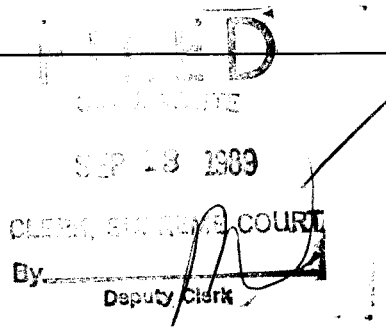
IN THE
SUPREME COURT
STATE OF FLORIDA

CASE NO. **74,406**



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RABEN PASTAL, a Joint Venture, comprised of RABEN BUILDERS, INC. and PASTAL CONSTRUCTION COMPANY,

Petitioners,

vs.

CITY OF COCONUT CREEK, a Florida Municipal Corporation, and JAMES COWLEY,

Respondents.

. . . . . .

ON CERTIFICATION FROM
THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Following the affirmance by the Fourth District Court of Appeal of an Order granting a post-trial Motion for Directed Verdict, and a denial of a Petition for Rehearing, the Fourth District Court of Appeal certified the following question as one of great public importance:

> May a municipality be held liable to an owner-developer of a building project under 42 U.S.C. §1983 for the wrongful refusal of the municipality's chief building official to withdraw a stop work order on the project? 545 So.2d 885, 890 (Fla. 4th DCA 1989).

James Cowley, the Chief Building Official for the City of Coconut Creek, had imposed a stop work order on a condominium development project undertaken by Raben-Pastal involving two (2) buildings in a multiple building development. There is presently no issue as whether the stop work order should have been issued in the first place, but rather whether it should have been lifted prior to the date it was in fact lifted.

The trial judge submitted the case to the jury on the theory that the conduct of Cowley and/or of the City of Coconut Creek violated procedural due process rights guaranteed to the Petitioners of the Fourteenth Amendment to the United States Constitution. The court directed a verdict as to the Petitioners' equal protection and substantive due process claims but nevertheless inquired of the jury whether Cowley had arbitrarily,

capriciously and unreasonably applied the provisions of the South Florida Building Code.

The Respondents' post-trial motions included a Renewed Motion for Directed Verdict on the procedural due process claim, a Motion for Judgment Notwithstanding the Verdict and, alternatively, a Motion for New Trial. The Respondents also moved for a set-off of $1.051 Million against the jury verdict.

Following hearings on February 26, 1986 and June 13, 1986, the court entered separate Orders Granting the Renewed Motion for Directed Verdict and an Order Granting Set-off on August 8, 1986. (T.R. 1895-1961, 1962-2006, Pet. App. 2,3).

The Order Granting the Renewed Motion for Directed Verdict recited that the claim asserted by the Petitioners pursuant to 42 U.S.C. §1983 "constitutes a procedural due process claim and not a substantive due process claim," and that the adequate remedies provided under Florida law preclude relief under the Civil Rights Act. (Pet. App. 2).

The factual background is that a stop work order was issued in late May of 1981 as a result of construction defects which were discovered by the City of Coconut Creek and its building official, James Cowley. The stop work order was issued pursuant to the South Florida Building Code.[1] There is no present issue that the stop work order was proper at its inception, but

[1] By virtue of Chapter 71-575, Laws of Florida, the South Florida Building Code is made applicable to all the municipalities in Broward County.

rather that its continuation deprived the Petitioners of due process rights.

During the pendency of the stop work order a controversy arose surrounding the City's refusal to accept either Charles Adams or Arthur Bromley as "special inspectors" as contemplated by the South Florida Building Code. The building official was of the mind that neither Adams nor Bromley were appropriate persons to hold this position as they had been involved in the original construction phase which resulted in the code violations.

Despite Raben-Pastal's insistence that Mr. Adams was an appropriate special inspector pursuant to §305 of the South Florida Building Code, Cowley insisted that this created a serious conflict of interest. This resulted in an appeal to the Board of Rules and Appeals and the filing of a Petition for Writ of Mandamus in the Circuit Court of Broward County.[2] The Petition was filed on July 20, 1981 and was ultimately denied.

The Board of Rules and Appeals met on July 30, 1981 and following a hearing declined to order that the stop work order be lifted. (T.R. 1708-1740).

Raben-Pastal did not follow the appeal provisions contained within the South Florida Building Code, but rather chose to continue to pursue the mandamus action. Following a hearing

[2] The Fourth District opinion incorrectly recites that the Mandamus action was filed in Federal Court. 545 So.2d at 886.

before Broward Circuit Judge John King, the petition for writ of mandamus was denied. No appeal was taken from this ruling.

A second appeal to the Board of Rules and Appeals was heard on November 12, 1981. This appeal sought to avoid a load test of the second of two (2) buildings involved following an agreement that both would be load tested prior to the lifting of the stop work order. The basis for this appeal was that the first building has passed a load test following correction of the defects, but that Petitioners did not want to undergo the expense of the second test. The Board of Rules and Appeals declined to interfere with the load test, and upon its successful completion, the stop work order was lifted and construction was resumed. (Joint Plaintiffs' Exhibits 1A, 1B and 2).

The judicial remedy provided by 5203.7 of the South Florida Building Code was not utilized by the Petitioners, nor did the Petitioners seek compensation or other relief through any other proceeding.

SUMMARY OF THE ARGUMENT

The Respondents respectfully submit that the certifi d question does not present one of "great public importance," and therefore, this Court should exercise its discretionary jurisdiction in declining review of the certified question.

Alternatively, Respondents submit that the Fourth District Court of Appeal properly applied United States Supreme Court law on the issue of municipal liability and that the holding of that Court should not be disturbed.

The ancillary issues presented do not require review by this Court as resolution of them is not necessary to resolution of the certified question.

As to both the procedural and substantive due process claims advanced by the Petitioners, these claims are subject to the finality doctrine and are premature as a matter of law.

The procedural due process claim is without merit as the trial court properly ruled, and the Fourth District properly affirmed, on the basis that adequate post-deprivation remedies are provided pursuant to Florida law.

The "rules of the game argument" is without merit as the United States Supreme Court decisions on the issue of municipal liability do not represent a "clear break" with existing law, but rather a development and distillation of existing law.

The set-off issue should not be reviewed as it is not properly a part of the certified question, nor is the resolution of this issue necessary to a fair determination of this case.

The trial court and the Fourth District Court of Appeal properly resolved the set-off issue.

ARGUMENT

I.

IF] QUESTION/"GREAT : IMPORTANCE"

The jurisdiction of this Court is invoked pursuant to Rule 9.030(a)(2)(A)(v), which provides in pertinent part as follows:

> The discretionary jurisdiction of the Supreme Court may be sought to review: decisions of district courts of appeal that: pass upon a question certified to be of great public importance.

The certification of a question by the Fourth District Court of Appeal, while serving as a jurisdictional basis for review, evokes only the potential discretionary jurisdiction of this Court and does not mandate an opinion on the question propounded. Pan American Bank of Miami v. Alliegro, 149 So.2d 45 (Fla. 1963); Zerin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

Therefore, the threshold determination as to whether the certified question truly presents one of "great public importance," is necessary to a determination as to whether or not this Court should exercise its discretionary jurisdiction.

The Petitioners have not suggested why the question presented is one of "great public importance." The Respondents would submit that the certified question as propounded is fact

specific and is not related to an alleged pattern of conduct or established procedure which is likely to recur. Joint Ventures v. Department of Transportation, 519 So.2d 1069 (Fla. 1st DCA 1988). Rather, the issue presented herein relates to a reaction to what was viewed by the officials of the City of Coconut Creek, by the media and by a substantial number of the members of the public at large as a crisis situation rather than an issue of recurring significance. The historical perspective of the stop work order should be considered in evaluating the potential public importance of the issue presented. Notice of the defects in the development in question followed closely in time to the Cocoa Beach Condominium collapse on March 21, 1981 which had resulted in heavy loss of life and which caused much of the concern for the safety of the Raben-Pastal project. Alles v. Department of Professional Regulation, 423 So.2d 624 (Fla. 5th DCA 1982).

The maintenance of the stop work order until satisfactory assurances of safety were provided should be considered in this historical context which militates against the likelihood that the situation will reoccur.

Further, as will be discussed in Section 11. of this brief relating to the certified question, the Fourth District Court of Appeal property followed the decision of the United States Supreme Court of City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), as it relates to the issue of municipal liability. As Praprotnik does not represent new law, but rather the refinement by the Supreme Court of a decade of

development of the law of municipal liability, there is no for this Court to review the decision of the Fourth District Court of Appeal.

II.

THE CERTIFIED QUESTION

THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN DETERMINING THAT THE CHIEF BUILDING OFFICIAL WAS NOT THE FINAL POLICY-MAKER IN THE CITY OF COCONUT CREEK CONCERNING THE LIFTING OF STOP WORK ORDERS.

A municipality may be held liable under **51983** only when the municipality itself causes the constitutional deprivation. Monell v. Department of Social Services of the City of New York, **436** U.S. **658, 98** S.Ct. **2018, 56** L.Ed.2d **611 (1978).** This causal nexus stems from the "subject to or causes to be subjected language of **42** U.S.C. §1983." Consequently, the first inquiry in any case alleging municipal liability pursuant to **§1983** is whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. City of Canton, Ohio v. Harris, **489** U.S. ____, **109** S.Ct. **1197, 103** L.Ed.2d **412 (1989).** (emphasis added).

The Supreme Court has consistently rejected respondeat superior as a basis for municipal liability, Id. at **1203, "[o]nly** when the execution of the government's policy or custom inflicts that injury that the municipality may be held liable under §1983."

Additionally, "it is only when a constitutional tort is caused via a policy, statement, ordinance, regulation or decision officially adopted and promulgated by that body's

offices," Monell, at 2021, that the governmental entity may be held liable.

In rejecting respondeat superior as a basis for municipal liability, the Monell Court explicitly concluded that municipalities can be held liable only if a government's law makers or those who represent the official policy effectuate an unconstitutional policy.

An essential point of concern was when could an official be deemed to be responsible for said policy in a specified area of government business. The Supreme Court emphasizedthat not every decision by a municipal officer will subject the municipality to §1983 liability. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

The Pembaur Court made it clear that liability will attach only when the official possesses final authority to establish municipal policy with respect to the alleged constitutional violation. Id. at 1299, 1300. (emphasis added). Furthermore, even if the official has discretion in the performance of his specified duties, this does not necessarily give rise to §1983 liability. Id. In Pembaur, the Court formulated the legal standard for determining when an official has final official policy-making authority.

The four guiding principles are:

(1) municipalities may be held responsible only for the acts for which the municipality itself is responsible;

(2) only municipal officials with 'final policy-making authority' may by their actions subject the municipality to §1983 liability;

(3) state law determines whether a particular official has final policy-making authority; and

(4) the action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. (emphasis in original). Id. at 1300.

As the applicability of these legal standards to subsequent cases led to diverging interpretations by the circuit courts of appeals, the Supreme Court revisited the issue in City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). In Praprotnik, the court solidified the methodology for ascertaining when an official act represents final authority. Praprotnik, as will be shown, is analogous to the case at bar and was properly applied by the Fourth District Court of Appeal to the fact situation presented by the record herein.

The Court in Praprotnik found that the determination of final policy-making authority is a question of state law. As there is no contention that the South Florida Building Code is unconstitutional, its provisions must supply the solution to the question of final authority.

James Praprotnik was an architect employed by the City of St. Louis in a management-level position who, after appealing a temporary suspension to the city's civil service

commission board, was transferred to a clerical position in another city agency and subsequently laid off. Id. at 919. Praprotnik claimed, relying on §1983, that the city had violated his First Amendment rights by the lay-off. He prevailed at the trial court level and the Eighth Circuit Court of Appeal affirmed, holding that the jury had implicitly determined that Praprotnik's lay-off was brought about by an unconstitutional city policy. The court of appeals defined a policy-maker as one whose employment decisions are final and not subject to de novo review by higher ranking officials. Furthermore, the court of appeals found that liability could attach to the municipality for decisions made by the personnel of the city.

The Supreme Court reversed, specifically setting forth the appropriate legal standard for determining when final decision-making authority is effectuated. In Praprotnik, the city charter expressly authorized the civil service commission to review employment policy as well as to review decisions of high-level employees. Praprotnik's contention that the civil service commission's review of individual employment actions gave "too much deference to the decisions of appointing authorities" was rejected.

The Praprotnik court made it clear that

> simply going along with discretionary decisions made by one subordinate . . . is not a delegation to them of the authority to make policy. Id. at 927.

In essence, the presumption by the board that a subordinate was properly applying policy is not tantamount to a finding that the official was acting with final authority. Id.

The Praprotnik analysis is applicable to the case at bar. The South Florida Building Code specifically sets guidelines and policies for regulating construction. South Florida Building Code, §§201-205. (Chapter 71-575, Laws of Florida).[3]

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[3] The relevant sections of the South Florida Building Code are as follows:

> **201.1(A) BUILDING OFFICIAL**
>
> (2) POWERS OF BUILDING OFFICIAL: The building official shall be subject to the powers vested in the Board of Rules and Appeals, as set forth in **5203** of this Code. Building officials shall delegate powers, duties and assignments to certified chief inspectors to interpret the provisions of the Code in categories in which the building official is not certified.
>
> (4) STOP WORK ORDERS: Whenever any building work is being done contrary to the provisions of this Code or is being done in an unsafe or dangerous manner, the building official or his duly authorized representative may order such work stopped, or may order the person or persons engaged in the doing or causing of such work to be done and such persons shall immediately stop work until arrangements, in compliance with the provisions of this Code and satisfactory to the building official or his duly authorized representative have been made, at which time he may authorize the work to proceed.
>
> **203 BOARD OF RULES AND APPEALS**
>
> In order to determine the suitability of alternate materials and types of construction, to provide for reasonable interpretation of the provisions of this Code and to assist in

(continued...)

[3](...continued)
and structures, there is hereby created a Board of Rules and Appeals, appointed by the appointing authority, consisting of twenty one members who are qualified by training and experience to pass on matters pertaining to building construction.

203.4 DUTIES:

(a) APPEAL FROM DECISION OF BUILDING OFFICIAL: The Board shall hear all appeals from the decisions of the building official wherein such decision is on matters regulated by this Code from any person, aggrieved thereby, and specifically as set forth in §204. "Alternate materials and types of constructions." Application for appeals shall be in writing and addressed to the Secretary of the Board.

(b) INTERPRET CODE AT REQUEST OF BUILDING OFFICIAL: The Board shall pass on all matters pertaining to this Code and referred to the Board by the building official for interpretation or clarification.

(g) Notwithstanding, and in addition to, the jurisdiction of the Board of Rules and Appeals created by Chapter **71-575,** Laws of Florida, Building Code as applicable to Broward County may be enforced by injunctive proceedings, or other appropriate legal proceedings, in the appropriate court having jurisdiction thereof, upon petition or complaint filed by the Board of Rules and Appeals, which is hereby granted the power to sue and be sued, or by any aggrieved person, any interested citizen, citizens association, corporation or other business entity if any elected or appointed officials named in §3 of Chapter **71-575** or any building official fails or refuses to comply with said Code.

203.5 POWERS

(a) **(1)** The Board of Rules and Appeals may interpret the provisions of the Code to cover

(continued...)

From this it is clear that the building official, James Cowley, was not vested with final policy-making authority. Petitioners had the opportunity to appeal to the Board of Review and Appeals, as provided by the Building Code, which regulated the projects in question.

The fact that the Board seemingly went along with the decision of the building official is irrelevant under the Praprotnik analysis. Mere acquiescence in the decision of the building official does not confer final decision-making authority on Cowley, necessary for the imposition of municipal liability.

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[3](...continued)

(a) (1) The Board of Rules and Appeals may interpret the provisions of the Code to cover a special case if it appears that the provisions of the Code do not definitely cover the point raised, or that the intent of the Code is not clear, or that ambiguity exists in the wording; but it shall have no authority to grant variances where the Code is clear and specific.

(b) The Board shall have the power to affirm, modify or reverse the decision of the Building Official wherein such decision is on matters regulated by the Code.

203.7 COURT REVIEW:

(a) Any party aggrieved by a decision of the Board of Rules and Appeals, whether or not a previous party to the decision, may apply to the appropriate court for a writ of certiorari to correct errors of law of such decision.

(b) Application for review shall be made to the proper court of jurisdiction within five days after the decision of the Board.

Furthermore, Petitioners were afforded "double protection" as the South Florida Building Code specifically authorizes any person aggrieved by a decision by the Board of Rules and Appeals to apply to the appropriate court for a writ of certiorari. Therefore, even if as Petitioners claim, the Board of Rules and Appeals deferred to the judgment of Cowley, Petitioners still had other avenues to pursue for remedial action before a final decision was made.

The Fourth District Court of Appeal correctly held "the [Building Code] not only provides guidance, it also provides for review of the building official's decision thus specifically denying 'final policy-making authority' over construction projects." 545 So.2d at 889. (emphasis added).

It has been the policy of the Supreme Court to limit municipal liability under §1983. This is especially true in instances whereby a municipal employee utilizes his discretionary power to carry out a constitutional policy in an allegedly unconstitutional manner. To impose liability on the City of Coconut Creek in the present case would be tantamount to finding it liable on a theory of respondeat superior. This would be in direct conflict to the teachings of Monell, Pembaur and Praprotnik.

The Fourth District Court of Appeal properly recognized this and properly applied Praprotnik to this case. This correct decision should not be disturbed.

III.

ANCILLARY ISSUES

Respondents recognize that while this Court has the authority to entertain issues ancillary to the certified question which may extend to "any error in the record," this is not mandatory. Tushin v. State, 425 So.2d 1126, 1130 (Fla. 1982); Bell v. State, 394 So.2d 979 (Fla. 1981); Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977); see also Confederation of Canada Life Insurance Co. v. Vega Y. Arminan, 144 So.2d 805, 807 (Fla. 1962); Zerin v. Charles Pfizer & Co., supra, at 594.

The Petitioners have requested that this Court address issues involving procedural due process, substantive due process and the issue of set-off in addition to considering the certified question. The Respondents submit that resolution of these issues will not affect the outcome of the case and should not be addressed as ancillary issues necessaryto the proper resolution of the certified question. Despite this assertion, the Respondents will address the ancillary issues discussed by the Petitioners.

1.

RIPENESS

The Petitioners advance the argument that their claim should be treated as one sounding in substantive due process pursuant to the Fourteenth Amendment to the United States Constitution. This argument is advanced despite the fact that the

trial court directed a verdict in favor of the Respondents on this claim, and despite the fact that the Order Granting Renewed Motion for Directed Verdict is specifically couched in procedural due process terms.

Regardless of whether the claim is one sounding in procedural due process or substantive due process, both are subject to the ripeness requirement enunciated by the Supreme Court in Williamson County Resional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

The Court in Williamson County followed recent decisions which made it "clear that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 3116.

The Court expressly applied this reason to both procedural and substantive due process claims.

> ... a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation ... .
>
> * * *
>
> ... the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss.' Id. at 3121. (procedural due process).

> We need not pass on the merits of petitioners' arguments, for even if viewed as a question of [substantive][4] due process, respondent's claim is premature.
>
> * * *
>
> That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. (emphasis added).
>
> * * *
>
> In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking ... . Id. at **3123-3124**.

Therefore, application of this doctrine renders Petitioners' claims premature regardless of whether the claims sound in procedural or substantive due process terms.

2.

PROCEDURAL DUE PROCESS

The trial court properly addressed the procedural due process issue in its Order Granting Renewed Motion for Directed Verdict. The court specifically held that procedural due process had not been violated by virtue of the fact that the South Florida Building Code provided adequate remedies to the Petitioners. The

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[4] "Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a taking ..." defines the substantive due process claim presented. Id. at **3123**.

review provisions contained in the South Florida Building Code provide not only review by the Board of Rules and Appeals[5] to the action of the building official in imposing a stop work order: but also for judicial review to any aggrieved party, whether or not they are a party to the Board of Rules and Appeals review.[6]

In addition, the courts of this state have consistently held that both the Fifth Amendment to the Constitution of the United States and Article X, section 6 of the Florida Constitution are self-executing and require that compensation be provided whenever a landowner has been subjected to unreasonable or arbitrary regulation as to the use of his property. Department of Agriculture and Consumer Services v. Mid Florida Growers, 521 So.2d 101 (Fla. 1988); Joint Ventures v. Department of Transportation, 519 So.2d 1069, 1070-1072 (Fla. 1st DCA 1988). See also Lee County v. New Testament Baptist Church of Ft. Myers. Florida, Inc., 507 So.2d 626, 627-628 (Fla. 2nd DCA 1987)(holding that circuit court review of agency action and an inverse condemnation action could be brought in the same action).

Therefore, the trial court correctly ruled, and the Fourth District left undisturbed, the holding that remedies available to the Petitioners, both administrative and judicial,

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[5] 5203.5(b)(1), South Florida Building Code.

[6] 5203.7, South Florida Building Code.

were adequate, and therefore, the process provided for redress passes constitutional muster.

In addition, the remedy provided by 5768.28, ~~Fla.~~ Stat. are constitutionally adequate. Martinez v. State of California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985); ~~Rymer~~ v. Douslas County, 764 F.2d 796 (11th Cir. 1985). ~~See also~~ Campbell v. City of Coral Springs, 538 So.2d 1373, 1374-1375 (Fla. 4th DCA 1989)(collectively holding the limitations imposed by state immunity statutes do not render the remedies inadequate).

Therefore, proceduraldue process is not denied where "under state law, the complaining party can obtain full redress for the wrongs complained of." Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); ~~City of Lake Worth v. Walton~~, 462 So.2d 1137, 1140 (Fla. 4th DCA 1984); ~~Lee County v. Zemel~~, 545 So.2d 344, 346 (Fla. 2nd DCA 1989).

Reliance by the trial court, and by the Fourth District Court of Appeal on Parratt and ~~Walton~~ is proper. In 51983 cases there is no procedural due process injury to a property interest where adequate remedies are available pursuant to state law.

3.

SUBSTANTIVE DUE PROCESS

Even if this Court were to treat the Petitioners' claim as sounding in substantive due process,[7] the finality doctrine previously referred to is applicable. Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, at 3122-3123.

Under this doctrine a substantive due process claim is premature absent a final determination as to how the property could be used by the landowner. Lee County v. New Testament Baptist Church of Ft. Myers, Florida, Inc., supra, at 629; see also Judge Ervin's Special Concurrence in Joint Ventures v. Department of Transportation, supra, at 1073-1074; Bensch v. Metropolitan Dade County, 541 So.2d 1329-1330 (Fla. 3rd DCA 1989).[8]

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[7] See footnote 4.

[8] Video International Production v. Warner - Amex Cable Co., 858 F.2d 1075, 1087-1088 (5th Cir. 1988) is not to the contrary. The constitutional deprivation alleged in that case was a First Amendment violation which the court held was a final deprivation by virtue of the fact that the building inspector sent a communication to cable customers concerning a zoning violation was resulted in the customers terminating service with the cable company. As the court pointed out, there was no avenue that could have been pursued to avoid the immediate injury resulting from the alleged First Amendment violation. This is clearly distinguishable from the case at bar.

4.

RULES OF THE GAME

Petitioners allege that if Praprotnik is applicable to the case at bar, then "Petitioners never had a chance to plead and prove their cause under the present law." See Initial Brief of Petitioners, at 28. It is abundantly clear that the progression of cases prior to Praprotnik logically and rationally led to the result obtained. See generally Monell v. New York City Department of Social Services, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978); Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Praprotnik does not represent a departure from prior law, but restates and clarifies the law as it relates to municipal liability dating from the rejection of respondeat superior as a basis for municipal liability in Monell. As its predecessors indicated, Praprotnik attempts to refine and focus on the method of delineating when a municipal representative has final policy-making authority. In the more recent Supreme Court decision of Jett v. Dallas Independent School District, ____ U.S. ____, 109 S.Ct. 2702 (1989), the Court reaffirmed the proposition that Praprotnik represented a distillation of previous §1983 law:

> Last term in St. Louis v. Praprotnik ... we attempted a clarification of tools a federal court should employ in determining where policy-making authority lies for purposes of §1983 ... . [T]he plurality reaffirmed the teachinss of our prior cases to the effect that 'whether a particular official has 'final

> policy-making authority' is a question of state law.' Id. at 2723. (emphasis added). Quoting Pembaur, 475 U.S. 483, 106 S.Ct. at 1300. (plurality opinion).

Therefore, Petitioners' contention that there has been a change in the "rules of the game" is without merit.

As the Florida Supreme Court has held, "[d]ecisional law ... in effect at the time an appeal is decided governs the case even if there has been a change since [t]he time of the trial." Lowe v. Price, 437 So.2d 142 (Fla. 1983). See also Wheeler v. State, 344 So.2d 244 (Fla. 1977); McGoff v. State, 457 So.2d 321 (Fla. 2nd DCA 1984); Williams v. Wainright, 325 So.2d 485 (Fla. 4th DCA 1975).

Furthermore, the Supreme Court of the United States has held that "all questions of civil retroactivity continue to be governed by the standard enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)." United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2578, 2594, 73 L.Ed.2d 292 (1982).

In Chevron, the court applied the "clear break"[9] standard as the threshold test of retroactivity. Johnson, 102 S.Ct. at 2587, n.12. Unless a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on

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[9] In general, the court has not subsequently let a decision to work a "sharp break in the web of the law" ... unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." (citation omitted). United States v. Johnson, 102 S.Ct. at 2588.

which litigants have relied ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed," retroactive application is proper.

The development of the municipal liability from Monell to Praprotnik does not represent a "clear break" so as to raise any question as to the propriety of retroactive application.

Appellants' reliance on Lee County Branch of NAACP v. City of Opa Locka, 748 F.2d 1472, 1480, n.12 (11th Cir. 1984) is misplaced. In Lee County, Congress had amended Section 2 of the Voting Rights Act of 1965 during the pendency of the appeal. This new legislation created a "clear break" which would require remand, but this is not comparable to the situation presented herein.

However, if this Court were to determine that the "rules of the game" have changed, Jett requires a remand for a new trial.

In Jett the Supreme Court unequivocally stated that "the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." Id. at 2723. (emphasis in original).

Thus, whether Cowley had final authority as a building official is a question of law to be determined by the judge. However, the record clearly reveals that the trial judge submitted the question of final authority to the jury.

> You are therefore instructed [the jury] to determine whether either the City or the South Florida Building Code delegated the final

authority to make decisions regarding stop work orders to James Cowley. (R. 1872).

Furthermore, Jett requires that once the judge determines finality "it is for the jury to determine whether their [in this case Cowley] decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur." Id. at 2723 (citing Monell, 436 U.S. at 661, n.2, 98 S.Ct. at 2020, n.2, 56 L.Ed.2d 611. (emphasis added).

In the instant case the jury received what amounted to a peremptory instruction that they "must find the City liable for any act of Cowley that you find violated the Plaintiffs' constitutional rights." (R. 1872).

Therefore, the judge invaded the province of the jury, to weigh the facts and determine whether Cowley's actions caused a constitutional violation.

This is in direct violation to the mandates of Jett. Therefore, if the "rules of the game" have changed the case must be remanded for retrial.

5.

SET-OFF

On November 25, 1985, a settlement was announced by and between the Petitioners and Post-Tensioned Structures, Inc., Post-Tensioned Placing and Service, Inc. Corporation, Arthur Bromley and Continental Casualty Company, in the amount of $1,051,000.00.

Mr. Coogler, spokesman for the settling Defendants, announced the settlement as follows:

> The settlement is for the settlement of a tortious claim between the parties.
>
> Payment of this figure will result in general releases being exchanged for any and all claims between the parties, Mr. Parriser, Charles Adams, Arthur Bromley and others. (T.R. **2010-2011**).

This settlement was announced to the jury by the Court to the effect that the issues between the settling Defendants and the Petitioners "have been resolved and will not be tried as part of this case." (T.R. **2016**).

Therefore, the case proceeded to trial only the issues involving the City of Coconut Creek, James Cowley and two **(2)** other professional Defendants who were later dismissed.

There was no discussion nor announcement that the settlement with those Defendants was for anything less than **"all** claims between the parties" nor was there any discussion that anything less than a general release would be exchanged.

Following the verdict, the Respondents filed a Motion for Set-Off alleging that the damages sustained by the Petitioners formed one (1) measure of damages and that they were therefore entitled to a set-off for this amount.

A hearing was held on the post-trial motions on February **26, 1986,** but the issue of set-off was deferred for later consideration by the trial court. (T.R. **1895-1961**).

The matter came back before the Court on June 13, 1986, and following extended discussion and briefing of the issues involved, the Court found that the released parties were liable for all damages sustained by the Petitioners which included the same damages that the Respondents were held liable by the jury. (T.R. 2003-2004). An Order granting the Set-Off was entered on August 8, 1986. (Pet. Supp. 3).

The set-off issue was fully argued and presented to the Fourth District Court of Appeal which ruled that because there was no apportionment of damages by the settling Defendants with those who remained, the set-off was proper.

It is clear from the announced settlement that the settling Defendants, referred to by the Petitioners as the professionals, intended to and accomplished a full settlement for any and all liability which was conditioned on the giving of general releases. No statement was made, nor did the settlement documents ever reflect that these professionals were liable to the Petitioners for anything less than the entire damages which formed a part of the liability ultimately assessed by the jury against the Respondents.

Throughout the course of the litigation, Petitioners consistently had taken the position that all of the Defendants, including the settling professionals, were jointly and severally liable for all the damages allegedly suffered by Raben-Pastal. The Third Amended Complaint provides that Plaintiff sues Defendants, jointly, severally and individually, and allege as follows:

* * *

The trial court recognized that the settling Defendants had contributed against a total liability for damages, based on the pleadings, the settlement and the proof as is evidenced by the Order Granting Set-Off which recites as follows:

> 1. That inasmuch as Plaintiff sued the Defendants, Arthur Bromley, Post-Tensioned Structures, Inc., Post-Tensioned Placement, Inc. and Donald Bryan, for both pre- and post-July 2nd damages, claiming in its pleadings that the negligent acts of the said Defendants prior to January 2nd were a proximate cause of its post-July 2nd as well as its pre-July 2nd damages, and since Plaintiff settled all of its claims with said Defendants for an aggregate sum of $1,051,000, without specifying which damages the sums were to be applied to, and inasmuch as the post-July 2nd damages described above are the same damages that were sought and awarded by the jury verdict recovered from the Defendants, City of Coconut Creek, Florida and James Cowley, the $1,051,000 settlement sum shall be set-off from the $2,500,000 jury verdict rendered in this cause. (Pet. Supp. 3).

Dobson v. Camden, 725 F.2d 1003 (5th Cir. 1984), en banc, does not support Petitioners' claim. Dobson related to separate wrongs for which each defendant was subject to liability, not the situation presented herein.[10]

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[10] Professor Schwartz makes the following observation about Dobson:

> The precedential value of Dobson is greatly diminished, if not obliterated, by the fact that after the case was heard by the court en banc, it determined that, since the settling and non-settling defendants were charged with separate wrongs for which was subject to his (continued...)

Respondents have previously relied on Crown Cork & Seal Co., Inc. v. Vroom, 480 So.2d 108 (Fla. 2nd DCA 1985) and Dionese v. City of West Palm Beach, 500 So.2d 1347 (Fla. 1987) for the proposition that a settling plaintiff is not entitled to more than one (1) recovery and that it is not for the settling plaintiff to determine how to apportion settlement proceeds.

This is consistent with the purposes of the Civil Rights Act, as the goal of 51983 is to compensate a plaintiff who has suffered a violation but not to allow double recovery. Sims v. Jefferson Downs Racing Association, 778 F.2d 1068, 1081-1082 (5th Cir. 1985); Hinshaw v. Doffer, 785 F.2d 1260, 1969 (5th Cir. 1986). See also Hall v. Ochs, 817 F.2d 920-926 (1st Cir. 1987).

To allow the Petitioners to avoid the obvious intent of the settlement made with the professionals would result in a windfall double recovery which this Court expressly rejected in Dionese, supra.

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[10](...continued)
own liability, the issue decided by the panel opinion was not actually before the court. 'Without any basis for joint liability, there are no problems of contribution or of crediting the settlement with [defendant] Denny's against the recovery from [non-settling defendant] Camden.'

Schwartz, §1983 Litigation: Claims, Defenses and Fees, 514.14, p. 315. (John Wiley and Sons 1986).

Therefore, the trial court was correct in granting the set-off, and his order which was affirmed by the Fourth District Court of Appeal should not be disturbed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that:

(1) the certified question does not present one of "great public importance," and therefore, the discretionary jurisdiction of this Court should not be invoked to respond to the certified question, but rather review should be denied and the opinion of the Fourth District Court of Appeal left undisturbed;

(2) the certified question, if it should be answered, should be answered in favor of the Respondents, that is, that the Fourth District Court of Appeal correctly applied the municipal liability standard in holding that the City of Coconut Creek was not responsible to the Petitioners pursuant to the Civil Rights Act;

(3) resolution of the ancillary issues is not necessary to a proper determination of the certified question, and therefore, this Court should not address those issues;

(4) in the event that resolution of the ancillary issues is determined to be warranted, these issues should be resolved in favor of the Respondents;

(a) both as to procedural due process and substantive due process, the finality doctrine precludes resolution of these issues as being premature;

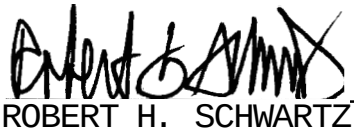
(b) procedural due process has been satisfied by the adequate state procedures provided under Florida law;

(c) the "rules of the game" have not changed; and

(d) the set-off issue was properly determined by the trial court and by the Fourth District Court of Appeal.

The Respondents respectfully submit that this Court should not exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal, but in the event that review is deemed appropriate, the certified question should be answered in favor of the Respondents. It is further submitted that the ancillary issues presented should not be reviewed, but if review is appropriate, they should be resolved in favor of the Respondents.

Respectfully submitted,

BY 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: BYRON G. PETERSEN, ESQUIRE, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Attorneys for Respondents, 500 East Broward Boulevard, Suite 1350, Fort Lauderdale, Florida 33394, SAM DANIELS, ESQUIRE, Daniels & Hicks, P.A., New World Tower, Suite 2400, 100 North Biscayne Boulevard, Miami, Florida 33132, MARTIN J. SPERRY, ESQUIRE, Sperry & Shapiro, P.A., 805 East Broward Boulevard, Suite 300, Fort Lauderdale, Florida 33301 and PAUL S. STUART, ESQUIRE, Stuart & Walker, P.A., Post Office Box 14004, Fort Lauderdale, Florida 33302, this 11th day of September, 1989.

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