FILED
SID J. WHITE
JUN 2 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

METROPOLITAN DADE COUNTY,

Petitioner,

CASE NO. 92,536

v.

CHASE FEDERAL HOUSING CORP., et al.,

DISTRICT COURT OF APPEAL
THIRD DISTRICT
NO. 97-00857

Respondents.

_____/

ANSWER BRIEF ON THE MERITS OF CHASE FEDERAL HOUSING CORP.

Robert M. Brochin
Florida Bar No. 0319661
David Ashton
Florida Bar No. 852945
MORGAN, LEWIS & BOCKIUS, LLP
Attorneys for Respondent
Chase Federal Housing Corp.
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
Telephone: (305) 579-0300
Facsimile: (305) 579-0321

MIA/58488.1

TABLE OF CONTENTS

MORGAN, LEWIS & BOCKIUS LLP

5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

TABLE OF AUTHORITIES

CASES

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

Page

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

Page

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

CONSTITUTIONS

STATUTES

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

REGULATIONS

MORGAN, LEWIS & BOCKIUS LLP

5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

COUNTY ORDINANCES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS

The parties stipulated to the facts in this case. Curiously, Petitioner's statement of the facts travels far beyond that Stipulation and does not cite to it. Petitioner's statement is also incomplete in significant respects. Drycleaning solvent contamination was discovered in a storm drain at the Southpark Center property previously owned by Chase Federal Housing Corp. ("Chase"). It was not discovered in an underground septic tank system and drainfield as alleged by the County. (R. 787 ¶ 6). There was no systematic release of solvents to an underground treatment unit at Southpark Center because no septic tank system existed.

Neither is there any record evidence that contamination has migrated off Southpark Center. Similarly, there is absolutely no record support for the bald assertion that contamination that was not "reasonably recoverable" migrated off the property. Quite the contrary, the County's Amended Complaint sought an injunction to compel Chase to contain **off-site** contamination. (R. 789 ¶ 12; R. 131). Finally, Chase has not been engaged in "4 years of active assessment and cleanup," nor is it "in a `monitoring only stage'." In reliance on the Drycleaning Program, Chase has not completed the rehabilitation

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

of Southpark Cleaner's contamination under the administrative order of Miami-Dade County Department of Environmental Resources Management ("DERM"). (R. 787, 789 ¶¶ 8, 13, 14). Chase is seeking to complete rehabilitation under the voluntary cleanup program of subsection 376.3078(9), Fla.Stat. (1997).

The issue on appeal is whether Chase's eligibility in that Drycleaning Cleanup Program precludes DERM from compelling site rehabilitation or from recovering rehabilitation costs under Chapter 24 of the County Code. The answer is yes by virtue of the supremacy of the Drycleaning Solvent Contamination Cleanup Act over Chapter 24. § 376.3078(3), Fla.Stat. (1997), amended by, Ch. 98-189, Laws of Fla. (the "Drycleaning Act").

The Drycleaning Contamination Cleanup Program

In the Spring of 1994, the Florida Legislature enacted the Drycleaning Act, Chapter 94-355, Laws of Fla. The Legislature created an innovative program to fund the cleanup of past and current pollution stemming from drycleaning operations. The Act created a trust funded by a tax on drycleaning facility gross receipts and drycleaning solvents to be used to rehabilitate drycleaning contamination throughout Florida (the "Drycleaning Cleanup Program" or "Program"). §§ 376.70, 376.75 & 376.3078(2), Fla.Stat. (1997). The Program was intended to

address past and current releases of solvents which occurred "as part of the normal operation of" drycleaners. Id. § 376.3078(1)(a), (b). Excluded from coverage were situations of unusual or abnormal releases of drycleaning solvents falling into the categories of grossly negligent behavior or intentional disposal occurring after the November 19, 1980 effective date of federal hazardous waste regulations covering drycleaning solvent wastes. Id. §§ 376.3078(3)(a)(3.), (3)(c), (7)(c), (7)(d).

The Drycleaning Act unequivocally states its purpose:

> (a) Significant quantities of **drycleaning solvents have been discharged in the past** at drycleaning facilities as part of the normal operation of these facilities.
> (b) **Discharges** of drycleaning solvents at such drycleaning facilities **have occurred and are occurring, and pose a significant threat** . . . .
> (c) **Where contamination** of the groundwater or surface water **has occurred, remedial measures have often been delayed for long periods while determinations as to liability and the extent of liability are made, and such delays result in the continuation and intensification of the threat** to the public health, safety, and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination.
> (d) **Adequate financial resources must be readily available to provide for the expeditious supply of safe and reliable alternative sources of potable water to affected persons and to provide a means for investigation and rehabilitation** of contaminated sites without delay.
> (e) **It is the intent of the Legislature** to encourage real property owners to undertake the voluntary cleanup of property contaminated with drycleaning solvents and **that the immunity provisions of this section and all**

> **other available defenses be construed in favor of real property owners.**

§ 376.3078(1), Fla.Stat. (1997) (emphasis added), as amended by § 10, ch. 98-189, Laws of Fla. (effective July 1, 1998).

A critical and essential element of the rights created by the Program is the shield against rehabilitation liability contained in subsection 376.3078(3), Fla.Stat. Eligibility under subsection 376.3078(3) entails rights to have rehabilitation activities funded from the trust fund and not to be sued either to compel performance of site rehabilitation or to compel payment of the costs of rehabilitation. Id. § 376.3078(3)(a). The Legislature provided that those potentially liable for eligible contamination resulting from drycleaning solvents -- **regardless of when the contamination was discovered** -- cannot be subject to administrative or judicial action by governmental agencies to compel rehabilitation or to pay for the cost of rehabilitation of such environmental contamination. Id. § 376.3078(3). Subsection 376.3078(3)'s "rehabilitation liability" provision states:

> (3) **Rehabilitation liability.--In accordance with the eligibility provisions of this section**, no real property owner or **no person** who owns or operates, or **who** otherwise **could be liable as a result of the operation of, a drycleaning facility** or a wholesale supply facility **shall be subject to administrative or judicial action brought by or on behalf of any state or local government** or agency thereof or by or on behalf

> of any person **to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents.** Subject to the delays that may occur as a result of the prioritization of sites under this section for any qualified site, **costs for activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, without recourse to reimbursement or recovery** from the real property owner or the owner or operator of the drycleaning facility or the wholesale supply facility.
>
> (a) **With regard to drycleaning facilities** or wholesale supply facilities **that have operated** as drycleaning facilities or wholesale supply facilities **on or after October 1, 1994, any such facilities, at which there exists contamination** by drycleaning solvents, **shall be eligible under this subsection regardless of when the contamination was discovered,** provided that [certain other criteria are met]."

Id. § 376.3078(3)(a) (emphasis added).

Subsequently, the 1995 Legislature modified the Program by preempting a directive to the Florida Department of Environmental Protection ("FDEP") to promulgate a rule on contamination cleanup prioritization. Id. §§ 376.3078(5) & (6), Fla.Stat. (1995). Chapter 95-239 enacted statutory criteria for prioritizing state-funded cleanups of contamination locations according to degree of risk. Id. The statutory prioritization system enabled FDEP to apply rehabilitation funding on a worst-sites-first basis. Id. In other words, funding is prioritized so that the most contaminated locations are addressed first. In

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

the interim, while awaiting funding, lower priority locations are protected from any legal action to compel rehabilitation by the rehabilitation liability shield. Id. § 376.3078(3). Most recently, this year the Legislature clarified that the immunity provisions of the Act are to be construed liberally in favor of landowners. It also confirmed that the Program extends to any contiguous land or groundwater areas impacted by eligible drycleaning contamination and uses risk-based rehabilitation remedies. §§ 8, 10, ch. 98-189, Laws of Fla., to be codified at §§ 376.301(10), 376.3078(1)(e), Fla.Stat.(effective 7/1/98).

The County's Lawsuit Under Chapter 24 Of The Miami-Dade Code

Six months after the enactment of the Act, the County filed suit against a number of current and former drycleaners and the underlying landowners in what is now the Village of Pinecrest, regarding area contamination. (R. 788 ¶ 10). Chase used to own the Southpark shopping center at 12651 South Dixie Highway, Miami, from June 1990 through December 1992. (R. 787 ¶ 4). During Chase's ownership, a drycleaner owned and operated a "Southpark Cleaners" drycleaning facility on-site. (R. 787 ¶ 5).

The County's claims against Chase arise from the discovery by DERM in January 1992 of drycleaning contamination at a storm drain behind Southpark Cleaners. (R. 787 ¶ 6). DERM

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

responded to this discovery by issuing Chase an administrative order directing it to investigate the contamination and take remedial measures. (R. 787 ¶ 6). Chase did not cause or contribute in any way to the discovered contamination. (R. 787 ¶¶ 7-8). In light, however, of a landowner's risk of being held strictly liable under Chapter 24 of the County Code ("Chapter 24") for failing to take steps to clean up contamination on its property, Chase promptly retained environmental consultants to assess the contamination and, if necessary, develop a remedy. (R. 787 ¶¶ 7-8). After delineating the extent of the contamination, Chase installed and operated a groundwater treatment system for two and a half years, expending in excess of $100,000 in cleanup costs. (R. 787, 789 ¶¶ 8, 13). In July 1996, DERM concluded that active remediation could be discontinued and water quality monitored periodically to confirm natural attenuation of residual contamination. (R. 787-88 ¶ 8). Based, however, on FDEP's earlier determination that the environmental contamination associated with Southpark Cleaners was eligible for the Drycleaning Program, Chase did not complete rehabilitation of the contamination. (R. 789 ¶ 14; R. 452).

Suing as a political subdivision of the State of Florida, Miami-Dade County claimed that as a result of DERM's

discovery of area drycleaning contamination, the Dade Water and Sewer Department ("WASD") incurred substantial expense in installing and servicing potable water supplies in nearby neighborhoods. (R. 788 ¶ 10). Miami-Dade's complaint contained four counts **based solely on Chapter 24**, seeking: injunctive relief to compel rehabilitation (count I), damages for WASD's potable water supply costs (count II), civil penalties (count III), and attorney's fees and administrative costs (count IV). (R. 788 ¶ 10). Chase moved to dismiss for failure to state a claim and based on the Drycleaning Program's litigation shield. (R. 788-89 ¶ 11). The trial court stayed the action to allow those potentially liable to enter the contamination into the Program. (R. 789 ¶ 11; R. 90-91). The trial court also held, however, that the Act's rehabilitation liability shield did not preclude Miami-Dade from "repleading and pursuing a claim for onsite containment of drycleaning solvents." (R. 91).

The County subsequently amended its complaint to allege that "contamination continues to exist in the groundwater of the County, and will continue to remain in the groundwater" unless addressed by Chase and others. The Amended Complaint sought an injunction to compel the containment of such contamination, both on-site and off-site. (R. 789 ¶ 12; R. 131 (emphasis added)).

Chase qualified the Southpark contamination for the Program and based on the rehabilitation liability shield, the trial court rightly granted Chase final summary judgment on all of the County's injunctive and damages claims. (R. 790 ¶ 15).

At no time did the County ever allege or argue at the trial court level that contamination rehabilitation costs incurred beyond Southpark's boundaries are excluded from the scope of the Drycleaning Program's liability shield. (R. 473-562; R. 580-640, R. 791-803). Neither did the County ever allege or offer proof that contamination **which was not reasonably recoverable** had left the Chase property. (Id.) Likewise, when Chase moved for summary judgment, Miami-Dade offered nothing suggesting that contamination rehabilitation costs incurred beyond the property boundaries are beyond the scope of the Program's rehabilitation liability shield (R. 791-803).

The Third District Court of Appeal affirmed the summary judgment in favor of Chase. Metropolitan Dade County v. Chase Federal Housing Corp., 705 So. 2d 674 (Fla. 3d DCA 1998). The Court ruled that the County was precluded from exercising any enforcement powers under Chapter 24 against Chase. This was true, whether analyzed under the standard of the constitutional supremacy of general state law over home rule powers or under the

default presumption of statutory construction that substantive statutes can be applied retroactively only if such an intent is clear. The Court explained that the entitlement to Drycleaning Program eligibility was undisputed and the legislature can permissibly eliminate mere county powers by "legislation retroactive in effect":

> As noted by the Fourth District Court of Appeal in Sun Harbor Homeowners Ass'n v. Broward County Dep't of Natural Resource Protection, 700 So. 2d 178 (Fla. 4th DCA 1997), a county regulating persons and things within its borders is not engaged in the pursuit of rights, but, instead, is engaged in the exercise of its powers--which powers the legislature can withdraw at any time.

705 So. 2d at 675 n.4. Alternatively, even assuming the Act affected substantive rights, the Court held that the legislative intent of retroactivity is clearly expressed in the statutory language setting up the "comprehensive statewide program for the elimination of contamination previously caused by and presently being caused by the discharge of drycleaning solvents":

> The **Act is a comprehensive one intended to resolve the many difficulties involved in eliminating environmental contamination** from the multitude of drycleaning sources throughout the state, **no matter when the contamination took place**. The Act sets up a "cleanup" fund, provides revenue sources for that fund, encourages drycleaning facility owners and operators to participate, and grants immunity to those who meet the conditions. The language of the immunity sections [§§ 376.3078(3) and (9)], is also comprehensive as to the preclusion of

administrative and judicial action against those who qualify.

705 So. 2d at 675, 676 (emphasis added).

The Third District then certified the following question as a matter of great public importance:

> ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE TO ELIGIBLE ENTITIES CONDITIONAL IMMUNITY FROM CERTAIN ADMINISTRATIVE AND JUDICIAL ACTIONS BY STATE AND LOCAL GOVERNMENTS AND AGENCIES, INTENDED BY THE LEGISLATURE TO APPLY RETROACTIVELY, THUS PRECLUDING ACTIONS AGAINST IMMUNIZED ENTITIES FOR THE RECOVERY BY A GOVERNMENT FOR ENFORCEMENT AND REHABILITATION COSTS EXPENDED PRIOR TO THE ENACTMENT OF THESE SUBSECTIONS?

This Court has required the filing of briefs on the merits, but has reserved judgment on the issue of jurisdiction.

SUMMARY OF THE ARGUMENT

The County's tortured statutory construction of the Drycleaning Act turns a state-funded no-fault cleanup program intended to supersede cleanup litigation on its head. Contrary to the County's assertion that a default presumption of a statute's non-retroactivity is determinative here, the Drycleaning Act plainly governs discharges of drycleaning solvents which have occurred in the past during the normal operations of drycleaners. The Drycleaning Program substitutes a no-fault fund of adequate financial resources to address rehabilitation of contamination in place of piecemeal enforcement litigation in which disputes over liability significantly delay rehabilitation activities to the detriment of the environment. People potentially strictly liable for drycleaning solvent contamination which qualifies for the Program are entitled to subsection 376.3078(3)'s shield against rehabilitation liability.

Such eligibility comprises two elements. First, the person potentially liable for the contamination is entitled to not be subject to any administrative or judicial action brought by a government agency to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. Second, such person

is entitled to state funding for rehabilitation activities, which may be delayed because of the statutory site prioritization system. Eligibility under subsection 376.3078(3) for this rehabilitation liability shield and rehabilitation funding attaches **regardless of when the contamination was discovered.**

The Miami-Dade County Home Rule Amendment to the Florida Constitution controls this action. Miami-Dade's attempt to exercise its Chapter 24 powers directly conflicts with Chase's eligibility rights under the state Drycleaning Act. When, as here, direct conflict exists between a general state law and a Miami-Dade County ordinance enacted under powers granted by the Home Rule Amendment, the general law applies to the County as if home rule powers had not been granted. The state law supersedes the conflicting local law. The County cannot enforce Chapter 24.

Two additional reasons render the default presumption of non-retroactivity inapplicable. First, the County's injunction, continuing harm, and penalty claims merely trigger a prospective application of the Drycleaning Act. These claims assert unabated current continuing pollutive conditions in area groundwater, not past violations. Second, and most importantly, the legislature specifically and intentionally made retroactive the comprehensive Drycleaning Act. The Program's language,

remedial purposes, and legislative history make this retroative intent manifest. The Program covers discharges which have occurred in the past and provides eligibility for liability protection and rehabilitation funding to any person who otherwise could be liable for eligible contamination **regardless of when the drycleaning contamination was discovered.**

Finally, the County's unsupported position that litigation concerning the costs of extending a water main to those affected by contamination eligible under the Program is an impermissible, belated afterthought never subjected to the crucible of the trial court. Indeed, rehabilitation of environmental contamination has a well-understood meaning under Florida law. "Rehabilitation" covered by the Drycleaning Program and shielded from litigation embraces all remedial measures that are necessary to address contamination wherever it may be located. Any arbitrary limitations on the Program's coverage undermines the ability of this remedial cleanup program to address whatever threats may exist from drycleaning solvent contamination.

ARGUMENT

I. THE DIRECT CONFLICT BETWEEN THE COUNTY'S LOCAL ENFORCEMENT POWERS AND CHASE'S ELIGIBILITY UNDER THE DRYCLEANING ACT RENDERS SUCH POWERS VOID UNDER THE FLORIDA CONSTITUTION

Home Rule Amendment Analysis

The Florida Constitution declares that Miami-Dade County's home rule powers are explicitly subject to the supremacy of general state law:

> (6) **Nothing in this section** [defining Miami-Dade's home rule power] **shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County** and any other one or more counties of the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal **affairs and all such general laws shall apply to Dade County** and to all municipalities therein **to the same extent as if this section had not been adopted and such general laws** shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and **shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith**, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

Art. VIII, § 11(6), Fla. Const. (1885), as amended (emphasis added) ("Home Rule Amendment"). Constitutional and general law are "supreme" in Miami-Dade County. Id. § 11(9). The Home Rule Amendment must be "strictly construed" to maintain such supremacy. Dade County v. City of Miami, 396 So. 2d 144, 148 (Fla. 1980).

Consequently, whenever **"any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute."** Rinzler v. Carson, 262 So. 2d 661, 668 (Fla. 1972) (emphasis added); Dade County v. Acme Specialty Corp., 292 So. 2d 378, 378 n. 2 (Fla. 3d DCA 1974)("County ordinances under Home Rule Charter are to be treated the same as municipal ordinances."); § 24-2, Miami-Dade Code (declaration that County Code must not be construed as "superseding or conflicting with" any state environmental laws).

Whenever the legislature acts to supersede a local government's authority to enforce its ordinances, the effect is immediate and applies to both future and pending proceedings and present and past offenses. Sun Harbor Homeowners Assoc. v. Broward County, 700 So. 2d 178, 180 (Fla. 4th DCA 1997); State ex re. Baker v. McCarthy, 122 Fla. 749, 166 So. 280 (1936) (subsequent conflicting state law renders prior ordinance void to extent of direct conflict); Dade County v. Wilson, 386 So. 2d 556, 561 (Fla. 1980) (electors rights under County's Home Rule Charter were ineffective and superseded by a subsequent conflicting general law); Texas Co. v. City of Tampa, 100 F.2d 347, 348 (5th Cir. 1938) (prior land use ordinances applied by

trial court were irrelevant on appeal when they had been subsequently superseded by a state land use law, because "[t]hat legislative enactment stands above [the ordinances]. It is paramount and controlling . . ."); cf. Campbell v. Monroe County, 426 So. 2d 1158, 1161 (Fla. 3d DCA 1983) (conflicting county ordinance "void as applied" to permit application); Dade County v. Mercury Radio Service, Inc., 134 So. 2d 791, 795-97 (Fla. 1962) (ordinance "invalid," "unenforceable," "unconstitutional" to extent of conflict).

In Sun, Broward County sought penalties for trimming mangroves without a permit in violation of a county ordinance. 700 So. 2d at 179. In Sun, as in this case, the Legislature eliminated enforcement powers previously possessed by the County. Id. at 181. In Sun, as in this case, the County took action under a local ordinance in conflict with the Legislature's act. Id. In Sun, as in this case, the alleged violation occurred prior to the Legislature's change of the law. Nevertheless, the Sun court held that the County's claim no longer existed after the legislative intervention. Id. at 180. As with the Mangrove Act at issue in Sun, the Drycleaning Act must apply "from the moment it takes effect to all pending proceedings." Id. As the Third District properly ruled below, the Legislature may withdraw

a county's power at any time. 705 So. 2d at 675 n.4. Miami-Dade's attempted enforcement of Chapter 24 in conflict with the rehabilitation liability shield of the Act, whether applied to past or present conduct, is barred. See Sun, 700 So. 2d at 180; Fogg v. Southeast Bank, N.A., 473 So. 2d 1352, 1355 (Fla. 4th DCA 1985); Pensacola & A.R. Co. v. State, 45 Fla. 86, 33 So. 985, 986 (Fla. 1903).

Direct Conflict Between County Powers And Program Eligibility

Chase is entitled to all of the rights of Drycleaning Program eligibility, namely the shield against rehabilitation liability and state-funded cleanup according to priority ranking. Program eligibility is defined in subsection 367.3078(3) in the following terms:

> **(3) Rehabilitation Liability. In accordance with the eligibility provisions of this section**, no real property owner or **no person** who owns or operates, or **who otherwise could be liable as a result of the operation of, a drycleaning facility** or a wholesale supply facility **shall be subject to administrative or judicial action brought by or** on behalf of **any** state or **local government** or agency thereof or by or on behalf of any person to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. Subject to the delays that may occur as a result of the prioritization of sites under this section for any qualified site, **costs for activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, without recourse to reimbursement or recovery** from the real

> property owner or the owner or operator of the drycleaning facility or the wholesale supply facility.
>
> (a) **With regard to drycleaning facilities** or wholesale supply facilities **that have operated** as drycleaning facilities or wholesale supply facilities **on or after October 1, 1994, any such facilities, at which there exists contamination** by drycleaning solvents, **shall be eligible under this subsection regardless of when the contamination was discovered**, provided that [certain other criteria are met].

§ 376.3078(3)(a), Fla.Stat. (1997) (emphasis added). The Third District correctly found that:

> The language of the immunity sections ... is ... comprehensive as to the preclusion of administrative and judicial action against those who qualify. The County's power to act against the immunized entities has been eliminated without a savings clause as to any administrative or judicial action no matter what its status.

705 So. 2d at 676.

As the Court found, Program eligibility applies "no matter when the contamination took place." Id. at 675. The Act's language declares that the benefit of the shield against rehabilitation liability is an integral component of Program eligibility. The Act states that contamination from a facility, such as Southpark Cleaners, in operation on October 1, 1994 "shall be **eligible under this subsection** regardless of when the contamination was discovered." § 376.3078(3)(a), Fla.Stat. (1997) (emphasis added). The reference to "eligib[ility] under

this subsection" is to subsection 376.3078(3), addressing "rehabilitation liability." The eligibility "under this subsection" comprises the entitlement to the shield against "rehabilitation liability," and the entitlement to state-funded rehabilitation of contamination in statutory priority order. Id. § 376.3078(3). According to the explicit language of paragraph 376.3078(3)(a), subsection 376.3078(3)'s entitlements are triggered "regardless of when the contamination was discovered." Id. § 376.3078(3)(a).

Similarly, the prefatory clause of the liability shield itself -- "[i]n accordance with the eligibility provisions of this section" -- specifically cross references the liability shield provision to the eligibility provisions of section 376.3078, including paragraph 376.3078(3)(a) and (b)'s provisions that eligibility rights attach "regardless of when the drycleaning contamination was discovered." Id. § 376.3078(3). In construing subsection 376.3078, and paragraphs (a) and (b) in particular, the Court "should not assume that the legislature acted pointlessly." Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 825 (Fla. 1985).

Thus, the County's lawsuit -- based upon DERM's discovery of contamination in 1992 (R. 787 ¶ 6) -- seeking to

hold Chase liable for cleanup and damages as the former landlord of a contaminating drycleaner, runs afoul of the plain language of subsection 376.3078(3). The rehabilitation liability shield which Chase is entitled to "regardless of when the contamination was discovered," plainly declares that "no person ... who otherwise could be liable as a result of the operation of, a drycleaning facility or a wholesale supply facility shall be subject to administrative or judicial action brought by or on behalf of any state or local government ... to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents." Consequently, the Third District correctly found that direct conflict existed, voiding the applicability of Chapter 24 to Chase. 705 So. 2d at 676. Any doubt as to the extent of the local power sought to be exercised must be resolved in favor of the supremacy of subsection 3078(3).

II. SUMMARY JUDGMENT WAS PROPER IN THIS CASE BECAUSE THE DEFAULT RULE PRESUMPTION OF NON-RETROACTIVITY OF A STATUTE IS INAPPLICABLE TO THE DRYCLEANING ACT

Retroactivity Analysis

Based on considerations of fairness and constitutional due process, Florida courts apply a "default rule" that:

> "A statute operates prospectively unless the intent that it operates retrospectively is clearly expressed. Indeed, an act should never be construed retrospectively unless this was clearly the intention of the legislature. This is especially so where the effect of giving it a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. **The presumption is that it was intended to operate prospectively, unless its language requires that it be given a retrospective operation.** The basis for retrospective interpretation must be unequivocal and leave no doubt as to the legislative intent."

Thayer v. State, 335 So. 2d 815, 817-18 (Fla. 1976), quoting 30 Fla.Jur., Statutes, § 151 (emphasis added); Larson v. Independent Life & Accident Ins. Co., 29 So. 2d 448, 448 (1947). As explained in Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 425 (Fla. 1994):

> The presumption against retroactive application of a law that affects substantive rights, liabilities, or duties is a well established rule of statutory construction. . . . As noted by the United States Supreme Court, it is an appropriate **default rule which comes into play in the absence of an express statement of legislative intent.**
>
> > Because it accords with widely held intuitions about how statutes ordinarily operate, **a presumption against retroactivity** will generally coincide with legislative and public expectations. Requiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

Arrow, 645 So. 2d at 425, quoting Landgraf v. USI Film Products, 511 U.S. 244, 272-73 (1994) (emphasis added).

The default presumption states that a "statute is not to be given a retrospective effect, unless its terms show clearly that such an effect was intended." In re Seven Barrels of Wine, 83 So. 627, 632 (Fla. 1920); Agency For Health Care Administration v. Associated Industries, Inc., 678 So. 2d 1239, 1256 (Fla. 1996). The necessary level of legislative intent of retroactive application to rebut the presumption, however, can be derived from the implication of the statute in issue so long as such implication is "unequivocal and leave[s] no room for doubt as to legislative intent." Larson, 29 So. 2d at 448; United States v. Olin Corp., 107 F. 3d 1506, 1512-13 (11th Cir. 1997) (Superfund case declaring "even absent explicit statutory language mandating retroactivity, laws may be applied retroactively if courts are able to discern clear 'congressional intent favoring such a result.'"), quoting Landgraf, at 280.

A. Miami-Dade's Injunction, Continuing Harm, and Penalty Claims Entail Only a Prospective Application of the Drycleaning Act

Retroactivity analysis is irrelevant, however, when the new statute authorizes or affects the propriety of prospective relief. Landgraf, 511 U.S. at 273-74. The County's claims for

injunction, continuing harm, penalties, and attorneys fees do not involve a retroactive application of the Drycleaning Act. Miami-Dade's suit was filed six months after the Act became law. Each of the Amended Complaint's claims allege that the "contamination continues to exist in the groundwater of the County, and will continue to remain in the groundwater" unless addressed by Chase. (R. 131-33; R. 789 ¶ 12). The County sought remedies of abatement of such environmental injury, compensatory damages for such environmental injury, penalties for failure to address the injury, and attorney's fees and litigation costs. (R. 789 ¶ 12; R. 118-120).

Statutes are construed to apply to conditions existing at the time of their passage. State v. City of Miami, 101 Fla. 292, 294, 134 So. 608, 609 (Fla. 1931); Pfeiffer v. City of Tampa, 470 So.2d 10, 17 (Fla. 2d DCA 1985). To the extent that Miami-Dade's claims are based on allegations of continuing but abatable nuisance and thus require proof of such continuing conditions, the Drycleaning Program's rehabilitation liability shield is being applied prospectively, not retroactively. See FDEP v. Fleet Credit Corp., 691 So. 2d 512, 514 (Fla. 4th DCA 1997) ("it is the ongoing contamination, not the initial disposal of wastes, that constitutes a continuing, but abatable,

nuisance"); FDER v. CTL Distribution, Inc., 23 Fla. L. Weekly D576b (Fla. 3d DCA Feb. 25, 1998) ("because contamination of the soil and groundwater by a hazardous substance is a continuing harm (until it is cleaned up)" the claim does not accrue "until the harm has been abated"). Similarly, the gravamen of the violation of Chapter 24's strict liability provision by a former owner, such as Chase, is failing to take steps to clean up contamination thereby "permitting," "suffering," or "allowing" contamination to continue. Seaboard System R.R. Inc. v. Clemente, 467 So. 2d 348, 356 (Fla. 3d DCA 1985). To the extent that the County's claims are grounded in Chase's **failure to continue cleanup** after its July 1996 eligibility determination (R. 787, 789-90 ¶¶ 8, 14), the claims are precluded by a simple prospective application of Chase's rights under the Drycleaning Act. Moreover, the County's penalty claims are based on Chapter 24's provision that "[e]ach day of continued violation shall be considered as a separate offense," and thus involve a prospective application of the Act. § 24-56, Miami-Dade Code.

Likewise, Miami-Dade's claim for injunction, like all claims for injunction, must be based on existing or imminent conditions. City of Coral Springs v. Florida Nat. Properties, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976). Contrary to the

County's undocumented appellate assertion that off-site contamination was not "reasonably recoverable," the Amended Complaint sought against Chase "a mandatory injunctive order ... to assess the extent of contamination, to remediate contamination which has left the boundaries of the property, to contain the contamination, both on and offsite, to prevent further spread of contamination ...." (R. 119). For an injunction to issue, the County would have to prove a compelling and current or imminent harm. Martin v. Pinellas County, 444 So. 2d 439, 441-42 (Fla. 2d DCA 1983); Johnson v. Killian, 27 So. 2d 345, 346 (Fla. 1946); FDER v. Kaszyk, 590 So. 2d 1010, 1011-12 (Fla. 3d DCA 1991). As in Martin and Kaszyk, Dade's claim also addresses a current condition of harm. Martin, at 441-42; Kaszyk, at 1011. Because Miami-Dade's claim arises from a current condition and the remedy is prospective relief, the Drycleaning Act would merely apply prospectively. Miami, supra, 134 So. at 609.

The United States Supreme Court has held that because "relief by injunction operates in futuro and the right to it must be determined as of the time of the hearing," the law in effect at the time of the hearing must be applied. American Steel Foundries v. Tricity Central Trades Council, 257 U.S. 184, 201 (1921); Landgraf, 511 U.S. at 269, 274. Because the relief

afforded by injunction is inherently prospective, the County's claim for injunction is governed by the law as it exists at the time of the hearing. Landgraf, 511 U.S. at 274;; Duplex Co. v. Deering, 254 U.S. 443, 464 (1921); Cf. Naegele Outdoor Advertising Co. v. City of Jacksonville, 659 So.2d 1046, 1048 (Fla. 1995) (injunctive relief does not operate retroactively). Thus, Miami-Dade's injunction claims are also defeated by a prospective application of the Drycleaning Act.

B. The Legislature Clearly Intended the Drycleaning Cleanup Program to Be Applied Retroactively to Contamination Regardless of When it Was Discovered

The Drycleaning Solvent Contamination Cleanup Act is clearly intended to be applied retroactively. When, as here, the legislature has prescribed the statute's proper reach, "there is no need to resort to judicial default rules" since the statute controls its application. Landgraf, 511 U.S. at 280. Careful analysis of the legislative intent of the Drycleaning Program -- reflected in its language, purpose, and history -- demonstrates its clear retroactive intent. See State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); Foley v. State, 50 So. 2d 179, 184 (Fla. 1951).

1. The Drycleaning Act's Language is Retroactive

As previously explained, the rehabilitation liability shield is an integral component of the eligibility granted under

the Drycleaning Program. The subsection 376.3078(3) eligibility rights (liability shield and state-funded cleanup in priority ranking order) specifically attach "regardless of when the contamination was discovered." § 376.3078(3)(a), Fla.Stat. (1997). This language clearly states that eligibility attaches to contamination predating the existence of the Program.

The accrual of Program eligibility rights "regardless of when the contamination was discovered," has great significance which the County totally ignores. In the area of environmental protection, "discovery" of contamination marks both when a person becomes aware of contamination and, due to contamination reporting requirements, when FDEP or DERM is made aware of the contamination problem. Thus "discovery" marks an accrual point for administrative and judicial enforcement claims. The accrual point in this case was when DERM discovered contamination in the Southpark storm drain. Thus, the Drycleaning Program made it clear that contamination locations discovered in the past and already under enforcement are entitled to the rehabilitation liability protection arising out of eligibility.

For instance, at the time the Program was created petroleum-derived drycleaning solvents were subject to the "discovery of contamination" requirements of the petroleum

cleanup rule. § 376.301(11), Fla.Stat. (1997); Fla.Admin.Code R. 17-770.250 (1993). A defined "discovery of contamination" gave rise to a duty to report to FDEP and DERM and commence rehabilitation of the contamination under the agencies' supervision. In re Just Oil Co., 15 F.A.L.R. 318, 320-23 (FDEP Dec. 18, 1992); Fla.Admin.Code R. 17-770.250(1) (1993); § 376.305(1), Fla.Stat. (1993). Under subsection 376.3078(3) of the Drycleaning Program, such past discoveries of contamination already known to the agencies and under enforcement are entitled to Program benefits.

Another example is the accrual of judicial actions upon occurrence of the last element of a claim -- typically the discovery of the injury. See City of Miami v. Brooks, 70 So. 2d 306, 308-09 (Fla. 1954); Penthouse N. Assoc. v. Lombardi, 461 So. 2d 1350, 1352 (Fla. 1984); FP&L v. Allis Chalmers Corp, 85 F.3d 1514, 1518 (11th Cir. 1996); 42 U.S.C. § 9658(a)(1) & (b)(4)(A) (1986) (preemptive "discovery" rule that a pollution damage claim accrues under state law no earlier than "discovery" of the pollution). By having the liability shield and the right to state-funded cleanup according to priority ranking attach to contamination regardless of when it was discovered, the Program made clear its statutory objectives of covering past occurrences

of contamination and substituting a readily-available, no-fault cleanup fund in lieu of prolonged litigation over responsibility. § 376.3078(1), Fla.Stat. Under the County's tortured construction, any discovered contamination reported to governmental agencies **at any time** will **never** be shielded from enforcement because enforcement powers attach before an eligibility determination can be obtained from FDEP. Such a construction disembowels the Program of any meaning.

Had the Legislature intended to limit the Program's entitlements to future discoveries of drycleaning contamination, it could have copied the limitation it used in establishing the current Petroleum Liability and Restoration Insurance cleanup program ("PLRIP"). This petroleum storage tank cleanup program states that "[a]ny incidents discovered prior to January 1, 1990, are not eligible to participate in the restoration insurance program." § 376.3072(2)(f)(4.), Fla.Stat. (1993). When the Legislature created the Drycleaning Program it explicitly included past contamination incidents.

The County's analogy to the litigation shield of section 376.308(5), Fla.Stat., is inappropriate. First, this Court has never mandated use of the word "retroactive" in order to make a statute so. Larson v. Independent Life & Accident Ins.

Co., 29 So. 2d 448, 448 (1947) (discussed supra). Second, the petroleum cleanup program's litigation shield arose in the extraordinary context of the virtual insolvency of the program in March 1995. Executive Order 95-82; Ch. 95-2, Laws of Fla.; Ch. 96-277. Laws of Fla. Third, the County did not disclose that the full retroactive reach of section 376.308(5) to claims accruing prior to March 29, 1995 is currently on appeal before the Third District Court of Appeal in JI 441, Inc. v. DERM, Case No. 97-01754. See Brief on the Merits of Amici Curiae Florida Bankers Association, et al. dated October 14, 1997, Appendix Tab H. Fourth and most significantly, the programs have very distinct legislative histories. See Appendix Tab H pp. 162-69.

In addition to subsection 376.3078(3)'s explicit directive, a superabundance of other statutory language confirms the Drycleaning Program's retroactive reach. The legislative findings declare:

> (a) Significant quantities of **drycleaning solvents have been discharged in the past** at drycleaning facilities as part of the normal operation of these facilities.
> (b) **Discharges** of drycleaning solvents at such drycleaning facilities **have occurred and are occurring, and pose a significant threat** . . . .

§ 376.3078(1), Fla.Stat. (1997), as amended by § 10, ch. 98-189, Laws of Fla. (emphasis added). Eligibility extends to

drycleaners which were "not determined by [FDEP], within a reasonable time after [FDEP]'s discovery, to have been out of compliance with the [FDEP] rules regulating drycleaning solvents, drycleaning facilities, or wholesale supply facilities implemented at any time on or after November 19, 1980." Id. § 10. Eligible drycleaners include facilities that have "at some time in the past operated for the primary purpose of drycleaning clothing." § 376.301(10), Fla.Stat. (1997). Eligibility also extends to drycleaners abandoned prior to October 1, 1994 "at which there exists contamination by drycleaning solvents." Id. § 376.3078(3)(b).

Despite all this clear language, the County argues that the plain meaning of the statutory language is that:

> subsection (3)'s immunity does not apply until after all of the eligibility requirements have been met by the facility and departmental rules for the prioritization of sites are promulgated. Only after these statutory preconditions have been satisfied is the responsibility for future cleanup measures then shifted to the state program.

Miami-Dade Initial Brief at 18. This excerpt demonstrates the County's fundamental confusion about the Drycleaning Program. Absolutely no aspect of Program **eligibility** -- as opposed to timing of cleanup funding -- is conditioned on a contamination location prioritization system. § 376.3078(3), Fla.Stat. (1997).

Absolutely nothing in the Act links the entitlement to eligibility to a precondition of FDEP promulgating "rules for prioritization of sites." Moreover, the 1995 Legislature, frustrated at FDEP's snail's pace implementation of the cleanup program, preempted any need for FDEP rulemaking by inserting a complete statutory prioritization system into the Act. § 3, ch. 95-239, Laws of Fla., codified at, §§ 376.3078(5) & (6), Fla.Stat. (1995). Chapter 98-189's deletion of the rulemaking authority simply confirms what occurred in 1995. § 10, ch. 98-189, Laws of Fla. There is no "plain meaning" supporting the County's construction of the Act.

2. The Drycleaning Act's Purpose Is Retroactive

Like its language, the Drycleaning Program's legislative purpose plainly confirms it applies to drycleaning contamination existing at the time of enactment. The Third District correctly noted that the Act "is a comprehensive one intended to resolve the many difficulties involved in eliminating environmental contamination from the multitude of drycleaning sources throughout the state, no matter when the contamination took place." 705 So. 2d at 675-76.

The Drycleaning Program is funded by taxation of drycleaning income and chemicals. It makes funds readily

available to address the public health hazards arising from drycleaning contamination. It replaced the preexisting situation in which cleanup was delayed and environmental damage increased while environmental enforcement agencies engaged in piecemeal administrative and judicial proceedings against those connected in some way to the contamination in an attempt to force rehabilitation. The evils intended to be remedied by the Program are plainly stated in the findings and declarations of the Act, quoted supra on page 3, namely: (1) past and ongoing release of drycleaning solvents as part of the normal operation of drycleaning facilities, (2) threats to health and environment posed by such drycleaning solvents, (3) delay of cleanup while the issues of who is responsible and to what extent are litigated, (4) existing inadequate financial resources available to clean up drycleaning solvent contamination, and (5) the need to give real property owners incentives to encourage voluntary cleanup activities. § 376.3078(1), Fla.Stat. (1997), as amended by § 10, ch. 98-189, Laws of Fla. The Program is clearly intended to replace existing protracted litigation over responsibility and long delayed cleanup with a comprehensive no-fault-type cleanup mechanism funded by drycleaners. Id.

The County's construction of the Act focuses myopically on merely one purpose of the Drycleaning Program -- avoiding delay in cleanups. The nonsensical result would be a Program which, at best, is applicable only to new contamination occurring from an unspecified time after FDEP's adoption of an application form on March 13, 1996 until December 31, 1998. Miami-Dade Initial Brief at 20; § 10, ch. 98-189, Laws of Fla., to be codified at, § 376.3078(3)(d), Fla.Stat. (Supp.1998). With regard to all other contamination locations, the County's paradigm of supposedly avoiding delayed cleanups is piecemeal, unsystematic, and often ineffective enforcement actions. See, e.g., FDEP v. Belleau, 1993 WL 206787 (FDEP Feb. 3, 1993), after order on remand, 18 F.A.L.R. 2484 (FDEP May 25, 1996), reversed, 695 So. 2d 1305 (Fla. 1st DCA 1997), on remand, FDEP v. Belleau, 20 F.A.L.R. 542 (FDEP Oct. 17, 1997) (10 year drycleaning enforcement action; targeted defendants held non-liable).

Contrary to the County's misguided analysis, the Drycleaning Act states and the Secretary of FDEP has declared that "section 376.3078 was created as a statutory alternative to the often lengthy site remediation process occurring in governmental enforcement actions due to disputed liability issues." Dade County v. Redd's Cleaners, 19 F.A.L.R. 3664, 3569,

3570 (FDEP June 27, 1997), appeal to Third District pending, Case NO. 97-2126; see also FDER v. Montco Research Products, Inc., 489 So. 2d 771, 773-74 (Fla. 5th DCA 1986) (purpose of Water Quality Assurance Trust Fund -- which the Drycleaning Program supplements -- "is to protect the public from contaminants immediately, without the necessity of delay because of economic or legal complications" and the Fund has retroactive effect). Section 376.315 directs that Chapter 376, Florida Statutes, must be liberally construed to effect its stated purposes. § 376.315, Fla.Stat. (1995). Chapter 98-189 also directs that the Drycleaning Act's immunity provisions must be construed "in favor of real property owners." § 10, ch. 98-189, Laws of Fla., to be codified at, § 376.3078(1)(e), Fla.Stat. (Supp.1998). Thus, the language of subsection 376.3078(3) must be construed to apply the Program's eligibility rights, including the rehabilitation liability shield, to past contamination regardless of when it was discovered.

3. The Drycleaning Act's Legislative History Confirms Retroactive Intent

Chapter 94-355's legislative history confirms this retroactive intent. The Act was intended to furnish a means of cleaning up the many locations contaminated with drycleaning

MORGAN, LEWIS & BOCKIUS LLP
5300 FIRST UNION FINANCIAL CENTER, 200 S. BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131-2339 • TELEPHONE (305) 579-0300

solvents which was prohibitively expensive for the typically small "mom and pop" operators. It was also necessary to address the overwhelming demand on the existing resources of the state's WQA Trust Fund. The legislative history states:

> Concerns have been raised that there may be many dry cleaning facilities which are contaminated as a result of discharge of solvents commonly used in the dry cleaning process. Due to the nature of dry cleaning solvents, cleanup of these types of contaminated sites is expected to be both difficult and costly. Small, independent owners of dry cleaning facilities may not have sufficient financial resources to investigate, cleanup and monitor these sites. . . . If the number of contaminated dry cleaning sites is substantial, the present level of funding for the [WQA Trust Fund] will be inadequate to conduct the cleanup activities.

"Present Situation," House of Representatives Committee on Natural Resources Final Bill Analysis & Economic Impact Statement, Chapter 94-355 (May 5, 1994), Appendix Tab B p. CA 09; see also Department of Environmental Protection Bill Analysis Form 1994 Session, Dry Cleaning Contamination Cleanup (April 14, 1994) (cleanup obligation will force many drycleaners out of business and the contamination will become state burden), Appendix Tab A p. CA 02. The Final Bill Analysis declares that the Act "**[a]bsolves** owners or operators of drycleaning facilities and wholesale suppliers from liability for site rehabilitation or civil action ...." Appendix Tab B p. CA 10 (emphasis added).

Moreover, as the Program was becoming law, FDEP itself -- the agency charged with administering the program and directly affected by the liability shield --- temporarily halted drycleaner enforcement actions. FDEP then formally suspended such enforcement actions at all drycleaning contamination locations except those that would not qualify for the program by virtue of gross negligence or intentional pollution. Memoranda dated May 8, 1994 and November 28, 1994 re Suspension of Dry Cleaner Enforcement Cases from John M. Ruddell, Director of Waste Management, FDEP to Waste Program Administrators, Appendix Tabs D.1. & D.2.; (R. 621-622). The County's fundamental disagreement with Florida's policy change from command-and-control piecemeal enforcement to a no-fault cleanup program cannot overcome the clear retroactive intent of the Program.

In sum, the Drycleaning Act rebuts the default rule presumption of non-retroactivity. The Act's retroactive intent must be implemented by the courts, absent a constitutional violation. See, e.g., Hess v. Dade County, 467 So. 2d 297 (Fla. 1985); Rupp v. Bryant, 417 So. 2d 658, 666 (Fla. 1982), superseded in part by statute, see Rice v. Lee, 477 So. 2d 1009 (Fla. 1st DCA 1985); Foley v. Morris, 399 So. 2d 215, 216 (Fla. 1976); FDOT v. Knowles, 402 So. 2d 1155, 1158 (Fla. 1981); Crane

v. Department of State, 547 So. 2d 266, 267 (Fla. 3d DCA 1989); Hernandez v. Department of State, 629 So. 2d 205, 206 (Fla. 3d DCA 1993); see also Pinellas County v. Laumer, 94 So. 2d 837, 840 (Fla. 1966); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). As the Third District correctly ruled, the County's ability to enforce Chapter 24 is an exercise of governmental power, not a protected substantive right. 705 So. 2d at 675 n.4; Sun, supra, 700 So. 2d at 180-81. With absolutely no constitutional impediment to the retroactive application of the Drycleaning Program, it must be applied to preclude Miami-Dade's action.

III. THE DRYCLEANING ACT'S LIABILITY SHIELD PRECLUDES LITIGATION OVER ANY REMEDIAL ACTIVITIES RESPONSIVE TO ENVIRONMENTAL CONTAMINATION RESULTING FROM ELIGIBLE SOLVENT DISCHARGES

The County Failed To Raise Its Argument In The Trial Court

Miami-Dade failed to present its novel argument that "rehabilitation" does not include replacement of a potable water supply to the trial court. The only argument Miami-Dade raised, and on which it prevailed, was that "rehabilitation" does not include containment of contamination on the drycleaning facility. (R. 91, 624-629). Thus, on appeal the County is pursuing a position totally inconsistent with that on which it prevailed in the trial court. If Miami-Dade is permitted to pursue its appellate position, then it is effectively seeking to prevail on

two irreconcilable positions, namely that the Program (1) does not cover "onsite containment" (R. 91; R. 789), and (2) does not cover offsite consequences of contamination. That is, the Program is meaningless.

Waiver and judicial estoppel should prevent the County's expedient change of position on appeal. Dober v. Worrell, 401 So. 2d 1322, 1324 (Fla. 1981) (the finality principle requires that arguments against summary judgment be raised first in the trial court); Lipe v. City of Miami, 141 So. 2d 738 (Fla. 1962); Olin's, Inc. v. Avis Rental Car System, Inc., 104 So. 2d 508, 511 (Fla. 1958) (judicial estoppel applies when litigant maintains inconsistent positions in pleadings and previous position was successfully maintained). Given the limited scope of the issue under review, the Court should decline to address the County's belated, inconsistent argument. Cf. Provident Management Corp. v. City of Treasure Island, 23 Fla.L.Weekly S253, S254 (Fla. May 7, 1998).

Had Miami-Dade raised its argument in response to Chase's summary judgment motion, Chase could have demonstrated that such construction is wholly inconsistent with FDEP and DERM's application of the concept of "site rehabilitation." See Sparta State Bank v. Pape, 477 So. 2d 3, 4 (Fla. 5th DCA

1985) (trial cannot be furnished de novo on appeal). For instance, FDEP exercised its virtually identical powers under the Water Quality Assurance Trust Fund to contribute in excess of $1.1 million to Miami-Dade towards extending a potable water system to area residents potentially affected by the drycleaning contamination here in issue. Appendix Tabs F & G; see also Montco, supra, 489 So. 2d at 774 (WQA trust funds could be used to address multi-site contamination).

Chase could also have submitted undisputed expert testimony that appropriate "site rehabilitation" remedies for contamination which has spread over a wide area include provision of alternative water supplies to individuals at risk from contamination. When scientifically justified by risk assessment and feasibility study, engineering and institutional controls can be used to connect at-risk residents to a temporary alternate water supply and to deed restrict use of area groundwater during a period when natural attenuation of the area groundwater is monitored until it is once again safe to use. See § 8, ch. 98-189, Laws of Fla., to be codified at, §§ 376.301(10), (16), (21), (24) and (40), Fla.Stat. (Supp.1998) (defining respectively: contaminated site, engineering controls, institutional controls, natural attenuation, and site rehabilitation). For example,

"public water supply connections" and "ground water monitoring to confirm natural attenuation" were the selected remedies for the United States Environmental Protection Agency's ("USEPA") Davie Landfill Superfund site in Broward County. USEPA, Record of Decision for Davie Landfill site (1994), Appendix Tab I p. CA238.

Florida law allows rehabilitation to occur by extending the point of cleanup compliance from the source of contamination:

> temporarily ... beyond the property boundary with appropriate monitoring, if such extension is needed to facilitate natural attenuation of to address the current conditions of the plume, provided human health, public safety, and the environment are protected.

Id. § 10, to be codified at, § 376.3078(4) ("Rehabilitation Criteria"), Fla.Stat. (Supp.1998). Human health is protected by the temporary supply of water until monitoring of natural attenuation of groundwater contamination demonstrates that the water is once again safe. See id. (future paragraphs 376.3078(4)(b), (c), (d), (f) and (i) -- all encouraging natural attenuation remedies protective of human health). These principled approaches to site rehabilitation are in use under existing cleanup programs for hazardous substances, drycleaning solvent, petroleum and Brownfields cleanup programs. USEPA, Record of Decision for Davie Landfill site, Appendix Tab I p. CA 238; FDEP 1993 Model Consent Order for Corrective Actions,

Appendix Tab E.1.; FDEP Guidelines for Voluntary Cleanup and Model Consent Order for Voluntary Corrective Actions, Appendix Tab D.3.; §§ 376.3071(5)(b) and 376.81(1)(b), (c), (d), (f) and (2), Fla.Stat. (1997).

Furthermore, Chase could have demonstrated how Miami-Dade's current position contradicts its understanding of the Act upon passage when DERM sought to have the Act vetoed because it "exempts drycleaning facilities from remediation enforcement actions" and supersedes DERM's strategies for "emergency protection of the water supply." Letter from John W. Renfrow to Estus Whitfield, Executive Office of the Governor, dated May 10, 1994, Appendix Tab C. None of this evidence was submitted to the trial court because the only argument Miami-Dade ever presented was that the rehabilitation immunity did not extend to onsite containment of contamination. (R. 91, 624-629, 789).

The Drycleaning Program Addresses Any Threats Whatsoever Posed By Drycleaning Contamination

On its merits, the County's narrow construction of the type of rehabilitation activities encompassed by the liability shield **totally ignores** the legislative intent of the Drycleaning Program. The Program replaces piecemeal enforcement with a state-funded program of remedial authorities responsive to

whatever threats may be posed by drycleaning contamination wherever it may become located.

Miami-Dade's argument fails to recognize the core of the liability shield is not merely "site rehabilitation," but "rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents." Id. § 376.3078(3). This phrase confirms that the concept of rehabilitation of environmental contamination includes any necessary costs of addressing off-facility contamination. Id. § 376.3078(4), see also § 10, ch. 98-189, Laws of Fla., to be codified at, § 376.3078(4), Fla.Stat. (Supp.1998). Judged by any rehabilitation criteria, provision of a water supply is covered by the Program's protection. Pre-1998 criteria for determining "completion of site rehabilitation program tasks" and "site rehabilitation programs" were:

> 1. The **degree to which human health, safety, or welfare may be affected** by exposure to the contamination.
> 2. The **size of the population or area affected by the contamination.**
> 3. The present and future **uses of the affected aquifer or surface waters**, with particular consideration as to the **probability that the contamination is substantially affecting, or will migrate to and substantially affect, a known public or private source of potable water.**
> 4. The **effect of the contamination on the environment.**

§ 376.3078(4)(a) & (b), Fla.Stat. (1997) (emphasis added). This definition of site rehabilitation criteria in terms of whatever remedial measures are necessary to respond to actual and potential health and environmental impacts wherever they may be is continued in Chapter 98-189. As just discussed, Chapter 98-189 explicitly contemplates rehabilitation remedies such as provision of temporary water supplies combined with monitoring of natural attenuation of off-facility groundwater contamination to safe levels. §§ 8, 10, ch. 98-189, Laws of Fla., to be codified at, §§ 376.301 and 376.3078(4), Fla.Stat. (Supp.1998).

Miami-Dade's conclusory discussion of the concept of "site rehabilitation" makes the fatal assumption that the referenced "site" means the parcel of real estate containing the drycleaning facility. In this way "site" cannot include activities off-site, such as provision of a water supply. Such a crabbed interpretation ignores that groundwater pollution does not respect property boundaries. This Court should interpret "rehabilitation of environmental contamination" liberally to advance the previously discussed remedial purposes of the Program, including the purposes of replacing environmental litigation with environmental mitigation and of protecting the interests of innocent landowners. § 376.315, Fla.Stat. (1997); §

10, ch. 98-189, Laws of Fla., to be codified at, § 376.3078(1)(e), Fla.Stat. (Supp.1998).

The relevant "contamination site" which is "rehabilitated" is the areal extent of "contiguous" drycleaning contamination wherever it happens to have become located. Chapter 376 defines "site rehabilitation" to include the "activities that reduce the levels of contaminants at a site through accepted treatment methods to meet the cleanup target levels established for that site." § 376.301(36), Fla.Stat. (1997). In the context of environmental rehabilitation, "site" means "any contiguous land, sediment, surface water, or groundwater areas that contain contaminants that may be harmful to human health or the environment." § 8, ch. 98-189, Laws of Fla., to be codified at, § 376.301(10), Fla.Stat. (1998); Fla.Admin.Code R. 17-770.200(9) (1993), R. 17-771.100(5)(j), R. 17-773.200(15) (all FDEP petroleum cleanup and reimbursement rules existing in 1994 defined "site" in this way). In other words, for purposes of rehabilitation, the contaminated site is the areal extent of contiguous contamination, regardless of real property boundaries. See FDEP Model Drycleaning Voluntary Cleanup Corrective Actions, Appendix Tab D.3., pp. 23, 33-35 (rehabilitation obligations include assessing on and off-facility

contamination and addressing neighboring "public or private wells which are or may be affected by the contaminant plume").

Thus, rehabilitation activities covered by the Program's eligibility rights include any activities necessary to address the threat to human health and the environment posed by the contaminated site. In administering its cleanup programs, FDEP has flatly rejected the type of limitation on "site rehabilitation" Miami-Dade is proposing. 1994 Model FDEP Consent Order for corrective actions, Appendix Tab E.1. p. CA 58 (model order used in 1994 obligated respondent to "provide within a reasonable time at its expense a permanent safe drinking water supply ... to replace any potable well that is shown ... to be contaminated"); § 376.3072(3)(a), Fla.Stat. (1993) (PLRIP program existing when Drycleaning Act enacted defined "restoration" to include activities "both on and off the property," including "expeditious rehabilitation or replacement of potable water supplies as provided in § 376.30(3)(c)(1)" ("restoration" and "rehabilitation" are used interchangeably in the Drycleaning Act, see, e.g., § 376.3078(4) & (4)(a)(4.), Fla.Stat.(1997)); Fla.Admin.Code R. 17-773.200(3) (1993) (cleanup reimbursement rule defining "rehabilitation" as synonymous with "remedial action" and "cleanup"). FDEP's interpretation of the cleanup

authorities it administers is entitled to judicial deference. PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988).

Broad interpretation of the types of activities encompassed by the Drycleaning Program parallels the USEPA's Superfund program authorities under the Comprehensive Environmental Response and Liability Act, 42 U.S.C. §§ 9601-9675. The Superfund National Contingency Plan -- which Chapter 376, Fla.Stat., is designed to "support and complement" -- defines "remedy" and "remedial action" as including "provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health ..." National Contingency Plan, 40 C.F.R. § 300.5 (July 1, 1993); § 376.30(5), Fla.Stat. (1993); 42 U.S.C. § 9601(24).

Any doubt as to the intended scope of the rehabilitation liability shield evaporates in light of the definition of the "**[c]harges against the funds for** drycleaning ... **site rehabilitation**" which are expressly authorized by paragraph 376.3078(2)(b). § 376.3078(2)(b), Fla.Stat. (1997) (emphasis added). Paragraph 376.3078(2)(b) is referenced in the definition of Program eligibility contained in subsection 376.3078(3). The paragraph lists all of the rehabilitation activities which may be funded by the Program whenever FDEP

determines contamination "may pose a threat to the environment or the public health, safety, or welfare." Id. § 376.3078(2)(a) & (b). Specifically included are "[e]xpeditious treatment, restoration, or replacement of potable water supplies." Id. § 376.3078(2)(b).

CONCLUSION

For all the foregoing reasons, this Court should find that the Third District correctly answered the question posed by its certified question in the affirmative, and it should accordingly approve the District Court's decision.

Robert M. Brochin
Fla. Bar No. 391661
David Ashton.
Fla. Bar No. 852945
MORGAN, LEWIS & BOCKIUS LLP
Attorneys for
Chase Federal Housing Corp.
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
Telephone: (305) 579-0300
Facsimile: (305) 579-0321

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of June, 1998 to Thomas H. Robertson, Esq., and Randy Duval, Esq. Miami-Dade County Attorney, Stephen P. Clark Center, Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1993, Kirk L. Burns, Esq., Halsey & Burns, P.A., 4980 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131, and Harris C. Siskind, Esq., Coll Davidson Carter Smith Salter & Barkett, P.A., 3200 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131-2312.

David Ashton
Florida Bar No. 852945