

**IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA**

THOMAS F. COLLINS, *et al.*,

Plaintiffs,

v.

MONROE COUNTY, FLORIDA,

a Political Subdivision of the State of Florida

Defendant,

v.

THE STATE OF FLORIDA,

Third-Party Defendant.

CASE NO. CA-M-04-379

**MONROE COUNTY’S MEMORANDUM OF LAW
ON LIMITED ISSUE OF STATUTE OF LIMITATIONS
IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT
PURSUANT TO COURT DIRECTION**

I. INTRODUCTION

On November 30, 2005, this Court heard oral argument on Monroe County’s and the State of Florida’s Cross-Motions for Summary Judgment (the “Motions”). At the conclusion of the proceedings, the Court requested the parties to provide further briefs regarding the County and State’s facial (four-year) and Section 380.085 (90-day) statute of limitations defenses, specifically addressing the following issues:

(1) Assuming the six wetland plaintiffs’ and five scarified upland plaintiffs’ properties were taken facially, by the Monroe County 2010 Plan and other Land Development Restrictions in the Monroe County Code (collectively, the “2010 Plan”), as set forth in the Special Master’s findings adopted by the Board of County Commissioners (“BOCC”), when were plaintiffs on notice of the facial takings under statute of limitations law such that the four-year statute on their facial inverse condemnation claims began to run? (Transcript of Hearing pp. 157, 178, 181.)

(2) Alternatively, assuming plaintiffs’ properties were taken by the application of the 2010 Plan to plaintiffs’ properties through the County’s Beneficial Use Determination (“BUD”) process, does the 90-day statute of limitations contained in Fla. Stat. section 380.085 apply to plaintiffs’ as-applied inverse condemnation claims? (Transcript of Hearing pp. 175, 178.)

As to the first question, if there were any takings, it was achieved by the very enactment of the 2010 Plan on January 4, 1996, and the four-year statute of limitations runs from that date as a matter of law. By operation of law, the publication of the 2010 Plan gave all plaintiffs constructive notice of the restrictions on their properties. Even if the Court should conclude that the four years did not begin to run until plaintiffs had actual notice of the applicability of the 2010 Plan to their properties, they all had actual notice of the restrictions in the 2010 Plan (1) in 1996 (1997 in the case of plaintiff Burstyn) as a result of the dramatic tax assessment reductions re-evaluating their properties as a result of the 2010 Plan restrictions; and (2) in April 2000 when the County’s biologist physically inspected their properties and designated them as wetlands or scarified lands. This is true as to all eleven of the plaintiffs, but especially as to the six wetland plaintiffs, as shown in the chart below. The answer to Question (1), therefore, is that the four-year statute of limitations began to run in 1996, and thus expired in 2000--well before plaintiffs filed their complaint for inverse condemnation on November 22, 2004.

WETLAND PLAINTIFFS’ NOTICE OF STATUS OF PROPERTY UNDER THE 2010 PLAN				
PLAINTIFF	THE 2010 PLAN	DOWNWARD TAX REASSESSMENTS	PLAINTIFFS’ BUD APPLICATIONS	COUNTY BIOLOGIST’S STUDIES
TOST	1996 statute ran 2000	1988 statute ran 1992	1997 statute ran 2001	April 2000 statute ran April 2004
SCHNEIDER	1996 statute ran 2000	1987 statute ran 1991	1997 statute ran 2001	April 2000 statute ran April 2004
LOMRANCE	1996 statute ran 2000	1987, if not 1981 statute ran 1991 If not 1985	1997 statute ran 2001	April 2000 statute ran April 2004
HILL	1996 statute ran 2000	1996 (if not late 1980s) statute ran 2000 Or mid-1990s	1997 statute ran 2001	April 2000 statute ran April 2004
BURSTYN	1996 statute ran 2000	1997 statute ran 2001	1997 statute ran 2001	April 2000 statute ran April 2004
DEL VALLE	1996 statute ran 2000	1996 statute ran 2000	1997 statute ran 2001	April 2000 statute ran April 2004

The answer to Question (2) is “yes.” Because Monroe County is an “area of critical state concern” under Chapter 380 of the Florida Statutes, that chapter permeates and applies to all land development proceedings in the County, and thus section 380.085’s 90-day limitations period applies to all inverse condemnation claims founded on as-applied final determinations reached in the BUD process. So, if the alleged takings were accomplished when the BOCC approved the beneficial use determinations during the period March 2002 through May 2004, plaintiffs’ inverse condemnations claims became barred well before the filing of plaintiffs’ inverse condemnation claims on November 22, 2004.

II. PLAINTIFFS WERE ON NOTICE OF THE 2010 PLAN AND ITS IMPACT ON THEIR PROPERTIES SO AS TO TRIGGER THE RUNNING OF THE FOUR-YEAR STATUTE OF LIMITATIONS ON THE 2010 PLAN’S EFFECTIVE DATE OF JANUARY 4, 1996.

A. As a Matter of Law, Plaintiffs Are Deemed to Have Been On Notice of the Accrual of Their Claims When the 2010 Plan was Enacted on January 4, 1996.

Facial takings claims accrue on the date of enactment of the regulation that is alleged to have caused the taking. City of Pompano Beach v. Yardarm Restaurant, 641 So. 2d 1377, 1387-88 (1994); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561, 571 (Fla. 4th DCA 2002) (“‘facial’ challenges to regulations are generally ripe the moment the challenged regulation or ordinance is passed”). This is both logical and fair.

It is logical because by definition the very enactment of the statute constitutes the facial taking Lost Tree Village Corp., 838 So. 2d at 572; Taylor v. Village of North Palm Beach, 659 So. 2d 1167, 1170-71 (Fla. 4th – DCA 1995) (hereinafter “North Palm Beach”); Glisson v. Alachua County, 558 So. 2d 1030, 1035-36 (Fla.1st DCA 1990). It is fair because property owners are deemed to be on constructive notice of enactment of land use laws affecting their property Palm Beach Polo, Inc. v. Village of Wellington, 2005 WL 3116121, *3 (Fla. 4th DCA) (property owners are on “constructive notice of the ordinances, resolutions, and filed plans and restrictions governing a parcel of property”); Town of Fort Lauderdale-by-the-Sea v. Meretsky,

773 So. 2d 1245, 1249 (Fla. 4th DCA 2000) (property owners, asserting estoppel claim against city that erroneously awarded a development permit contrary to the ordinance setting forth the permitting procedures, are deemed to be on constructive notice of the permitting regulations from the date of enactment.).

For example, a property owner who is adversely affected by an order by the state land planning agency approving a local comprehensive plan under Fla. Stats. sections 380.05 and 163.3184 must appeal the order within 30 days from its rendition—not *from when the property owner becomes aware of the plan's impact on his or her property*. Fla. Stat. sections 380.05, 163.3184, 120.68.

Plaintiffs' inverse condemnation claims are unquestionably facial.¹ The County's beneficial use determinations, stipulated to by plaintiffs, were that: (1) the 2010 Plan had taken plaintiffs' properties from its inception, meaning a facial taking; (2) all subsequent applications for development permits were not required and none were made separately or in- the BUD process; and (3) the basis for plaintiffs' inverse condemnation claims is that the County made this facial determination in the BUD process. Not only do plaintiffs rely on this determination as the foundation for their complaint, they also based their *BUD applications* on a facial theory, *stipulated* with the County that the County purchase their properties because the regulations facially caused the loss of beneficial use, *sought no land use relief* from the regulation as would be required for the alleged taking to be as-applied, then *accepted* the determination as a matter of law by not appealing it in accordance with the statute, and finally, *based* their inverse condemnation complaint on it.

By not appealing the BOCC Resolutions based on the Special Master's determinations that the takings were facial, plaintiffs' belated as-applied arguments are barred by administrative *res judicata*. San Remo Hotel L.P v. City & County of San Francisco, 125 S. Ct. 2491

¹ This is true even as to plaintiffs Collins and Magrini. Even though these plaintiffs have applied for development permits through the ROGO process in addition to pursuing other relief through the BUD process, their takings claims are based solely on the BUD process, not their ROGO applications.

(2005) (once a court or administrative agency has decided an issue of fact or law necessary to its decision in proceedings involving inverse condemnation, the parties are thereafter precluded from re-litigating issues that were or could have been raised in the prior proceedings). See also Key Haven Associated Enter. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 159 (Fla. 1983); Bowen v. Florida Dept. of Environ. Regulation, 448 So. 2d 566, 568-70 (Fla. 2d DCA 1984).

Plaintiffs, in their opposition to the cross-motions, belatedly seek to totally recast their longstanding position by theorizing (on second thought) that the taking was not facial because when the 2010 Plan became effective, plaintiffs did not know whether it applied to their properties because an on-site biological determination was required to fix the definitive boundaries of their respective wetlands. This theory is both too little and too late. Too little, because plaintiffs were in fact entirely aware of the wetlands designations of their properties, and therefore of the impact of the 2010 Plan upon them, when the 2010 Plan became effective on January 4, 1996, and in any event more than four years before they filed suit. And too late, because plaintiffs entered the BUD process under a facial theory, advocated and stipulated to that facial theory during the BUD process, received a facial determination through the BUD process, accepted that determination by failing to appeal it, and exploited that determination as the basis for their complaint. And—as the most telling fact of all *plaintiffs would not have entered the BUD process seeking fair market value offers for their properties in the first place if they were unaware that their properties were affected by the wetlands designations in the 2010 Plan!*

(1) The County's Determination Was of a Facial Taking.

For each of the six wetland plaintiffs, the BUD process resulted in a determination by the Special Master that the plaintiff had been “deprived of all reasonable economic use” of his or her property because the 2010 Plan had rendered the lots(s) “unbuildable.” See Special Master’s Proposed Beneficial Use Determinations for Tost, Schneider, Lomrance, Hill, Burstyn and Del Valle plaintiffs (collectively, the “wetland” plaintiffs or properties), para. 6, attached hereto as

Exhibits “A-13” through “A-17.”² For each of the five scarified land plaintiffs, the determination was that plaintiffs were “not able to obtain a building permit.” See Special Master’s Proposed Beneficial Use Determination for Davis, Johnson, Radenhausen, Magrini and Collins plaintiffs (collectively, the “scarified land” plaintiffs or properties), para. 8, attached hereto as Exhibit “B-11.” The Special Master’s determinations in each case were adopted by the BOCC, resulting in a resolution that each plaintiff “has been deprived of all economic use of their property by operation of the [2010 Plan].” See BOCC Resolutions, attached hereto as Exhibits A-22 through A-27 (wetland plaintiffs) and B-13 (scarified land plaintiffs).

These are determinations of a facial taking. Where a plan contemplates no viable uses of a property, the taking is facial. Taylor v. City of Riviera Beach, 801 So. 2d 259, 260 (Fla. 4th DCA 2001) (hereinafter “Riviera Beach”). In contrast, a claim can be asserted for an as-applied taking only when the property owner has made a meaningful application for a permit or variance under the plan, and a final determination has been made “as to the nature and extent of development that will be permitted.” *Id.* at 262. “In a facial takings claim, the landowner maintains that the mere enactment of the regulation constitutes a taking of the affected property without adequate procedures to provide prompt, just compensation.” North Palm Beach, 659 So. 2d at 1170. Facial takings claims are characterized by a claim that the regulation “constitute[s] a deprivation of all or substantially all economic, beneficial or productive use of the affected property.” *Id.* at 1171.

Here, the Special Master determined that the very terms of the 2010 Plan denied plaintiffs all ability to develop their properties. In the case of the wetland plaintiffs, the Special Master concluded that those plaintiffs had been denied all economic use of their lots by finding that:

The 2010 Plan imposes a “100% open space requirement” (applicable to all wetland plaintiffs);

² Exhibit “A,” collectively, is comprised of the wetland plaintiffs’ BUD applications, Staff Reports, Special Master Proposed Beneficial Use Determinations, Hearing Transcripts and BOCC Resolutions. Exhibit “B,” collectively, is the same information for the scarified land plaintiffs.

In mangrove wetlands in particular the 2010 plan prohibited any development under all circumstances (applicable to all wetland plaintiffs except Lomrance); and

No variance, building permit or other land use relief is authorized.

See Special Master's Proposed Beneficial Use Determinations, paras. 3-4, Exhibits A-13 through A-17. Simply put, the Special Master concluded, and the BOCC agreed, that the 2010 Plan constituted a flat-out ban on development of the wetland plaintiffs' properties – once the 2010 Plan was in place, such property owners had no chance of obtaining a permit or variance, and plaintiffs never sought either in this case. Riviera Beach, 801 So. 2d at 262. The 2010 Plan from the outset “contemplate[d] no viable use of the propert[ies] (id. at 260), and “constitute[d] a deprivation of all or substantially all economic, beneficial or productive use of the affected property.” North Palm Beach, 659 So. 2d at 1171. There could not be a better fit between the findings of the Special Master and the BOCC on the one hand, and the Florida judicial definition of a facial taking on the other.

The findings of the Special Master and BOCC as to the scarified land plaintiffs reflect a facial taking as well. Although the Special Master's Beneficial Use Determinations point out that, technically, the 2010 Plan gives the appearance of allowing permits or variances, he concluded that as a practical matter permits are untenable. See Special Master's Beneficial Use Determination for scarified land plaintiffs, para. 8, Exhibit B-11. Moreover, it must again be emphasized that the scarified land plaintiffs *never applied for a permit or variance* through the BUD process or through any other application, so if there was no facial taking, there cannot have been any taking. Riviera Beach, 801 So. 2d at 262; San Remo Hotel L.P., 125 S. Ct. 2491.

Plaintiffs were entirely complicit in the County's determination of a facial taking and contrary to Plaintiffs' attorney Tobin's affidavit – *it was exactly what they asked for*. Plaintiffs' BUD applications *themselves* state:

All reasonable economic use of the property has been denied by virtue of Monroe County's Year 2010 Comprehensive Plan, Future Land Use Map Designation, land development regulations, and rate of growth limitations (and moratoriums) for residential and commercial development.

See wetland plaintiffs' BUD Applications, Part II, paras. 1, 4, Exhibits A-1 through A-6.

Further, as expressly memorialized in the Special Master's determinations, on multiple occasions plaintiffs' counsel Tobin *stipulated* that "[t]he Applicants and the Planning Director have *agreed* that ['purchase of the property for just compensation'] is the preferred relief for all of the Lots . . . " (Special Master's Proposed Beneficial Use Determinations for the wetland plaintiffs, paras. 13-14, Exhibits A-13 through A-17 (emphasis supplied)), and the BUD hearing transcripts plainly show that plaintiffs' counsel expressly stipulated to everything that was contained in the County Staff Reports. See, e.g., Hearing Transcript of Beneficial Use Hearing, Burstyn and Del Valle plaintiffs, Exhibit A-21. Those Staff Reports said that the lots were "unbuildable" by operation of the 2010 Plan; that "no portion may be filled and the lot[s] must remain in a natural condition;" and that "the applicant[s] ha[ve] no avenues for obtaining a variance from the regulations for this lot." See Staff Reports (wetland plaintiffs), Exhibits A-7 through A-12.

Then, plaintiffs stood by contentedly over a period of 10-13 months (depending on the plaintiff), while the Special Master's determinations were sent up for BOCC approval. See, e.g., Special Master's Beneficial Use Determination and BOCC Resolution for Burstyn plaintiff, dated May 21, 2001 and March 20, 2002, respectively (Exhibits A-17 and A-26). Plaintiffs posed no objections at the public hearing held pursuant to Monroe County Code § 9.5-174, at which the BOCC approved the Special Master's determinations. Subsequently, plaintiffs continued to demonstrate their support for the finding of faciality by not exercising their various statutory rights to an administrative appeal under, e.g., Fla. Stat. § 380.07 to contest the Special Master's facial take findings. That statute provides that in Areas of Critical State Concern, "[w]hensoever any local government issues any development order ... [w]ithin 45 days after the order is rendered, *the owner*, the developer, or the state land planning agency may appeal the order to the Florida Land and Water Adjudicatory Commission by filing a notice of appeal with the commission." (emphasis added.) Fla. Stat. § 380.07(2). Similarly, Monroe County Code section 9.5-521(b) and (c) permits any owner aggrieved by an order of an administrative official of the county to appeal that order within 30 days. See also Florida E.C.R. Co. v. State

Land and Water Adjudicatory Comm'n., 464 So. 2d 1361 (Fla. 3d DCA 1985); Manatee County v. Estech Gen. Chem. Corp., 402 So. 2d 1251 (Fla. 2d DCA 1981), rev. denied 412 So. 2d 468 (Fla. 1982).

Finally, plaintiffs' complaint for inverse condemnation is based on an allegation of a facial taking, in that it is premised on the BOCC's decision that the 2010 Plan deprived plaintiffs of all economic use of their property. See, e.g., First Amended Complaint in Inverse Condemnation, ¶¶ 18-29, 31 (stating that as to each plaintiff, the County, by way of the BOCC Resolutions, has deprived each plaintiff of all reasonably economic use of his or her property). Paragraph 31 of the complaint concedes that the BOCC Resolutions are a determination that the alleged taking occurred "by the operation of the Plan and Land Development Regulations of the Code."

In summary, the County in this case unequivocally concluded, and plaintiffs advocated, agreed, and based their complaint on the notion that from the outset, the 2010 Plan deprived plaintiffs of all beneficial use of their property and left no meaningful recourse for development. The taking, if any, thus had to be facial under Florida law.

(2) Plaintiffs Cannot Now Re-Theorize That The Taking Was Not Facial.

Plaintiffs now belatedly attempt to claim that the 2010 Plan did not, in and of itself, take their property after all, on the theory that plaintiffs had no way of knowing what their properties were classified as for purposes of the 2010 Plan's application until the properties obtained an official or site-mapped classification from the County, which plaintiffs claim did not happen until 2002. First, plaintiffs *were* in fact on both constructive and actual notice that their properties were wetlands or scarified uplands under the 2010 Plan well before 2002, and far more than four years before they filed their inverse condemnation complaint on November 22, 2004. Second, nothing of this "official conditions map" theory, even if it were correct as a matter of law, which it is not, was ever raised in plaintiffs' BUD applications, before the Special Master, at

the BOCC hearings or in their complaint. Plaintiffs are barred by administrative *res judicata* and *collateral estoppel* from alleging a new core theory of the taking.

B. Plaintiffs Were on Actual Notice of the Classification of Their Properties More than Four Years Before They Filed Suit.

Each plaintiff became aware that his or her property was either wetland or scarified up-land under the 2010 Plan more than four years before their inverse condemnation suit was filed.

(1) Actual Notice by the Six Wetland Plaintiffs:

As set forth below, and as summarized in the chart contained in Appendix 1, the six wetland plaintiffs all were on *actual* notice of the classification of their properties vis-a-vis the 2010 Plan more than four years before they brought their inverse condemnation claims. These facts are *in addition* to the fact that in January 1997 each of the plaintiffs filed applications under the BUD process seeking fair market value offers by reason of the operation of the 2010 Plan affecting their beneficial use, and so were undeniably aware in January of 1997 that the 2010 Plan applied to their properties.

(a) Tost Plaintiffs

The Tosts first became aware of the classification of their property at the latest in 1988 when they received a tax reassessment that reduced their property assessment from \$14,791 to \$1,909. See Exhibit “C-1” (Tost tax assessment). The Tosts admitted in their depositions that they noted the dramatic reassessment based on the wetland classification and went to the County Tax Assessor to object. See Transcripts of Deposition, Mr. Tost pp. 59:23-25, 60:1-5; Mrs. Tost p. 6:3-11, attached as Exhibit “C-2.” This very Court has held that property appraisals provide notice so as to begin the running of any notice-based statute of limitations periods. See Latorre v. Monroe County, 2000 WL 34509018, *12 (because the County was on notice of property appraisal evidencing owner’s improvements more than four years before it brought its code enforcement action, the action was barred by the four-year statute of limitations.).

Additionally, when the 2010 Plan was adopted in 1996, it expressly adopted the Natural Features Maps that delineated the classifications of plaintiffs’ properties. As discussed above, as

a matter of law property owners are on notice of regulations affecting their property. Palm Beach Polo, Inc., 2005 WL 3116121, at 3; Town of Fort Lauderdale-by-the-Sea, 773 So. 2d at 1249.

Moreover, the Tost property was physically inspected by the County Biologist in furtherance of the Tosts' BUD application in April 2000, who classified the property as "mangrove and salt marsh wetlands . . . unbuildable pursuant to Monroe County LDRs" in his April 2000 report, over four years prior to the filing of the takings complaint. Plaintiffs and their attorneys all knew that these inspections and evaluations were occurring as part of the BUD process, that in applying for BUD relief they consented to physical inspection of their land, and that if the inspections revealed that their properties were not restricted by the 2010 Plan from beneficial use by reason of their status as wetlands or scarified lands, they certainly would not receive the relief they were seeking. Plaintiffs were on full inquiry notice of the biologist's findings, and should not now be heard attempting to benefit from having stuck their heads in the sand. Finally, and conclusively, Tost had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

(b) *Schneider Plaintiffs*

Schneider *et al.* first became aware of the wetland status of his property at the latest in 1987 when his property was reassessed from \$18,226 in 1986 to a mere \$50. See Exhibit D (Schneider tax assessment).

Schneider *et al.*, like the Tosts, were on notice of his property's wetland status when the 2010 Plan became effective in 1996 because of its express incorporation of the Natural Conditions Maps.

Moreover, Schneider *et al.*, like the Tosts, were on notice by virtue of the County Biologist's inspection of the Schneider property in April 2000 as part of his BUD application, and identification of it as "mangrove and salt marsh wetlands ... unbuildable pursuant to Monroe County LDRs" in his April 2000 report. Finally, and conclusively, Schneider *et al.* had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

(c) *Lomrance Plaintiff*

Lomrance first became aware of the wetland status of his property at the latest in 1987 when each of his four lots were reassessed at a value of \$50. See Exhibit E-1 (Lomrance tax assessment). Lomrance admitted in his deposition that he noted this when he received his tax bill, and that he went to Key West to ask why his assessment had been reduced. See Transcripts of Deposition, pp. 28:6-12, 30:21-25, 31:1-6, attached as Exhibit E-2. He was told that he could not build because his property was wetlands, received a letter saying that his property was being turned into a park, and was told in 1981 that his property would have to remain in a natural state. He further testified that he viewed the lowered tax bill in 1987 as an attempt to steal his property. See pp. 14:20-16:13; 8:2-11; 11:15-25; 23:6-23; 31:7-24; 40:4-11. (Exhibit E-2.)

Lomrance, like the Tosts and Schneider, was on notice of the status of his property upon the enactment of the 2010 Plan and its Natural Features Maps, and again when the County Biologist inspected and designated his property in April 2005 as part of the BUD process. Finally, and conclusively, Lomrance had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

(d) *Hill Plaintiffs*

The Hill plaintiffs first became aware of the wetland status of their property at the latest in 1996 when their property was reassessed from \$3,800 in 1995 down to \$2,280 in 1996. See Exhibit F-1 (Hill tax assessments). In fact, Mrs. Hill admits in her deposition that they noted a tax fluctuation in the mid-80s and made an inquiry to the County, and thereafter knew they couldn't do anything with their property because of its wetlands status. See Transcript of

Deposition, pp. 25:8-17, 26:2-25, 27:1-3, 28:3-6, attached as Exhibit F-2. Mrs. Hill testified that they went to the County several times in the late 1980s to obtain a fill permit and were denied, and that they stopped trying to obtain build permits throughout the 1980s and 1990s because they were told they would not be successful. See pp. 14:6-16:8; 18:19; 19:1-7; 36:24-37:13; 38:2-7. See also Answers to Interrogatories, No. 10. She further testified that she

believed the downward tax assessment meant that the property had been taken. Pp. 25:13-27:9. (Exhibit F-2.)

The Hills, like the others, were on notice of the status of their property upon the enactment of the 2010 Plan and its Natural Features Maps, and again when the County Biologist inspected and designated the property in April 2000 as part of their BUD applications. Finally, and conclusively, the Hills had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

(e) Burstyn Plaintiff

Burstyn first became actually aware of the wetland status of his property at the latest in 1997 when the assessed value of his property plummeted from \$13,800 to \$50. See Exhibit G (Burstyn tax assessment). Then Burstyn, like the others, was on notice upon the enactment of the 2010 Plan and its Natural Features Maps, and again when the County Biologist inspected and designated the property in April 2000 as part of the BUD process. Finally, and conclusively, Burstyn had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

(f) Del Valle Plaintiffs

The Del Valles first became actually aware of the wetland status of their property at the latest in 1996-97 when they received their tax bill reassessing their property at \$50. See Exhibit H-1 (Del Valle tax assessment). According to the Del Valle's deposition testimony, in 1996 or 1997 they received a letter from the seller of their property, Mr. Brenner, who informed them that the County had declared their property as wetland. Plaintiffs understood this to mean that their lot was unbuildable, and that the land was essentially being taken away from them. See Transcripts of Deposition, Mr. Del Valle pp. 19:23-25; 21:1; 22:5-10, 18-25; 23:1-7, 15-25; 24:1-9; Mrs. Del Valle pp. 7:22-25; 8:1-15; 11:11-20; 12:12-15, attached as Exhibit H-2.

The Del Valles, like the others, were on notice upon the enactment of the 2010 Plan and its Natural Features Maps, and again when the County Biologist inspected and designated the property in April 2000 as part of the BUD process. Finally, and conclusively, the Del Valles

had actual notice the 2010 Plan restrictions because the BUD Application expressly sought compensatory relief from the 2010 Plan restrictions.

In summary, by the time the 2010 Plan became effective on January 4, 1996, each of the wetland plaintiffs had *actual notice* that their property was wetland under the 2010 Plan. The only arguable exception is plaintiff Burstyn, but Burstyn in any event was on notice by 1997. Thus, each of the wetland plaintiffs was on notice of his or her property's wetland status under the 2010 Plan well more than four years before suit was filed on November 22, 2004. Plaintiffs all had conclusive notice of the 2010 Plan restrictions because each of them alleged in their January 7, 1997 BUD Applications that the 2010 Plan restrictions had deprived their properties of all beneficial use. Their inverse condemnation claims are time-barred.

(2) Actual Notice by the Five Scarified Land Plaintiffs:

The County's argument as to the applicability of the four-year statute of limitations has to date focused on the six wetland plaintiffs, since there can be no credible dispute that the wetland properties, if they were taken at all, were taken facially by the 2010 Plan restrictions and that plaintiffs had notice more than four years before suit was filed. However, based on the manner in which plaintiffs have postured their claims during and after the BUD process, including the assertions in their inverse condemnation complaint, the alleged taking of the five scarified land properties was facial as well and, therefore, also subject to the four-year statute of limitations. The scarified land plaintiffs alleged a facial taking in their BUD applications, consented to that characterization during the BUD process, failed to appeal the facial determination made in the BOCC resolution, and based their complaint for inverse condemnation on a facial taking theory.

Moreover, by virtue of the tax assessments and the County Biologist's property examinations, each of the scarified land plaintiffs was on actual notice of the applicability of the 2010 Plan to his or her property well more than four years before suit was brought, and therefore these

claims should be time-barred as well. The time and manner of notice with respect to each scarified land plaintiff is summarized in the chart below.

SCARIFIED LAND PLAINTIFFS' NOTICE OF STATUS OF PROPERTY UNDER THE 2010 PLAN				
PLAINTIFF	THE 2010 PLAN	DOWNWARD TAX REASSESSMENTS	PLAINTIFFS' BUD APPLICATIONS	COUNTY BIOLOGIST'S STUDIES
DAVIS	1996 statute ran 2000	1996(see Exh. I) ³ statute ran 2000	1997 statute ran 2001	February 2000 statute ran February 2004
JOHNSON	1996 statute ran 2000	1996(see Exh. J) ⁴ statute ran 2000	1997 statute ran 2001	February 2000 statute ran February 2004
RADENHAUSEN	1996 statute ran 2000	1996(see Exh. K) ⁵ statute ran 2000	1997 statute ran 2001	February 2000 statute ran February 2004
MAGRINI	1996 statute ran 2000	1996(see Exh. L) ⁶ statute ran 2000	1997 statute ran 2001	February 2000 statute ran February 2004
COLLINS	1996 statute ran 2000	1998(see Exh. M) ⁷ statute ran 2002	1997 statute ran <u>2001</u>	February 2000 statute ran February 2004

Finally, to reemphasize an overarching — and obvious — point applicable to all of the plaintiffs: Plaintiffs entered the BUD process in the first place, seeking a fair market value offer for their properties based on an alleged taking by the restrictions of the 2010 Plan. Had they not been aware that their properties were of such a classification as to have been taken, they

³ Exhibit I, Davis's Tax Assessments, shows that the Davis property was downwardly reassessed from \$30,000 in 1990 to \$17,634 in 1996.

⁴ Exhibit J, Johnson's Tax Assessments, shows that the Johnson properties were downwardly reassessed from \$33,750 and \$44,939 in 1995 to \$20,250 and \$26,963, respectively, in 1996.

⁵ Exhibit K, Radenhausen's Tax Assessments, shows that the Radenhausen property was downwardly reassessed from \$18,165 to \$7,875 in 1996.

⁶ Exhibit L, Magrini's Tax Assessments, shows that the Magrini property was downwardly reassessed from \$48,750 in 1994 to \$27,000 in 1996.

⁷ Exhibit M, Collins' Tax Assessments, shows that the Collins property was downwardly reassessed to \$50 in 1998.

would have simply sought a determination of the classification of their properties and requested development permits or variances, and only then, if necessary, pursue the BUD process to obtain fair market value relief.

(3) In any event, plaintiffs are bound by res judicata and collateral estoppel and cannot be permitted to change their core theory at this late stage.

Even in the doubtful event plaintiffs can establish that they lacked notice of the applicability of the 2010 Plan to their properties, they are bound by *res judicata* and collateral estoppel to their longstanding theory that the alleged taking was facial. As discussed above, plaintiffs based their BUD applications on a facial theory, wholly endorsed the Special Master's facial determination and the BOCC's adoption thereof did not appeal administratively or judicially from these facial determinations as seeing erroneous or invalid, and based their complaint for inverse condemnation on that determination.

Additionally, the determination that the taking, if any, was facial is administrative *res judicata* because, as discussed above, plaintiffs never exercised their right to appeal the determination. See Key Haven Associated Enterprises, 427 So. 2d at 159 (in rejecting property owner's attempt to "rephrase" their constitutional question in a collateral attack: ". . . the only way [the property owner] can challenge the propriety of the permit denial, based on asserted error in the administrative decision making process or on asserted constitutional infirmities in the administrative action, is on direct review [i.e. certiorari] in the district court."); American Riviera Estate Co. v. City of Miami Beach, 735 So. 2d 527, 528 (Fla. 3rd DCA 1999) citing Fla. R. App. P. 9020(a)(3) (appeal from an administrative decision "can only be accomplished by filing a petition for a writ of certiorari in the circuit court within thirty days of the rendition of the order to be reviewed").

As part of plaintiffs' effort to belatedly transform their claims into "as-applied" claims in hopes of overcoming the four-year statute of limitations, counsel states in his new affidavit that he "did not agree (and did not have authority from any of the Plaintiffs to stipulate or agree) to the form or amount of 'beneficial use relief' the Plaintiffs would accept from the

County.” See November 23, 2005 Affidavit of Andrew M. Tobin, Esq., ¶ 5. This self-serving backtracking is directly belied, however, by the Hearing Transcripts from the BUD proceedings, which are replete with statements by Mr. Tobin himself that plaintiffs stipulated to everything in the Staff Reports. See, e.g., Hearing Transcript of Beneficial Use Hearing, Burstyn and Del Valle plaintiffs, Exhibit A-21. Those Staff Reports said that the lots were “unbuildable” by operation of the 2010 Plan; that “no portion may be filled and the lot[s] must remain in a natural condition;” and that “the applicant[s] ha[ve] no avenues for obtaining a variance from the regulations for this lot.” See Staff Reports (wetland plaintiffs), Exhibits A-7 through A-12.

Plaintiffs should not be permitted to defeat summary judgment by reversing the core taking theory upon which their suit is based. They should be held to their longstanding theory that their properties were taken facially, by the very enactment of the 2010 Plan, by their actual and constructive notice of the facial regulatory effects, the result being that the four-year statute of limitations ran before they filed their inverse condemnation action.

III. WHETHER OR NOT PLAINTIFFS’ INVERSE CONDEMNATION CLAIMS ARE FACIAL, THEY ARE ALSO BARRED BY THE 90-DAY STATUTE OF LIMITATIONS IMPOSED BY FLA. STAT. SECTION 380.085.

The second question asked by the Court is whether Fla. Stat. section 380.085’s 90-day statute of limitations period applies to inverse condemnation claims brought following final determinations reached during a County BUD proceeding. The answer is “yes,” because the 2010 Plan was developed as a direct result of the statutory mandate of the State Administrative Commission under Chapter 380, and all administrative and judicial proceedings must be effectuated pursuant to and in compliance with the latter. Thus, even if the alleged takings were not facial, but rather were accomplished when the County made its beneficial use determinations during the period March 2002 through May 2004, plaintiffs’ inverse condemnations claims became time-barred 90 days later on, at the latest, August 2004, well more than 90 days before their complaint was filed on November 22, 2004.

A. Chapter 380 Preempts All Judicial and Administrative Proceedings From County Land Use Development Orders, Plans and LDRs.

Chapter 380, Florida Statutes, commonly known as The Florida Environmental Land and Water Management Act of 1973 (“Chapter 380,” or the “Act”), “governs the natural resources, conservation, reclamation and use of land and water” in the State of Florida. Monroe County v. Ambrose, 866 So. 2d 707, 709, n.1 (Fla. 3d DCA 2003). Since 1979, Monroe County has been designated as an “area of critical state concern” pursuant to Fla. Stat. § 380.0552, the legislative intent behind which was to, among other things, protect the Florida Keys, conserve the community character, and “*promote[] coordination and efficiency among governmental agencies in the Florida Keys.*” Id. at 709, n.2. The Act defines “governmental agency” as, *inter alia*, “[a]ny local government, as defined in this chapter, or any department, commission, agency, or other instrumentality thereof...” Fla. Stat. 380.031 subd. (6)(b), (c). “Local government,” of course, includes counties. Fla. Stat. 380.031 subd. (10).

Monroe County’s LDRs, including the 2010 Plan and ROGO, were created under the mandate of the State Administrative Commission and in furtherance of Chapter 380. See Ambrose at 706, n.3. Consistently, the designation of Monroe County by the state as an area of critical state concern was to further the Act’s purpose of protecting the Florida environment by ensuring “an increased state role in [county] decisions which have a statewide impact.” Id. at 711. It is thus clear that Chapter 380 is an all-encompassing set of environmental land use regulations that preempt every land use proceeding conducted by local government agencies, and infiltrate all procedural interstices in those proceedings.

This must have been the legislative intent, for permitting landowners (or government agencies) to step in and out of the reach of Chapter 380 at their pleasure, as plaintiffs here postulate, “would clearly subvert significant legislation and regulations designed and enacted for the purpose of preserving our most precious lands.” Id. at 711. To achieve the goals of the Act, the legislature must have intended that its provisions control every single plan, land development regulation, permit process, and other land use activity engaged in at the local level. Chapter

380 preempts and overrides any other statutory provision that is inconsistent, including the four-year statute of limitations.

As stated by the Florida Supreme Court, “the Legislature has made a statutory determination that development in an area of critical state concern will have an adverse impact if the development is not in accordance with chapter 380.” Young v. Dept. of Community Affairs, 625 So. 2d 831, 834 (Fla. 1993). The result is that “development in the Florida Keys Area will have an adverse impact if not in accordance with chapter 380, the local development regulations, and the local comprehensive plan.” *Id.* For this reason, the Supreme Court in Young observed that, because Monroe County is within an area of critical state concern, permits issued to the landowners by Monroe County were subject to the procedures of Chapter 380, specifically, section 380.07 (setting forth the procedure for appealing development orders in areas of critical state concern). *Id.* at 832 n.3.

B. Plaintiffs’ Cannot Simply Proclaim That They Have Chosen Not To Bring Their Inverse Condemnation Claims Under Chapter 380.

Because of Chapter 380’s preemption, nothing that the plaintiffs have done in these proceedings escape it, including the filing of their inverse condemnation claims. The claims are deemed to be brought pursuant to Chapter 380 and subject to its terms.

In Ambrose, plaintiffs filed suit in the circuit court, asserting that their property was not subject to Monroe County’s 2010 Plan and ROGO. The Court of Appeal correctly observed that the landowners’ suit fell under Chapter 380. Ambrose, 866 So. 2d at 709. This is mandated because whenever a landowner pursues an action in the circuit court arising from a local government’s permitting process, Chapter 380, specifically section 380.085, is the only mechanism that permits this action to be brought directly. *Id.* at 712, n.5 (“Section 380.085, Florida Statutes (1997), enables a person substantially affected by the denial of a permit to build, to initiate an action in circuit court on the grounds that an area of critical state concern development order effects a taking without compensation.”).

Consistently, in Lee County v. New Testament Baptist Church of Fort Myers, Florida, Inc., 507 So. 2d 626 (Fla. 2d DCA 1987), the Second District Court of Appeal, after noting that the proceeding in the instant case concerned the actions of a county agency and not a state agency, nevertheless applied Key Haven's exhaustion of administrative remedies requirement. *Id.* at 628. Were it true that Chapter 380 does not apply to plaintiffs' inverse condemnation claim, that claim could not be brought at all because plaintiffs did not first appeal the BOCC Resolutions to the Administration Commission.

It is section 380.085 that, like its counterpart section 253.763 (relating to state lands), gives landowners the right to file inverse condemnation actions directly in the circuit court upon exhaustion of the administrative process. Section 380.085 subd. (b)(2); Bowen v. Florida Dept. of Environ. Regulation, 448 So. 2d 566, 568-69 (Fla. 2d DCA 1984) (observing that, in the case of the analogous section 253.763, "this section now provides for proceeding directly to the circuit court on an inverse condemnation action following final agency action denying, on its merits, a permit application."). Absent Chapter 380, no landowner, including plaintiffs herein, would be permitted to proceed with an inverse condemnation action in the circuit court without having first exhausted all remedies at the administrative level. See Key Haven Assoc. Ent., Inc., 427 So. 2d at 158 ("We hold that Key Haven could not pursue the inverse condemnation action in circuit court without first having taken an [administrative] appeal of the permit denial ..."). See also Fox v. Treasure Coast Reg'l Planning Council, 442 So. 2d 221, 226 (Fla. 1st DCA 1983) (including, in listing landowner's options, relief under Section 380.085, with no mention of an ability to bring an action four years later, outside of Chapter 380).

Given the preemptive impact of Chapter 380 on local land use proceedings, the fallacy of plaintiffs' position is obvious. Landowners cannot simply remove themselves from the provisions of Chapter 380, including section 380.085's 90-day statute of limitations, by simply proclaiming themselves to not be proceeding under that Chapter. They have no choice because it is only because of Chapter 380 that they have the right to bring an inverse condemnation proceeding without having exhausted their administrative or judicial remedies through appeal to

the Administrative Commission or to the circuit court by way of certiorari. Their argument is totally fallacious and merits the granting of attorneys' fees to the County and the State for having to rebut it. See Section 380.085(5) ("The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails.").

C. Plaintiffs' Position Is Implausible As A Practical Matter.

The implausibility of plaintiffs' theory becomes all the more obvious when its practical ramifications are considered. According to plaintiffs, the procedures laid out in Section 380.085 exist at a plaintiffs' pleasure—an aggrieved property owner can avail himself of them, or not. Thus, the idea goes, plaintiffs could have administratively appealed the BOCC Resolutions to the Administration Commission, and in that event, pursuant to Bowen, they would have had to file their inverse condemnation complaint within 90 days of the final disposition of their appeal. As the Second District Court of Appeal stated:

Thus, if an administrative appeal is instituted under 253.76, the 'taking' issue may not be heard by the circuit court until the 253.76 proceedings are completed. The ninety-day time limitation on bringing inverse condemnation actions in the circuit court, contained in 253.763(2), is automatically tolled until the agency completes the review process. Where no appeal to TIF is taken, the inverse condemnation suit must be filed within ninety days of the DER decision."

Bowen at 570.

Yet, according to plaintiffs, by *not* appealing the BOCC Resolutions, they "removed" themselves from the 90-day limitations period of the Act and bought themselves another *four years* to bring their claims! In fact, according to plaintiffs' argument, by not appealing they now have four years to bring *any number of appeals* arising from the BUD process, from the designations of their properties on the Natural Features Maps to the manner in which their applications were processed. They could even raise due process arguments for up to four years after the fact, as plaintiffs here in fact attempt to do in their complaint by alleging that "[a] five to seven year delay in rendering a Beneficial Use Determination does not substantially advance a legitimate state interest." See Complaint ¶ 39. All of this is directly contrary to the Florida Supreme Court ruling in Key Haven and all of the subsequent DCA opinions which require the

filing of these claims within the 30-day period of the appeal to the Administrative Commission and/or by certiorari to the circuit court.

If landowners aggrieved in land use proceedings could simply file inverse condemnation claims that fall outside of section 380.085, that provision's creation of the landowner's right to do so would be superfluous. See Monroe County v. Ambrose, 866 So. 2d 707, 712, n.5 (Fla. 3d DCA 2003) (Section 380.085, Florida Statutes (1997), enables a person substantially affected by the denial of a permit to build, to initiate an action in circuit court on the grounds that an area of critical state concern development order effects a taking without compensation.”).

For a landowner to obtain such a windfall by sitting on his rights to appeal would be an absurd result. Were that the case, property owners' rights to appeal land use determinations would be severely compromised because the property owners would have to weigh the potential benefits of appealing and having only 90 days to file an inverse condemnation action, against the loss of a four-year statute of limitations on any claims they might eventually need to bring if they waived the appeal. The absurdity of this is demonstrated in the statutory language and judicial opinions that state that having failed to appeal, the only relief that can be granted is inverse condemnation within the same 90-day period and all other claims are forever barred. The Legislature could never have adopted such an irrational scheme that punishes property owners that actually assert their rights. The only conclusion that makes any sense is that whether or not one appeals, one is limited to filing an inverse condemnation action within the 90-day period.

D. Plaintiffs' Reliance On Chapter 380's Definition Of "Agency" Is Overly Narrow.

Plaintiffs read Section 380.085 in a vacuum. They tout subd. (1)(a)'s definition of "agency" ("any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government"), as if the lack of an express reference to local government agencies, by name, means that such entities are not included.

Plaintiffs ignore the last part of the definition, which brings within the term “agency” *any other unit or entity of state government*. Pursuant to Section 380.031, containing the definitions for Chapter 380, “governmental agency” means, *inter alia*: “[the] state or any department, commission, agency, or other instrumentality thereof;” and “[a]ny local government, as defined in this chapter, or any department, commission, agency, or other instrumentality thereof. . .” Fla. Stat. 380.031 subd. (6)(b), (c). “Local government” is of course defined as “any county or municipality.” Fla. Stat. 380.031 subd. (10). The only reading of Section 380.085’s definition of “agency” therefore includes counties.

E. Basic Statutory Construction Is Contrary To Plaintiffs’ Theory.

The four-year statute of limitations on which plaintiffs rely, Fla. Stat. 95.11, subd. (3)(p), is a general “catch-all” statute of limitations, to be applied in “[a]ny action not specifically provided for in these statutes.” Moreover, section 95.011 says that each of the statutes of limitations in the chapter applies unless “a different time is prescribed elsewhere in these statutes.” Section 380.085, in contrast, is a highly specific statute of limitations, expressly applicable to landowners seeking redress for adverse decisions by government agencies that restrict the development of land.

It is a well-accepted canon of statutory instruction that a specific statute overrides a less specific one. See Stoletz v. State, 875 So. 2d 572, 575 (Fla. 2004). Yet plaintiffs erroneously advocate the applicability of a general statute of limitations over a specific one, namely, Section 380.085. As pointed out in Joint Ventures, Inc. v. Dept. of Transp., 519 So. 2d 1069, 1073 (Fla. 1st DCA 1988), “Section 380.085, Florida Statutes, provides specific judicial remedies.”

Thus, basic rules of statutory construction compel the finding that the 90-day statute of limitations imposed by the highly specific section 380.085 controls over the general “catch-all” limitations period imposed by section 95.11.

IV. CONCLUSION

If there has been a taking of plaintiffs' properties, it was a facial taking by the very enactment of the 2010 Plan on January 4, 1996, and the applicable four-year statute of limitations ran from that date as a matter of law. Even if the Court concludes that the statute did not commence running until plaintiffs were on actual notice of the 2010 Plan's applicability to their properties, plaintiffs were unquestionably on actual notice thereof well more than four years before they filed suit. Plaintiffs' inverse condemnation action is barred by the four-year statute of limitations applicable to facial takings claims.

Should the Court alternatively conclude that the alleged taking resulted from the County's application of the 2010 Plan to plaintiffs' properties, Chapter 380 subjects plaintiffs' "as-applied" takings claims to a 90-day statute of limitations. That period expired before plaintiffs filed suit, and their inverse condemnation claims are thus time-barred.