IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D08-2819
Lower Tribunal No. CA-P-95-165 (Garcia, J.)

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

APPELLANT,

vs.

EVERETT G. WEST, et al., and R. FURMAN RICHARDSON AND UNCIA TRADING CORPORATION,

APPELLEES.

APPELLEES' ANSWER BRIEF

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(2) Appellant's minor argument involves a ruling, by the trial court, that it contends denied the State's motion to exclude valuation testimony that uses comparable sales of similar properties, outside of the blighted area, that may be inflated because of a rate-of-development ordinance. 2

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(4) Correspondence between 1982 and 1986, between State agencies and to Monroe County officials, reveal the respective roles of the County and State where the North Key Largo moratoria were concerned. 8

(5) The September 15, 1986 comprehensive plan, partly enacted by AdComm and partly by Monroe County, included a "one-year" North Key Largo development moratorium – with an ending date of October 1, 1987. The 1986 moratorium had not ended as of the date of the condemnation blight order – more than 20 years after its adoption. 11

(6) The trial court considered Mr. Gallaher's and Mr. Craig's expert witness testimony, and that of former County Commissioners Sorensen and Swift, in its condemnation blight order. Mr. Gallaher's testimony and charts demonstrated there was no private market for North Key Largo land after 1986, and that the government was steadily acquiring North Key Largo properties year after year. 13

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B. As a corollary to its mistaken argument that there was a categorical regulatory taking in 1982, Appellant incorrectly argues that Landowners could not establish *condemnation blight* existed, and the subject properties should be valued as of 2004 under the current regulations. 17

C. Appellant argues the parties should not use comparable sales in Monroe County, beyond North Key Largo, as a County rate-of-development ordinance enhances the values of these properties over what it would be without the ordinance. The court allowed the State to present expert testimony on its enhancement theory. Without a trial transcript, there is no record of such evidence, or absence thereof, at trial. 17

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(1) The standard of review is de novo 18

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(1) The standard of review is de novo. 25

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I. STATEMENT OF THE CASE AND OF THE FACTS

A. This is an appeal from two final judgments in eminent domain

This is an appeal from two final judgments awarding just compensation for the condemnation of two parcels of land in Monroe County, Florida

(1) ***The State's major argument is that condemnation blight did not apply because the properties were inversely condemned, by categorical regulatory takings, on September 9, 1982. The State argues the properties should be valued, as they would if the properties had been physically occupied, and the Landowners ousted, on September 9, 1982.***

The major issues in the State's brief take exception to the court's condemnation blight order, holding the properties had been subjected to condemnation blight by a series of ("rolling") development moratoria, starting on February 9, 1982.[1] The order required the parties to value the properties as of the 2004 *de jure* taking dates, without consideration of land use regulations adopted after February 8, 1982. This restriction was later relaxed.

Landowners respond to the first issue by noting that the development moratoria the State contends were *categorical* regulatory takings,[2] are *temporary takings* that do not accrue (or "ripen") until the temporary takings *end*. Landowners rely on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[3] where the Supreme Court held development moratoria are not categorical takings, and that any taking claim arising from a development moratorium must be

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[1] *R-IX: 1444-66*.

[2] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[3] 535 U.S. 302 (2002).

analyzed using the *Penn Central* as-applied criteria.[4] Appellant's inverse condemnation argument was presented to the lower court as a *de-facto* taking argument, and Landowners' answer brief addresses the State's *categorical* regulatory taking and *de-facto* taking theories.

(2) ***Appellant's minor argument involves a ruling, by the trial court, that it contends denied the State's motion to exclude valuation testimony that uses comparable sales of similar properties, outside of the blighted area, that may be inflated because of a rate-of-development ordinance.***

The State calls this its "ROGO motion." There is no indication that the ROGO ordinance is in the record.[5] There are other problems with the State's argument on this point, as most of the argument consists of quotations from deposition transcripts that are no longer part of the Record on Appeal.[6] Appellees argue that, in fact, the lower court *allowed* the State to present such expert testimony as it wished on its alleged "ROGO effect," if it could prove the existence of such an effect. The lower court ruled:

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[4] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[5] *R-X; 1503-21*. Appellant's Statement of the Case and the Facts includes a detailed recitation of the ROGO ordinance, but with no record references. To the best of Appellees' knowledge, the ROGO ordinance is not in the record on appeal.

[6] The initial brief includes 10 pages with quotations from two depositions Appellant inadvertently moved into the record, and were not before the trial court. Appellees' motion to correct the record, removing these transcripts from the ROA, was granted. Supp. Vols. XVII and XVIII (pp. 2206-2526) are no longer part of the ROA, and the following portions of the initial brief should not be considered. Page 35, line 12, through page 39, line four; page 39, last line, through page 41, line 14; and page 42, line 16, through page 43, line six.

> Plaintiff's Motion in Limine and Alternative Motion to Strike Appraisal and Land Planning Report … is DENIED; and subject to the following clarification: Plaintiff's land planner is to approach development of the subject properties from the mind set occurring in 1982. Plaintiff's appraiser will then appraise the subject properties with 2004 valuation dates. Plaintiff's appraisal shall be delivered to Defendants by February 29, 2008. *Plaintiff has the option of hiring an expert to identify the influence the Rate of Growth Ordinance ("ROGO") has on the comparable sales used by Plaintiff's appraiser. Said expert must have a factual basis for his or her opinion*. Said opinion may be submitted as a supplemental report which the court will deal with at a later date.[7]

Appellees argue that the lack of a trial transcript makes it impossible to review this issue beyond the lower court's ruling above, and that one cannot tell whether the State presented evidence that the lower court invited it to do, that would prove ROGO *enhanced* the market value of *developed* properties. Appellees suggest that the effect of ROGO is to *depress* the values of *undeveloped* properties.

B. The Course of Proceedings Below

The State filed this 1995 action as a slow-take.[8] Nine years later, by agreement, it executed quick-takes,[9] obtaining immediate possession of the two properties "without prejudice for Defendants to assert a claim of condemnation blight in the valuation phase."[10] These acquisitions occurred on March 17, 2004 (Parcel 1) and April 21, 2004 (Parcel 7).[11] What remained was the just compensation due the Landowners, that was tried to a jury in May 2008. Both judgments were appealed.

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[7] *R-X: 1651-52*. [Emphasis added].

[8] Ch. 73, Fla. Stat. *R-I: 1-15.*

[9] Ch. 74, Fla. Stat.

[10] *R-V: 768-779.*

[11] *R-IX: 1466.*

Following the quick-takes, Landowners dismissed their regulatory taking counterclaims[12] and moved to establish the existence of condemnation blight.[13] The court granted the motion in limine, finding the State was the driving force behind the series of development moratoria beginning February 9, 1982, and continued until September 15, 1986, and the "one-year" development moratorium on North Key Largo imposed on September 15, 1986 – and continued at least through the date of the court's condemnation blight order – or more than 20 years.[14]

The State filed six motions in limine in November 2007.[15] One of the six – the ROGO motion[16] – is the basis for its minor argument. The State's motions in limine were heard on November 8, 2007[17] and January 18, 2008.[18] The court rendered a written order on February 19, 2008.[19] In its oral ruling and order, the court relaxed the condemnation blight order's restrictions by expressly allowing the State to offer expert testimony on its perceived ROGO effect, as follows.

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[12] *R-V: 831-32.*

[13] *R-VI: 984-86.*

[14] *R-IX: 1444-66*.

[15] *R-X: 1503-39*.

[16] *R-X: 1503-21.*

[17] *R-X: 1605.*

[18] *R-X: 1632, 1633-44* (excerpt of oral ruling)

[19] *R-X: 1651-52*.

A jury trial on compensation was had, and two judgments rendered.[20] Two Notices of Appeal were filed on October 30, 2008.[21]

C. Statement of the Facts

The Florida Keys are part of a chain of islands from Key Biscayne, in Dade County, to the Marquesas Keys, west of Key West, in Monroe County. One of the largest islands in the Keys is Key Largo, located entirely within Monroe County. The parcels of land that are the subject of this appeal are located in a sparsely developed area referred to as North Key Largo. North Key Largo extends ~10.5 miles, from the intersection of US-1 and CR 905, north to the Ocean Reef Club. Parcel 1 has an area of ~27.2 acres; Parcel 7 comprises ~5.8 acres.[22]

(1) *In 1975, the Florida Keys was designated an Area of Critical State Concern, giving the Department of Community Affairs and the Governor and Cabinet the major role in regulating land uses in the Keys.*

Section 380.05, Fla. Stat., provides authority for the designation of Areas of Critical State Concern (ACSC).[23] On March 3, 1975, the Division of State Planning (now Department of Community Affairs, DCA) recommended to the Administration Commission (AdComm, made up of the Governor and Cabinet), that the

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[20] *R-XIII: 2177-82* (Richardson and UNCIA) and *R-XIII: 2183-88* (West, *et al.*).

[21] *R-XIII: 2191-98*. Two appeals were docketed by the District Court. However, Appellant treated the two appeals as if they were consolidated. Technically, they should be, but Appellant has not sought a consolidation order.

[22] *R-IX: 1446.* These statements of fact are from the Findings of Fact in the condemnation blight order. *R-IX: 1444-66*. The order is in the appendix.

[23] *R-IX: 1446*.

Florida Keys be made an ACSC. On April 25, 1975, AdComm designated the Florida Keys an ACSC.[24] The most significant aspect of an ACSC designation is the transfer of legislative power over land use from local government to the State.[25]

(2) *In 1975, Monroe County adopted a "Major Development Project Ordinance" that encompassed every subdivision or parcel "of land and/or water" of five acres or more. This included both properties in this appeal.*

After the 1975 ACSC designation, Monroe County adopted Ordinance No. 21-1975, a Major Development Project Ordinance. The ordinance defined a Major Development as any development involving a subdivision or a parcel that had "five acres or more of land and/or water." Both parcels in this case exceeded the threshold. The Major Development Project Ordinance remained in effect until September 15, 1986, when the County's 1986 Comprehensive Plan became effective.[26]

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[24] In *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), the supreme court reversed the ACSC designation. Eight months later, the Legislature re-established the Florida Keys ACSC by statute, as of July 1, 1979. *R-IX: 1446*.

[25] *See, e.g.* § 380.05(6) (DCA shall approve or reject local government land development regulations, and amendments thereto, before they are effective); § 380.05(8) (if a local government's land development regulations "do not comply with the principles for guiding development," DCA can submit proposed regulations to AdComm, that may reject, accept, or modify said regulations and adopt new or revised local land development regulations by rule); § 380.05(16) ("no person shall undertake any development within any area of critical state concern except in accordance with this chapter").

[26] *R-IX: 1446-47*, citing Landowners' request for judicial notice, *R-V: 842-887.*

(3) *From February 9, 1982, through September 14, 1986, the County adopted 14 moratoria that prohibited all development on the subject properties.*

Beginning February 9, 1982, Monroe County adopted two resolutions, five ad-hoc extensions, and seven ordinances that prevented Major Development applications from being accepted or processed, until September 15, 1986 – except for a five-day gap in 1982 and a 48-day gap in 1983 – as shown in the Table below.[27]

Pre-9/15/86 Major Development Moratoria				
Action	**Enacted**	**Effective Date**	**Duration, Days**	**Ending Date**
Resolution 065-1982	Feb. 9, 1982	Feb. 9, 1982	90	May 10, 1982
GAP		May 11, 1982	5	May 16, 1982
BOCC Minutes	May 17, 1982	May 17, 1982	55	July 11, 1982
BOCC Minutes	July 12, 1982	July 12, 1982	90	Oct. 10, 1982
BOCC Minutes	Oct. 4, 1982	Oct. 11, 1982	30	Nov. 10, 1982
BOCC Minutes	Nov. 1, 1982	Nov. 11, 1982	30	Dec. 11, 1982
BOCC Minutes	Dec. 13, 1982	Dec. 13, 1982	182	June 13, 1983
Ordinance 015-1983	June 10, 1983	June 14, 1983	109	October 1, 1983
GAP		Oct. 1, 1983	48	Nov. 18, 1983
Ordinance 025-1983	Oct. 28, 1983	Nov. 18, 1983	366	Nov. 18, 1984
Ordinance 015-1984	April 30, 1984	May 3, 1984	178	Oct. 28, 1984
Ordinance 029-1984	Oct. 19, 1984	Oct. 28, 1984	184	April 30, 1985
Ordinance 009-1985	April 17, 1985	April 30, 1985	184	Oct. 31, 1985
Ordinance 033-1985	Oct. 18, 1985	Oct. 30, 1985	182	April 30, 1986
Ordinance 008-1986	April 18, 1986	April 30, 1986	76	July 15, 1986
Resolution 078-1986	March 7, 1986	July 16, 1986	61	Sept. 15, 1986
Total Length of MDM (Months)		**Feb. 9, 1982**	**55.2 Months**	**Sept. 15, 1986**

[27] *R-V: 1447*, citing Landowners' second request for judicial notice*, R-V: 888-983*.

There were 14 legislative acts over 4-½ years, establishing three distinct moratoria; a three month moratorium followed by a 5-day gap, another of 16.3 months followed by a 48-day gap, and a third of 40.4 months followed by the State/County 1986 comprehensive plan. That plan included a one-year development moratorium that applied only to North Key Largo, plus a second year in which construction was prohibited in order to give the State time to purchase the property.

(4) *Correspondence between 1982 and 1986, between State agencies and to Monroe County officials, reveal the respective roles of the County and State where the North Key Largo moratoria were concerned.*

On October 25, 1982, a proposal was developed by the Florida Department of Natural Resources ("DNR") and DCA to designate North Key Largo for State acquisition under the Conservation and Recreation Lands (CARL) program. A proposal was submitted to the CARL Selection Committee, that stated:[28]

> In an attempt to secure an optimal portion of the remaining hammock on North Key Largo, staff from the Bureau of Land and Water Management (DCA), and this office have developed the following C.A.R.L. acquisition project proposal.[29]

On February 1, 1983, DCA appeared before the AdComm, asking AdComm to delegate DCA, rather than Monroe County, to prepare land development regulations and a zoning map for the Florida Keys, and for approval to file a lawsuit

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[28] *R-IX:1447-48.*

[29] Exh. 6, p. 6. *R-IX: 1314, 1448*. Exh. 6 is a 27-document compilation of admitted state government communications, accepted in evidence by the court at its January 31, 2007, hearing on Landowners' motion in limine. This compilation, identified in the ROA only as a "Notice of Filing," is at *R-IX: 1312-1438.*

against the County so that the State could use the Circuit Court's contempt power to force the County Commission to "cooperate" with the State.[30]

On March 26, 1984, K. P. Howell, Chief, DNR Bureau of Appraisal, wrote his supervisors regarding moratoria imposed on water and electric service hookups on North Key Largo:[31]

> In my opinion, the water and electrical hookup prohibitions are, in essence, a taking of the property without compensation; and, in my opinion and in the opinion of several others both in … County government as well as in this Bureau …, *if the facts were presented to a judicial hearing, the court would rule in favor of the property owners*.[32]

On April 16, 1984, the DNR Executive Director wrote the chair of the County Commission, stating the State did not want the County approving development activities in CARL areas that would increase the State's acquisition costs:[33]

> Actions of special concern include such issues as annexation, extension of services (water, sewer, etc.), change in zoning, developments of regional impact, and any other proposed change which is likely to preclude public use or *increase the potential cost to the state*.[34]

On September 4, 1984, the Governor issued Executive Order 84-157, creating the North Key Largo Habitat Conservation Plan ("HCP") Study Committee, with "participating members" including DNR, DCA, Monroe County, and other state agencies, "interest groups" including various citizens and environmental

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[30] *R-IX: 1448.*

[31] *Id.*

[32] *R-IX: 1322-33; 1448*. [Emphasis added.]

[33] *R-IX: 1448.*

[34] *R-IX: 1334; 1448*. [Emphasis added.]

groups, and federal agency "observers." Though the Executive Order states the HCP is to be the product of an agreement between the "participating parties and interests," the Governor appointed all of the representatives of the "participating parties and interests," with the exception of Federal agency observers.[35]

By August 16, 1985, the HCP Study Committee circulated a draft HCP that included both Parcel 1 and 7 – the subjects of this eminent domain proceeding – within the North Key Largo CARL acquisition area.[36]

On February 14, 1986, the DNR Executive Director again wrote the County Commission, stating the North Key Largo Hammocks Addition had been placed on the CARL list in July 1985, and expressing his concerns with development approvals increasing the State's acquisition costs.[37]

> Once a project is placed on the acquisition list, decisions made by local governmental authorities, such as rezoning, annexation, extension of water/sewer services, etc., may have an effect upon the Trustees' continued interest in acquiring the property. In that regard, staff has been directed by the Trustees as follows:
>
> > "If by government action subsequent to the time a parcel is placed on a State acquisition list, a project is given an enhanced highest and best use which would result in a governmentally derived higher value, *the staff will terminate further acquisition activities unless the owner agrees that the appraisal will be done at the highest and best use [at the] time the project was placed on the acquisition list*."[38]

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[35] *R-IX: 1446*, Exh. 7, *R-IV: 519-21*.[Emphasis added.]

[36] *R-IX: 1449.*

[37] *Id.*

[38] *R-IX: 1347-51, R-IX: 1449*. [Emphasis added.]

(5) ***The September 15, 1986 comprehensive plan, partly enacted by AdComm and partly by Monroe County, included a "one-year" North Key Largo development moratorium – with an ending date of October 1, 1987. The 1986 moratorium had not ended as of the date of the condemnation blight order – more than 20 years after its adoption.***

In its condemnation blight order, the trial court stated:[39]

> The September 15, 1986, LDRs included a one-year moratorium on all development on North Key Largo, *plus* a second year of no development to enable the state to buy the privately owned lands on North Key Largo. The end of the North Key Largo moratorium was contingent upon the County's adoption – *and DCA's approval* – of the HCP that was to have been produced by the Governor's "study committee." The HCP was never approved, and the North Key Largo moratorium is still in effect today – more than 20 years after it went into effect.

On October 8, 1986 – three weeks after the Governor's HCP was to be completed – DNR's Assistant Executive Director wrote to the attorney drafting the HCP Committee's proposals, with objections to the latest draft,[40] expressing the State's concern over proposals to complete construction of electrical and water utilities on North Key Largo – and their effect on acquisition costs.

> … the resulting plan remains inconsistent with this Department's ongoing programs which serve to protect the natural environment of Key Largo. The following broad issues, most of which were stated in our July 21, 1986, letter, continue to be problematic.
>
> > 1. *Destruction of critically imperiled natural communities and endangered species located within an approved CARL acquisition project.* Since these are the primary environmental resource values which serve as the basis for the [North Key Largo] Hammocks land acquisition project, we would be in possible conflict with the intent of the Land Acquisition Selection Committee and Governor and Cabinet, if we simultaneously pursued acquisition and development within this area.

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[39] *R-IX: 1451.*

[40] *R-IX: 1449.*

> 2. *Possible increase in the cost for acquisition of an approved CARL acquisition project. The allocation of additional development rights in accordance with the HCP could increase cost to the State.* Additionally, the HCP recommendation that the Florida Keys Aqueduct Authority and Florida Keys Electric Cooperative rescind moratoria on services to areas of critical habitat, within CARL project boundaries, *could be expected to inflate property values, and cost to the State*.[41]

On June 6, 1990, Percy Mallison, Director, DNR Division of State Lands, sent the following request to the County Planning Commission.[42]

> *The Department of Natural Resources requests the Monroe County Planning Commission approve native zoning for [North Key Largo], rather than approving the HCP….* [43]

On January 8, 1996, Percy Mallison, Director, DNR Division of State Lands, expressed to the Secretary the "dilemma" DNR was "struggling to overcome" in North Key Largo.[44]

> … *the implementation of development restrictions typically reduces the current fair market value of the land we are trying to buy.* Among the desired outcomes of this whole exercise, of course, is that we should accelerate our acquisition efforts. This outcome is being impeded by reductions in land value.
>
> My staff and I have met on several occasions to discuss the issue and the purpose of this memo is to set out the various alternatives …
>
> 1. Attempt to purchase property at current fair market value – i.e., subject to new development restrictions. …. *Disadvantages*: less willing sellers resulting in a decline in number of purchases; in some cases, *current FMV may be next to nothing*

[41] *R-IX: 1352-54*; *1450.*

[42] *R-IX: 1450.*

[43] *R-IX: 1423, 1450.*

[44] *R-IX: 1450.*

> *which could provide visible evidence that comp plan amounts to a "taking."*
>
> 2. Attempt to purchase property at an amount in excess of the current FMV. …. *Disadvantages*: … could add fuel to the fire of the private property movement. * * *
>
> 4. Seek a judicial determination of value by instituting one or more suits in eminent domain and then attempt to purchase property based on the court's opinion of how value should be determined. …. *Disadvantages*: could create a judicial forum to litigate comp plan issues; would be more expensive; would set a precedent for other CARL projects where disputes may exist on applicability of land use regulations; may be difficult to apply judicial rationale to other property.[45]

(6) ***The trial court considered Mr. Gallaher's and Mr. Craig's expert witness testimony, and that of former County Commissioners Sorensen and Swift, in its condemnation blight order. Mr. Gallaher's testimony and charts demonstrated there was no private market for North Key Largo land after 1986, and that the government was steadily acquiring North Key Largo properties year after year.***

On Landowners' motion in limine, the court heard the testimony of their experts, appraiser Robert Gallaher and planner Donald Craig.[46] Mr. Gallaher used two charts, Exhibits 2 and 3, both reproduced in the Appendix, to support his opinion. Exhibit 2 shows the number of parcels – and acres – of North Key Largo land purchased for conservation purposes annually from 1960-2005.[47] Exhibit 3 shows

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[45] *R-IX: 1428-29*, *1450-51*.

[46] Mr. Gallaher's testimony is in the Record on Appeal, at Vol. XVI, pp. 50-84, and Mr. Craig's testimony is at Vol. XVI, pp. 84-158.

[47] *R-VIII: 1138.*

the number of private sales, and the percentage of North Key Largo land in government/conservation ownership, from 1960 to 2005.[48]

The trial court concluded the State had acquired "almost all of the land in North Key Largo and driven fair market values to zero," holding:

> Mr. Gallaher's testimony was illustrated by two charts. Exhibit 3 shows the number of private sales on NKL from 1960-2005, and compares those sales to the percentage of land area held for conservation purposes. Gallaher's testimony explains that the NKL "fair market," i.e., sales between willing buyers and willing sellers – *ended in 1986 with only three sales* that year. *There have been no private sales of NKL land in the past 21 years*. Mr. Gallaher's Exhibit 2 shows the number of parcels – and acres – of NKL lands purchased for conservation purposes annually from 1960-2005. For example, in 1984, when there were three private sales, there were 186 conservation sales. Mr. Gallaher's testimony shows how private sales of NKL parcels dropped to zero in 1987 – and stayed there – while conservation sales skyrocketed starting in 1983, and were still strong in 1999-2000 with 52 sales each year.
>
> There has not been a private sale on NKL since 1986. The only buyer is the government and perhaps a conservation group or two. Condemnees' Exhibit 3 shows there were *only 12 private sales in the five years 1982-86*. Exhibit 2 shows that there were *448 conservation sales from 1982-86 – 37 times the number of private sales*. For the preceding five years, 1977-81, there were 38 private sales and 30 conservation sales, a ratio of five to four with a 25% advantage to private sales. *The court concludes that the most likely date the fair market ended was when the County adopted the major development moratorium on February 9, 1982*. From then until the *de jure* taking in 2004, condemnees were deprived of all beneficial use of their property. There is no "fair market value" on NKL because sellers can sell only to one buyer.[49]

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[48] Exhibit 3 was admitted into evidence, *R-VIII-1136 (Exhibit List)*, but the clerk cannot locate it. Appellees served an unopposed motion to supplement the record on appeal, that they expect will be granted. To avoid delay, Appellees included a copy of Exhibit 3 in the Appendix to this brief.

[49] *R-IX: 1452-53*. [Emphasis added.]

The trial court also read the transcripts of the depositions of former County Commissioners Kenneth Sorensen, who served on the County Commission from November 2000 to November 2004, and Edwin Swift, who served from November 2002 to November 2006, and made the following factual determination.

> In addition to the live testimony of Mr. Craig, the court reviewed the depositions of Mr. [the word "Sorensen" is missing] and Mr. Swift, who were County Commissioners in 1980-84 and 1982-86, respectively. *The court finds that the State placed a tremendous amount of pressure on the County's elected officials to stop development on NKL*, pressing for the moratorium that began on February 9, 1982, and pushing the County to keep rolling over the major development moratoria until September 15, 1986. *The court finds that the State placed its heavy thumb on the scales of justice, and the County had little control over the fate of North Key Largo after February 8, 1982*.
>
> The September 15, 1986, LDRs included a one-year moratorium on all development on NKL, *plus* a second year of no development to enable the state to buy the privately owned lands on NKL. The end of the NKL moratorium was contingent upon the County's adoption – *and DCA's approval* – of the HCP that was to have been produced by the Governor's "study committee." The HCP was never approved, and the NKL moratorium is still in effect today – more than 20 years after it went into effect.[50] [Emphasis added.]

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[50] Former Monroe County Commissioner Kenneth Sorensen's deposition transcript is in the Record on Appeal at *Supp. Vol. XIX: 2527-72*. Former County Commissioner Edwin Swift's deposition transcript is at *Supp. Vol. XIX: 2573-2609*.

II. SUMMARY OF ARGUMENT

A. The first issue is whether a series of development moratoria, from 1982 to 1986, followed in 1986 by a "one-year" moratorium that never ended, entitled Landowners to a condemnation blight instruction directing the parties to value the properties as of the 2004 *de jure* takings, disregarding land use regulations adopted during the preceding 22 years.

This argument stems from the court's finding that Landowners were *deprived of all beneficial use* of their property since 1982. Appellant argues this language proves a *categorical* regulatory taking[51] occurred in 1982. Appellees' analysis of relevant regulatory taking decisions exposes Appellant's erroneous interpretation of the law. The regulations at issue are *development moratoria* that the Supreme Court has held are *temporary* takings.[52] *Temporary* regulatory takings – even if they deprive a landowner of all beneficial use – are never *categorical* takings. Furthermore, temporary taking claims, whether physical or regulatory, do not accrue (or "ripen") until the temporary taking ends.[53] Finally, courts do not utilize physical taking principles in regulatory taking cases.[54] Appellant's categorical regulatory taking theory is inconsistent with takings law.

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[51] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[52] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 330-32 (2002).

[53] *Creppel v. United States*, 41 F. 3d 627, 633 (Fed. Cir. 1994).

[54] *Tahoe-Sierra, supra*, at 331-32.

B. As a corollary to its mistaken argument that there was a categorical regulatory taking in 1982, Appellant incorrectly argues that Landowners could not establish *condemnation blight* existed, and the subject properties should be valued as of 2004 under the current regulations.

The notion that condemnation blight did not affect Landowners' properties is a legal conclusion that is inconsistent with the lower court's findings of fact, which Appellant does not challenge. Appellees' brief reviews condemnation blight and de-facto takings law, as well as the leading Florida, and some relevant federal, condemnation blight decisions. Given a series of moratoria that go back 22 years, Landowners were entitled to an instruction to the parties that their experts value the subject properties without consideration of the value-reducing regulations.

C. Appellant argues the parties should not use comparable sales in Monroe County, beyond North Key Largo, as a County rate-of-development ordinance enhances the values of these properties over what it would be without the ordinance. The court allowed the State to present expert testimony on its enhancement theory. Without a trial transcript, there is no record of such evidence, or absence thereof, at trial.

Appellees submit it is reasonable to believe that when "less valuable" undeveloped properties receive development approvals their fair market values are likely to rise until matching other similar properties in the South Florida market. Without a trial transcript that would show how the State cross-examined Landowners' expert witnesses, and how the State's witnesses dealt with the State's enhancement theory, Appellees submit there is an insufficient record on which to decide this issue in favor of Appellant.

III. ARGUMENT

A. Notwithstanding the Supreme Court's decision in *Tahoe-Sierra*,[55] the State argues that its precondemnation actions were *categorical* regulatory takings that accrued on February 9, 1982, and that the statute of limitation ran four years later. But development moratoria are *temporary* regulatory takings, and temporary regulatory taking claims accrue when the temporary regulatory taking ends.

(1) *The standard of review is de novo*

This is a question of law and the standard of review is *de novo*. *Wickham v. State*, 998 So. 2d 593, 596 (Fla. 2008).

(2) *Tahoe-Sierra holds that development moratoria are temporary – not categorical – regulatory takings. Temporary regulatory takings accrue – and the statute of limitation begins – when the temporary taking ends.[56] As the temporary regulatory takings ended when the State took title, the statute of limitation on a taking claim began when the State deposited its good-faith estimates in 2004 – not in 1982.*

In this appeal, the lower court concluded its findings of fact in the condemnation blight order,[57] by finding Landowners had been *deprived of all beneficial use* of the properties since February 9, 1982. Appellant seizes on that finding to argue that, *whenever* a landowner is deprived of *all* beneficial use, a categorical regulatory taking must have occurred.[58] This could be problematic if adopted by this Court, as the State's theory would turn every temporary development morato-

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[55] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

[56] *Reed Island-MLC, Inc. v. United States,* 67 Fed. Cl. 27 (Fed. Cl. 2005).

[57] *R-IX: 1444-66*, at 1453.

[58] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992) (A categorical regulatory taking claim accrues the moment the regulation is enacted. The regulation must be permanent, with no variances or avoidances.)

rium into a categorical regulatory taking. It would mean payment of compensation to every owner of undeveloped property in the affected area – whether they had applied for development approval or not. This cannot be – and is not – the law.[59]

(a) Development moratoria are temporary regulatory takings. Temporary regulatory takings, even if they deprive landowners of all beneficial use, are not categorical regulatory takings.

Tahoe-Sierra,[60] rejected landowners' argument that a temporary development moratorium is a *categorical* taking. Justice Stevens held:

> [A] permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, *a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted*.[61]

(b) Temporary taking claims, whether physical or regulatory, do not accrue until the temporary taking ends.

As *Reed Island, supra,* explains: "a temporary taking differs from a permanent taking primarily because a temporary taking is limited in duration or is ac-

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[59] *See, e.g. Gardens Country Club v. Palm Beach County*, 590 So. 2d 488, 491 (Fla. 4th DCA 1991) (County tried to suspend development until it completed a new comprehensive plan, but the District Court held that a comprehensive plan remains in effect until the new one is enacted, while noting the "county could have avoided this controversy *had it enacted a moratorium ordinance* pending its consideration of the comprehensive plan's revision, but it did not do so.)

[60] *Tahoe-Sierra, supra*, at 332-27.

[61] *Tahoe-Sierra, supra,* at 331-32. [Emphasis added.]

knowledged to be readily reversible."[62] *Reed Island* also compares permanent and temporary takings, as follows:

> The two forms of taking are also different for claim accrual purposes. A permanent takings claim accrues when all events which fix the government's liability have occurred, and the plaintiff is aware of their existence. ... By contrast, a temporary takings claim accrues when "the regulatory [or other] process that began it has ended" because, among other things, the property owner "would not know the extent of their damages until the Government completes the 'temporary' taking." ... Only when "'all events' occurred to fix the alleged liability of the Government" would the temporary takings claim accrue. … *see also Independence Park Apartments v. United States* … (citing *Creppel* in holding that "*the end of the temporary taking establishes the date when the statute of limitations begins to run on the takings claim*"). [Citations omitted; emphasis added.][63]

In this appeal, 14 moratoria were adopted between February 9, 1982 and July 16, 1986. Each had a defined ending.[64] The "final" moratorium, effective September 15, 1986, was a "one-year" moratorium that, on its face, would end on October 1, 1987.[65] None of these 15 moratoria were permanent on their face.

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[62] *Reed Island, supra*, n.56, at 33-34. *See, e.g., Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 641-42 (Fed. Cir. 1987).

[63] *See also Enterprises Prod. Co. v. United States*, 133 F.3d 893 (Fed. Cir. 1998) (landowner *may* bring claim before temporary taking has ended), *Independence Park Apartments v. United States*, 61 Fed. Cl. 692, 709 (2004), and *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (claim accrues when *all* events have occurred to fix liability of government).

[64] *See* Major Development Moratoria chart, *supra,* on page 7.

[65] *Id*. at *R-IX: 1462-63*. This moratorium was still in place when the subject properties were acquired by the State in 2004.

(c) Contrary to the State's arguments, had the State not utilized its quick-take authority in 2004 – and dismissed its complaint – Landowners could have proceeded on their regulatory taking counterclaims.

Consistent with the temporary regulatory taking principles above – and contrary to the State's arguments – Landowners could have proceeded with their regulatory taking counterclaims without the slightest difficulty. Assuming the 1986 North Key Largo moratorium had not ended (which it hasn't), Landowners *may* bring temporary regulatory taking claims before a temporary taking ends.[66] Ordinance 25-1983, effective November 18, 1983, was rolled over six times before the September 15, 1986, moratorium became effective – without a break – so that Landowners' temporary taking claims would have started on November 18, 1983, and continued *ad infinitum* until the State/County rescinded the moratorium or acquired Landowners' property.[67]

There are no meaningful Florida decisions on temporary taking damages to guide us, but there are extra-jurisdictional decisions we can turn to. One well-cited example is *Sheerr v. Township of Evesham*,[68] where the court devised a compensa-

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[66] *Enterprises Prod. Co. v. United States, supra,* at n.63.

[67] Landowners would have had to apply for a Beneficial Use Determination from Monroe County, but that is not something the State or County can block.

[68] 445 A.2d 46 (NJ Super. 1982). Appellees' counsel have never figured out how this well-written, single-judge decision was published in a regional reporter, much less cited 24 times. It has been cited by the New Jersey Supreme Court in *Riggs v. Long Beach*, 538 A.2d 808 (N.J. 1988), the Arizona Supreme Court in *Corrigan v. Scottsdale*, 720 P.2d 513 (Ariz. 1986), the Illinois Court of Appeal in *St. Lucas Ass'n v. Chicago*, 571 N.E.2d 865 (Ill. App. Ct. 1st Dist. 1991), the Michigan Supreme Court in *Schwartz v. Flint*, 395 N.W.2d 678 (Mich. 1986), the New Mexico Court of Appeals in *Primetime Hospitality, Inc. v. City of Al-*

tion plan for a parcel that was zoned *Environmental Protection* with no permitted uses. The remedy in *Sheerr* required the township to pay the "option value" of the property on an annual basis; plus interest, legal fees, and taxes for the years it had not paid anything, assuming the arrears were due annually, in advance.[69]

Assuming, for the case before us, that 10% of fair market value per year is a reasonable option value, Landowners could have been awarded a substantial lump sum for arrearages and compounded, market-rate (not statutory) interest since 1983. And should the State not wish to buy, Landowners would have a comfortable annuity going forward. On the other hand, the State could acquire the property by eminent domain, which it did.

(d) Courts do not utilize physical taking principles in regulatory taking cases, and vice-versa.

The State relies on two *physical* taking decisions to support its argument that the "date of taking" was February 9, 1982. In *Basic Energy Corp. v. State Dept. Corrections,*[70] the State built a prison on the property before an appeal reversed the original condemnation. The landowner contested a second condemnation because

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buquerque, 168 P.3d 1087 (N.M. Ct. App. 2007), the Washington Supreme Court in *Sintra, Inc. v. City of Seattle*, 935 P.2d 555 (Wash. 1997), and the Wisconsin Supreme Court in *Town of Rhine v. Bizzell*, 751 N.W.2d 780 (Wis. 2008).

[69] *Id*. at 64. The *Scheerr* court recognized the fact that courts cannot order the legislative body to purchase a parcel of land, they *can* order regular payments of just compensation to "rent" land, *i.e.,* as in a temporary taking situation.

[70] 709 So. 2d 124 (Fla. 1st DCA), *review denied* (Fla. 1998).

it wanted "compensation … for the property as valued with a state prison on it."[71] The State relied on Ch. 73.041, Fla. Stat., stating compensation for a *physical* taking is determined as of the "date of appropriation." The District Court held the "date of appropriation" is the "time when DOC took physical, if not lawful, possession."[72]

Regulatory takings are not treated in the same manner as physical takings. The Supreme Court established this point in *Tahoe-Sierra*:

> [The] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it *inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa*. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims.[73]

The date of appropriation is the date of valuation *only* in *physical* takings, as that is the date the condemnor physically occupies the property and the landowner is ousted, or the right to sell the property is impeded. In this case, until the quick-takes in 2004, the government never occupied the subject properties, and the landowners were not ousted. Though Landowners could not build anything on the property, they could walk on it, launch a boat from it, sell it, and, of course, pay

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[71] *Basic Energy, supra*, at 125.

[72] *Crigger v. Florida Power Corp.*, 469 So. 2d 941 (Fla. 5th DCA 1985), stands for the same proposition.

[73] *Tahoe-Sierra*, *supra* n.3, at 322-24. [Footnotes omitted, emphasis added.]

property taxes. There was no physical occupation, no ouster, and no date of appropriation other than the quick-take in 2004.

(e) The introduction of a Beneficial Use Determination procedure on September 15, 1986, added another step to the ripening of regulatory taking claims.

The County/State comprehensive plan, effective September 15, 1986, included a "one-year" development moratorium on North Key Largo. However, the 1986 plan included an administrative Beneficial Use Determination (BUD) ripening procedure,[74] that has been the subject of several decisions of this Court.[75]

In its initial brief, the State does not take the position that, at some point, the 1986 North Key Largo moratorium must become a permanent regulatory taking. The State's brief makes a point of stating there was no BUD process before September 15, 1986. As this Court's *Collins*, *Bauknight*, and *Clay* opinions hold, since September 15, 1986, even categorical claims do not accrue until a landowner applies for, and receives, a Beneficial Use Determination.[76]

B. Government cannot allow property to depreciate while it dawdles in condemning land slated for public acquisition – and then take advantage of this depreciation when it finally gets around to condemning. The State's actions precluded all development on North Key Largo for more than 20 years, but it did not go so far as to physically occupy the properties before it acquired title from "willing sellers" or in condemnation

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[74] *See Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3d DCA 1992).

[75] *See Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA 2008), *pet. disc. rev. filed* (Fla. 2009); *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008); *Bauknight v. Monroe County*, 994 So. 2d 362 (Fla. 3d DCA 2008); *Clay v. Monroe County*, 849 So. 2d 363 (Fla. 3d DCA 2003).

[76] *Collins, supra*, at 716

proceedings. Its non-possessory actions give rise to condemnation blight, not a "de-facto" taking.

(1) ***The standard of review is de novo.***

This is a question of law and the standard of review is *de novo*. *Wickham v. State*, 998 So. 2d 593, 596 (Fla. 2008).

(2) ***The Constitutional right to just compensation is superior to any state or federal statute, and its decisional history is filled with references to equity and fairness.***

In *United States v. Virginia Electric & Power Co.*,[77] the Supreme Court, quoting a respected eminent domain treatise, said of condemnation blight:

> '[I]t would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned.[78]

The State raised below, and may yet argue, its theory that its precondemnation behavior amounted to a "de-facto taking." Compensation for a de-facto taking is not the same as compensation for condemnation blight. In *City of Buffalo v. J. W. Clement Co.*,[79] one of the leading cases on condemnation blight, the New York Court of Appeals distinguished de-facto takings, which require physical entry and ouster of the landowner, or legal interference with the owner's right to dispose of

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[77] *United States v. Virginia Electric & Power Co*., 365 U.S. 624 (1961).

[78] *Id*. at 636, citing 1 Orgel, VALUATION UNDER EMINENT DOMAIN, § 105, at 447 (2d ed). Today's leading eminent domain treatise, J. L. Sackman, NICHOLS ON EMINENT DOMAIN, 3RD ED., CH. G18, CONDEMNATION BLIGHT, Matthew-Bender, Sept. 2008 Supp., devotes a 46-page chapter to condemnation blight.

[79] 269 N.E. 2d 895 (NY 1971).

the property, from condemnation blight. Condemnation blight is not a taking, but is an evidentiary procedure that assures just compensation to the owner of a property that has depreciated in value as a result of the government's non-possessory acts before the *de-jure* taking.

> [I]t is clear that a *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand, "condemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.[80]

(3) *Condemnation blight in the Florida courts*

The leading condemnation blight cases in Florida are *Tallahassee Bank & Trust Co.*, *State Road Dept. v. Chicone*, and *Dade County v. Still.*

(a) Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co.[81]

In *Tallahassee Bank*, the City accommodated state officials by freezing the zoning of properties the State wanted to acquire for a new Capitol Center.[82] When the State began condemnation proceedings, the landowners alleged the State and City had restricted their properties to residential uses in order to keep the State's acquisition costs down, while surrounding properties were rezoned for commercial

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[80] *Id*. at 903.

[81] 108 So. 2d 74 (Fla. 1st DCA 1958), *writ quashed*, 116 So. 2d 762 (Fla. 1959) .

[82] *Tallahassee Bank*, *supra* n.81, at 78-79.

uses. The trial court agreed and instructed the jurors to value the subject properties under commercial "A" zoning rather than the existing residential "B" zoning.[83] The First District Court of Appeal affirmed the trial court. The supreme court wrote an opinion and quashed the conflict jurisdiction writ.

(b) State Road Department of Florida v. Chicone[84]

Chicone involved the condemnation of improved parcels for a highway project, publicly announced three years earlier. In three years, the properties had been vacated and their values decreased by 20%. Relying on *Virginia Electric*,[85] the supreme court held: "[T]he value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for [the] measure of compensation for the property taken," and that "compensation shall be based on [the] value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken."[86]

(c) Dade County v. Still[87]

In *Still*, Dade County had, in 1938 (39 years before the condemnation petition was filed) established a minimum street width of 70 feet in front of the Still property. In 1951, the minimum width was increased to 100 feet. The supreme court affirmed a condemnation blight instruction, holding:

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[83] *Id.* at 80.

[84] 158 So. 2d 753 (Fla. 1963).

[85] *Virginia Electric*, *supra* n.77.

[86] *Chicone, supra* n.84, at 758.

[87] 377 So. 2d 689 (Fla. 1979).

> The appraisal evidence in the instant case clearly reflects that the ordinance depressed the value of the property. Since the owner received no compensation at the time the ordinance was passed, *the county cannot now seek to have the owner's compensation reduced by reason of its own governmental action*."[88]

(4) *Condemnation blight in the federal courts*

In the 13 years this case was before the trial court, there were four federal, "park-building," decisions on condemnation blight: *Drakes Bay Land Company v. United States*,[89] *Assateague Island Condemnation Cases v. 222 Acres of Land,*[90] *United States v. Certain Lands in Truro*,[91] and *Althaus v. United States*.[92] *Drakes Bay*, *Truro*, and *Althaus* were relied on by the trial court in this case, in its condemnation blight order. *R-IX: 1444-66.* Two days after the State served its Initial Brief in this case, the Eleventh Circuit Court of Appeals filed a decision affirming *United States v. 480 Acres of Land in Dade County*.[93] *480 Acres* involves condemnation blight claims associated with the expansion of Everglades National Park, and is discussed below.

(d) Drakes Bay Land Company v. United States.

In *Drakes Bay*, federal officials (i) successfully pressured the Marin County Board of Supervisors to deny variances that would allow subdivision of Drakes

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[88] *Still*, *supra* n.87, at 690. [Emphasis added.]

[89] 424 F.2d 574 (Ct. Cl. App. Div. 1970), *appeal after remand*, 459 F.2d 504 (Ct. Cl. App. Div. 1972) (Point Reyes National Seashore).

[90] 324 F. Supp. 1170 (DC Md. 1971) (Assateague Island National Seashore).

[91] 476 F. Supp. 1031 (DC Mass. 1979) (Cape Cod National Seashore).

[92] 7 Cl. Ct. 688 (Cl. Ct. 1985) (Voyageurs National Park).

[93] 557 F. 3d 1297 (11th Cir. 2009) (Everglades National Park).

Bay's property, (ii) successfully protested the extension of a public water line to the property, and (iii) purchased the only property that could have provided access to Drakes Bay's ridgeline property. Once the Park Service acquired the only land Drakes Bay could use to access its property, Drakes Bay's land was worthless. The appellate court held:

> [I]t would seem, and we hold, from the language and legislative history, that [the United States] acquired an inchoate interest at once, to be perfected later. Important legal consequences follow when, as here, the Congress flatly declares that it is going to acquire land. *One of these is that subsequent enhancement or diminution in value, resulting from the project itself, is excluded from Constitutional "just compensation."*[94]

(e) Assateague Island Condemnation Cases, Op. No. 3 v. 222 Acres of Land.

Assateague Island is another National Seashore case – where the landowners argued the fair market values of land being condemned for the park should not be based on Assateague Island sales – as the government desired – but rather on off-island sales of properties unaffected by the value-reducing governmental acts on Assateague Island. As the trial court put it:

> [T]he Government relies primarily on sales of lots on Assateague, in the Ocean Beach and South Ocean Beach subdivisions, during the years 1961-1965. The lot owners contend that the number of such sales was not sufficient to provide a fair basis for determining a fair market value for the lots, and that prices during those years were depressed by special and unusual circumstances, including actions taken by the State of Maryland at the instance of the Secretary of the Interior. The lot owners rely primarily on sales in north Ocean City,

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[94] *Drakes Bay, supra* n.89, at 584. [Emphasis added.]

Maryland, and Fenwick, Delaware, which the Government argues are not comparable for a number of reasons.[95]

Assateague Island is in Worcester County, Maryland. The county adopted a moratorium on building permits, and restricted sewage disposal permits, for properties on Assateague Island. These actions were at the urging of the Department of Interior, to slow development until Congress could consider the development of the national seashore.[96] The moratorium and sewage permit processes were struck down by Maryland courts before the United States decided to develop the national seashore and to take land on Assateague Island by eminent domain.[97]

Landowners argued the moratorium on building permits, and the difficulty in obtaining sewage disposal permits, had decreased the value of their land. They argued for the right to introduce evidence of land sales in nearby communities that were not subject to these restrictions.[98] The court agreed, and considered sales in other areas not subjected to those restrictions. Furthermore, the landowners were *not required to show* that the Department of Interior's *sole motive or purpose* in encouraging the restrictions was to depress land value.[99]

The Assateague Island court was not faced with the question of the appropriate standard to set aside a zoning restriction. It only considered whether land

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[95] *Assateague Island, supra* n.90, at 1172.

[96] *Id*. at 1175-76.

[97] *Id*. at 1177.

[98] *Id*. at 1171-72.

[99] *Id*. at 1180-81.

sales under the restrictions could be used as comparables. Furthermore, there was evidence that the Government's primary purpose *was* to depress property values.

> "The Secretary of the Interior asked the State to defer the building of a bridge 'until Congress has had an opportunity to evaluate the legislative proposals that will soon be placed before it to create a National Seashore' because *otherwise the bridge will 'result in a monetary windfall to present property owners' and delaying construction would 'avoid unnecessary inflation and speculation in land values*.'"[100]

(f) *United States v. Certain Lands in Truro*.

Congress created the Cape Cod National Seashore, 16 U.S.C.A. §§ 459b-459b-8, in 1971. Section 459b-3(b)(2) provided that improved property located within the Seashore is not subject to condemnation if the town in which the property is located enacts a "valid zoning bylaw" *approved by the Secretary of the Interior*.[101] In 1962, a federal lawyer handed the Secretary's "suggested" zoning changes to the affected towns, indicating that a minimum three acre zoning provision was likely to be approved by the Secretary and Congress. Indeed, such zoning was demanded and "it is not surprising that the town of Truro unanimously voted at the town meeting to enact a bylaw which changed the zoning within the Truro-Seashore area from 1/2 acre to three acre zoning in February 1963."[102]

In *Truro*, federal officials literally coerced the local governments to re-zone lands within the acquisition area from one house per ½ acre to 1 house per 3 acres,

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[100] *Id*. at 1175, ¶ 28.

[101] *Truro, supra* n.91, at 1032. The Secretary was also directed to submit proposed regulations to Congress and the affected towns specifying standards for the approval of zoning bylaws. 16 U.S.C.A. § 459b-4(a).

[102] *Id.* at 1034.

stating they would condemn all the developed parcels immediately unless the towns made the zoning changes. The towns did so, and the court held:

> [T]he federal government cannot disavow the nexus which exists between its actions and the adoption of the Truro zoning provision. *It is clear both from the statutory language and the evidence presented at the hearing that Congress made an offer which Truro realistically could not refuse*. To characterize the enactment of the three acre zoning provision as the totally free act of the Truro citizenry at town meeting would be to shut ones eyes and ears to what really went on.[103]

The *Truro* court held in favor of the landowners, as follows:

> [A]ny fluctuation in property value which has resulted from the three acre zoning provision is a fluctuation which is attributable to the federal project itself and therefore that *the three acre provision should not be considered in determining the fair market value of the land in question*.[104]

(g) Althaus v. United States

In 1971, Congress authorized the establishment of Voyageurs National Park in northern Minnesota. In 1975, the National Park was formally established and the National Park Service ("Service") began acquiring privately-owned land. By 1983, the Service had acquired 97.5% of the land designated for the park.[105] In 1982 and 1983, the *Althaus* landowners, whose properties were within the park boundaries, against whom the Service had not instituted eminent domain proceedings, filed inverse condemnation claims in the United States Court of Claims. *Id*.

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[103] *Id*. at 1035. [Emphasis added; citations omitted.]

[104] *Id*. at 1036.

[105] *Althaus, supra* n.92, at 690.

The *Althaus* opinion describes some peculiar comments by the Service's land acquisition official – Kenneth White. At a meeting with 50 to 100 affected landowners, Mr. White told the landowners:

> Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar. We will let you wait for a couple of years."[106]

Mr. White continued:

> After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers. *Id.*

The *Althaus* court compared the Service's "offers to purchase," to condemnation awards after trial. The court calculated "the average excess of award over appraisal and offer [was] 785 percent." *Id.* This means a $10,000 "offer" led to an $88,500 condemnation award – making the average offer 11 cents on the dollar, not even the 30 cents landowners were told to expect.

The *Althaus* court relied on the decision in *Drakes Bay*, stating "Our case is remarkably similar; if anything, it is stronger…. With *Drakes Bay* as a template, the nearly parallel facts lead to the same conclusion." The court noted "There was extensive publicity about the establishment … of Voyageurs National Park. The wide dissemination of plans, proposals, and suggestions the court cited earlier were

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[106] *Id*. at 691.

even more pervasive than … in *Drakes Bay*."[107] The court also considered the negative effects of the Service's land acquisition efforts:

> Although there was no bar, actual or constructive, to access to plaintiffs' properties as there was in *Drakes Bay*, an event of substantively equivalent impact occurred as a result of Kenneth White's activities. In the court's view, White's role was significant among the events resulting in a taking. *No prudent person would be interested in purchasing plaintiffs' properties under the threat of government action to compel its sale ultimately at less than a third of its fair market value*. The alternative he posed, protracted litigation and the accompanying inconvenience and expense, made the property no more attractive. *Id*. [Emphasis added.]

(h) United States v. 480 Acres of Land in Dade County, Florida

In February 2009, the Eleventh Circuit released this park-building decision.[108] Although the landowners were unsuccessful in *480 Acres*, the 11th Circuit compared their factual situation to those in *Truro* and *Assateague Island*. The court concluded that the landowners in *Truro* and *Assateague Island* presented strong evidence that, *but for* the pressure of federal officials, the value-depressing regulations would not have been adopted. The Eleventh Circuit had no standard for condemnation blight and, in *480 Acres*, it adopted the trial court's standard:[109]

> (1) "… the primary purpose of the regulation was to depress the property value or that the ordinance was enacted with the specific intent of depressing property values for the purpose of condemnation," and
>
> (2) … that the government body imposing the regulation is either the same government body involved in the condemnation or has acted "in concert [or] agreement with" that entity.

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[107] *Althaus, supra* n.92, at 695.

[108] *480 Acres, supra* n.93.

[109] *Id*. at 1308.

The *480 Acres* plaintiffs were unsuccessful because they did not convince the court that Dade County was "acting in concert [or] agreement with" the National Park Service when it rezoned plaintiffs' property from 1 dwelling unit per 5 acres, to 1 dwelling unit per 40 acres. The Eleventh Circuit's standard would not change the outcome in *Tallahassee Bank*,[110] where the City and State both employed the same planner and the two entities were in lock-step for years.[111]

Nor would it affect the outcome of this case. The trial court's condemnation blight order[112] recites, at great length, the pressures of State agencies on Monroe County to adopt or enact 14 moratoria between 1982 and 1986, and the 1986, one-year North Key Largo moratorium. It is fair to say that Monroe County and the State of Florida are joined at the hip as a result of the Florida Keys Area of Critical State Concern designation, and the power wielded by the State under that designation would certainly meet the Eleventh Circuit's test.

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[110] *Tallahassee Bank, supra*, on page 26 of this brief.

[111] *Tallahassee Bank, supra* n.81 , at 84-86.

[112] R-IX: 1444-66.

C. The State moved, in limine, for an order preventing the parties' appraisers from relying on comparable sales, using properties outside of North Key Largo – that had development moratoria in place for the previous 26 years – based on the State's belief that property valuations within Monroe County would be "enhanced" due to the County's rate-of-development ordinance.[113]

(1) *The standard of review is abuse of discretion.*

This issue involves a disputed matter of fact, and the standard of review is abuse of discretion.

(2) *The State did not file a transcript of the jury trial. The Court has no record of the evidence presented to the jury and the verdicts may not be reversed on appeal on the basis there was a lack of competent substantial evidence.*

See, e.g., Fla. Dept. Transp. v. Raiche, 527 So. 2d 842 (Fla. 2d DCA 1988); *Grossman v. Sea Air Towers, Ltd.*, 513 So. 2d 686 (Fla. 3d DCA 1988); *Dept. Children & Family Svcs. v. Amora*, 944 So. 2d 431 (Fla. 4th DCA 2006).

(3) *The State's "ROGO motion" is based solely on Appellant's counsel's opinion that Monroe County's rate of development ordinance enhanced the fair market values of developed properties and those comparables should not be presented to the jury. The lower court gave Appellant express permission to present evidence of facts supporting the State's position, but there is no evidence in the record to show whether he did so or not.*

The State's ROGO motion, *R-X: 1503-16*, raises several issues, the "ROGO effect" being one. The ROGO effect argument consists of Appellant's attorney's

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[113] The initial brief includes 10 pages with quotations from two depositions Appellant inadvertently moved into the record, and were not before the trial court. Appellees' motion to correct the record, removing these transcripts from the ROA, was granted. Supp. Vols. XVII and XVIII (pp. 2206-2526) are no longer part of the ROA, and the following portions of the initial brief should not be considered. Page 35, line 12, through page 39, line four; page 39, last line, through page 41, line 14; and page 42, line 16, through page 43, line six.

opinion – unsupported by any evidence[114] – that, in 2004, the existence of a rate-of-development ordinance in Monroe County would increase the fair market values of moratorium-free properties beyond the fair market value they would have without the existence of the ordinance. The lower court's response to this argument was favorable to the State – not unfavorable as the initial brief contends – as follows:

> Plaintiff's Motion in Limine and Alternative Motion to Strike Appraisal and Land Planning Report … is DENIED; and subject to the following clarification: Plaintiff's land planner is to approach development of the subject properties from the mind set occurring in 1982. Plaintiff's appraiser will then appraise the subject properties with 2004 valuation dates. Plaintiff's appraisal shall be delivered to Defendants by February 29, 2008. *Plaintiff has the option of hiring an expert to identify the influence the Rate of Growth Ordinance ("ROGO") has on the comparable sales used by Plaintiff's appraiser. Said expert must have a factual basis for his or her opinion.* Said opinion may be submitted as a supplemental report which the court will deal with at a later date.[115]

Appellees submit that the ball was in the State's court, to "prove it." Nothing in the record on appeal suggests the State followed through on the court's offer to "identify the influence" of ROGO on the comparable sales both parties were using.

If asked, Appellees would note that Monroe County is not an isolated real estate market like Grand Cayman Island or Bermuda. Logic tells us that individuals desiring property such as that in the Florida Keys can, and likely do, compare Keys' real estate market prices to those of properties in Dade County (*e.g.,* Key

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[114] Counsel's motion included some comments made by Landowners' expert planner and appraiser, but did not introduce into evidence the transcripts from which the comments are said to come. Nor has Appellant filed a transcript of the trial so this Court could see how this issue was raised and dealt with at trial.

[115] *R-X: 1651-52*. [Emphasis added.]

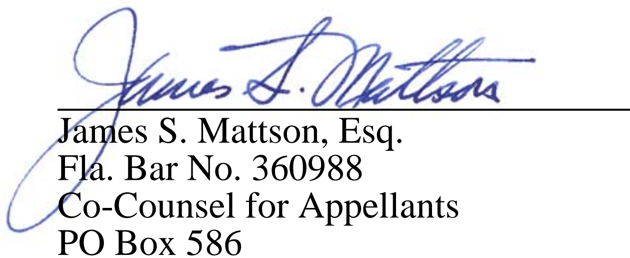
Biscayne), Collier County (*e.g.,* Marco Island), or Lee County (*e.g.,* Sanibel and Captiva). It is inherently logical that, if Keys' properties are more expensive than comparable properties in other markets, potential buyers will buy in other markets.

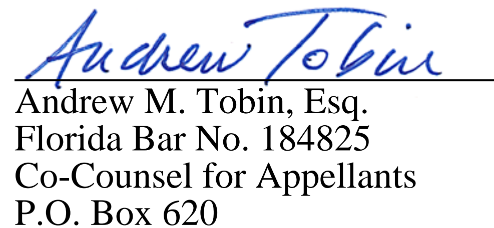
As Appellant's counsel was speculating that a rate-of-development ordinance enhances the fair market values of developed parcels, he noted the ROGO *depresses* the value of *undeveloped* land in the Keys, stating "[u]nimproved properties cannot benefit from this provision in ROGO and so are considerably less valuable."[116] We submit it is reasonable to conclude that when "less valuable" undeveloped properties receive development approvals, their market values will rise until they match similar properties in the South Florida market. The State's suggestion they would continue to rise, *above the competition*, is logically unsound.

Without a trial transcript that shows how the State cross-examined Landowners' expert witnesses, and how the State's witnesses dealt with the State's enhancement theory, Appellees submit there is an insufficient record on which to decide this issue in favor of Appellant.

IV. CONCLUSION AND RELIEF SOUGHT

Appellants pray for an order AFFIRMING the Final Judgments below:





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[116] *R-X: 1511*.

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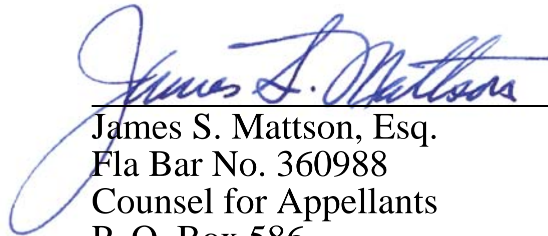
V. CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by first class mail, postage prepaid, on **J.A. Spejenkowski, Esq.** Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this 29th day of May 2009.

VI. CERTIFICATE OF FONT COMPLIANCE

I certify that the foregoing brief was prepared with Microsoft Word 2003, using 14-point, Times Roman font.



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