

**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 FOR CLARIFICATION**

Landowners suggest the Court revisit three areas in its opinion that – though dicta – could be clarified to avoid confusion in the future. These are:

(1) Two quotations from *Monroe County v. Ambrose* lead to this opinion's incorrect statement that the County's "first land use regulations were not enacted until 1986." The County's first zoning ordinance was adopted in 1959.

(2) The quotation at fn. 10, from Justice Scalia's concurrence in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), inverts the point Justice Scalia was making, that was: while TDRs may be part of a landowner's *compensation*, they do not constitute a *use of land* in a *Penn Central* analysis.

(3) The trial court time line, at pp. 5-6, inaccurately – and somewhat confusingly – describes the actions of the original trial judge, and the successor judge.

**(1) *The Court's remarks regarding the State Comprehensive Plan, the 1986 Monroe County Comprehensive Plan, and the quotation from Monroe***

***County v. Ambrose, lead to the incorrect conclusion that the County had no land use regulations until 1986.***

The State Comprehensive Plan was not adopted by the County in 1986 as fn. 3 states. What the County adopted in 1986, and the Florida Administration Commission amended, was a Comprehensive Plan unique to the Florida Keys.<sup>1</sup> This plan was required by Chapter 380 (Areas of Critical State Concern), not Chapter 163 (Comprehensive Plans).

Monroe County adopted its first land use (“zoning”) regulations in 1959. In fn. 16, taken directly from *Monroe County v. Ambrose*, the phrase “but the first land use regulations were not enacted until 1986” is incorrect. Monroe County had *zoning* regulations long before September 15, 1986.

The *Ambrose* opinion misled the *Collins* panel where, at *Collins* fn. 3, the Court states “the first land development regulations were adopted in 1986 pursuant to Sections 380.05(6) and (8), Florida Statutes (1985).” The County’s 1959-1986 land use regulations were called zoning regulations, and the 1986 land use regulations were called “land development” regulations. We may be a little sensitive, but the Florida Keys was not the Wild West, as some may think, before 1986.

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<sup>1</sup> See, in general, the Florida Administration Commission’s Rules at Ch. 28-20, Fla. Admin. Code, particularly § 28-20.020, that states: The Monroe County Comprehensive Plan Volume I (Background Data Element) and Volume II (Analysis and Policy Element), which were adopted in Monroe County Resolution Number 049-1986 and portions of which were approved by the Department of Community Affairs in Chapter 9J-14, F.A.C., are incorporated by reference with the following amendments....

We have reviewed the briefs filed in *Ambrose*, and none of the parties to that appeal stated that Monroe County had no land use regulations until 1986. Monroe County's pre-1986 zoning resolutions and ordinances are available on the County Clerk's website,<sup>2</sup> but they are voluminous. The first zoning ("land use") regulations were adopted on December 8, 1959, by Resolution No. Z-1, effective January 4, 1960. We attach a copy of Resolution Z-1, and its Index to the 1959 zoning regulations, to this motion.

**(2) *The reference to Justice Scalia's comment on TDRs, in *Suitum v. Tahoe Regional Planning Agency*, suggesting that the value of a TDR may be considered in a Penn Central analysis, is taken out of context.***

The question of whether a TDR can be considered a "use" of real property has been the subject of several legal articles. But, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), where Mrs. Suitum was entitled to a TDR as she could not build a residence on her lot, Justice Scalia, in his concurring opinion in which Justices O'Connor and Thomas joined, made the following point.

TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land. The latter is valuable, to be sure, but it is a *new* right conferred upon the landowner in exchange for the taking, rather than a *reduction* of the taking. In essence, the TDR permits the landowner whose right to use and develop his property has been restricted or extinguished to extract money from others. Just as a cash payment from the government would not relate to whether the regulation "goes too far" (*i.e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking; and just as a chit or coupon from the government, redeemable by and hence marketable to third parties, would relate not to the question of taking but to the

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<sup>2</sup> <http://www.minutes-monroe-clerk.com/weblink/Browse.aspx>.

question of compensation; so also the marketable TDR, a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation. It has no bearing upon whether there has been a “final decision” concerning the extent to which the plaintiff’s land use has been constrained.

Putting TDRs on the taking rather than the just-compensation side of the equation (as the Ninth Circuit did below) is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence: Whereas once there is a taking, the Constitution requires just (i.e., full) compensation, see, e.g., *United States v. 564.54 Acres of Monroe and Pike County Land*, 441 U.S. 506, 510, 60 L. Ed. 2d 435, 99 S. Ct. 1854 (1979) (owner must be put “in as good a position pecuniarily as if his property had not been taken”); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326, 37 L. Ed. 463, 13 S. Ct. 622 (1893) (“the compensation must be a full and perfect equivalent for the property taken”), a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value, see, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). If money that the government-regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and has thus not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. It would be too obvious, of course, for the government simply to say “although your land is regulated, our land-use scheme entitles you to a government payment of \$1,000.” That is patently compensation and not retention of land-value. It would be a little better to say “under our land-use scheme, TDRs are attached to every parcel, and if the parcel is regulated its TDR can be cashed in with the government for \$1,000.” But that still looks too much like compensation. The cleverness of the scheme before us here is that it causes the payment to come, not from the government *but from third parties* – whom the government reimburses for their outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.

Respondent maintains that *Penn Central* supports the conclusion that TDRs are relevant to the question whether there has been a taking. In *Penn Central* we remarked that because the rights to develop the airspace above Grand Central Terminal had been made transferable to other parcels in the vicinity (some of which the owners of the terminal themselves owned), it was “not literally accurate to say that [the owners] have been denied *all* use of [their] pre-existing air rights”; and that even if the TDRs were inadequate to constitute “just compensation” if a taking had occurred, they could nonetheless “be taken into account in considering the impact of regulation.” *Penn Central*, *supra*, at 137 (emphasis in original). This analysis can be distinguished

from the case before us on the ground that it was applied to landowners who owned at least eight nearby parcels, some immediately adjacent to the Terminal, that could be benefitted by the TDRs. See 438 U.S. at 115. The relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished. It is for that reason that the TDRs affected "the impact of the regulation." This analysis is supported by the concluding clause of the opinion, which says that the restrictions "not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.*, at 138. If *Penn Central's* one-paragraph expedition into the realm of TDRs were not distinguishable in this fashion, it would deserve to be overruled. Considering in the takings calculus the *market* value of TDRs is contrary to the import of a whole series of cases, before and since, which make clear that the relevant issue is the extent to which use or development of the land has been restricted. Indeed, it is contrary to the whole principle that land-use regulation, if severe enough, can constitute a taking which must be *fully* compensated.

I do not mean to suggest that there is anything undesirable or devious about TDRs themselves. To the contrary, TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property *is* taken.

Fn 10 of the *Collins* opinion quotes only the last two sentences of Justice Scalia's concurrence in *Suitum*, suggesting to the trial court, on remand, that all the government has to do to avoid a taking is give the landowner a TDR. Landowners respectfully suggest that fn. 10 does not reflect the current state of the Supreme Court's regulatory takings jurisprudence.

**(3) *The description of the proceedings below, on pp. 5-6 of the Collins opinion, confuses the actions of former Chief Circuit Judge Richard Payne, and successor Circuit Judge David Audlin.***

On pg. 5, the *Collins* opinion refers to an "initial hearing" at which the court (a) determined that an "as-applied" taking had occurred, and (b) that Appellants

claims were not ripe. On pg. 6, the opinion continues, stating “the successor judge set the case for bench trial,” and then “entered the amended order” that is the subject of this appeal. The proceedings below were not as described.

The index to the record on appeal shows that Defendants served their summary judgment motions in mid-2005. The first hearing on those motions, before Chief Judge Payne, was on November 30, 2005. Judge Payne requested additional memoranda of law on two points. They were filed by February 2006, and Judge Payne re-set the motions for hearing on October 30, 2006.

On October 26, 2006, Defendants sought to withdraw their summary judgment motions. Judge Payne ordered them to appear for the hearing, and Defendants filed an emergency Petition for a Writ of Prohibition with this Court on October 27, 2006. It was denied the same day,<sup>3</sup> and the hearing proceeded as scheduled. However, both defendants’ counsel stood mute, positing that the trial court had no authority to hear their “withdrawn” motions for summary judgment. On November 6, 2006, Judge Payne denied both Defendants’ Motions for Summary Judgment. The trial court did not have any dates available before the end of the year, when Judge Payne retired, and the liability trial had to wait for the successor judge.

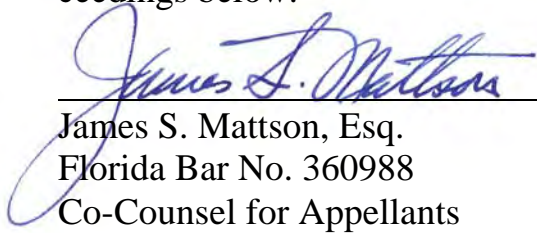
Successor Judge Audlin set the case for a liability trial, and the subsequent process is described in our Initial Brief. Judge Audlin rescinded Judge Payne’s

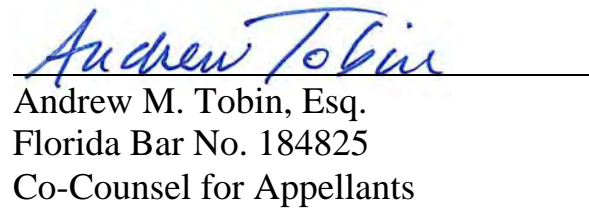
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<sup>3</sup> *The State of Florida and Monroe County v. Collins, et al.*, Fla. 3rd DCA, Case No. 3D06-2660 (Writ of Prohibition Denied, Oct. 27, 2006).

November 6, 2006, order denying the governments' motions for summary judgment and, on the eve of said trial, rendered an order granting the motions.

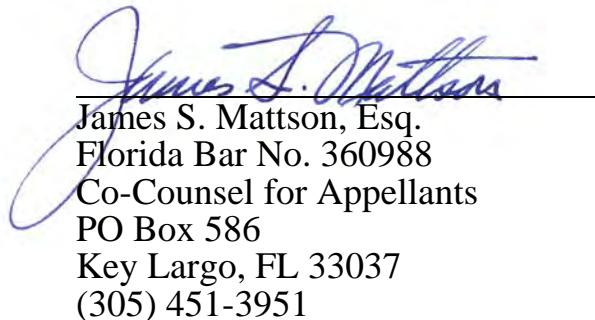
Appellants pray for entry of a revised Opinion by this Court that (1) corrects its statements regarding Monroe County's land use regulations prior to 1986, (2) expands the quote from Justice Scalia's concurring opinion in *Suitum*, to reflect his position that TDRs are not *uses* of property, but may – if they can be valued – may be part of *compensation*;<sup>4</sup> and (3) clarifies its description, on pp. 5-6, of the proceedings below.

  
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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, and **Derek Howard, Esq.**, Assistant 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 14<sup>th</sup> day of January 2009.

  
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<sup>4</sup> If a TDR's value is not determinable, the condemning authority acquires it with title to the property. It can sell the TDR and reduce its cost of acquisition.

MONROE COUNTY ZONING REGULATIONS

RESOLUTION NO. Z-1

A RESOLUTION providing for the creation of zoning districts for the entire unincorporated area of Monroe County; said districts and zoning classifications to be for the purpose of facilitating the enforcement of regulations and restrictions provided herein within the boundaries of said districts; prescribing the class of land and building usage to be permitted in each of said several zones; establishing requirements and fees for the issuance of permits for buildings and structures, alterations, repairs, moving of buildings and other improvements for the occupancy of or any change in the usage of land or buildings in said unincorporated area; providing that all provisions of the plumbing, electrical and building codes, as adopted, not in conflict with specific provisions of this Resolution, shall be complied with in said unincorporated area; providing that all Health and Sanitation Laws shall be complied with; empowering and authorizing the County Zoning Director to issue or withhold said permits; providing for an appeal from any act or decision of said Zoning Director; providing for adjustment of conflicts with any regulations, boundary or restriction of an existing subdivision of land relative to structures erected thereon prior to the adoption of this Resolution.

The following Resolution was offered by Commissioner Higgs and seconded by Commissioner Harris and upon vote carried. Effective January 4, 1960.

WHEREAS, this Board was granted authority by Chapter 59-1576, Laws of Florida, 1959, to establish zoning regulations, building, plumbing and electrical codes in the unincorporated area of Monroe County, and

WHEREAS, a number of advertised public hearings were held in relation to the regulations, restrictions and boundaries hereinafter provided, and

WHEREAS, at which hearings any and all citizens, property owners or any other person or party of interest did have an opportunity to be heard, and

WHEREAS, this Board desires to establish zoning classifications and boundaries thereof, to regulate and reasonably restrict all new uses and change of uses within the unincorporated area of Monroe County, to provide regulations and restrictions relating to structures and to provide by law for the manner in which such regulations, restrictions and boundaries shall be determined, established and enforced and from time to time amended, supplemented, changed or repealed, all in conformity with the authority conferred by law upon this Board,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, as follows:

1. That the following zoning regulations designated as "ZONING REGULATIONS FOR MONROE COUNTY, FLORIDA", attached hereto and made a part hereof, be and the same are hereby adopted and shall become effective January 4, 1960, within all of Monroe County, Florida, except that portion of said County that may be included in any municipality.

Passed December 8, 1959.

RESOLUTION NO. Z-1

ZONING REGULATIONS  
FOR  
MONROE COUNTY, FLORIDA

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