

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

THOMAS F. COLLINS, et al.,

Plaintiffs,

vs.

MONROE COUNTY,

Defendant,

vs.

The STATE of FLORIDA,

Third-party Defendant.

CASE NO. CA-M-04-379

**PLAINTIFFS' OPPOSITION TO MONROE COUNTY'S CROSS-MOTION FOR
SUMMARY JUDGMENT AND THE STATE OF FLORIDA'S MOTION FOR
SUMMARY JUDGMENT**

On July 29, 2005, the State of Florida served a Motion for Summary Judgment that asserts six defenses to Plaintiffs' claims. On August 11, 2005, Monroe County served a Cross-Motion for Summary Judgment that lists nine defenses.¹

I. THE GOVERNMENT'S DEFENSES

The County's Memorandum of Law does not follow the points raised in its Motion for Summary Judgment in a logical fashion, making it difficult to craft a response thereto. Plaintiffs have consolidated the government's defenses – as they are stated in the Motions for Summary Judgment – not the memoranda of law – into the following eight defenses.

A. Plaintiffs' taking claims are barred by a 90-day statute of limitations at § 380.085, Fla. Stat. (2005). (County MSJ ¶ A.1; State MSJ ¶ 2.)

B. All Plaintiffs except Collins and Magrini cannot raise "as-applied" taking claims because they did not apply for building permits, that the other nine Plaintiffs can only raise "facial" taking claims, and that the 4-year statute of limitations on "facial" claims expired on January 3, 2000. (County MSJ ¶ A.2; State MSJ ¶¶ 3, 5.) ("Ripeness")

¹ Monroe County and The State of Florida are referred to, *infra*, as "government."

C. In the cases of those Plaintiffs who own properties that contain wetlands, their properties were “facially taken” when the wetland provisions of the County’s Year 2010 Plan went into effect on January 4, 1996, and these Plaintiffs’ taking claims are now barred by the 4 year statute of limitations. (County MSJ ¶ A.3; State MSJ ¶ 4.)

D. Plaintiffs’ temporary taking claims (based on the County’s delay in processing their Beneficial Use Determination Petitions) (a) are “due process” claims that may not be asserted in a taking claim, citing *Lingle v. Chevron, USA, Inc.*, and (b) “were required to be asserted in the beneficial use hearing and/or in an appeal to the Administration Commission, or by Certiorari in the Circuit Court. (County MSJ ¶ B.2.a.)

E. The County’s several-year delay in processing Plaintiffs’ beneficial use determination petitions does not amount to a temporary taking because (a) Plaintiffs were responsible for the first two years of delay, and (b) the County’s “36-month” review period was a “reasonable period of time,” citing *Tahoe-Sierra Preservation Counsel v. TRPA*. (County MSJ ¶ B.2.b; State MSJ ¶ 6.)

F. Plaintiffs’ temporary and “as-applied” taking claims are barred by res judicata and claim preclusion, because Plaintiffs failed to raise such claims before it during the beneficial use process, or on appeal to the Administration Commission, or by Certiorari to the Circuit Court. (County MSJ ¶ B.3, C.1.)

G. Plaintiffs’ taking claims are moot, because of Plaintiffs’ (a) waiver of all remedies for land use approval in the beneficial use process,” and (b) “stipulation in the beneficial use determination process accepting the alternative remedy of purchase of their properties.” The State also argues that the “stipulation” renders Plaintiffs’ taking claims “unripe.” (County MSJ ¶ D.1.)

H. Plaintiffs’ temporary taking claims must be dismissed because they are “merged and incorporated” within Plaintiffs’ permanent taking claims.” (County MSJ ¶ B.1.) Plaintiffs may not recover for both a temporary and a permanent taking. (State MSJ ¶ 6.)

II. OPPOSITION TO DEFENDANTS’ SUMMARY JUDGMENT MOTIONS

A. Plaintiffs’ taking claims are governed by Florida’s four-year statute of limitations, NOT by the 90-day period for bringing a claim under § 380.085, Fla. Stat. (2005).

The government’s leading argument is that regulatory taking claims by Florida Keys landowners are *not* governed by the four-year statute of limitations that applies to regulatory taking claims elsewhere in Florida. Government argues that, by some sleight-of-hand nobody has noticed for 27 years, the statute of limitations for filing taking claims in the Florida Keys is only 90 days. The government erroneously asserts:

The running of the ninety-day statute of limitations requires Plaintiffs to assert a regulatory taking under Chapter 380 of the Florida Statutes upon the rendering of the County’s final BUD resolution decision, *County Memo at 18*, and they are barred by the ninety-day statute of limitations applicable to inverse condemnation claims, and specifically applicable to Monroe County under the Areas of Critical State Concern legislation. See Fla.

Stat. §§ 380.085(2); 253.763(2); *Monroe County v. Ambrose*, 866 So. 2d 707, 712 (Fla. 3d DCA 2003), *County Memo at 21*.

Ignoring regulatory taking decisions such as *Hill v. Monroe County* [, DCA, and the Administration Commission], 581 So. 2d 225 (Fla. 3rd DCA 1991), *Monroe County v. Gonzalez*, 593 So.2d 1143 (Fla. 3rd DCA 1992), and *City of Key West v. Berg*, 655 So. 2d 196 (Fla. 3rd DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995), the government now argues that Hill, Gonzalez, and Berg really should have brought their regulatory takings claims pursuant to § 380.085.²

A reading of the statute reveals (a) it does not apply to decisions of local governments, but only to permit denials by state agencies, and (b) it is a *discretionary* remedy that does not shorten *any* statutes of limitations for taking claims brought under the Florida Constitution. To conclude, § 380.085(6) states “The provisions of this section are *cumulative* and shall not be

² Subsection 380.085, Fla. Stat., enacted in 1978, reads as follows.

380.085 Judicial review relating to permits and licenses.--

(1) As used in this section, unless the context otherwise requires:

(a) “Agency” means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) “Permit” means any permit or license required by this part.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state’s police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

(3) If the court determines the decision reviewed is an unreasonable exercise of the state’s police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney’s fees and court costs to the agency or substantially affected person, whichever prevails.

(6) The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.

History.--ss. 1, 2, 3, 4, 5, 6, ch. 78-85.

deemed to abrogate any other remedies provided by law.” The government’s argument is patently frivolous.

(1) § 380.085 does not apply to decisions of local government

The statute on which the government relies – one of five identical statutes enacted in 1978 – is a *discretionary remedy applicable only to certain classes of permits denied by state agencies*. By enacting these statutes, the Legislature did not shorten the four-year statute of limitations for regulatory taking claims *anywhere* in Florida. These provisions are merely cumulative remedies that permit applicants may utilize if they so choose (and very few have).

Subsection 380.085(2) states that a person who is denied a permit *by a state agency* may seek review under its provisions. § 380.085(2) reads, in pertinent part:

(2) Any person substantially affected by a ***final action of any agency*** with respect to a permit ***may*** seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located ...

As to which entities’ actions are affected, § 380.085 (1) & (2) state in pertinent part:

(1) As used in this section, unless the context otherwise requires:

(a) “***Agency***” means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other ***unit or entity of state government***.

(b) “Permit” means any permit or license required by this part.

(2) Any person substantially affected by a ***final action of any agency*** with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state’s police power constituting a taking without just compensation. ***Review of final agency action*** for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence ***shall proceed in accordance with chapter 120***.

Monroe County is not a state agency. In *Hill v. Monroe County*, 581 So. 2d 225 (Fla. 3rd DCA 1991), a *regulatory taking* case, the Third DCA held:

[W]e note that Chapter 120, Florida Statutes (1989), also known as the “Administrative Procedure Act,” only applies where a challenge is made to a State agency action. *Chapter 120 does not apply to the regulations enacted by a County Com-*

mission, unless the county is expressly made subject to Chapter 120 by general or special law. Section 120.52(1)(c), Florida Statutes (1989). See also Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (Fla. 2nd DCA 1975) (Board of County Commissioners of Hillsborough County held was not to be an “agency” within the meaning of Section 120.52(1)(c) in the absence of a general law, special law or existing judicial decisions.). In this case, Monroe County was not made subject to Chapter 120. [Emphasis added.]

See also Florida Water Services Corp. v. Robinson, 856 So. 2d 1035 (Fla. 5th DCA 2003), where the District Court reached a similar conclusion, citing Hill v. Monroe County, supra, as follows.

Historically, the APA has never applied to the actions of county commissions. *Hill v. Monroe County, 581 So. 2d 225 (Fla. 3d DCA 1991)* (chapter 120 does not apply to the regulations enacted by a county commission unless the county is expressly made subject to the chapter by general or special law); *Board of County Commissioners of Hillsborough County v. Casa Development, Ltd., 332 So. 2d 651 (Fla. 2d DCA 1976)* (board of county commissioners is not an agency covered by the APA); *Sweetwater Utility Corp. v. Hillsborough County, 314 So. 2d 194 (Fla. 2d DCA 1975)* (board of county commissioners is not an agency subject to judicial review under APA). Nor do we find anything in the revisions of the definition of “agency” to indicate the Legislature has changed the scope of the APA’s applications to counties. See Ch. 96-159, §3; Ch. 99-245, §64; Ch. 99-379, §2, Laws of Fla.

(2) § 380.085(3) does not provide full compensation as required by Art X, sec 6, Fla. Const.

§ 380.085(3) reads:

(3) If the court determines the decision reviewed is an unreasonable exercise of the state’s police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

- (a) Agree to issue the permit;
- (b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, *consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action*; or
- (c) Agree to modify its decision to avoid an unreasonable exercise of police power.

§ 380.085(3)(b) requires a circuit court to consider “any enhancement to the value of the land attributable to government action.” This is a “benefit offset,” common when railroad companies condemned land and “offset” the market value of the land by the “benefits” that would accrue when the railroad was built. Under Florida law, no “benefit offset” is allowed when valuing land taken by eminent domain. If § 380.085 was an exclusive remedy, it would be unconstitutional as benefit offsets do not provide full compensation under Art. X, § 6, Fla. Const.

(3) § 380.085(6) states that the statute is not an exclusive remedy.

§ 380.085(6) reads: The provisions of this section are *cumulative* and shall not be deemed to abrogate any other remedies provided by law. Nothing more need be said.

It is worth noting that, in 1978, Florida did not recognize a right to Constitutional full compensation for a regulatory taking. The only remedy in 1978 was invalidation of the regulation. See *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984). It would appear that some legislators were attempting to change this situation by leveling the playing field somewhat. In today's post-*First English* world, those 1978 efforts fall well short of what one can accomplish by filing a regulatory taking claim under Art. X, § 6, Fla. Const.

B. Plaintiffs were relieved of the need to apply for building permits because of the “futility exception.” The Beneficial Use Determination decisions are final, written decisions of the local government, making Plaintiffs’ regulatory taking cases ripe for judicial review.

The government relies on the “at least one meaningful application” requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) for ripeness, while ignoring the “futility exception” thereto. Plaintiffs have invoked the *futility exception* in this case. Each Plaintiff is the recipient of a *final, written decision* from Monroe County, stating that Plaintiffs can do essentially *nothing* economically beneficial on their property. The government has its head firmly planted in the sand, and takes the indefensible position that the Beneficial Use Determination resolutions of the Board of Commissioners of Monroe County are **not** final decisions of Monroe County. Regardless of what they are or are not, these Beneficial Use Determination resolutions are admissible as statements against interest, and admit that these properties have been stripped of all, or substantially all, economically beneficial use.

In *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), the District Court held, under the heading “*Takings and Ripeness Jurisprudence:*”

The ripeness inquiry thus centers on whether the landowner “obtained a final decision from the [regulatory agency] determining the permitted use for the land.” [Palazzolo, 533 U.S. 606, 618, 150 L. Ed. 2d 592, 121 S. Ct. 2448]; accord Taylor v. Vill. of N. Palm Beach, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) (“Florida courts have adopted the

federal ripeness policy.”). This “final determination requires at least one meaningful application.” *Taylor*, 659 So. 2d at 1173.

In practice, the ripeness doctrine has precluded takings claims when the regulatory agency denies a landowner’s application to develop a substantial project, and the landowner never applies for a less intensive use. *See, e.g., MacDonald, Sommer & Frates*, 477 U.S. at 352-53; *Williamson County Reg’l Planning Comm’n*, 473 U.S. at 187-88. Conversely, when a regulatory takings claim is ripe, “it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty.” *Palazzolo*, 533 U.S. at 620. Thus, in *Palazzolo*, even though the landowner’s applications did not explore every possible development use of the property, his claim was ripe because the regulatory agency’s decisions on the applications submitted left no doubt as to the permitted use of the property.. ...

As the *Palazzolo* court noted, a “*futility exception*” exists to the ripeness requirement that we have similarly acknowledged in *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995). There we explained:

A limited exception to the ripeness requirement might exist where, by virtue of the past history, repeated submissions would be futile. Further, *where the governmental agency effectively concedes that any other development would be impermissible, this can negate the requirement of pursuing further administrative remedies and the governmental action is effectively treated as a final decision.*

Id. at 1181 (citation omitted); accord *Palazzolo*, 533 U.S. at 622 (“Ripeness doctrine does not require a landowner to submit applications for their own sake.”). For example, in *Taylor v. Riviera Beach* we held the landowner’s taking claim was ripe where it would have been futile to seek an amendment to a comprehensive plan after the same had already been considered and rejected. 801 So. 2d at 263. ...

In order to succeed in stating an *as-applied takings claim*, Lost Tree must show that it obtained a final decision on the permitted use of the land, which requires at least one meaningful application, *see Taylor v. Village of N. Palm Beach*, 659 So. 2d at 1173, *or that it is futile to submit additional applications in light of past history or the expressly stated view of the appropriate governmental entities.* *See, generally, Palazzolo*, 533 U.S. at 622; *Taylor v. Riviera Beach*, 801 So. 2d at 263.

Finally, in *City of Key West v. Berg*, 655 So. 2d 196 (Fla. 3rd DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995), the only avenue of relief that Mr. Berg had *not* traveled was the City’s “beneficial use” provision in its newly-adopted Comprehensive Plan. Berg’s failure to seek beneficial use was the reason the Third District Court of Appeal found his claim “unripe.”³ In the case before this Court, Plaintiffs *have* obtained a final, beneficial use decision from the government entity responsible for determining the permitted use for the land, as required by the Su-

³ Though the District Court sent the Berg case back as unripe, the City of Key West knew when its goose had been cooked. Within a few months, the City settled with Mr. Berg for \$3.5 million.

preme Court and the Florida courts. Therefore, Plaintiffs' as-applied takings claims are ripe for judicial review.

C. For Plaintiffs who own properties that contain wetlands, their properties were NOT “taken” when the wetland provisions of the County’s Year 2010 Plan went into effect on January 4, 1996, because *neither the County nor Plaintiffs knew where these wetlands were.* Furthermore, Monroe County has the authority to permit development on environmentally sensitive land, via the Beneficial Use Determination process, if the alternative is a regulatory taking.

(1) The wetland designations in the 2020 Comprehensive Plan were not applied to any discrete properties when the plan was adopted.

The wetland restrictions of Monroe County’s Year 2010 Plan did not attach to any real estate in the Florida Keys on enactment – ***because the government did not know where the wetlands were.*** At no time prior to the County’s field inspection of Plaintiffs’ properties – undertaken only after their Beneficial Use Determination applications were filed – did Monroe County know what vegetation and habitat was on each parcel. The Affidavit of Donald Craig explains how habitat designations were treated during the relevant period, as follows.

1. Affiant is familiar with Monroe County’s Land Development Regulations and Comprehensive Plan, including the set of seven 1986 Existing Conditions Maps prepared by Monroe County in 1984-85 at a scale of 1 inch to 2000 feet, and approved by the Florida Administration Commission in July 1986 as part of Monroe County’s 1986 Comprehensive Plan.

2. Affiant is thoroughly familiar with the process by which the 1986 Existing Condition Maps were updated following their adoption in July 1986, and that process was as follows. The Florida Administration Commission adopted Rule 28-20.025 as part of Monroe County’s “Year 2010 Comprehensive Plan,” that became effective on January 6, 1996. Sub-part 19 of Rule 28-20.025 required Monroe County to update the 1986 maps, as follows.

Sections 9.5-227 (a) (b) and (c) Monroe County Code, Existing Conditions Map, are amended to read as follows:

(a) *Authority: The board of county commissioners, upon the recommendation of the planning commission, shall adopt* the existing conditions map which shall consist of the 1985 Department of Transportation aerial photographs at a scale of 1" = 200' depicting habitat types coded according to the system set forth in Volume I of the Monroe County Comprehensive Plan.

(b) *Effect:* The official land use district map is hereby designated, established and incorporated as a part of this chapter; and the originals thereof, which are on file at the offices

of the property appraiser and the department of planning, shall be as much a part of this chapter as if the information contained therein were set out in full in this chapter.

(c) *Review and Amendment:* The existing conditions map may be refined to reflect conditions legally in existence on February 28, 1986. Such refinements shall be made pursuant to the procedures for typographical and drafting errors in section 9.5-511(e). The existing conditions map as referenced throughout this chapter is intended only to serve as a general guide to habitat types for the purpose of preliminary determination of regulatory requirements. Final habitat determinations shall be based upon field verification. Unlawful conditions shall not be recognized when determining regulatory requirements.

NOTE: The county has agreed along with the above change, to add a disclaimer to the existing conditions map, land use district map, and future land use map when it becomes effective. The disclaimer will be added when these maps are updated and will state that (1) all land use, including improved subdivisions, are recognized as to and affected by the existing conditions of the site and (2) that all maps are to be verified by site visit as provided in Section 9.5-227.

3. Though the Year 2010 Plan became effective in January 1996, Monroe County took more than six years to adopt revisions to the 1986 Existing Conditions Maps in accordance with Rule 28-20.025(19). On March 20, 2002, based on the recommendation of the Planning Commission, the Board of County Commissioners adopted the amendments by Ordinance 007-2002, which amendments became effective on July 5, 2002, 21 days after publication of the Department of Community Affairs' final order 02-OR-161, approving Ordinance 007-2002. Section 9.5-336(b), Monroe County Code, adopted by Ordinance 007-2002, states:

The existing conditions map as referenced throughout this chapter is intended only to serve as a general guide to habitat types for the purpose of preliminary determination of regulatory requirements. The County Biologist shall make the final determination of habitat type based upon field verification.

4. The Existing Conditions Maps adopted in 1986 and the amended maps adopted in 2002 were prepared by visual examination of high-altitude black and white aerial photographs taken by the Florida Department of Transportation along the US-1 right-of-way. The original Existing Conditions Maps were prepared, beginning in 1984, from low-resolution (150 dpi) "blue-line" copies of the 1981 FDOT aerial photos. The amended Existing Conditions Maps, adopted in 2002, were prepared from the FDOT 1985 photo series.

5. Affiant is familiar with a GIS thematic habitat map developed by the US EPA and the Army Corps of Engineers to provide "ADvanced IDentification" of various wetland habitat types in the Florida Keys. The ADID thematic map was developed by the Florida Marine Research Institute in the mid-1990's using visual interpretation of 1991 aerial photographs. The ADID thematic map is subject to the same accuracy problems as the Existing Conditions Maps, and it cannot be, and is not, used by Monroe County to determine habitat or vegetation type on a specific parcel of land. The ADID map is only useable as a general guide that may or may not reflect what exists on the ground. It is not a substitute for onsite investigation.

6. Affiant states that, while error rates of maps constructed by photointerpretation of aerial photographs can be determined by constructing an error matrix using extensive ground-truthing, neither extensive ground-truthing nor error analyses have been conducted on the 1986 and 2002 habitat maps, nor on the ADID thematic map. None of these purported habitat maps is

accurate, and onsite biological surveys are necessary to determine habitat and vegetation in the Florida Keys on any land that is not completely devoid of water and vegetation.

7. Since 1987, Monroe County has not possessed habitat maps of adequate accuracy to permit determination of the buildability – or non-buildability – of a parcel of land in the Florida Keys without an onsite biological survey. Monroe County does not conduct such surveys except upon the request of an applicant for development approval, in which case the County charges a fee for doing so.

(2) Contrary to Defendants’ arguments, the Board of Commissioners of Monroe County had the authority to grant relief to Plaintiffs in the Beneficial Use Determination process, including allowing the construction of residential dwelling units in areas designated as wetlands.

The government contends that Monroe County had no authority to allow any development on sensitive habitat after January 4, 1996. This argument ignores the legislative mandate at § 380.08, Fla. Stat., that *absolutely prohibits* such a rule or regulation. That statute reads:

380.08 Protection of landowners’ rights.--

(1) *Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is unduly restrictive or constitutes a taking of property without the payment of full compensation, in violation of the constitutions of this state or of the United States.*

Monroe County’s “Beneficial Use Determination” procedure was adopted for the sole purpose of compliance with § 380.08. Plaintiffs filed their Beneficial Use Determination petitions in January 1997, when the entire Beneficial Use Determination process was set out in its entirety in the Year 2010 Comprehensive Plan. The entire text of that provision follows.⁴

**MONROE COUNTY YEAR 2010 COMPREHENSIVE PLAN
BENEFICIAL USE
PROCEDURES AND CRITERIA**

Objective 101.18

Monroe County hereby adopts the following procedures and criteria for the determination of Vested Rights and Beneficial Use, for the effect of such determinations.

Policy 101.18.5

⁴ On June 10, 1998, Monroe County adopted new Beneficial Use Ordinance 021-1998, which added additional provisions to those in the Year 2010 Comprehensive Plan, *supra*. These provisions are not applicable to these Plaintiffs, whose applications were filed more than 18 months before Ordinance 021-1998 became effective.

1. It is the policy of Monroe County that neither the provisions of this Comprehensive Plan nor the Land Development Regulations shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of adoption of this Comprehensive Plan. Accordingly, Monroe County shall adopt a Beneficial Use procedure under which an owner of real property may apply for relief from the literal application of applicable land use regulations of this plan when such application would have the effect of denying all economically reasonable use that property unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare to its citizens under Florida Law. For the purpose of this policy, all reasonable economic use shall mean the minimum use of the property necessary to avoid a taking within reasonable time as established by current land use case law.* Adopted pursuant FAC Rule 28-20.100(16).

2. The relief to which an owner shall be entitled may be provided through the use of one or a combination of the following:

a) Granting of a permit for development which shall be deducted from the Permit Allocation System;

b) Granting of use of Transferable Development Rights (TDRs);

c) Government purchase of all or a portion of the lots or parcels upon which all beneficial use is prohibited. This alternative shall be the preferred alternative when beneficial use has been deprived by application of Division 8, of the Land Development Regulations;

d) Such other relief as the County may deem appropriate and adequate.

3. Development approved pursuant to Beneficial Use determination shall be consistent with all other objectives and policies of the Comprehensive Plan and the Land Development Regulations unless specifically exempted from such requirements in the final Beneficial Use determination.
*Adopted pursuant FAC Rule 28-20.100(17).

There is nothing in the Year 2010 Plan “Beneficial Use Procedures and Criteria” prohibiting granting permits in environmentally sensitive habitat. That option always presented itself, and Plaintiffs’ taking claims did not “ripen” until the Board of Commissioners rendered its Beneficial Use Determination resolutions. Then Plaintiffs’ taking claims were “ripe,” and the four-year Statute of Limitations began to run.

D. Plaintiffs’ temporary taking claims, based on the County’s delay in processing their Beneficial Use Determination Petitions, are claims arising from extraordinary delays, which are specifically acknowledged in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987 as a “temporary taking.” They are not “due process taking” claims.

Plaintiffs’ temporary taking claims for the extraordinarily long time it took Monroe County to process their Beneficial Use Determination applications are not based on due process

violations, but are based on “extraordinary delay,” a concept acknowledged – by inference – as a temporary taking in *First English*, 482 U.S. 304, 321 (1987).

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. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.

E. The County’s 5 to 7 year delay in processing Plaintiffs’ beneficial use determination petitions is an extraordinary amount of time that no amount of explanation on the part of Monroe County can justify. This amounts to part of the temporary taking of Plaintiffs’ property. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)

Monroe County sat on its hands for years following the submission of Plaintiffs’ Vested Rights and Beneficial Use Determination petitions before and on January 3, 1997. It did not convene a beneficial use hearing until December 18, 2000 – *four years* after these applications were filed. The County’s hearing officer then took an inordinately long time to draft recommended orders that did little more than parrot the language in the Planning Director’s memoranda – that were not completed until November 2000, nearly four years after the applications were filed. It then took between two and four years for the County Commission to make its final Beneficial Use Determinations. The government seeks to lay some of the responsibility for these delays on the Plaintiffs, an argument that doesn’t wash. From undersigned counsel’s own files and the records of the Clerk of Court, Plaintiffs re-created the following table of events.

Event	Date	Interval Days	Total Days	Total Months	Total Years
VR & BUD Applications Submitted	3-Jan-97	0	0	0.00	0.00
County Ceased Scheduling Hearings	30-Aug-97	239	239	7.85	0.65
Mandamus Petition Filed	29-Sep-97	30	269	8.84	0.74
County Hired Overby for Hearings	11-Nov-97	43	312	10.25	0.85

Counsel Informed County re Overby Bias Issue	13-Nov-97	2	314	10.32	0.86
Mandamus Hearing	13-Nov-97	0	314	10.32	0.86
Mandamus Issued	24-Nov-97	11	325	10.68	0.89
First Overby Disqualification Motions Filed	18-Dec-97	24	349	11.47	0.96
Letter to McGarry re Orders on Disqualifications	30-Dec-97	12	361	11.86	0.99
County Refused to Disqualify Overby	31-Dec-97	1	362	11.89	0.99
Overby Denied Disqualification Motions	5-Jan-98	5	367	12.06	1.00
Petitioners File Petition for Writ of Prohibition	8-Jan-98	3	370	12.16	1.01
Order Granting Writ of Prohibition Issued	19-Jan-98	11	381	12.52	1.04
Deadline to Start Hearings (Mandamus Case)	30-Jan-98	11	392	12.88	1.07
Monroe County Notice of Appeal Filed	10-Feb-98	11	403	13.24	1.10
New Deadline to Start Hearings (Prohibition)	28-Feb-98	18	421	13.83	1.15
Prohibition Order Affirmed by Third DCA and Vested Rights Hearings Convened	27-Apr-98	58	479	15.74	1.31
Plaintiffs' Beneficial Use Hearing Held	18-Dec-00	966	1,445	47.47	3.96
Recommended Orders: Burstyn, Del Valle	21-May-01	154	1,599	52.53	4.38
Recommended Orders: Collins, Davis, Johnson, Magrini, Radenhausen	25-Jun-01	35	1,634	53.68	4.47
BOCC Resolutions: Burstyn, Del Valle	20-Mar-02	268	1,902	62.49	5.21
BOCC Resolutions: Collins, Davis, Johnson, Magrini, Radenhausen	17-Jul-02	119	2,021	66.40	5.53
Recommended Orders: Tost, Schneiders	1-May-03	288	2,309	75.86	6.32
Recommended Orders: Hill Family, Lomrance	2-May-03	1	2,310	75.89	6.32

BOCC Resolutions: Tost, Schneider Heirs, Hill Family, Lomrance	17- Mar-04	320	2,630	86.41	7.20
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Landowners cannot be “charged” with delaying the Beneficial Use Determination process because they exercised their Constitutional rights to require the government to provide a hearing officer who was not biased against landowners’ counsel (a process that took only 4 ½ months from start to finish). In *Utah State Road Commission v. Friberg*, 687 P.2d 821 (Utah 1984), the state unsuccessfully sought to do what the government is trying to argue here..

The state began eminent domain proceedings against the Fribergs on June 23, 1972. Fribergs were not too happy about the prospect of losing their land, and left the state’s deposit with the court so they could later challenge the state’s authority to take their property. In June 1973, Fribergs and others sued the state in federal court, enjoining the highway construction. The state conceded it had not prepared an Environmental Impact Statement (EIS) and the court ordered one prepared. The EIS was finally approved by the Federal Highway Administration in February 1978, some 5-½ years after Fribergs’ eminent domain proceeding began.

Construction did not begin immediately after the EIS approval. In February 1979, a second federal lawsuit was instituted by a neighborhood citizens group, challenging the sufficiency of the EIS. The Fribergs were not members of the group, nor were they plaintiffs, but they did contribute funds to the organization. The federal court again enjoined the project. That injunction was dissolved in October 1979. In December 1979, Fribergs agreed to vacate the property in March.

Because of the long delay in the actual compensation trial, Fribergs moved to change the valuation date from June 1972 to December 1979. The Utah supreme court explained the law, and the state’s position, as follows.

When valuation is fixed at a date prior to the actual taking and the value of the property increases during a prolonged condemnation proceeding so that the valuation does not reflect a fair valuation of the property and does not therefore constitute “just compensation,” the statute fixing the time of valuation is unconstitutional as applied. ...

... a valuation date later than that established by statute may be required when a delay in the condemnation proceedings results from causes for which the condemnee is not re-

sponsible and the delay would result in a nonrecognition of value in the award of compensation. ...

The State contends that ... the State had met all the statutory and constitutional requirements necessary ... to establish its right to condemn the property when the trial court entered its order of immediate occupancy on December 14, 1972. Based on that conclusion, the State asserts that the Fribergs thereafter remained on the property solely by the permission of the State. The State's theory seems to be that entitlement to condemn was established at that time. *In addition, the State contends that the delay in this case is attributable solely to the Fribergs' own actions and that they should not be permitted to profit from a delay they themselves caused.*

The trial court found, and *the State asserts on this appeal, that the sole blame for the delay in the consummation of the condemnation proceedings rests on the Fribergs because they filed the first federal court action against the State, which resulted in an injunction against the State's proceeding with the I-215 project, and because they financially supported the second federal action challenging the sufficiency of the E.I.S., which also resulted in an injunction.*

687 P. 2d at 829-32. The supreme court rejected the state's argument, holding:

The law does not require landowners to meekly yield to the State's claim to condemn his or her land. Every landowner in this country has a right to resist with every legal means available the expropriation of his or her land. The right of eminent domain does not require docile passivity on the part of a landowner. Nor did the Fribergs engage in tactics that unjustifiably protracted this litigation by demands for a series of continuances. All they did was pursue an established, well-recognized and well-founded legal remedy to compel the State to comply with federal law. The Fribergs' neighbors then challenged the validity of the E.I.S. and the State's compliance with NEPA. Although the State may have had a good-faith belief that it did not have to comply with NEPA, it nevertheless was stopped dead in its tracks by federal court injunctions because it failed to comply with that law. That failure existed even before the State commenced action against the Fribergs. ...

The contention that the Fribergs should lose the appreciated value of their property because of their participation in the federal action simply does not wash. *The State, as a matter of constitutional law, cannot penalize the Fribergs' assertion of a federal right by requiring it to give up a state constitutional right – the [right] to just compensation for their land.*

687 P.2d at 834-35.

F. Plaintiffs' temporary and as-applied taking claims are NOT barred by res judicata/claim preclusion, because Constitutional claims cannot be decided in an administrative proceeding, nor on appeal to the Administration Commission, nor by Certiorari to the Circuit Court. No appeal of an administrative "ripening" decision is required as a prerequisite to bringing an inverse condemnation action in Circuit Court.

The government's argument that the County Commission can make a final determination on whether the County has effected a regulatory taking, is absurd. If this were the law, there

would be never be another regulatory taking in the United States. What local government body would decide it has “taken” property and must pay full compensation? It is settled law in Florida that administrative agencies may not determine Constitutional questions. Only the judiciary may do so. *Estuary Properties v. Askew*, 381 So. 2d 1126 (Fla 1st DCA 1979), *rev’d in part & aff’d in part*, *Graham v Estuary Properties*, 399 So. 2d 1374 (Fla. 1981) (administrative hearing officer properly declined to consider “taking issue” because that issue was a judicial question beyond the purview of the administrative hearing.)

The same argument advanced by the government in this case was recently advanced by the town of Taos, New Mexico, in *Takhar v. Town of Taos*, 93 P.3d 762 (NM App 2004). Ms. Takhar sued the town for estoppel and a regulatory taking. Following an argument similar to Monroe County’s here; the New Mexico Court of Appeals held:

Under *Williamson County* [473 U.S. 172 (1985)], a state’s procedure, where a local authority’s decision is merely reviewed on appeal, does not affect the finality of the decision for the purpose of a federal court claim because *such a procedure only permits a determination as to whether the local authority erred; it is merely a review of the effect of the final decision made by the initial government agency that is regulating the land use.* See *Williamson County*, 473 U.S. at 193 ...; see also *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196, 719 A.2d 465, 473, 475-76 (Conn. 1998) (holding that the plaintiff was not required, before bringing an inverse condemnation action, to pursue an administrative appeal to the superior court);

... *We are unaware of any authority giving the Town Council jurisdiction or authority to consider claims for damages for inverse condemnation. We are unaware of any reason why an inverse condemnation claim should be barred simply because a local authority has denied a special use permit sought by the landowner in an attempt to reach a mutually acceptable solution, after the authority has prevented the landowner from completing his or her project. ... While the amount of acreage and the density limitations were likely considered by the Town Council for its determinations, and would also likely be considered by the district court in assessing liability under the estoppel and inverse condemnation claims, this overlap does not necessarily mean fact preclusion sets in to bar Plaintiff’s claims. Furthermore, on the record before us, we see no basis to invoke claim preclusion or separation of powers to bar ... Plaintiff’s action invoking the district court’s original jurisdiction.*

Were the result as the Town would have it, neither an estoppel claim nor an inverse condemnation claim could be litigated in district court even were the administrative process completed through an appeal to the district court. That does not appear to us to be a result contemplated under any New Mexico constitutional provision, statute, or case law. Nor does it appear to be sound. The Town’s cases and arguments asserting fact and claim preclusion are based on administrative quasi-judicial adjudications of facts and issues where the attempted subsequent court adjudication would actually amount to a second adjudication of the same facts and issues.

The Connecticut Supreme Court reached the same result in *Cumberland Farms, Inc. v. Town of Groton*, 262 Conn. 45, 808 A.2d 1107 (2002), as follows.

This appeal marks the second occasion that we have had these parties before us in this matter. In *Cumberland Farms, Inc. v. Groton*, 247 Conn. 196, 197, 201-202, 719 A.2d 465 (1998), we concluded that the board's denial of the plaintiff's application for a variance constituted a final decision that enabled the plaintiff to maintain this separate and independent inverse condemnation action without first pursuing its administrative appeal to completion. ...

... We reject the town's arguments and conclude that: (1) for policy reasons, the doctrine of collateral estoppel does not bar the plaintiff from litigating, in its inverse condemnation action, any and all factual issues relevant to its claim of inverse condemnation regardless of whether those issues were decided by the board; and (2) because none of the factual issues raised by the plaintiff in its inverse condemnation claim actually was litigated and decided in the administrative appeal, the decision of the court ... cannot have preclusive effect as to the factual issues raised in the plaintiff's inverse condemnation action. ...

... to accord preclusive effect to the board's findings in the context presented would be to vest the board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim and, in effect, would give the board the authority to settle the issue raised by that claim. Under such a regime, local zoning boards would have the power to decide virtually all inverse condemnation actions that are predicated on a claim that the denial of a variance application constitutes a practical confiscation. Such a result would run counter to the well established common-law principle that administrative agencies lack the authority to determine constitutional questions. ...

Our conclusion is reinforced by virtue of the fact that, in the present case, *the board's decision itself is the action that gives rise to the constitutional claim.* ...

We conclude, therefore, that the plaintiff is entitled to a de novo review of the factual issues underlying its inverse condemnation claim, unfettered by the board's previous resolution of any factual issues. ...

G. Plaintiffs' taking claims are NOT moot, because Plaintiffs' (a) did not waive any remedies in the beneficial use process," and (b) did not stipulate to anything in the beneficial use proceedings.

There were no waivers or stipulations by Plaintiffs in the Beneficial Use Determination process. See the Affidavit of Andrew M. Tobin, Esq., that states the following.

1. Affiant is Andrew M. Tobin, Esq., whose business address is P.O. Drawer 620, Tavernier, FL 33070. Affiant is President of Andrew M. Tobin, P.A., and is a member of The Florida Bar. Affiant has practiced law in Monroe County, Florida, for over 25 years.

2. Affiant represented Plaintiffs in the above-styled case in their administrative Beneficial Use Determination proceedings from the time their applications were submitted in January

1997, through their administrative hearings on December 18, 2000, and until their final decisions were rendered by Monroe County between March 20, 2002, and March 17, 2004.

3. When Affiant arrived at the December 18, 2000, hearing on all of Plaintiffs' Beneficial Use Determination applications, he was given copies of Monroe County's staff reports on each of the subject properties. All of the staff reports were dated approximately one month prior to the hearing. Every one of the staff reports regarding the properties that are the subject of this lawsuit was written by the Director of Planning and concluded with the following recommendations.

It is recommended that the Special Hearing Officer find the applicant has been deprived of all reasonable economic uses of the property and is entitled to beneficial use relief. It is further recommended that an order be prepared that establishes this relief as the purchase of the lot by the Monroe County Land Authority. (Burstyn, Del Valle), or

It is recommended that the Special Hearing Officer find the applicant has been deprived of all reasonable economic uses of the property and is entitled to beneficial use relief. It is further recommended that an order be prepared that establishes this relief as an offer to purchase the lots for fair market value by Monroe County. (Collins, Davis, Johnson, Lomrance, Magrini, Radenhausen, or

It is recommended that the Special Hearing Officer find the applicant has been deprived of all reasonable economic uses of the property and is entitled to beneficial use relief. It is further recommended that a survey be prepared that delineates any non-mangrove wetland and an order be prepared that establishes relief as an offer to purchase that portion of the property. (Hill Family Investments, Schneider, Tost)

4. As Monroe County's Director of Planning had concluded – prior to the December 18, 2000, hearing – that all of the Plaintiffs' subject properties had been “deprived of all reasonable economic use,” Affiant, the Director of Planning, and Special Land Use Counsel Karen Cabanas agreed that Plaintiffs would not be required to present evidence to the hearing officer on the issue of deprivation of all reasonable economic use. There being no other issues on which evidence was required, Monroe County provided the Director's reports to the hearing officer and the hearing was concluded.

5. Neither Affiant nor any of the Plaintiffs in the above-styled case agreed – before, during, or after the December 18, 2000, hearing – to limit the form of “beneficial use relief” to either monetary or non-monetary relief.

6. Neither Affiant nor any of the Plaintiffs in the above-styled case agreed – before, during, or after the December 18, 2000, hearing – to accept, as monetary relief, any sum of money other than that which is required by the Just Compensation Clauses of the Florida and United States Constitutions.

H. Plaintiffs are entitled to recover for either a temporary and a permanent taking, or for a temporary taking that is terminated by the issuance of a building permit.

While the law of regulatory takings is neither static nor simple, the following quotes and statements describe the legal status of Plaintiffs' “temporary” and “permanent” taking claims.

Uncompensated Takings

The Constitution does not prohibit taking private property for public use. *It prohibits doing so without paying for it. Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 717-18 (1999).

The Florida constitution requires that property owners be compensated when the government substantially interferes with an owner's use of property, or when a regulation denies substantially all economically beneficial or productive use of land. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

Physical Takings

Under Florida law, a *per se* taking occurs when the government "requires the landowner to submit to the physical occupation of his land." *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. 2d DCA 1994) (quoting *Yee v. City of Escondido*, 503 U.S. 519 (1992)). The required "physical occupation" arises when the government "permanently deprives the owner of his 'bundle' of private property rights, including the right to possess and dispose, as well as the right to prevent the government from using the occupied area." *Flotilla, Inc.*, 636 So. 2d at 764 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). *Lloyd's of London v. St Petersburg*, 864 So. 2d 1145, 1147 (Fla 2nd DCA 2003), *rev. denied*, 871 So. 2d 871 (Fla. 2004).

Plaintiffs have not been deprived of their "rights to possess and dispose of" the subject properties, nor have they lost "the rights to prevent the government from using the subject properties." Thus, there have been no physical takings of the subject properties.

This 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. *Tahoe-Sierra Preservation Council v. TRPA*, 535 U.S. at 323-24.

Regulatory Takings

The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-16 (1922).

It would be a very curious and unsatisfactory result, if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent,

can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178-79 (1872).

Temporary Regulatory Takings

All regulatory takings are temporary, and the landowner has no right under the Just Compensation Clause to insist that a “temporary” taking be deemed a permanent taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317-19 (1987).

“Temporary” takings which deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. *First English*, 482 U.S. at 317-19.

Cessation of Regulation Unnecessary for Finding of Regulatory Taking

While cessation of regulation may be sufficient for finding a temporary taking, nothing in these cases supports the proposition that the end of regulation is necessary. The Supreme Court has actually suggested to the contrary: “It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *see also Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996) (noting that Supreme Court found a temporary taking even though “the ordinance in *First English* by its terms was indefinite; it would expire only if declared unconstitutional or repealed.”) *Bass Enterprises Prod. Co. v. United States*, 133 F.3d 893, 895-96 (Fed. Cir. 1998)

Judicial Remedies for Regulatory Taking

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*, 429 U.S. 621, 658-61 (Brennan Dissent).

The government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a “taking.” Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation. *Ibid.*

Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, “permit a court, at the behest of a private person, to require the Government to exercise the power of eminent domain. We merely hold that where the government’s activities have 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. *First English*, 482 U.S. at 321.

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English*, 482 U.S. at 315 (citing *Jacobs*, 290 U.S. at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well. Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717-18 (1999).

Put simply, an uncompensated temporary regulatory taking is a Constitutional tort. *Ibid.*

Compensation for a Temporary Regulatory Taking

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327. 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. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923)

We grant leave to the parties to ... present evidence of the actual damages Lucas has sustained as a result of the State's temporary nonacquisitory taking of his property without just compensation. See, e.g., *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513, cert. denied, 479 U.S. 986, 107 S. Ct. 577, 93 L. Ed. 2d 580 (1986) (limiting recovery to actual losses where regulatory taking is temporary balances public and private interests). We direct the trial judge to make specific findings of damages appropriate to compensate Lucas for his temporary deprivation of the use of his property. To this end, we do not dictate any specific method of calculating the damages for the temporary nonacquisitory taking. *Accord, Poirier v. Grand Blanc Township*, 192 Mich. App. 539, 481 N.W.2d 762 (1992) (no formula or artificial measure of damages applicable; amount to be recovered is generally left to discretion of trier of fact). *Lucas v. South Carolina Coastal Council*, 424 S.E. 2d 484 (SC 1992) (on remand)

Sheerr v. Township of Evesham, 445 A.2d 46, 64-65 (NJ Sup. Ct 1982), involving a wooded section of the Scheerr property that was zoned for "public park and recreation uses," is an example of the option value approach. That court ordered:

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 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 *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270-71 (11th Cir. 1987) (*Wheeler III*), the 11th Circuit held:

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 v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir. 1985).

In *City of Tampa v. Redner*, 852 So. 2d 270 (Fla. 2nd DCA 2003), the court adopted the *Wheeler III* formula to calculate temporary taking damages for an eight-year downzoning of a commercial building. Use of the *Wheeler III* method in *City of Tampa v. Redner* is not an adoption of *Wheeler III* for all temporary taking cases in Florida. See *Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 639 (Fla. 1972) (the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case). See also *Corrigan v. City of Scottsdale*, 720 P.2d 513 (AZ), *cert denied*, 479 U.S. 986 (1986) (measure of damages decided on facts of each case).

THE FIRST ENGLISH REQUIREMENT

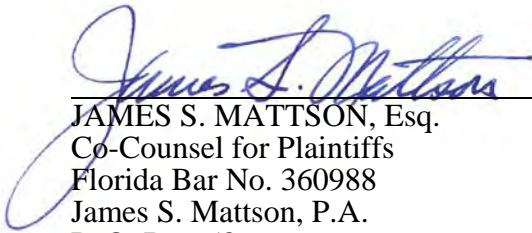
In *Gonzalez v. Monroe County*, affirmed, *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3rd DCA 1992), this same Court held that the County's regulations effected a regulatory taking of Mr. Gonzales' lot and, following the Supreme Court's guidance in *First English*, *supra*, entered the following Order.

IT IS ADJUDGED that § 9.5-262 and 9.5-343, Monroe County Land Development Regulations, as applied to plaintiffs' properties, have taken plaintiffs' properties for a public purpose without just compensation, in contravention of the Taking Clause of the Fifth Amendment to the United States Constitution, and Art. X, § 6, of the Florida Constitution. The regulations, as applied, are invalid as an unreasonable exercise of the police power. *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984), *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3rd DCA 1992). The United States Supreme Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), stated:

Once a court determines that a taking has occurred, the government retains the whole range of options already available amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. *First English*, 107 S. Ct. at 2389.

THEREFORE, IT IS ORDERED that defendant notify this court within 30 days after the date of this order, how it intends to proceed in light of the court's invalidation of the subject regulations and the Supreme Court's opinion in *First English*, quoted above. Defendant shall have six months from the date of this order to provide public notice, conduct hearings, and carry out whatever action it has chosen."

A similar order should be entered in this case. If, after being presented with the options available to it, the government does nothing, the Court can enter an order requiring that building permits be issued and temporary taking damages be paid.

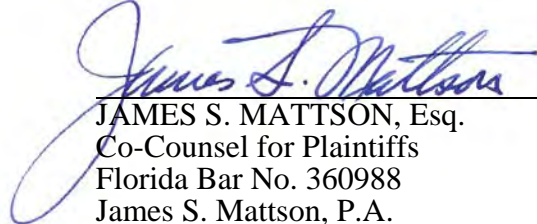


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Certificate of Service

I certify that I served a copy of the foregoing on **Robert Shillinger, 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, **Stephen J. Moore, Esq.**, 1500 Traders on Grand Bldg, 1125 Grand Blvd, Kansas City, MO 64106-2511, and **Jonathan A. Glogau, Esq.**, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, by hand, in open court this 30th day of November 2005.



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