

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup>  
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  
GOVERNMENT'S 90-DAY 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.,<sup>1</sup> and (2) by Florida's four year statute of limitations. This memorandum addresses only the § 380.085 argument. Another memorandum addresses the four year statute of limitations.

**1 THERE IS NO LEGISLATIVE OR JUDICIAL  
SUPPORT FOR THE GOVERNMENT'S ARGUMENTS**

In an illogical stand, defendants hypothesize that § 380.085 was part of a legislative plan to strengthen the state's ability to protect the Florida Keys. *It was not*. Defendants also posit that Florida Keys Landowners do not enjoy the same right to just compensation for confiscatory regulation of their land that belong to other citizens of Florida and the United States. Defendants cite 14 appellate opinions in their supplemental memoranda,<sup>2</sup> yet none supports their arguments

<sup>1</sup> § 380.085 is one of five statutes enacted into law simultaneously by Ch. 78-85, Laws of Florida (1978). § 161.212, § 253.763, § 373.617, § 380.085, and § 403.90, Fla. Stat. As all five statutes are identical, Landowners refer to the statute at issue by both terms.

<sup>2</sup> The 14 citations are: *Albrecht v. State of Florida*, 444 So. 2d 8, 11 (Fla. 1984); *Bowen v. Florida Dept. of Environ. Regulation*, 448 So. 2d 566, 568-69 (Fla. 2<sup>nd</sup> DCA 1984); *Caloosa Property Owners Ass'n. v. Palm Beach County*, 429 So. 2d 1260, 1264 (Fla. 1<sup>st</sup> DCA 1983); *Florida Welding & Erection Service v. American Mutual Ins. Co.*, 285 So.2d 386 (Fla.1973); *Flo-Sun, Inc. v. Kirk*, 783 So.

that (a) § 380.085 applies to final County administrative decisions, (b) Ch. 78-85 is the exclusive remedy for bringing inverse condemnation actions for regulatory takings in Areas of Critical State Concern, and (c) Ch. 78-85 supersedes the four-year statute of limitation that applies to actions brought pursuant to Art X, Sec. 6(a), Fla. Const., and Amendments 5 and 14, U.S. Const.

One of defendants' stranger citations is an obtuse reference to *Flo-Sun, Inc. v. Kirk*.<sup>3</sup> *Flo-Sun* actually *supports* Landowners' argument that Ch. 78-85, which states "*The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law,*" means what it says. In *Flo-Sun*, the supreme court held:

*First, the language of section 403.191, the cumulative remedies/savings clause, could not be more clear. The remedies included within chapter 403 are intended to be "additional and cumulative" to the remedies currently available (i.e., public nuisance suit under chapter 823). It would be less than intellectually credible to conclude that section 403.191 does not mean what its words plainly express. See Capers v. State, 678 So. 2d 330, 332 (Fla. 1996) ("The plain meaning of statutory language is the first consideration of statutory construction.") ...*

Equally querulous is defendants' *omission* of a recent supreme court opinion that cites *Flo-Sun* on this same point, where the supreme court held:<sup>5</sup>

Another subsection further illuminates the Legislature's intent. Section 376.313(1) provides that "*the remedies in ss. 376.30-376.319 shall be deemed to be cumulative and not exclusive.*" This language evidences an intent in section 376.313(3) to create an *entirely new cause of action cumulative to the common law*. See *St. Angelo v. Healthcare & Ret. Corp. of America*, 824 So. 2d 997, 999 (Fla. 4th DCA 2002) ("A 'cumulative remedies' clause in a statute usually does not supersede other common law remedies."); cf. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001) (concluding that interpreting a cumulative remedies clause in section 403.191, Florida Statutes (1995), to foreclose other remedies "would be less than intellectually credible").

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2d 1029, 1035 (Fla. 2001); *Fox v. Treasure Coast Reg'l Planning Council*, 442 So. 2d 221, 226 (Fla. 1<sup>st</sup> DCA 1983); *Griffin v. St. Johns River Water Management Dist.*, 409 So. 2d 208, 210 (Fla. 5<sup>th</sup> DCA 1982); *Joint Ventures, Inc. v. Department of Transp.*, 519 So. 2d 1069, 1073 (Fla. 1<sup>st</sup> DCA 1988); *Key Haven v Bd. of Trustees*, 427 So. 2d 153, 158 (Fla. 1982); *Lee County v. New Testament Baptist Church*, 507 So. 2d 626 (Fla. 2<sup>nd</sup> DCA 1987); *Manatee County v. Estech General Chemicals Corp.*, 402 So. 2d 75, 75-76 (Fla. 2<sup>nd</sup> DCA 1981); *Monroe County v. Ambrose*, 866 So. 2d 707, 709 n.1 (Fla. 3<sup>rd</sup> DCA 2003), *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518 (Fla. 5<sup>th</sup> DCA 2005); and *Young v. Dept. of Community Affairs*, 625 So. 2d 831, 834 (Fla. 1993).

<sup>3</sup> *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1035 (Fla. 2001).

<sup>4</sup> 783 So. 2d at 1036. [Emphasis added.] Monroe County was well aware of *Flo-Sun* because County Attorney James T. Hendrick filed an Amicus brief in the case on behalf of Monroe County.

<sup>5</sup> *Aramark v. Easton*, 894 So. 2d 20, 25-26 (Fla. 2004). [Emphasis added.]

Finally, we find it probative that the statute contains an attorney's fees provision allowing a plaintiff to recover reasonable attorney's and expert witness fees. See §376.313(6), Fla. Stat. (2002). Because attorneys' fees are not available in actions under the common law, the Legislature's provision for attorneys' fees is evidence that it was creating a new cause of action.

Of the other opinions cited by defendants, two have nothing to do with the Chapter 78-85 statutes.<sup>6</sup> Eight pre-date the Supreme Court's June 1987 decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).<sup>7</sup> The pre-*First English* opinions came down when the Chapter 78-85 compensation statute was the “only game in town,” following the 1974 decision in *Mailman Development Co. v. Hollywood*<sup>8</sup> that held invalidation – not compensation – was the sole remedy for confiscatory land use ordinances in Florida. None of the eight addresses defendants' novel theories. Only one involves an application of a Ch. 78-85 statute.<sup>9</sup> The other two cite to *dicta* in *Joint Ventures* and *Ambrose*. For *Joint Ventures*, defendants cite to *dictum* in a concurrence to the First DCA opinion (not the supreme court opinion that quashed that opinion). The citation to *Ambrose* is to *dictum* in a footnote that had nothing whatsoever to do with the case the Third DCA was wrongly deciding.

## **2 LANDOWNERS RELY ON STATUTORY CONSTRUCTION, LEGISLATIVE HISTORY, AND JUDICIAL INTERPRETATION, TO SHOW THE GOVERNMENT'S THEORIES ARE WRONG**

Chapter 78-85 was a response to the Fourth DCA's decision in *Mailman*, *supra* fn 8, and reflects that era in the Supreme Court's development of its regulatory takings compensation jurisprudence. The five statutes have seen almost no application since June 1987, when the Supreme Court reversed the “invalidation-not-compensation” scheme that had taken hold in

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<sup>6</sup> *Florida Welding & Erection Service v. American Mutual Ins. Co.* and *Young v. Dept. of Community Affairs*, *supra* fn 2.

<sup>7</sup> *Albrecht* (1984), *Bowen* (1984), *Caloosa* (1983), *Fox* (1983), *Griffin* (1982), *Key Haven* (1982), *Lee County* (April 1987), and *Manatee County* (1981), *supra* fn 2.

<sup>8</sup> 286 So. 2d 614 (Fla. 4<sup>th</sup> DCA), *cert. denied*, 293 So. 2d 717, (Fla. 1974), *cert. denied*, 419 U.S. 844 (1974).

<sup>9</sup> The *Koontz* opinion, *supra* n. 2, is the third in a series. *Koontz* has done well using the statute to coerce the St. Johns River Water Management District into giving him a permit Defendants do not even try to make any points from the *Koontz* decision, though they cite it.

California and Florida.<sup>10</sup> For defendants to pull this aged rabbit out of a hat is the ultimate frivolous defense. Landowners summarize their response in the five bullet points that follow.

## **2.1 No Grand Plan.**

✦ Subsection 380.035 was not enacted as part of Chapter 380, nor was it intended to strengthen Chapter 380. Chapter 78-85 was a response to *Mailman Development Co. v. Hollywood, supra* – and was enacted to strengthen landowners’ rights – not to strengthen the government’s ability to confiscate property without paying for it.

## **2.2 Statutory Construction: Plain Meaning.**

✦ A simple application of the Plain Meaning rule of statutory construction to the six paragraphs in Ch. 78-85 shows the statute (a) does not apply to local government regulations, and (b) is not an exclusive remedy.

## **2.3 Statutory Construction: Legislative History.**

✦ Published reviews of the legislative history show that the statute’s reach was limited to *specific state agency permit decisions*, eliminating local government land use regulations from its ambit, and the Senate refused to accept a House amendment that would have excised the “cumulative/abrogate other remedies” clause.

## **2.4 Judicial Interpretation.**

✦ In *Dade County v. National Bulk Carriers*, 450 So. 2d 213, 215-16 (Fla. 1984), the supreme court reversed the Third DCA’s erroneous conclusion that Chapter 78-85’s reach extended to Dade County’s land use regulations.

## **2.5 No Key Haven Appeal.**

✦ The government’s argument that Florida Keys landowners must “appeal” a Beneficial Use determination by the County Commission to FLAWAC, pursuant to § 380.07(2), Fla. Stat., is incorrect for several reasons

## **3 STATUTORY CONSTRUCTION 101: A STATUTE MEANS WHAT IT SAYS**

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

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

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

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<sup>10</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

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

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

(a) Agree to issue the permit;

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

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

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

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

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

History, Ch. 78-85, Laws of Florida (1978).

**3.1 The Plain Meaning rule: (a) administrative decisions of Monroe County are not included within the ambit of § 380.085 and (b) the statute is not an exclusive remedy.**

In *State v. Bodden*,<sup>11</sup> the supreme court explains the “plain meaning” rule.

We have explained that as a fundamental principle of statutory construction, “legislative intent is the polestar that guides the Court’s inquiry.” ... *Legislative intent is derived primarily from the language of the statute.* ... Thus, “it is axiomatic that in

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<sup>11</sup> 877 So. 2d 680, 685 (Fla.), *cert. denied*, 543 U.S. 1003 (2004). [Emphasis added; citations omitted.]

*construing a statute courts must first look at the actual language used in the statute.”*  
....

We begin with the actual language used by the Legislature .... As we have explained, “the legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated.”

### **3.1.1 Monroe County is not an “agency” for purposes of Chapter 78-85, Laws of Florida, because it is not an “agency subject to Chapter 120.”**

The plain meaning of Chapter 78-85 is easily divined from its words. Sections 1(a) and (2) read as follows.

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

(2) Any person substantially affected by a *final action of any agency* with respect to a permit may seek review within 90 days of the rendering of such decision .... *Review of final agency action* for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence *shall proceed in accordance with chapter 120.*

Reading subsections (1)(a) and (2) *in pari materia* makes it clear that the law refers to “agencies” that are “units or entities of state government,” *and* are subject to administrative review pursuant to Chapter 120. Monroe County – like all Florida counties and municipalities – is not an “agency subject to Chapter 120.” In *Hill v. Monroe County*, a *regulatory taking* case where neither the Department of Community Affairs, the Administration Commission, nor Monroe County raised a § 380.085 defense, the Third DCA held:<sup>12</sup>

[W]e note that Chapter 120, Florida Statutes (1989), also known as the “Administrative Procedure Act,” only applies where a challenge is made to a State agency action. *Chapter 120 does not apply to the regulations enacted by a County Commission, unless the county is expressly made subject to Chapter 120 by general or special law.* Section 120.52(1)(c), Florida Statutes (1989). *See also Sweetwater Utility Corp. v. Hillsborough County*, 314 So.2d 194 (Fla. 2nd DCA 1975) (Board of County Commissioners of Hillsborough County held was not to be an “agency” within the meaning of Section 120.52(1)(c) in the absence of a general law, special law or existing judicial decisions.). In this case, *Monroe County was not made subject to Chapter 120.*

<sup>12</sup> 581 So. 2d 225, 226-27 (Fla. 3rd DCA 1991). [Emphasis added.]

The Fifth DCA recently reached the same conclusion, citing *Hill v. Monroe County* among others, as follows.<sup>13</sup>

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

In *Young v. Dept. Community Affairs*,<sup>14</sup> a case involving a § 380.07 appeal of a permit denial to FLAWAC, Justice Barkett’s concurring opinion reaches the same conclusion.

Although section 380.07(3) clearly provides that review of local government development orders in areas of critical state concern shall be pursuant to chapter 120, *nothing in section 380.07 or in the relevant area of critical state concern statutes specifically makes a local government an agency for chapter 120 purposes*. Nor has my research uncovered any judicial decision making local governments issuing development orders in areas of critical state concern “agencies” for chapter 120 purposes.

### **3.1.2 Chapter 78-85 is permissive, and may be exercised at the option of the landowner – who may elect to file an inverse condemnation lawsuit in circuit court instead.**

Section (2) of Chapter 78-85 states that a person who is denied a permit *by a state agency* may seek review under its provisions. Section (2) reads, in pertinent part:

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

BLACK’S LAW DICTIONARY defines “may” as follows.<sup>15</sup> “In construction of statutes ... “may” as opposed to “shall” is indicative of discretion or choice between two or more alternatives.”

<sup>13</sup> *Florida Water Services Corp. v. Robinson*, 856 So. 2d 1035 (Fla. 5<sup>th</sup> DCA 2003). [Emphasis added.]

<sup>14</sup> 625 So. 2d 831, 837 (Fla. 1993). [Emphasis added.]

<sup>15</sup> BLACK’S LAW DICTIONARY, 6<sup>th</sup> Ed., West Publishing Co., 1990, at 979.

### **3.1.3 Section (6) of Chapter 78-85 states that its remedy is not exclusive**

Section 6 affirmatively retains the remedy of a common law, inverse condemnation action under Art. X, § 6(a), Fla. Const. It reads: “*The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.*” BLACK’S LAW DICTIONARY defines “law” as follows.

*The “law” of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts.*<sup>16</sup>

Section (6) clearly preserves all remedies for regulatory takings, whether established by the Florida Constitution, a statute, or judicial precedent – including the precedents of the Supreme Court.

### **3.2 The Legislative History of Chapter 78-85: Statutes applicable only to certain state agency permit decisions, and do not affect any other legal remedies**

In *Mailman, supra*, fn. 8, 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.]*

#### **3.2.1 The March 1975 Final Report of the Governor’s Property Rights Study Commission laid the groundwork for Chapter 78-85, Laws of Florida**

The *Mailman* decision was not well-received, either by the Governor or the Florida Senate. Shortly after *Mailman*, Governor Askew appointed a “Governor’s Property Rights Study Commission” (GPRSC) to examine conflicts between property rights and land use regulations and recommend legislation. The GPRSC, made up of legislators, agency heads, developers, and

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<sup>16</sup> BLACK’S LAW DICTIONARY, 6<sup>th</sup> Ed., West Publishing Co., 1990, at 884.

attorneys – with land use attorney Robert M. Rhodes its Executive Director – released its Final Report on March 17, 1975.<sup>17</sup> Its substantive recommendations were:

1. A system should be provided whereby compensation is paid for any regulation that unduly diminishes the value of property, even though it does not constitute an unconstitutional taking without compensation.

2. Any system of compensable regulation should allow regulating governments an opportunity to modify, rescind or grant a variance in lieu of compensation. Such options should, however, be required to be exercised within a reasonable time, because delay itself can cause damage to the property owner.

3. Diminution of pre-regulation market value that exceeds a certain threshold should be compensated.

4. Compensation or other relief should be determined by judicial proceedings rather than by administrative proceeding.

*“5. Any system of statewide compensable regulation should speak to all governmentally imposed regulations.”*

*“6. Any system of statewide compensable regulation should not preclude existing methods of compensation.”*

*... GPRSC Final Report*

5. Any system of statewide compensable regulation should speak to all governmentally imposed regulations.

6. Any system of statewide compensable regulation should not preclude existing methods of compensation.

Had the GPRSC’s recommendations been adopted

*in toto*, local government land development regulations *would have been* subject to Ch. 78-85’s remedies. *That did not happen*. GPRSC’s recommendation that the remedy not be exclusive *did* survive the legislative process.

### **3.2.2 The legislative history of Chapter 78-85 supports the plain meaning analysis.**

Robert Rhodes, the former Executive Director of the GPRSC, described Chapter 78-85’s legislative history, from the *Mailman* decision to enactment in May 1978, in a 1978 Florida Bar Journal article.<sup>18</sup> Cookston and Burton analyzed Chapter 78-85 in a 1981 University of Miami

<sup>17</sup> FINAL REPORT OF THE GOVERNOR’S PROPERTY RIGHTS STUDY COMMISSION, Robert M. Rhodes, Executive Director, March 17, 1975 (16 pp). This report is archived at the Florida Legislative Library. A parallel study was issued in 1976, entitled the FLORIDA SENATE SELECT COMMITTEE ON PROPERTY RIGHTS AND LAND ACQUISITION, FINAL COMMITTEE REPORT ON THE “TAKING ISSUE,” (1976).

<sup>18</sup> Robert M. Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, 52 FLA. BAR. J. 741-45 (Nov. 1978)

Law Review article.<sup>19</sup> Later, Robert Banks reviewed the legislative history and the judicial interpretation of Ch. 78-85 in a 1985 Florida State University Law Review article.<sup>20</sup>

Bills modeled after the GPRSC and Senate Select Committee reports were introduced – and died – in the 1976 and 1977 Sessions.<sup>21</sup> Bills essentially identical to the 1977 House bill were introduced in the 1978 Session.<sup>22</sup> Senate Bill (SB) 261 could not obtain full Senate approval and was then redrafted as a Committee Substitute, CS/SB 261, which was approved by the Senate but was unsatisfactory to the House – causing the Senate to re-redraft portions of CS/SB 261.<sup>23</sup>

Three of four proposed House amendments were accepted by the Senate. The two major

*The Senate acceded to House demands that local government land use regulations not be subject to the bill's remedies.*

changes *accepted* by the Senate were (a) *removing all local government regulations from the ambit of the bill*, and (b) *adding a “prevailing party” attorneys’*

*fee provision* – that, by the way, allows agencies to recover attorneys’ fees. The major change

*The House acceded to Senate demands that the bill preserve all other legal remedies.*

the Senate *rejected* was a House amendment to *strike the provision of CS/SB 261 that the act is cumulative to other legal remedies.*<sup>24</sup> The House receded

from that request and passed the revised CS/SB 261. It became law on May 29, 1978.

<sup>19</sup> Roy P. Cookston and Burt Bruton, *Zoning Law*, 35 UNIV. MIAMI L. REV. 581-637, at 633-37 (1981).

<sup>20</sup> Robert P. Banks, *Comment: Procedural Issues in Raising a Constitutional Taking Claim: Trends in Florida Law*, 12 FLA. STATE UNIV. L. REV. 825-50, at 838-50 (Winter 1985)

<sup>21</sup> Rhodes, *supra*, at 742; Cookston and Bruton, *supra*, at 634.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Rhodes, *supra*, at 742 and 745 n. 24.

**3.2.3 Chapter 79-85 would not have passed constitutional muster if it was an exclusive remedy – because it left the decision of whether to pay the landowner up to the agency**

Cookston and Burton point out, correctly, Landowners submit, that Chapter 79-85 does not authorize the court to order compensation – leaving the decision whether to pay the land-

*As Ch. 78-85 does not authorize the court to order compensation, it cannot stand as the sole remedy under the Constitutions' "taking" clauses.*

owner up to the agency. However, they also pointed out that this omission was not a fatal flaw because other remedies existed that could – based on the March 1981 opinions of Justices Brennan and

Rehnquist in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981).

The failure expressly to authorize compensation without the agency's consent is deceptive, however, since the proposal's alternative remedies were cumulative with others provided by law. ... Indeed, a state's attempt to bar the just compensation remedy altogether would probably be unconstitutional, as the *San Diego* opinions indicate.<sup>25</sup>

**3.3 Judicial Interpretation of Chapter 78-85 -- Statutes applicable only to certain state agency permit decisions**

In *Dade County v. National Bulk Carriers*,<sup>26</sup> Dade County denied National Bulk Carriers an "unusual use" permit to excavate a lake on its property and fill the remainder of the land to the 100-year flood level. National Bulk Carriers filed a regulatory taking lawsuit. Aside from the "takings" issue – where *National Bulk Carriers* represents the Florida Supreme Court's final stand in the compensation/invalidation debate – this case involved another erroneous interpretation of Chapter 78-85 by the Third District Court of Appeal.

In a second issue in the case – not particularly memorable because of the arcane nature of Chapter 78-85 – the Florida Supreme Court *also* held that *local land use decisions are not sub-*

<sup>25</sup> Cookson and Burton, *supra*, at 635 n.279.

<sup>26</sup> 450 So. 2d 213 (Fla. 1984).

ject to the process created in Ch 78-85.<sup>27</sup> It did so citing the 1978 Rhodes article, fn 2 supra, holding as follows.<sup>28</sup>

The [circuit] court noted that its opinion should not be construed as a denial of National Bulk Carriers' right to raise the taking issue in a separate action. ... *the Third District Court of Appeal ... remanded the cause for further proceedings pursuant to section 373.617, Florida Statutes ....*

*We ... hold that the district court's application of section 373.617 to the facts of this case was erroneous.*

Section 373.617(2) provides a method of judicial review of final action of any agency with respect to a permit. A "permit" is defined to mean "any permit or license required by this chapter." See §373.617(1)(b). "Agency" is defined to mean "any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government." See §373.617(1)(a). It is obvious that the legislature intended to apply the provisions of chapter 373 to agencies dealing with water resources. The short title of that chapter is "Florida Water Resources Act of 1972." The limited scope of this legislation was explained in an article appearing in The Florida Bar Journal:

***Key operational definitions of "agency" and "permit" limit the court action to state agency decisions*** involving Chapters 161, 253, 373, 380 and 403, Fla. Stat. Hence, the Department of Natural Resources decisions regarding coastal construction control lines, Trustees of the Internal Improvement Trust Fund decisions regarding dredge and fill permit appeals and sale and lease of state owned lands, Land and Water Adjudicatory Commission and regional water management district decisions regarding water permits, Land and Water Adjudicatory Commission decisions regarding developments of regional impact and areas of critical state concern, and Environmental Regulation Commission decisions regarding pollution control permits are subject to the circuit court action established by the act.

***"Key operational definitions of "agency" and "permit" limit the court action to state agency decisions ..."  
... citing Rhodes.***

R. Rhodes, *Compensating Police Power Takings: Chapter 75-85, Laws of Florida*, 52 FLA. B. J. 741, 743 (1978) (footnotes omitted).

***The district court has clearly attempted to add to section 373.617 in order to make it cover a situation which is not within the meaning of the legislation.*** The courts cannot amend or complete acts of the legislature intending to supply relief in instances where the legislature has not provided such relief.

<sup>27</sup> *National Bulk Carriers*, 450 So. 2d at 216.

<sup>28</sup> *Dade County v. National Bulk Carriers*, 450 So. 2d at 215-16. [Emphasis added.]

#### **4 § 380.07 APPEALS TO FLAWAC ARE NOT A PREREQUISITE TO THE FILING OF A REGULATORY TAKING CLAIM IN CIRCUIT COURT**

##### **4.1 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, supra* at fn.2, and that case is *Lee County v. New Testament Baptist Church, supra* fn.2. 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.

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.

##### **4.2 § 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, supra* fn. 14, 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”<sup>29</sup> 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 constitute 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.

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<sup>29</sup> § 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.]*

#### **4.3 Beneficial Use determinations are not “development orders” as defined in Chapter 380 – and even if they were so classified, they are standardless and wholly discretionary with the Monroe County Commission**

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”).

A Chapter 380 “development order” is defined in §§ 380.031(3) and (4), Fla. Stat., as:

(3) “Development order” means any order granting, denying, or granting with conditions an application for a *development permit*.

(4) “Development permit” includes any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter.

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<sup>30</sup> of all beneficial use may secure relief through an efficient non-judicial procedure.

Relief under the Beneficial Use regulation has shifted through the years – substantially after Judge Payne’s decision in 1991, affirmed in *Monroe County v. Gonzalez*, where the Third DCA adopted the trial court’s judgment as the District Court’s opinion.<sup>31</sup>

Plaintiff exhausted the only administrative remedy that could have provided him with complete relief, by petitioning the Board of County Commissioners for a rezoning. A rezoning to Improved Subdivision, which plaintiff sought, would have restored

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<sup>30</sup> 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).

<sup>31</sup> 593 So. 2d 1143 (Fla 3<sup>rd</sup> DCA 1992)

plaintiff's right to build a single-family home on his lot. Plaintiff's rezoning petition was denied prior to the filing of this action. The court finds that the other administrative remedy urged by the defendant, application for "beneficial use" pursuant to § 9.5-171, et seq., MCC, is not an adequate remedy for two reasons. First, the beneficial use provision only provides for relief which is "*the minimum necessary to raise the investment-backed value of the property to forty (40) percent of its value immediately prior to the effective date*" of the confiscatory regulations. *The Fifth Amendment to the United States Constitution, and Art. X, § 6, of the Florida Constitution, require compensation in the amount of 100% of the fair market value, for its highest and best use, of property taken for public use, not 40%. Therefore, the court finds that the beneficial use provision of the Monroe County Code is not an adequate administrative remedy when property has been taken in contravention of the Just Compensation clauses of the United States and Florida Constitutions.*

In *Gonzalez*, the landowner did not petition the County Commission for a beneficial use determination for two reasons; because of the 40% clause and because the "relief" allowed in that regulation did not include allowing Mr. Gonzalez to build a house on his platted, single-family lot. Monroe County adopted a new beneficial use "policy" in its Year 2010 Comprehensive Plan, effective January 4, 1996, under which Plaintiffs in this case filed their beneficial use applications. This Comprehensive Plan element remains in effect today and reads as follows.

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### **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 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.**

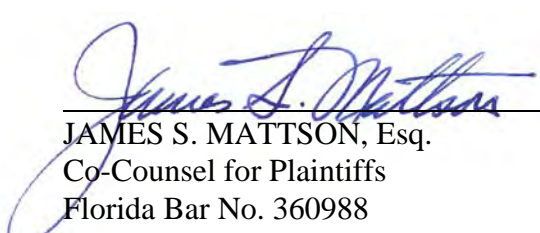
3. Development approved pursuant to Beneficial Use determination shall be consistent with all other objectives and policies of the Comprehensive Plan and the Land Development Regulations unless specifically exempted from such requirements in the final Beneficial Use determination.

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#### **4.4 Conclusion**

Each plaintiff in this case received a determination by the Board of County Commissioners that they had been “deprived of all beneficial use of their property, and that their remedy would be “just compensation.” Considering the complete lack of standards in the beneficial use process, and the fact that the process is wholly discretionary with the Board of County Commissioners, *there is nothing to appeal.*

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 fn. 31, 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.*” *Gonzalez, op. cit.*

  
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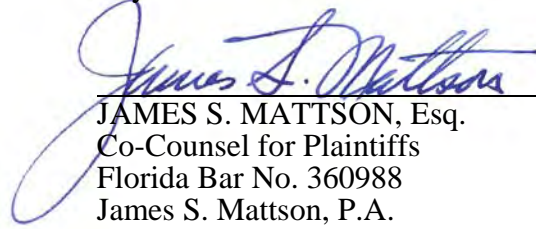
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### CERTIFICATE OF SERVICE

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 27<sup>th</sup> day of January 2006.



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