

**IN THE CIRCUIT COURT OF THE 16TH
JUDICIAL CIRCUIT OF FLORIDA, 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 I. BURSTYN,
P.A.**

Plaintiffs,

vs.

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

Defendant.

CASE NO. CA-M-04-379

MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Plaintiff landowners (“Landowners”) serve their Motion for Summary Judgment on Liability in the above-captioned action, pursuant to Rule 1.510, Fla. R. Civ. P. The pleadings, discovery on file, documents judicially noticed, and the affidavits and certified copies of resolutions attached hereto, demonstrate there is no genuine issue as to any material fact, and that Landowners are entitled to summary judgment as a matter of law.

MATERIAL FACTS ON WHICH THERE IS NO GENUINE DISPUTE

1. The Board of County Commissioners (“BOCC”) of Defendant Monroe County is the governing body of Monroe County. The Board adopted Resolutions 102-2002, 105-2002, 305-2002, 123-2004, 125-2004, 126-2004, and 130-2004, on March 20, 2002, July 17, 2002, and March 17, 2004, certified copies of which are attached hereto.

2. The BOCC's resolutions, certified copies of which are attached hereto, constitute final determinations of what defendant will permit Landowners to do with their property under the Monroe County Comprehensive Plan, Land Development Regulations, and other ordinances.

3. In the BOCC resolution applicable to each plaintiff, defendant determined that plaintiff has been deprived of all Beneficial Use of their property by the operation of defendant's Comprehensive Plan and Land Development Regulations.

4. The attached affidavit of appraiser Robert E. Gallaher establishes that the fair market value of each of the subject properties identified in the First Amended Complaint has been diminished by at least 99%.

5. Defendant has neither offered nor paid Landowners fair market value for the subject properties.

6. Plaintiffs' taking claims are ripe for judicial review.

DEFENDANT'S AFFIRMATIVE DEFENSES ARE WITHOUT MERIT

7. Defendant's first, second, third, fourth, fifth, seventh, eleventh, twelfth, thirteenth, and fifteenth defenses are not affirmative defenses, and Landowners need not negate those defenses to be entitled to summary judgment on liability.

8. Defendant's sixth defense, statute of limitations, is without merit. The Beneficial Use process initiated by Landowners in 1977 was an administrative safety valve that gave Monroe County an opportunity to avoid a taking claim by agreeing to issue a building permit to the petitioner. Because of the existence of the Beneficial Use safety valve, a taking claim is not "ripe" until the County decides whether it will issue a permit or "take" the property by the combined effects of its regulations. The statute of limitation on Landowners' temporary taking claim has not even *started* to run, as the temporary taking has not ended. The statute of limitation on Landowners' permanent taking claims did not start to run until BOCC Resolutions 102-2002, 105-2002, 305-2002, 123-2004, 125-2004, 126-2004, and 130-2004, were rendered on March 20, 2002, July 17, 2002, and March 17, 2004. The oldest resolutions, 102-2002 and 105-2002,

were rendered 992 days (2.7 years) before service of the original Complaint in this action. Therefore, the four year statute of limitation had not run before the Complaint was filed.

9. Defendant's eighth defense, estoppel, is also without merit. Landowners were required to "ripen" their taking claims by obtaining a final determination from Defendant of what uses Landowners would be allowed on the subject properties.¹ The beneficial use determination process was one of two avenues available to Landowners for "ripening" their taking claims. Application for a beneficial use determination did not constitute a representation by the applicant that the applicant would not file an inverse condemnation action against Monroe County after receipt of the final decision.

10. Defendant's ninth defense, waiver, is without merit. Landowners are guaranteed just compensation by Art. X, § 6(a), of the Florida Constitution. No municipal, county, or state ordinance, law, or regulation can prevent Landowners from having the compensation guaranteed by the Constitution determined by a 12-person jury.

11. Defendant's tenth defense, laches, is also without merit. Landowners elected to apply for a beneficial use determination, rather than submit applications for development approvals and wait until they had been turned down for four consecutive years. Defendant states no facts that support its contention that Landowners delayed the beneficial use proceedings, fails to identify any law, ordinance, or regulation that would have permitted Landowners to "demand an offer of purchase," other than the instant litigation. Defendant's allegation of "untimely filing" fails for the same reason its statute of limitations argument fails.

12. Defendant's fourteenth defense, nuisance, is not only meritless – it is absurd. In *Lucas v. South Carolina Coastal Council*,² The Supreme Court remanded to the South Carolina Supreme Court for a determination of whether construction of homes on Lucas' lots could be a

¹ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

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

common law “nuisance” under state law.³ On remand, the South Carolina Supreme Court held otherwise:

Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas’s desired use of his land; nor has our research uncovered any such common law principle.⁴

13. Defendant’s first, second, fourth, seventh, twelfth, and thirteenth defenses, and fourteenth – the “affirmative defense” of nuisance – all fail to state either a defense or an affirmative defense, and are subject to being stricken on motion.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where it is shown that no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law.⁵ In ruling on the motion, the court must view the evidence in the light most favorable to the non-moving party.⁶ However, the non-moving party cannot just manufacture a disputed fact.⁷

A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.

As U.S. District Court Judge James Lawrence King stated:⁸

To meet this burden, the non-moving party must go beyond the pleadings. If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the Court should refuse to grant summary judgment. However, a mere scintilla of evidence in support of the non-moving party’s position is insufficient to defeat a motion for summary judgment.

If the opposing proof is incredible or has no probative force, it cannot create a factual issue.⁹

³ “... as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.” *Lucas*, 505 U.S. at 1031-32.

⁴ *Lucas v. South Carolina Coastal Council*, 424 S.E. 2d 484, 486 (SC 1992) (on remand)

⁵ Rule 1.510, Fla. R. Civ. P.

⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

⁷ *Landers v. Milton*, 370 So. 2d 368 (Fla. 1979); also see *Fisel v. Wynns*, 667 So. 2d 761 (Fla. 1996) (“it is never enough ‘for the opposing party merely to assert that an issue does exist.’”)

⁸ *DeCarion v. Monroe County*, 853 F. Supp. 1415, 1416 (SD FL 1994).

MEMORANDUM OF LAW

1: Monroe County has taken the Landowners' properties by regulation

When regulations deprive property owners of all reasonable beneficial use of property – and the regulator fails to compensate the property owner as guaranteed by the Florida Constitution – the government has “taken the property without compensation.” Monroe County adopted resolutions stating its regulations deprived Landowners of all reasonable beneficial use of their properties. Is there any fact issue remaining as to the County’s liability for taking Plaintiff Landowners properties without compensation?

Justice Brennan’s dissent in *San Diego Gas & Electric v. City of San Diego* (“*San Diego Gas*”)¹⁰ was the first modern Supreme Court opinion to address the issue of just compensation for temporary regulatory takings.

once a court finds that a police power regulation has effected a “taking,” *the government entity must pay just compensation for the period commencing on the date the regulation first effected the “taking,” and ending on the date the government entity chooses to rescind or otherwise amend the regulation.*¹¹

Six years later, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (“*First English*”),¹² the Supreme Court finally bit the bullet, holding:

“temporary” takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. *Cf. San Diego Gas & Electric Co.*, 450 U.S., at 657 (BRENNAN, J., dissenting) (“Nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable”). It is axiomatic that the Fifth Amendment’s just compensation provision is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. at 49.¹³

Then, in *Lucas v. South Carolina Coastal Council* (“*Lucas*”),¹⁴ the state established a coastal setback line landward of Lucas’ waterfront lots in 1988, prohibiting Lucas from con-

⁹ *Johnson v. Studstill*, 71 So. 2d 251 (Fla. 1954) (no issue of material fact if the evidence is too incredible to be accepted by reasonable minds).

¹⁰ 450 U.S. 621 (1981).

¹¹ *Ibid.*, at 658-61.

¹² *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (“*First English*”).

¹³ *Ibid.*, at 318-19 (1987),

¹⁴ 505 U.S. 1003 (1992).

structing “any more than a walkway or small deck on his property.”¹⁵ The Supreme Court held Lucas had been *deprived of all economically beneficial or productive use of his land*, and was entitled to just compensation unless the Coastal Council could prove that building homes on the lots would constitute a common law nuisance under state law.¹⁶ The Supreme Court noted that the state could still avoid a *permanent* regulatory taking if it elected to do so – which it elected not to do.¹⁷

Monroe County has taken Plaintiff Landowners’ property by its confiscatory regulations, and is liable to Plaintiffs for full (just) compensation for their land. Art X, § 6, Fla. Const.¹⁸

2: Monroe County is liable for temporary taking damages and full compensation for the fee simple estate

Unlike a physical taking,¹⁹ a regulatory taking is “temporary” and lasts until the government [perhaps] rescinds or modifies the regulation so the owners recover beneficial use of their land.²⁰ If not, a permanent taking occurs. Monroe County

¹⁵ *Lucas* (on remand), 424 S.E. 2d at 485.

¹⁶ See footnote 3.

¹⁷ The Coastal Council eventually paid Lucas \$1,575,000 and took title to both lots. It then re-sold the lots for \$785,000 and permitted substantial single-family homes to be constructed on each. See Dana Beach and Kim Diana Connolly, “A Retrospective on *Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century*,” 12 SOUTHEASTERN ENVTL. L.J. 1 (Fall 2003).

¹⁸ *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

¹⁹ In a physical appropriation, the property is deemed to be permanently taken on the date of the unlawful appropriation. See, e.g., *Edwards Dairy, Inc. v. Pasco Water Auth., Inc.*, 378 So. 2d 866 (Fla. 2nd DCA 1979) (pipeline); *County of Volusia v. Pickens*, 439 So. 2d 276 (Fla 5th DCA), *petition denied*, 443 So. 2d 980 (Fla 1983) (property was “wrongfully appropriated” in 1973, but the opinion does not say how it was appropriated.); *Crigger v. Florida Power Corp.*, 509 So. 2d 1322 (Fla. 5th DCA), *review denied*, 519 So. 2d 986 (Fla. 1987) (power line).

As Florida courts did not recognize a right to compensation for regulatory takings until well after *First English* was decided in 1987, *Pickens*, a 1983 decision, can only be a physical taking case.). See *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984) (invalidation sole remedy when regulation “takes” property).

Nearly every Florida inverse condemnation appellate opinion in print today involves physical takings, not regulatory takings. This includes *Foster v. City of Gainesville*, 579 So. 2d 774 (Fla. 4th DCA 1991) (airplane noise is physical invasion of airspace over property), a case often cited for the proposition that an inverse condemnation claim is tried as if it were an eminent domain proceeding.

There is not one reported appellate decision in Florida where a temporary regulatory taking has *not* been terminated before trial, either by rescission of the regulation, see, e.g., *City of Tampa v. Redner*, 852 So. 2d 270 (Fla. 2nd DCA 2003), or a sale of the property, see *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001), where the property was lost through foreclosure, making the temporary regulatory taking permanent on the date of foreclosure.

²⁰ “Once a court finds that a police power regulation has effected a “taking,” the government entity must pay just compensation for the period commencing on the date the regulation first effected the “taking,” and ending on the date the government entity chooses to rescind or otherwise amend the regulation.” *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 658-61 (1981) (Brennen, J., dissenting)

chose not to modify its regulations. Must the County pay Landowners temporary taking damages as well as just compensation for the fee?

Plaintiff Landowners cannot force the County to buy the property,²¹ but nothing prevents the County from freely choosing to do so.²² Following a hearing, a Special Master determined, as findings of fact, that Landowners had been deprived of all reasonable beneficial use of the subject properties by the County's Comprehensive Plan ("ComPlan") and Land Development Regulations ("LDRs"). The Special Master's Recommended Orders then went to the BOCC for approval, modification, or rejection. At that point, the County could have limited its financial liability to the Landowners by modifying the ComPlan and LDRs, or by agreeing to issue building permits to Plaintiffs. As the Supreme Court noted in *Lucas, supra*:²³

Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. *See First English Evangelical Lutheran Church*, 482 U.S. at 321. But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Ibid.*

Just as South Carolina did on remand in *Lucas*, the County chose to keep its "taking" regulations in place. And as *Lucas* was, Landowners are entitled to temporary taking damages from the date the temporary taking began until it ends, and just compensation for a "permanent deprivation."²⁴

²¹ *First English*, 482 U.S. at 321; *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994) (footnotes omitted) (concluding that "the Government should not be put to the obligation of paying for more than it wants when it does not set out to take it. The property owner is entitled to just compensation for what is taken, no less, but no more."), *cert. denied*, 115 S. Ct. 898 (1995).

²² In fact, the government may condemn the land explicitly before the inverse condemnation suit is resolved. *See, e.g., Georgia-Pacific Corp. v. United States*, 568 F.2d 1316 (Ct. Cl. 1978) (noting that the landowner's suit in the Court of Claims must be suspended until the government's suit in district court is completed).

²³ *Lucas*, 505 U.S. at 1030 n.17.

²⁴ Professor Gregory Stein described an alternative to this two-takings scenario, where "a court instead might treat the entire sequence as a single condemnation," and would calculate compensation as though the property was condemned "explicitly and permanently" at the commencement of the temporary regulatory taking, and then add interest until the government actually pays for the property. Gregory Stein, "*Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*," 70 WASH. L. REV. 953, 981 (1995). This is how Florida courts treat unlawful physical appropriations of land. *See cases cited in note 19, supra.*

Immediately following the "single condemnation" hypothesis, Stein observes that the two-taking scenario "probably is more in line with most parties' expectations under current law, since a temporary regulatory taking resembles an encumbrance on a fee more than it resembles a permanent taking in fee. If the landowner owns a fee simple subject to the government's regulation – whether the government's interest is "lease-like," "easement-like," or anything else – then, like any other fee simple owner, he is entitled to benefit from any appreciation in the value of the property. The government is no more entitled to this value than is the typical tenant or mortgage lender." *Ibid.*

In slow-take eminent domain proceedings under Chapter 73, Fla. Stat. – and non-possessory inverse condemnation proceedings such as this – the *date of taking* and the *date of valuation*, i.e., the date as of which the property’s fair market value is determined for compensation purposes, is established by § 73.071(2), Fla. Stat. (2004). The statute establishes this “as of the date of trial, or the date upon which title passes, whichever shall occur first.”

3: Landowners’ taking claims were not ripe for judicial review until the BOCC rendered their Beneficial Use decisions in 2002 and 2004.

A regulatory taking claim is not ripe for judicial review until the landowner has obtained a final decision from local government regarding the application of its regulations to the subject property.²⁵ Florida’s four-year statute of limitations on inverse condemnation claims does not begin to run until the final decision is obtained. Plaintiffs’ final decisions were rendered. Is there any doubt that these claims were timely filed?

Plaintiff Landowners’ Beneficial Use applications were filed and complete by January 4, 1997, but Landowners’ taking claims did not *ripen* until the Beneficial Use determinations were rendered on March 20, 2002, July 17, 2002, and March 17, 2004. The following Table shows the relevant dates for each Plaintiff Landowner.

Plaintiff	Hearing Date	R. O. Date	BOCC Resolution	BOCC Date
Burstyn, P.A.	12/18/2000	5/21/2001	105-2002	3/20/2002
Collins	12/18/2000	6/25/2001	305-2002	7/17/2002
Davis	12/18/2000	6/25/2001	305-2002	7/17/2002
Del Valle	12/18/2000	5/21/2001	102-2002	3/20/2002
Hill Family Investments, Inc.	12/18/2000	5/2/2003	130-2004	3/17/2004
Johnson	12/18/2000	6/25/2001	305-2002	7/17/2002
Lomrance	12/18/2000	5/2/2003	126-2004	3/17/2004
Magrini	12/18/2000	6/25/2001	305-2002	7/17/2002

²⁵ *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

Radenhausen	12/18/2000	6/25/2001	305-2002	7/17/2002
Schneider, Ricklin, & Riordan	12/18/2000	5/1/2003	123-2004	3/17/2004
Tost	12/18/2000	5/1/2003	125-2004	3/17/2004

4: Landowners’ temporary regulatory takings began with their Beneficial Use applications were filed rather than when the BOCC rendered its decisions.

Temporary regulatory takings normally begin when the landowner is denied an administrative remedy such as a variance. An exception to this rule exists when the government unduly delays the permitting or administrative remedy process. The County took five to seven years for the County to render Plaintiffs’ Beneficial Use decisions. Is five to seven years a “normal permitting delay?”

Temporary regulatory takings normally do not begin with an application, but presumptively begin on the *Williamson County* ripening date,²⁶ the date the local government issues “final decision” on the application of its regulations to the subject property. One author explained how a property owner could rebut that date where the government then uses the permitting process as a means to delay reaching that result officially.²⁷

Such a rebuttal would be appropriate, for example, in a case in which the municipality makes an early, informal decision to reject a permit and then uses the permitting process as a means to delay reaching that result officially. The presumption that the [temporary regulatory taking begins] at the time of the final variance denial might even increase the likelihood of municipal delay by postponing the accrual of liability until a date that the municipality controls and can defer improperly. *Sophisticated government bodies would have an additional incentive to avoid reaching a final determination since the reaching of that decision also would serve to start the compensation meter running.*

Stein’s rebuttal premise can be traced to *First English, supra*, where Justice Rehnquist stated:²⁸

We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of *normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like* which are not before us.

²⁶ See, e.g., *Linzenberg v. Town of Ramapo*, 1 A.D. 3d 321, 766 N.Y.S. 2d 217 (NY, App. Div., 2nd Dept. 2003)

²⁷ Stein, note 24, *supra*, at 974.

²⁸ 482 U.S. at 322.

Six months ago, the Federal Circuit Court of Appeals analyzed the question of *extraordinary* permitting delays as a basis for a temporary taking.²⁹ The County’s five to seven-year delay in processing Plaintiff Landowners’ Beneficial Use applications is not “due to a complex regulatory scheme that requires detailed information before the issuance of a permit” and is *not* a *First English* “normal permitting delay.”

Because of the County’s unreasonable delay in processing the Landowners’ Beneficial Use petitions, their temporary regulatory taking damages did not begin to accrue on the dates in 2002 and 2004 the BOCC issued their Beneficial Use Resolutions. Plaintiffs submit that the County is liable for temporary regulatory taking damages from the date of application, January 4, 1997, rather than the dates of the BOCC Resolutions.

5: The Best Method for Determining Temporary Regulatory Taking Damages in this Case is the *Wheeler Before-the-take, After-the-take starts* method.

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken.³⁰ It rests on equitable principles and it means substantially that *the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.*³¹

There is no single method for computing compensation for a temporary taking, so courts have adopted a flexible approach to the issue.³² In 1977, Hagman and Misczynski co-authored

²⁹ In *Bass Enterprises Production Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004), the Federal Circuit held:

The question of whether a delay is extraordinary is not a simple matter of the number of months or years taken by the Government to make its decision however. ... Our Court in *Wyatt* also recognized that, since “delay is inherent in complex regulatory permitting schemes,” we should examine “the nature of the permitting process as well as the reasons for any delay” to determine if the delay is disproportionate to the regulatory permitting scheme from which it arises. 271 F.3d at 1098. As we explained in *Wyatt*:

Complex regulatory schemes often require detailed information before the issuance of a permit. The nature of the regulatory scheme is especially critical when the permitting process requires detailed technical information necessary to determine environmental impacts. Governmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations.

381 F.3d at 1366-67.

³⁰ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

³¹ *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923)

³² 720 P.2d 513 (AZ), *cert denied*, 479 U.S. 986 (1986) (measure of damages decided on facts of each case). *See also Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 639 (Fla. 1972) (eminent domain) (the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case).

their seminal 660-page tome – WINDFALLS FOR WIPEOUTS³³ – that Justice Brennan cited in his four-Justice dissent in *San Diego Gas*. In a 1982 article, Hagman suggested four ways to compute temporary taking damages: rental return, option price, “interest on lost profits,” “before-the-take, after-it-ends,” “before-the-take, after-the-take-starts,” and “benefit to the government.”³⁴ Since that time, many courts have rejected the “interest on lost profits” method.³⁵

The leading case is *Corrigan v. City of Scottsdale*,³⁶ where the Arizona Supreme Court – citing WINDFALLS FOR WIPEOUTS and Hagman’s 1982 article – listed all of Hagman’s methodologies for computing temporary regulatory taking damages: rental return, option price, “interest on lost profit,” “before-after valuation” (two alternatives), and “benefit to the government” – including the methods Hagman had rejected. This left only three of Hagman’s original six: rental value, option value (which Hagman suggested is probably the same as rental value), and the “before-the-take, after-the-take-starts” method. A brief summary of the three approaches follows.

The leading case on rental value is *Kimball Laundry Co. v. United States*,³⁷ where the government seized a laundry in 1943 and returned it 3-½ years later. *Kimball Laundry* involved improved real estate and an operating laundry. The Court held rental value was the proper measure for the taking, rejecting the “before-the-take, after-it-ends” and “benefit to the government” theories. New Jersey courts are the main proponents of option value, and their legislature has written it into their eminent domain code. For example, *Sheerr v. Township of Evesham*³⁸ in-

³³ D. Hagman and D. Misczynski, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION, Planners Press, Amer. Planning Assoc., Chicago, IL 1977. (Available at BarnesandNoble.com.)

³⁴ Donald G. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, Chap. 12 in 1982 ZONING AND PLANNING LAW HANDBOOK 201, E. Strom, Ed., at 218-27. In this article, Hagman rejected the *before-the-take, after-it-ends* method that was rejected in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), and *benefit to the government*, from *San Diego Gas* (just compensation is what property owner lost, not what government gained), and opined that rental value and option price are the same measure.

³⁵ See, e.g., *SDDS, Inc. v. South Dakota*, 650 N.W. 2d 1 (SD 2002). But see *Miller Brothers v. Michigan Dept. Natural Resources*, 513 N.W. 2d 217 (Mich. App. 1994) (calling it “rent,” the Miller Brothers court states that damages for taking an oil and gas lease should be measured by “something close to the amount of money they could have received in interest on present value of the income stream.”)

³⁶ 720 P.2d 513 (AZ), *cert. denied*, 107 S.Ct. 577 (1986).

³⁷ 338 U.S. 1 (1949).

³⁸ 445 A.2d 46 (NJ Sup. Ct 1982).

volved a wooded section of private property that was zoned for “public park and recreation uses.” The *Scheerr* court held:³⁹

... there has been a taking, continuously from the date of the enactment of the PPR ordinance until the present time ... and that taking will continue until the municipality changes its ordinance, if it intends to do so. By way of compensation, it is appropriate that the municipality pay plaintiff the option value of the premises from the date of the enactment of the PPR ordinance to the date on which the municipality chooses to remove that designation. ... *Option value must be established by expert testimony and calculated on the market value of the property without any zoning regulation.* Legal fees, the cost of expert witnesses and other expenses incurred in establishing the “option,” as well as real estate taxes, shall be added to the value otherwise fixed. Interest is to be paid at the rate of 12% as follows: (1) on monies actually expended by plaintiffs, from the date of the expenditure; (2) on the amount or amounts fixed for the value of the option, from the dates those amounts should have been paid, proceeding on the assumption that payment was required annually, in advance.

In *Nemmers v. Dubuque*,⁴⁰ land was rezoned from industrial to residential. The Eighth Circuit found a compensable vested right in the light industrial zoning. In *Nemmers II*,⁴¹ the Eighth Circuit used the “before-the-take, after-the-take-starts” method.⁴²

In determining the proper measure of just compensation, we look to the market value of the parcel of land. ... Market value should be determined as of the date of the taking: for a temporary taking, the government is responsible for compensating the owner for the interim during which it effected the taking. ... Thus, *the proper method for calculating the damages in this case is to compute the return over three and one-half years at an interest rate of 15% on the difference between the property’s fair market value when zoned L-1 and its fair market value when zoned R-3.* ...

This method was also used in *Wheeler v. City of Pleasant Grove*,⁴³ where the 11th Circuit held:⁴⁴

In the case of a temporary regulatory taking, the landowner’s loss takes the form of an injury to the property’s potential for producing income or an expected profit. ... The landowner’s compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. *Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property’s fair market value without the regulatory restriction and its fair market value with the restriction. See [Nemmers II.]* Under this approach, the landowner recovers what he lost. To award any affected party additional compensation for lost profits or increased costs of development would be to award double recovery: the

³⁹ 445 A.2d at 64-65.

⁴⁰ 716 F.2d 1194 (8th Cir. 1983) (“*Nemmers I*”).

⁴¹ *Nemmers v. Dubuque*, 764 F.2d 502 (8th Cir. 1985) (“*Nemmers II*”).

⁴² 764 F.2d at 504-05.

⁴³ 833 F.2d 267 (11th Cir. 1987) (*Wheeler III*).

⁴⁴ 833 F.2d at 270-71.

relevant fair market values by definition reflect a market estimation of future profits and development costs with respect to the particular property at issue.

In the sole published Florida temporary regulatory taking case, *Tampa v. Redner*,⁴⁵ the Second District Court adopted the *Wheeler III* formula to calculate temporary taking damages for an eight-year downzoning of a commercial building, after the city had rescinded the downzoning. However, use of the *Wheeler III* method in *Redner* cannot be presumed to be an adoption of *Wheeler III* for all temporary regulatory taking cases in Florida. See *Dade County v. General Waterworks Corp.*, note 32 above, where the supreme court determined that compensation methodologies in eminent domain cases are determined on a case-by-case basis.

The highest court of the State of New York recently approved another method for computing temporary taking damages in *520 East 81st Street Associates v. New York*⁴⁶ *520 East 81st Street* is a modification of the *Nemmers II/Wheeler III* method. The court assumed the landowner would have made a profitable sale of the property on the date of the temporary taking, and then awarded a “market rate of return” on the proceeds of the hypothetical sale. Where the after-the-take-starts fair market value is essentially zero, as Robert Gallaher’s attached affidavit states, there is no difference between the *520 East 81st Street* approach and *Nemmers II/Wheeler III*.

The fairest way to compensate Plaintiffs for the temporary regulatory taking is the “before-the-take, after-the-taking-starts” method, used by the 8th Circuit in *Nemmers II*, and the 11th Circuit in *Wheeler III*. The *Nemmers* and *Wheeler* courts held that compensation, in those fact situations, is the “market rate of return” on the difference between the “before-the-take” and the “after-the-taking-begins” fair market values of the subject property.

RELIEF REQUESTED

Plaintiffs respectfully pray that this Court:

- (a) accept jurisdiction of the parties and subject matter herein;
- (b) render a nonfinal Order on Liability, finding:

⁴⁵ 852 So. 2d 270 (Fla. 2nd DCA 2003).

⁴⁶ 780 N.E.2d 518 (NY, 2002).

- i. that Monroe County's land development regulations and comprehensive plan have deprived Plaintiff-Landowners of all beneficial use of the subject properties;
 - ii. that Monroe County has effected both temporary and a permanent regulatory takings of the subject properties without full and just compensation;
 - iii. that Monroe County is liable to Plaintiffs for full and just compensation for temporary regulatory takings of plaintiffs' subject properties;
 - iv. that Monroe County is liable to Plaintiffs for permanent regulatory takings of plaintiffs' subject properties as of the of trial or the date defendant acquires fee simple title to said properties;
 - v. that the temporary regulatory takings began on January 4, 1997, which date shall be used for valuation purposes for temporary taking damages;
 - vi. that Plaintiffs' temporary taking damages shall be computed by applying a market rate of return, compounded annually, to the difference in Fair Market Values of the subject properties with and without the offending regulations on the date the temporary taking began, and continuing until the County pays for the fee simple interest in the property;
 - vii. setting Landowners' just compensation claims for trial before a 12-person jury, at which trial the jury will determine the Fair Market Values of the subject properties on the date the temporary takings began, with and without the offending regulations, and the properties' Fair Market Values on the date of trial or the date Defendant acquires fee simple title to the Subject Properties, whichever occurs first;
 - viii. that the valuation proceeding is to held in accordance with Chapters 73 and 74, Florida Statutes, and the process is the same as if the cause were a statutory eminent domain proceeding.
 - ix. That Monroe County is liable to plaintiffs for attorneys' fees, costs, and expert witness' fees, pursuant to Chapters 73 and 74, Fla. Stat., as prayed for the First Amended Complaint herein.
- (c) grant Plaintiffs such other and further relief as may be just, and
- (d) award Plaintiffs the costs of this action pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

Dated: February 25, 2005

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Certificate of Service

I certify that I served a copy of the foregoing on Robert Schillinger, Esq., Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, Robert H. Freilich, Esq., Paul, Hastings, et al., 515 S Flower St FL 25, Los Angeles, CA 90071-2201, E. Tyson Smith, Esq., White & Smith, 1125 Grand Blvd, Ste 1500, Kansas City, MO 64106-2507, and Stephen J. Moore, 1500 Traders on Grand Bldg, 1125 Grand Blvd, Kansas City, MO 64106-2511, by priority mail, postage prepaid, this 25th day of February 2005.

JAMES S. MATTSON, ESQ