

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

**CASE NO. 3D07-1603  
Lower Tribunal No. CA-M-04-379 (Audlin, J.)**

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**THOMAS F. COLLINS and PATRICIA COLLINS, T/E; DONALD  
DAVIS; AURELIA DEL VALLE and MARIA DEL VALLE, T/E;  
HILL FAMILY INVESTMENTS, INC.; RICHARD J. JOHNSON  
and JOANN C. JOHNSON, T/E; ROBERT A. LOMRANCE;  
JOSEPH MAGRINI and ELDA S. MAGRINI, T/E; KEITH P.  
RADENHAUSEN; FRANK J. SCHNEIDER, MARY ANN  
RICKLIN, and ROSEMARY RIORDAN, T/C; HUBERT TOST  
and MARILYN TOST, T/E., AND SAMUEL I. BURSTYN, P.A.,**

**APPELLANTS,**

**vs.**

**MONROE COUNTY, a Political Subdivision of the State of Florida,  
and the STATE OF FLORIDA,**

**APPELLEES.**

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**REPLY BRIEF OF APPELLANTS**

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The Government, as a defendant, uses the ripeness doctrine as both a sword and a shield. As a shield against suit, the Government will argue that the case is not yet ripe for judicial decision. It will explain that the disputed development proposal has not yet been fully explored; the property owner may still get permission to do something, even if it is less than the original proposal. The result of a successful not-yet-ripe defense is the postponement of the suit to another day, no matter what the cost to the property owner.

As a sword against recovery, the Government will argue that the case is over-ripe. The governmental decision had been made definitively, and the property owner waited too long to bring suit. Because the cause of action against the Government accrued more years ago than the relevant statute of limitations provides, the property owner is barred from a recovery on the claim. The result of a successful over-ripe defense is that the taking goes forever unrecompensed.

*Bayou Des Familles Development Corp. v. United States*, 130 F.3d 1034 , 1037-38 (Fed. Cir. 1997).

## I. PRELIMINARY STATEMENT

Both Answer Briefs take issue with Landowners on the main issue – prudential ripeness as established in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*.<sup>1</sup> The State’s Answer Brief also raises a “tipsy coachman” alternative to the *Glisson v. Alachua County*<sup>2</sup> model relied on by the trial court. The County’s Answer Brief raises four sub-issues, including (i) an argument that Landowners’ failure to make certain documents part of the Record on Appeal requires this Court to affirm the summary judgment below, (ii) that the summary judgment orders of the predecessor Judge below cannot be reinstated because the Defendants “withdrew” their summary judgment motions (the issue of

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<sup>1</sup> 473 U.S. 172 (1985)

<sup>2</sup> 558 So. 2d 1030 (Fla. 1<sup>st</sup> DCA), *review denied*, 570 So. 2d 1304 (Fla. 1990).

the supposed “withdrawal” of their motions was not raised by Landowners, and was not the subject of a cross-appeal, and need not be discussed), (iii) that if the judgment below is reversed, this Court may not enter, or require the trial court, to enter, partial summary judgment on liability in favor of Landowners, and (iv) that Landowners’ request to have a senior judge appointed to case is “judge-shopping.”

Accompanying this Brief is an Appendix with copies of two trial memoranda. The memoranda responded to the issues in the State’s Answer Brief, when those issues were first raised before Judge Richard Payne. The memoranda are entitled “Plaintiffs’ Supplemental Memorandum on the Government’s four-year Statute of Limitation Defense” and “Plaintiffs’ Supplemental Memorandum on the Government’s 90-Day Statute of Limitation Defense.”

## II. ARGUMENT

**A. ISSUE 1: RIPENESS.** The State mischaracterizes the trial court’s reliance on *Glisson*, arguing that the court “recognized this as a facial taking.” The order appealed from states “the court specifically finds that the BUD resolutions do not ... ripen an as-applied takings claim. Landowners did not plead facial taking claims, and the *Glisson* approach is a red herring, and the facial taking analysis should be ignored.

(1) *The trial court incorrectly concluded that Landowners’ Beneficial Use Determination decisions failed to ripen their regulatory taking claims.*

Appellees and the trial court place too much weight on the first sentence in the following quote from *Glisson*, which in turn takes everything but the word “may” from the 7<sup>th</sup> and 9<sup>th</sup> Circuit cases cited therein.

A final decision *may* be shown by (1) a rejected development plan, and (2) a denial of a variance. *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). Although the final decision prerequisite also

may be satisfied by proof that attempts to comply would be futile, futility is not established until at least one meaningful application has been filed. *Unity Ventures*, 841 F.2d at 775; *Kinzli*, 818 F.2d at 1454.

558 So. 2d at 1036. In the first sentence, *Glisson* uses “*may*,” not “*shall*.” BLACK’S LAW DICTIONARY, 6<sup>TH</sup> ED., West (1990), at p. 979, defines “*may*” as:

an auxiliary verb qualifying the meaning of another verb by expressing ... possibility, probability or contingency. ... Word “*may*” usually is employed to imply permissive, optional or discretionary, and not mandatory action or conduct. ... In construction of statutes ... word “*may*” as opposed to “*shall*” is indicative of discretion or choice between two or more alternatives....

Many decisions where the landowner fails the ripeness test involve substantial multi-unit projects, and when a developer’s first plan is rejected he does not want to go back and ask for a half-loaf. *See, e.g., Williamson County, supra* (736-lot subdivision); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (159 single-family and multifamily lots). But when the “development project” is one house on a single-family lot, the problems are fewer.

Monroe County’s Beneficial Use Determination (BUD) procedure is almost unique. It is the only one of its kind we have been able to find in Florida. Its uniqueness should prompt more analysis than typical variances – that can only be utilized *after* some development application has been rejected. Landowners’ research has turned up two beneficial use procedures, similar to the County’s BUD. One is in Utah; the other is in New Jersey.

(2) *Salt Lake County's Takings Ordinance*

In *Arnell v. Salt Lake County Bd. of Adjustment*,<sup>3</sup> Mr. Arnell bought a residential lot on a steep (40%) slope, for \$95,000. When he filed for a building permit, he learned the County had recently adopted a Slope Ordinance that prohibited *any* development on slopes greater than 30%. He applied for and was denied a variance. But Salt Lake County has a Takings Ordinance, and Arnell filed a “takings relief petition” with the County Commission. A hearing officer was appointed to conduct a hearing, determine whether a taking had occurred, and make a recommendation.

The hearing officer determined the lot was rendered worthless by the Slope Ordinance, and that a single-family residence was its only viable use. His recommendation was to grant an exception to the Slope Ordinance or pay Arnell \$95,000. Arnell took his claim to the County Council, but without success. He then sought compensation in district court, but the court entered summary judgment for the County on the ground that his taking claim was unripe. On appeal to the Court of Appeals, the appellate court held that his claim was ripe, writing:<sup>4</sup>

*A regulation that “denies all economically beneficial or productive use of land” will require compensation under the Takings Clause.” Palazzolo, 533 U.S. at 617 (quoting Lucas v. South Carolina Coastal Council, ... This is a so-called **total taking**. Even if a regulation falls short of eliminating all economically beneficial use of land, an analysis of a complex of factors indicates whether the *interference is so great that a **virtual taking** has nonetheless occurred.**

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<sup>3</sup> 112 P. 3d 1214 (Utah Ct. App. 2005).

<sup>4</sup> 112 P. 3d at 1220-22. [Emphasis added.]

The County maintains that it denied the Petition because Plaintiff failed to provide the requested site-specific data to obtain a variance. However, the Council's Findings of Fact and Conclusions of Law belie this argument. ... Indeed, the Council's final conclusion is perhaps the most telling as to the County's actual reason for denying Plaintiff a variance:

The effect of granting an exception to, or compensating, [Plaintiff] might be that the County is obligated to grant similar relief to other lot owners similarly situated in existing and future subdivisions, effectively rescinding residential building restrictions on slopes that have been accepted by property owners and developers and enforced for well over 25 years. Granting an exception would defeat the purpose of the Wasatch Canyon Master Plan and FCOZ and would result in a manifest injustice to those who have complied in the past and will do so in the future.

Based on the above findings, ... it is clear that Plaintiff would not have been granted a variance from the Slope Ordinance to build on Lot 13 under any circumstances. Therefore, *Plaintiff's takings claim is ripe because the extent that the Slope Ordinance restricts development on Lot 13 is certain: it is a complete bar.*

**(3) *The Highlands Area, New Jersey***

The Highlands Area is 800,000 acres in 88 municipalities, in seven counties. Part of the area is set aside for preservation, including the 93 acres that belong to OFP. Before the Highlands Area designation, OFP had been trying to "vest" a 26-lot subdivision on its 96 acres. But that did not happen and OFP sued, challenging the constitutionality of the Highlands Act because it permitted the State to "take" its property without compensation. The trial court dismissed the claim on summary judgment, stating that the Highlands Act "provides protection to property owners through an administrative process to lessen the effect of [its] land restrictions."

In *OFP, LLC v. State of New Jersey*,<sup>5</sup> The appellate court affirmed the trial court, and wrote a dissertation on the Act’s “relief valve,” stating:

The Highlands Act establishes an administrative procedure for determination of any claim that its regulatory provisions have resulted in a taking. ... N.J.S.A. 13:20-33(b)(3) provides that “[t]he Highlands permitting review program established pursuant to this section shall include... ***a provision that may allow for a waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation.***” (Emphasis added).

The New Jersey DEP has adopted regulations implementing the hardship provision. Those regulations are similar to Monroe County’s BUD procedure, and begin with the following.<sup>6</sup>

(a) In accordance with N.J.S.A. 13:20-33b, the [DEP] may, on a case by case basis, waive any requirement ... if necessary to avoid the taking of property without just compensation.

....

(c) In determining whether to waive any requirement of this chapter to avoid an alleged taking of property without just compensation, the [DEP] shall consider:

1. The investments the property owner made in the property as a whole on which regulated activities are proposed and whether the investments were reasonable,....;
2. The minimum viable and economically beneficial use of the property as a whole, ...; and
3. The environmental impacts of the minimum viable and economically beneficial use for the property as a whole, and the consistency of these impacts with the goals of the Highlands Act[.]

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<sup>5</sup> 930 A.2d 442 (NJ App. Div. 2007), *certif. granted*, 2007 NJ LEXIS 1518 (NJ, Dec, 5, 2007)

<sup>6</sup> 930 A. 2d at 449.

Just as in the case at bar, the New Jersey Highlands “hardship waiver” process must be exercised to ripen a regulatory taking claim. As the court held:<sup>7</sup>

We ... conclude that the trial court correctly held that OFP’s taking claim should not be entertained because OFP failed to avail itself of the administrative remedy of a hardship waiver application

...

We recognize that the DEP could administer N.J.A.C. 7:38-6.8 in a manner that fails to give property owners such as OFP the hardship relief required “to avoid the taking of property without just compensation.” ... However, we can not just assume that the DEP will default in this statutory responsibility. Instead, *the DEP must be allowed to “arrive[] at a final, definitive position regarding how it will apply” N.J.A.C. 7:38-6.8 to the property owned by OFP and others before the courts can determine whether a regulatory taking has occurred. Williamson, supra, 473 U.S. at 191, 105 S. Ct. at 3119, 87 L. Ed. 2d at 141.*

- (4) *Appellees’ Answer Briefs suggest they do not accept Landowners’ argument that confiscatory land development (zoning) regulations are violative of Due Process in Florida. This excerpt from Landowners’ trial memorandum, in the Appendix, makes Landowners position clearer.***

In *Dade County v. National Bulk Carriers*,<sup>8</sup> 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.*”

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

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<sup>7</sup> 930 A. 2d at 450, 453. [Emphasis added.]

<sup>8</sup> 450 So. 2d 213, 215-16 (Fla. 1984).

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 may think *National Bulk Carriers* has no impact after *First English*,<sup>9</sup> one only needs to read *Monroe County v. Gonzalez*,<sup>10</sup> a post-*First English* decision in which this Court adopted the trial court’s liability order as the District Court’s opinion – including the relief clause that reads as follows:<sup>11</sup>

IT IS ADJUDGED that § 9.5-262 and 9.5-343, 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.”

*Joint Ventures v. FDOT*, 563 So. 2d 622 (Fla. 1990), also makes the same point by invalidating a state statute that “freezes” development of property that

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

<sup>10</sup> 593 So. 2d 1143 (Fla 3<sup>rd</sup> DCA 1992).

<sup>11</sup> *Id.*, 593 So. 2d at 1145.

FDOT might want to acquire, as unconstitutional on Due Process grounds. The supreme court rejected FDOT's argument that affected landowners could always file inverse condemnation actions.

DOT contends that Joint Ventures' right to seek compensation through inverse condemnation cures the statute's failure to expressly provide for compensation. We disagree. Although the right to seek relief through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation, see *First English*, that remedy is not equivalent to a property owner's remedy under the doctrine of eminent domain. Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a "taking" by regulation, and it is not a substitute for eminent domain protection facilitated by chapters 73 and 74.

The property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is "taken" through formal condemnation proceedings. The former has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee. In *State Road Department v. Forehand*, 56 So.2d 901, 903 (Fla. 1952), the Court considered the due process requirements of the state's summary method of securing possession of property pending condemnation proceedings:

Notice to the parties, the appointment of appraisers, the submission of testimony, the right to be represented by counsel and a determination by the court of whether or not these things have been done are all required before possession of the land is turned over to the petitioner, including a deposit in the registry of the court of no less than twice its appraised value.

*See also United States v. Clarke*, 445 U.S. 253 (1980) (recognizing that important legal and practical differences exist between the two proceedings); *Department of Transp. v. Grossman*, 536 So.2d 1181 (Fla. 3d DCA), *review denied*, 545 So.2d 1366 (Fla. 1989) (the condemnor, not the landowner, has the burden to proceed under chapter 74).

Landowners also note the significance of *Key West v. Berg*.<sup>12</sup> Berg had submitted development plans to the City, but argued that he could not be expected to apply to the City for a Beneficial Use Determination, because the City had not adopted regulations implementing the bare-bones Beneficial Use policy in its 1994 Comprehensive Plan. Berg's failure to seek a Beneficial Use Determination led to the Third DCA ruling his claim was unripe. Landowners here *have* obtained final Beneficial Use Determinations from the government entity responsible for determining the permitted use for the land, as required by the Supreme Court and the Florida courts. Therefore, Landowners regulatory takings claims are ripe for judicial review.

**B. ISSUE 2: CLAIM ACCRUAL. Neither the State nor the County took issue with Landowners' claim accrual argument. The point is conceded.**

**C. ISSUE 3: PER-SE REGULATORY TAKINGS.**

Landowners have little to add in reply, except that the issue is semantic.

**D. ISSUE 4: TIPSY COACHMAN. The State raises a 90-day Statute of Limitations that exists in certain administrative settings.**

The State is referring to five identical statutes enacted in 1978 as Ch. 78-85, one of which is § 380.085, the statute relied upon in Appellee's Answer Brief. Landowners briefed this issue in a memorandum of law submitted to the trial court (then-Chief Judge Richard Payne) on January 27, 2006. The memorandum is part of the Record on Appeal, and is reproduced in the Appendix to this Reply Brief.

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<sup>12</sup> 655 So. 2d 196 (Fla. 3<sup>rd</sup> DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995).

First, these statutes were a legislative response to the Fourth DCA’s decision in *Mailman Development Co. v. Hollywood*,<sup>13</sup> as an effort to strengthen landowners’ rights – not to strengthen the government’s ability to confiscate property without paying for it. Second, the text of the five statutes does not encompass local government decisions. Third, Monroe County is not an “agency” for purposes of Ch. 78-85. *Hill v. Monroe County*, 581 So. 2d 225 (Fla. 3<sup>rd</sup> DCA 1991). Fourth, Ch. 78-85 is permissive and does not affect the right to file an inverse condemnation action in Circuit Court. Fifth, section 6 of Ch. 78-85 states that its remedy is not exclusive. Sixth, the legislative history of Ch. 78-85 supports the plain meaning of the statute. Seventh, the Florida Supreme Court agreed with Landowners’ position in *Dade County v. National Bulk Carriers*, *supra*, where it reversed the Third District Court’s erroneous interpretation of Ch. 78-85.

Landowners’ memorandum of law, *R-Supp. Vol. IV, 380-97*, reprinted in the Appendix accompanying this Reply Brief, also discusses the State’s theory that BUDs can only be appealed to FLAWAC pursuant to § 380.07.

#### **E. ISSUE 5: MONROE COUNTY’S FOUR SUB-ISSUES**

- (1) ***The County argues that Landowners’ failure to make certain documents part of the Record on Appeal requires this Court to affirm the summary judgment below.***

The transcripts referred to by the County were mentioned in the State’s Motion for Summary Judgment on the 90-day Statute of Limitation grounds. Land-

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<sup>13</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).

owners' oppose that argument on legal grounds, and the transcripts would not make a difference one way or the other. The County's argument is without merit.

**(2) *The County argues that the summary judgment orders of the predecessor Judge below cannot be reinstated because the Defendants "withdrew" their summary judgment motions.***

Monroe County and the State attempted to "withdraw" their summary judgment motions on the eve of their hearing, and Judge Payne declined to entertain the attempted withdrawal. The notices of withdrawal were served *eleven months* after both summary judgment motions had been argued – for 4-½ hours – on November 30, 2005. Defendants' summary judgment motions contained *at least fifteen legal arguments*, all of which were briefed and argued on November 30, 2005. All parties subsequently filed supplemental briefs – at the Court's request – between November 30, 2005 and March 3, 2006. Monroe County alone filed hundreds – perhaps thousands – of pages of exhibits in support of its summary judgment motion.

In *In Re: White Farm Equipment Co*, 23 B.R. 85, 93 (U.S. Bank. Ct., ND Ohio 1982), the Court held that Counsel could not withdraw a summary judgment motion that had been the subject of extended proceedings before the Court:

In the instant proceeding, counsel for Plaintiffs presumes that he may file a motion with the Court, have it pre-tried, argue it at great length, and then, after sensing that the Court considers it unfavorably, notice a withdrawal of it without procuring nor even seeking either the consent of the parties or leave of court. Such disorderly practice not only is an affront to the Court but, if sanctioned, would play havoc with motion practice for the most obvious of reasons: motions would take on an ephemeral character at the whim and caprice of the movant. In view of the foregoing, the Court, adopting the reasoning of D'Addio, holds that the Plaintiffs' purported withdrawal of the motion for partial summary judgment is a nullity. Accordingly, such motion is still before the Court for consideration on the merits. ... Thus the Court has before it cross-motions for summary judgment.

Also provided to the Court was *Gedeon v. Leiby*, 598 N.E. 2d 108, 109 (Ohio 8<sup>th</sup> App. Dist. 1991), in which the court held:

The parties have not cited, and we do not find, any rule or case authority regarding the procedure for the withdrawal of motions in Ohio. ***Case authority from other jurisdictions provides for the withdrawal of pretrial motions upon leave of court. The absolute right of withdrawal of pretrial motions has been allowed only prior to submission of the motions to the court; "submission" is defined as application for the court's consideration in whole or in part by the moving party.*** See, e.g., *Kossoff v. Samsung Co., Ltd.* (1984), 123 Misc. 2d 177, 474 N.Y.S.2d 180 (court refused to allow withdrawal of motion after it had been submitted for the court's consideration); *Simers v. Great Eastern Clay Products Co.* (1913), 82 Misc. 422, 143 N.Y.S. 1020 (defendant allowed to withdraw motion prior to court's deadline for submission of all papers in support of and opposing motion); ... According to these authorities, withdrawal would not have been proper in this case because the summary judgment motions had been "submitted," and because appellants failed to comply with the court's deadlines. [Citations omitted.]

These authorities were provided to Judge Payne at the summary judgment hearing referred to by the County. Appellees' attempts to withdraw their summary judgment motions were unsuccessful, and is not a reason not to reinstate Judge Payne's order denying said motions.

(3) ***The County argues that if the judgment below is reversed, this Court may not enter, or require the trial court, to enter, partial summary judgment on liability in favor of Landowners.***

Landowners believe they have stated their position sufficiently in their Initial Brief.

(4) ***The County argues that Landowners' request to have a senior judge appointed to hear this case is "judge-shopping" and should be rejected.***

Landowners believe they have stated their position sufficiently in their Initial Brief.



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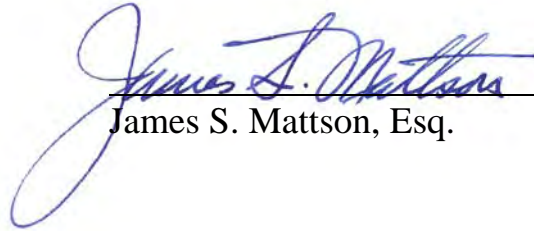


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### III. CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by first class mail, postage prepaid, on **Derek Howard, Esq.**, Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, **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 16<sup>th</sup> day of June 2008.



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#### **IV. CERTIFICATE OF FONT COMPLIANCE**

I certify that the foregoing brief was prepared with Microsoft Word 2003, using 14-point, Times Roman font.



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