

**IN THE CIRCUIT COURT FOR THE  
SIXTEENTH JUDICIAL CIRCUIT, IN AND  
FOR MONROE COUNTY, FLORIDA**

**GALLEON BAY CORPORATION, a Florida  
Corporation,**

**Plaintiff,**

**vs.**

**BOARD OF COMMISSIONERS OF MONROE  
COUNTY, FLORIDA,**

**Defendant, and**

**The STATE OF FLORIDA,**

**Third-party Defendant.**

**CASE NO. CA-K-02-595 (Payne, J.)**

**AMENDED ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY**

This cause previously came before the Court November 3, 2003, on Plaintiff's Motion for Summary Judgment on Liability. On the parties' motions to amend the Court's previous Order, having considered argument of counsel, reviewed the record, the Motions and the Responses thereto, affidavits on file, and the applicable law, the Court hereby GRANTS Plaintiff's Motion to Amend its prior Order Granting Summary Judgment on Liability, Memorandum Opinion, and Order of Taking.

**I. FINDINGS OF FACT**

The Galleon Bay subdivision ("subject property") consists of 10.64 acres on No Name Key, in Monroe County, Florida. The subdivision has 14 single-family lots, totaling 4.64 acres, that surround a 2.05-acre land-locked lake (Tract A). Tracts B and C, comprising 2.94 acres, are restricted in perpetuity by Conservation Easements. Roads and utility easements comprise the remaining 1.01 acres. Plaintiff Galleon Bay Corporation ("Galleon Bay") owns Lots 1-11, 13, and 14 of the subdivision. Hannelore Schleu is the sole shareholder of Galleon Bay. As the grantor of the plat, Galleon Bay is the legal owner of Tracts A, B, and C, and the roads and utility easements. Lot 12 has been sold to a private party.

### **A. Historical background**

In the late 1960's and 1970's, Wolfgang Schleu and Hannelore Schleu, his wife, were engaged in acquiring property on No-Name Key, by themselves and with others, for the purpose of establishing residential subdivisions and selling the lots for residential purposes. They platted Bahia Shores, a 91-lot residential subdivision, in 1969, and Dolphin Harbour, a 44-lot residential subdivision, in 1970. These subdivisions are located immediately to the west of Galleon Bay.

Wolfgang and Hannelore Schleu purchased most of the Galleon Bay property in 1971, for \$58,000. They transferred that property to Galleon Bay, then wholly owned by the Schleus, in 1972. In January 1984, Galleon Bay acquired the land on the northern shoreline of Galleon Bay for \$75,000. Wolfgang Schleu passed away in February 1984, and Hannelore Schleu became the sole shareholder of Galleon Bay.

Until September 15, 1986, the subject property was zoned "General Use," with an allowed density of one Dwelling Unit ("DU") per acre. As part of a plan to create a channel from the lake to the Gulf of Mexico, and use the subject property as an area where commercial fishermen could reside and ply their trade, it was re-zoned Commercial Fishing Village ("CFV") on September 15, 1986. The CFV zoning allowed as-of-right development of single-family homes at a density of 3 DU's per acre, and 12 DU's per "buildable acre" with the use of Transferable Development Rights ("TDR's"). Sec. 9.5-262, Monroe County Code, ("MCC"). With 8.59 acres of buildable upland, Galleon Bay was entitled to build 25 single-family homes as-of-right, and up to 82 DU's using TDR's, on the property.

In 1989, the Florida Department of Environmental Regulation denied Galleon Bay's application for a permit to create the proposed access channel. In 1990, Galleon Bay concluded that commercial fishing activities were not feasible on the subject property, and submitted an application to plat the property for 42 DU's. Negotiations ensued over the number of DU's to be built on the property. As a condition of plat approval, Monroe County and Galleon Bay agreed to reduce the density to 14 single-family lots, instead of the 42 DU's applied for or the 25 DU's allowed as-of-right. Monroe County also required Galleon Bay to grant a perpetual conservation

easement to the County over Tract C. Monroe County issued final plat approval for a 14-lot Subdivision on May 19, 1991.<sup>1</sup>

The Florida Department of Community Affairs (“DCA”) appealed the plat approval to the Florida Land & Water Adjudicatory Commission, pursuant to its oversight authority under Ch. 380, Fla. Stat. Galleon Bay responded by filing suit against the DCA and Monroe County in Circuit Court. The lawsuit and appeal were both settled, and a Revised Plat of Galleon Bay approved and recorded on April 21, 1994.<sup>2</sup> The revised plat downsized and rearranged the 14 lots so they surrounded the lake and left more open space. As a condition of the revised plat approval, Galleon Bay was required to grant another perpetual Conservation Easement to the County, over Tracts B and C.<sup>3</sup> Tracts B and C comprise 3.08 acres of the subject property, or 33.5% of the upland area of the subdivision.

### **B. The rate-of-growth ordinance, a/k/a ROGO**

While Galleon Bay, DCA, and the County were engaged in litigation, Monroe County adopted Ordinance 16-1992, the Dwelling Unit Allocation Ordinance, a/k/a ROGO (Rate-of-Growth Ordinance). ROGO became effective on July 13, 1992.<sup>4</sup> ROGO limits the number of single-family home building permits that are issued in Monroe County each year, using a point system. There are separate queues for the Lower, Middle, and Upper Keys. Building permit applicants compete for permit “allocations” each quarter with the other applicants in their queue. For an application to win an allocation, it needs enough points to rank in the top “x” places in the queue, where “x” is the number of allocations available to be awarded. In September 1996, Galleon Bay submitted building permit applications for each of their 13 lots. Their 13 permit applications were placed in the Lower Keys ROGO queue on January 8, 1997.

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<sup>1</sup> That plat was recorded May 20, 1991, in Plat Book 7, at Page 59, of the Official Records of Monroe County.

<sup>2</sup> The revised plat is recorded in Plat Book 7, Pages 65-66, of the Official Records of Monroe County.

<sup>3</sup> The easement is recorded at Book 1305, Pages 1577-80, of the Official Records of Monroe County.

<sup>4</sup> ROGO is codified at §§ 9.5-121, *et seq.*, MCC.

### C. Application for administrative relief from ROGO

After four years without a single ROGO allocation, Galleon Bay's applications were eligible for administrative relief from ROGO pursuant to § 9.5-122(h), MCC, which reads:

1. If an Applicant for an Allocation Award who has
  - (a) complied with all requirements of the Dwelling Unit Allocation System; and
  - (b) whose Application has not been withdrawn; and
  - (c) whose Application has been considered in at least three (3) of the first four (4) consecutive annual Allocation periods; and fails to receive an Allocation Award, said Applicant may apply to the Board [of County Commissioners] for administrative relief ....

\* \* \*

6. At the conclusion of the public hearing, the Board may take any or a combination of the following actions:
  - (a) grant the Applicant an Allocation Award for all or a number of dwelling units requested in the next succeeding quarterly Allocation Period or extended pro rata over several succeeding quarterly allocation periods;
  - (b) offer to purchase the property at its fair market value;
  - (c) suggest such other relief as may be necessary and appropriate.

On January 29, 2001, Galleon Bay filed an application for administrative relief. The Board of County Commissioners ("BOCC") conducted a hearing on the administrative relief application on July 19, 2001. The Director of Planning presented a memorandum to the BOCC that stated Galleon Bay's lots "are not competitive for ROGO allocations." Her memo stated that, in May 2001, the ROGO scores for the 13 lots ranged from -71 to -77, while an application needed more than +20 points to obtain an allocation. The memo reads as follows.

**Zoning** — The Improved Subdivision lots are allowed one single family residential dwelling and accessory uses. As an improved subdivision, *they have no TDR value under the current code.* The CFSD portion of the application allows commercial fishing, detached dwellings and accessory uses as of right. Attached dwellings are permitted as a conditional use.

**ROGO** — The ROGO point system is designed to direct growth to protect natural resources and encourage infill to improved subdivision lots. In response to Objectives 101.5 and 207.7 of the Monroe County 2010 Comprehensive Plan, which directs the County to *implement activities to prohibit the destruction of Key Deer and to protect it's habitat*, land development regulations have been adopted that scores minus ROGO points for any lot on No Name Key. No Name Key is in a critical habitat and is a priority for ac-

quisition by the USFW and CARL, programs. The island lacks the basic public facilities and therefore positive points are not given for infill. The subject parcels are not competitive for ROGO allocations.

**Moratorium** — Objective 301.2 of the Monroe County 2010 Comprehensive Plan directs the County to: *Ensure that all roads have sufficient capacity to serve development at the adopted LOS standards concurrent with the impact of said development.* Section 9.5-292 of the Land Development Regulations establishes a minimum Level of Service (LOS) C for each road segment of US #1 and requires that the capacity portions of US #1 be assessed annually. Big Pine Key (segment #10) continues to be below the LOS C threshold, although, in 2000 the segment improved from a LOS E to a LOS D. Therefore the segment is considered inadequate and as a result the Development Moratorium for activities that could generate additional trips continues.

**A Habitat Conservation Plan** is being prepared for Big Pine Key, and No Name Key which will include requests for permits from US Fish and Wildlife Service (USFWS) for road improvements which should improve the LOS on US #1. Completion of the Plan and permitting approvals may be several years in the future. Funding, design and construction will further increase the time before improvements can be made to the road section.

**Land Acquisition** — Policy 207.7.3 and Policy 207.7.4 directs the County *to identify key deer habitat areas as priority acquisition sites and to coordinate programs for acquisition with federal, state and non-profit conservation organizations.* There are currently several active acquisition programs ongoing on Big Pine Key and No Name Key which are designed to protect key deer habitat and provide for freedom of movement and access to most areas of Big Pine Key. All of Big Pine Key and No Name Key is *located within a conservation area or areas proposed for acquisition by governmental agencies for the purpose of conservation and resource protection.* Several offers have been made to the applicant to purchase their properties on No Name Key.

**Eligibility for Administrative Relief** – Section 9.5-122.2 (f) of the Monroe County Land Development Regulations and Policy 101.6.1 of the 2010 Comprehensive Plan provides a mechanism whereby an applicant who has not received an allocation award in ROGO may apply to the Board of County Commissioners for administrative relief. The applicant is eligible for Administrative Relief having complied with all requirements of the dwelling unit allocation system and been considered in at least 3 of the last four consecutive annual allocation periods.

**Relief under Administrative Relief** – The remedies available to an applicant for Administrative Relief include *issuance of a building permit or just compensation by purchase of the property* or such other relief as may be necessary or appropriate.

Policy 207.7.3 and Policy 207.7.4 of the 2010 Comprehensive Plan directs the County to identify Key deer habitat areas as priority acquisition sites and to coordinate programs for acquisition with federal, state and non-profit conservation organizations. Policy 101.2.14 specifically states, *“for those ROGO applications and properties which have been denied a ROGO award for four consecutive years and have applied for administrative relief which are located in a CARL project or the National Wildlife Refuge and have received*

*negative habitat scores under ROGO, the County or the state shall offer to purchase the property if funding for such is available. Refusal of the purchase offer shall not be grounds for granting a ROGO award.”*

Therefore, the Administrative Relief appropriate for the subject property is an offer to purchase the lots; they are located within a conservation area or areas proposed for acquisition by governmental agencies for the purpose of conservation and resource protection and have received negative habitat scores under ROGO.

**Recommendation --** It is recommended that the Board of County Commissioners find that the applicant has met the criteria and qualifies for Administrative Relief. It is further recommended that an order be prepared that establishes this relief as an offer to purchase the lots for fair market value by Monroe County.

At the end of the July 19, 2001, hearing the BOCC declined to grant any allocation awards to Galleon Bay, nor did it provide any “other necessary and appropriate relief,” but directed the County staff to purchase the 13 lots for fair market value.

#### **D. Application for vesting from 1996 ROGO and Comprehensive Plan amendments**

The ROGO point system was amended in January 1996, in the County’s Year 2010 Comprehensive Plan (“2010 Plan”). The 2010 Plan included a grandfathering procedure, which it called “vested rights,” that provided relief from the 2010 Plan’s provisions. In January 1997, Galleon Bay filed an application for such relief. A hearing officer conducted an evidentiary hearing on the vested rights application on April 27, 1998. On October 14, 1998, the hearing officer entered a recommended order that would grant Galleon Bay “vested rights” on all 13 lots. The recommended order was submitted to the BOCC which, on April 14, 1999, rejected the hearing officer’s recommendation, by BOCC Resolution 175-1999.

On May 12, 1999, Galleon Bay filed a Complaint in Circuit Court<sup>5</sup> for Certiorari review of Resolution 175-1999. On September 30, 2002, this Court granted the Writ, quashing the Resolution. Monroe County filed a petition for Certiorari with the Third District Court of Appeals. The District Court denied Certiorari on June 17, 2004. 876 So. 2d 569 (Fla. 3<sup>rd</sup> DCA 2004).

In her 2003 counter-affidavit to Plaintiff’s Motion for Summary Judgment, the County Planning Director agreed with Galleon Bay’s planning expert, Donald Craig, that should the Dis-

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<sup>5</sup> 16<sup>th</sup> Jud. Cir. Case No. CA-K-01-1451.

tract Court deny Certiorari, the 13 lots would each receive a ROGO score of +2. That included six perseverance points, one for each year the applications were in the queue. The County did not dispute Mr. Craig’s opinion that there is no possibility that any of the 13 lots will receive allocations under the County’s existing regulations.<sup>6</sup> At the 2003 summary judgment hearing, the County conceded that residential use on Galleon Bay’s 13 lots is impossible.<sup>7</sup>

**E. Galleon Bay’s Investment in the Subject Property**

Plaintiff purchased the subject property in 1971 and 1984 for \$133,000. Beginning in 1988, Galleon Bay expended and accrued substantial sums to obtain the two plat approvals, marketing the lots, seeking building permits, and paying taxes, interest, engineers, surveyors, and lawyers over a 17-year odyssey of disappointment. Ms. Schleu’s 2003 Affidavit recites the following outlays between January 1, 1988, and April 27, 1998 (the day of the Vested Rights hearing) as shown in the following Table.

<b>Year</b>	<b>Outlays And Debt</b>	<b>Year</b>	<b>Outlays And Debt</b>
1988	\$11,446.32	1994	\$21,790.15
1989	\$18,287.84	1995	\$134,784.53
1990	\$21,221.49	1996	\$105,784.53
1991	\$12,725.15	1997	\$71,670.49
1992	\$17,096.62	1/1 – 4/27/98	\$29,858.52
1993	\$22,214.12	<b>Total</b>	<b>\$466,888.54</b>

<sup>6</sup> In the latest (as of November 3, 2003) ranking of Lower Keys building permit applications, Galleon Bay’s 13 lots, with scores ranging from -66 to -72 points, were ranked at the bottom of the ROGO queue, in positions 127-139 out of 139 pending applications. Increasing their scores to +2 would move the lots up only five positions in the rankings, to 122-134 out of 139. In order to obtain one of the 12 permit allocations in the July 14, 2003, ROGO round, at least +19 points were necessary.

<sup>7</sup> The County did suggest that, by sacrificing 11 of the lots, Galleon Bay might obtain permits to build on two of the lots. The Court rejects that theory *infra*, largely because the lots are presumed to be intended for use as lots, not acreage, and must be considered independently in an inverse condemnation action. *Dept. of Transportation v. Jirik*, 498 So. 2d 1253 (Fla. 1986).

In BOCC Resolution 175-1999, *supra* at p. 6, the BOCC adopted Finding of Fact 16, which states:<sup>8</sup>

During the period beginning with the initial plat approval on May 20, 1991, and ending on April 27, 1998, [Galleon Bay] expended and obligated the sum of \$578,670.00 to develop, permit, and sell the subject lots.

Exhibit A of the Complaint shows the hearing officer and BOCC included \$165,000 in “future obligations” that are not included in Ms. Schleu’s summaries. Neither Ms. Schleu, the BOCC, nor the hearing officer included the original cost of the land, nor has the Court been provided an accounting of Plaintiff’s expenditures since April 27, 1998, more than a seven-year period. The Court is aware that litigation is not without cost, and that taxes and interest continue to accrue even when land lies fallow. The record shows, however, that Plaintiff expended funds, including acquisition costs, and incurred debts, totaling between \$600,000 and \$765,000 between 1971 and April 1998.<sup>9</sup>

#### **F. Uses of the subject property**

The allowed uses in CFV land use districts are set out in Sec. 9.5-246, MCC, as follows.

(a) The following uses are permitted as of right in the CFV District:

- (1) commercial fishing;
- (2) detached dwellings,
- (3) accessory uses.
- (4) Collocations on *existing* antenna-supporting structures ....
- (5) Satellite earth stations less than two meters in diameter, as accessory uses ....
- (6) Home occupations ....

(b) The following uses are permitted as minor conditional uses in the CFV District, ....

- (1) detached dwellings, ....

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<sup>8</sup> The time period in Finding of Fact 16 does not match Ms. Schleu’s analysis, as the former was predicated on a starting date of May 21, 1991, and was intended to show expenditures “in reliance on” the plat approval. For Inverse Condemnation purposes, the Court considers *all* investment by the property owner.

<sup>9</sup> Adding the acquisition cost of \$133,000, to Ms. Schleu’s outlay and debt total of \$466,889, yields an investment of \$599,889. Adding the acquisition cost to the BOCC figure, and adding Ms. Schleu’s totals for 1988-1990, yields a total investment of \$762,624. The difference of \$162,735 appears to be due to the \$165,000 in “future obligations” that was included in the BOCC’s Finding of Fact 16.

- (2) Replacement of an *existing* antenna-supporting structure ....
  - (3) Attached wireless communications facilities, as *accessory uses* ....
  - (4) Stealth wireless communications facilities, as *accessory uses* ....
  - (5) Satellite earth stations greater than two meters in diameter, as *accessory uses*
- (c) The following uses are permitted as major conditional uses in the CFV District, subject to the standards and procedures set forth in article III, division 3.
- (1) Reserved
  - (2) Land use overlays A, E, INS, PF, PB, subject to provisions of section 9.5-257.

Monroe County conceded at oral argument in 2003 that residential uses are not available on the 13 lots. No accessory uses are permitted except as accessories to a permitted principal use; i.e., a residence. Section 9.5-4(A-2), MCC. There are no homes or existing antenna-supported structures in the Galleon Bay subdivision.

Section 9.5-4 (C-12), MCC, defines *commercial fishing* as follows.

*Commercial fishing* means the catching, landing, processing or packaging of seafood for commercial purposes, including the mooring and docking of boats and/or the storage of traps and other fishing equipment and charter boat uses and spot diving uses.

Plaintiff filed the Affidavit of Thomas Hill, President of Key Largo Fisheries, who concluded the commercial fishing uses allowed at the subject property have a value of zero. Mr. Hill's conclusions are supported by numerous statements addressing the lack of vessel access to the ocean, the lack of electricity and potable water on No Name Key, and the state of the commercial fishing industry in the Florida Keys. Monroe County did not file a counter-affidavit to Mr. Hill's Affidavit, and conceded during oral argument in 2003 that commercial fishing was not a viable use on the Galleon Bay lots. Monroe County did submit an Affidavit by its Planning Director, in which the Director opined, "The property would be ideal for aquaculture use." The Court struck the Planning Director's aquaculture statement for reasons set out in the Court's analysis, *infra* at p. 32.

#### **G. Diminution in value**

For the 2003 hearing, Galleon Bay filed the Affidavit of real estate appraiser Robert Galaher, who opined that the fair market value of Galleon Bay's 13 lots was \$2,900,000 as of Octo-

ber 7, 2003, disregarding the effect of Monroe County's Comprehensive Plan and Land Development Regulations. Mr. Gallaher opined that the market value of the 13 lots, plus the lake, road, and easement areas, restricted by the County's regulations, is \$1,000 per acre, or \$10,260. This was a diminution in the fair market value of Galleon Bay's property of 99.65%. For the 2005 hearing, Galleon Bay filed an Affidavit by Mr. Gallaher opining that the 13 lots would have had a fair market value of \$5,250,000 on February 25, 2005, if they could be used for the construction of single-family homes. The diminution in value rose to 99.80% over the two years.

For the 2003 hearing, Monroe County submitted the Affidavit of real estate appraiser Trent Marr, who opined that the fair market value of the subject property, when appraised on a "retail gross lot sell-out approach," was \$1,290,000 on September 5, 2001. Mr. Marr's Affidavit also contains a "discounted" fair market value of \$900,000 as of the same date. Mr. Marr did not dispute Mr. Gallaher's opinion that the subject property has a current fair market value, encumbered by the County's ROGO, of \$1,000 per acre. Mr. Marr's appraisals are more than four years old, do not reflect the fair market value at the present time, and would not be admissible in a condemnation trial. However, considering Mr. Marr's appraisals for the purpose of determining whether there has been a diminution of the fair market value of the 13 lots as a result of allegedly confiscatory regulations, Mr. Marr's four-year old appraisals reflect a diminution in value between 98.9% and 99.2%.

## **II. STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Rule 1.510, Fla. R. Civ. P. In ruling on the moving party's motion, the court must view the evidence in the light most favorable to the non-moving party, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). However, the non-moving party cannot just manufacture a disputed fact.

A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence suffi-

cient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.

*Landers v. Milton*, 370 So. 2d 368 (Fla. 1979); *also see Fisel v. Wynns*, 667 So. 2d 761 (Fla. 1996) (“it is never enough ‘for the opposing party merely to assert that an issue does exist’”).

The facts as articulated above are not in dispute. Indeed, the Court finds that there are no disputed issues of material fact to preclude summary judgment.<sup>10</sup> The issues in dispute are legal in nature and thus appropriate for summary disposition.

### III. CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY

The purpose of the Takings Clause is to prevent government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The United States and Florida Constitutions both provide that private property may not be taken for public use without just compensation and due process.<sup>11</sup>

In *Warner v. Boca Raton*, 887 So. 2d 1023 (Fla. 2004), the Florida supreme court stated:

In interpreting the scope of constitutional rights, this Court has stated that in any state issue, *the federal constitution represents the “floor” for basic freedoms, and the state constitution represents the “ceiling.”*

887 So. 2d at 1030. [Emphasis added.]

#### A. The Federal Constitution as the floor

Article VI makes the U.S. Constitution the Supreme Law of the Land. In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) the Supreme Court held:

In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that “It is emphatically the province and duty

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<sup>10</sup> Defendant argued in 2003 that at least four disputed issues of material fact exist to preclude summary judgment. First, that Galleon Bay could abandon 11 of the platted lots and gather enough ROGO points to build two homes. Second, that “aquaculture” is a permitted use and “the property would be ideal for aquaculture use.” Third, that Plaintiff “could have” obtained approvals for market-rate or “affordable housing” residential development between 1992 and 1998. Fourth, that the difference between the County’s appraiser’s 2001 appraisal and Plaintiff’s appraiser’s 2003 appraisal gives rise to a disputed issue of material fact. These issues were disposed of in the 2003 Order.

<sup>11</sup> Fifth and Fourteenth Amendments, U.S. Const.; Article X, sec. 6(a) and Article I, sec. 9, Fla. Const.

of the judicial department to say what the law is.” This decision declared *the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution*, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” [Emphasis added.]

The *federal judiciary* defines the parameters of the Constitution. The federal judiciary is not limited to the Supreme Court.<sup>12</sup> For Taking Clause interpretations, the decisions of the Court of Appeals for the Federal Circuit and its predecessors<sup>13</sup> are the primary sources of law after the Supreme Court.

### **B. State constitutions as ceilings**

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980), the Court held:

[A] State in the exercise of its police power may adopt reasonable restrictions on private property *so long as the restrictions do not amount to a taking without just compensation* or contravene any other federal constitutional provision. [Emphasis added.]

Similarly, in *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982), the Supreme Court held:

As a number of recent State Supreme Court decisions demonstrate, *a state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution*, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. [Emphasis added.]

In *State v. Wicklund*, 589 N.W. 2d 793, 798 (1999), the Minnesota supreme court held:

We have long recognized that we may articulate independent and more protective standards under our state constitution than are accorded under comparable provisions of the Federal Constitution.<sup>14</sup>

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<sup>12</sup> 28 U.S.C. § 1331 provides that all questions under the Constitution and laws of the United States will be decided in U.S. District Courts. The Tucker Act of 1887, 28 U.S.C. § 1491, created a separate jurisdiction where the Court of Claims was responsible for claims brought against the United States for just compensation.

<sup>13</sup> The Court of Appeals for the Federal Circuit was established in 1982 by merging the Court of Customs and Patent Appeals and the appellate division of the Court of Claims.

<sup>14</sup> *State v. Oman*, 110 N.W.2d 514 (Minn. 1961) (state’s due process standard may be developed independent of federal law); *Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (declining to lower state’s standards for searches and seizures to federal level); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (equal protection analysis under state law more stringent than federal law); *State v. Hershberger*, 462 N.W.2d 393

In *R.T.G., Inc., v. State*, 780 N.E. 2d 998, 1007-09 (Ohio 2002), the Ohio supreme court developed a different “relevant parcel” rule than the Supreme Court had stated in *Penn Central v. City of New York*, 438 U.S. 104 (1978) and *Keystone Bituminous v. DeBenedictis*, 480 U.S. 470 (1987), holding:

RTG argues that we should define the relevant parcel in the vertical context as including only the coal rights that lie under RTG’s property to the exclusion of any surface rights. The state asserts that coal rights cannot be severed from surface rights for purposes of this analysis and thus the relevant parcel must include both surface and coal rights. In this case, we agree with RTG.

In *Penn Central*, the court ... declined to consider Penn Central’s air rights above Grand Central Station as a separate estate from the remainder of the property pursuant to the parcel-as-whole rule. ...

In *Keystone*, the ... Act ... required coal companies during subsurface mining to leave certain amounts of coal in place to prevent subsidence of the surface estate. ... Applying the parcel-as-a-whole rule, the Court held that the coal required to be left in place by the Subsidence Act did “not constitute a separate segment of property.”...

... However, property rights are defined by state law. ... Furthermore, *states are free to interpret their constitutions independently of the United States Constitution so long as that interpretation affords, as a minimum, the same protection as its federal counterpart.*

780 N.E. 2d at 1007-09. [Emphasis added.]

### C. Uncompensated takings of property

The Constitution does not prohibit taking private property for public use. It prohibits doing so *without paying for it*. In *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985), the Court held:

*The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.* ... Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a “reasonable, certain and adequate provision for obtaining compensation” exist at the time of the taking. [Citation omitted; emphasis added.]

In *Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 717-18 (1999), the Court held:

The city argues that because the Constitution allows the government to take property for public use, a taking for that purpose cannot be tortious or unlawful. *We reject this con-*

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(Minn. 1990) (greater religious liberties under state law than under federal law); *State v. Hamm*, 423 N.W.2d 379 (Minn. 1988) (12-member jury required under state but not federal law).

*clusion*. Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English*, 482 U.S. at 315 (citing *Jacobs*, 290 U.S. at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.* [Emphasis added; citations omitted.]

Inverse condemnation has long been the cause of action for compensation for physical takings. In *United States v. Clarke*, 445 U.S. 253, 256-58 (1980), the Court distinguished inverse condemnation from condemnation, as follows.

[A] landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation .... a "condemnation" proceeding is commonly understood to be an action brought *by* a condemning authority such as the Government in the exercise of its power of eminent domain. In *United States v. Lynah*, 188 U.S. 445 (1903), for example, which held that the Federal Government's permanent flooding of the plaintiff's land constituted a compensable "taking" under the Fifth Amendment, this Court consistently made separate reference to condemnation proceedings and to the landowner's cause of action to recover damages for the taking.

More recent decisions of this Court reaffirm this well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation. Thus, in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 291 (1958), when discussing the acquisition by the Government of property rights necessary to carry out a reclamation project, this Court stated that such rights must be acquired by "paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." ...

Until recently, before the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), many states, including Florida,<sup>15</sup> did not *allow* inverse condemnation claims for *regulatory takings*.

### ***1. Physical takings vis-à-vis regulatory takings***

In *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872), the Supreme Court defined a *physical taking* as a factual situation where:

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<sup>15</sup> *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984) (sole remedy for regulatory taking is invalidation of regulation; regulation that "takes" property is invalid exercise of police power).

real estate is actually invaded by ... additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution.

In *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992), the Court held that a physical taking occurs only when there is a physical occupation of the landowner's property, holding:

The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252, 94 L. Ed. 2d 282, 107 S. Ct. 1107 (1987). Thus whether the government floods a landowner's property, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 13 Wall. 166, 20 L. Ed. 557 (1872), or does no more than require the landowner to suffer the installation of a cable, *Loretto, supra*, the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

A physical taking occurs only when there has been *physical occupation* of property. In *Tahoe-Sierra, supra*, the Supreme Court held:

This longstanding distinction between *acquisitions of property for public use*, on the one hand, and *regulations prohibiting private uses*, on the other, *makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.* ... [W]e do not apply our precedent from the physical takings context to regulatory takings claims. [Emphasis added.]

In *Lloyd's of London v. St Petersburg*, 864 So. 2d 1145, 1147 (Fla 2<sup>nd</sup> DCA 2003), *rev. denied*, 871 So. 2d 871 (Fla. 2004), the 2<sup>nd</sup> District Court analyzed physical takings as follows.<sup>16</sup>

Under Florida law, a *per se* taking occurs when the government "requires the landowner to submit to the *physical occupation of his land.*" *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. 2d DCA 1994) (quoting *Yee v. City of Escondido*, 503 U.S. 519 (1992)). The required "physical occupation" arises when the government "permanently deprives the owner of his 'bundle' of private property rights, including the *right to possess and dispose*, as well as the *right to prevent the government*

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<sup>16</sup> Other Florida physical taking cases of note include *Worth v. West Palm Beach*, 101 Fla. 868, 132 So. 689 (1931) (road); *Edwards Dairy v. Pasco Water Authority*, 378 So. 2d 866 (Fla. 2<sup>nd</sup> DCA 1979) (pipeline); *Crigger v. Florida Power Corp.* (3 opinions), 436 So. 2d 937 (Fla. 5<sup>th</sup> DCA 1983), 469 So. 2d 941 (Fla. 5<sup>th</sup> DCA 1985), 509 So. 2d 1322 (Fla. 5<sup>th</sup> DCA 1987) (power line); *South Fla. Water Mngt. Dist. v. Steadman Stahl, P.A. Pension Fund*, 558 So. 2d 1087 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 574 So. 2d 143 (Fla. 1990) (flooding); *Foster v. Gainesville*, 579 So. 2d 774 (Fla 1<sup>st</sup> DCA 1991 (avigational easement); *Basic Energy Corp. v. Dept. of Corrections*, 709 So. 2d 124 (Fla. 1<sup>st</sup> DCA 1998) (prison); *Brevard County v. Blasky*, 875 So. 2d 6 (Fla. 5<sup>th</sup> DCA 2004) (license revoked). Finally, the decision in *County of Volusia v. Pickens*, 439 So. 2d 276 (Fla. 5<sup>th</sup> DCA), *rev. denied*, 443 So. 2d 980 (Fla 1983), where no facts are given in the opinion, is obviously a physical taking case – readily apparent from the 1983 date which predates Florida's recognition of inverse condemnation claims for regulatory takings. See fn. 15 and associated text.

from using the occupied area.” *Flotilla, Inc.*, 636 So. 2d at 764 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

If one looks at the Coliseum in Rome, it may seem quite permanent, having existed for two thousand or so years, but give Halliburton the contract and they will demolish it in a week – and turn it into a parking lot. So much for “permanent,” as even a “permanent” physical occupation can be reversed. The structures could be demolished and the property returned to the original owner. But that would not relieve the government from paying just compensation for a temporary physical taking, as in *Kimball Laundry v. United States*, 338 U.S. 1 (1949) (laundry facility).

In *Hendler v. United States*, 952 F.2d 1364, 1375-76 (Fed. Cir. 1991), the Federal Circuit held that *permanent* does not mean forever, “or anything like it,” stating:

As Justice Marshall said in *Loretto*: “when the physical intrusion reaches the extreme form of a *permanent physical occupation*, a taking has occurred. In such a case, ‘the character of the government action’ not only is an important factor in resolving whether the action works a taking but also is determinative.” *Id.* at 426.

In this context, “*permanent*” *does not mean forever, or anything like it*. A taking can be for a limited term – what is ‘taken’ is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. .... [Emphasis added.]

## 2. Regulatory takings<sup>17</sup>

The first Supreme Court decision holding a regulation was an unconstitutional taking was in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-16 (1922), where Justice Holmes held:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

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<sup>17</sup> For an objective analysis of regulatory takings, through the 1999 9<sup>th</sup> Circuit decision in *Monterey v. Del Monte Dunes*, see Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION*, Island Press, Washington, DC (1999). For a collection of opposing, biased articles on the hot topics in takings law, see *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES*, Thomas E. Roberts, Ed., Amer. Bar Assn. (2002), and its supplement, *TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA*, Amer. Bar Ass’n. (2003).

Regulatory takings did not receive the attention of the Court again for a half-century, until *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), an appeal of an unsuccessful challenge to the city’s Landmark Law, that was affirmed on the merits. Two years later, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court affirmed an unsuccessful facial challenge to a downzoning – because the Agins had not submitted a development plan under the new ordinance – without reaching the issue of whether regulatory takings require compensation.

***a) Justice Brennan’s San Diego Gas dissent established the basic premises for compensating landowners for regulatory takings***

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In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), where the Court dismissed the case because petitioner had not obtained a final decision from the California courts, Justice Brennan wrote an oft-cited dissent – in which he was joined by three Justices – where he squarely addressed the issue of just compensation for regulatory takings as follows.<sup>18</sup>

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a “taking,” *the government entity must pay just compensation for the period commencing on the date the regulation first effected the “taking,” and ending on the date the government entity chooses to rescind or otherwise amend the regulation.* Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary “takings” involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory “taking.” As a starting point, the value of the property taken may be ascertained as of the date of the “taking.” ... *The government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a “taking.”* Rules of valuation already developed for temporary “takings” may be particularly useful to the courts in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment ... although additional rules may need to be developed .... *Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation. ...*

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<sup>18</sup> Justice Rehnquist, in a concurring opinion, wrote: “If I were satisfied that this appeal was from a “final judgment or decree” of the California Court of Appeal, as that term is used in 28 U. S. C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN.” 450 U.S. at 633-34. Justice Rehnquist’s concurring opinion is considered the “fifth vote” in *San Diego Gas*, and Justice Brennan’s dissent is treated today as a majority opinion.

*San Diego Gas*, 450 U.S. at 658-61, and 61 n.26. [Emphasis added; citations omitted.]

***b) First English established the following: (1) government activities that unduly interfere with use of property are compensatory takings; (2) all regulatory takings are temporary; and (3) government has three choices after a regulatory taking has been determined by a court – amendment of the regulation, rescission of the regulation, or exercise eminent domain***

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In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-17 (1987), Justice Rehnquist delivered the opinion of the Court, drawing extensively from Justice Brennan’s dissent in *San Diego Gas*, striking down California’s “no-compensation” rule, and – by inference – Florida’s identical rule, holding that:

As [the Fifth Amendment’s] language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. ... This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the “constitutional obligation to pay just compensation.” ...

It has also been established doctrine at least since Justice Holmes’ opinion for the Court in *Pennsylvania Coal Co. v. Mahon*..., that “the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” ... In *Pumpelly v. Green Bay Co.*, ... construing a provision in the Wisconsin Constitution identical to the Just Compensation Clause, this Court said:

*It would be a very curious and unsatisfactory result, if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.*

*First English*, 482 U.S. 315-17. [Emphasis added; citations omitted.]

Having established the principle that compensation is the prescribed remedy for *any* taking, the *First English* Court held, even though *regulatory takings are, by their very nature, temporary takings*, affected landowners are entitled to monetary compensation even if the government chooses to discontinue the offending regulations, as follows.

The Court has recognized in more than one case that *the government may elect to abandon its intrusion or discontinue regulations*. ... Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional

taking of property; *the landowner has no right under the Just Compensation Clause to insist that a “temporary” taking be deemed a permanent taking.* But we have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.

In considering this question, we find substantial guidance in cases where the government has only temporarily exercised its right to use private property. In *United States v. Dow*, ... though rejecting a claim that the Government may not abandon condemnation proceedings, the Court observed that abandonment “results in an alteration in the property interest taken – from [one of] full ownership to one of temporary use and occupation.” ... In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily. ... Though the takings were in fact “temporary” ... there was no question that compensation would be required for the Government’s interference with the use of the property....

*These cases reflect the fact that “temporary” takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.* ... Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. ... Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a “temporary” one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

*First English*, 482 U.S. at 317-19. [Emphasis added; citations omitted.]

The Court went on to reassure governments that its *First English* decision would not allow private landowners – or the judiciary – to *require* legislative bodies to exercise eminent domain if it is their preference to amend or withdraw the offending regulation. However the Court held that, once a regulatory taking has been found by a court, there are but three options available to the government – *amendment* of the regulation, *withdrawal* of the invalidated regulation, or exercise of *eminent domain*. The Court’s opinion reads:

Nothing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function.... *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.* Thus we do not, as the Solicitor General suggests, “permit a court, at the behest of a private person, to require the ... Government to exercise the power of eminent domain ....” ... We merely hold that where the government’s activities have already worked a taking of all use of property, *no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.* ...

*We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us. We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations.*

*First English*, 482 U.S. at 321. [Emphasis added; citations omitted.]

***c) Rescission of the offending regulation is not necessary for a judicial finding of a regulatory taking***

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In *Bass Enterprises Prod. Co. v. United States*, 133 F.3d 893, 895-96 (Fed. Cir. 1998), the Federal Circuit held that rescission is not an element of a regulatory taking claim, as follows.

While cessation of regulation may be sufficient for finding a temporary taking, *nothing in these cases supports the proposition that the end of regulation is necessary*. The Supreme Court has actually suggested to the contrary: “It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *see also Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996) (noting that Supreme Court found a temporary taking even though “the ordinance in *First English* by its terms was indefinite; it would expire only if declared unconstitutional or repealed.”). “Temporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings” ... None of the cases relied upon by *Bass* conclude that the cessation of regulation is a necessary condition to liability. *Indeed, “the distinction between ‘permanent’ and ‘temporary’ takings refers to the nature of the intrusion and not its temporal duration.” Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993). [Emphasis added; citations omitted.]

Los Angeles County’s “taking” ordinance was still in effect when the Supreme Court rendered its landmark decision in *First English*. So too, was the offending regulation in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), when the Supreme Court rendered that decision. In *Lucas*, at footnote 17, the Court pointed out:

Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. *See First English Evangelical Lutheran Church*, 482 U.S. at 321. But “where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” *Ibid*.

After the Supreme Court remanded *Lucas* to the South Carolina Supreme Court, the South Carolina Supreme Court held:

The [Supreme] Court ... noted that, pursuant to the 1990 Act, Lucas may apply for a special permit to build seaward of the baseline. *Clearly, Lucas has been only temporarily deprived of the use of his land if he can obtain a special permit to construct habitable structures on his lots.* ... Accordingly, the remand of this case from the United States Supreme Court has created for Lucas a cause of action for the temporary deprivation of the use of his property....

We have reviewed the record and heard arguments from the parties regarding whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle. *We hold that the sole issue on remand from this Court to the circuit level is a determination of the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property.*

*We are aware that, once Lucas applies for a special permit pursuant to the 1990 Act, Coastal Council could deny the special permit or place such restrictions on the permit that Lucas might contend a subsequent unconstitutional taking has occurred.* We emphasize that this Order is made without prejudice to the right of the parties to litigate any subsequent deprivations which may arise as the result of Coastal Council's actions in regard to the granting or non-granting of a special permit for future construction.

*Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 485-86 (SC 1992). [Emphasis added.]

A 2003 law review article by Beach and Connolly, *A Retrospective on Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century*, 12 SOUTHEASTERN ENVTL. L.J. 1 (Fall 2003), states "the State court ... directed the S.C. Coastal Council to pay Lucas \$1,575,000 for the lots and legal fees, and take title to the lots." They continue:

*Ironically, upon taking title to the Lucas property, the state agency proceeded to enable the very action – that of development – which it had spent years arguing was inappropriate. The agency sold both lots to a private buyer for development. The buyer paid \$360,000 for 11 Beachwood East and \$425,000 for 13 Beachwood East. In 1996, that buyer built a five-bedroom house of approximately 4,200 square feet on the first lot. The County's assessed value for this lot was \$1,318,000. The second lot sold again in April 1999 for \$650,000. In 2001, the new buyer built a 3,200-square-foot, four-bedroom house, assessed at \$1,235,000.*

12 SOUTHEASTERN ENVTL. L.J.at 14.

## **D. Determining whether there has been a compensable regulatory taking**

There are two types of regulatory taking claims, as-applied, or partial, claims that are subject to the three-part analysis in *Penn Central*, *supra*, and *per se*, or categorical, claims. See *Lucas*, *supra*.

### ***1. As-applied regulatory takings – the Penn Central three-part test***

In *Penn Central*, 438 U.S. at 123-24, the Court held:

In engaging in these essentially *ad hoc*, factual inquiries, the Court's decisions have identified several factors that have particular significance. The *economic impact of the regulation* on the claimant and, particularly, the *extent to which the regulation has interfered with distinct investment-backed expectations* are, of course, relevant considerations. ... So, too, is the *character of the governmental action*. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. [Emphasis added; citations omitted.]

The Florida supreme court follows *Penn Central*'s three-part test. For example, in *Keshbro, Inc. v. Miami*, 801 So. 2d 864, 871 n. 12 (Fla. 2001), the supreme court held:

Those regulations which fall short of effecting a categorical taking are appropriately analyzed under the ad-hoc factual inquiry outlined in *Penn Central Transportation Co. v. City of New York* ... The *Penn Central* analysis is an ad-hoc factual inquiry requiring the examination of several factors in the consideration of a takings claim; keenly relevant in that analysis is "the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations."

#### ***a) Economic impact***

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As to *Penn Central*'s first prong, *economic impact of the regulation*, the Court has never defined a numerical threshold that would meet this test. In *Lucas*, 505 U.S. at 1019 n.8, in response to a comment in Justice Stevens' dissent, Justice Scalia stated:

JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." ... This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. *Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-*

*backed expectations” are keenly relevant to takings analysis generally.* [Emphasis added.]

The Florida supreme court has held that the Florida constitution requires that property owners be compensated when the government *substantially interferes with an owner’s use of property, or when a regulation denies substantially all economically beneficial or productive use of land.* See *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

### ***b) Investment-backed expectations***

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In her concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 616-19 (2001), Justice O’Conner wrote:

[I]nterference with investment-backed expectations is one of a number of factors that a court must examine. Further, *the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.* ...

Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property “goes too far.” ...

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. *We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a post-enactment acquirer of property, such as a donee, heir, or devisee.*

### ***c) Character of the government action***

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In *Penn Central*, *supra*, Justice Brennan explained the third prong – character of the governmental action – as follows.

It is, of course, implicit ... that a use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose, ... *or perhaps if it has an unduly harsh impact upon the owner’s use of the property.*

Justice Brennan identified three earlier opinions of the Court where the “character of governmental regulation” has such an “unduly harsh impact upon the owner’s use of the property” that just compensation must be paid, as follows.

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, *see id.*, at 414-415, the Court held that the statute was invalid as effecting a “taking” without just compensation. *See also Armstrong v. United States*, 364 U.S. 40 (1960) (Government’s complete destruction of a materialman’s lien in certain property held a “taking”); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (if height restriction makes property wholly useless “the rights of property... prevail over the other public interest” and compensation is required).

*Penn Central*, 438 U.S. at 127-28. [Emphasis added.]

## **E. The Williamson County ripeness test**

### ***1. The ripeness requirement***

As-applied regulatory taking claimants must pass a *ripeness* test, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), before they are eligible for judicial review. The *Williamson County* Court held:

*[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.*

473 U.S. at 186. [Emphasis added.]

### ***2. Ripeness ≠ exhaustion of administrative remedies***

The *Williamson County* Court held the ripeness requirement is *not* a requirement that the claimant must exhaust administrative remedies.

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. ... While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured

party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. ...

... While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, ... *respondent would not be required to resort to those procedures ... because those procedures clearly are remedial.* Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

*Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.*

473 U.S. at 192-94. [Emphasis added.]

### **3. Repetitive and unfair land use procedures, the “futility exception”**

In *Palazzolo*, *supra*, the Supreme Court held:

While a landowner must give a land-use authority an opportunity to exercise its discretion, *once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.* ...

... Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. ... *Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999).*

533 U.S. 606, 620-21 (2001). [Emphasis added.]

### **4. Lucas per se, or “categorical” regulatory takings**

A *per se*, or “categorical” taking is a *wipe-out* of *all* – not just *substantially all* – beneficial use of property.<sup>19</sup> In *Lucas*, *supra*, the Court identified two factual situations in which a regulation results in a taking “without case-specific inquiry into the public interest advanced in

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<sup>19</sup> In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a reduction in land value of 93.7% was not a categorical taking. In *Rith Energy v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001), a 91% reduction was not a categorical taking. In *Cooley v. United States*, 324 F.3d 1297, 1302 (Fed. Cir. 2003), a 98.8% reduction in value was not a categorical taking. All required a *Penn Central* analysis, *infra*.

support of the restraint.” The first is where a *regulation allows a physical invasion* of property. See *Loretto, supra*. The second is “where regulation denies *all* economically beneficial or productive use of the land,” to-wit, a “categorical taking.” Under *Lucas*, if a regulation deprives the property of *all* economic value, there is no need for the *Penn Central* three-part test. Nor is there a *Williamson* ripeness requirement. Compensation is due unless the regulation prevents use of the property in a manner that creates a nuisance under state law. *Lucas*, 505 U.S. at 1029. Justice Scalia, speaking for the Court in *Lucas*, explained the categorical rule as follows.

Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation. ... Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life” ... And the *functional* basis for permitting the government, by regulation, to affect property values without compensation – that “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law” ... does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses. ...

[A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. ... As Justice Brennan explained: “From the government’s point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.” ...

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

[Emphasis added; citations omitted; footnote omitted.]

#### **IV. HAS MONROE COUNTY EFFECTED A TAKING OF THE SUBJECT PROPERTY**

##### **A. Are the 13 lots separate units or a single tract?**

Before a *Penn Central* or *Lucas* test can be employed, this Court must decide the threshold question of how the uses and values of Galleon Bay’s 13 lots are to be determined. In other

words, what is the relevant parcel? Is it the individual lots, or are the lot lines to be disregarded and the land considered as if it was unplatted acreage? That question was answered by the Florida supreme court in *Dept. of Transportation v. Jirik*, 498 So. 2d 1253 (Fla. 1986), where the supreme court held there is a *presumption* that platted lots are treated *separately* in inverse condemnation and eminent domain proceedings, as follows.

Jirik instituted inverse condemnation proceedings seeking damages for the substantial diminution in the value of lot one resulting from the loss of access to and from that lot .... In response, the Department of Transportation argued that lots one, two and three are a single tract for condemnation purposes .... The trial court rejected the department's argument, found that the three lots were indeed separate, and concluded that although there existed no diminution of access to lot two, there *had* been a taking through loss of access to lot one for which compensation was owed. ....

.... We agree with the district court that the factors to be considered in making such a determination are physical contiguity, unity of ownership, and unity of use. ....

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In this case, it is undisputed that the three parcels are physically contiguous and are all owned by Jirik. The parties disagree, however, as to whether the three parcels have been used separately or have been treated as a single unit. Thus, the determination of whether Jirik's land is a single tract turns on whether the land enjoyed unity of use.

... The district court below ... adopted the presumption first established by *Wilcox v. St. Paul & Northern Pacific Railway Co.*, 35 Minn. 439, 442, 29 N.W. 148, 150 (1886):

In respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract. *Prima facie* that character has been given to it by the proprietor. Presumably the division or platting was with a view to the use of the property, or to its disposal and ultimate use, in such subdivisions as have been made; and if any facts exist which might be considered sufficient to rebut this presumption, they should be disclosed.

.... we conclude, in agreement with the district court below, that the presumption set out in *Wilcox* is sound and that it is applicable to the facts of this case. .... When property is, in fact, unoccupied, the question of whether separate lots are one unit is more difficult. Given the complexity and formalities of modern-day city planning, we believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence. *As one commentator has noted, considerable time and expense is necessary to bring a modern subdivision to the platting stage.* [ ] Furthermore, an owner of one or more platted lots cannot easily abandon or disregard formally established divisions because planning boards, city commissions, and other governmental entities must approve such decisions. [

] Thus, the reason behind the presumption is stronger today than when the rule was first established in *Wilcox*. We therefore hold that vacant city<sup>20</sup> property constitutes presumptively separate units if platted into lots.

498 So. 2d at 1254-57. [Footnotes, citations omitted; emphasis added.] In this case, the 13 lots are contiguous and all owned by the same entity. The only issue is whether the lots share a unity of use. Following the holding in *Jirik*, the lots are *presumptively separate units* and they must be considered and valued *separately* in this proceeding.

Monroe County argued that Galleon Bay's 13 lots should be treated as if they shared a unity of use. The Court rejects Defendant's argument for several reasons. First, *Jirik* was an inverse condemnation case – as is this case – decided by the highest court of this state, and the principle of *stare decisis* requires this court to stand by precedent and not disturb a settled point of law. Second, the Galleon Bay subdivision is not a “paper plat” laid down over some agricultural acreage in the middle of nowhere. Plaintiff expended and obligated the sum of \$578,670, after its plat was approved, from 1991 to 1998, *see* fn. 9, *supra*, and another \$200,000 before 1991, on the development of these 13 lots. It would be highly inequitable and unjust to deprive Galleon Bay of the rights it has acquired in these lots as individual home sites. Third, if *Jirik* conflicts with *Penn Central*, *supra*, this Court relies on the Supreme Court's decision in *City of Mesquite*, *supra*, for the proposition that “a state court is entirely free to read its own State's constitution more broadly than the Supreme Court reads the Federal Constitution.” The Federal Bill of Rights protects individual rights against oppression by the government – not vice-versa – and “broadly” means that state courts may provide *individuals* more protection against government interference with their property than the *minimal* protection federal courts provide under the U.S. Constitution. *Jirik* can be viewed as a broader reading of the Florida constitution than *Penn Central*'s reading of the federal Constitution.

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<sup>20</sup> The use of the adjective *city* in *Jirik* cannot be read to mean an incorporated municipality because Ms. Jirik's lots were in Tavernier, in the Florida Keys, not in an incorporated city. Galleon Bay Corporation's lots are not in an incorporated city, but the Galleon Bay subdivision is bounded on the west by the 44-lot Dolphin Harbour residential subdivision and the 91-lot Bahia Shores residential subdivision. The Galleon Bay subdivision and its neighboring subdivisions are just as much of a “city” as was Tavernier in 1985.

## B. Applying the *Lucas* per se, categorical test

Plaintiff's appraiser concluded that, as of February 25, 2005, the subject property could only be sold as investment acreage, and that the fair market value of the subject property has been reduced from \$5,250,000 to \$10,260 (\$1,000 per acre) a reduction in value of 99.80%. Although Plaintiff's lots retain only 0.20% of value, a Federal Circuit decision, *Cooley, supra* at fn 19, has held that a residual value of 1.2% is insufficient to qualify for the *Lucas* per se, categorical treatment. Plaintiff's 13 lots' residual value – 1/6<sup>th</sup> of the residual percentage in *Cooley, supra* – is so small as to be insignificant, and the Court can only conclude that this case qualifies for *Lucas* categorical treatment. In point of fact, the facts in this case are indistinguishable from those in *Lucas*. Here, as in *Lucas*, Plaintiff's 13 lots have been so severely limited by the County's regulations that they have no use at all. They are, like Mr. Lucas' lots, being required:

to be left substantially in [their] natural state – carry[ing] with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. *Lucas, supra*, 505 U.S. at 1029.

In sum, the facts of this case are “on all fours” with those in *Lucas v. South Carolina Coastal Council*, and this Court sees no *rational* basis for resorting to a three-part *Penn Central* analysis in this case.

This Court is aware of language in *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004), that interprets the word “permanent” in fn. 19 of *Tahoe-Sierra, supra*, where the Supreme Court stated “*Lucas* carved out a narrow exception to the rules governing regulatory takings for the “extraordinary circumstance” of a *permanent* deprivation of all beneficial use.” The Federal Circuit, in *Bass Enters., supra*, characterizes fn. 19 as meaning “the rule applied in *Lucas* would only be applicable to *permanent*, rather than *temporary*, regulatory takings.” As the Supreme Court has consistently characterized *all* regulatory takings as “temporary,” it is difficult to determine what the Court meant by the phrase “permanent deprivation of all beneficial use” in *Tahoe-Sierra's* fn. 19. The Federal Circuit's explanation is also out of character as that Circuit has consistently applied the adjective “permanent” only to physical takings, and “temporary” to regulatory takings.

As this Court does not enjoy the privilege of second-guessing the Supreme Court or the Federal Circuit – and in an abundance of caution – it will conduct a three-part *Penn Central* analysis in this case, on the possibility that *Tahoe-Sierra* may have overruled *Lucas sub silentio*.

### C. Applying *Penn Central*'s three factors

#### 1. The “*nature of the regulation*”

In *Penn Central*, *supra*, the “character of the governmental action” prong lies in the landowner’s favor “*if the regulation has an unduly harsh impact upon the owner’s use of the property.*” The *Penn Central* opinion identifies *Pennsylvania Coal Co. v. Mahon*, *supra*, as one of three leading cases where the “character of governmental regulation” has such an “unduly harsh impact upon the owner’s use of the property” that just compensation must be paid. The *Penn Central* Court stated:

*Pennsylvania Coal* ... is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a “taking.” ... Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414-415, the Court held that the statute was invalid as effecting a “taking” without just compensation. *Penn Central*, 438 U.S. at 127-28. [Emphasis added.]

In the case before this Court, Monroe County’s regulations have had “the same effect as the complete destruction of rights” Galleon Bay had developed since acquiring the subject property – and after expending on the order of three-quarters of a million dollars. The purposes for destroying these rights, as stated by the Monroe County Director of Planning, included preserving habitat for Key deer, ensuring that the Level of Service on nearby roadways stays at a particular level, and so on (*see* Director’s memorandum for July 19, 2001, BOCC hearing on Plaintiff’s application for administrative relief).

This Court finds that the “character of the governmental action” is such that it falls into the category of “forcing Plaintiff alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The County’s purposes, while laudatory in the abstract, have nothing to do with suppressing a

common-law nuisance (building and occupying single-family homes is not a common law nuisance under Florida law),<sup>21</sup> and the costs are unfairly being borne by Galleon Bay when they should be borne by the public as a whole. The “character of the governmental action” prong does not preclude compensation to plaintiff for a regulatory taking.

## ***2. The economic impact of the regulation on the claimant***

Given the adverse effect of Monroe County’s regulations on Galleon Bay’s ability to obtain building permits, and the decision of Monroe County not to issue the permits after four years in the ROGO, the fair market value of the subject property has been reduced from the \$5,250,000 it would have if building permits were obtainable (as of February 25, 2005), to \$10,260 (\$1,000 per acre), a reduction in value of 99.80%. Defendant’s appraiser’s Affidavit reaches a slightly different conclusion, in part because his appraisal is more than four years older than Plaintiff’s appraisal. As Defendant’s appraiser did not separately appraise the present-value numerator (\$10,260), the diminution in value computed from his four-year old appraisal is between 98.9% and 99.2%. Thus, the ROGO has reduced the economic value of the subject property by somewhere between 98.9% and 99.80%.<sup>22</sup>

This Court holds that the only other uses allowed on the lots, primarily commercial fishing uses, are not reasonable and have no economically beneficial value. As for Defendant’s effort to create a disputed issue of fact by positing that Galleon Bay could abandon 11 of the platted lots and gather enough ROGO points to build two homes, the Court rejects Defendant’s the-

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<sup>21</sup> Under the nuisance rationale of *Lucas* and *Keshbro*, *supra*, the Monroe County ROGO was not adopted to prevent a common-law nuisance. As the Florida Supreme Court stated in *Keshbro v. City of Miami*, *supra*:

Under *Lucas*, the cities can resist compensation only if they can identify “background principles of nuisance and property law that the prohibit the uses” proscribed by the orders. *Lucas*, 505 U.S. at 1031. *A regulation so restricting the use of property can “do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”* *Id.* at 1029.

801 So. 2d at 875-76. [Emphasis added.]

<sup>22</sup> This difference in fair market value estimates is irrelevant to liability. Compensation is for the jury to decide. That is why this is a jury issue, and not part of the liability determination.

ory. *Jirik, supra*, requires the Court to consider each of the 13 lots independently. For any use to be considered viable in this case it must be such that it that can be applied to a single lot without diminishing the uses or value of any other lot in the subdivision.

As for the Director's assertion that "aquaculture" is a permitted use and "the property would be ideal for aquaculture use," the Court finds the assertion mere conjecture and speculation, and strikes it for that reason. *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955) ("to permit such evidence would open a flood-gate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest"). In addition, the Court strikes the Director's aquaculture assertion as an opinion that would be inadmissible at trial. Nothing in the Director's Affidavit demonstrates that she has education, training, or experience that would qualify her to offer opinion testimony that the lake is "ideal for aquaculture," or an opinion that aquaculture would be an economically beneficial use on the subject property. Finally, the Court rejects the suggestion that aquaculture could be considered a viable use because it does not meet the independent lot presumption of *Dept. of Transportation v. Jirik, supra*.<sup>23</sup>

Defendant argues and the Director states in her Affidavit that Galleon Bay "could have" obtained two ROGO allocations in 1993, 11 in the third or fourth quarters of 1994, or 9 in the first or second quarters of 1995.<sup>24</sup> The fact that, in hindsight, there were more allocations available than applications in the third and fourth quarters of 1994 and the first and second quarters of 1995, could not have been known by Plaintiff in advance of that period. These opportunities are not relevant today, nor were they relevant in 2001 when Plaintiff obtained a final decision on the use of the lots from Monroe County. Defendant's theory is rejected, and the Director's specula-

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<sup>23</sup> While the Director refers to aquaculture as a "permissible use," Defendant's Response to the Motion for Summary Judgment characterizes it as an "as-of-right" use. The Monroe County Code, cited above on page 8, makes it clear that *if* aquaculture is allowed in a CFV District, it is allowed as a *major conditional use* listed as "Land use overlay A." Land use overlay A is an "agricultural/aquacultural use overlay" established by Ordinance 027-2001, effective October 10, 2001, three months after Galleon Bay had "ripened" its taking case by obtaining a final decision on the use of its property from the Monroe County Commission. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, supra*.

<sup>24</sup> As the revised plat was not approved until April 21, 1994, the possibility of allocations in 1993 is irrelevant.

tion stricken, as irrelevant speculation and conjecture. *Yoder v. Sarasota County, supra*. The same result applies to Defendant's and the Director's argument that Galleon Bay "could have" obtained building permits for affordable housing had they applied therefor between 1992 and 1998.

The Court finds that Galleon Bay applied for as-of-right, reasonable uses of its 13 lots, went through the ripening process of the ROGO for four years, including the administrative relief process, and received a final determination of what it could do with its property. Its taking case was ripe on July 19, 2001, and no amount of hindsight by Defendant and its Planning Director can un-ripen Galleon Bay's case. *Williamson County, supra*. The Court holds that Galleon Bay meets the second prong of the *Penn Central* test, having been deprived of between 98.9% and 99.80% of the fair market value of its property.<sup>25</sup>

### ***3. Plaintiff's investment-backed expectations***

It is not always necessary to have an evidentiary trial on a taking claimant's investment-backed expectations, because examination of the common law and relevant legal regime at the time plaintiff began the process can establish the presence or absence of reasonable expectations. *Commonwealth Edison v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002) ("The question is what a reasonable company in [claimant's] position should have anticipated.").

Until 1986, and even until July 13, 1992 when the ROGO became effective, Monroe County allowed entities like Galleon Bay to buy undeveloped tracts of land, plat those tracts into subdivisions, build roads and canals for access, and sell the lots at a profit. The Schleus did just this with the neighboring platted subdivisions of Bahia Shores and Dolphin Harbour, both on No-Name Key adjacent to the Galleon Bay subdivision. Galleon Bay reasonably made a \$133,000 investment in the subject property in 1971 and 1984.

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<sup>25</sup> This determination is for determining liability alone. It does not usurp the jury's province to determine the compensation to which Plaintiff are ultimately entitled.

When Galleon Bay applied to plat the subject property for residential use in 1990, Monroe County exacted a 46% density reduction, from an as-of-right 25.8 DU's to 14 DU's, and a perpetual conservation easement on 33.5% of Galleon Bay's non-water land. Plaintiff had every reason to expect that Monroe County would honor the *quid pro quo* inherent in such exactions; i.e., allow the construction of single-family homes on each platted lot.

Plaintiff reasonably expended funds and incurred debt totaling between \$600,000 and \$765,000 to acquire, plat, develop, permit, and sell the subject lots between 1971 and 1998. Plaintiff has undoubtedly continued to pay lawyers, taxes, and interest since 1998. The Court finds Plaintiff's investment reasonable in light of the appraised value of the lots today at \$5.25 million. The Court declines to consider Defendant's appraisal for this prong, as it is more than four years old while Plaintiff's appraisal is seven months old. The Court finds that Plaintiff meets the third *Penn Central* prong, as the current, regulation-inhibited, fair market value of the subject property, at \$1,000 per acre (\$10,260), deprives Galleon Bay of between 98.3% and 98.80% of the value of the subject property.

#### **V. THE DATE OF BEGINNING OF THE TEMPORARY REGULATORY TAKING IS JULY 19, 2001**

In its November 2003 liability order, this Court rejected Plaintiff's proposed "date of beginning" of the temporary regulatory taking, July 13, 1992, the date the ROGO became effective, and chose April 21, 1994, the date the Revised Plat of Galleon Bay Subdivision was approved, as the "date of beginning" of the temporary regulatory taking of Galleon Bay's property.

On April 24, 2005, Galleon Bay filed a motion to amend the Court's "date of beginning" of the temporary regulatory taking to April 13, 1997, the date Galleon Bay's 13 building permit applications were *first* denied by the County – the first of 16 denials that had to be obtained before Galleon Bay was eligible to request a "variance" in the form of administrative relief from the ROGO. In its motion, Galleon Bay put forward its position that, under normal circumstances, the "date of beginning" of the temporary regulatory taking would be July 19, 2001, the date it was denied a variance from the ROGO. Galleon Bay invoked the "normal delay" language of

*First English, supra*, to support an April 13, 1997, “date of beginning,” rather than the *Williamson County, supra*, ripening date of July 19, 2001. Galleon Bay argued its April 24, 2005, motion on June 21, 2005, and this Court delayed its ruling until it could hear all of the parties’ proposals to amend its 2003 summary judgment order.

In its latest motion to amend the Court’s 2003 Order Granting Summary Judgment on Liability, Galleon Bay has elected to forego its “extraordinary delay” claim and prays for the Court to adopt the *Williamson County* ripeness date – July 19, 2001 – as the date of beginning of the temporary regulatory taking of its property. As the claims based on the earlier dates are Galleon Bay’s claims to waive, the Court accepts Galleon Bay’s legal position and finds that the temporary regulatory taking of Plaintiff’s property began on July 19, 2001.

## **VI. COMPENSATION FOR A TEMPORARY REGULATORY TAKING**

There is no single method for computing compensation for a temporary taking. The flexible approach of the Arizona Supreme Court in *Corrigan v. City of Scottsdale*, 720 P.2d 513 (AZ), *cert denied*, 479 U.S. 986 (1986) (measure of damages decided on facts of each case), has been followed by many state courts. *See also, Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 639 (Fla. 1972) (the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case). The court must pick a methodology that will replace the value of the taken property as closely as possible. In *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923), the Court held:

The compensation to which the owner is entitled is the *full and perfect equivalent of the property taken. Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327. It rests on equitable principles and it means substantially that *the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken.*

### **A. The alternatives**

In 1977, UCLA Law School Dean Donald Hagman co-authored WINDFALLS FOR WIPE-OUTS,<sup>26</sup> a temporary taking primer that Justice Brennan cited in *San Diego Gas*. Dean Hagman

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<sup>26</sup> D. Hagman and D. Misczynski, WINDFALLS FOR WIPE-OUTS: LAND VALUE CAPTURE AND COMPENSATION, Amer. Planning Assoc., Washington, DC (1977).

later divided temporary taking damage methods into six categories: *rental return*, *option price*, *interest on lost profit*, *before-the-take*, *after-it-ends*, *before-the-take*, *after-the-take-starts*, and *benefit to the government*.<sup>27</sup> Hagman's 1982 article abandoned the *before-the-take*, *after-it-ends* approach, rejected by the Supreme Court in *Kimball Laundry*, *supra*, and the *benefit to the government* from *San Diego Gas* (just compensation is what property owner lost, not what government gained), and suggested that rental value and option price may be same measure.

### **1. Rental value**

In *Kimball Laundry*, *supra*, the US seized a laundry in 1943 and returned it 3-½ years later. After the return, a jury awarded annual rent of \$70,000 and \$45,776 for damages beyond normal wear and tear. *Kimball Laundry* involved improved real estate and an operating laundry. This method is not suitable for determining compensation for undeveloped residential lots.

### **2. Option value**

New Jersey courts are proponents of option value, and the state legislature has written it into New Jersey's eminent domain code. *Sheerr v. Township of Evesham*, 445 A.2d 46, 64-65 (NJ Sup. Ct 1982), involving a wooded section of the Scheerr property that was zoned for "public park and recreation uses," is an example of the option value approach. The *Scheerr* court held:

there has been a taking, continuously from the date of the enactment of the PPR ordinance until the present time ... and that taking will continue until the municipality changes its ordinance, if it intends to do so. By way of compensation, it is appropriate that the municipality pay plaintiff the option value of the premises from the date of the enactment of the PPR ordinance to the date on which the municipality chooses to remove that designation. *Lomarch* supports this approach. *Option value must be established by expert testimony and calculated on the market value of the property without any zoning regulation*. Legal fees, the cost of expert witnesses and other expenses incurred in establishing the "option," as well as real estate taxes, shall be added to the value otherwise fixed. Interest is to be paid at the rate of 12% as follows: (1) on monies actually expended by plaintiffs, from the date of the expenditure; (2) on the amount or amounts fixed for the

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<sup>27</sup> Donald G. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, Chap. 12 in 1982 ZONING AND PLANNING LAW HANDBOOK 201, E. Strom, Ed., at 218-27. ("Hagman 1982

value of the option, from the dates those amounts should have been paid, proceeding on the assumption that payment was required annually, in advance.

### ***3. Before-the-take, after-the-take-starts***

In *Nemmers v. Dubuque*, 716 F.2d 1194 (8<sup>th</sup> Cir. 1983) (“*Nemmers I*”), land was rezoned from industrial to residential. The Eighth Circuit found a compensable vested right in the light industrial zoning. In *Nemmers v. Dubuque*, 764 F.2d 502 (8<sup>th</sup> Cir. 1985) (“*Nemmers II*”), the Eighth Circuit used the “before-the-take, after-the-take-starts” method, at 764 F.2d at 504-05.

In determining the proper measure of just compensation, we look to the market value of the parcel of land. ... Market value should be determined as of the date of the taking: for a temporary taking, the government is responsible for compensating the owner for the interim during which it effected the taking. ... Thus, *the proper method for calculating the damages in this case is to compute the return over three and one-half years at an interest rate of 15% on the difference between the property’s fair market value when zoned L-1 and its fair market value when zoned R-3. ...*

This method was used in *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11<sup>th</sup> Cir. 1987) (*Wheeler III*), where the 11<sup>th</sup> Circuit held, 833 F.2d at 270-71:

In the case of a temporary regulatory taking, the landowner’s loss takes the form of an injury to the property’s potential for producing income or an expected profit. ... The landowner’s compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. *Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property’s fair market value without the regulatory restriction and its fair market value with the restriction. See Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8<sup>th</sup> Cir. 1985). Under this approach, the landowner recovers what he lost.

In *City of Tampa v. Redner*, 852 So. 2d 270 (Fla. 2<sup>nd</sup> DCA 2003), the court adopted the *Wheeler III* formula to calculate temporary taking damages for an eight-year downzoning of a commercial building. Use of the *Wheeler III* method in *City of Tampa v. Redner* is not an adoption of *Wheeler III* for all temporary taking cases in Florida, *Dade County v. General Waterworks Corp.*, *supra*.

## **VII. A TEMPORARY REGULATORY TAKING REMAINS IN EFFECT FOLLOWING THE DATE OF THIS ORDER AND NO PERMANENT TAKING HAS OCCURRED**

While the law applicable to regulatory takings is neither static nor simple, the Court believes the following statements accurately characterize the status of Galleon Bay’s taking claim.

## **Uncompensated Takings**

The Constitution does not prohibit taking private property for public use. It prohibits doing so *without paying for it*. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717-18 (1999).

The Florida constitution requires that property owners be compensated when the government substantially interferes with an owner's use of property, or when a regulation denies substantially all economically beneficial or productive use of land. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994).

## **Physical Takings**

Under Florida law, a *per se* taking occurs when the government "requires the landowner to submit to the physical occupation of his land." *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. 2d DCA 1994) (quoting *Yee v. City of Escondido*, 503 U.S. 519 (1992)). The required "physical occupation" arises when the government "permanently deprives the owner of his 'bundle' of private property rights, including the right to possess and dispose, as well as the right to prevent the government from using the occupied area." *Flotilla, Inc.*, 636 So. 2d at 764 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). *Lloyd's of London v. St Petersburg*, 864 So. 2d 1145, 1147 (Fla 2<sup>nd</sup> DCA 2003), *rev. denied*, 871 So. 2d 871 (Fla. 2004).

Galleon Bay has not been deprived of its "right to possess and dispose of" the subject property, nor has it lost "the right to prevent the government from using the subject property." Thus, there has been no physical taking of the subject property.

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. *Tahoe-Sierra*, 535 U.S. at 323-24.

## **Regulatory Takings**

The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-16 (1922).

It would be a very curious and unsatisfactory result, if ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178-79 (1872).

### **Temporary Regulatory Takings**

All regulatory takings are temporary, and the landowner has no right under the Just Compensation Clause to insist that a “temporary” taking be deemed a permanent taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317-19 (1987).

“Temporary” takings which deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period. *First English*, 482 U.S. at 317-19.

### **Cessation of Regulation Unnecessary for Finding of Regulatory Taking**

While cessation of regulation may be sufficient for finding a temporary taking, nothing in these cases supports the proposition that the end of regulation is necessary. The Supreme Court has actually suggested to the contrary: “It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.” *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *see also Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996) (noting that Supreme Court found a temporary taking even though “the ordinance in *First English* by its terms was indefinite; it would expire only if declared unconstitutional or repealed.”) *Bass Enterprises Prod. Co. v. United States*, 133 F.3d 893, 895-96 (Fed. Cir. 1998)

### **Judicial Remedies for Regulatory Taking**

Once a court finds that a police power regulation has effected a “taking,” the government entity must pay just compensation for the period commencing on the date the regulation first effected the “taking,” and ending on the date the government entity chooses to rescind or otherwise amend the regulation. *San Diego Gas*, 429 U.S. 621, 658-61 (Brennan Dissent).

The government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a “taking.” Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation. *Ibid.*

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. Thus we do not, as the Solicitor General suggests, “permit a court, at the behest of a private person, to require the Government to exercise the power of eminent domain. We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *First English*, 482 U.S. at 321.

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government’s action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. *See First English*, 482 U.S. at 315 (citing *Jacobs*, 290 U.S. at 16). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *In those circumstances the government’s actions are not only unconstitutional but unlawful and tortious as well. Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717-18 (1999).

Put simply, an uncompensated temporary regulatory taking is a Constitutional tort. *Ibid.*

### **Compensation for a Temporary Regulatory Taking**

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923)

We grant leave to the parties to ... present evidence of the actual damages Lucas has sustained as a result of the State’s temporary nonacquisitory taking of his property without just compensation. *See, e.g., Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513, *cert. denied*, 479 U.S. 986, 107 S. Ct. 577, 93 L. Ed. 2d 580 (1986) (limiting recovery to actual losses where regulatory taking is temporary balances public and private interests). We direct the trial judge to make specific findings of damages appropriate to compensate Lucas for his temporary deprivation of the use of his property. To this end, we do not dictate any specific method of calculating the damages for the temporary nonacquisitory taking. *Accord, Poirier v. Grand Blanc Township*, 192 Mich. App. 539, 481 N.W.2d 762 (1992) (no formula or artificial measure of damages applicable; amount to be recovered is generally left to discretion of trier of fact). *Lucas v. South Carolina Coastal Council*, 424 S.E. 2d 484 (SC 1992) (on remand)

*Sheerr v. Township of Evesham*, 445 A.2d 46, 64-65 (NJ Sup. Ct 1982), involving a wooded section of the Scheerr property that was zoned for “public park and recreation uses,” is an example of the option value approach. That court ordered:

that the municipality pay plaintiff the option value of the premises from the date of the enactment of the PPR ordinance to the date on which the municipality chooses to remove that designation. ... Option value must be established by expert testimony and calculated on the market value of the property without any

zoning regulation. Legal fees, the cost of expert witnesses and other expenses incurred in establishing the “option,” as well as real estate taxes, shall be added to the value otherwise fixed. Interest is to be paid as follows: (1) on monies actually expended by plaintiffs, from the date of the expenditure; (2) on the amount or amounts fixed for the value of the option, from the dates those amounts should have been paid, proceeding on the assumption that payment was required annually, in advance.

In *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11<sup>th</sup> Cir. 1987) (*Wheeler III*), where the 11<sup>th</sup> Circuit held, 833 F.2d at 270-71:

In the case of a temporary regulatory taking, the landowner’s loss takes the form of an injury to the property’s potential for producing income or an expected profit. The landowner’s compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property’s fair market value without the regulatory restriction and its fair market value with the restriction. *See Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir. 1985).

In *City of Tampa v. Redner*, 852 So. 2d 270 (Fla. 2<sup>nd</sup> DCA 2003), the court adopted the *Wheeler III* formula to calculate temporary taking damages for an eight-year downzoning of a commercial building. Use of the *Wheeler III* method in *City of Tampa v. Redner* is not an adoption of *Wheeler III* for all temporary taking cases in Florida, *See Dade County v. General Waterworks Corp.*, 267 So. 2d 633, 639 (Fla. 1972) (the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case). *See also Corrigan v. City of Scottsdale*, 720 P.2d 513 (AZ), *cert denied*, 479 U.S. 986 (1986) (measure of damages decided on facts of each case).

## **VIII. DEFENDANT’S REMAINING DEFENSES HAVE NO MERIT**

### **A. Failure to exhaust administrative remedies and “ripeness” defense**

The third option available to the Board of County Commissioners in the ROGO administrative relief section; i.e., “such other relief as may be necessary and appropriate,” is sufficient to allow the BOCC to grant any relief they are empowered to grant under the “beneficial use” provision. The government cannot be permitted to erect a series of administrative relief barriers to judicial relief, when one such relief provision follows another with no change in the relief that may be granted or the identity of the tribunal. *Lucas v. South Carolina Coastal Council*, *supra*. The Court rejects Defendant’s theory that Plaintiff could be required to “ripen” a second time. Once a property owner has “ripened” her claim, pursuant to *Williamson County Regional Plan-*

*ning Comm'n v. Hamilton Bank of Johnson City, supra*, it is ripe and she cannot be required to suffer through additional remedies with the same actors and the same authority.

### **B. Statute of limitations inapplicable**

This defense was raised in Defendant's Motion to Dismiss the Second Amended Complaint and rejected. The Supreme Court's decisions in *Palazzolo v. Rhode Island, supra*, and *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency, supra*, make it clear that when a property owner must "ripen" her case to have her inverse condemnation claim heard by a court, no statute of limitations can begin to run until after the case is ripened.

### **IX. THE FIRST ENGLISH REQUIREMENT**

In *Gonzales v. Monroe County, affirmed, Monroe County v. Gonzales*, 593 So. 2d 1143 (Fla. 3<sup>rd</sup> DCA 1992), this Court held that the County's regulations effected a regulatory taking of Mr. Gonzales' lot and, following the Supreme Court's guidance in *First English, supra*, entered the following Order.

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.

THEREFORE, IT IS ORDERED that defendant notify this court within 30 days after the date of this order, how it intends to proceed in light of the court's invalidation of the subject regulations and the Supreme Court's opinion in *First English*, quoted above. Defendant shall have six months from the date of this order to provide public notice, conduct hearings, and carry out whatever action it has chosen."

A similar order will be entered in this case.

## X. CONCLUSIONS OF LAW

**This Court finds, as Conclusions of Law, that:**

**(a) Galleon Bay Corporation has been deprived of all or substantially all economically beneficial use of the subject property,**

**(b) there has been no physical taking of the subject property,**

**(c) Monroe County's regulations have effected an uncompensated, temporary regulatory taking of the subject property, in contravention of the compensation requirements of the United States and Florida Constitutions, beginning on July 19, 2001,**

**(d) Monroe County is liable to Plaintiff Galleon Bay Corporation for damages for the temporary regulatory taking of the subject property on July 19, 2001, which shall be determined by the Court on an annual basis beginning July 19, 2001, continuing until the temporary regulatory taking is terminated,**

**(e) Said regulations, as applied to the subject property, are invalid as an unreasonable exercise of the police power, *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984),**

**(f) said temporary regulatory taking is continuing as of the date of this order,**

**(g) it is not necessary that the temporary regulatory taking terminate for the Court to find that such a taking has occurred, or to award damages, and**

**(h) equity requires the Court to enter such orders as are necessary (i) to provide constitutionally mandated compensation to Plaintiff, (ii) require Monroe County to inform the Court how and when it intends to terminate the temporary regulatory taking or, if Monroe County intends to continue the offending regulation in violation of the United States and Florida Constitutions, (iii) to order the issuance of the 13 pending building permits on a schedule to be determined.**

## XI. ORDER ON LIABILITY

IT IS ADJUDGED that:

1. The plaintiff/property owner is Galleon Bay Corporation, a Florida Corporation.
2. The subject property consists of all lands within the Revised Plat of Galleon Bay, situated in Government Lots 1 and 3, Sec. 18, T. 66S, R. 30E, Monroe County, recorded April 21, 1994, in Plat Book 7, Pages 65-66 of the Official Records of Monroe County, FL, with the exception of Lot 12.
3. Monroe County has deprived Plaintiff of all or substantially all beneficial use of the subject property. Plaintiff's property was taken for a public use or purpose, by Defendant Monroe County's regulations, in contravention of Amendments 5 and 14, U.S. Constitution, and Art. X, sec 6, and Art I, sec 9, Florida Constitution, and full compensation has not been made to Plaintiff. The County's actions are "not only unconstitutional but unlawful and tortious as well." *Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687, 717-18 (1999). The Court finds that such taking is a temporary regulatory taking, as there has been no physical occupation of the subject property by Defendant(s), Plaintiff has not been ousted from the property, continues to pay taxes and is listed as the owner on the County's tax roll, and has never been deprived of the right to sell said property or to exclude the government from the property; and a temporary regulatory taking as a matter of law because Defendant(s) could remove the offending regulations at any time, thereby restoring Galleon Bay's rights to use its property.
4. The nature of the estate taken by Monroe County is temporal, and runs from the date of beginning of the temporary taking until Monroe County either (a) exercises eminent domain and purchases the property for its fair market value, or (b) issues the 13 pending building permits.
5. The date of beginning of the temporary taking is July 19, 2001, the date Plaintiff's application for administrative relief from the Dwelling Unit Allocation Ordinance was denied. The date of termination of the temporary taking shall be the earlier of the date(s) that Plaintiff's 13 pending building permits are issued or the date(s) Monroe County tenders payment of the fair market value for the subject property as determined by a jury verdict in an eminent domain proceeding.
6. The responsible government agency is Monroe County, a political subdivision of the State of Florida.
7. The Monroe County Land Development Regulations and Comprehensive Plan, as applied to the subject property taken, *supra*, 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); *Joint Ventures v. FDOT*, 563 So. 2d 622 (Fla. 1990); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S.*

*Corp.*, 640 So. 2d 54 (Fla. 1994). The United States Supreme Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), states:

Once a court determines that a taking has occurred, the government retains the whole range of options already available amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. *First English*, 107 S. Ct. at 2389.

**THEREFORE, IT IS ORDERED THAT:**

8. Defendant shall notify this court, within 30 days after rendition of this order, whether it intends to: (a) amend or withdraw all regulations that prevent Plaintiff from receiving the 13 pending building permits it applied for in January 1997, and issue said building permits pursuant to a schedule to be set by the Court, or (b) exercise eminent domain and acquire the subject property pursuant to Chapter 73 or Ch. 74, Fla. Stat.

9. Defendant is liable to Plaintiff for damages for the temporary regulatory taking of the subject property. The Court shall determine the temporary regulatory taking damages, according to the before-the-take, after-the-take-begins methodology in *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11<sup>th</sup> Cir. 1987) (*Wheeler III*), and the payment methodology in *Sheerr v. Township of Evesham*, 445 A.2d 46 (NJ Sup. Ct 1982), in a non-jury trial, and shall enter a separate Order on said damages.

10. Temporary regulatory taking damages shall be determined beginning on July 19, 2001, the date of beginning of the temporary regulatory taking, as if paid annually in advance, and adjusted as of each annual anniversary of said date of beginning. Interest shall also be added to the damages from the dates those amounts should have been paid, until they are paid, proceeding on the assumption that payment was required annually, in advance. Should the temporary regulatory taking continue after July 19, 2006, the Court shall convene additional non-jury trials to determine such future damages as necessary.

11. The Court shall convene a 12-person jury for a trial on the fair market value of the fee simple interest in the subject property on the date of trial, pursuant to Chapter 73, Fla. Stat., determined as if building permits have been issued for each of the 13 the subject lots, no sooner than 90 days from rendition of this Order.

12. Should Defendant decide not to exercise eminent domain and purchase the subject property for the value determined by the jury, within 20 days of the jury verdict, Defendants' regulations are hereby declared invalid and of no effect as to the subject property. In that event, the Court shall enter an order setting forth the timetable, and any other conditions that justice requires, for issuing the 13 pending building permits.

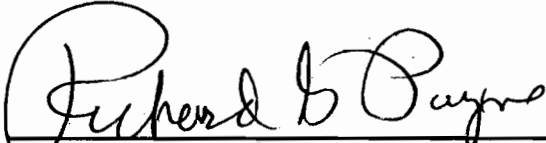
13. Monroe County may, at any time, make the good faith deposit required by Chapter 74, Fla. Stat., and convert the Chapter 73 proceeding into a Chapter 74 proceeding. If Monroe County so converts the proceeding, title shall transfer to the County as provided by law and the County shall no longer have the option to abandon the eminent domain proceeding as provided for in Chapter 73.

14. Monroe County is liable to pay reasonable costs and attorneys' fees for this entire proceeding after conclusion of the valuation trial, and as required by Chapter 73 or 74, Florida Statutes, whichever is applicable.

15. The Court shall retain jurisdiction of this matter until the regulatory taking of the subject property has terminated, all temporary regulatory taking damages have been determined by Order of the Court, and all provisions in the Court's Orders have been met, and to enter such other and further orders as justice requires.

DONE AND ORDERED, in Chambers, in Key West, Florida, this 30<sup>th</sup> day of

January 2006.

  
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RICHARD G. PAYNE.  
CHIEF CIRCUIT JUDGE

Copies to: James S. Mattson, Esq.  
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Derek Howard, Esq.  
Jon Glogau, Esq.  
Robert Freilich, Esq.