

IN THE CIRCUIT COURT OF THE SIXTEEN JUDICIAL CIRCUIT IN AND
FOR MONROE COUNTY

THOMAS F. COLLINS and PATRICIA
COLLINS, T/E; DONALD DAVIS;
AURELIA DEL VALLE and MARIA
DEL VALLE, T/E; HILL FAMILY
INVESTMENTS, INC.; RICHARD J.
JOHNSON and JOANN C. JOHNSON,
T/E; ROBERT A. LOMRANCE;
JOSEPH MAGRINI and ELDA S.
MAGRINI, T/E; KEITH P.
RADENHAUSEN; FRANK J.
SCHNEIDER, MARY ANN RICKLIN
and ROSEMARY RIORDAN, T/C;
HUBERT TOST and MARILYN TOST,
T/E and SAMUEL L. BURSTYN, P.A.

Plaintiffs,

vs.

CASE NO. CA-M-04-379

MONROE COUNTY, a Political
Subdivision of the State of Florida,

Defendant,

vs.

STATE OF FLORIDA

Third-Party Defendant.

RECEIVED

MAY 11 2006

James S. Mattson, P.A.
Key Largo, FL 33037

ANSWER TO SECOND AMENDED COMPLAINT

For its Answer to Plaintiffs' Second Amended Petition Defendant Monroe County, Florida:

1. Admits the factual allegations in paragraph 1, but denies that the Court(s) have subject matter jurisdiction and in support thereof incorporates paragraphs 2-90 of this Answer.

2. Denies the jurisdictional and venue allegations contained in paragraph 2. Temporary. Answering further states that permanent regulatory takings under Art. X, § 6(a), Fla. Constitution may not concurrently exist.

3. Denies all allegations contained in Paragraph 3. Answering further states that an Eminent Domain action pursuant to Chapter 73 of the Florida Statutes cannot exist for a regulatory taking under Art. X, § 6 (a), of the Florida Constitution.

PARTIES

4. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 4, and based on said lack of knowledge or information denies said allegations.

5. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 5, and based on said lack of knowledge or information denies said allegations.

6. Admits that the Board of Commissioners of Monroe County is the governing body of Defendant but denies all remaining and further allegations contained in paragraph 6.

SUBJECT PROPERTIES

7. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 7, and based on said lack of knowledge or information denies said allegations.

8. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 8, and based on said lack of knowledge or information denies said allegations.

9. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 9, and based on said lack of knowledge or information denies said allegations.

10. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 10, and based on said lack of knowledge or information denies said allegations.

11. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 11, and based on said lack of knowledge or information denies said allegations.

12. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 12, and based on said lack of knowledge or information denies said allegations.

13. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 13, and based on said lack of knowledge or information denies said allegations.

14. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 14, and based on said lack of knowledge or information denies said allegations.

15. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 15, and based on said lack of knowledge or information denies said allegations.

16. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 16, and based on said lack of knowledge or information denies said allegations.

17. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 17, and based on said lack of knowledge or information denies said allegations.

18. Admits that Samuel I. Burstyn, P.A. applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 18.

19. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 19.

20. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 20.

21. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 21.

22. Admits that Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 22.

23. Lacks sufficient knowledge or information to admit or deny the allegations contained in paragraph 4, and based on said lack of knowledge or information denies said allegations.

24. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 24.

25. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 25.

26. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 26.

27. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 27.

28. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application containing the quoted language but denies all remaining and further allegations contained in paragraph 28.

29. Admits that the Plaintiff mentioned therein applied for a Beneficial Use Determination, on or about January 3, 1997 and that the Board of County Commissioners adopted a Resolution relating to that Beneficial Use Determination Application

containing the quoted language but denies all remaining and further allegations contained in paragraph 29.

30. Paragraph 30 contains legal conclusions that require no answer. To the extent that the allegations in paragraph 30 are deemed to contain allegations of fact, Defendant denies all such factual allegations.

31. Denies each and every allegation contained in paragraph 31.

32. Denies each and every allegation contained in paragraph 32.

33. Denies each and every allegation contained in paragraph 33.

COUNT I

34. Defendant adopts, re-alleges and incorporates by reference all of its responses to paragraphs 4 through and including 33 with the same force and effect as if fully set out herein.

35. Denies each and every allegation contained in paragraph 35.

36. Denies each and every allegation contained in paragraph 36.

37. Denies each and every allegation contained in paragraph 37.

38. Denies each and every allegation contained in paragraph 38.

39. Denies each and every allegation contained in paragraph 39.

40. Denies each and every allegation contained in paragraph 40.

41. Denies each and every allegation contained in paragraph 41.

42. Denies each and every allegation contained in paragraph 42.

43. Denies each and every allegation contained in paragraph 43.

COUNT II

44. Defendant adopts, re-alleges and incorporates by reference all of its responses to paragraphs 4 through and including 33 and paragraphs 35 through and including 42 with the same force and effect as if fully set out herein.

45. Denies each and every allegation contained in paragraph 45.

COUNT III

46. Defendant adopts, re-alleges and incorporates by reference all of its responses to paragraphs 4 through and including 33 and paragraphs 35 through and including 43 with the same force and effect as if fully set out herein.

47. Denies each and every allegation contained in paragraph 47. Answering further states that Plaintiffs voluntarily abandoned any claims for “temporary regulatory taking damages” for delays in rendering the Beneficial Use Determination evidenced by the filing of abandonment with the Court on, or about, April 5, 2006.

48. Admits that Plaintiffs have retained counsel but lacks sufficient knowledge or information regarding obligations of and between Plaintiffs’ and attorneys James S. Mattson and Andrew M. Tobin and therefore denies same. Defendant denies each and every allegation contained in Paragraph 48 not hereinbefore expressly admitted.

49. Paragraph 49 contains legal conclusions that require no answer. To the extent that paragraph 49 is deemed to contain allegations of fact, the same are denied.

50. Paragraph 50 contains legal conclusions that require no answer. To the extent that paragraph 50 is deemed to contain allegations of fact, the same are denied.

51. Defendant denies each and every allegation contained in Paragraphs 1 through and including 50 of Plaintiffs' Second Amended Complaint except those hereinbefore expressly admitted.

52. Defendant denies the authenticity, relevancy, and materiality of any documents referred to in Plaintiffs' Second Amended Complaint.

FIRST DEFENSE
FAILURE TO STATE A CLAIM

53. Plaintiffs' Second Amended Complaint fails to allege facts sufficient to state a cause of action against Defendant, and fails to state a claim upon which relief can be granted against Defendant, so that Plaintiffs' Second Amended Complaint should be dismissed.

SECOND DEFENSE
FAILURE TO STATE A CLAIM – NO JUSTICIABLE CONTROVERSY
SUBJECT MATTER JURISDICTION

54. Plaintiffs' Second Amended Complaint fails to allege a justiciable controversy, so that Plaintiffs' Second Amended Complaint should be dismissed. On January 2, 1997, Plaintiffs filed Applications for Beneficial Use Determination. Without objection or appeal, each Plaintiff's Beneficial Use Determination Application resulted in a Special Master's Proposed Recommendation that the preferred relief was purchase. Thereafter, the Board of County Commissioners ("BOCC") adopted such Recommendation(s). Plaintiffs did not appeal or seek other relief from the BOCC action. Plaintiffs bring this action to compel Defendant to purchase property that Plaintiffs allege

in paragraphs 18 through 29 that Defendant has already agreed to purchase – because of such, there is no justiciable controversy.

55. Plaintiffs Magrini filed for a Building Permit on November 27, 1995 and applied for a Rate Of Growth Ordinance (“ROGO”) allocation on January 8, 1996. Plaintiffs Magrini have not been denied a Building Permit. Because there is no case in controversy, the Court lacks subject matter jurisdiction.

56. Plaintiffs Collins filed for a Building Permit on December 1, 1997 and applied for a ROGO allocation on April 13, 1998. Plaintiffs Collins have not been denied a Building Permit. Because there is no case in controversy the Court lacks subject matter jurisdiction.

THIRD DEFENSE

SUBJECT MATTER JURISDICTION – MOOTNESS

57. The Court lacks subject matter jurisdiction because the case is moot. Plaintiffs’ Second Amended Complaint fails to allege a justiciable controversy, so that Plaintiffs’ Second Amended Complaint should be dismissed. On January 2, 1997, Plaintiffs filed Applications for Beneficial Use Determination. Without objection, or appeal, each Plaintiffs’ Beneficial Use Determination Application resulted in a Special Master’s Proposed Recommendation that the preferred relief was purchase. Thereafter, the BOCC adopted such Recommendation(s). Plaintiffs did not appeal or seek other relief from the BOCC action. Plaintiffs bring this action to compel Defendant to purchase property that Plaintiffs allege in paragraphs 18 through 29 that Defendant has already agreed to purchase. As such this matter is moot in that the issue has been resolved.

FOURTH DEFENSE
SUBJECT MATTER JURISDICTION – RIPENESS

58. The Court lacks Subject matter jurisdiction because Plaintiffs' claims are premature and not ripe:

a. Plaintiffs have not demanded offers from Defendant, despite Defendant's recommendation that Plaintiffs' properties be purchased;

b. Defendant did not make a final decision regarding development approval of Plaintiffs' properties;

c. Plaintiffs have not submitted applications for development, nor exhausted the administrative remedies required as a Constitutional requisite for filing a taking claim;

d. Plaintiffs have not prepared a Habitat Conservation Plan (HCP) as required by the U.S. Fish & Wildlife Service;

e. Plaintiffs have not sought administrative relief or exemptions available pursuant to Chapters 163 and 380 of the Florida Statutes;

f. Plaintiffs were not barred from applying for and pursuing administrative relief and development approval of the subject properties during the period of the "Temporary and Permanent Takings" as alleged and at least two Plaintiffs have applications for development pending or approved;

g. Two of the Plaintiffs (Collins and Magrini) failed to exhaust their respective administrative remedies in that each had the right to seek relief under the "ROGO" Administrative Relief process after the sixteenth quarter of participation in the "ROGO" process. Neither Plaintiffs Collins nor Magrini availed themselves of that relief, which included purchase, or the granting of a building permit;

h. Plaintiffs have not complied with Chapter 73, Fla.Stat, and in particular § 73.015 entitled "Pre-suit Negotiation." Plaintiff's desire to invoke Chapter 73 for the payment of costs and fees (if successful) required Plaintiffs to make an offer to sell their respective properties for full compensation prior to bringing this action. This action is based on a Resolution to purchase. Before bringing this action Plaintiffs were required to make an offer to sell, and the selling price, before bringing an action requiring Defendant's to purchase at an unknown value.

i. None of the Plaintiffs, except Plaintiffs Collins and Magrini, has filed a meaningful development application;

j. None of the Plaintiffs, except Plaintiffs Collins and Magrini has sought a variance from the Land Use Regulations (“LDRs”) after any denial of a Building Permit Application;

k. Plaintiffs Magrini filed for a Building Permit on November 27, 1995 and applied for a ROGO allocation on January 8, 1996. Plaintiffs have received an allocation. Plaintiffs Magrini have not been denied a Building Permit and because there has been no denial their claim is not ripe; and/or

l. Plaintiffs Collins filed for a Building Permit on December 1, 1997 and applied for a ROGO allocation on April 13, 1998. Plaintiffs Collins have not been denied a Building Permit and because there has been no denial their claim is not ripe.

FIFTH DEFENSE
STATUTE OF LIMITATIONS

59. Plaintiffs’ Second Amended Complaint is barred by the Statute of Limitations. Taking claims must be filed within four (4) years of their accrual or they are barred. Fla. Stat. Plaintiffs’ claims therefore are barred, whether based upon a taking allegedly resulting from (a) the beneficial use process initiated by Plaintiffs in 1997; or (b) other regulations adopted prior to the Beneficial Use Determinations. Plaintiffs’ Beneficial Use Determinations were rendered on, or before, March 17, 2004. Plaintiffs acknowledged on December 10, 1998 by their filing of an Eighth Intervener in *Ambrose et al., v. Monroe County* Case NO.97-20-636-CA-148 that the 1986 and 2010 Plan(s) and Code(s) adversely affected their properties and sought relief from the County’s Land Use Regulations in that action. More than 6 years passed from the filing of the Ambrose action and the filing of *this* Complaint Plaintiffs claims are thus time-barred.

60. Plaintiffs’ Second Amended Complaint is barred by the Statute of Limitations. Taking claims must be filed within four (4) years of their accrual or they are barred. Fla.Stat. §95.11(3). Plaintiffs’ filed their Beneficial Use Determination Applications on, or about, January 3, 1997 claiming that all reasonable economic use of

their property had been denied by virtue of Monroe County's Year 2010 Comprehensive Plan, Future Land Use Map Designation, land development regulations, and rate of growth limitations (and moratoriums for residential and commercial development. This allegation within their respective Beneficial Use Determination Application(s) indicates notice of the effect of the County's LDRs and the effect on their respective properties. More than 6 years passed from the filing of the Beneficial Use Determination Application(s) and the filing of *this* Complaint Plaintiffs claims are thus time-barred.

61. All of the Plaintiffs' Beneficial Use Determinations were rendered on, or before, March 17, 2004. Plaintiffs' Second Amended Complaint is barred by the Statute of Limitations pursuant to Chapter 380 of the Florida Statutes § 380.085 which provides a ninety day limitation period for inverse condemnation claims founded on as-applied final determinations reached in the Beneficial Use Determination process. Plaintiffs allege that a temporary taking occurred the date each Plaintiffs Beneficial Use Determination was rendered. Each Plaintiff had 90 days to seek relief from those Determinations

62. Plaintiffs acknowledged on December 10, 1998 by the filing of an Eighth Intervener in *Ambrose et al., v. Monroe County* Case NO.97-20-636-CA-148 that the 1986 and 2010 Plan(s) and Code(s) adversely affected their properties and sought relief from the County's LDRs in that action. The adverse affect of these LDRs were either facial or as applied. In either instance the applicable Statute of Limitations is 4 years. More than 6 years passed from the filing of the Eight Intervener in the Ambrose action and the filing of *this* Complaint in this matter. Plaintiffs claims are thus time-barred.

63. Those Plaintiffs claiming ownership of the Subject Properties prior to 1986 were notified in 1986 that the assessed value of their properties had been reduced upon the adoption of the 1986 Comprehensive Plan. Plaintiffs were then aware of the adverse affect attributable to the enactment and/or application of the 1986 Comprehensive Plan. Because thirteen years passed from the Notice and the filing of this Complaint, Plaintiffs' claims are time-barred.

64. Those Plaintiffs claiming ownership of the Subject Properties prior to 1996 were notified in 1996 that the assessed value of their properties had been reduced upon the adoption of the 2010 Comprehensive Plan. Plaintiffs were then aware of the adverse affect attributable to the enactment and/or application of the 2010 Comprehensive Plan. Because seven years passed from the Notice and the filing of this Complaint, Plaintiffs' claims are time-barred.

65. Plaintiffs Magrini filed for a Building Permit on November 27, 1995 and applied for a ROGO allocation on January 8, 1996. ROGO allows for administrative relief no earlier than the conclusion of the third annual allocation period and no later than ninety days following the close of the fourth annual allocation period. Failure to request administrative relief constituted a waiver of any rights that the Subject Property had been taken by the Defendant without payment. Plaintiffs was eligible to file for administrative relief in November of 2000 and failed to do so. More than ninety days have passed since that time. Plaintiffs Magrini's claim is thus time barred.

66. Plaintiffs Collins filed for a Building Permit on December 1, 1997 and applied for a ROGO allocation on April 13, 1998. ROGO allows for administrative relief no earlier than the conclusion of the third annual allocation period and no later than

ninety days following the close of the fourth annual allocation period. Failure to request administrative relief constituted a waiver of any rights that the subject property had been taken by the county without payment of just compensation. Plaintiff was eligible to file for administrative relief in April of 2002 and failed to do so. More than ninety days have passed since that time. Plaintiffs Collins' claim is time barred.

SIXTH DEFENSE

ESTOPPEL

67. Plaintiffs are barred and precluded from maintaining this action by virtue of estoppel. All Plaintiffs made Applications for Beneficial Use Determinations and received a recommendation for purchase. Defendant relied upon Plaintiffs' choice of remedy, did not take further remedial actions, and therefore Plaintiffs are estopped from maintaining this action.

68. Plaintiffs are barred and precluded from maintaining this action by virtue of estoppel. Each Plaintiff has previously filed the same or similar action in this Court in an action styled *Ambrose et al., v. Monroe County* Case NO.97-20-636-CA-148. That matter is still pending after having been remanded with instructions to ascertain the effect, if any, of the Plan(s) and Code(s) on each Plaintiff's properties. Plaintiffs are barred from filing a "new" action and are estopped from pursuing this action when they are litigating the same issues in another action.

69. On January 2, 1997, Plaintiffs filed Applications for Beneficial Use Determination. Without objection, or appeal, each Plaintiffs' Beneficial Use Determination Applications resulted in a Special Master's Proposed Recommendation that the preferred relief was purchase. The BOCC adopted the Special Master's

Recommendation(s). Plaintiffs did not appeal or seek other relief from the BOCC's action Plaintiffs' are estopped from seeking relief that the BOCC's adoption of the Special Master's Recommendation created the "take." Plaintiffs are estopped from utilizing their requested relief to create a new or different cause of action.

SEVENTH DEFENSE

WAIVER

70. Plaintiffs have waived all legal and equitable right to maintain this action or to be awarded damages in excess of compensation provided by the Beneficial Use Determination Regulations. Plaintiffs pursued the administrative remedy of Beneficial Use in lieu of applying for development approval. Further, Plaintiffs did not allege any delay, or taking by virtue of delay, in the administration of the Beneficial Use process. Finally, Plaintiffs stipulated to and did not contest the Special Master's Recommendation, and BOCC's Resolutions of purchase, which resulted from the Beneficial Use Determination procedure invoked by Plaintiffs. Accordingly, Plaintiffs have waived any claim that the Beneficial Use Process resulted in a taking of property.

71. Plaintiffs Magrini filed for a Building Permit on November 27, 1995 and applied for a ROGO allocation on January 8, 1996. ROGO allows for administrative relief no earlier than the conclusion of the third annual allocation period and no later than ninety days following the close of the fourth annual allocation period. Failure to request administrative relief constituted a waiver of any rights that the subject property had been taken by the county without payment of just compensation. Plaintiffs Magrini were eligible to file for administrative relief in November of 2000 and failed to do so. More

than ninety days has passed since that time. Plaintiffs Magrini have waived the right to bring this action.

72. Plaintiffs Collins filed for a Building Permit on December 1, 1997 and applied for a ROGO allocation on April 13, 1998. ROGO allows for administrative relief no earlier than the conclusion of the third annual allocation period and no later than ninety days following the close of the fourth annual allocation period. Failure to request administrative relief constituted a waiver of any rights that the subject property had been taken by the county without payment of just compensation. Plaintiffs Collins were eligible to file for administrative relief in April of 2002 and failed to do so. More than ninety days has passed since that time. Plaintiffs Collins have waived the right to bring this action.

EIGHTH DEFENSE

LACHES

73. To the extent that Plaintiffs' contend that their Complaint sounds in equity, Plaintiffs' Second Amended Complaint is barred by reason of the unreasonable delay created by: (a) failing to seek administrative relief or to pursue applications for development approval prior to applying for relief pursuant to the Beneficial Use process; (b) delaying the expeditious processing of Beneficial Use Determinations; (c) failing to demand an offer of purchase following the Beneficial Use Determinations; and/or (d) the untimely filing of this action.

74. Plaintiffs sought relief in the form of purchase by their Applications for Beneficial Use Determination, stipulated to relief at their respective Beneficial Use Determination Hearing(s) and having failed to object to the Special Master's

Recommendations and BOCC's Resolutions should not be allowed to utilize another process to seek new and/or different compensation. Plaintiffs' stipulation to purchase, failure to seek other relief which may have been available nor objecting to the Special Master's Ruling and BOCC's Resolution(s) caused Defendant to not take steps to protect its interests causing additional damages (if any).

75. Plaintiff Davis filed for a building permit but allowed that Application to expire through his own inaction or decision. His Application was made and was not denied. Defendant has been prejudiced by Plaintiff Davis' lack of diligence and/or decisions. Plaintiff Davis' decision to allow his building permit to lapse caused Defendant to not take steps to protect its interests causing additional damages (if any).

76. On December 12, 1997, Plaintiffs' filed *Ambrose et al., v. Monroe County* Case NO.97-20-636-CA-148 seeking relief from the same LDRs as the within action. That matter is still pending after having been remanded from the Appellate Court with instructions to ascertain the effect, if any, of the Plan(s) and Code(s) on each Plaintiff's parcel and suggesting the Court order compensation based on that determination, if any. Plaintiffs' failure to proceed in that matter caused Defendant to not take steps to protect its interests causing additional damages (if any).

NINTH DEFENSE

FAILURE TO JOIN INDISPENSABLE PARTIES

77. Plaintiffs have failed to join all parties needed for a just adjudication in that Plaintiffs have failed to join the State of Florida and the United States. The complained of regulatory and administrative actions of Defendant resulted from State- and Federally-mandated land use and environmental requirements.

TENTH DEFENSE

IMPROPER PARTIES/SEVERANCE/NO COMMONALITY

78. Upon information and belief, Plaintiffs have improperly joined persons as Plaintiffs where such persons may not have common issues of law and/or fact. Though all Plaintiffs filed a Beneficial Use Determination Application, the effect and resolution of each Plaintiff's Application are different.

79. Plaintiffs Magrini filed an Application for a Building Permit and a ROGO allocation prior to the Beneficial Use Determination Application. Neither Application has been denied. Plaintiffs Magrini had an administrative remedy available through the ROGO process of which Plaintiffs Magrini did not seek. Plaintiffs Magrini have received an allocation. This is inconsistent with Plaintiffs' taking allegation. These issues are different than the other Plaintiffs' and should be severed for lack of commonality.

80. Plaintiffs Collins filed an Application for a Building Permit and a ROGO allocation after the Beneficial Use Determination Application. Neither Application has been denied. Plaintiffs Collins had an administrative remedy available through the ROGO process of which Plaintiffs Collins did not seek. Plaintiffs Collins are eligible to receive an allocation. This is inconsistent with Plaintiffs' taking allegation. These issues are different than the other Plaintiffs and should be severed for lack of commonality.

81. Plaintiff Davis filed for a building permit and allowed that Application to expire. His application was made prior to any affect of the Defendant's LDRs and was not denied. These issues are different than the other Plaintiffs and should be severed for lack of commonality.

ELEVENTH DEFENSE
NUISANCE

82. Pursuant to the Florida Environmental Land and Water Management Act of 1972, as set forth in Chapter 380, Fla. Stat., Monroe County's Florida Keys were designated as an "Areas of Critical State Concern" in order to preserve endangered species and habitat, wetlands and to ensure that hurricane evacuation be accomplished to promote public health, welfare and safety. Pursuant to Chapter 380, the State Administration Commission and the Department of Community Affairs and Environmental Regulation have adopted legislative amendments, rules and regulations requiring Monroe County to preserve the sanctity of endangered species, habitats, wetlands and hurricane evacuation in order to prevent public harm and public nuisance to the state's waters, bays, estuaries, rivers and shorelines, destruction of habitat and species and to ensure safety during hurricane evacuation. Similar Federal laws and regulations have been applied to the Florida Keys with respect to habitat and species destruction and despoliation of wetlands with resulting public harm and nuisance to the environment.

83. The 1986 and 2010 Comprehensive Plans of Monroe County, the Monroe County Land Development Regulations, including the Rate of Growth Ordinance to restrict building permit issuance in the Florida Keys, were all approved and mandated by State and Federal laws and regulations to prevent public harm and public nuisance.

84. Development of Plaintiffs' properties would have caused significant public harm and public nuisance and the restrictions placed upon Plaintiffs' properties have appropriately prevented such public harm and public nuisance and cannot constitute

regulatory takings, permanent or temporary, under the Florida Constitution and applicable decisional law.

85. If there was delay in processing Plaintiffs' Beneficial Use Determination applications, which Defendant denied and continues to deny, then any such delay was caused or contributed to by the actions or inactions of Plaintiffs. If Plaintiffs were injured or damaged as alleged, which Defendant denied and continues to deny, then the same was caused or contributed to by the actions or inactions of Plaintiffs.

86. Plaintiffs sought relief in the form of purchase for Applications for Beneficial Use Determination, stipulated to relief at their respective Beneficial Use Determination Hearing(s) and failed to object to the Special Master's Recommendations and BOCC's Resolutions contributed to damages that may have resulted from the Beneficial Uses Determinations rendered by the BOCC.

87. Plaintiffs on December 12, 1997 filed *Ambrose et al., v. Monroe County* Case NO.97-20-636-CA-148. Plaintiffs sought relief as to the same LDRs. That matter is still pending after having been remanded from the Appellate Court with instructions to ascertain the effect, if any, of the Plan(s) and Code(s) on each Plaintiff's parcel and suggesting the Court order just compensation based on that determination, if any.

TWELFTH DEFENSE
FAILURE TO MITIGATE DAMAGES

88. Plaintiffs sought relief in the form of purchase by their Applications for Beneficial Use Determination, stipulated to relief in their respective Beneficial Use Determination Hearing(s) and failed to object to the Special Master's Recommendations and BOCC's Resolutions contributed to damages that may have resulted from the

Beneficial Uses Determinations rendered by the BOCC. The stipulation and failure to seek alternative relief contributed to or caused damages sustained by Plaintiffs, if any. Plaintiffs, having agreed to the remedy had a duty to perform that agreement at the earliest possible date and according to the terms and conditions agreed upon.


RESERVATION

89. Defendant reserves the right to plead additional, different, and further defenses learned through discovery or otherwise.

IMMATERIAL PLEADINGS

90. Pursuant to Fla.R.Civ.P. 1.140(f), the Court should strike all references to court decisions found in paragraphs 33, 35, 38, 39, 42, 45, and 49 of the Second Amended Complaint.

WHEREFORE, having fully answered Plaintiffs' Second Amended Complaint, Defendant prays that the same be dismissed, that Plaintiffs take nothing thereby, for its costs and expenses herein expended and incurred and for such other and further relief as the Court deems fair in the premises.


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CERTIFICATE OF SERVICE

The undersigned certify that a copy hereof has been furnished to James S. Mattson, Esq., P.O. Box 586, Key Largo, Florida 33037; and Andrew Tobin, Esq., P.O. Box 620, Tavernier, Florida 33070, attorneys for Plaintiffs, by mail on this 8th day of May 2006.

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Robert Shillinger, Esq.

FBN: 058262