraisal where, you know, taking doesn't occur
11 until the jury verdict is in and they pay for the
12 property. And there appraisers have to speculate.
13 We're talking about appraisers using rock-solid
14 data for property with comparable highest and best
15 use, whether it be single family or not.

16 Now this property in '82 was zoned for single
17 family residential, one unit per acre. That's
18 where you're going to start. Let's say it's 20
19 acres. So you're looking at 20 homes. The
20 appraiser has to consider the cost of building the
21 roads, the infrastructure and all that sort of
22 stuff, water, sewer. In 2004. All of it is done
23 as if it's in 2004.

24 THE COURT: Okay. But without the
25 regulations.

1 MR. MATTSON: Correct, without the
2 regulations. But let me -- Mr. Lehrman has some
3 misunderstandings about dates and how things
4 actually came to be. First of all, there was not
5 state comprehensive plan that we were trying to
6 comply with. Second, Chapter 163 comprehensive
7 plans weren't due until about 1988, 1989. Monroe
8 County's wasn't due, Monroe County's 163 comp was
9 due in the early '90s, like '92 or '93. So we
10 weren't trying to fit a state comprehensive plan.
11 From 1982 to 1986 we were trying to create a
12 comprehensive plan under Chapter 380.05, which is
13 the area of critical state concern statute. There
14 only were three areas of critical state concern:
15 us, the Green Swamp, and Apalachicola Bay. And it
16 was called a comp plan back then because nobody
17 really knew what a comp plan was. In fact, the
18 comp plan requirement came into effect as an
19 amendment to Chapter 380 while all of this was
20 going on. And I would just like to read from this
21 one thing from Ken Sorenson's depo on Page 9.

22 He says, "And then '83, September '83 there
23 was another moratorium. October '83 DCA
24 required us officially that the moratorium be
25 demanded and no development of five acres or

1 50 units or more be approved until the
2 completion of now a called for comprehensive
3 land use plan. As I said, the bar started
4 going up again. It was rather frustrating as
5 being a public official because we never knew
6 what the rules were and we were under
7 critical concern. So whatever effect,
8 whatever effect the DCA said became the rule.
9 We were elected officials without the power
10 of elected officials, and I think coercion is
11 not an unfair word that was happening."

12 I want to touch as quickly as I can on some
13 of the other comments that Mr. Lehrman has made.
14 There is no guessing as to possible upzonings.
15 Guessing is out. It's based on what a planner
16 will be able to say would have been likely or not
17 likely in 1982 based on what was going on around
18 him. It's easy enough to go look in the records
19 to go see what happened. The fact that we're
20 going back 25 years to find regulations isn't
21 particularly rare. Dade County versus Steel went
22 back 37 years. The Raleigh-Durham airport case
23 went back 20 to 22 years.

24 Statute of limitations issue, somehow
25 Mr. Lehrman believes that we are trying to

1 substitute condemnation blight for a regulatory
2 taking claim, which is simply not true. His
3 argument about statute of limitations is simply
4 not true. It's simply not correct. He cites no
5 case law to support it, and there isn't any. And
6 the Shaddock case, which we did ask you to take
7 judicial notice of, your own case, is a very good
8 example.

9 Shaddock was a suit for temporary taking.
10 Tempory taking was from '82 to '92 when the
11 property was purchased by the state. Or '91.
12 '91, '92. The temporary taking didn't ripen and
13 the statute of limitations began until it was
14 bought. Because temporary takings, you know,
15 there's no end until either the taking ends or the
16 property is bought. So in this case if we were
17 pursuing a regulatory taking case, our statute of
18 limitations would have started in 2004 when the
19 property was acquired. You can sue for a
20 regulatory taking before the end of the taking.
21 You don't have to wait for it to end if your
22 damages are harder to calculate because you don't
23 know when it's going to end. So we filed a
24 regulatory taking claim in this case as a counter
25 claim. For a simple legal reason: The State filed

1 a slow take. In other words, they didn't come in,
2 put money in the register of the court and sue to
3 take the property. They came in and sued to take
4 the property. They wanted to go to a trial. At
5 the end of the trial they would have 20 days to
6 decide if they wanted to pay that much money.
7 Well we knew from the beginning where we were
8 going with condemnation blight and we didn't want
9 the state to walk away 20 days after the trial and
10 say we ain't buying it. So eventually they start
11 seeing the prices go up from 2000 to 2005. I
12 imagine someone wisely said, We better get that
13 piece of property. So they bought it for
14 \$550,000. Did we come in and complain they hadn't
15 paid enough? No. But we did dismiss our
16 regulatory taking claim and we proceeded to go
17 forward on our condemnation blight issue. We
18 raised it in motion for summary judgement. Not a
19 very, not a very appropriate way to raise it. It
20 does have to be raised as a motion in limine. But
21 this is the kind of thing that you don't give to a
22 twelve-person jury, because they will do what they
23 did in Galleon Bay, they will split the baby.
24 There's no way they're going to figure out who's
25 right. And judges figure out the legal issues.

1 This is a legal issue.

2 THE COURT: We've gone way over our time.
3 Does counsel for the State want to give final
4 comments?

5 MR. LEHRMAN: I can do it very quickly,
6 Judge, from here if you wish.

7 It appears that what we've come down to
8 really is a question of weight versus
9 admissibility. The issue that it might be
10 something which is complicated for the jury to
11 come up with and will result in a distasteful
12 verdict for one side or the other certainly is not
13 a reason to disregard the Armadillo case nor the
14 Yoder case. We have a 1982 valuation which is
15 urged by the defendants in this case. It is based
16 on under the Tallahassee Bank case. It has the
17 statutes which require, which had the specific
18 intent of lowering the property values. I believe
19 you are correct that it was the areas of critical
20 state concern. Also a statute of statewide
21 application. Deposition of Nancy Linnan who was
22 in charge of administering this program mentioned
23 not just Monroe County as being, quote, targeted
24 as an area of critical state concern. Some of the
25 counties which she mentioned where it specifically

1 was regulations went into effect, of course
2 statewide application was applied in these
3 following counties: Lake County, Franklin County,
4 Polk County, Monroe County, Okaloosa County,
5 Walton County --

6 MR. MATTSON: Objection, Your Honor. That is
7 absolutely untrue.

8 MR. LEHRMAN: Excuse me.

9 MR. MATTSON: Absolutely untrue.

10 THE COURT: All right. But that's now legal
11 argument.

12 MR. LEHRMAN: All right. This is contained
13 within a deposition. This is Linnan. If I'm
14 incorrect in quoting her, Your Honor, we'll see
15 when you read the deposition. But I believe that
16 that is correct.

17 It's not an arbitrary, confiscatory statute
18 targeting property to take at some 30-year date,
19 25-year date in the future very cheaply. It's a
20 development statute. It's an environmental
21 statute. It has nothing to do with a taking.

22 THE COURT: A shield, not a sword?

23 MR. LEHRMAN: Yes, sir. And if Your Honor --

24 THE COURT: It can be used as a sword.

25 MR. LEHRMAN: In some cases. And if Your

1 Honor does agree this is such a sword case,
2 Armadillo indicates that it's a question of
3 weight, not admissibility. Despite the arguments
4 and protestations of the owner of the property
5 that, Hey, I might get a quotient verdict the way
6 I did in another case. I mean, those things do
7 happen. We can't control always what happens in a
8 jury room. But just because of that we can't say
9 let's take away the issue of weight from the jury.

10 MR. TOBIN: Judge, I'd just like to say one
11 thing, if I can. Mr. Lehrman has consistently
12 misrepresented, and probably unintentionally. He
13 keeps saying valuation date in 1982, or valuation
14 date. We are not seeking a valuation date in '82.
15 The valuation date is 2004. The only thing we're
16 asking the court to do is to right now the
17 property is zoned zero. Can't use it for
18 anything. That's what the zoning code is, zero.
19 It went from one unit per acre in the early '80s
20 to zero in 1996 when the comprehensive plan was
21 adopted. So the only thing we're asking the court
22 to do is to disregard the current zoning. The old
23 zoning was one unit per acre under GU. GU is a
24 holding pattern. Everybody and their brother
25 knows, and we have Miami Herald articles, that all

1 of North Key Largo was getting rezoned.

2 MR. LEHRMAN: Your Honor, those articles are
3 not in evidence.

4 MR. TOBIN: I understand it's not in
5 evidence, but in terms of what the appraisers are
6 going to do is they're going to say, You know
7 something? There was Garden Cove. All these
8 things are getting resale. There was a reasonable
9 likelihood that property zoned GU would be
10 changed. A developer would pay a little bit of a
11 premium for property in this area because he could
12 have gotten the zoning changed. It's a simple
13 calculation. If you follow his advice, we will
14 spend a week or two impeaching his appraiser as to
15 how he uses today's valuation. It becomes a
16 convoluted exercise for the jury to sit there and
17 say which law applies to which appraisal? Because
18 they're going to be so divergent.

19 THE COURT: I understand.

20 MR. TOBIN: Thank you, Judge.

21 THE COURT: How much time do you all need to
22 send me proposed orders?

23 MR. MATTSON: Not much.

24 MR. LEHRMAN: How detailed do you want the
25 order?

1 THE COURT: Detailed.

2 MR. LEHRMAN: Detailed? How many pages?
3 That's the best way.

4 THE COURT: How many pages? Whatever it
5 takes, but detailed so it's clear for purposes of
6 review. And I'd like them either by e-mail or
7 disk so I can make whatever changes.

8 MR. LEHRMAN: We prefer e-mail. Does Your
9 Honor use Word or Word Perfect?

10 THE COURT: Word.

11 MR. LEHRMAN: Good.

12 THE COURT: Fifteen, twenty days?

13 MR. MATTSON: I have a brief due in about
14 twelve days, so I would like a little bit more
15 time.

16 THE COURT: Twenty, twenty-five days?

17 MR. MATTSON: Twenty days is fine.

18 THE COURT: Let's say how about due February
19 20th, which is a Tuesday. You know what? Let's
20 just make it February 23rd, end of the week,
21 that's Friday.

22 MR. LEHRMAN: Okay. Your Honor, may I have
23 your e-mail address?

24 THE COURT: Call my office because I don't
25 know it. She could tell you.

1 We do not or do have a trial date on this
2 case?

3 MR. MATTSON: Do not.

4 MR. LEHRMAN: There is none.

5 MR. MATTSON: Without an appraiser we
6 can't --

7 THE COURT: February 23rd.

8 MR. LEHRMAN: Thank you, Your Honor.

9 MR. MATTSON: Thank you, Judge.

10 (Thereupon the hearing was concluded at
11 1:30 p.m.)

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1 STATE OF FLORIDA
COUNTY OF MONROE

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3 I, TINA M. ROBERGE, Registered Professional
4 Reporter, Florida Professional Reporter, certify that I
5 was authorized to and did stenographically report the
6 foregoing proceedings and that the transcript is a true
7 and complete record of my stenographic notes.

8 Dated this 16th day of March, 2007.

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Tina M. Roberge, RPR, FPR

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