o/a 10-3-84

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ATLANTIC INTERNATIONAL
INVESTMENT CORPORATION,

Petitioner, CASE NO. 64,551

vs.

STATE OF FLORIDA, et al.,

Respondents.

MAX SIMON, individually and
as class representative,

Petitioner, CASE NO. 64,552

vs.

STATE OF FLORIDA, et al.,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT
DEPARTMENT OF ENVIRONMENTAL REGULATION

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

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PREFACE - DEFINITIONS AND ABBREVIATIONS

Respondents in this case, defendants in trial court below, are the State of Florida and the Florida Department of Environmental Regulation, formerly the Florida Department of Pollution Control, respectively referred to in this brief as the "State," "DER" and "DPC." Petitioner, Atlantic International Investment Corporation, is referred to as "Atlantic," and its project, Cape Atlantic Estates, is abbreviated "CAE." Other relevant entities in the history of this case include (and will be referred to as): the Florida Division of Administrative Hearings (DOAH), the St. Johns River Water Management District (St. Johns), the South County Drainage District (SCDD), and Mondex, Inc. (Mondex), a legally distinct entity from Mondex Realty (so designated). The separate intervening parties of Simon and Rosser, et al, are collectively referred to herein as "Intervenors." The following symbols will be used:

R-record including the trial transcript

A-appendix to this brief (followed by P. paragraph number, when reference is to Final Order)

Pl. Ex.-plaintiff's exhibit at trial (followed by exhibit number)

Def. Ex.-defendants' exhibit at trial (followed by exhibit number)

Defendants' Composite Exhibit 1, which contains volumes 10 through 14 of the proceedings of an administrative hearing in the original DER permitting process, is cited by Exhibit, Volume (in Roman numeral) and Page number; excerpts from volumes of the proceedings, all of which were proffered at trial but from which only volumes 10 through 14 were admitted, are cited "DOAH" followed by Volume and Page number.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent, Department of Environmental Regulation, adopts the Statement of the Case and of the Facts set out in the Answer Brief of the State of Florida.

DER notes in particular the failure of Petitioners to recognize and fully describe the implications of the Stipulation and Consent Agreement of June 27, 1977, the joint motion for adoption of the settlement, and the Order of the First District of June 29, 1977 approving the settlement. (Def. Comp. Ex. 2).

POINT I

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

A. The Order of the First District Court of Appeal of June 29, 1977, precludes relitigation of the issues settled in Case No. CC-93.

The mere noting of the fact that Atlantic sought review of the DER permit denial before the First District is not as important as noting the result of that review. Only a clear articulation of what occured in the First District in 1977 serves to explain why the First District, in 1984 did not err in reversing the trial court below.

On June 27, 1977, DER and Atlantic entered into a Stipulation and Consent Agreement (the Stipulation) which resolved all issues formerly in dispute before the First District in Case No. CC-93 (R. 535). In that case, Atlantic had sought review of DER's denial of Atlantic's application for permit to construct a drainage system. Case No. CC-93 included issues arising out of the pre-application actions of the parties. Atlantic and DER jointly requested the First District to approve and implement the Stipulation, vacate the Department's final order of permit denial, and dismiss the petition for writ of certiorari filed by Atlantic

(R. 555).

On June 29, 1977, the First District entered its order and mandate in Case No. CC-93, ruling that the Stipulation was "in all respects a lawful and proper settlement of the matter" and that "it should be put into effect by an appropriate decree embracing its terms, conditions and provisions" (R. 555). DER's final order of denial was vacated and the court's mandate was certified to DER with an order to carry into effect the terms of the Stipulation (R. 555).

The trial court's judgment which is the subject of the instant appeal concludes that "the cumulative effects of the actions of the various agencies of the State have rendered the lots of CAE ... of no reasonable use", and that the State has "taken" the lots, for which the plaintiffs below are "constitutionally entitled to compensation" (A. 49, P. 1). The judgment is based upon findings of fact and conclusions of law which can be summarized as follows:

> 1. A 'taking' has occurred because the cumulative actions of the State have rendered it economically impossible for Atlantic to install certain drainage improvements;
> 2. The 'economic impossibility' results from a combination of increased costs and inflation which, after the ownership was divided and income set at 1967-72 prices, rendered the land unimprovable.
> 3. In particular, two factors resulting from actions of the State brought about

> the economic impossibility of construction:
> (a) delays in the permitting process, and
> (b) the increased complexity of the drainage improvements made necessary by the DER-Atlantic Stipulation and Consent Agreement.

A careful reading of the judgment reveals that most if not all of the actions of the state agencies predate the First District's order of June 29, 1977, in Case No. CC-93. In fact, the judgment concludes:

> the realities faced by Atlantic when forced to abandon the project were in place by the date of taking, which the court finds to be September 1, 1977, and St. Johns' [Water Management District] actions before that date were not extensive (A. 11, P. 11).

Paramount in the trial court's mind, of course, were the actions of DER, beginning with the initial assertion of jurisdiction in 1971 and ending with the court-adopted settlement of June 29, 1977. This is illustrated by the trial court's ruling that:

> DER, however, is another matter. Although that Court finds that the cumulative actions of all the state actions amounts to a taking, the court is also of the opinion that the actions of DER alone, in the particular circumstances of this case, also would have effected a taking. (A. 11-12, P. 11).

DER took no action adverse to Atlantic after June 29, 1977.

The issue is thus crystallized: If there was a taking on September 1, 1977, there surely must have been a taking

on June 29, 1977. Atlantic is in fact alleging that on the very day the First District granted its motion for approval of the Stipulation and Consent Agreement, the die was cast on which the trial court found a "taking".[1] Atlantic relitigated those issues settled in Case No. CC-93 in the trial court below. The First District's order of June 29, 1977, precluded such relitgation, and for that reason the First District's reversal of the trial court judgment in the instant case should be affirmed.

Case No. CC-93 resulted in the adoption of the Stipulation and Consent Agreement by the First District. The Consent Agreement, adopted by the court, constituted a final judgment. See Board of County Commissioners of Pasco County v. Hesse, 351 So. 2d 1124 (Fla. 2d DCA 1977). It has long been the rule in Florida that any defenses on behalf of either party are waived by a stipulated settlement. Phillips v. Acacia Mutual Life Insurance Co., 124 Fla. 1979, 168 So. 34 (1936). A consent decree is an admission of the facts upon which the decree rests and will support the application of res judicata. Mims v. Reid, 98 So. 2d 498 (Fla. 1957). Furthermore, a stipulation entered into during the course of one action

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1 Curiously, Atlantic does not attack the First District' order of June 29, 1977, or the Stipulation and Consent Agreement on which it was based. To repudiate the settlement would be a tacit admission that Atlantic's inability to complete the drainage improvements was of its own making.

is to be recognized in other actions or proceedings. Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1 (Fla. 1971).

Upon judicial review of the administrative proceeding in Case CC-93, Atlantic could have asserted, and indeed did assert, constitutional objections to the treatment received at the hands of governmental bodies. This notwithstanding, some misapplied instance of "res judicata" is not the basis upon which the First District below reversed the trial court. The district court's reliance on Key Haven Associated Enterprises, Inc. v. Board of Trustees Of the Internal Improvement Trust Fund, 427 So. 2d 153 (Fla. 1983) was wholly consistent with this Court's subsequent holding in Albrecht v. State, 444 So. 2d 8 (Fla. 1984).

In Key Haven, the Court addressed situations where an aggrieved party challenges the unconstitutional application of a statute or rule by an agency, and held that:

> 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.

If, however, an aggrieved party accepts the agency decision as "intrinsically correct," then that party "may" seek circuit court relief, such as for inverse condemnation, id., but only after exhausting all review procedures available in the executive branch. Id. at 538.

It must be emphasized that the circuit court review is permissive, not mandatory. The Supreme Court so acknowledged, when it stated that:

> When an aggrieved party has no grounds for contesting the propriety of agency action a remedy is available, but not mandatory, in the circuit court for inverse condemnation. (emphasis added) Id. at 539.

and further adding that by electing circuit court as a 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 540.

In pursuing its claim in the instant case, Atlantic ventured where Key Haven explicitly held an aggrieved party in circuit court could not go: a claim of taking based on a challenge to the propriety of the state's actions. Such a challenge to the propriety of agency action could only have been raised before the district court of appeal.

The trial court judgment in the instant case, even while stating that it "may not, and will not, review the validity of the permit denial" by DER, goes on to consider "the general background of the denial of the permit, the delay, the grounds therefor, and the subsequent granting thereof" (A. 48, P. 16). The same final judgment goes

on to find that DER's actions amounted to a taking (A. 11-12, P. 11), that DER "imposed" significant and unwarranted delays, that the denial of the permit was not based on statutory grounds but was done for individual reasons of the personnel involved, and that the delays and increased complexity of the improvements mandated in the permit rendered the project economically unfeasible (A. 23, P. 44; A. 25, P. 50; A. 28, P. 56).[2]

The issues settled in the earlier First District case are reflected by Atlantic's petition for writ of certiorari filed in Case No. CC-93 on May 10, 1976 (A. 51), and from its "brief of petitioner" filed in that case (Def. Comp. Ex. 2). The issues included constitutional issues arising from DER's actions.[3]

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2 The trial court faulted the State for increasing the complexity and cost of the drainage improvements in the permit issued by DER. The final judgment characterizes this by stating that "DER had increased the cost of the improvements by imposing the requirements which were set forth in the permit" (emphasis added) (A. 31-32, P. 63), in spite of the fact that Atlantic agreed to the requirements.

It is important to note that the trial court found, in paragraph 63 of the final judgment that:

A. If the delays had not occurred and DER had not increased the costs of the improvements, Atlantic could have completed the development (hence, no taking)

B. If there had been only delay but no increase in the cost or complexity of the improvement, Atlantic could have completed the development (hence, no taking). But the combination of both rendered Atlantic virtually bankrupt (hence, a taking).

The ruling overlooks Atlantic's role in stipulating to the "increased complexity of the improvements" (A. 31-32, P. 63),.

3 The petition alleged: [continued on next page]

In Key Haven, this Court held that when direct review of agency action by a district court of appeal is sought, "the claim of the taking of property can be raised in this direct review proceeding." Id. at 539. (emphasis added). The court cited Estuary Properties, Inc. v. Askew, 381 So. 2d 126 (Fla. 1st DCA 1979), rev'd on other grounds sub nom Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.) U.S. cert. denied sub nom. Taylor v. Graham 454 U.S. 1083 (1981), for that proposition and also for the proposition that the reviewing district court has the authority to require the state to institute inverse condemnation proceedings.

In Albrecht, this Court acknowledged and went beyond

A. DER's final order was not based on competent substantial evidence. B. The DOAH proceeding did not comply with the essential requirements of law. C. DER misapplied the law. D. The permit denial violated Article I, Section 10 of the Florida and U.S. Constitutions. E. DER was estopped from applying Ch. 403, F.S., to Atlantic. (Petition for Writ of Certiorari, Case No. CC-93).

The allegations placed at issue in the brief included: A. DER had no jurisdication over the proposed project. (Brief, Case No. CC-93, page 18); B. Atlantic had vested rights in the project protected by the due process clause of the state and federal constitutiona. (Brief, Case No. CC-93, page 32); C. Preventing Atlantic from performing its legal contracts might result in a "taking" of Atlantic's and the purchasers' interests in the land and impair the contractual obligations involved. (Brief, Case No. CC-93, pp. 36, 41-42); D. DER's refusal to exempt Atlantic from permitting requirements violated the equal protection clause of the state and federal constitutions. (Brief, Case No. CC-93, page 41).

Key Haven, when, after stating that:

> 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.

444 So. 2d at 12, citing Key Haven, 427 So. 2d at 159, it held that:

> the point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. 444 So. 2d at 12 (emphasis added).

By entering into the Stipulation in Case CC-93 and moving the First District for an order approving the same, both DER and Atlantic abandoned their quest to have the propriety of the agency's actions determined by the First District. But at trial below, Atlantic then attempted to pursue an inverse condemnation claim in circiut court without ever accepting the propriety of the agency's actions as required by Key Haven and Albrecht.

In its Initial Brief before this Court, on page 39, Atlantic suggests that:

> As Albrecht instructs, once the permitting matters were resolved, the Circuit Court properly considered the reasonableness of the delays, the practical consequences of the delays, the general issue of whether the State in all the circumstances met the standards of fair dealing that a citizen may expect from his government, and the ultimate fact issue of whether the practical consequences of all State actions resulted in a taking.

Curiously, there is no cite to any portion of the opinion. After reviewing the opinion, one can only conclude that Albrecht simply does not "instruct" as Atlantic says. Albrecht does instruct that Key Haven:

> ... 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 the 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.

444 So. 2d at 12-13.

One could speculate as to whether, if the First District in Case CC-93 had affirmed DER's permit denial (and all of the events that preceded the same), Atlantic could have gone back to circuit court, and pursued its inverse condemnation claim with the propriety of state action judicially determined. One could also speculate as to the necessity of Atlantic pressing its claim in circuit court if the First District had instead found DER's permit denial improper, and had ordered the permit Atlantic had applied for, issued. But there is nothing in the record to legitimize such speculation.

What is in the record is the Stipulation and Settlement Agreement, DER and Atlantic's joint motion, and the First District's Order embracing the settlement as its own.

This makes this case sui generis, unlike the mold into which Atlantic casts the facts of this case.

The Order of the First District from which Atlantic appeals in this case, then, was emminently correct. The Albrecht holding that there is no legislative mandate that constitutional issues must be raised in Section 120.68, F.S. judicial review (444 So. 2d at 11) is irrelevant to this Court's consideration of the First District's decision below. This is so, not because Atlantic sought judical review of the permit denial, but because of the outcome of that review, which was fashioned by Atlantic and DER, and was not "imposed" by the latter.

B. Reversal is not required by the doctrine of the law of the case.

Respondent DER adopts the arguments set forth in Point I of the Answer Brief of the State of Florida.

C. Litigation of the "taking" issue below was barred by the doctrine of election of remedies.

The law in Florida is well settled that:

> Where more than one remedy for the enforcement of a particular right actually exists, and such remedies considered with reference to the relations of the parties as asserted in the pleadings are inconsistent, the pursuit of one with knowledge of the facts is in law a waiver of the right to pursue the other inconsistent remedy. McCormick v. Bodeker, 119 Fla. 20, 21, 160 So. 483, 484 (1935) (emphasis added).

Accord, Williams v. Robineau, 124 Fla. 422, 168 So. 644 (1936); Cooley v. Rahilly, 200 So. 2d 258 (Fla. 4th DCA 1967). The Williams case goes on to state:

> A position taken which does not injure the opposite party is not an election which precludes a change or raise an estoppel. The election is matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. 168 So. at 646.

Applying these principles to the instant case, the court should note that the "taking" cause of action in the 1975 amended complaint was essentially the same as in the post-consolidation, 1979 and 1980 complaints (R. 43, 472, 677); essentially, each complaint alleged that the State, through its regulatory process, had deprived Atlantic of property without due process of law.

The remedies sought in the 1975 amended complaint were framed in the alternative, a feature not found in the post-consolidation complaints. Paragraph 3 of the prayer for relief in the 1975 complaint requests:

> 3. That the attempted action of the Department of Pollution Control to deny a permit to improve and drain said land be declared null and void and of no legal force and effect and that such permit be delcared to be in full force and effect; that Defendant, Department of Pollution Control be required to approve the plans tendered

> in connection with such permit and to issue said permit and Plaintiff be allowed and authorized to proceed with the said improvement and drainage in accordance with such plans and specifications as they might thereafter be modified (R. 47-48).

In Paragraph 6, however, Atlantic prays:

> 6. That in the alternative Plaintiff be awarded damages in excess of $30,000,000.00 against the State of Florida for the taking of private property without compensation in violation of Article X. Section 6 and Article I, Section 9 of the Constitution of the State of Florida and due process and equal protection of the law as required by the Constitution of the United States. (R. 48) (emphasis added).

The alternative remedies of permit issuance and compensation for "taking" are clearly inconsistent. The Florida legislature recognized the inconsistent nature of these remedies when it enacted into law Sections 253.763, 373.617, 380.085, and 403.90, Florida Statutes. The remedies in those sections are set out in the alternative and at the option of the state agency at fault whenever a "taking" is found by a court.

In settlement of Case No. CC-93 before the First District in June, 1977, DER conceded Atlantic a permit governed by stipulated terms. Atlantic not only elected to pursue one of two inconsistent remedies, but in fact received the remedy sought. At the time the settlement was entered

(June, 1977) the only pending complaint was the pre-consolidation, 1975 Amended Complaint. It was not until two years later that Atlantic abandoned its claim for relief in the alternative, when it filed the 1979 Amended and Supplemented Complaint, post case consolidation.

When DER accepted the Atlantic settlement, DER gave up any chance that the First District in Case CC-93 might have affirmed the denial of the original permit application. Such an affirmation would have, in effect, declared DER's actions to be supported by competent substantial evidence, in accordance with organic and statutory law, and not arbitrary or capricious, effectively barring assertions to the contrary by Atlantic in the circuit court litigation.

Because Atlantic elected and received the benefits of one of the alternative and inconsistent remedies, and the State, by its acceptance of the Stipulation, materially altered its position to its disadvantage, the trial court litigation below was barred by the doctrine of election of remedies.

POINT II

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

Respondent Department of Environmental Regulation adopts the Argument set forth in Point III of the Answer Brief of the State of Florida.

POINT III

THE DISTRICT COURT'S HOLDING THAT THERE WAS NO TAKING WAS CORRECT BECAUSE NEITHER THE FACTS NOR THE LAW SUPPORT THE CONCLUSION THAT PETITIONERS HAVE SUFFERED A COMPENSABLE TAKING.

Atlantic's argument to this Court in its Initial Brief continues the pattern set below of citing any and all presently existing theories of "taking", no matter how irrelevant or unrelated to this case, which might support the substantive determination of the trial court, that a compensable taking has occurred.

A. THE FACTS OF THIS CASE DO NOT SUPPORT A FINDING THAT THERE WAS A TAKING, UNDER THE ESTUARY PROPERTIES CASE OR OTHER APPLICABLE COURT DECISIONS.

The trial court concluded that a combination of governmental actions had resulted in a taking of Cape Atlantic Estates. This conclusion was based upon an analysis of the six factors set out in Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.) U.S. cert. denied, sub nom. Taylor v. Graham, 454 U.S. 1083 (1981), and upon an application of case law to the so-called "facts" of this case. In reviewing the trial court's findings and conclusions below, however, the District Court held that the judgment on appeal would be reversed even if Atlantic had not made a choice

of the type described in Key Haven "because the facts do not support the trial court's finding that there was a taking." 438 So. 2d at 871.

A review of the six-factor test as applied by the trial court shows that not one factor was correctly applied and that the trial court misconstrued and inappropriately applied all six factors. The trial court totally ignored many uncontroverted facts present in the record and drew conclusions from unrelated facts to rationalize the ultimate decision.

In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, reh. denied, 439 U.S. 883 (1978), the Supreme Court of the United States determined that the question of what constitutes a taking in any particular case calls for essentially "ad hoc factual inquires." 438 U.S. at 124:

> The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proven to be a problem of considerable difficulty ... [T]his Court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [citation omitted] Indeed, we have frequently observed that whether a particular

> restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' 438 U.S. at 123, 124.

Several factors which have been considered in the past were enumerated by this Court in Graham v. Estuary Properties:

> (1) Whether there is a physical invasion of the property.
> (2) The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.
> (3) Whether the regulation confers a public benefit or prevents a public harm.
> (4) Whether the regulation promotes the health, safety, welfare or morals of the public.
> (5) Whether the regulation is arbitrarily and capriciously applied.
> (6) The extent to which the regulation curtails investment backed expectations.
> 399 So. 2d at 1380-81.

The trial court analyzed all six factors, finding in favor of Petitioners on each. Careful scrutiny of the judgment, as was provided by the First District, reveals that the trial court reached an incorrect conclusion regarding each factor.[4]

1. Whether there has been a physical invasion of

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4 The following analysis of the trial court's application of the six factor Graham v. Estuary Properties test discusses mainly DER's actions. DER adopts the position that consideration of Volusia County and St. Johns actions, or of the Florida Legislature, was improper in the first place, as discussed in the Answer Brief of Respondent State of Florida, pages 24-27.

the property.

The trial court found that there was no physical invasion of CAE, but held, nevertheless, that the practical effect of governmental action was to eliminate physical access to the individual lots (A. 35, P. 71). The Final Judgment states that many courts have found such a limitation to be virtually equal to physical invasion (A. 35, P. 71). However, no such case is cited by the trial court.

None of the complaints filed by Atlantic in Case Nos. 75-295 or 79-762 (R. 3, 42, 432, 461, 472, 677), or the Intervenors' Motions to Intervene, (R. 1593, 2030) raise the issue of elimination of access. A reading of the testimony of the case sub judice discloses that the question of elimination of access was not tried before the trial court, and access was mentioned only in the most peripheral manner (R. 4688-89).

A judgment should be responsive to the issues presented by the pleadings. Paul v. Commercial Bank of Ocala, 66 Fla. 83, 63 So. 265 (1913); Hughes v. Russell, 391 So. 2d 256 (Fla. 4th DCA 1981). An issue neither raised by the pleadings nor tried by the parties in the trial court should not be ruled upon by an appellate court. A judgment on a matter outside of the issues framed by the pleadings is error. Cortina v. Cortina, 98 So. 2d 334 (Fla. 1957); Stack v. Okaloosa County, 347 So. 2d 145 (Fla. 1st DCA 1977).

Moreover, logic requires that the determination that there has been a physical invasion of the property because of an alleged elimination of access be rejected. Physical invasion is a trespassory act. One does not physically invade property by restricting the ability of another to physically enter that property. In other words, physical invasion of property is just that - actual physical use or actual physical appropriation.

Acutal entry and occupation form the basis of physical invasion. E.g., State Road Dept. v. Harvey, 142 So. 2d 773 (Fla. 2d DCA 1962). Invasion by water, earth, sand or other material is a physical invasion. E.g., Kendry v. State Road Dept., 213 So. 2d 23 (Fla. 4th DCA 1968), cert. denied 222 So. 2d 752 (1969). An easement over private lands for public use is a physical invasion. E.g., City of Miami Beach v. Belle Isle Apartment Corp., 177 So. 2d 884 (Fla. 3d DCA 1965) cert. denied, 188 So. 2d 819 (Fla.1966). In the present case, however, there is no governmental act that even remotely resembles a physical invasion.

Furthermore, the finding of the trial court that the practical effect of governmental action has been to eliminate physical access is without support in the record. There is no testimony or other evidence substantiating the finding that access was eliminated. Instead, the record reflects,

if anything, that access to the land has remained unchanged. The fact that existing access remains unimproved is not recognized as a lost property right requiring compensation. It was error for the trial to conclude that a physical invasion of the property had occurred. It remains to be shown where this issue was raised, and if raised, where the trial court took testimony as to the actual elimination of access to any individual lot on the entire 14,000 acres. There is not a shred of evidence in the record to support the determination of the trial court, much less competent, substantial evidence on this particular point. Atlantic, in its Initial Brief, fails to cite any record support for such "evidence" because there is none. Petitioners may not have been able to improve their access, but access simply has not been eliminated.

Instead Atlantic relies upon case law with little or nothing in common with the present case. For example, in Hillsborough County Aviation Authority v. Beneitez, 200 So. 2d 194 (Fla. 2d DCA 1967) it was specifically held that a physical invasion had occurred. 200 So. 2d at 198.[5]

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5 Another example of Appellee's mis-citation to existing case law is found in Atlantic's footnote 29. Appellee cites Ed Zaagman, Inc. v. City of Kentwood, 277 N.W. 2d 475 (Mich. 1979) for the proposition that a zoning ordinance was confiscatory because the ordinance made it economically infeasible to install roads to landlocked property. The case simply does not stand for that proposition. See 277 N.W. 2d at 479.

2. The degree to which there is a diminution in value of the property. Or stated another way, whether the regulation precludes all economically reasonable use of the property.

The trial court found that the value of the lots at CAE had diminished, that the delays and increased complexity of improvements had made it impossible for Atlantic to construct the project, that Atlantic had lost a potentially large profit and that the lots were not usable for any practical or reasonable purpose (A. 28, 31-32, 34-35).

It is absolutely clear that diminution of value, standing alone, is insufficient to establish an unconstitutional taking of land. Penn Central Transp. Co. v. New York City; Deltona Corp. v. United States, 647 F. 2d 1184 (Ct. Cl. 1981) U.S. cert. denied, 102 So.Ct. 1712 (1982); Holaway v. City of Pipestone, 269 N.W. 2d 28 (Minn. 1978); Fifth Avenue Corp. v. Washington County, etc., 282 Or. 591, 561 P.2d 50 (1978). While the extent of diminution of value may be a relevant consideration, Goldblatt v. Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8L.Ed.2d 130, 134 (1962), the mere presence of the diminution is not dispositive, even when quite large. For example, diminution in excess of 75% does not necessarily establish a taking, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), nor does diminution in excess of 87.5%, Hadacheck v. Sebastian, 239 U.S 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

Instead, a diminution in value must actually deprive an owner of all economically viable use of the property. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1, 28 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1960); Penn Central, 438 U.S. at 138; Oceanic California, Inc. v. City of San Jose, 497 F.Supp. 962, 973 (N.D.Cal. 1980). This rule is alive and well in Florida. Graham v. Estuary Properties; see also Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376 (Fla. 1965); Askew v. Gables-By-The-Sea, Inc., 333 So. 2d 56 (Fla. 1st DCA 1976), cert. denied 345 So. 2d 420 (Fla. 1977).

The record here does not disclose any prohibition against use of the land. Rather, as noted in Point I, DER, by entering into the Stipulation in Case CC-93, has approved development of the property. The trial court does not find that another plan of development would not prove workable or profitable, or even that Atlantic's plan could not have been utilized in an economically feasible manner by another developer.

The uncontroverted testimony from both Petitioners' and Respondents' witnesses was that the property has reasonable use and economic viability. Atlantic's property appraiser,

Mr. Knight, testified that part of the property was presently leased to hunting clubs, that part of the land was being used at that time for agricultural purposes, that the land could be used for cattle or timber production, and that the highest and best use of the land, even with improvements, was recreational use (R. 4552, 4553). Mr. Anderson, who appraised the property for the State, essentially agreed, testifying that the land had present agricultural, grazing, timber and residential value (where the latter was permitted), and that the highest and best use of the property was agricultural (R. 4492).

Indeed, Atlantic can hardly be heard to argue that the land had lost all reasonable use as of September 1, 1977. Atlantic represented in judicial proceedings, at least through 1976, that the property had use as a hunting and fishing preserve. Atlantic Int'l Inv. Corp. v. Turner, 381 So. 2d 719, 721 (Fla. 5th DCA), cert. denied, 388 So. 2d 119 (Fla. 1980).

That Atlantic may have been deprived of what it considers to be the highest and best use of its property (putting in access road and drainage canals) does not constitute a taking. Loss of highest and best use is no more than

another way of stating that there has been some diminution in value, rather than complete destruction of all economically viable use of the property. Deltona Corp. v. United States, 647 F.2d at 1193, and cases cited therein. The simple fact that an improvement would increase the value of property does not mean that disallowing that improvement constitutes a taking. Graham v. Estuary Properties, at 1382.

The same is true for all of the individual lot owners represented in this matter, irrespective of what each privately considers to be the highest and best use of his or her land. The Intervenors suggest that they cannot use their individual 1¼ or 2½ acre plots for timber, agricultural, or other purposes mentioned by Mr. Knight and Mr. Anderson. This is not true. Any lot owner may use his or her property in accordance with the applicable zoning code for any use desired. Nothing prevents lot owners from pooling their interests for lease to hunting clubs, viable timber production or agricultural purposes. How can any individual lot owner have suffered a taking when no lot owner has been denied any requested use of his or her land? It is apparent that even the individual lots have retained reasonable use and economic viability. (The trial court even held that the

lots, without the improvements, were not useless (A. 16, P.25)).

The trial court concluded that government action caused Atlantic to lose profits. (Actually, it appears, that, through payments to its alter-ego, Mondex, Inc., Atlantic realized a large profit from CAE, discussed more fully infra.) In any event, loss of profits is simply not a dispositive test of whether there has been an unconstitutional taking:

> At any rate, loss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim. Prediction of profitabilty 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 interest.

Andrus v. Allard, 444 U.S. 51, 66, 100 S.Ct. 318, 327,62 L.Ed.2d 210, 223 (1979). See also Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91, 100 (1st Cir. 1977). In the absence of arbitrary and capricious application of the law, restricting profitability does not deprive an owner of his property. Farrugia v. Frederick, 344 So. 2d 921 (Fla. 1st DCA 1977). A restriction on a profit is not a deprivation of the right to use property. State Department of Environmental Regulation v. Oyster Bay Estates, Inc., 384 So. 2d 891, 895 (Fla. 1st DCA 1980). Loss of speculative future profits is not a basis upon which a taking may rest. United States v.

Grand River Dam Auth., 363 U.S. 229, 236, 80 S.Ct. 1134, 1138, 4 L.Ed.2d 1186, 1191 (1960); Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923).

The record suggests that Altantic has profited enormously from the sale of lots in CAE. Atlantic International Investment Corporation was acquired in 1967 by Mondex, Inc. (R. 4416-17, 4233-34). Mondex owns all of the stock of Atlantic (R. 4234), and Atlantic was acquired specifically for this project (R. 4409-10). Anthony Trella is president of Atlantic and president of Mondex (R. 4116-17). Eugene Lipman is senior vice-president of Atlantic and senior vice-president of Mondex (R. 4384). Being wholly owned and wholly controlled by Mondex, Atlantic is nothing but an alter-ego of Mondex.

Uncontroverted testimony reveals that Atlantic grossed over thirty million dollars ($30,000,000.00) from the sale of lots in Cape Atlantic Estates (R. 4293). The purchase price of the land was seven million dollars ($7,000,000.00) (A. 12, P. 12). Mr. Trella testified that most of the receivables had been paid out, primarily to cover the broker's fee for selling this property (six million dollars) and administrative expenses (8.6 milion dollars) (R. 4136-37). It is also clear from the record that Atlantic's real estate

broker was none other than Mondex Realty, another wholly-owned subsidiary of Mondex, Inc. (R. 4286). Atlantic (=Mondex) did nothing other than pay itself a broker's fee of over six million dollars (and then represent it to the lower court as a business expense). As if that were not enough, it also appears that the 8.6 million dollars of "administrative expense" was also paid to Mondex (R. 4301).

The inevitable conclusion is that Atlantic (=Mondex) has lost nothing on Cape Atlantic Estates, but, instead, has profited immensely. Still, Atlantic seeks additional unearned profit in the form of a taxpayer-supported windfall.

If Atlantic lost profits because it was financially incapable of completing improvements, their losses were due to Atlantic's (and Mondex's) own actions. Atlantic's plan of development set out lots in a simple, rectangular grid pattern of 1¼ and 2½ acre parcels (A. 12, P. 12). The sales plan for the lots, not the natural contours of the land, dictated the drainage plan. Atlantic Int'l Inv. Corp. v. Turner, 381 So. 2d at 725 (Smith, J. dissenting) (R. 3967-68). Approximately 95-98% of the lots were sold, mostly to out-of-state purchasers, before Atlantic sought to obtain the necesary permits to complete the drainage improvements (R. 4188-89, 4400). Most purchasers never even viewed the property in advance of sale (R. 4187).

By the time it became apparent that DPC an its successor, DER, could not approve Atlantic's original drainage plan, Atlantic had already locked itself into an untenable position. The drainage plan could hardly be changed because so many of the lots had already been sold. This problem with the grid design has already had more than adequate judicial recognition. See Atlantic Int'l Inv. Corp. v. Turner, 383 So. 2d 919, 921-22 (Fla. 5th DCA 1980); Atlantic Int'l Inv. Corp. v. Turner, 381 So. 2d at 725-26, dissenting opinion of Judge L. Smith. This particular grid pattern for streets and drainage has been determined to be a "terrible development design." 383 So. 2d at 921.

By 1972, Atlantic voluntarily ceased lot sales (R. 4128). The trial court suggests that this had a significant impact on Atlantic's cash flow situation which, in part, made it impossible for Atlantic to find financing for the modified improvement plan agreed to by Atlantic and DER (A. 29-30, P. 59). This suggestion is patently erroneous because it ignores the fact that Atlantic had already sold between 95% and 98% of the lots by the time sales were voluntarily suspended.

Atlantic's cash flow was non-existent because in 1972 all its accounts receivable from Cape Atlantic Estates had been pledged to cover Atlantic's and Mondex's indebtedness (R. 4301). Atlantic and Mondex have themselves to blame

for that unenviable situation. Mr. Trella went so far as to state that he did not even attempt to secure financing to meet the increased costs of the improvements (R. 4113). Having agreed to these new improvements in an arms-length and informed negotiation with DER, Atlantic later found that it had underestimated the costs of what it had voluntarily agreed to do (R. 4334).

Even if it is assumed that Atlantic no longer had sufficient assets to finance improvements, it has never been proven that another entity with sufficient assets or credit could not have properly managed and accomplished this project. While Atlantic may have found itself incapable of completing this particular plan of development at this particular time, it has not been shown that a more well planned development count not have worked or will not presently work. Atlantic had locked itself into this particular project by pre-selling lots within the framework fo a wholly inflexible development scheme, prior to completing the improvements or receiving the necessary approvals. Atlantic Int'l Inv. Corp. v. Turner, 383 So. 2d at 921. That is Atlantic's fault.

The trial court mistakenly assumed that the only reasonable use available for the property was construction, and without the improvements for drainage and access such a use would have been impossible (A. 28, P. 56). Not even Atlantic maintained or represented that any of the lots would be

suitable for building (R. 4194). The project engineer testified that the planned improvements were not designed to make land suitable for building (R. 3996), and both counsel for Atlantic and for one of the Intervenors went so far as to state that Atlantic never even promised that the improvements would make the land usable for any development purposes (R. 4056-57). In fact, Atlantic's president testified that he considered this offering nothing more than a speculative investment, like stock (R. 4193). See also Def. Comp. Ex. 2, Atlantic's Initial Brief in Atlantic International Investment Co. v. State Department of Environmental Regulation, Case No. CC-93, pages 14-16.

Atlantic argues most strenuously that DER ignores the problems created by multiple ownership and that the landlocked lots are useless. Both the trial court (A. 34) and Atlantic's expert stated otherwise, and in relation to individual lots, not as to the parcel as a whole. Moreover, the problems created by multiple ownership were specifically and unequivocally of Atlantic's own creation by adopting this particular grid system and by selling all of its lots before making the promised improvements.

If Atlantic is correct it may safely be assumed that the worse the management plan the better the chances are

for forcing the state into condemnation proceedings. This is not presently the state of the law.

3. Whether the regulation confers a public benefit or prevents a public harm.

Of the six factors set out by the Florida Supreme Court in Graham v. Estuary Properties, the trial court's treatment of the public benefit - public harm factor was the most egregious. The trial court ignored facts in the record, drew unsubstantiated conclusions from relatively unrelated facts in order to support its decision, and ignored the legal significance of the earlier proceedings under Chapter 120, Florida Statutes.

Whether regulation creates a public benefit or prevents a public harm was discussed in some detail in Graham v. Estuary Properties. Creation of a public benefit tends to indicate a taking, while prevention of a public harm tends to indicate a valid exercise of the state's police power. The mere fact that a benefit is conferred when a harm is prevented is not the test.

The test of whether a public benefit has been conferred is whether some rights have been created in the public which were not present prior to the regulation:

> It would seem, therefore, that if the regulation preventing the destruction of the mangrove forest was necessary to avoid unreasonable pollution of the waters thereby causing attendant

> harm to the public, the exercise of the police power would be reasonable. On the other hand, if the retention of the forest simply created a public benefit by providing a source of recreational fishing for the public the regulation might be a taking. 399 So. 2d at 1381. [emphasis added]

Maintenance of the status quo is not a creation of rights not previously present. It is improvement of the public's position by regulation that creates public benefit:

> In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e. cause a public harm. It is true that the public benefits in that the bays will remain clean, but that is a benefit in the form of maintaining the status quo. Estuary is not being required to change its development plan so that public waterways will be improved. That would be the creation of a public benefit beyond the scope of the state's police power. 399 So. 2d at 1382 [emphasis added]

Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), cited with approval at 399 So. 2d at 1382, is applicable in this regard. Just states that an owner has no absolute right to change the esential character of his land so as to use it for a purpose for which it was unsuited in its natural state, and which injures the rights of others. 201 N.W.2d at 768. In other words,

certain lands simply cannot, absent an incredible expenditure of energy (e.g. money, manpower, planning, management, maintenance, etc.) be forced to assume a character out of synch and wholly alien to the natural system surrounding it. In the present case, when Atlantic sought to do this very act, it was stopped not by State inaction and resistance, but by its own startling discovery that it actually could not afford to make the improvements under circumstances of its own making (the rectangular subdivision of the property) and of its acceptance (the negotiated settlement agreement).

Altantic may be unhappy because it would rather have not expended the financial resources necessary to protect neighboring property from the obvious adverse effects of a drainage project of such magnitude and poor planning. Nevertheless, Just makes it clear that the essential nature of the land simply cannot be changed, at least not without adequately safeguarding the rights of others. If that is too expensive, the property is not taken by the sovereign but rather the project withers, because the owner has no right to run rough-shod over his neighbors. This type of regulation does not place an undue burden on Atlantic, and protects the public. According to this Court in Graham v. Estuary Properties, Inc., supra, there is no creation

of rights not already present. The public's position is not improved. There is merely retention of the status quo and prevention of a public harm.

The public benefit - public harm issue is easily resolved in favor of a prevention of a public harm in the present case. The trial court noted St. Johns efforts to "prevent adverse water quality and water quantity impacts from [CAE]" (A. 39, P. 78), actions the court found to be arbitrary (A. 40, P. 79). The court made this finding despite an express legislative declaration of policy mandating the management of water, the prevention of damage from excess drainage, and the preservation of natural resources. Section 373.016, Fla. Stat. (Supp. 1972). Maintenance of the status quo at CAE in terms of impact of pollution on waters of the state does not create public benefits. The public has gained no greater rights than had previously existed; prevention of pollution of state waters clearly falls into the realm of prevention of a public harm. Neither Atlantic nor the Intervenors has been required to construct improvements for the public good.

The Final Judgment concludes and Atlantic argues, that since DER ultimately granted a permit to Atlantic, the originally proposed improvements could have been constructed

in a manner consistent with the public health, safety, welfare and morals (A. 36, P. 74). The trial court's conclusion ignores the fact that the permit which was ultimately issued arose out of a Stipulation and Consent Agreement between DER and Atlantic which settled all issues raised in In re: Cape Atlantic Estates, DOAH Case No. 75-1090, and in the subsequent appeal Atlantic International Investment Corp. v. DER and Brevard County, Case No. CC-93 (Fla. 1st DCA, appeal dismissed per stipulation June 29, 1977). The modified access and drainage improvements agreed to in the settlement significantly differed from those initially requested by Atlantic. Atlantic's initial plan could not be approved and was not approved. The various reasons were cogently stated by Secretary Landers in the final order in In re: Cape Atlantic Estates.

Finally, the trial court held that a public benefit had been created because of the express desire of some personnel of the DPC, St. Johns and Volusia County to preserve CAE in its natural state (A. 36, P. 73). However, this foray into the minds of DPC personnel was an inappropriate role for a circuit court when a district court had already issued an order on the matter. The trial court's analysis, of course, ignores the function fo the Chapter 120, Florida Statutes, proceeding which ensued in In re: Cape Atlantic

Estates. Chapter 120, Florida Statutes, was established to create a forum for fact finding and decision-making in which the agency can set policy and adjudicate controversies. Any action by any DER employee was only free-form, preliminary agency action, regardless of its tenor. Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Capeletti Brothers, Inc. v. State, Dept. of Transp., 362 So. 2d 346 (Fla. 1st DCA 1978) cert. denied, 368 So. 2d 1374 (Fla. 1979).

4. Whether the regulation promotes the health, safety, welfare, or morals of the public.

The valid exercise of police power is confined to those acts which promote the health, safety, welfare or morals of the public. Coca-Cola Co., Food Division, Polk County v. State, Dept. of Citrus, 406 So. 2d 1079 (Fla. 1982) U.S. appeal dismissed, sub nom. Kraft, Inc. v. Florida Dept. of Citrus, 102 S.Ct. 228 (1982); Larson v. Lesser, 106 So. 2d 188 (Fla. 1958). All property is subject to the exercise of the police power. Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282 (1914). Reasonable restrictions upon the use of property in the interest of the public health, safety, welfare or morals are valid exercises of the police power. Sarasota County v. Barg,

302 So. 2d 737 (Fla. 1974); State Dept. of Environmental Regulation v. Oyster Bay Estates, Inc., 384 So. 2d 891 (Fla. 1st DCA 1980).

The trial court did not find that DPC's (and later DER's) regulation in the present case did not promote the health, safety, welfare or morals of the public. The lower court did not conclude that any state actor acted in such a fashion as to not promote the health, safety, welfare or morals of the public.

The trial court did conclude that "it has not been established that the granting of the permit would materially and adversely affect the public health, safety, welfare and morals" (A. 37, P. 74). This is a rather misplaced conclusion because Atlantic has not argued that DPC/DER had no jurisdiction or that development at Cape Atlantic Estates would not have significant environmental impact. It is true that DER recognized that some improvements could be made consistently with the public health, safety, welfare and morals (A. 36). But it is also true that the improvements finally agreed upon were significantly different from those which Atlantic initially wished to have permiteed. The initial permit application was justifiably denied in order to prevent environmental harm, and a permit was ultimately

issued for a very different project, modified by and with the full agreement of the developer, after arms-length and informed negotiation. Now, after obtaining authorization to proceed, Atlantic attempts to claim that the State has taken its property. There is not legal precedent for this attempt at compensation.

Atlantic does not argue that the sovereign may not place reasonable restrictions upon the use of property in the interest of the public health, safety, welfare and morals. Atlantic does not argue that its property (or that of the Intervenors) is not subject to reasonable exercise of the police power. Atlantic does not challenge (in the present case) the validity of those statutes and administrative rules by which the development at Cape Atlantic Estates was regulated.

Instead, Atlantic argues that since a permit ultimately issued, then the improvements could be made consistently with the public health, safety and welfare. Atlantic overlooks that the permit ultimately granted by way of negotiation and settlement was significantly different from that permit which was initially applied for in 1974. Further, if the initial permit denial and Final Order of permit denial in Case CC-93 were improper, Atlantic certainly waived

its right to challenge such actions by virtue of the settlement agreement tendered to and approved by The First District in the earlier appeal. Atlantic thus meaninglessly plows the same ground twice when it tries to force this case to assume any similarity at all with Zabel v. Pinellas County Water and Navigation Control Auth., 171 So. 2d 376 (Fla. 1965). To do so, Atlantic must still argue that the Final Order denying the permit was invalid. According to Key Haven, and Albrecht, however, Atlantic cannot raise this issue again, and certainly not in the circuit court forum, while still arguing that the administrative action was improper.

5. Whether the regulation is arbitrarily and capriciously applied.

The trial court concluded that DER, St. Johns and Volusia County had acted arbitrarily and capriciously towards Atlantic, and that these cumulative actions had resulted in a taking (A. 49, P. 1). In regard to the actions of St. Johns and Volusia County, Respondent DER reiterates its adoption of Respondent State of Florida's discussion of the impropriety of considering the actions of these two dismissed defendants (see page 19, supra, note 4, pages 24-27 of the State's Initial Brief). An examination

of the record reveals that the trial court's conclusions as to DER's "arbitrary and capricious" actions were unsupported by the facts, and that the First District correctly reversed the final judgment.

First, the circuit court's review of DPC/DER's actions is nothing less than a collateral attack on the correctness of the administrative Order reviewed in Case No. CC-93 by this court. Not only does the circuit court lack jurisdiction to undertake such an examination (State, Dept. of H.R.S. v. Lewis, 367 So. 2d 1042 (Fla. 4th DCA 1979); School Board of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st DCA 1977) cert. denied, 358 So. 2d 132 (Fla. 1978)), but also this collateral review occurred after the trial court refused to accept a proffer of the entire proceedings in that case (R. 4346-49). The case had been settled by a Stipulation and Consent Agreement entered into between Atlantic and DER and specifically approved by the First District Court (Pl. Ex. 41).

Second, the contention that the permit was denied for the individual reasons of certain DER employees (A. 25, P. 50) is erroneous. The transcripts of the testimony of each individual establishes beyond question that each recognized that the project, as originally applied for, and severe environmental shortcomings (Def. Comp. Ex. 1,

Vol. X, at 78-79; Def. Comp. Ex. 1, Vol. XI, at 17; Def. Comp. Ex. 1, Vol. XII, at 41-42, 45-46, 66; Def. Comp. Ex. 1, Vol. XIII, at 15-16).

Third, the statement that DPC refused to process the permit application for three years is entirely incorrect. When the application was finally filed with DPC in September of 1974, it was processed in a rapid and timely fashion. On November 6, 1974, Atlantic was advised of the recommended agency action that would deny issuance of the permit (Pl. Ex. 31).

The trial court states that "Mr. Garcia's testimony is unrebutted that DPC refused to discuss technical or other requirements and to hold workshop sessions with Atlantic to discuss the improvements and permitting [Trella at 43, 83, 85]." (A. 24, P. 47). In fact, Atlantic's Complaint rebuts this testimony. In paragraph 10 of the initial Complaint filed in this matter (Case No. 75-295) it is stated (by the same Mr. Trella who verified the Complaint) 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 submittted 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. 3) [emphasis added].

The same Mr. Trella, testifying under oath in In re: Cape Atlantic Estates stated:

> Q. (Mr. Middlebrooks): Now to your knowledge, Mr. Trella, for approximately what period was Mr. Garcia attempting to work with DPC to get some guidance as to what your project plans had to consist of?
> A. (by Mr. Trella): Well, as I stated, we presented the project to them in June, 1972, and we didn't file an application until, I believe, September of '74. So we took two years and three months to reach a point of application. And the reasons that it took that long was that we had various - numerous workshop sessions with the staff of DPC regarding acceptable drainage plans and et cetera.
> Q. How long, Mr. Trella?
> A. Over two years.
> (DOAH Vol. 1, p. 141) [emphasis added]

Contrary to the trial court's impression, DPC did not wrongfully or unlawfully prevent Atlantic from filing a permit application. SCDD, pursuant to Ch. 67-1022, Laws of Florida, was required to have its drainage plans approved by the circuit court. In August of 1971 SCDD filed a petition in Circuit Court in Volusia County seeking several amendments

to its plan (Pl. Ex. 14). Newly chartered Volusia County intervened, asserting that SCDD had been abolished by virtue of the charter approval of Volusia. This litigation continued through July 1973. Mr. Lipman, senior vice-president of Atlantic, testified that until a December 1973 agreement between Atlantic and Volusia County was signed, Atlantic itself did not know where it was going with Cape Atlantic Estates in terms of the improvements, did not know how improvements would be done, did not know when improvements would be done, and did not know what improvements would be done (R. 4280-81). Without knowing the where and how of its drainage plan, Atlantic or SCDD could not have even completed any application for DPC/DER permit from August 1971 through December of 1973.

The St. Johns River Water Management District was dismissed from the case for failure to state a cause of action against it, yet Atlantic still complains of St. Johns' actions. Volusia County was dismissed from the case for failure to state a cause of action against it and Atlantic still complains of Volusia County's actions.

Atlantic is left, with nothing more than DER's actions about which to complain. Since DBR prevailed over Atlantic on the merits at trial, Atlantic assumes the interesting

and apparently unique posture of claiming a taking date of September 1, 1977, while admitting that DER took no action detrimental to its position after June 29, 1977, the day the First District approved of the settlement agreement in Case No. CC-93. What happened between June 29, 1977 and September 1, 1977 which caused a taking? The record reflects only suggestions from St. Johns to Atlantic that additional permit requirements might have to be met (A. 38), hardly an action which could cause a taking of property, especially in view of the fact that St. Johns was no longer a party to the lawsuit in the trial court below.

This Court has stated:

> 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. ... [s]itting in their review capacity the district courts provide a proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision making process necessary to render the final agency order constitutional. A party may, however, seek circuit court relief for injuries arising from an agency decision which the party accepts as intrinsically correct ... . Key Haven v. Board of Trustees of Internal Improvement, 427 So. 2d 153, 158 (Fla. 1982).

Accord, Albrecht v. State of Florida, 444 So. 2d 8, 12

(Fla. 1984). On this score Atlantic missed the mark on both opportunities. Atlantic already had the chance to have the propriety of the state's action determined judicially, but chose settlement instead. As if that were not enough under Key Haven and Albrecht, Atlantic has never accepted the state's action as intrinsically correct. Atlantic had no right to bring this issue to the trial court below.

The clear teaching of Key Haven and Albrecht is that when a litigant chooses the circuit court forum he necessarily agrees that the state did not act in an arbitrary and capricious fashion. This makes perfect sense, especially in view of the fact that if the action were arbitrary and capricious it would, as a matter of law, be invalid (See Point IV, below).

6. The extent to which the regulation curtails investment backed expections.

The trial court found that the combined actions of the various agencies caused Petitioners to suffer frustration of their reasonable investment-backed expectations (A. 40, P. 82). According to the trial court, Atlantic's reasonable investment-backed expectations were frustrated because Atlantic appeared to have suffered a financial loss where,

without the regulation, it would have made a large profit, and the reasonable investment-backed expectations of individual lot purchasers were frustrated because they purchased in the expectation that their lands would be improved with access roads and drainage (A. 40, P. 82).

It is clear that the extent to which investment-backed expectations are curtailed is a relevant consideration in analysis of the taking question. Penn Central, 438 U.S. at 124. The term "reasonable investment-backed expectations" has never been precisely defined; however, the available case law suggests several factors which may enter into consideration.

Regulation which neither extinguishes a fundamental attribute of ownership nor prevents the owner from deriving some economically viable use from the property does not frustrate investment-backed expectations. Deltona Corp., 657 F.2d at 1192. The inability to exploit a property interest earlier thought to be available for development does not frustrate investment-backed expectations. Penn Central, 438 U.S. at 130; Deltona Corp. The fact that government may destroy recognized economic interests does not necessarily frustrate investment backed expectations. United States v. Central Eureka Mining Co., 357 U.S. 155,

78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958); United States v. Willow River Power Co., 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945). The frustration of specultative eonomic expectations are simply not compensable. 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 (1923). The inability to obtain future profits has been held to be something less than loss of a fundamental attribute of ownership. Andrus v. Allard, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210, 223 (1979). In light of this case law it is impossible to find that Atlantic's reasonable investment backed expectations were frustrated.

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in it natural state and which injures the rights of others. Just v. Marinette County, 56 Wis.2d 7, 17, 201. N.W.2d 761, 768 (1972), cited with approval in Graham v. Estuary Properties, Inc., 399 So. 2d at 1382. See also Ocean Villa Apartments, Inc. v. City of Fort Lauderdale, 70 So. 2d 901, 902 (Fla. 1954). Atlantic's reasonable investment-backed expectations were hardly frustrated when DPC refused to

permit its initial plan of improvements. DER did not destroy Atlantic's recognized investment-backed expectations. Until such time as workable and realistic modifications to the plan of improvement were agreed upon, Atlantic had little more than a speculative economic expectation.

Likewise, the purchasers have suffered no extinguishment of a fundamental attribute of ownership. The trial court's statement that the purchasers cannot use their property has a hollow ring. The evidence is that the land has present uses (R. 3576-77, 4492), and the trial court so found (A. 16, P. 25).

If the purchasers bought the property for speculative purposes (R. 4196), loss of speculative economic expectations are simply not compensable. Grand River Dam Auth; Omnia Commercial Co. A fortiori, the inability to build on their property by those purchasers who bought CAE lots for the purpose of construction is not a loss of an attribute of ownership and certainly is not compensable, since this expectation was wholly unreasonable and without basis. Not only did Atlantic not represent in its sales campaign that such a use was or would be available, even after improvements were complete, but it also expressly stated in the offering statements that the lots were not homesites (R. 4132-33).

It is impossible to conclude that these purchasers, the great bulk of whom bought the property sight unseen from out-of-state telephone solicitations (R. 4189-90) and without the slightest knowledge of the entire plan for development, have suffered frustration of their reasonable investment-backed expectations. These buyers did nothing more than buy into a speculative land transaction, and if these purchasers have lost anything, the loss is no more than a non-compensable speculative interest.

B. DELAY HAS NOT CAUSED A TAKING UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE.

The trial court's Final Judgment adopted two theories of taking. The first theory, discussed at length above, followed the six-factor analysis set out in Graham v. Estuary Properties. The second theory was a fall back position, essentially that whether the governmental agencies acted properly or improperly, the cumulative delay had rendered Atlantic financially incapable of completing the promised improvements. Not only did the trial court ignore Atlantic's patent contributions to the delays[6],

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6 The trial court was concerned with delays both in the determination of SCDD's continued viability and in DPC/DER's permitting of the project (A. 21, P. 40; A. 23, P. 44). The record shows Volusia County was not responsible for delays in determining whether SCDD still existed after the adoption of Volusia's Home Rule Charter; according to an SCDD Board member, Volusia acted "diligently" in trying to resolve the matter (R. 4149). The actual reason for the delay was the adamant contention of both Atlantic and SCDD that the latter remained viable, a contention the lower court found to be without to be without merit (A. 22, P. 40; Pl. Ex. 14, SCDD's 1/23/72 Memorandum of Law). [continued on the next page]

but the second legal theory adopted by the trial court is without any foundation under the present facts and circumstances and without legal precedent.

The trial court found that the initial improvements would cost 2.7 million dollars (A. 29, P. 58), and that the modified improvements, agreed to by Atlantic, would have cost 7 million dollars (A. 28-29, P. 57). Yet even at this rate Atlantic could have afforded to make these improvements were it not for the toll taken by inflation, 240% on the cost of doing the same work (Id.). Thus, with inflation and only because of inflation the project would now cost 17 million dollars (Id.). Setting aside Atlantic's

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The trial court's conclusions as to DPC/DER's delays in processing the permit, besides being an improper review for that court to undertake in the first place (see Point I, supra), were likewise erroneous, as the record shows that the denial of the original permit application was based on legitimate concerns over the environmental shortcomings of the project (see Point II at 43 supra). Judicial recognition has previously been given to the fact that "... development problems in [CAE] were to some degree self-created ..." because of a "terrible development design" which did not incorporate "... any consideration for the natural contour and topography of the land ... ." Atlantic Int'l Inv. Corp. v. Turner, 383 So. 2d at 921-22. The same opinion contained this advice: "Other developers of hammock tracts might not face such a long delay because they can choose a different and perhaps better development plan." Id., at 922. See also, Atlantic Int'l Inv. Corp. v. Turner, 381 So. 2d at 724 ("The delay here was occasioned by appellant's failure to provide adequate pollution control facilities ..."), Judge L. Smith, dissenting opinion.

(and Mondex's) corporate manuevering with the accounts receivable, (see Point III.A.2 above) and Atlantic's significant contribution to any delays, inflation is what pushed the project costs out-of-sight.

There is no case which even remotely suggests that delay, by itself, can cause a compensable taking. The only case in which delay has even been recognized as a factor are so-called "precondemnation activities" cases, where the government publicly announces an intention to condemn certain property but delays such action to the detriment of the owners, either causing an artificial drop in property value or depriving the owner of the ability to sell, utilize as is, or improve the property. E.g. Richmond Elk's Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977); Benenson v. United States, 548 F.2d 393 (Ct. Cl. 1977); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970). In these types of cases the property labors under a cloud of public condemnation. Any reliance on these types of cases for the proposition that delay itself caused the taking is overreaching and wholly mistaken.

Holding that a delay can cause a taking during periods of inflation is nothing more than holding that a taking is a function of the size of the assets of the property

owner. The same delay which, by inflation, renders a project financially impossible for one person might have no effect upon another person with ten or one hundred times the financial capability of the first person. Is there a taking of the property of the poorer person but not the richer? Will legal and administrative precedent vary on account of the national economy? The incredible scenarios which the delay theory of the trial court brings to mind are limitless.

There is no legal foundation upon which to build a taking theory based upon delay and a resulting cost increase due to inflation. The question of whether a taking has occurred depends instead upon the character of the invasion (or regulation) and not the amount of damages. Penn Central; Florida East Coast Properties v. Metropolitan Dade County 572 F.2d 1108 (5th Cir. 1978), cert. denied, 439 U.S. 1002 (1978). The Fifth Amendment to the United States Constitution does not undertake to socialize all losses, but only those which result in the taking of property. Not all economic interests are property rights. United States v. Willow River Power Co., 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed 1101 (1945). Further, a guaranteed stable economy is hardly a fundamental attribute of ownership or a recognized property right.

No case can be found, nor does any case exist, which even remotely supports the contention that a delay, per se, can cause a taking. The citations of the trial court to this effect (A. 43, P. 6), and those found in Atlantic's

initial brief to this Court are inapplicable.

No case cited by Atlantic, not one, holds that a delay in and of itself can cause a taking. San Diego Gas and Electric v. City of San Diego, 450 U.S. 621, 651, 101 S.Ct. 1287, 1303 (1981) cannot possible be read for such a proposition of law, neither can Askew v. Gables By-The-Sea, 333 So. 2d 56 (Fla. 1st DCA 1976). A delay may cause an increase in damage but the inaction is not what causes the taking (E.g. City of Shreveport v. Bernstein, 39 So. 2d 1141 (La. App. 1980); Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977); Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977).

In yet another illustration of misplaced reliance on case law, (Petitioner's Initial Brief, page 32) Atlantic cites Doheny v. Grove Isle, Ltd., 442 So. 2d 966, 975, 977 (Fla. 1st DCA 1983) for the proposition that the First District erred in "[seeking] to excuse DER's failure to act during this period [of delay] by holding that the DER's regulation did not require DER to provide pre-submission review" of Atlantic's project. A close look at the holding in Grove Isle reveals that the issue of requiring notification of specific deficiencies dealt with applications already filed with the agency, and not with pre-submission reviews.

Innovative as the delay theory may be, it has no application in the present case.[7] But, even assuming arguendo that a delay could cause a taking, the facts and circumstance would not support its application to the case sub judice.

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7 It is implicit that Atlantic, by virtue of the fact that it settled out of court with DER in Case CC-93, must share in the "blame" for whatever delay was caused by the entire chain of events. If this is not so, then it logically follows that an owner with a most objectionable development plan will be able to enter into protracted administrative proceedings with DER, wasting as much time as is possible, then agree to a modified plan, obtain a permit and then sue the agency under the "delay" theory. See also the comment by Judge L. Smith at 381 So. 2d 724 as to where the actual blame for the delay should be placed.

POINT IV

EVEN IF GOVERNMENTAL REGULATION OF CAE DEVELOPMENT IMPOSED AN UNREASONABLE BURDEN ON THE PROPERTY'S USES OR VALUE, SUCH REGULATION WAS NEITHER A "TAKING" NOR COMPENSABLE, BUT WAS AT WORST A DEPRIVATION OF PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW AND IS THEREFORE INVALID.

Atlantic alleged in the trial court that the cumulative actions of the state "agencies, division, political subdivisions or agents" constituted a taking of property (R. 1236). Atlantic characterized the "state actors" as having acted "arbitrarily and capriciously," and stated that there were "abuses of power" on the state's part. Atlantic, in its Initial Brief before this Court, persists in its allegations.

Arbitrary, capricious and unreasonable acts of state officials violate constitutional guarantees of due process. Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938); Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147 (1924). Violations of due proces which impede a property owner's attempt to utilize his property, however, are not compensable; the proper remedy is to hold invalid and unenforceable those actions which are violative of due process.

The rights of property owners in matters relating to the regulation of their property are set out in the Fifth and Fourteenth Amendments to the United States Constitution. These amendments, in pertinent part state:

> No person shall ... be deprived of ... property without due process of law, nor shall private property be taken for public use, without just compensation.
>
> (N)or shall any state deprive any

> person of ... property without due process of law.

Article X, Sec. 6(a) and Art. I, Sec. 9, of the Florida Constitution, are similar:

> No private property shall be taken except for a public purpose and with full compensation therefor paid ...
>
> No person shall be deprived of life, liberty or property without due process of law...

The constitutions of many states require compensation for property which is either damaged or taken, but neither the federal constitution nor the Florida Constitution awards compensation for damaged property:

> If the damage suffered by the plaintiff is the equivalent of a 'taking' or an appropriation of plaintiff's property for public use, then our Constitution itself recognizes the plaintiff's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque injuria and compensation therefore by the defendants cannot be compelled. Weir v. Palm Beach County, 85 So. 2d 865, 867 (Fla. 1956). (emphasis added)

The organic provision that no person shall be deprived of life, liberty or property without due process of law is not intended to hamper the state in its discretionary exercise of any appropriate sovereign governmental powers, unless substantial private rights are arbitrarily invaded. Dutton Phosphate Co. V. Priest, 67 Fla. 370, 65 So. 282 (1914). Constitutional due process requirements are limitations placed upon the valid exercise of the police power; an unreasonable exercise of the police power violates due

process of law. State ex rel Furman v. Searcy, 225 So. 2d 430 (Fla. 4th DCA), cert. denied 232 So. 2d 178 (Fla. 1969). Clearly, regulation which violates due process or other organic law cannot cause a compensable taking or appropriation because these actions are outside of, and not within, the limits of organic law, in the sense spoken to by the court in Weir v. Palm Beach County, supra.

Regulation of property use may appear to be so oppressive or arbitrary that it crosses the line separating a valid exercise of the police power from an exercise of eminent domain power. However, the proper remedy to be afforded a property owner under the circumstances of invalid regulation is not the awarding of the value of the diminished property right (if any); the proper remedy is a declaration of the invalidity of the purported exercise of the police power. Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), aff'd, 447 U.S. 255 (1980); Pamel Corp. v. Puerto Rico Highway Authority, 621 F.2d 33 (Ct. Cl. 1980); Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, U.S. appeal dismissed 429 U.S. 990 (1976).[8]

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8 As Chief Judge Breitel aptly and accurately pointed out for a unanimous court in Fred F. French, supra, there is a clear distinction between a Fifth Amendment compensable "taking" and a Fourteenth Amendment "non-compensable taking". ..."[W]hen the state 'takes,' that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other [continued on next page]

An arbitrary or unreasonable exercise of the police power regulation private property constitutes a deprivation of property without due process of law. Nectow v. City of Cambridge, 277 U.S. 183, 188-189, 48 S.Ct. 447, 448, 72 L.Ed. 842, 844-45 (1928); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255 (1977), U.S. appeal dismissed, 439 U.S. 809 (1978). The appropriate remedy for such a due process violation is to hold excessive regulatory action invalid or unenforceable through declaratory relief or mandamus, allowing the regulation to be enjoined. E.g.: Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 , 62 L.Ed.2d 332 (1979); Agins v. City of Tiburon. Invalidation of the regulatory action, not monetary damages, was the relief granted in Pennsylvania Coal Co. v. Mahon,

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private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking,' and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a 'taking' or 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised ... . Similarly, in Pennsylvania Coal Co. v. Mahon (citation omitted), a police power and not an eminent domain case, Mr. Justice Holmes states: 'while property may be regulated to a certain extent, if regulation goes too far it will become a taking' (citation omitted) ... .

The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the Pennsylvania Coal case, was there an actual 'taking' under the eminent domain power, despite the use of the terms 'taking' or 'confiscatory.' Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric." 350 N.E.2d at 384-85. (emphasis added throughout).

260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), a case relied upon in Graham v. Estuary Properties, Fred F. French, and, erroneously, by the trial court in the instant case. See also, Maryland-Nat'l Capitol Park v. Chadwick, 286 Md. 1, 405 A.2d 241 (1979).

This rule has been adopted in Florida. Corneal v. State Plant Board, 95 So. 2d 1 (Fla. 1957); Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918); Mailman Development Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. 4th DCA 1974), U.S. cert. denied 419 U.S. 844 (1974). A land owner cannot transmute police power violations into lawful takings for which compensation must be paid. Agins v. City of Tiburon. Such police power violations are simply not compensable. The regulation is invalid or unenforceable as it pertains to the affected land-owner's property. Mailman Development Corp.; Forde v. City of Miami Beach, 146 Fla. 656, 1 So. 2d 642 (1941).

The reason for this rule is plain. It would amount to usurpation of the legislative power for the judiciary to force condemnation upon a legislature, thus, invalidation rather than forced compensation is the appropriate remedy. Agins, 598 P.2d at 30-31. Moreover, constitutional guarantees can be secured without requiring the state to purchase property.

In Graham v. Estuary Properties, 399 So. 2d at 1381 the court stated:

> It may be, however, that a regulation complies with the standards required for the police power but still results in a taking.

This statement is even more true than it appears at first glance, but the trial court erroneously interpreted its significance. Only valid police power regulation could ever rise to the level of a compensable taking, but certainly not all valid police power regulation does. It does not follow, as extrapolated by the trial court, that if a valid police power regulation may cause a taking, an invalid police power regulation must cause a taking. Instead the forementioned cases hold that, in the context of land use law, invalid (arbitrary, capricious, overly-oppressive) police power action is exactly that: invalid. Otherwise, the landowner is able to transmute invalid action into a valid action by compelling compensation. Agins.

This Court has recognized the position set forth in this Point of Argument, albeit indirectly, in both Key Haven and Albrecht. Specifically, this Court has held that:

> [i]t is a settled proposition that a regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking[,] Albrecht, 444 So. 2d at 12,

and, that:

> The propriety of the agency action must be finally determined before a claim for inverse condemnation exists. Id.

The reason why the propriety of the state's actions must be either agreed to by the complaining party or judicially determined is obvious: compensation is not an appropriate relief mechanism where a "taking" occurs by improper police power actions. Relief is by invalidation. A Fifth Amendment

"taking" is compensable. A Fourteenth Amendment due process "taking" is not. The trial court below was entirely unable to recognize this distinction. The First District did.

In the instant case, Atlantic sought compensation in circuit court on a "taking" claim, even as it attacks the validity of the state's exercise of its police powers. Such relief is inappropriate for the reasons outlined above, and is in fact prohibited under the holdings of this Court in Key Haven, and Albrecht, supra.

CONCLUSION

For the reasons stated in this brief, and in the brief of the Attorney General filed on behalf of the State of Florida, Respondent Department of Environmental Regulation requests this Court to affirm the opinion of the First District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent Department of Environmental Regulation has been furnished by United States Mail to the individuals listed below this 23rd day of July, 1984:

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