O/a 10-3-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ATLANTIC INTERNATIONAL INVESTMENT CORPORATION,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

CASE NO. 64,551

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MAX SIMON, individually and as class representative,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

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ANSWER BRIEF OF THE STATE OF FLORIDA

On Appeal from the District Court of Appeal
First District, State of Florida

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MITCHELL D. FRANKS
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LOUIS F. HUBENER
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PRELIMINARY STATEMENT

The following abbreviations and reference symbols are used in this brief:

"Atlantic"	Atlantic International Investment Corp., petitioner here and plaintiff in the trial court.
"CAE"	Cape Atlantic Estates, 14,000 acres in Volusia and Brevard Counties.
"State"	State of Florida, respondent here and defendant in the trial court.
"DPC"	Department of Pollution Control
"DER"	Department of Environmental Regulation, successor to DPC, a respondent here and defendant in the trial court.
"DBR"	Department of Business Regulation, a defendant in the trial court.
"Volusia"	Volusia County, a defendant in the trial court.
"St. Johns"	St. Johns River Water Management District, a defendant in the trial court.
[R]	refers to the record, including the trial transcript.
[A]	refers to the appendix to this brief, a separate volume.
[Pl.Ex.]	refers to an exhibit of the plaintiffs.
[Def.Ex.]	refers to an exhibit of the defendants.
[Adm.Tr.]	refers to the transcript of a DER administrative hearing in 1975. Five volumes (Vols. 10-14] were received into evidence as defendants' Composite Exhibit 1.

STATEMENT OF THE CASE

Atlantic's brief fails to describe the **settlement** of this case in 1977. Nor does it point out that the trial court **ruled** that no cause of action was ever stated against Volusia County or St. Johns, and that the trial court granted a directed verdict in favor of DBR at trial. Atlantic further fails to note that it did not properly appeal those rulings. Instead, in great disservice to this Court and its own credibility, Atlantic's brief now attributes their allegedly culpable acts to the "State of Florida." For these reasons, a more complete and accurate statement of the case is here set forth.

In February, 1975, Atlantic sued the Department of Business Regulation and its Division of Land Sales; the Department of Pollution Control (predecessor of the Department of Environmental Regulation); and Volusia County. The complaint was filed in the circuit court in Leon County, Florida (Case No. 75-295).

The complaint [R 3] followed a **preliminary** order of the Department of Pollution Control issued in November, 1974, denying Atlantic a permit to construct several hundred miles of drainage canals intended to drain Cape Atlantic Estates (CAE) into off-site waters of the state. Earlier, in August, 1974, the Division of Land Sales had issued a notice to Atlantic to show cause why its registration should not be suspended or revoked for not having completed certain improvements (drainage and rough graded dirt roads promised lot purchasers by December, 1973). Atlantic alleged:

> 17. The actions by the Department of Pollution Control in denying the request for permit and the Division of Florida Land Sales in threatening to revoke registration amounts to a taking of property without compensation in violation of Article X, Section 6 of the Constitution of the State of Florida and Article I, Section 9, of the Constitution of the State of Florida. Said actions have deprived or will deprive Plaintiff of its investment in the property under agreements for deed and thereby deny Plaintiff its property without due process of law. (R 7)

Atlantic sought the **alternative** of an order requiring DPC to issue a permit **or** compensation for the taking of its property. An amended complaint filed in March 1975 contained essentially the same allegation. (R 47)

The trial court directed Atlantic to pursue its administrative remedies and purported to retain jurisdiction of the "taking" claim based on the DPC permit denial. DBR (Land Sales) then **dismissed** its notice to show cause. After an administrative hearing, DER (successor to DPC) rejected the DOAH hearing officer's recommendation and entered a final order in May 1976 denying the permit. Atlantic then appealed to the First District challenging the propriety of the permit denial. As the First District recounted in its opinion below (A 145):

> Prior to a decision by this court on the petition for certiorari, but subsequent to oral arguments, Atlantic and DER entered into a stipulation and consent agreement which provided, inter alia, the following: (1) a 13-month baseline study would be conducted to establish water quality standards for discharges from the project; (2) that after construction of modified drainage facility DER would issue a 3-year **temporary operation permit** if the facility complied with the plans

> attached to the agreement; (3) that the facility would be monitored; and (4) if, upon expiration of the temporary no water quality violations remained uncured, DER would issue the operation permit. **The parties' joint motion for this court's approval of this agreement stated that it 'resolve[d] or rendere[d] moot all issues formerly in dispute before this Court.' On June 29, 1977, this court approved the stipulation and consent agreement, vacated the DER order sought to be reviewed, remanded to DER for proceedings consistent with the terms and conditions of the stipulation and consent agreement, and dismissed the petition for writ of certiorari.**[1],[2] (e.s.)

In 1978 Atlantic found it could not afford the road and drainage improvements and so returned to the circuit court where, in August 1979, it sued DBR, DER, Volusia County, St. Johns and the "State of Florida" for a "taking." [R 472]

The complaint alleged **no** acts by the State of Florida, Count I simply alleging that various "cumulative actions" of the other defendants constituted the unlawful taking of Atlantic's property for which the "State of Florida" was responsible. Count II sought $30,000,000 in damages against Volusia for breach of contract.

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[1] The motion, stipulation and order are found at A 57-82.

[2] Atlantic's brief misleads the court when in referring to this sequence it states that "DER finally issued a permit." (Atl.Br. 3, 15, 24, 51) The appeal was settled by the District Court approved consent agreement, **not** the administrative grant of a permit, and the agreement "resolved or rendered moot all issues . . . before the Court." The DER final order was **vacated.** Atlantic never undertook construction pursuant to the agreement and thus never proved its entitlement to a DER **operation** permit. It did, however, have authorization to construct the drainage system and roads.

Count III alleged Atlantic had **vested rights** to complete the improvements and sought $30 million in damages. Count IV sought damages against Land Sales for breach of terms of the Improvement Trust Agreement.

On February 22, 1980, in an Order on Pending Motions [R 672] the trial court ruled:

A. Count I stated a cause of action for compensation as to some defendants but was technically insufficient becuase it failed to allege ownership or a date of taking.

B. Count II stated a cause of action against Volusia County but trial to determine the taking question would be held first.

C. Allegations in Count III as to vested rights were insufficient.

D. Atlantic failed to exhaust available administrative remedies in regard to Count IV.

E. **The complaint failed to state a cause of action against St. Johns River Water Management District.**

The court dismissed the complaint as to St. Johns and also dismissed Counts III and IV. **The final judgment recites that St. Johns had been dismissed because it was not a necessary party. [A 10] That is wrong. The court had actually found the complaint failed to state a cause of action against St. Johns.**[3] [R 673]

Atlantic filed a second "amended and supplemental complaint" in March 1980 which in Count I alleged the same taking claim against

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[3] Atlantic never appealed the ruling as to St. Johns. Nor did it further pursue its vested rights claim. Its brief now appears to make a belated and improper claim to vested rights. [Atl.Br. 1, 16, 44, 45, 59]

DBR, DER, Volusia County and the State of Florida. [A 126; R 826] St. Johns was not a defendant. Count II alleged the same $30 million damage claim for breach of contract against Volusia County and the State of Florida. Volusia County filed a motion to dismiss the second amended complaint **for failure to state a cause of action** which the court granted as to Count I. [R 1488] Volusia County was not dismissed because it was not a "necessary party" as later stated in the final judgment. Motions to dismiss filed by DER, DBR and the State of Florida were denied. Volusia County's subsequent motion for judgment on the pleadings as to Count II was granted and final judgment entered. [R 2997]

In September, 1980, the presiding judge, Victor M. Cawthon, disqualified himself from further participation in this cause after motions for disqualification for prejudice were filed by defendants. The consolidated cases were then reassigned to Judge John A. Rudd, Sr., for further proceedings.

In February, 1981, complaints in intervention were filed separately by Max Simon and Claude and Geraldine Rosser. Each sought to represent as a class the lot purchasers of CAE. In April, 1981, the trial court certified Max Simon as the class representative. [R 2571] The class claim was identical to Atlantic's.

The taking claim was tried in April 1982. After presentation of Atlantic's evidence, the trial court granted a motion for involuntary dismissal with prejudice in favor of DBR, Land Sales and its director.

At trial, over strenuous objection, the court heard evidence from Atlantic as to various alleged actions of St. Johns and Volusia County even though it had granted motions to dismiss for failure to state a cause of action as to both. Notwithstanding these earlier rulings and the dismissal of DBR at trial, the final judgment held the "State of Florida" responsible for actions of St. Johns, Volusia and DBR which the court ruled contributed to the "taking." [A 11, ¶11; A 49, ¶1] It ordered the State of Florida to begin eminent domain proceedings against the 14,000 acres of Cape Atlantic Estates.[4]

As stated, neither Atlantic nor the class appealed the earlier dismissal of St. Johns. They did attempt to cross-appeal the dismissals as to Volusia and DBR which cross-appeals the First District dismissed as **untimely**. Atlantic's petitions for mandamus relief on the District Court rulings were denied in the Florida Supreme Court. Atlantic Int. Inv. Corp. v. District Court of Appeal, First District, Nos. 63,175 and 63,446 (August 3, 1983).

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[4] It should be noted that Atlantic authored the 50 page final judgment which the trial court signed without the slightest change thereto. The judgment misstates the grounds upon which St. Johns and Volusia had been dismissed, attempting to say they were not "necessary parties" when the court had in fact ruled **no cause of action** had been stated against them. The judgment ignores the dismissal at trial of DBR. Many federal courts hold that a trial court's wholesale adoption of a proposed order is disfavored and such orders are scrutinized with "maximum doubt." Dreyfus & Cie. v. Panama Canal Co., 298 F.2d 733, 739 (5th Cir. 1962); In re Las Colines, Inc., 426 F.2d 1005, 1010 (1st Cir. 1970), cert. den., 405 U.S. 1067 (1972). That principle was especially apposite in this case.

The State of Florida strenuously argued before the District Court that the trial court's hearing evidence as to Volusia's and St. Johns' acts **after** their dismissal, as well as requiring the State to defend those acts, was error. It also asserted as error the hitherto unrecognized "respondeat superior" relationship the trial court used to attribute liability to the State, especially in view of the fact that no cause of action had been established as to Volusia and St. Johns, and no culpable acts proved against DBR. [State's Initial Brief, Pts. I and II; Reply Brief Pts. I and II]

With the Supreme Court's rulings on the belated cross-appeals, the **law of the case** was established that no cause of action existed as to St. Johns and Volusia and none was proved against DBR. The State of Florida and DER therefore argued below that the only acts at issue before the District Court were those of DER. In reversing the trial court's judgment, the District Court's opinion notes Atlantic's failure to appeal the St. Johns' ruling, the two untimely cross-appeals and the Supreme Court's rulings. It clearly does not adopt Atlantic's and the trial court's apparent respondeat superior theory as to St. Johns, Volusia and DBR, nor, appropriately, does it consider and analyze their actions in the context of the purported "taking."

Atlantic's brief makes no mention of the law of the case as to St. Johns, Volusia and DBR, nor of the fact that **their acts were not at issue before the District Court and cannot be at issue here.** Throughout its brief Atlantic indiscriminately categorizes as

culpable "state actions" acts which perforce had to have been committed by these legally non-culpable parties, two of which are not even agencies of the State (Volusia and St. Johns). Even the final judgment of the trial court acknowledges that the only action of the State of Florida itself was the legislature's approval of the charter abolishing SCDD and transferring its functions to Volusia. [A 11] The trial court held the state responsible but never ruled it **committed** the actions which Atlantic's brief attributes to the "State of Florida:"

> Actions and inactions of the Florida Legislature, the Department of Environmental Regulation (and its predecessor, the Department of Business Regulation, the Division of land Sales and Condominiums, Volusia County, and the St. Johns River Water Management District are to be considered actions of the State of Florida for purposes of the "taking" classes of the Florida and United States Constitutions." [FJ A 44 ¶7]

Although the final judgment ignored the court's earlier rulings as to St. Johns, DBR and Volusia, clearly it was never the "actions of the State" which were at issue, but those of the individual parties.

The Supplementary Appendix (annexed to this brief) shows Atlantic's numerous indiscriminate references to "State actions." These can only refer to **particular acts of particular defendants, three of whom are not before this Court.** Atlantic's attempt to cloud the issues and facts and avoid the consequences of its failure to timely cross-appeal is little short of deliberate deception and is an extreme disservice to the Court in a case which is already sufficiently complex.

The only acts reviewed by the District Court and subject to review here are those of DER. The State therefore will not discuss or defend at length the acts of St. Johns, Volusia or DBR, although in the following Statement of Facts it will distinguish their actions from those of the State. It is respectfully suggested that if this Court deems the acts of St. Johns, Volusia and DBR still to be at issue, and that the "State of Florida" was obligated to defend them at trial and is now in the present appeal, that it request supplemental briefs of the parties.

STATEMENT OF THE FACTS

CAPE ATLANTIC ESTATES

Plaintiff Atlantic is a wholly-owned subsidiary of Mondex, Inc., which in turn is wholly-owned by the Summit Organization. In 1967 and 1968 Atlantic acquired approximately 14,000 acres of contiguous land in southern Volusia County and northern Brevard County which it named Cape Atlantic Estates ("CAE"). The groundwater table is normally high and at or near the surface during the rainy season throughout much of the site. [Pl.Ex. 11, 1967, pp.5,6; 1968 Supp. p.3; Pl.Ex. 12 1969 Supp. p.4; Revised Reclamation Plan, 1971, p.8] Surface drainage is poorly developed and inefficient. [Pl.Ex. 27, p.II-1]

Atlantic imposed on the land a "grid" system of subdivision. The land was entirely divided into a series of rectangular tracts and further subdivided by metes and bounds into about 5,000 or more rectangular lots of two and one-half or one and one-quarter acres.

All of the lots were for sale. The drainage scheme sought to superimpose a criss-crossing network of nearly 400 miles of canals and roads upon the grid. None of the low-lying and naturally wet areas or ponds were incorporated into the drainage scheme for use. [R 4192] Atlantic admitted the grid system dictated the drainage scheme it later sought to impose. [R 3966, 3970, 3971; 4192] Although such a design was common in the land sales industry at the time [R 4191], it also totally ignored all natural features and was not a state of the art design. [R 4466]

The lands were registered for sale with DBR (Land Sales) pursuant to Chapter 498, F.S., and lots were sold by telephone solicitation of prospective purchasers residing out of state under ten year contracts for deed. [R 4189, 4190] By 1972, when Atlantic voluntarily stopped sales of CAE lots, approximately 95-98% of the lots were under contracts for deeds. [R 4401]

In 1967 the South County Drainage District ("SCDD") was formed pursuant to Chapter 298, F.S., to drain the site. [Pl.Ex. 6] **Officers of Mondex, Inc., or Atlantic were members of the SCDD board of supervisors and Atlantic's president was superintendent of the district.** [R 4136] The special act waived any requirement that members of the SCDD board live in Volusia County. (Perhaps the reason why Atlantic complains that it did not "receive" notice of the proposed Home Rule Charter. [Atl.Br. 10])

In 1971 J. J. Garcia prepared a drainage plan known as the Revised Plan of Reclamation [Pl.Ex. 12] for the SCDD which then

sought the necessary circuit court approval under Chapter 298, F.S. Meanwhile, a Volusia County Home Rule Charter had been approved in 1970 and went into effect in 1971. [Pl.Ex. 24] The charter purportedly eliminated all Chapter 298 drainage districts, including SCDD, in Volusia County and transferred their functions and responsibilities to the county.

FACTS CONCERNING THE STATE OF FLORIDA

The 1980 amended and supplemented complaint alleged **no** specific acts by the State of Florida but simply sought to attribute general liability to it for the "cumulative actions" of all other parties. (A 136, ¶21) This is still the theory of Atlantic's brief although the law of the case is that three of those parties, DBR, St. Johns and Volusia are not culpable.

The only acts conceivably attributable to the State of Florida, apart from those of other individual parties, are the creation of SCDD (Chapter 67-1022, Laws of Florida), and the legislature's approval of the Volusia County Home Rule Charter which transferred SCDD's functions to Volusia County.

Chapter 67-1022 did **not** exempt SCDD from compliance with state pollution control laws and regulations. See argument, <u>infra</u>, p.26. The legislature's approval of the charter caused no delay. It was Atlantic's or SCDD's **subsequent** relations with Volusia County that resulted in delay. See <u>Facts</u>, <u>infra</u>. However, the trial court

found no cause of action existed against Volusia. **That is the law of the case.**

FACTS CONCERNING VOLUSIA COUNTY

Atlantic's own evidence (the Volusia County Circuit Court file pertaining to SCDD's activities, Pl.Ex. 14) reveals that on August 16, 1971, the SCDD filed a petition in the Volusia County circuit court to amend its original reclamation plan with the Garcia Revised Plan of Reclamation. On August 28, 1971, Volusia County moved to intervene in the proceeding and asserted that the Volusia County Home Rule Charter (Chapter 70-966, Laws of Florida) [Pl.Ex. 24] abolished the SCDD. On August 29, 1971, Brevard County also filed its objection to the revised plan asserting that the plan would cause substantial environmental damage to Brevard County and that notice of the formation of the SCDD in Brevard County had never been properly given and that the SCDD did not exist in Brevard County.

In response, SCDD, whose directors were Atlantic's officers, strenuously contended it was **not** abolished by the home rule charter and that it continued to exist in both Volusia and Brevard Counties. The circuit court ruled in favor of Volusia County and Brevard County holding that the charter abolished SCDD, and, because of a lack of proper notice, SCDD had never existed in Brevard County. SCDD appealed the judgment to the First District Court of Appeal which affirmed the trial court in May, 1973. SCDD v. Brevard County, 277 So.2d 31 (Fla. 1st DCA 1973). SCDD then sought certiorari review by the Supreme Court which was denied on August 30, 1973. (281 So.2d 211)

Atlantic contended, and the trial court found, that Volusia County caused a delay from 1971 through 1973 by refusing to assume the responsibilities of SCDD under the home rule charter. [A 37, ¶76] This is untrue; the issue in their litigation was precisely the opposite. The file and the District Court opinion reveal that SCDD maintained that the county had no responsibilities because SCDD had **not** been abolished; Volusia insisted SCDD was abolished. [Pl.Ex. 14]

At trial Atlantic contended SCDD was forced to take this position in the litigation because Volusia refused to expend general revenue funds for the proposed SCDD drainage and road improvements. However, Atlantic's own evidence, the deposition of Alan Dakan, assistant county attorney in 1971-1973, reveals that both Atlantic and Volusia County desired to **amicably** work out an agreement concerning Volusia County's responsibilities under the Charter relating to CAE as a result of the apparent abolishment of SCDD. Although Dakan speaks of extreme positions which both the county and Atlantic **could** have taken, it is quite apparent that both desired an amicable resolution of their differences. (See deposition excerpts, A 140) There is **absolutely nothing** in that deposition and the attached documents which reveals that Volusia County acted improperly in any way. The county had a duty to inform the circuit court of the charter provisions respecting SCDD. Moreover, Atlantic's attorney stipulated that Volusia County acted **expeditiously and in good faith** in negotiating the agreement between the county and Atlantic establishing their respective responsibilities concerning

implementation of a proposed drainage plan. (See A 141) **Atlantic never sought an adjudication of the specific details of the obligations, particularly financial, that Volusia inherited from SCDD.** Volusia County and Atlantic entered a settlement agreement defining their respective responsibilities and agreeing on a drainage plan on December 4, 1973, barely three months after the Florida Supreme Court denied SCDD's petition for certiorari. Atlantic agreed to finance and Volusia agreed to contract for the construction of the improvements.

FACTS CONCERNING ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Atlantic continues to argue St. Johns contributed to the taking by asserting jurisdiction, increasing Atlantic's costs, and acquiring land to "control" CAE. (Atl.Br. 15, 16)

St. Johns did not acquire Turnbull Hammock (wetlands contiguous to CAE) until March, 1980, long after the September 1, 1977 "taking" date found by the trial court. [Dep. of Auth. 4/7/81 p.8] Auth., on page 9 of that deposition, testified St. Johns was not even approached by the Trust for Public Lands concerning the possible sale of Turnbull Hammock to St. Johns until January, 1978, five months **after** the taking date. There is **no** evidence that St. Johns even contemplated the acquisition before September 1, 1977. Moreover, the apparent reasons for acquisition are well within the purposes of Chapter 373, F.S. [Dep. of Auth 4/7/81 p.56]

St. Johns exercised permitting authority in Brevard County in 1977 and asserted in an August 9, 1977 letter to Atlantic that in reviewing a permit application for the 2000 acres of CAE in Brevard County under Chapter 16 I-4, F.A.C., it would review the "water resource implications of the entire project area" including that part in Volusia County. It did not, as Atlantic continues to argue, assert permitting authority over the part in Volusia County. [Pl.Ex. 60]

If St. Johns' assertion was improper, Atlantic had remedies under Chapter 120, F.S., it could have pursued, but, instead, chose to scrupulously avoid. It never applied to St. Johns for a permit. There is, therefore, no evidence from which to conclude St. Johns would have imposed additional requirements or otherwise thwarted Atlantic's plans. The trial court correctly found the 1979 complaint stated no cause of action against St. Johns. **St. Johns was not named a defendant in the subsequent 1980 complaint.**

FACTS CONCERNING DER

Atlantic's brief contends DER caused a delay in 1971-1973 by refusing to provide Atlantic technical assistance or to discuss or accept a permit application. [Atl.Br. 11, 12]

The facts are different. It was admitted by pre-trial stipulation that "DPC took the position that further review and processing of a permit application would be inappropriate under the then present circumstances [of the SCDD/Volusia County litigation]." [R 3295]. There is nothing of record which shows that Atlantic or SCDD

or Volusia County submitted an application which DPC refused to review. DPC did not know, anymore than anyone else did, who would be the appropriate and responsible party to submit an application.

The facts show DPC did attempt to provide guidance during the pendency of the litigation. Plaintiff's Exhibit 21, a letter by Atlantic's legal counsel, clearly states that the project was submitted to DPC "during the middle of 1972," and that following the settlement agreement with Volusia (December, 1973) Atlantic met with the Orlando DPC office for further discussions in March, 1974.

Atlantic alleged in its first complaint, **sworn to** by its president, Trella, that:

> 10. Plaintiff submitted an application for a permit to complete installation of its drainage network and dirt roads to the Pollution Control Board on or about September 10, 1974, a copy of which is attached hereto and made a part hereof as Exhibit "E". **This application for permit was submitted after two (2) years of negotiations with the Department of Pollution Control and modifications of the plan of reclamation and drainage were made at the suggestion of the Pollution Control staff.** [R 6]

If Atlantic's sworn statement is true, negotiations began with DPC no later than September, 1972.

The only evidence of DPC's refusal to discuss an application is the testimony of Atlantic's engineer, Garcia, who testified a certain DPC employee refused to discuss an application despite "weekly" requests. On cross examination, Garcia admitted he did not know what position the employee held; that he did not go to the

employee's supervisor or to the DPC executive director; nor did he complain to anyone else in DPC because "engineers speak only to engineers". [R 3978-3979] Garcia, who was so careful to **document** the position of other agencies at this time [Pl.Exs. 15-20b], admitted he did not submit any written request for meetings to DPC nor did he confirm any alleged position or "refusal" of DPC in writing. [R 3981] Neither Atlantic's president, nor its legal counsel, each of whom Garcia informed of the alleged impasse, spoke to anyone. [R 3978-3981]

The hearing officer, whom the trial court effectively overruled, considered these same matters at the administrative hearing and found in his recommended order:

> Around October, **1972, as a result of discussions with various county officials and the Department of Pollution Control,** petitioner decided that an environmental impact study would be beneficial and therefore retained the services of Brevard Engineering Company of Cape Canaveral, Florida, to make such an environmental assessment of Cape Atlantic Estates. (E.S.) [A 102]

and that:

> The evidence establishes that Petitioner's representatives had consulted with members of the Respondent's [DER's] regional office and headquarters for some **two years** prior to action upon the application. During this extended period, there were numerous meetings, telephone calls and consultations between the Petitioner's representatives and the agency at which various aspects of the project were discussed and suggestions made by agency representatives. [Pl.Ex. 38 at p.24; A 119] (E.S.)

In fact, according to Atlantic's **verified** first complaint, DPC became so involved in assisting Atlantic that Atlantic maintained DPC was **estopped** to deny the permit.

> 16. Plaintiff alleges that **the Department of Pollution Control, having made suggestions and recommendations to modify the proposed plan prior to the filing of the application for a permit,** which suggestions and recommendations were incorporated into the plan and exhibits submitted with the application is therefore estopped to deny issuance of a permit. [R 7]

It is simply not conceivable that the DPC caused any delay from 1971-1973 by refusing to process an application because Atlantic had no drainage plan the DPC could review until it jointly agreed on one with Volusia County in their **December 1973** settlement agreement. [Pl.Ex. 26] Thereafter, Atlantic did submit an application. The evidence is clear, however, that it was meeting and negotiating with DPC for at least two years before submitting its application.

Atlantic's brief contends that DPC employees acted on "non-statutory grounds" or for "private reasons" in issuing its preliminary denial of Atlantic's permit in November 1974. [Atl.Br. 13, 25]

The only evidence Atlantic introduced as to these "private reasons" is the testimony these employees gave at the Chapter 120 administrative hearing (evidence subject to review in the later appeal to the First District). A review of the testimony reveals the DPC employees denied the application because of the adverse impacts each foresaw on water quality. [See Def.Comp.Ex. 1, TR. ADM.

HEARING Vols. 10-14] Alex Senkevich was a civil engineer and head of the Orlando DPC office. [Vol. 10 p.7] Gene Medley was a biologist with a degree in Fresh Water Ecology. [Vol. 11 p.5] James Hulbert had a M.S. degree in water pollution biology. [Vol. 12 p.6] Thomas Hunnicutt had a M.S. degree in environmental engineering. [Vol. 14 p.5] All testified that they thought it proper to deny the application because of adverse water quality impacts. Moreover, it is important to note that the Hearing Officer later found in his recommended order that:

> It is impossible to state precisely what the impact of construction of the canal system, roads, ditches, retention ponds and control devices envisioned in the drainage plan will have on the water quality of the canals, Turnbull Hammock, Turnbull Creek, and the Indian River. [Rec. Order Pl.Ex. 38, p.15; A 110.]
>
> ...[T]he waters in the main canal may not always have met all of the regulatory criteria for Class III waters under Department Regulations...[Pl.Ex. 38, p.17; A 112.]
>
> ...Although it cannot be determined what the exact quality of the canal waters will be in full operation, there are certain projected consequences which reasonably may be considered likely to occur. [Pl.Ex. 38, p.17; A 112.]
>
> ...Although the Department was justified in anticipating long range consequences of construction and operation of the proposed facilities, there was insufficient evidence to determine that wholesale construction of homes or other development with attendant sources of pollution would ensue in the foreseeable future. [Pl.Ex. 38 p.27; A 122.]

The hearing officer himself was far from certain about the impacts of the drainage system on water quality. Furthermore, his

careful summary of each DPC employee's testimony reveals the many factors each one considered [A 107-110.] From this, it can scarcely be concluded that the DPC employees acted arbitrarily and capriciously, even assuming the trial court had authority to determine that question following Atlantic's appeal to the First District.

The DER secretary entered a final order denying the permit and rejected, **inter alia**, the hearing officer's finding that CAE would not be developed for the next ten years and his decision to limit consideration of projected water quality impacts to that period time. [A 87-90; Final Order, Pl.Ex. 39, pp.5-8] Atlantic then appealed the final order to the First District.

Prior to the First District's rendition of an opinion, DER and Atlantic entered into a Stipulation and Consent Agreement dated June 27, 1977. [A 61; Pl.Ex. 41.] Atlantic and DER submitted the Stipulation and Consent Agreement to the First District in a joint motion for approval representing to the court that:

> 1. **The Stipulation and Consent Agreement resolves or renders moot all issues formerly in dispute before this Court.** [Def.Comp.Ex. 2; A 59.]

The First District then entered an order providing in part:

> It appears from the duly executed agreement filed herein that the signatory parties have amicably adjusted and settled the controversy in this proceeding, subject to the terms and conditions of their agreement. **The agreement is in all respects a lawful and proper settlement of the matter, and it should be put into effect by an appropriate decree embracing its terms, conditions and provisions**; it is, therefore

> Ordered by this Court that **the order herein sought to be reviewed be, and the same is hereby, vacated; and this cause is remanded to the Department of Environmental Regulation** for action in conformity with, and for carrying into effect, the terms and conditions of the stipulation and consent agreement.... [Def.Comp.Ex. 2; A 57.] (E.S.)

Notwithstanding this settlement and the First District's approval of it as "in all respects lawful and proper", Atlantic returned to circuit court and attacked the **preliminary** DPC denial of 1974 (which had been followed by Ch. 120, F.S., proceedings), the final order of DER (vacated by the First District) and the very settlement agreement whose approval Atlantic had solicited from the First District (the agreement having turned into a DER "permit" that "imposed" unbearable costs).

FACTS AS TO THE COSTS OF ROAD AND DRAINAGE IMPROVEMENTS

Atlantic's brief attempts to blame the "State" and DER for the increased costs of the road and drainage improvements in CAE. Atlantic says the facts show the increased costs are attributable to: 1) inflation (for which it blames the State of Florida); and 2) an imposed DER permit (the argument wholly ignores the fact that the "permit" was a settlement agreement which the First District approved).

Atlantic's false premise aside, the record facts clearly show Atlantic ignored inflation and under estimated construction costs. Atlantic submitted the Harris Plan to DPC in September 1974 as part of its application. [See Pl.Ex. 28, 29] The Harris Plan projected a

total construction cost over a six year period -- **through 1980** -- of only $2,388,000. Atlantic's own cost expert McLouth testified that the Harris Plan estimates were off by at **least an order of magnitude** -- that is by at least half -- and further that the inflation rate for construction costs in 1971-1972 was 8% and in 1973 increased to 12% to 13% annually. [R 4334-4337] Even Atlantic's president agreed, admitting inflation "took off" in **1972** and that Atlantic's cost estimates may not have been valid. [R 4206] The **1974** Harris Plan, however, contained no inflation factor.

Pursuant to its 1973 Improvement Trust Agreement with DBR, Atlantic was obligated to submit revised construction cost estimates to DBR which, under the agreement, was withholding 10% of the proceeds from the contracts for deeds to insure completion of the promised improvements. This agreement was based on Atlantic's estimate that it would cost $1.9 million to complete the improvements. [Pl.Ex. 25] Despite inflation, Atlantic's president admitted Atlantic **never** submitted any revised construction cost estimates to DBR. [R 4204]. The record is clear: Atlantic never kept track of or attempted to provide for the effects of inflation.

The trial court found that because of such extras as "stabilized roads and the extra handling of materials" the actual cost to complete the construction as provided in the DER-Atlantic Consent Agreement in 1977 would have been $17 million. [A 29 ¶58] Throughout its judgment, the trial court refers to the fact that DER **imposed** these "extra costs."

The First District correctly noted the record does not support that finding. The DER-Atlantic settlement agreement [A 61] says nothing and requires nothing regarding "stabilized roads," **nor** does it require "special or extra handling of materials." It does provide for a water quality study and certain design modifications which Atlantic's president testified would not make any material difference in cost. [R 4204, 4205.] Atlantic's brief, conceding the agreement is silent on the "extra requirements," now attempts to argue they were necessary because of "reduced run-off and siltation criteria." (Atl.Br. 33) There are simply no such terms in the record, not in the settlement agreement and not in the testimony of Garcia, Atlantic's engineer. There are no record citations in support of this argument in Atlantic's brief. (Atl.Br. 33, 34) Even the trial court found the increased cost "was not the result of modifying the drainage system itself." [A 29 ¶58][5]

Even if the First District was wrong, the record is clear that DER did not "impose" any costs upon Atlantic. Atlantic **agreed** to the settlement agreement and sought and obtained the First

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[5] Atlantic now argues the State's engineer agreed with Atlantic's that the extra costs were attributable to "stabilized roads." That is **absolutely false.** The two engineers' cost estimates were not far apart, but the State's engineer never said any increase was the result of "stabilizing roads." He never mentioned the term. [Testimony of Smith R 4008 et seq.] As Atlantic's cost expert testified, Atlantic's estimates were off from the beginning by at least "an order of magnitude." [R 4334-4337] Atlantic wanted to represent to prospective purchasers that the improvements would cost only $110 per acre. [See Sample Contract "General Conditions," Pl.Ex. 8]

District's approval of it. Even if it could be said the consent agreement resulted in additional costs, Atlantic's **president and its engineer** both admitted they agreed to the settlement and did not bother to estimate its costs before they entered into it! [R 4204, 4205; 3949, 4951, 3998].

Furthermore, Atlantic **never** sought any relief from DER from the purported "road stabilization" and "special handling requirements". Instead, in 1979 it requested from DER an extension of time to perform under the settlement agreement. [Def.Ex. 3]

POINT I. THE LAW OF THE CASE IS THAT THE STATE OF FLORIDA IS NOT LIABLE FOR THE ACTIONS OF THE FORMER PARTIES ST. JOHNS, VOLUSIA COUNTY AND DBR; MOREOVER, THE STATE IS NOT LIABLE FOR THE ACTS OF THE LEGISLATURE SINCE THE ACTS DID NOT CAUSE OR CONTRIBUTE TO A TAKING.

A. The law of the case - Atlantic's purported cause of action against the State of Florida is predicated on vicarious liability since it asserts in the 1980 complaint that "the **cumulative actions of the State of Florida**, by and through its agencies, divisions, political subdivisions including the remaining defendants..." constituted a taking of its lands. [A 136] Although the action purports to be a constitutional rather than a tort claim, its theory is obviously one of vicarious liability. Vicarious liability was also the basis for the final judgment against the State of Florida even

though the trial court had entered previous rulings in favor of St. Johns, DBR and Volusia.[6]

As set out at length in the Statement of the Case, **ante**, the law of the case is that no cause of action was alleged against Volusia or St. Johns, and none proved at trial against DBR. Although Atlantic's brief argues extensively about their acts and attempts to characterize them as "state actions", they are no longer at issue.

Even were it otherwise, it is clear that neither St. Johns nor Volusia is a mere agent of the State in a "respondeat superior" relationship. St. Johns is neither an agency of the State, nor the alter ego of DER; rather, it is a special taxing district under Chapter 373, F.S., with powers of taxation, eminent domain, and the right to sue and be sued. Deseret Ranches v. St. Johns River Water Mgt. Dist., 406 So.2d 1132 (Fla. 5th DCA 1981), aff'd in part, rev'd in part, 421 So.2d 1067 (Fla. 1982). Volusia County has legislative powers, taxing powers, eminent domain powers, and the right to sue and be sued. Although counties are **political** subdivisions of the State, no case has ever held the State vicariously liable for the

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[6] "Actions and inactions of the Florida Legislature, the Department of Environmental Regulation (and its predecessor, the Department of Pollution Control), the Department of Business Regulation, the Division of Land Sales and Condominiums, Volusia County, and the St. Johns River Water Management District are to be considered actions of the State of Florida for purposes of the "taking" clauses of the Florida and United States Constitutions". (Trial Court Final Judgment A 44, ¶7)

acts of counties. A county is not "the state acting locally;" the State is not responsible for the acts and obligations of counties acting in local matters. Amos v. Mathews, 126 So. 308, 321 (1930). Nor has any case ever held that vicarious liability attached to the "principal" when the "agents" had done no legal wrong.

The issue of vicarious liability, and whether it was fair to make the State of Florida defend the actions of **former** parties, was argued at length below (State's Initial Brief, Pts. I, II,; Reply Brief Pts. I, II), as was the sufficiency of evidence introduced as to those actions. (Pt. V) It is obvious that the District Court did not view the vicarious liability theory with approval, but it did not need to consider it in view of the law of the case. The arguments made to the District Court will not be repeated here. If this Court deems the actions of Volusia, St. Johns and DBR still to be at issue, it is respectfully suggested that the Court order supplemental briefs submitted or review the briefs filed with the District Court.

B. The actions of the Legislature - The only acts Atlantic attributes to the State of Florida, apart from those of other named individual parties, are the creation of SCDD (Ch. 67-1022, Laws of Florida), and the approval of the Volusia County Home Rule Charter transferring SCDD's functions to Volusia.

Atlantic argues that the enactment of Ch. 67-1022 made it the "public policy of the State" to drain CAE and that state agencies

(presumably DER) and other defendants ignored this "state policy". This argument would have been appropriate, if anywhere, in Atlantic's appeal of the DER permit denial to the First District in 1976. Drainage is the purpose and policy of any act creating a Chapter 298 drainage district. That act did not exempt SCDD or Atlantic from compliance with state pollution control laws and regulations. Authorizing SCDD to undertake drainage within the framework of the law is hardly an act of taking on the part of the legislature nor an endorsement of any drainage design.[7]

The mere legislative approval of the home rule charter caused no delay or taking. Technically, it "abolished" SCDD only upon the county electorate's approval of the charter; but even then it provided for the county to assume SCDD's functions. If delay occurred, it can be attributed to Atlantic's decision to litigate over the charter, a matter not resolved until December 1973 when, after its appeals proved futile, Atlantic entered an agreement with Volusia. (See Facts, pp.11,12,13 **ante**) Neither the State nor the legislature should be held financially responsible for Atlantic's failure to prevail in that litigation.

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[7] All property is acquired and held subject to the exercise of the police power. Moviematic Industries, Corp. v. Bd. of County Comm'rs, 349 So.2d 667 (Fla. 3d DCA 1977); City of Miami Beach v. Texas Co., 194 So. 368, 376 (Fla. 1940); Sharrow v. Dania, 83 So.2d 274 (Fla. 1955); Dutton Phosphate Co. v. Preist, 65 So. 282 (Fla. 1914).

POINT II. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT PRIOR DISTRICT COURT REVIEW OF THE PERMIT DENIAL FORECLOSED RENEWAL OF THE INVERSE CONDEMNATION ACTION IN CIRCUIT COURT.

(Corresponding to Atlantic's Point I as rephrased)

A. The opinion below is fully consistent with Albrecht v. State, 444 So.2d 8 (Fla. 1984), and Key Haven Assoc. Enterprises, Inc. v. Board of Trustees of the Int. Improvement Fund, 427 So.2d 153 (Fla. 1982).

To avoid the obvious inference that it was responsible for delays incurred because of inadequacies in the original drainage plan and application, Atlantic, contrary to the dictates of Key Haven and Albrecht, attacked the propriety of the **vacated** DER denial in circuit court. Its manifest intent was to make DER responsible for the delay attendant to Atlantic's appeal to the First District.

Key Haven and Albrecht, however, clearly require resolution of the **propriety** of administrative action at the District Court level - unless it is conceded in circuit court. Atlantic's argument as to Albrecht and Key Haven, therefore, is grounded in **two** fundamentally erroneous premises: 1) that the settlement agreement approved by order of the First District (which Atlantic's brief refers to as DER's "grant of a permit") was administrative agency action that it could attack in circuit court; 2) that under the guise of a "constitutional claim" over which the circuit court purportedly retained jurisdiction, it could relitigate the merits of the very permit issues it had represented to the First District were "resolved or rendered moot" by the settlement.

In Key Haven, this Court agreed with the First District's Key Haven decision (400 So.2d 66) and held that a mere "constitutionally rephrased" attack on the propriety of a permit denial in circuit court is barred. The propriety of the denial **must** be decided in the district court:

> A suit in the circuit court requesting that court to declare an agency's action improper because of such a constitutional deficiency in the administrative process should not be allowed. 427 So.2d at 158
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> * * *
>
> ...direct review in the district court of the agency action may be eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings. We disagree with the holdings in Albrecht v. State, 407 So.2d 210 (Fla. 2d DCA 1981), and in Coulter insofar as they conflict with our conclusions in this case. Id. at 159
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> * * *
>
> We agree with the district court, and wish to emphasize, that if a party in Key Haven's position has appealed to the trustees and received an adverse ruling, the only way it can challenge the **propriety** of the permit denial, based on asserted error in the administrative decision-making process or on asserted constitutional infirmities in the administrative action, is on direct review of the agency action in the district court. Id.
>
> * * *
>
> We emphasize that, by electing the circuit court as the judicial forum, a party foregoes any opportunity to challenge the permit denial as improper and may not challenge the agency action as arbitrary or capricious or

> as failing to comply with the intent and purposes of the statute. Id. at 160.

In Albrecht, this Court reversed a decision of the Second District that prohibited a party from arguing an inverse condemnation action in circuit court that **conceded** the **propriety** of the DER permit denial:

> ...Direct review in the district court of the agency action **may** be eliminated and proceedings properly commenced in circuit court **if** the aggrieved party accepts the agency action as proper. Key Haven, 427 So.2d at 159. **The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.** In Key Haven we merely provided an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. **Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper.** 444 So.2d 12, 13 (E.S.)

Atlantic did **not** concede the propriety of DER final action upon its return to the circuit court in 1979. In fact, its entire case against DER was based on what it contended was agency permitting error, a matter it represented to the First District as fully resolved by the settlement agreement. Atlantic's so-called constitutional claim in circuit court was simply a collateral attack on

the merits of the **vacated** DER final order and the settlement agreement the First District approved in 1977.

Although the trial court said in its final judgment that it declined to review the DER final order in terms of competent substantial evidence [A 27, ¶51], it proceeded to do exactly that. Specifically, the trial court purported to find the permit had not been justifiably denied in order to prevent environmental harm [A 36, ¶74]; that it was not established that the granting of the permit would materially and adversely affect the public health, safety, welfare and morals [A 37, ¶74]; and that DER overruled the hearing officer's order, **"clearly ignoring substantial competent evidence which supported it."** [A 37, ¶75] It also found that the settlement caused an increase in construction costs of at least $11 million and said DER "imposed" this cost. (Final Judgment ¶s 58, 63) (A 54, 56).[8]

The First District's opinion holds that Atlantic made a Key Haven type election:

> By proceeding in circuit court on a taking claim, after Atlantic had sought review of DER's denial of the permit in this court and

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[8] The court then attempted to deny what it had just done: "This Court may not, and will not review the validity of the permit denial, but the general background of the denial of the permit, the delay, **the grounds therefor**, and the subsequent granting thereof are relevant in determining. . .whether government action has. . .been **arbitrary and capricious.**" [A 48, ¶16] The judgment does not say how review of the validity of the denial differs from review of the "grounds therefor," or how an invalid denial differs from one that is "arbitrary and capricious."

> after it had entered into a stipulation and consent agreement with DER, which was approved by this court, Atlantic effectively sought to do that which is impermissible under Key Haven. (A 147)

In other words, fully consistent with Albrecht and Key Haven, Atlantic could not litigate the propriety of DER permitting actions in circuit court. The district court's sentence preceeding the above quotation, that "Atlantic's taking claim regarding the lots in CAE could have and should have been raised in the 1976 action in this court" may not be technically well phrased, but in substance it is entirely correct. Atlantic's taking claim rested entirely on the alleged **impropriety** of DER action. The First District is saying that should have been determined in the 1976 appeal. However, Atlantic chose to settle that issue.

The logic of the First District's reasoning is clear and perfectly consistent with Albrecht and Key Haven. Had Atlantic obtained a decision in 1977 that the denial was **valid**, it could have brought its taking case in circuit court acknowledging the validity of the denial. On the other hand, had Atlantic obtained a decision in the First District in 1977 that the permit denial was **invalid**, it would have obtained its permit then. This point is critical because even the trial court found Atlantic could have afforded the road and drainage system in 1977. [FJ A-29 §58, A-31 §13] Atlantic's brief acknowledges this. [Atl.Br. p.18] Had the District Court ruled the denial invalid, **there would have been no taking claim.** That is no doubt why this Court said in Albrecht:

> **The point is the propriety of the agency action must be finally determined before a claim for inverse condemnation exists.** 444 So.2d 12

Atlantic has asserted its circuit court taking claim should be allowed because it could not have brought to the attention of the district court events following the DER permit denial in 1976. The contention is wholly without basis in fact. The record is absolutely clear that the only agency actions following the permit denial up to the alleged taking date were: 1) DER's entry into the settlement approved on **June 29, 1977,** only two months before the purported "taking" date of September 1, 1977. DER did absolutely nothing with respect to Atlantic after June 29, 1977; 2), St. Johns' assertion of permitting jurisdiction over the portion of CAE in Brevard County in August 1977. Atlantic never submitted on application or even its DER settlement to St. Johns for review. St. Johns' actions, however, are no longer at issue.

B. Other grounds sustain the District Court's rejection of the trial court's exercise of appellate authority.

It was contended below, and is reargued with emphasis here, that the trial court had no authority or jurisdiction to review the propriety of the DER permitting actions. (State Br. Pts 3, 4; Reply Br. Pts 3, 4) In doing so, it arrogated to itself the very function ascribed to appellate courts. Moreover, the trial court's review of the settlement agreement approved by the First District and its characterization of it as a DER permit that "took" Atlantic's

property by "imposing" extra costs is not only an affront to common logic but an unprecedented usurpation of District Court authority.

No matter what the circuit court thought of the District Court approved settlement agreement, it clearly ignored the limits of its authority in reviewing the settlement:

> An inferior court therefore can have no authority to correct mistakes made by the appellate court in its conclusions of fact or its interpretation of the law. Otherwise, litigation would be interminable, the superior court would be subordinated to the inferior, and the judgments of the superior could be enforced only when they coincided with the judgments of the inferior. Thus, when the lower court, purportedly for errors committed by the appellate court, attempts to open up for review a decree entered pursuant to the appellate court's mandate, and also attempts to exercise jurisdiction over other features of the decree in disregard of the latter court's decision and without leave first granted by the appellate court, the lower court unwarrantedly interferes with and disregards the judgment of the appellate court. Fla. Jur.2d, Appellate Review, §408.

A circuit court is no more at liberty to depart from decrees of the district court than district courts are to depart from Supreme Court decisions. Langley v. New Deal Cab Co., 138 So.2d 789 (Fla. 1st DCA 1962), cert. den., 155 So.2d 550; Reaves v. Rozzo, Inc., 286 So.2d 221 (Fla. 4th DCA 1973).

Estoppel also bars Atlantic's attempt to settle permitting issues in the District Court and then raise those same issues and attack the settlement in circuit court:

> To sustain the present petition would allow petitioner to allege one state of facts for one purpose and in the same suit deny such

> allegations and set up a new and different state of facts wholly inconsistent therewith for another purpose.
>
> . . .where a party to a suit has assumed an attitude on a former appeal, and has carried his case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or on another appeal, any other or inconsistent position toward the same parties and subject matter. . . .
>
> The foregoing is the doctrine of estoppel against inconsistent positions in judicial proceedings, not the doctrine of res adjudicata. Palm Beach Company v. Palm Beach Estates, 110 Fla. 77, 148 So. 544 (1933)

Atlantic placed squarely in issue before the First District in 1976-77 the propriety of the DER permit denial. [Def.Comp.Ex. 2] It agreed to a settlement it represented to the court "resolved or rendered moot all issues before the court" and obtained a **decree of approval** from the court. It could not later relitigate the permitting issues or question the settlement in circuit court. See also, Lovett v. City of Jacksonville Beach, 187 So.2d 96, 101 (Fla. 1st DCA 1966); "where a party recovering a judgment or decree accepts its benefits [as Atlantic accepted the promise of construction approval], he is estopped to seek reversal thereof by appeal. **His conduct amount amounts to a release of errors.**" Cannon Land & Rock v. Maule Industries, 304 So.2d 636 (Fla. 3d DCA 1967): a litigant may not accept the benefit of a decree and then attack it.

Even if the trial court had the authority to review the **vacated** DER final order and other permitting matters, it did not properly do so. In evidence were only 5 out of a total of 22

volumes of the testimony taken at the administrative hearing. (The 5 volumes covered the testimony of **some** DER witnesses.) The trial court thus lacked a proper evidentiary basis for reviewing the final order even if it had that authority. It simply could not have determined that DER "ignored substantial competent evidence" if the 5 volumes it supposedly reviewed contained none of Atlantic's testimony in favor of the permit.

The trial court even attempted to extend its appellate powers to the point of reviewing DER's preliminary order of denial (which was followed by a Chapter 120 administrative hearing) and the personal reasons and motives of the DER staff. The trial court found that "the denial of the permit was not on statutory grounds, but was done for individual reasons of the four state employees charged with the decision". [FJ A25, ¶50] This idle and unprecedented inquiry into personal motivations and reasons is a grossly improper standard of review. The **correctness** of an agency order is not based on motive, but on **evidence**. Direct Oil Corp. v. Brown, 178 So.2d 13 (Fla. 1965); see also, Manatee County v. Estech, 402 So.2d 75 (Fla. 2d DCA 1981), holding that the motive for a permit denial is not a relevant consideration in a taking claim. Moreover, there is not one case holding that the preliminary, free-form agency action is subject to judicial review when it is followed by full blown administrative proceedings and a final agency order.

All of these maladroit attempts of the trial court to act as an appellate body demand reversal of the final judgment.

C. Volusia County v. Dept. of Business Regulation, 325 So.2d 454 (Fla. 1st DCA 1976), did not establish law of the case.

Atlantic contends the above decision approved its subsequent (1980) inverse condemnation claim. In its entirety the decision states:

> Upon considering the briefs, the record, and oral argument, we find no reversible error.
>
> Accordingly, the interlocutory appeal is dismissed

This decision enunciates no principle or rule of decision, relates no facts or issues, and thus establishes no law of the case.

By way of background, the circuit court order appealed had merely denied motions to dismiss the original complaint and directed Atlantic to pursue its administrative remedies before DER. The complaint alleged a taking based on DER's preliminary denial of a drainage permit. The district court's ruling, even if construed to recognize a taking claim in circuit court, could logically apply only to a case in which the permit was **correctly** denied under law and regulations. Hence, Atlantic's subsequent appeal to the District Court of the DER final order of denial for adjudication of that issue.

The interlocutory ruling certainly did not establish any law of the case as to Atlantic's 1980 amended and supplemented complaint which pleaded an entirely different taking theory. When the factual and legal issues change, so may the law of the case. Saudi Arabian Airlines v. Dunn, 438 So.2d 116, 123 (Fla. 1st DCA 1983); Lincoln

Fire Ins. v. Lillebeck, 130 Fla. 635, 178 So. 394 (Fla. 1938); Walker v. Atl. Coastline R.R. Co., 121 So.2d 713 (Fla. 1st DCA 1960). Neither the trial nor district court ruling held the circuit court had jurisdiction to review the **propriety** of the DER permit denial. Nor can the interlocutory ruling be read as conceding the circuit court authority to review the very settlement the First District later approved in 1977. Atlantic's contention that the court approved settlement is agency permitting action it could solicit and then attack is the height of intellectual dishonesty. By attempting to characterize its 1980 action as a "constitutional claim" that could not be raised in the administrative process, Atlantic deliberately obscures the fact that what it really sought in circuit court in 1980 was a readjudication of the merits of the permit denial and invalidation of the settlement agreement it voluntarily entered.

D. The First District's decision does not violate principles of res judicata, estoppel by judgment or election of remedies.

Atlantic contends the District Court misapplied principles of res judicata, estoppel by judgment and election of remedies. It argues the first two do not preclude its renewed circuit court action because inverse condemnation questions could not be adjudicated in the prior administrative action or appeal. It also argues that election of remedies does not apply because its decision to accept the settlement (and construction permit) was not an alternative to pursuit of its taking claim but a condition precedent to it.

The opinion below did not discuss or analyze these doctrines. In any event, the argument is without merit because Atlantic's inverse condemnation claim against DER is based on permitting issues it could have had adjudicated in the District Court. (Atlantic had to establish that DER's permitting denial was improper because otherwise it had only itself to blame for the delay culminating in the settlement.) This Court ruled in Key Haven and Albrecht, however, that the propriety of the permit denial must be determined in the district court before an inverse condemnation claim can arise (unless the propriety is conceded, and Atlantic never did that).

The second contention is without merit because the settlement was Atlantic's election to **agree to** a modified and conditioned construction permit rather than to pursue the inconsistent alternative of inverse condemnation - i.e., compensation in lieu of a permit. It is ludicrous to contend these are not inconsistent and that the settlement was a condition precedent to the inverse condemnation claim. The condition precedent, as this Court so clearly stated in Albrecht, is a determination of the propriety **vel non** of the permit denial. **That** Atlantic elected to forego.

Atlantic and Simon argue that res judicata, election of remedies and estoppel by judgment theories do not apply to the Simon class because they were not parties to the "previous permitting and appellate proceedings." [Atl.Br. 41]

This contention is wholly without merit. The class had no right to litigate the DER permit denial in circuit court six years

or more after the conclusion of administrative proceedings on an application the class did not submit to DER. The fact is the class failed to timely intervene in those proceedings. If the class did not want to be bound by rulings and proceedings on the application Atlantic submitted, it should have submitted an application of its own. In fact, the class never submitted a permit application to DPC or DER.

Furthermore, the Simon class was an intervening class in circuit court. The class took the suit as it found it in 1982, and as an intervenor it was bound by the record. Coast Cities Coaches, Inc. v. Dade County, 178 So.2d 703 (Fla. 1965); United States v. State, 129 So.2d 890 (Fla. 3d DCA 1965). They had no right to raise permitting issues previously resolved by the settlement agreement that arose out of the same suit. They were bound by Atlantic's election and that agreement. The trial court never ruled otherwise.

POINT III. THE DISTRICT COURT DID NOT REWEIGH THE EVIDENCE BUT PROPERLY FOUND IT INSUFFICIENT.

(Corresponding to Atlantic's Point II)

The contention that the district court wrongly "reweighed" the evidence is patent nonsense. It is axiomatic that an appellate court may review the sufficiency of the evidence, and if the weight and sufficiency are contrary to the trial court's findings of fact, the appellate court has a duty to reverse. Heath v. First Nat'l Bank in Milton, 213 So.2d 883 (Fla. 1st DCA 1968). And it may also reverse where the trial court clearly misinterprets the probative

force of the evidence. Drumright v. Dana, 190 S. 54 (Fla. 1939); Huwer v. Huwer, 175 So.2d 243 (Fla. 2d DCA 1965).

As argued ante, the trial court had absolutely no authority to review the district court settlement, and thus the argument that it "imposed" any additional or even onerous costs is **immaterial.** Before Atlantic brought a $150 million dollar taking claim against the State it had the obligation at the very least to seek relief from such costs. **It never did that.**

Moreover, Atlantic now attempts to ascribe those "extra" costs to "reduced runoff and silting" requirements. See Facts, ante at p.22. These requirements are no more evident in the settlement agreement than are "stabilized roads." Garcia, Atlantic's engineer, said nothing about "runoff and silting" requirements. The district court was absolutely correct in refusing to accept the misstatements of fact Atlantic wrote in the final judgment.

Other "factual" issues raised by Atlantic on pp.44,45 of its brief are easily rebutted.

1. The acts of Land Sales are **not** at issue. The drainage and road improvements were requirements only because Atlantic promised them in its contracts.

2-6. The "State" (Land Sales) does not approve lot sales, only registration of land for sale. Expenditures for improvements prior to changes in the law may confer vested rights, but the trial court ruled against Atlantic's vested rights claim and that ruling was not appealed. [R 672] Atlantic and the purchasers took the risk that the drainage system, involving significant change to CAE and discharge of its tremendous drainage **offsite**, might not be approved.

7. The transfer of SCDD functions to Volusia did not create delay. Atlantic's denial of that transfer and decision to litigate with Volusia did. Volusia's acts are no longer at issue. See Facts, ante, p.12.

8-11. See Facts ante, at p.16 et seq. To the contrary, the permit (settlement agreement) proves there was significant uncertainty about "public harm." It had extensive monitoring requirements and provisions addressing water quality violations. [A 68-71] An operation permit would issue **only** if no water quality violations remained uncured. [A 71]

12. Atlantic caused the delay by litigating with Volusia. See Facts, ante, p.12. As the District Court found, Atlantic did not submit a permit application to DER until 1974, although it could have done so earlier had it so desired.

13. The trial court denied Atlantic's vested rights claim. See p.4, ante. The claim was not renewed in the 1980 complaint.

14. The only agency whose acts are at issue in this appeal is DER.

15. Atlantic may install road and drainage improvements pursuant to the District Court approved settlement.

The record in this case simply does not support Atlantic's distorted view of the facts.

POINT IV. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD THE FACTS OF THIS CASE DO NOT ESTABLISH A TAKING.

(Corresponding to Atlantic's Point III as rephrased)

A. Atlantic had no taking claim after the 1977 settlement.

In settlement of the 1977 appeal, Atlantic obtained an agreement that authorized it to construct the road and drainage system without which, it asserts, it has no use of its property. Clearly, the State and DER have not denied Atlantic's proposed use of CAE. Atlantic's purported taking claim therefore rests solely on the effects of alleged delay and increased costs for which it blames everyone but itself. In addressing this issue, it must be borne in mind that the law of the case is that the actions of St. Johns,

Volusia and DBR (Land Sales) cannot be the basis for Atlantic's taking claim.

What remain for analysis in the context of Atlantic's claim are:

1. The $11 million in "extra costs" allegedly "imposed" in the 1977 settlement agreement.

2. DER's allegedly defective rulings on the permit application in 1975-1976.

3. DER's alleged failure to provide meetings in 1971-1973.

Circuit court review of the settlement agreement approved by decree of the First District was foreclosed for the reasons stated in Point II, ante, regardless of whether it necessitated additional expenditures. The First District's finding as "simply not tenable" Atlantic's position that "the final **executive** action was the grant of a DER permit in 1977" is eminently correct. [A 148]

Even considering the argument, Atlantic has yet to show where either "road stabilization" or "reduced runoff and siltation requirements" are to be found in the agreement - or anywhere else. Moreover, in that the trial court specifically found that Atlantic could have afforded the improvements in 1977 had not DER increased their complexity in the settlement agreement (A 31 §63), an explanation is in order as to 1) why Atlantic entered the settlement agreement; 2) why it did so without estimating the costs; 3) why it never sought relief from those costs; and 4) why the State should pay for Atlantic's carelessness. No explanation has ever been offered.

Circuit court review of the second question is also foreclosed for the reasons expressed in Point II. But even were the issue reviewable by the circuit court, examination of Def.Comp.Ex. 1 (administrative hearing testimony) reveals the DER employees based their decisions on anticipated water quality effects. As to the final vacated DER order which the circuit court found invalid, missing from evidence were 17 out of 22 volumes of administrative testimony underlying this order as well as applicable DER regulations! Clearly, the trial court's rulings as to DER and the propriety of the final order could not have been based on sufficient evidence.[9]

The contention that DER denied Atlantic meetings in 1971-1973 is contradicted by Atlantic's sworn complaint and by the hearing officer's findings. See Facts, ante, pp.15,16,17. It also ignores the fact that no drainage plan even existed for DER to review until Atlantic and Volusia agreed upon one in their **December 1973** agreement. (Pl.Ex. 26) Atlantic filed its application the following September. Atlantic's version of these facts as revised for trial and offered through Garcia fails to explain why Garcia - the company engineer - was put off by a DER subaltern whose position he

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[9] At trial, Atlantic moved into evidence **excerpts** from five volumes of the administrative testimony of four DER employees to prove DER's denial had been "arbitrary and capricious." The State objected to circuit court review of administrative action. The court denied the objection. The State then moved for admission of the entire 22 volumes of the administrative transcript under §90.108, F.S., which was without prejudice to its objection. The court admitted only the complete testimony of the individuals as to whom Atlantic had introduced excerpts and later purported to find DER **ignored** "substantial competent evidence." See pp.29,30,34 ante.

admitted not knowing; why Garcia never documented either his requests to DER or DER's reputed denials; or why neither Garcia, Atlantic's president nor its lawyer submitted requests to higher DER authority. At most, Garcia's testimony may indicate one person at DER was uncooperative. It certainly does not establish that the employee's **undocumented** lack of cooperation was an agency action of any kind, much less one for which the State should pay $150 million. A taking claim must sustain a heavy burden of proof. Spears v. Berle, 422 N.Y.S.2d 636, 397 N.E.2d 1304 (N.Y. 1979). Atlantic's self-serving evidence based solely on undocumented, oral occurrences did not meet the requisite burden.

Atlantic opens its taking argument in Point III by misapplying numerous cases. In Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), the state imposed a physical restriction on the mining of coal. Atlantic, in contrast, obtained authority to construct its road and drainage system. Atlantic faces no property restriction. Similarly, Sixth Camden Corp. v. Township of Evesham, 420 F.Supp. 709 (D. N.J. 1976), was a civil rights action for damages. At issue was a past zoning action of the township that was allegedly overly restrictive. In the reported decision, the court did not find a taking but only denied motions to dismiss. In this case no zoning or other property restriction is at issue. Arastra Limited v. City of Palo Alto, 401 F.Supp. 962 (N.D. Calif. 1975), also cited by Atlantic, is another zoning case in which the zoning classification allowed only economically infeasible uses. Zoning is not at issue here.

Continuing in this vein, Atlantic cites Benenson v. United States, 212 Ct.Cl. 375, 548 F.2d 939 (1977), for a taking based on "a series of delays and inconsistent government actions." In Benenson, the taking was found simply because the federal government forbade demolition of the historic Willard Hotel, even though it could no longer be economically operated for any purpose. In contrast, Atlantic obtained DER's agreement to its desired improvements.

Atlantic also relies on the dissenting opinion in San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981), saying Justice Rehnquist's statement that he would agree with "much of" the dissent makes it a majority view. Atlantic does not mention that Justice Stewart, one of the **dissenters**, has since left the Court, and it is speculation at best whether that dissent will become law. Moreover, the question the dissent addresses--whether overly restrictive zoning is a Fifth Amendment taking requiring compensation, or a police power action subject only to invalidation on due process grounds--is not the issue here. Atlantic's complaint is that the settlement agreement it **voluntarily entered** is too expensive. Certainly it is not too much to ask that Atlantic seek relief from those expenses before presenting a $150 million inverse condemnation claim in circuit court.

B. Atlantic has not been deprived of any property right. Its interest in the drainage system was a subjective expectation at best.

Where a property restriction is at issue, the property owner must show that it has the effect of depriving him of all reasonable

use of his property. Forde v. City of Miami Beach, 1 So.2d 642 (Fla. 1941). There is no restriction at issue here. Hence, the landowners are obligated to demonstrate a physical invasion or entry upon their lands amounting to informal appropriation substantially ousting the owner and depriving him of all beneficial enjoyment. Kirkpatrick v. City of Jacksonville, 312 So.2d 487 (Fla. 1st DCA 1975); Dept. of Transportation v. Burnette, 384 So.2d 916 (Fla. 1st DCA 1980). The State has not entered the CAE lands or forbidden the proposed drainage system. Either Atlantic or the lot owners may undertake it. The lot owners, who have always been financially obligated under their contracts to pay for the system, **did not show they were unable to do so.** Thus, to the extent the costs of the system have increased, Atlantic and the lot owners at best have suffered only damages which the First District held in Kirkpatrick, supra, are the mere consequences of a legal act and come about as the result of no direct physical invasion. As such, they are not compensable.[10]

Even if the equivalent of a physical invasion is not required, the owners must demonstrate the destruction of a private property **right** by governmental action, Village of Tequesta v. Jupiter Inlet,

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[10] The cost of the system in 1977 - $17 million - spread over 14,000 acres, comes to only $1412 per acre. It is absolutely clear that such damages are not recoverable. See, Village of Tequesta v. Jupiter Inlet, 371 So.2d 663 (Fla. 1979); Northcutt v. State Road Dept., 209 So.2d 710 (Fla. 3d DCA 1968); Jamesson v. Downtown Dev. Auth., 322 So.2d 510 (Fla. 1975); Omnia v. United States, 261 U.S. 502 (1923); Dept. of Transportation v. Burnette, supra.

371 So.2d 663 (Fla. 1979), or the appropriation of some right. Florida East Coast Properties, Inc. v. Metro Dade County, 572 F.2d 1108 (5th Cir. 1978). No such destruction or interference exists. As far as the State and its agencies are concerned, Atlantic and the owners may undertake the drainage plan in accordance with the consent agreement they **voluntarily** entered, and have whatever use of the property, if any, that will provide them.

Atlantic's and the class' interest in the drainage system, apart from the settlement agreement, never amounted to a property right. Although they expected to discharge the drainage from 14,000 acres of CAE onto property they did not own, this mere unilateral expectation is not a property interest entitled to protection. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). As stated in Webb

> ...'property interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....' Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection.

The CAE owners never had a constitutional right to any sort of drainage system they proposed. Nor did they ever have an unqualified right to discharge into offsite waters of the State thus making their water quality and quantity problems those of someone else. At most they had only a **subjective** expectation they could implement their drainage plan. This Court held in Graham v. Estuary

Properties, Inc., 399 So.2d 1374, 1383 (Fla. 1981), such an expectation is in no way tantamount to a right.

C. The Estuary Properties Factors Applied.

Atlantic's reliance on the six factors discussed in Estuary Properties is strained and misplaced. Those factors are set out as possible considerations, not as a "settled formula" for finding a taking. In Estuary Properties they were applied to the review of a regulation; there was no regulation or regulatory action properly before the trial court for review.

Applying the six factors does not lead to a taking finding.

1. **Physical invasion** - there has been no invasion, nor has the State **eliminated** access as the trial court found. [A 35 ¶71] Atlantic and the class have the **same** access they have always had. Atlantic may construct roads in accordance with its agreement or it could request modification of that agreement.

2. **Diminution in value caused by the regulation** - again there is no regulation aside from the settlement. The value of the property without improvements, even if nominal, is immaterial since the improvements are permitted. Moreover, Atlantic paid only $500 per acre for CAE purchasing the land for $8 million and selling it for over $30 million. Even if Atlantic's land is worth $200 per acre now (which does not take into account the substantial income Atlantic received on these same lots under defaulted contracts) the

decrease is not a taking.[11] It is erroneous to measure the decline from a speculative value based on hypothetical improvements which never came to fruition and to which the lot owners had no established right. Dept. of Transportation v. Burnette, 384 So.2d 916, 920 (Fla. 1st DCA 1980).

Atlantic's president testified he considered the property offering nothing more than a speculative investment, like stock [R 4173], and declined to say the property was suitable for development. [R 4195, 4196] Loss of speculative future profits simply does not support a taking claim. United States v. Grand River Dam Auth., 363 U.S. 229, 80 S.Ct. 1134, 4 L.Ed.2d 1186 (1960); Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1963).

3. **Creation of public benefit or prevention of harm** - DER's initial denial of a permit based on water quality considerations was intended to prevent the harm of pollution. The denial furthered no state enterprise. That a benefit may be conferred when a harm is prevented is not the test for a "taking." Graham v. Estuary Properties, Inc., supra.

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[11] See, Euclid v. Ambler Realty, 272 U.S. 365 (1926), 75% reduction; Hadacheck v. Sebastian, 239 U.S. 394 (1915), 87.5% reduction; Turnpike Realty Co. v. Town of Dedham, 248 N.E.2d 891 (Mass. 1972), 88% reduction; Haas & Co. v. City of San Francisco, 605 F.2d 1117 (9th Cir. 1979), property value reduced from $2,000,000 to $100,000. At $200 per lot, Atlantic's holdings are worth over $320,000.

4. **Promotion of public health, safety and welfare** - as the Supreme Court acknowledged in Estuary Properties, control of pollution is a legitimate concern of the police power. However, whether or not the permit denial was a proper exercise of the police power was for the district court to decide, not the circuit court. The entry into the settlement agreement did not prove the drainage system was consistent with the public health, safety and welfare, or applicable pollution regulations. The very terms and conditions of the agreement belie that conclusion.

5. **Arbitrary and capricious application of regulation** - again, the consent agreement is not a regulation. Review of the preliminary DER denials and the vacated final order was not within the purview of the trial court, but, even if it was, there is no substantial evidence to show an arbitrary and capricious denial.

6. **Curtailment of investment backed expectations** - Atlantic claims it has lost profits because of its inability to sell the remaining lots at more than nominal value; the class' expectation was to have more valuable property than it has. Lost profits are intangibles which do not constitute property in the constitutional sense. Jamesson v. Downtown Dev. Auth., 322 So.2d 510 (Fla. 1975). Even as an "investment expectation" the United States Supreme Court has accorded "lost profits" but little weight. In Andrus v. Allard, 444 U.S. 51 (1979), the Supreme Court stated

> ...loss of future profits - **unaccompanied by any physical property restriction** - provides a slender reed upon which to rest a takings claim. Prediction of profitability is

> essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. 444 U.S. at 66. [Emphasis added]

As was the case in Andrus, no physical property restriction has been imposed on CAE. Thus, Atlantic's reliance on Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), is wholly misplaced. As the Supreme Court pointedly noted in Andrus, a restriction existed in Pennsylvania Coal preventing mining of coal. See Andrus, supra, 444 U.S. at 66, fn. 22.

Atlantic may not divide up its investment in CAE to demonstrate a loss of profit or failure of its investment expectation. As the Supreme Court stated in Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978):

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights **in the parcel as a whole**...Id. at 438 U.S. 130. (Emphasis added)

The State is not the guarantor of profits and success for the land sales industry. Atlantic has taken in over $30 million on an $8 million investment and has had every opportunity to realize a profit.

Atlantic finds itself in the same situation presented in Deltona Corp. v. United States, 657 F.2d 1184 (Ct.Cl. 1981), cert. den. 102 S.Ct. 1712. In 1964 Deltona purchased 10,000 acres around Marco Island for development. Because of changes to the Corps of Engineers' regulations, Deltona was unable to obtain fill permits for two sections of the development which comprised 20% of the total acreage and 33% of the developable lots. Deltona had entered sales contracts for over 90% of the lots in those two sections. Most of the land could not be used without the Corps' permits. The Court of Claims held that Deltona's investment-backed expectation that it could fill was subject to change in the Corps' permitting regulations. Deltona never had any assurance the permits would issue, only an expectation. Moreover, Deltona alone was to blame for its plight because, just as Atlantic has done, it rushed into land sales contracts before undertaking improvements. Citing Penn Central, supra, the court held Deltona could not divide up the total acreage for purposes of arguing a taking. Deltona's claim amounted only to an example of some diminution in value, not a taking. The same analysis applied to this case makes it clear Atlantic has no claim. It has sold the vast majority of lots, making $30 million on an $8 million investment. Atlantic never intended to develop any of its lots, as did Deltona. Moreover, Atlantic, unlike Deltona, has its permit equivalent.

That Atlantic's remaining lots are distributed in checkerboard fashion and are thus difficult to sell is not a result of state action. Atlantic acquired land with extremely poor drainage

characteristics, failed to develop a sensible drainage plan by setting aside the wetter and lower lying areas, and locked itself into a grid system the sole purpose of which was to facilitate sale of every square inch of CAE.[12]

The expectations of the class were just as subjective as those of Atlantic. If the class members have no use of their lots without the improvements their plight is attributable to 1) their buying swampland in the configuration proposed by Atlantic before improvements were in; and 2) Atlantic's curious failure to estimate the costs of the settlement agreement (assuming for argument the agreement requires $11 million for purposes not expressed therein).

The purchasers, moreover, have never established the nature of their investment expectation. They purchased property, much of it swampland, sight unseen following a telephone solicitation. The purchase was, as Atlantic's president said, a speculative

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[12] Atlantic never had, as its brief would suggest, an unqualified right to the proposed drainage improvements, a fact underscored by its entry into the settlement agreement with DER. In Estuary Properties, the developer was not allowed to claim a taking because of the denial of the interceptor waterway since, as the Court held, the developer had no absolute right to change the character of the land. No such right has been established in this case. Loss of value based on changing the character of land does not dictate a taking finding. Just v. Marinette Co., 201 N.W.2d 761, 771 (Wis. 1972). The inherently faulty nature of Atlantic's plan was recognized by the Fifth District, if not by the trial court, as a "terrible development design." Atlantic Int. Inv. Corp. v. Turner, 383 So.2d 919, 921 (Fla. 5th DCA 1980). See also, Atlantic Int. Inv. Corp. v. Turner, 381 So.2d 719, 725 (Fla. 1st DCA 1980), wherein Judge Larry Smith recognized the difficulties presented by the grid system and the unsuitability of the application Atlantic made to DER.

investment. [R 4193] It beggars belief that such action could give rise to any **reasonable** expectation. Atlantic's own expert appraiser refused to characterize their actions as informed. [R 4567] Atlantic's purchase offers never stated what, if anything, the property could be used for although they specifically disclaimed CAE as a building or homesite offering. [Pl.Ex. 8] The purchasers' expectations were not established at trial nor did any of them show the property was developable even with drainage. Atlantic **declined** to make that claim. [R 4195, 4196] Their expectations, whatever their nature, were entirely subjective. Without demonstrating a use or a feasible development proposal, the taking claim must fail. Town of Indiatlantic v. McNulty, 400 So.2d 1227 (Fla. 5th DCA 1981); see also, Grand River Dam, supra; Omnia Commercial, supra.

D. Delay has not caused a taking under the facts of this case.

As an alternative to the six factors discussed in Estuary Properties, Atlantic argues that, whether the defendants acted properly or not, the overall delay rendered the project economically infeasible, and therefore it is constitutionally entitled to a government bailout. This theory ignores both Atlantic's patent contributions to the delay and the fact that if DER properly denied the permit in 1976 Atlantic has **only** itself to blame for the delay. The theory also fails to account for Atlantic's own failure to timely estimate the purported increased costs of the settlement.

As previously discussed, Atlantic caused the initial delay from 1971 - 1973 by its ill-advised decision to litigate with Volusia County. Volusia and Atlantic agreed upon a revised drainage plan for submission to DER in December 1973. Atlantic's attorney stipulated Volusia acted in good faith and expeditiously in their negotiations. [A 141] DER received the application in September 1974 and issued a timely preliminary decision within 60 days.

As to Atlantic's contention that DER refused to accept an application during the litigation period, it is to be noted that the First District properly observed Atlantic submitted no application to DER during that time. The opinion also correctly found that DER's rules did not prevent the filing of an application at an earlier date. Had Atlantic or SCDD chosen to do so - even in the midst of their suit with Volusia - DER's rules as well as section §403.061(18), F.S. (1971), mandated a decision within 60 days, failing which the permit would issue by default.

Thus Atlantic's fevered assertion that the "State" withheld a "permit" for 10 years [Atl.Br. p.51] is absurd and even desperate. It not only ignores Atlantic's and SCDD's own actions but also the fact that the "permit" was a negotiated settlement agreement requiring extensive water quality monitoring, the setting aside of certain areas for natural drainage, and other modifications that distinguish it from Atlantic's original application.

Atlantic's reliance upon Askew v. Gables-By-The-Sea, Inc., 333 So.2d 56 (Fla. 1976), for its delay theory is misplaced. In Gables

the Trustees of the Internal Improvement Fund unlawfully revoked Gables' dredging permit. That action caused Gables' Corps of Engineers'permit to expire, and the Corps denied the permit (essential to development) on reapplication. The court did not hold that delay effected the taking, but that the revocation and bad faith action preventing Gables' timely use of its Corps' permit did. Moreover, the Trustees had a moral obligation to Gables because they had sold Gables the submerged lands knowing the lands had to be filled in order to be used. Similarly, in Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10 (Fla. 1976), also cited by Atlantic, the city's calculated delay as a recession worsened made it impossible for the developer to begin construction during the 90 day life of its building permit. The city was held estopped to then change the zoning or enforce the 90 day restriction.

In this case, Atlantic did not purchase its land from the State nor did it obtain a permit which any agency subsequently revoked or caused to expire. These cases may hold a state agency or city responsible if they thwart a permit holder's legitimate efforts under a lawfully obtained permit. They do not hold the state liable for the effects of inflation when a negotiated agreement is reached, especially one presented to a court as the satisfactory and lawful resolution of permitting differences.

Atlantic calls San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), the essence of a delay case. [Atl.Br. 51] San Diego Gas is a zoning case, factually dissimilar, and has

nothing to do with delay. The majority opinion did not determine whether the zoning - an "open space preservation" classification - was so restrictive as to be a taking. The dissent, which Atlantic erroneously conceives to be the law, seemed to assume a taking - if the zoning were not rescinded. The question it went on to consider, but perforce did not decide, was whether the landowner was entitled to compensation for an "interim taking" - between the enactment of the zoning and its rescission. The dissent's hypothetical discussion of that question has nothing to do with delay and the effects of inflation.

In this case there is no zoning classification at issue. Moreover, a confiscatory zoning regulation is categorically different from the denial of a permit to discharge drainage from 14,000 acres and 400 miles of canals into off-site waters of the state. Certainly the landowner in San Diego Gas had the unqualified right not to be required to devote its property to open space public use. But just as certain, Atlantic had no corresponding unqualified right to the permit it sought. The landowner in San Diego Gas did not seek to use its property in a harmful way - Atlantic did.

Examination of Atlantic's authority shows there is not one case in favor of its "inflation" or "delay" theory of taking. The Supreme Court has acknowledged the police power is one of the most essential and least limitable powers of government. Hadacheck v. Sebastian, 239 U.S. 394 (1915). No case has ever held its exercise is to be constrained or curtailed by inflationary federal economic

policies. Even conceding "inflation" and various "extras" added to the cost of the settlement, no case holds a negotiated, arms-length agreement, approved by a court, is a taking.

To hold that the index of inflation is yet another factor to be considered in agency negotiations or permitting proceedings will only create chaos in the law. What may be a taking in times of high inflation may not in times of economic stability. Delay that may thwart a poorer developer may have little effect on wealthier ones. Are agencies to insist on complete financial disclosures from all applicants? Where is their authority for that? Could an appellate court that took "too long" to decide a case be held liable, as part of the "State," for a taking?

The facts of this case simply do not justify Atlantic's claims about delay and inflation. As the District Court noted, Atlantic could have submitted an application to DER before September 1974 had it so desired, and the law required DER action within 60 days. Section 403.061(18), F.S. (1971). It did not do so. Moreover, the trial court found Atlantic still could have afforded in 1977 the drainage plan it originally proposed. Instead, it chose to settle its appeal. Atlantic freely elected to enter the settlement agreement and has admitted it did not evaluate the costs before doing so. Under these circumstances, even assuming the agreement was more expensive, its claim deserves no sympathy. It certainly does not deserve $150 million from the State of Florida.

REMAINING ISSUES

There are two important issues the First District did not address in its opinion because of its decision to reverse the trial court. These are: 1) whether the trial court erred in ordering the State to condemn CAE lots based on their value with the road and drainage system that was not built; 2) whether the trial court erred in permitting the class to intervene and raise the taking question as to property that Atlantic had not put in issue. Atlantic's claim only pertained to its 2,079 lots that were not under contracts for deed. (Points VIII and IX of State's DCA brief)

As to the first issue, the State argued the lots should be valued in their unimproved condition relying on Burnette v. Dept. of Transportation, 384 So.2d 916, 920 (Fla. 1st DCA 1980); Danforth v. United States, 308 U.S. 271, 285 (1939); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 285 (1943); Graham v. Estuary Properties, Inc., supra.

The State also contended the class should not have been allowed to intervene because it had no interest in Atlantic's lots and did not stand to gain or lose anything. Faircloth v. Mr. Boston Distiller Corp., 248 So.2d 240 (Fla. 1970). Additionally, Atlantic, not the class, held legal title to the remaining lots, and Atlantic did not assign its claim to the class until long after the class intervened. Thus, the class had no cause of action at the time it intervened. Marianna & B.R. Co. v. Maund, 62 Fla. 538, 56 So. 670

(1911); Dept. of Transportation v. Burnette, supra; 1 Fla.Jur.2d, Actions §34.

If the Court affirms the First District, as it should, these issues need not be addressed. If otherwise, further briefing and consideration may be necessary.

CONCLUSION

Atlantic designed an extremely faulty plan which had but one objective - the sale of every square inch of land in Cape Atlantic Estates - and the resultant necessity for off-site disposal of drainage water from 14,000 acres. Atlantic settled litigation over its drainage plan and now argues that the cost of that settlement is a "taking" of its property. The premise of this claim - that the cost is attributable to the "wrongfully" denied DER permit - is barred: first, by the settlement stipulation which abandoned the opportunity for appellate review of the denial; and, second, by the Court's decisions in Key Haven and Albrecht prohibiting a challenge to the correctness of agency action in circuit court. The specious and grasping nature of Atlantic's claim is especially obvious when one considers that Atlantic voluntarily agreed to the modifications called for in the settlement and then attacked them in this suit as having been "imposed," seeking not relief from those requirements but rather to compel the State to buy its project.

On the basis of the reasons and authority set forth in this brief, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to:

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