

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

CASE NO. 3D07-1603

**THOMAS F. COLLINS, et al.,
Appellants,**

vs.

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

Appellee, and

The STATE OF FLORIDA,

Third-Party Appellee.

L. T No.: CA-M-04-379

**APPELLANTS' MOTION TO STRIKE MONROE COUNTY'S ANSWER BRIEF FOR
NON-COMPLIANCE WITH RULES OF APPELLATE PROCEDURE**

Monroe County's answer brief contains improper citations, without record references, to what appears to be non-record material, including at least one local ordinance and 11 County code provisions.¹ The County's Statement of the Case and Facts is unduly argumentative, and includes statements of fact that are not in the record below or, if they are, have no record citations that would allow appellants or this court to locate them.² The County's brief also cites, at page 38, footnote 14, to an interlocutory ruling in an unrelated civil action, that is not in the record of this case, and occurred after final judgment was entered below.³

¹ See *Keller Industries, Inc. v. Yoder*, 625 So. 2d 82 (Fla. 3rd DCA 1993) (materials not submitted to trial court may not become part of the appellate process), citing *Thornber v. City of Ft. Walton Beach*, 534 So. 2d 754 (Fla. 1st DCA 1988) ("That an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court.")

² See *Greenfield v. Westmoreland*, 2007 Fla. App. LEXIS 2348, 32 Fla. L. Weekly D 533 (Fla. 3rd DCA 2007) (brief stricken where statement of facts was unduly argumentative and contained immaterial matters, citations to the record were inadequate, and the table of contents did not list the issues on appeal), citing *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1st DCA 1989) (same).

³ See *Thornber v. City of Ft. Walton Beach*, *supra*. Also see *E.I. Du Pont de Nemours & Co v Native Hammock Nursery, Inc.*, 698 So. 2d 267 (Fla. 3rd DCA 1997), *review denied*, 707 So. 2d 1126 (Fla. 1998) (matters from an unrelated, non-final proceeding cannot be introduced to support a motion for new trial, and may not be reviewed by the appellate court).

Fla. R. App. P. 9.210(b)(3) and (c) read, in pertinent part, as follows:

(b) **Contents of Initial Brief.** The initial brief shall contain the following, in order:

(3) A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition of the lower tribunal. References to the appropriate volume and pages of the record or transcript shall be made.

(c) **Contents of Answer Brief.** The answer brief shall be prepared in the same manner as the initial brief; provided that the statement of the case and of the facts may be omitted.

....

The “may” in rule 9.210 (c) is not permissive. In FLA. APPELLATE PRACTICE, 2007-08 ED., West (2007), § 16.11 n.3, Judge Padovano notes that, before 1996, rule 9.210(c) “provided that the answer brief *shall* omit a statement of the case and facts unless there are areas of disagreement.” Citing *Sabawi v. Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000), Judge Padovano writes: “*Decisions under the current rule continue to discourage a restatement of the facts except to the extent necessary to specify areas of disagreement.*” Monroe County’s brief identifies no such disagreement. Yet appellee has filed a 16-page “correction and supplement” to Appellants’ 7-page Statement of the Case and the Facts.

The first ten pages of the County’s statement of the case and the facts have 25 record references – of which 12 are in one paragraph and its accompanying footnote on pages 8-9 – and the final six pages have 27 record references. There are also 10 references to materials that were not in the record on appeal (ROA) when the County filed its brief – and were the subject of a partially successful motion to supplement the record – that do not have citations to the ROA.


In the attached Appendix, Appellants have identified at least 25 statements of fact that have no record reference, although four are referenced to documents that were permitted to be added to the ROA but have no pinpoint citations to the ROA. Appellants have not combed the record to determine which of the other 21 statements may or may not be in the record below, or in the record on appeal, but that task is properly assigned to appellee. Appellants believe that several “facts,” however, were not before the trial court.

Appellants have also listed 16 argumentative statements, in the County's Statement of the Case and the Facts, that are improperly identified as "facts" and belong in the argument section of the answer brief. Finally, although the ideal way to locate irrelevant statements would be to determine whether a statement (of the case or the facts) appears in a party's argument, appellants have not undertaken the ideal approach, but have identified a representative subset of eight irrelevant statements in the brief.

RELIEF SOUGHT

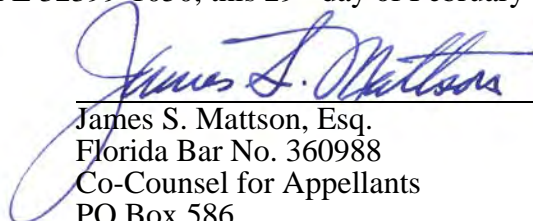
Appellants pray for an Order STRIKING Monroe County's Answer Brief and ordering Monroe County to file an amended answer brief in which it shall delete all legal and rhetorical argument contained in the Statement of the Case and the Facts, delete fn. 14 and all references thereto, delete all references to facts and documents for which it cannot provide a pinpoint citation to the record on appeal, and make pinpoint citations to the record on appeal for all references to facts or documents that remain in its brief. *See Greenfield v. Westmoreland, supra.*


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CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by first class mail, postage prepaid, on **Robert Shillinger, Esq.**, Chief Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, **Derek Howard, Esq.**, Paul Hastings et al., 875 15th St NW, Washington, DC 20005-2221, **Stephen J. Moore, Esq.** and **Elizabeth A. Moran, 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, this 29th day of February 2008.


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**APPENDIX TO APPELLANTS' MOTION TO STRIKE MONROE COUNTY'S
ANSWER BRIEF FOR NON-COMPLIANCE WITH RULES OF APPELLATE
PROCEDURE**

I. Reference to interlocutory ruling in unrelated proceeding that occurred after final judgment was entered in this case.

Pg. 38 Footnote 14. In *Galleon Bay Corp. v. Monroe County* (Circuit Court Case No. CAK-02- 595) – another inverse condemnation action over which Judge Audlin is presiding and Landowners' attorneys are representing the landowner – Judge Audlin recently ruled in favor of the landowner on a case-altering motion to amend that the County and State vigorously opposed.

II. Statements of fact and references to documents not in record on appeal (ROA) or, if it may be in ROA, no record reference is given.

- 1) Pg. 2. The 1996 Comp Plan introduced more stringent land development policies and regulations, including ones that specifically provided for wetland protection. None of the Landowners challenged the adoption of either Plan.
- 2) ROGO sets forth a point system whereby the County quarterly allocates the limited number of building permits that the State allows it to issue each year for the construction of new residential dwelling units in the entire Florida Keys.
- 3) Pg. 2, Footnote 2. In 1999, the County entered into a "Memorandum of Agreement" with DCA establishing new standards for wetland protection until the next cycle of comp plan amendments. The agreement defined "red-flag" wetlands as "those wetlands whose high level of function capacity and lack of disturbance prohibit development under any circumstances. The agreement also provided that development was prohibited under any circumstances in "high functional capacity wetlands," which are defined as those wetlands which score at 7.0 or higher under the Keys Wetlands Evaluation Procedure (KEYWEP). The terms of the Memorandum of Agreement were formally adopted into the LDRs by Monroe County Ord. 007-2002 (adopted on March 20, 2002).
- 4) Pp. 2-3. ROGO awards positive and negative points to applicants in the system based on criteria including the availability of public infrastructure; protection of endangered species and wetlands habitats; and whether the property is in the Coastal Barrier Resources System ("CBRS"). Section 2.5.5 of ROGO confirmed that its essential provisions were required by the terms of a settlement agreement between the County and DCA.
- 5) Pg. 3. According to the County's LDRs, a property owner seeking development approval for a use permitted as of right must initiate a development review process by either requesting a "preapplicaiton [sic] conference" pursuant to Section 9.5-43, or submitting an application for a building permit along with a description of the proposed development pursuant to Section 9.5-55. If the proposed development requires a residential ROGO allocation, the applicant must also apply for such an allocation pursuant to Section 9.5-122.1.

- 6) Pg 4. The County's LDRs also provide for administrative appeals and variances. Section 9.5-521 provides that affected persons may appeal any order, decision, determination or interpretation by any administrative official with respect to respect provisions of the LDRs.
- 7) Section 9.5-523 provides for variances that may be granted by the Planning Director, and section 9.5-521 provides for variances that may be granted by the Planning Commission. None of the Landowners availed themselves of the administrative appeal of variance provisions of the County's LDRs.
- 8) Development of those Properties is therefore regulated by the U.S. Fish & Wildlife Service ("USFWS") pursuant to the ESA.
- 9) The properties owned by Burstyn, P.A., Del Valle, Hill Family, Lomrance Schneider, Ricklin & Riordan, and Tost contain "red-flag" wetlands and their development is subject to the Corps of Engineers' CWA Sec. 404 permitting authority.
- 10) Pg. 5. Section 9.5-112 of the County's LDRs provides that prior to submittal of a building permit application to the building department, either a letter of coordination from the USFWS or Army Corp of Engineers permit may be required. None of the Landowners requiring development approvals from the Federal government have alleged that such approvals have been applied for, much less obtained.
- 11) Pg. 7. Pursuant to Sec. 9.5-174, the Board of County Commissioners ("BOCC") rendered final BUDs for Hill Family Investments; Lomrance; Schneider, Ricklin and Riordan; and Tost on March 17, 2004. All other Landowners received final BUDS in either March or July of 2002. Each of the BUD Resolutions passed by the BOCC evidenced the Board's approval of the Special Master's recommendation that the Property be purchased in accordance with the applicable provisions of the Plan and Code. Sec. 9.5-173 provides that just compensation is "the fair market value immediately prior to the comprehensive plan or land development regulations in effect at the time of the filing of the beneficial use application." The BUD Resolutions made no findings of fact regarding the fair market values of the Subject Properties as of the dates they were rendered.
- 12) Pg. 13. Among the issues discussed at that Conference was the number of days required to try the issue of liability at the bench trial. The Parties disagreed on the point but agreed that the trial could be shortened if legal issues were decided by the court in advance. The trial court welcomed both Parties to submit motions seeking to resolve those issues, including the County and State's affirmative defenses to the Second Amended Complaint.
- 13) Pp. 25-26. Despite the final BUDs, the Landowners cannot assert that it would have been futile to commence the development review process by application pursuant to Sec. 9.5-43 or Sec. 9.5-55 of the County's LDRs. ... Indeed, the rationale for the "at least one meaningful application" prerequisite requirement to the futility defense is underscored by the fact that Landowners Magrini and Collins obtained building permits by commencing the development review process by application pursuant to Sec. 9.5-55 of the County's LDRs.

III. Statements of fact referenced to documents sought to be added to ROA after answer brief was filed. The documents in the following excerpts were NOT allowed to be added to the ROA.

- 14) Pg. 2. On July 13, 1992, Monroe County Ordinance No. 016-1992 (commonly called the “Rate-of-Growth Ordinance” or “ROGO”) became effective. [McGarry Aff., 9.]
- 15) Pg. 2. ROGO’s stated intent is to maintain a reasonable and safe hurricane evacuation clearance time, and to also help prevent irreversible environmental degradation. [McGarry Aff., ¶ 9.]
- 16) Pg. 3. With the exception of Collins and Magrini, no other Landowner ever filed a complete application for development approval.⁴ [McGarry Aff., ¶ 28.]
- 17) Pg. 4. The Collins, Davis, Johnson, Magrini and Radenhausen Properties are located on Big Pine Key, which is critical habitat for the federally protected Key Deer. [McGarry Aff., 7.]
- 18) Pg. 5. The 1996 Comp Plan contained a beneficial use determination (“BUD”) provision, codified at Sec. 9.5-171, et seq., of the County’s LDRs. (See BUD Ordinance in Joint Appendix filed May 21, 2007 in the trial court, which is part of the County’s Motion to Supplement Record).
- 19) In order for an applicant to establish an entitlement to relief, Sec. 9.5-173 requires the applicant to “demonstrate that the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application deprive the applicant of all reasonable economic use of the property.” If the applicant meets this threshold requirement, Sec. 9.5-173(1) provides that “[j]ust compensation shall be the preferred option” if the certain criteria enumerated therein are established. The County may provide for alternative forms of relief, including the issuance of building permits, only if compensation is not the preferred relief.
- 20) Pg. 6. The BUD Process is not an application for development approval nor a substitute for either an application for Building Permit or ROGO Allocation. Nothing in Sec. 9.5-171, et. seq., provides that a property owner may resort to the BUD process to obtain development approval in lieu of complying with the development review requirements set forth in Article III of the LDRs. The BUD process provides no mechanism for an applicant to describe proposed development for which approval pursuant to the process may be granted. (See BUD Ordinance in Joint Appendix filed May 21, 2007 in the trial court, which is part of the County’s Motion to Supplement Record).
- 21) Pg. 9. However, none of the Landowners filed building permit or ROGO allocation applications as Magrini and Collins had done. [McGarry Aff., ¶ 9.]

IV. Statements of fact referenced only to documents added to ROA after answer brief was filed are not record references. The documents cited in the following excerpts were allowed to be added to the ROA

- 22) Pp. 9-10. In addition to seeking BUDs in 1997, each Landowner moved to intervene in a Circuit Court action filed in 1997 by property owners “seeking

declaratory relief to determine their rights pursuant to Chapter 380, Florida Statutes, and to determine the effect, if any, of the 1986 Land Development Regulations, [ROGO], and the [1996 Comp Plan].” *Ambrose v. Monroe County*, 866 So.2d 707, 709 (Fla. 3rd DCA 2003). [Br. in Support of Def.’s Supp. Cross Mot. for Summ. J., 3] The trial court granted summary judgment in favor of the Landowners finding in part that they had a vested right to build single family homes without regard to the regulations at issue, by virtue of recording their parcels of land. The trial court determined that the Landowners did not have to show reliance or change of position and that their rights were vested solely on the recordation of their land. On December 10, 2003, this Court reversed, “finding that a plain reading of Section 380.05(18) gives the Landowners a vested right to develop their property if the Landowners have demonstrated a good faith reliance and change of position.” 866 So.2d 707. This Court also noted that in the absence of a vested right, a landowner was entitled to compensation to the extent the County’s regulations rendered the landowner’s property practically useless. 866 So.2d at 712. After the case was remanded back to the trial court, the Landowners elected neither to establish reliance nor seek compensation. [Br. in Support of Def.’s Supp. Cross Mot. for Summ. J., 5.]

- 23) Pp. 10-11. While *Ambrose* remained pending, Landowners filed the action at bar. The First Amended Complaint, filed on or about December 10, 2004, alleged in part that “[i]n the BOCC Resolution applicable to each Plaintiff, Defendant has determined that each Plaintiff has been deprived of all beneficial use of their property by the operation of the [Comprehensive Plan and LDRs]” the same regulations at issue in *Ambrose*. [Pls.’ 1st Amend. Compl. 31.] Need to supplement record with First Amended Complaint]. The First Amended Complaint alleged that regulatory taking damages began to accrue on January 4, 1997 – the date the Landowners filed their BUD applications.
- 24) Pg. 31. If this Court were to accept Landowners’ argument – “as long as the County Commission can act to prevent a taking by disregarding the confiscatory effects of its regulations and issuing building permits to a landowner who – by a plain reading of the County’s regulation – would not otherwise obtain a permit, the County’s regulations cannot be the basis of a facial taking” [Pls.’ Resp. to Defs.’ Mem. & Obj. to Proposed Summ. J. Order, 1-2].
- 25) This is because Landowners also argued below that if there was no BUD process, this “would render any confiscatory (i.e., facial taking) County [LDR] unconstitutional on due process grounds.” [Pls.’ Resp. to Defs.’ Mem. & Obj. to Proposed Summ. J. Order, n. 1].

V. Argumentative “statements of the case and the facts”

- 1) Pg. 4. The County stated, and Landowners did not object or contravene, that it was not the County’s jurisdiction that affected the availability of Building Permits. “This is up to Fish and Wildlife and FDOT, and who else. And DCA...” (Emphasis added). Plaintiffs responded by saying “I have nothing to add.” [Statements made at administrative Beneficial Use Determination hearing in 2000.]
- 2) Pg. 6. The BUD Process is not an application for development approval nor a substitute for either an application for Building Permit or ROGO Allocation. Nothing in Sec. 9.5-171, et. seq., provides that a property owner may resort to the

BUD process to obtain development approval in lieu of complying with the development review requirements set forth in Article III of the LDRs. The BUD process provides no mechanism for an applicant to describe proposed development for which approval pursuant to the process may be granted. (See BUD Ordinance in Joint Appendix filed May 21, 2007 in the trial court, which is part of the County's Motion to Supplement Record).

- 3) Pg. 7. At one BUD hearing, the attorney for Landowners stated, "...it's pretty much my understanding that we've got a stipulation on practically everything.... And that these hearings are really not going to be evidentiary in nature...." [R. Vol. V, 992.] At another BUD hearing, the County informed the Special Master that "these properties do have development potential under ROGO." Appellants did not contest this or add anything to the record. [R. Vol. III, p. 619-22]
- 4) Pp. 9-10. In addition to seeking BUDs in 1997, each Landowner moved to intervene in a Circuit Court action filed in 1997 by property owners "seeking declaratory relief to determine their rights pursuant to Chapter 380, Florida Statutes, and to determine the effect, if any, of the 1986 Land Development Regulations, [ROGO], and the [1996 Comp Plan]." *Ambrose v. Monroe County*, 866 So.2d 707, 709 (Fla. 3rd DCA 2003). [Br. in Support of Def.'s Supp. Cross Mot. for Summ. J., 3] The trial court granted summary judgment in favor of the Landowners finding in part that they had a vested right to build single family homes without regard to the regulations at issue, by virtue of recording their parcels of land. The trial court determined that the Landowners did not have to show reliance or change of position and that their rights were vested solely on the recordation of their land. On December 10, 2003, this Court reversed, "finding that a plain reading of Section 380.05(18) gives the Landowners a vested right to develop their property if the Landowners have demonstrated a good faith reliance and change of position." 866 So.2d 707. This Court also noted that in the absence of a vested right, a landowner was entitled to compensation to the extent the County's regulations rendered the landowner's property practically useless. 866 So.2d at 712. After the case was remanded back to the trial court, the Landowners elected neither to establish reliance nor seek compensation. [Br. in Support of Def.'s Supp. Cross Mot. for Summ. J., 5.]
- 5) Pg. 10, footnote 7. *Ambrose* was not voluntarily dismissed without prejudice and the case closed until after the County answered Landowners' Second Amended Complaint and set forth the defense that Landowners were impermissibly splitting causes of action. RV: 809-832.
- 6) Pp. 10-11. While *Ambrose* remained pending, Landowners filed the action at bar. The First Amended Complaint, filed on or about December 10, 2004, alleged in part that "[i]n the BOCC Resolution applicable to each Plaintiff, Defendant has determined that each Plaintiff has been deprived of all beneficial use of their property by the operation of the [Comprehensive Plan and LDRs]" the same regulations at issue in *Ambrose*. [Pls.' 1st Amend. Compl. 31.] Need to supplement record with First Amended Complaint]. The First Amended Complaint alleged that regulatory taking damages began to accrue on January 4, 1997 – the date the Landowners filed their BUD applications.
- 7) Pg. 11. On April 5, 2006 – before any ruling on the parties' summary judgment motions, and after Monroe County argued in its motion and memoranda of law that Landowners' claims to compensation for regulatory takings beginning on January 4, 1997, were barred by the statute of limitations – Landowners sought

leave to amend their Complaint asserting that they were entitled to compensation as of later dates. [R. Vol. IV, 802-805.]

- 8) Pg. 12. The County and State filed a Notice of Withdrawal of their cross motions for summary judgment motions on October 24, 2006. [R. Vol. V, 852-853.] However, the trial court refused to allow the County and State to withdraw their cross motions. Following an October 30, 2006, hearing at which the County and State declined to argue their withdrawn cross motions, the trial court entered an order on November 9, 2006, denying the motions. [R. Vol. V, 867-873.]
- 9) The trial court found in part that the “record is susceptible to a factual interpretation that what had occurred here with regard to Plaintiffs’ various properties was an ‘as applied’ taking in each case as opposed to a ‘facial’ taking in which case the taking does not ripen for litigation until the Plaintiffs have applied for and received a final determination from the local government permitting authority.” [R. Vol. V, 867-873.]
- 10) Pp. 12-13. The trial court also dismissed the County’s Ambrose affirmative defense:
- 11) It is not known whether these Plaintiffs or any of the Ambrose Plaintiffs could make that [reliance] showing as none have ever attempted to do so but it is clear that until the Ambrose case was concluded (Cert. Denied July 9, 2004) they could not know that these regulations would affect the use of their properties.
- 12) [R. Vol. V, 867-873.] In its decision, however, this Court acknowledged that the Landowners asserted that these regulations “limited or modified their rights to develop their parcels of land.” 866 So.2d at 709.
- 13) Pg. 14. On April 6, 2007, Landowners filed a Motion for Partial Summary Judgment on the Issue of Whether Objective or Subjective Testimony Is Required To Prove Or Disprove Plaintiffs’ Reasonable Investment Backed Expectations. At page 2 of that motion, Landowners stated, “[p]art to this case involves the Supreme Court’s three-part test in Penn Central Transp. Co. v. City of New York.” Landowners conceded at page 4 that in order “to prove liability,” the second-prong of Penn Central test required them to demonstrate “[t]hat when Plaintiffs or their devisors acquired the property, there existed a reasonable expectation that they could build one (or more) single-family home(s) on the property, and that their investment in the property was non-trivial.
- 14) Pp. 14-15. On April 11, 2007, Landowners filed a Motion for Partial Summary Judgment on the Conclusiveness of Monroe County’s Resolutions on Plaintiffs’ Petitions For Beneficial Use Determination (“Partial SJ Motion on BUD Conclusiveness”). [R. Vol. V, 912-921.] In that motion, Plaintiffs alleged that the resolutions “constitute admissions that the Plaintiffs have suffered regulatory takings of their subject properties.” [R. Vol. V, 912.] Landowners did not reject the three-prong Penn Central test. As to Penn Central, Landowners argued that the final BUDS “meet[] the first prong in a Penn Central taking.” [R. Vol. V, 920.] On May 10, 2007, Monroe County filed its response in opposition to Landowners’ Partial SJ Motion on BUD Conclusiveness. [R. Vol. V, 971-1016.]
- 15) Pg. 15. Landowners had not previously sought through discovery either the identity of the County or State’s witnesses, or the substance of expected testimony.

- 16) Pp. 15-16. On April 25, 2007, the County filed its Motion for Partial Summary Judgment on Count I of the Second Amended Complaint. [R. Vol. V, 967-970.] That motion argued that if application of the Comprehensive Plan and LDRs resulted in regulatory takings of the Subject Properties, Landowners were not entitled to temporary taking compensation because it was not alleged that the regulations at issue were either judicially invalidated, or rescinded by the County. The motion argued that by operation of law, Landowners would only be entitled to permanent taking compensation sought in connection with Count II. On or about May 17, 2007, the County filed a “Memorandum of Law in Support of its Motion For Partial Summary Judgment.” [R. Vol. VI, 1185-1207.] Landowners did not file a response to Monroe County’s motion.

VI. Irrelevant statements of the case and the facts

- 1) Pg 1. In 1979, the Florida Keys was designated as an Area of Critical State Concern (“ACSC”) pursuant to the Florida Keys Protection Act. Section 380.0552(9), Fla. Stat., provides that any enactment, amendment, or rescission concerning Monroe County’s Comprehensive Plan and Land Development Regulations (“LDRs”) is effective only upon the approval of the State. The Department of Community Affairs (“DCA”) is also authorized to recommend to the Administration Commission that it adopt amendments to the County’s Comprehensive Plan to bring it into compliance with State principles for guiding development. Those principles are set forth in Section 380.0552(9), Fla. Stat.
- 2) Pg. 4. In addition to the County’s LDRs, development of the Subject Properties is governed by Federal laws and regulations, including the Clean Water Act (CWA), Endangered Species Act (“ESA”), and those relating to the CBRs.
- 3) Development of those Properties is therefore regulated by the U.S. Fish & Wildlife Service (“USFWS”) pursuant to the ESA.
- 4) The properties owned by Burstyn, P.A., Del Valle, Hill Family, Lomrance Schneider, Ricklin & Riordan, and Tost contain “red-flag” wetlands and their development is subject to the Corps of Engineers’ CWA Sec. 404 permitting authority.
- 5) Pg. 8. The Land Authority is an agency that, among other things, carries out a land acquisition program for the preservation of environmentally sensitive lands in the Florida Keys. [R. Vol. V, 1014.] Subsequent to the filing of the BUD applications by Landowners and the stipulation that just compensation was the preferred relief, the Land Authority began making offers to purchase the Subject Properties. [R. Vol. V, 1014.] Following the passage of the BUD Resolutions, the Land Authority continued to seek to acquire the Subject Properties, but was informed by Landowners’ attorney that his clients wanted to build and would not be interested in selling for what the agency would offer. [R. Vol. V, 1015.]
- 6) Pg. 8 Footnote 5. BOCC Resolution # 305-2002 – the same Resolution Landowners assert constituted final determinations of what could be done with the Properties included property owners other than Landowners, including Charles & Susan Peabody (“Peabody”) and Paul F. Reuter (“Reuter”). [R. Vol. V, 1005.] Peabody applied for a Building Permit on June 17, 1996, and for a ROGO Allocation on July 2, 1996. [R. Vol. V, 1006.] A Building Permit was issued on May 20, 2005. [R. Vol. V, 1006.] Thereafter, Peabody sold the Property to Lieu

Heung (“Heung”). [R. Vol. V, 1006.] Heung applied for Building Permit on February 21, 2006, and for ROGO Allocation on July 25, 2006. [R. Vol. V, 1007.] The ROGO Application is awaiting an allocation. [R. Vol. V, 1007.] Reuter made an Application for a Building Permit on or about May 18, 1995. [R. Vol. V, 1007.] An Application for a ROGO Allocation was submitted on April 1, 1998, and a Building Permit Allocation was granted and available on February 22, 2006. [R. Vol. V, 1006.]

- 7) Pp. 9-10. In addition to seeking BUDs in 1997, each Landowner moved to intervene in a Circuit Court action filed in 1997 by property owners “seeking declaratory relief to determine their rights pursuant to Chapter 380, Florida Statutes, and to determine the effect, if any, of the 1986 Land Development Regulations, [ROGO], and the [1996 Comp Plan].” *Ambrose v. Monroe County*, 866 So.2d 707, 709 (Fla. 3rd DCA 2003). [Br. in Support of Def.’s Supp. Cross Mot. for Summ. J., 3] The trial court granted summary judgment in favor of the Landowners finding in part that they had a vested right to build single family homes without regard to the regulations at issue, by virtue of recording their parcels of land. The trial court determined that the Landowners did not have to show reliance or change of position and that their rights were vested solely on the recordation of their land. On December 10, 2003, this Court reversed, “finding that a plain reading of Section 380.05(18) gives the Landowners a vested right to develop their property if the Landowners have demonstrated a good faith reliance and change of position.” 866 So.2d 707. This Court also noted that in the absence of a vested right, a landowner was entitled to compensation to the extent the County’s regulations rendered the landowner’s property practically useless. 866 So.2d at 712. After the case was remanded back to the trial court, the Landowners elected neither to establish reliance nor seek compensation. [Br. in Support of Def.’s Supp. Cross Mot. for Summ. J., 5.]
- 8) Pg. 28. None of the Landowners submitted appraisals of their Properties in connection with their BUD Applications.