

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' SUPPLEMENTAL MEMORANDUM ON THE GOVERN-
MENT'S FOUR-YEAR STATUTE OF LIMITATION DEFENSE**

On November 30, 2005, the Court requested supplemental memoranda on two defenses. Those are that Landowners claims are barred by (1) a 90-day statute of limitations in § 380.085, Fla. Stat., and (2) by Florida's four year statute of limitations at § 95.11(3)(p), Fla. Stat. This memorandum addresses only the four-year arguments. Another memorandum addresses the 90-day statute of limitations.

**1 THE GOVERNMENT'S ARGUMENTS IN ITS MO-
TIONS FOR SUMMARY JUDGMENT THAT RELATE
TO THE FOUR-YEAR STATUTE OF LIMITATIONS**

In their motions for summary judgment, defendants state only three issues that involve the four-year statute of limitations. The County's supporting memoranda of law include a variety of arguments that are not identified in its motion. Fla. R. Civ. P. 1.510(c) provides that the mo-
tion for summary judgment "*shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued.*" The purpose of this rule is to eliminate surprise and to provide parties a full and fair opportunity to argue the issues. *Lee v. Treasure Island Marina, Inc.*, 620 So. 2d 1295 (Fla. 1st DCA 1993). This Court may not consider arguments on issues that are not clearly spelled out in its motion but appear only in its memoranda of law. That said, the issues to be addressed in this supplemental memorandum of law are as follows.

A. 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”)

B. 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.)

C. 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.)

2 SUMMARY OF LANDOWNERS’ RESPONSES

2.1 Williamson County’s¹ “ripeness” requirement does not require an application for a building permit. It requires a “final decision” by the local government. As the beneficial use decision was a final decision, Landowners’ as-applied takings claims are ripe.

“As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until *the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.*”²

- Landowners have obtained such final decisions and their as-applied taking claims are “ripe” for judicial review.

2.2 For those Landowners whose properties contain so-called “unbuildable” wetlands, no facial taking could ever occur because (a) land use regulations that facially take property in Florida are unconstitutional and invalid *ab initio*, (b) Monroe County never had accurate maps that would have informed property owners that their lands contained such wetlands, and (c) a variance could always be obtained through the beneficial use process.

2.3 Landowners were not required to raise their taking claims to administrative bodies because such bodies cannot resolve Constitutional issues such as whether a “taking” has occurred, and administrative bodies’ findings of fact and conclusions of law on elements of a Constitutional taking claim are neither res judicata nor binding on a Court that is deciding a taking claim.

¹ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

² *Williamson County*, 473 U.S. at 186.

3 LANDOWNERS RESPONSES TO DEFENDANTS' ARGUMENTS INVOLVING THE FOUR-YEAR STATUTE OF LIMITATIONS AT § 95.11(3)(p), FLA. STAT.

3.1 Williamson County's "ripeness" requirement does not require an application for a building permit. It requires a "final decision" by the local government. As the beneficial use decision was such a "final decision," Plaintiffs' as-applied takings claims are ripe.

The government raises the "ripeness" requirement often attributed to the Supreme Court's 1985 *Williamson County*³ decision, but *incorrectly* argues that ripeness requires a *building permit application* and denial.⁴ That is not so. What the Supreme Court held in *Williamson County* is that a landowner must have a "final decision" from the local government – which does not necessarily equate to a denial of a building permit. The Supreme Court's holding in *Williamson County* is as follows.⁵

Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, respondent's claim is not ripe.

As the Court has made clear in several recent decisions, *a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.*

3.1.1 Ripeness and the "futility exception"

In *Lost Tree Village Corp. v. City of Vero Beach*,⁶ the Fourth DCA held in 2002:

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. at 618]; *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.

³ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ("*Williamson County*"). "Ripeness" had come up in Supreme Court decisions handed down before *Williamson County*, e.g., *Hodel*, *Agins*, and *Penn Central*. *Williamson County* at 188-90. It has come up since in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁴ *Williamson County* involved a denial of plat approval.

⁵ *Williamson County*, 473 U.S. at 186.

⁶ 838 So. 2d 561 (Fla. 4th DCA 2002).

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.*

3.1.2 Beneficial Use Determinations are Final Decisions of the County stating what beneficial use, if any, the County will allow

Each Plaintiff has received such a *final, written decision* from Monroe County, stating that they can do absolutely *nothing* economically beneficial on their property. Those decisions are their Beneficial Use Determinations, rendered by the highest administrative body in Monroe County – the County Commission. Certified copies of Plaintiffs' Beneficial Use Determinations were filed in open court on November 30, 2005, and are part of the record.

3.1.3 If the Beneficial Use process did not function as a super-variance, and produce decisions that "ripen" the taking claims of landowners when County chooses not to allow a variance from its land development regulations, its regulations are subject to a judicial determination that they are unenforceable and must be stricken.

Although defendants seek to portray the Beneficial Use Determinations as something other than what they are – and what Plaintiffs say they are (final, ripening, decisions) – the County's Beneficial Use process *must* yield definitive, final decisions stating what beneficial use(s) a landowner has. Otherwise, large portions of Monroe County's Comprehensive Plan and Land Development Regulations would be subject to *invalidation as confiscatory and unconstitu-*

tional. In *Mailman Development Corp. v. City of Hollywood*,⁷ the Fourth DCA held that landowners were not entitled to compensation for confiscatory land use regulations, as follows:

... enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. Cf., *City of Miami v. Romer*, Fla. 1952, 58 So. 2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), *the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.* 286 So. 2d at 215. [Emphasis added.]

In *Dade County v. National Bulk Carriers*,⁸ a landowner had sought an “unusual use” permit to dredge a lake on its property and fill the remainder to the flood level. Dade County denied the permit because “the project would conflict with the policies of Dade County’s Comprehensive Development Master Plan and the Florida State Comprehensive Plan to *preserve the land in its natural state.*” Sounds familiar, doesn’t it? The supreme court held:

Under the type of statutory permitting-scheme involved in *Key Haven, Albrecht*, and *Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. ***If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken.*** See *City of Miami Beach v. Lachman*, 71 So. 2d 148 (Fla. 1953)... and *Mailman* See also *Kasser v. Dade County*, 344 So. 2d 928 (Fla. 3d DCA 1977). ***We hold that this cause should be remanded to the circuit court for a determination of whether the county’s action is confiscatory and constitutes a taking without just compensation, in which event the action of the board must be stricken.*** A denial of rezoning cannot be both reasonable and confiscatory.

While some out-of-state lawyers might think *Dade County v. National Bulk Carriers* has no impact after *First English*,⁹ they should read *Monroe County v. Gonzalez*, a post-First English opinion of the Third DCA. Sixteenth Circuit Judge Payne’s decision in September 1991, that was affirmed without delay in February 1992, in *Monroe County v. Gonzalez*,¹⁰ where the Third

⁷ 286 So. 2d 614 (Fla. 4th DCA 1973), *cert. denied*, 293 So. 2d 717 (Fla.), *cert. denied*, 419 U.S. 844, 42 L. Ed. 2d 72, 95 S. Ct. 77 (1974).

⁸ 450 So. 2d 213, 215-16 (Fla. 1984).

⁹ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

¹⁰ 593 So. 2d 1143 (Fla 3rd DCA 1992).

DCA adopted the trial court's summary judgment on liability as the District Court's opinion, including the relief clause, which reads:¹¹

IT IS ADJUDGED that § 9.5-262¹² and 9.5-343,¹³ Monroe County Land Development Regulations, as applied to plaintiff's property, ***have taken plaintiff's property 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).*** 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), states:

“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.”

If defendants think *National Bulk Carriers* had no viability after *First English*, Monroe County v. Gonzalez should disabuse them of that notion. And defendants should note there is no statute of limitations applicable to unconstitutional ordinances.

Bringing this issue to a close, Landowners ask the Court to once again consider *City of Key West v. Berg*.¹⁴ Mr. Berg had submitted to development plans to the City of Key West, but maintained that he could not be expected to apply to the City for a Beneficial Use Determination, because the City had not adopted regulations implementing its nascent Beneficial Use policy in its 1994 Comprehensive Plan. Mr. Berg's failure to seek a Beneficial Use Determination led to

¹¹ *Id.*, 593 So. 2d at 1145.

¹² § 9.5-262 was the “allocated residential density” for Offshore Island (OS) zoning districts. In Mr. Gonzalez' case the allocated density was 1 DU per 10 acres of upland.

¹³ § 9.5-343 was the “district open space ratio” (OSR) for OS zoning districts. In this case the OSR was 95%, with a variance available to reduce that to 90%.

¹⁴ 655 So. 2d 196 (Fla. 3rd DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995).

the Third DCA holding that his claim was not “ripe.”¹⁵ In the case before this Court, Plaintiffs *have* obtained a final Beneficial Use Determination from the government entity responsible for determining the permitted use for the land, as required by the Supreme Court and the Florida courts. Therefore, Plaintiffs’ as-applied takings claims are ripe for judicial review.

3.2 For those Plaintiffs whose properties contain so-called “unbuildable” wetlands, no facial taking could ever occur because (a) land use regulations that facially take property in Florida are unconstitutional and invalid *ab initio*, (b) Monroe County never had accurate maps that would have informed property owners that their lands contained such wetlands, and (c) a variance could always be obtained through the beneficial use process.

For Plaintiffs who own properties that contain so-called “unbuildable” wetlands, those properties were *not* “taken” when the wetland provisions of the County’s 1986 Plan went into effect on September 15, 1986, or when its Year 2010 Plan went into effect on January 4, 1996, or at any other time until the date of the County’s Beneficial Use Determination. There are two bases for this statement.

FIRST: the County’s Beneficial Use process always existed as a super-variance, and the County can override any provision of its Comprehensive Plan or Land Development Regulations to *avoid* a taking.

SECOND: No maps have ever existed that accurately or reliably identified such wetlands. In addition, the *inaccurate* maps possessed by the County were not available to the public in a form that would allow a landowner to align the property’s parcel lines with the County’s habitat polygons. *See* Supplemental Affidavit of Donald L. Craig.

3.2.1 Habitat maps

Plaintiffs have filed two Affidavits of Donald L. Craig, the first one in November 2005 and the second, supplemental affidavit, simultaneous with this memorandum. In his Supplemen-

¹⁵ 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.

tal Affidavit, Mr. Craig makes the following sworn statements about the County’s “habitat maps.”

3.2.2 Donald Craig’s Affidavit

I. THE 1986-2002 EXISTING LAND CONDITIONS MAPS

7. The set of seven Existing Land Conditions maps, prepared by Monroe County Planning & Zoning Department biologists Mark Robertson and Andy Hooten in 1984-1985, at a scale of 1:24,000 (1 in = 2,000 ft), were approved by Monroe County on February 28, 1986, and by the Florida Administration Commission in July 1986, as part of Monroe County’s 1986 Comprehensive Plan. These seven maps became Monroe County’s official Existing Land Conditions maps on the effective date of the 1986 Comprehensive Plan, September 15, 1986. As Affiant stated in paragraphs 7 and 8 of his November 25, 2005, Affidavit, *the 1986 maps remained Monroe County’s sole, official, Existing Land Conditions maps until July 5, 2002.*

11. Exhibits 9-24 attached hereto are excerpts of the 1986 existing condition maps, showing the habitat designations for each of the properties involved in the subject litigation. Each map excerpt has been georeferenced to the Monroe County Property Appraiser’s Office (PAO) shoreline GIS thematic map, so that the parcels can be located reasonably accurately, relative to the existing condition maps. The even-numbered exhibits are at the 1:24,000 (1 in = 2,000 ft) scale of the original maps, and display only the existing conditions map, mile markers, PAO section lines, and the subject property (in red). The odd-numbered exhibits are enlarged to a 1:4,800 scale (1 in = 400 ft), except for Exhibit 18, which is at 1:6,000 (1 in = 500 ft).

Plaintiff	Acquisition Date	Key	Lot(s)	Subdivision	1986-2002 Existing Conditions Map
Schneider Heirs	Sept 1964	Ramrod	L1-2, B4	Silver Shores Estates	640: SMB ¹⁶
Tost	Feb 1969	Summerland	8 acres	Unplatted	640: SMB (2/3); 612; Fringing Mangroves (1/3)
Lomrance	May 1981	Big Torch	L13-16, B2	Rainbow Beach Estates	640: SMB
Hill Family Inv.	Oct 1984	Key Largo	L1, 21-22, B9	Thompsons	426: Hardwood Hammock (1/3); 740.3: Disturbed w/ SMB (2/3)
Johnson-86	April 1986	Big Pine	L1, B12	Tropical Bay 3 rd Add’n	NONE (Residential)
Burstyn	May 1986	Duck	L11, B9	Center Island, Duck Key	Disturbed (740.0)
Collins-87	June 1987	Big Pine	L1, Sec A	Doctors Arm 3 rd Add’n	740.3: Disturbed w/ SMB

¹⁶ SMB = Salt Marsh & Buttonwood Association

Radenhausen	April 1989	Big Pine	L6, B37	Port Pine Heights 2 nd Add'n	NONE (Residential)
Del Valle	April 1990	Duck	L24, B10	Center Island, Duck Key	Disturbed (740.0)
Johnson-90	April 1990	Big Pine	L10, B11	Tropical Bay 3 rd Add'n	NONE (Residential)
Collins-91	April 1991	Big Pine	L2, Sec A	Doctors Arm 3 rd Add'n	740.3: Disturbed w/ SMB
Davis	Aug 1992	Big Pine	L38, Sec B	Doctors Arm 3 rd Add'n	740.3: Disturbed w/ SMB
Magrini	Oct 1994	Big Pine	L21, B4	Pine Channel Estates Sec 2	NONE (Residential)

THE WEINER MAPS

12. As Affiant's November 25, 2005, relates in detail, Monroe County adopted a replacement set of existing conditions maps by Ordinance 007-2002. This amended set of maps legally replaced the 1986 maps, attached hereto as Exhibits 1-7, on July 5, 2002. *However, the replacement maps have not been made available to the public.*

13. The 2002 replacement maps were prepared by Dr. Arthur H. Weiner, a private biologist, under contract to the Monroe County Property Appraiser's office (PAO). Dr. Weiner prepared the 2002 maps on mylar copies, at a scale of 1:2,400 (1 in = 200 ft), of black and white aerial photographs taken in 1985 by FDOT. Dr. Weiner and an assistant physically drew habitat demarcation lines (i.e., "polygons"), to the best of their abilities, on the mylars.

14. Dr. Weiner's maps were not prepared as aids to the Planning Department, but as general guidelines to the Monroe County Property Appraiser's office. The original maps exist as a collection of 200 to 250 mylars, approximately 24" x 36" and are currently physically located in the office of George Garrett, director of the Monroe County Marine Resources Department. The 1985 photographs, with Dr. Weiner's habitat demarcation lines, can be reproduced on blueprint machines. There have long been "blue-line" copies at the planning department offices that were available to County personnel as *guidelines – not official maps* – prior to July 5, 2002. *The Weiner maps have never been printed, nor have they been made available to the public as were the 1986 existing conditions maps and the County's zoning maps.* In addition, the PAO has a set of hard copies of these maps.

THE ADID MAPS

15. These paragraphs supplement the statements in paragraphs 10 and 11 of Affiant's November 25, 2005 affidavit. Since that date, Affiant has obtained copies of the Final Report and the Metadata from the ADID project manager. Copies of those documents are attached hereto as Exhibits 25 and 26.

16. In 1991, the US EPA contracted with the Florida Marine Research Institute (FMRI) to produce a set of ADID thematic maps of the Florida Keys. (ADID means Advanced Identification.) The FMRI staff manually photointerpreted 1:13,200 (1 in = 1,100 ft) Color Infrared (CIR) aerial photographs taken in 1991 to create a land cover database for the Keys. FMRI then transferred its visual observations to standard, USGS 1:24,000 quadrangle maps (1 in = 2,000 ft).

The final maps were delivered to EPA on a set of USGS quadrangle maps and as a GIS dataset. (See metadata and final report.) Monroe County has a copy of the GIS dataset that it uses as a “first cut” in determining whether a wetland may exist on a parcel of land.

GROUND-TRUTHING AND ACCURACY OF HABITAT MAPS

17. Photointerpretation of aerial photographs remains an art, not a science, in that even experienced, unbiased photointerpreters can assign different habitat types to a photographic signature, and even when the photointerpreters agree on a habitat type, ground-truthing can reveal that the interpreters’ designation is incorrect. To determine the accuracy of a photointerpreted dataset, it is *absolutely necessary* to conduct blind field investigations of randomly selected polygons, (without informing the field investigator of the photointerpreter’s designation; hence “blind”). An error matrix (sometimes called an omission-commission matrix) is then created that shows how often a particular habitat photointerpretation is incorrect, as well as the nature of the error. The number of ground-truthed polygons must be large enough to calculate a statistical probability that a particular habitat is correctly identified on the dataset itself.

18. The recognized standard text for conducting error analyses of photointerpreted data is Congalton and Green, *ASSESSING THE ACCURACY OF REMOTELY SENSED DATA: PRINCIPLES AND PRACTICES*, Lewis Publishers, Boca Raton, FL, 1999. The following figure from Congalton and Green illustrates a simple, four-category error matrix.

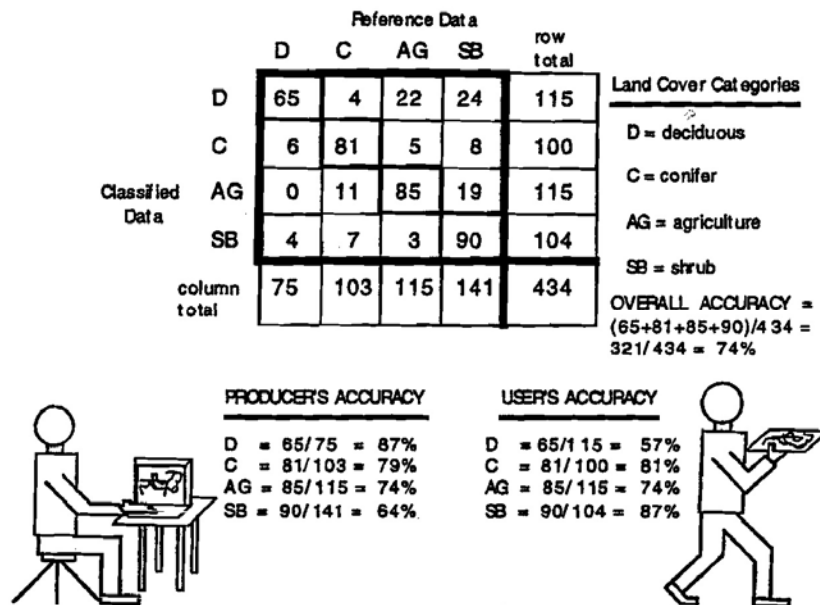


Figure 2-1 Example error matrix.

19. Monroe County did not conduct an error analysis on its 1986 existing conditions map. Neither the PAO nor Dr. Weiner conducted an error analysis on the Weiner maps. FMRI did not conduct an error analysis on the ADID thematic map. According to FMRI’s own metadata, the accuracy of the ADID dataset is “UNKNOWN.” None of these purported habitat maps is accurate, and the degree of inaccuracy is UNKNOWN. *For that reason*, 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.

FURTHER AFFIANT SAYETH NAUGHT.

3.2.3 Habitat Maps: Discussion

The 1986 Existing Conditions maps are the only maps the County has printed and made available to the public, and they are at a scale of 1:24,000 (1 in = 2,000 ft). Counsel for Monroe County has referred in memoranda to the “Natural Features Maps” that were part of the Year 2010 Comprehensive Plan, but those were reduced reproductions of the seven 1986 Existing Conditions maps. A full-scale photocopy of the legend from the cover sheet entitled Natural Features Maps is printed below.

- (1) Note that there are no existing or planned potable waterwells and associated cones of influence in the Florida Keys
 - (2) See "Florida Keys" Comprehensive Plan, Volume I" (Monroe County Department of Planning, 1986) for identification of map codes
- Sources: Federal Emergency Management Agency, 1989, "Monroe County, Florida Flood Insurance Study." (Floodplains)
Monroe County Planning Department, 1985, "Endangered Animal Species Maps." (Animals-endangered, threatened, and species of special concern)
Monroe County Planning Department, 1985, Existing Conditions Maps." (Wetlands, Upland Vegetation, Disturbed, and Developed Land)
Southern Illinois University, Cooperative Wildlife Research Lab, (no date), "Big Pine Key Fresh Water and Nontidal Wetlands."
Southern Illinois University, Carbondale, Illinois. (Freshwater Wetlands of Big Pine Key)
U.S. Department of Commerce, NOAA, August 1990. Bahia Honda to Key West (Chart No. 11445). NOAA, Washington, D.C. (Water Resources)
U.S. Department of Commerce, NOAA, December 1990, Matecumbe to Bahia Honda. (Chart No. 11449). NOAA, Washington, D.C. (Water Resources)
U.S. Department of Commerce, NOAA, June 1989, Elliott Key to Matecumbe. (Chart No. 11463). NOAA, Washington, D.C. (Water Resources)

According to the table in Mr. Craig’s supplemental affidavit, as well as Exhibits 9-24 of his Affidavit, none of the Landowners’ properties were legally classified as “freshwater wetlands” during the period September 15, 1986, to July 5, 2002. Some were classified as part or all “Salt Marsh & Buttonwood Associations” (Classification 640). These included the Schneider Heirs’ property on Ramrod Key, 2/3 of the 8 acre Tost property on Summerland Key, the Lomrance lots on Big Torch Key. Some were classified as part or all “Disturbed with Salt Marsh & Buttonwood” (740.3). These included the Hill Family Investments lots on Key Largo, the two Collins lots on Big Pine Key, and the Davis lot on Big Pine Key. The Del Valle and Burstyn lots were not classified as having any wetlands on-site, but were classified “Disturbed” (740.0). The

Johnson, Radenhausen, and Magrini lots were all classified “Residential.” There were no habitat classifications in areas designated Residential.

Salt Marsh & Buttonwood Associations are “wetlands,” but SM&B designation does not give any indication of whether these are “red-flag” or “yellow-flag” or “green-flag” wetlands. That level of analysis requires an on-site field inspection, such as the inspections done by the County biologists and introduced in Plaintiffs’ December 8, 2000, Beneficial Use hearings. 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. Plaintiffs did not know until after the reports were provided to the hearing officer on December 8, 2000.

As Mr. Craig states in his affidavits on file, the “Weiner maps,” though now the “official” “existing” conditions maps (existing as of 1985; not today) have not been printed for distribution and the public has not been made aware that they exist. They were not even prepared by the County Planning Department or County biologists. As Mr. Craig notes in his last paragraph:

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.

3.2.4 The Planning Director’s Deposition

Marlene Conaway, Monroe County’s most recent Planning Director, testified in her deposition on October 4, 2005, that has been filed for the record in this proceeding, that the existing conditions maps were only “tools,” as was the ADID thematic map,¹⁷ and that *both before and after the Weiner maps were adopted* by Ordinance 007-2002, an on-site identification was necessary to determine the type of wetlands that existed on a parcel. Conaway Deposition Tr. at 54-64. In sum, the wetland restrictions of Monroe County’s Year 2010 Plan did not attach

¹⁷ A digital computer file that can be viewed with special software, called GIS programs. The software used by the County, the Property Appraiser, and Plaintiffs’ attorneys, is called ArcGIS. Thematic maps cannot be viewed without the software, and a basic set of the software CDs costs \$1,500.00.

to any real estate in the Florida Keys on enactment – *because the government did not know where the wetlands were.*

3.2.5 The Beneficial Use process and statutory prohibition on restricting the use of land under Chapter 380

While defendants argue 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.¹⁸

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

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

¹⁸ 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.

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.

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.

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.

3.2.6 Counties and municipalities regulate by ordinance, not memoranda

Very little, if anything, needs to be said regarding the mysterious “Memorandum” that someone in Monroe County, and someone presumably in Tallahassee, signed in 1999 with regard to “red-flag” wetlands. No such memorandum – if one does exist – changes the lawful ability of the Monroe County Commission to override any comprehensive plan provision, or any land development regulation, if that is what it takes to avoid a regulatory taking of privately owned property. Furthermore, as no County Commission can bind a future County Commission, even if the signers of the purported memorandum choose to cast their votes in that manner,

nothing prevents successor Commissioners from casting their votes another way. In short, the existence or non-existence of the purported memorandum has no legal significance.

3.3 Plaintiffs were not required to raise their taking claims to administrative bodies because such bodies cannot resolve Constitutional issues such as whether a “taking” has occurred, and administrative bodies’ findings of fact and conclusions of law on elements of a Constitutional taking claim are neither res judicata nor binding on a Court that is deciding a taking claim.

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*¹⁹ (administrative hearing officer properly declined to consider taking issue because that was a judicial question beyond his legal purview.)

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*.²⁰ 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*, 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 pur-

¹⁹ 381 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)

²⁰ 93 P.3d 762 (NM App 2004).

pose 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*,²¹ 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. ...

²¹ 262 Conn. 45, 808 A.2d 1107 (2002).

... 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. ...

3.3.1 Applying *Key Haven* to a County or Municipality, it is the Commissioners or Council – the top administrative body of the local government – to which one must exhaust a claim of an unconstitutional application of an otherwise constitutional ordinance

Defendants cite only one case to support their argument that a § 380.07 “appeal” of a Board of County Commissioners’ final administrative decision is required by *Key Haven v Bd. of Trustees*,²² and that case is *Lee County v. New Testament Baptist Church*.²³ The *Lee County* opinion held that the landowner had to exhaust its administrative remedies, “under *Key Haven*,” and that it had done so when it appealed to the highest administrative body in the County – the County Commission – because the County Commission “seemed to have the power” to correct the challenged ordinance.

In this case, although we are concerned with a county ordinance rather than a rule promulgated by a state agency, the Board of County Commissioners would seem to have the power to modify the ordinance to correct constitutional infirmities much the same as would an agency vis-à-vis an agency rule. ***Therefore, under Key Haven all administrative remedies must be exhausted in that respect, which they were when the Church appealed the denial of the development order to the Board and the Board affirmed the denial.*** At that point the Church’s avenue for relief was the circuit court, which is where the Church filed this lawsuit.

²² 427 So. 2d 153, 158 (Fla. 1982).

²³ 507 So. 2d 626 (Fla. 2nd DCA 1987).

The Landowners in this case submitted “beneficial use” petitions directly to the Monroe County Commission, which in turn retained a hearing officer to determine the facts and prepare a recommended order. When the recommended orders were completed, they were queued before the County Commission for a final decision – where they languished for two and four years before the County Commission rendered its final decisions.

3.3.2 § 380.07(2) Appeals to FLAWAC are not appellate reviews, but are de-novo hearings before a different administrative body than the one that denied relief, and are not required by Key Haven

In *Young v. Dept. Community Affairs*,²⁴ because an “appeal” of a “development order” in an Area of Critical State Concern (ACSC), pursuant to § 380.07(2), Fla. Stat., results in a de-novo, Chapter 120 hearing by FLAWAC, the Florida Supreme Court held that a 380.07 “appeal”²⁵ is not really an *appeal* – *i.e.*, a review of a lower tribunal’s ruling based on the evidence below. According to the supreme court,

although section 380.07(2) provides for an “appeal” of a development order in any area of critical state concern or for any development of regional impact, this term must be interpreted in its “broadest, nontechnical sense ... to mean merely an application to a higher authority.”

While the instant case involves a development permit, we find that the statutory framework relating to areas of critical state concern distinguishes this case from *J.W.C. Unlike DER, Monroe County is not an agency for purposes of chapter 120*. See section 120.52(1)(c), Fla. Stat. (1987) (units of government not enumerated in subsections (a) and (b), including counties and municipalities, are only agencies to the extent they are expressly made subject by general or special law or existing judicial decisions). ***Thus, the development order issued by Monroe County did not con-***

²⁴ 625 So. 2d 831, 834 (Fla. 1993).

²⁵ § 380.07(2), Fla. Stat., reads as follows.

Whenever any local government issues any *development order* in any area of critical state concern, or in regard to any development of regional impact, copies of such orders as prescribed by rule by the state land planning agency shall be transmitted to the state land planning agency, the regional planning agency, and the owner or developer of the property affected by such order. *Within 45 days after the order is rendered, the owner, the developer, an appropriate regional planning agency by vote at a regularly scheduled meeting, 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. The appellant shall furnish a copy of the notice of appeal to the opposing party, as the case may be, and to the local government which issued the order. The filing of the notice of appeal shall stay the effectiveness of the order and shall stay any judicial proceedings in relation to the development order, until after the completion of the appeal process. [Emphasis added.]

stitute proposed agency action or any other type of agency action. The effect of the Department’s “appeal” to the Commission was to “stay the effectiveness” of an otherwise valid order. § 380.07(2). In contrast, DER’s letter of intent to issue the permit in J.W.C. was simply preliminary agency action and DOT remained an applicant for the permit until final agency action was taken by DER. 396 So. 2d at 786-87.

In short, the “appeal” of a Monroe County development order, provided for in § 370.07(2), is not required to be exhausted under Key Haven. This is not to say that appeals to FLAWAC, of Development of Regional Impact (DRI) orders issued by local governments, are not required by Key Haven. But DRI regulations are state regulations – not local ordinances – and the fact that DRI approvals go through local governments before they are acted upon by state agencies does not change the fact that DRIs are state – not local – development projects.

3.3.3 The Beneficial Use process operates as a shield, protecting the County from taking and invalidation lawsuits.

Monroe County’s Beneficial Use regulation, in effect since September 15, 1986, has always had the following “Purpose” clause.

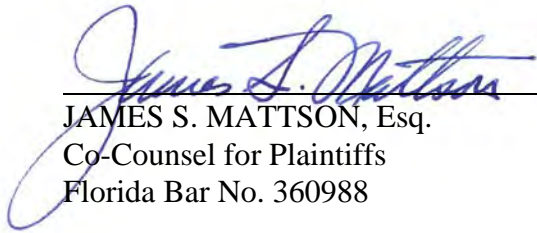
Purpose. It is the purpose and intention of the Board of County Commissioners to ensure that each and every landowner has a beneficial use of his property in accordance with the requirements of the fifth and fourteenth amendments to the United States Constitution and to provide a procedure whereby landowners who believe they are deprived of all beneficial use may secure relief through an efficient non-judicial procedure.²⁶

The Beneficial Use process is not there to protect Landowners. It is Monroe County’s *shield* against regulatory taking lawsuits, and is the last opportunity the County has to avoid a lawsuit for a regulatory taking. *Without the Beneficial Use administrative procedure, all of Monroe County’s confiscatory regulations adopted since 1986 would be unconstitutional and invalid.* *Dade County v. National Bulk Carriers*, *supra* fn. 8 (“a zoning ordinance is, by definition, invalid if it is confiscatory”).

²⁶ Ordinance No. 33-1986, originally codified at Sec. 8-101, Monroe County Land Development Regulations, September 15, 1986; now codified at § 9.5-161, Monroe County Code, Municipal Code Corporation (current through December 15, 2005, Supp. No. 90).

4 CONCLUSION

While Plaintiffs may not be happy with the result – and may have preferred a building permit – there is nothing they can do about it. As the United States and Florida Constitutions consider Just Compensation an adequate remedy for the confiscation of property by an entity with eminent domain power, there is no rational, legal difference between a building permit and receiving Fair Market Value for their property. If the County Commission – as it did in these Landowners’ cases – attempts to purchase their property for less than Fair Market Value, they only have to cite to the Third DCA’s opinion – actually, Judge Payne’s decision – in *Monroe County v. Gonzalez, supra*, where that “option” was declared unconstitutional and Landowners are entitled to receive “*compensation in the amount of 100% of the fair market value, for its highest and best use, of property taken for public use.*”

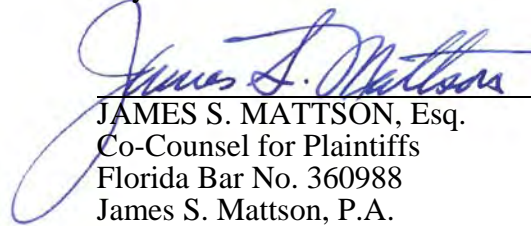


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CERTIFICATE OF SERVICE

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 27th day of January 2006.



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