IN THE SUPREME COURT OF FLORIDA
CASE NO. 92,536

METROPOLITAN DADE COUNTY,

Petitioner,

v.

CHASE FEDERAL HOUSING CORP., et al.,

Respondents.
_____/

District Court of Appeal
Third District
Case Nos. 97-49
97-50
97-857

ANSWER BRIEF OF RESPONDENT, SUNILAND ASSOCIATES

HALSEY & BURNS, P.A.
Douglas M. Halsey
Florida Bar No. 288586
Kirk L. Burns
Florida Bar No. 515711
Evan M. Goldenberg
Florida Bar No. 0087580
First Union Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309
(305) 375-0077 (Telephone)
(305) 375-0020 (Facsimile)
Attorneys for
Suniland Associates

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QUESTION PRESENTED

ARE SUBSECTIONS 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?

STATEMENT OF THE CASE AND FACTS

This is an appeal of a decision of the Third District Court of Appeals affirming a summary judgment against Petitioner, Miami-Dade County (the "County"), and in favor of Respondent, Suniland Associates, a Florida general partnership comprised of Gerald Katcher, Howard Scharlin, and Harry Corash (collectively "Suniland Associates").[1] The County brought suit against Suniland Associates on December 19, 1994, seeking to recover sums it spent in responding to drycleaning solvent contamination caused by Daphne's Cleaners, a tenant at property owned by Suniland Associates.[2] In granting final summary judgment, the trial court determined that the County's claims were barred by the Florida Drycleaning Solvent Contamination Cleanup Act (the "Drycleaning Act" or "Act"), Section 376.3078 et seq., Florida Statutes (1997).[3]

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[1]Citations to the record shall be indicated parenthetically by "R." followed by the page number, e.g. (R. 136). Citations to documents contained in the appendix shall be indicated parenthetically by "App." followed by the page number, e.g., (App. 1). Citations to the Stipulated Statement of Facts on Appeal, filed in the Third District Court of Appeals ("Third District") on March 13, 1997, but not included in the record forwarded to the Court by the Third District, shall be indicated by citation to the appendix.

[2]The County also sued other property owners and their drycleaner tenants in the same action. These property owners also obtained summary judgments and the County's appeals of those decisions were consolidated with this case by the Third District.

[3]"Dry cleaning" should be spelled as two separate words; however, the Florida legislature elected to use the single word "drycleaning" throughout the Act. Accordingly, for the sake of consistency, the words "drycleaning," "drycleaner," and "dryclean" are used herein.

The County appealed the final summary judgment to the Third District. See Metropolitan Dade County v. Chase Federal Housing Corp., et al., Case Nos. 97-857; 97-50; and 97-49. (Fla. 3d DCA Jan. 28, 1998). (App. 1-5) In a unanimous opinion dated January 28, 1998, the Third District affirmed, holding that "the Act, including its grants of immunity, is retroactive and precludes the County's actions against appellees." Id. at 4. In so ruling, the Third District certified the following question as being 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?

Id. at 5. This appeal followed.

The Drycleaning Solvent Contamination Cleanup Act

Effective July 1, 1994, six months before the County brought suit, the Florida legislature enacted the Drycleaning Contamination Cleanup Act, codified in Chapter 376, Florida Statutes, at Sections 376.3078 et seq. Ch. 94-355, Laws of Fla. As set forth in the Act, the legislature specifically found that "significant quantities of drycleaning solvents have been discharged in the past at drycleaning facilities as part of the normal

operations of the these facilities," and that such discharges "have occurred and are occurring, and pose a significant threat to the quality of the groundwater and inland surface waters of this state." §§ 376.3078(1)(a) and (b), Fla. Stat. (1997).

In order to combat the threat posed by drycleaning solvents, the legislature directed the Florida Department of Environmental Protection ("DEP") to undertake the assessment and cleanup of contaminated properties. As provided in Section (2) of the Drycleaning Act, DEP shall: (1) investigate contaminated drycleaning facilities, (2) pay for the treatment, restoration, or replacement of potable water supplies affected by drycleaning solvents, (3) remediate contaminated soils, groundwater, and surface waters, and (4) restore affected properties to their condition prior to the contamination. § 376.3078(2), Fla. Stat. (1997). Cleanup actions are funded entirely through the imposition of a tax on the revenue of drycleaner operators and wholesale suppliers of drycleaning solvents. § 376.303, Fla. Stat. (1997).

In addition to recognizing the health threat caused by drycleaning solvent pollution, the legislature also recognized that litigation involving the assessment and remediation of the contamination exacerbated the pollution problem. "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 . . . , in greater damage to the environment, and in significantly higher costs to contain and remove the contamination." § 376.3078(1)(c), Fla. Stat. (1997). Accordingly, in addition to providing for the cleanup of contaminated sites, the Drycleaning Act extended judicial and administrative immunity to certain owners and operators of contaminated drycleaning facilities.

The Act's *first* immunity provision is found in Section 376.3078(3) which provides in pertinent part:

> (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 could otherwise be liable as a result of the operation of, a drycleaning 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 . . . , 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 owner or operator of the drycleaning facility* . . .

§ 376.3078(3), Fla. Stat. (1997) (emphasis added).

As indicated, immunity is extended only to "eligible" facilities. The eligibility criteria are set forth in Section (3) which contains different standards depending on whether a site is an "existing" or "abandoned" drycleaning facility. "Abandoned"

drycleaning facilities, which in this case includes the drycleaner that operated on Suniland Associates' property, are defined as those sites "*that ceased to be operated as drycleaning facilities . . . prior to October 1, 1994.*" Pursuant to Section (3), such abandoned facilities will be eligible for cleanup and judicial immunity, "*regardless of when the contamination was discovered,*" provided they have registered with DEP, operated in accordance with DEP guidelines since 1980, and did not operate in a "grossly negligent" manner. § 376.3078(3)(b), Fla. Stat. (1997) (emphasis added).[4] The County stipulated that Suniland Associates' shopping center is an eligible facility within the meaning of Section (3). (App. 10)

Facilities eligible for cleanup under Section (3) are not cleaned up on a "first come, first served" basis. In Sections (4) through (6) of the Act, the legislature created a scoring and ranking system under which contaminated sites are prioritized according to their potential threat to human health and the environment. For example, contaminated sites near potable water

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[4]"Gross negligence" is defined to mean a willful discharge of drycleaning solvents, the willful concealment of a spill, or the willful violation of a federal, state, or local law governing the operation of a drycleaner. § 376.3078(3), Fla. Stat. (1997). Section (7) of the Act further defines "gross negligence" to include an operator's failure to install impermeable containment material beneath his drycleaning equipment or his failure to undertake "immediate" abatement actions in the event of a spill taking place after July 1, 1995, including the failure to remove the chemicals from a septic tank or affected soils. § 376.3078(7), Fla. Stat. (1997).

wells receive a higher ranking than those which do not pose a threat to drinking water supplies and, as a result, are cleaned up first. § 376.3078(5), Fla. Stat. (1997). ("A site shall be awarded points based on the proximity of the public water supply well or private well . . . . A site shall be awarded points based on groundwater vulnerability . . . "). The Act further vests DEP with authority to immediately undertake cleanup actions at any site it believes poses a threat to human health, or where failure to prevent migration of the contaminants would cause irreversible harm to the environment. § 376.3078(6)(h), Fla. Stat. (1997).

The Drycleaning Act also has a phase-out provision pursuant to which sites discovered to be contaminated in the future will not be covered. Section (3)(d) provides that with respect to drycleaning solvent contamination reported to DEP after July 1, 1997, the applicant will have to pay an increasing deductible until December 31, 2005, at which time, the State will no longer accept sites in the program. § 376.3078(3)(d), Fla. Stat. (1997). *This past term the legislature advanced the deadline for becoming eligible to participate in the program.* Only drycleaning facilities where contamination discovered before December 1998 will be able to participate in the program.[5] Ch. 98-198, § 10, Laws of Fla.

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[5]Because DEP did not begin to accept applications for the cleanup program until March 1996, the window of opportunity to obtain eligibility for the program is now only 2¾ years.

In 1995, the legislature amended the Drycleaning Act to include *two additional* immunity provisions prohibiting judicial actions by local governments. Ch. 95-239, Laws of Fla. In Section 376.3078(3)(o), the Act extends litigation protection to real property owners whose property is contaminated with drycleaning solvents, even where the contamination resulted from acts of a grossly negligent drycleaner. "A real property owner shall not be subject to administrative or judicial action . . . , for gross negligence or violations of department rules *prior to January 1, 1990, which resulted from the operation of a drycleaning facility,* provided the real property owner demonstrates that [he or she did not contribute to the contamination nor participate in the ownership or management of the drycleaning facility.]" § 376.3078(3)(a), Fla. Stat. (1997).

In addition, the legislature also amended the Act to include a provision aimed at encouraging voluntary cleanups by property owners. Section (9) generally provides that owners of real property contaminated with drycleaning solvents may voluntarily cleanup their property "whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program." § 376.3078(9), Fla. Stat. (1997). In exchange for cleaning up their property, real property owners are provided judicial immunity:

> A real property owner that voluntarily conducts such site rehabilitation, *whether*

> *commenced before on or after October 1, 1995*, shall be immune from liability . . . to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination, or to pay any fines or penalties regarding rehabilitation. . . .

§ 376.3078(9), Fla. Stat. (1997) (emphasis added). The only limitation to the immunity provided by this section is that the cleanup must have been done in a timely manner and in accordance with federal and state standards. § 376.3078(9), Fla. Stat. (1997).[6]

The County has stipulated that Suniland Associates voluntarily cleaned up the drycleaning solvent contamination at its property in accordance with Section (9) of the Act. (App. 9-10)

The Events Giving Rise to the County's Lawsuit

Suniland Associates is the owner of the Suniland South Shopping Center located at 12115 South Dixie Highway, Miami, Florida ("Shopping Center"). (App. 6) The Shopping Center was built in the early 1970s. (App. 7) From 1983 through 1992, a drycleaner by the name of "Daphne's Cleaners" operated at the Shopping Center. (App. 7) At no time did Suniland Associates or its partners own or operate a drycleaning business at the Shopping Center or participate in the management and operation of Daphne's Cleaners. Daphne's Cleaners has been the only drycleaner to do business at the Shopping Center. (App. 7)

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[6]The immunity provisions set forth in Sections 376.3078(3), 376.3078(3)(o), and 376.3078(9), shall be referred to as Section (3), Section (3)(o), and Section (9), respectively.

On November 18, 1991, the County issued Suniland Associates and Daphne's Cleaners an Emergency Order to Correct a Sanitary Nuisance. (App. 7); (R. 393) As indicated in the Emergency Order, the County had detected drycleaning solvents in the septic tank and storm drain of the Shopping Center and in water wells in a nearby neighborhood. As a result, the County directed Suniland Associates to assess the contamination discovered at its property and, if necessary, to take appropriate remedial action. (App. 7); (R. 394) At approximately the same time, the County performed tests at drycleaners at three other shopping centers in south Miami-Dade County. These tests also revealed drycleaning solvent contamination. Those shopping centers are located at 11723 South Dixie Highway (five blocks north of the Suniland South Shopping Center); 8283 S.W. 124th Street (approximately three blocks south of the Suniland Shopping Center property); and 12673 South Dixie Highway (five blocks south of the Suniland Shopping Center). (App. 8) The four shopping centers and drycleaning businesses at which contamination was discovered were all separately owned and operated. The drycleaning businesses at the shopping centers had operated for different periods of time.[7] (R. 429)

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[7]As of 1991, Daphne's Cleaners had operated at Suniland South Shopping Center for seven years, while drycleaners at the 11723 South Dixie Highway and 8283 S.W. 124th Street properties had done business there for over 20 years. The drycleaner at 12673 South Dixie Highway was a new business. (R. 425-26)

Emergency Orders to Correct Sanitary Nuisances were issued by the County to the owners of each of the shopping centers.

Upon receipt of its Emergency Order, Suniland Associates -- but not the owners of Daphne's Cleaners -- contacted the County's Department of Environmental Resources Management ("DERM"), met with agency representatives, and timely responded to DERM's requests. "[C]learly, they were concerned about what was happening, and they responded . . . ." Deposition of Gary Service, DERM Code Enforcement Officer, dated November 4, 1984, at p. 18 (R. 429). Suniland Associates -- but not the owners of Daphne's Cleaners -- hired environmental engineers to begin assessment work and to design and install a groundwater treatment system. (App. 7) The septic system at the Shopping Center was pumped out and the contents were sent off-site for disposal in 55 gallon drums, in accordance with applicable laws and regulations. The storm drain behind the drycleaner was analyzed and its contents removed and properly disposed. (App. 7) Pursuant to a Contamination Assessment Report approved by the County, a groundwater treatment system, known as an air-stripper, was installed at the property in July, 1992. (App. 7) Suniland Associates continued to operate the air-stripper until November 2, 1994. (R. 391) At that time, the County wrote Suniland Associates to notify it that it could discontinue groundwater treatment. "DERM acknowledges the success of the groundwater treatment system for source control of ground-

water contaminants at the subject site." (R. 396) Suniland Associates continued to test the groundwater, however, to make sure the drycleaning chemicals had been removed. Suniland Associates' assessment and cleanup costs exceeded $450,000.00. (App. 9)

It is undisputed that prior to the receipt of the November 18, 1991 Emergency Order from the County, neither Suniland Associates nor its partners were aware that drycleaning chemicals had been discharged into the septic tank and storm drain at the Shopping Center, nor had they ever seen, or heard about, any tenants or other parties improperly storing, handling, or disposing of drycleaning chemicals at the Shopping Center. (App. 7-8)

Miami-Dade County claims that in 1993, as a result of the drycleaning solvent contamination, it had to install potable water mains throughout the residential development located east of the four shopping centers. According to the County, the drycleaning solvents from the four separate sites had migrated eastward into the development, known as Suniland Estates, rendering existing private water wells unsuitable for use. (App. 8) The County does not allege, nor is there record evidence to suggest, however, that all of the areas in which the County installed water mains were contaminated, that drycleaning solvents coming from Suniland Associates' property caused all of the contamination, or that the contamination in the Suniland Estates area was not reasonably capable of division among the four different source areas. (R. 127-

134) Prior to installing the water mains, the County never requested Suniland Associates to cleanup the groundwater contamination in the Suniland Estates area.[8]

Notwithstanding the fact that Suniland Associates had timely cleaned up the contamination on its property and complied with every request of the County, on December 19, 1994, the County brought suit against Suniland Associates, seeking damages and injunctive relief for the discharge of drycleaning solvents. Similar claims were brought against the owners of Daphne's Cleaners, and the owners and operators of the three other shopping centers and their drycleaner tenants. The Complaint contained four counts: injunctive relief (Count I), damages (Count II), civil penalties (Count III), and attorney's fees and administrative costs (Count IV). *All four counts were based exclusively upon the strict liability provisions of Chapter 24 of the Metropolitan Dade County Code.* (App. 8-9)[9] Between December 1994 and August 9, 1995, the

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[8]The County states that the contamination which had migrated off site from the shopping centers was not "reasonably recoverable." There is no record evidence to support this assertion. In fact, the County specifically sued Suniland Associates seeking injunctive relief requiring it "to remediate the [groundwater] contamination which has left the boundaries of the property . . . ." (R. 132). See also Transcript of Hearing dated October 3, 1995, at p. 45. (R. 624).

[9]Section 24-57 of the County Code, on which the County's Complaint was based, is at pages 23-26 of the appendix to the County's brief. The Court's attention is directed to 24-57(g) which imposes joint and several liability on any person who has a legal, beneficial, or equitable interest in the property on which a violation has occurred or existed, regardless of fault and 24-57(j)'s provision equating the cessation of a violation with the "functional

County conducted no discovery and did not move for preliminary injunctive relief as requested in its Complaint. From August 9, 1995 through August 2, 1996, the trial court stayed the County's case to allow Suniland Associates and the other drycleaner sites to apply for participation in the State's drycleaning program. (R. 59-60; 88-92; 561) The County did not appeal the stay order.[10]

By letter dated February 27, 1996, the County determined that Suniland Associates could discontinue its groundwater monitoring at the Shopping Center, having successfully remediated the drycleaning solvent contamination. (App. 9) On June 12, 1996, DEP determined that the Shopping Center was an "eligible" facility under Section (3) of the Drycleaning Act. (App. 10) The County did not appeal the DEP's eligibility determination. Accordingly, on November 18, 1996, Suniland Associates moved for final summary judgment under the Act's immunity provisions because the County's lawsuit constituted a prohibited judicial action by a local government. (R. 382) Suniland Associates sought summary judgment under two of the Act's three immunity provisions: Section (3) pertaining

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equivalent of a confession of judgment . . . for which attorneys fees shall be awarded."

[10]Since the statute's enactment, DEP has consistently interpreted the Act as precluding governmental enforcement of pollution laws against drycleaning facilities. On May 8, 1994, DEP issued a directive suspending all enforcement efforts against potentially eligible sites. (App. 12) In a subsequent memorandum issued on November 28, 1994, DEP reaffirmed its policy of discontinuing enforcement actions with respect to drycleaning facilities and their owners. (App. 13) See also (R. 494, 621-622).

to "eligible" facilities, and Section (9) pertaining to real property owners who have conducted voluntary cleanups. (R. 382-387) The County did not file any affidavits in opposition to the motion for summary judgment. By order dated December 11, 1996, the trial court granted Suniland Associates' Motion for Final Summary Judgment on both grounds. (R. 641-644) The County's appeal to the Third District followed.

In its opinion dated January 28, 1998, the Third District affirmed. The Court's review of the Act's comprehensive funding, cleanup, and immunity provisions, led it to unanimously conclude "that the legislature has clearly expressed its intention that the Act is to be retroactively applied." (App. 4) The Court further observed that the Act would not have impaired the County's substantive rights because county governments do not possess regulatory rights, but merely delegated powers "which powers the legislature can withdraw at any time." (App. 4, n. 4).

SUMMARY OF THE ARGUMENT

The Drycleaning Act is a comprehensive, statewide program pursuant to which DEP has assumed primary jurisdiction to respond to drycleaning solvent contamination in the state's groundwater. The Act specifically provides that real property owners who voluntarily clean up drycleaning solvent contamination shall not be subject to suit by local governments to pay for the cost of environmental rehabilitation, *regardless of when the cleanup was commenced*. Here, the County stipulated that Suniland Associates voluntarily cleaned up the pollution caused by its tenant. Another section of the Drycleaning Act further provides that "eligible" sites are immune from judicial action by local governments to pay for the cost of environmental rehabilitation *regardless of when the contamination was discovered*. Here, too, it is undisputed that Suniland Associates' property is an eligible facility. Based upon these provisions of the Drycleaning Act, the trial court granted final summary judgment in Suniland Associates' favor and against the County. The Third District affirmed in a unanimous decision.

On appeal, the County makes several arguments to reverse the summary judgment. As it did in both the trial court and Third District, the County claims that the Drycleaning Act is substantive in nature and therefore should not have been applied to its on-going lawsuit against Suniland Associates. According to the County, because its damages were incurred prior to enactment of the

statute, its cause of action was a "property right" which could not be legislatively extinguished.

The County's legal argument is fundamentally flawed. First, the County ignores its status as a subdivision of the State of Florida. Miami-Dade County is not a private citizen. It is not an independent sovereign. It is a *political subdivision* of the state, created by the state. Long established precedent holds that the protections in the federal and state constitutions *do not apply to county or municipal governments*. Second, Article VIII, Section 6 of the Florida Constitution affirmatively mandates that general laws of the legislature supersede conflicting ordinances and actions taken under the Miami-Dade County Charter. This Court has held that in the case of a conflict between a general law and action taken under a county charter, the latter is void and unconstitutional. Accordingly, once Suniland Associates completed its voluntary cleanup under Section (9) of the Act, it became "immune from liability" and the County no longer had the power to pursue its lawsuit against it. As the United States Supreme Court's concluded in City of Trenton v. New Jersey, 262 U.S. 182, 187-188 (1923), the power of the state, unrestrained by the constitution, over the rights and property of its political subdivisions, cannot be questioned. The County may be unhappy with the decision of the legislature to preempt its ability to enforce its ordinances relating to drycleaning solvent contamination, but

the County's forum for relief is the Florida legislature, not the courts.

Third, the County ignores the language of the Drycleaning Act which contains unequivocal language showing the legislature's intent to extinguish existing claims of state and local governments for pollution rehabilitation costs. In unambiguous terms, the legislature decided that real property owners shall not be subject to judicial actions for drycleaning solvent contamination: (1) at abandoned sites "regardless of when the contamination is discovered;" (2) at non-eligible sites where the contamination was caused by gross negligence occurring prior to January 1, 1990; and (3) at sites where the contamination has been cleaned up by the property owner, even when the cleanup was commenced before October 1, 1995 -- the voluntary cleanup provision's effective date. These unambiguous provisions expressly contemplate pre-enactment events as triggers to the litigation protection afforded under the statute. Significantly, this past term, the legislature amended the Drycleaning Act to provide that:

> 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.

Chapter 98-189, § 10, Laws of Fla.

The County finally argues that even if the Act's litigation bars do apply, they are limited only to pollution cleanup costs, not sums spent extending potable water pipelines into the area contaminated by drycleaning solvents. As reflected in the record, the County never raised this argument in the trial court and, as such, is precluded from raising it now. Indeed, if the County had timely raised this issue below, Suniland Associates could have presented undisputed evidence showing, among other things, that the state funding was available to pay for the cost of alternative sources of potable water, the very expense the County claims is beyond the scope of the Act. Even if the County had raised this argument, however, it is refuted by the Drycleaning Act's explicit allowance for the state's payment of replacement water costs, and should therefore be rejected.

ARGUMENT

I. THE FLORIDA CONSTITUTION PERMITS THE STATE TO ENACT LEGISLATION PREVENTING ITS SUBDIVISIONS FROM PURSUING CLAIMS WHICH AROSE PRIOR TO THE LAW'S ENACTMENT.

In adopting the Drycleaning Act, the State of Florida decided for itself and its subdivisions that no action may be taken against owners of qualifying drycleaning facilities to compel site rehabilitation or to recover site rehabilitation costs. Although it is well established that the legislature may at any time and for any reason withdraw some or all of the power it has granted to the subdivisions it has created, including the power to sue, the County urges the Court to take the unprecedented action of imposing a judicial limitation on the legislature's power over its subdivisions by barring legislation that would negate claims which arose under County ordinances prior to the enactment of such legislation. The County's position is based on a fundamental misapprehension of Florida constitutional law, and a misguided belief that it can, through its own ordinances, create legal rights for itself which are not subject to contrary provisions of general law. There is no authority, and the County has cited none, which supports its implicit claim to power independent of that conferred or authorized by the state.

The County's Initial Brief sidesteps completely the threshold issue on which the certified question is based: Is the state's constitutional authority over its subdivisions subject to

judicially created presumptions on retroactive legislation? Courts in this and other states have been cautious in applying legislation retroactively so as not to interfere with existing contractual rights or property interests of private citizens. The County, however, is not a private citizen. It is a political subdivision of the state and, as a result, does not possess constitutional rights, such as the right to be free from state impairment of contractual obligations or state seizure of its property. The County's authority to regulate drycleaners or groundwater contamination is also subject to withdrawal by the legislature at its discretion at any time. Article VIII, Section 11 of the Florida Constitution is very clear: general laws of the legislature shall have supremacy over conflicting laws or actions taken by a county government. Indeed, a subdivision of the state cannot by ordinance create in itself a right or interest to defeat contrary legislation enacted by the sovereign to which it is a subordinate. As the Third District observed: "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." Op. at 4, n. 4 (App. 4)

The County has cited no cases or other authority which would allow this Court to limit to prospective application only a general law, which by its terms: (i) bars all local government enforcement actions against owners of qualifying drycleaning

facilities; and (ii) in the case of a voluntary cleanup, provides that real property owners "shall be immune from liability." The County's status as a political subdivision rendered its enforcement authority against Suniland Associates void, not voidable, upon Suniland Associates' eligibility in the Drycleaning Cleanup Program. No County "rights" or protected interests have been impaired by the Drycleaning Act. Rather, the County is a subpart of, and subservient to, the State of Florida. When the legislature concluded that eligible facilities shall be immune from liability, this immunity extended to claims of local governments, regardless of when the claims arose.

A. Political subdivisions, such as Miami-Dade County, do not have constitutionally protected rights.

In Florida, a county is a political subdivision of the state. Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372 (1916). The County has stipulated to this. (App. 6) It is generally recognized that "[a county] is created for administrative purposes; it is the representative of the sovereignty of the state, auxiliary to it, an aid to the more convenient administration of the government." Id. at 372. As this Court explained, "the relation of the state to its counties and districts is sovereign governmental, not contractual or equality of rights." Carlton v. Mathews, 103 Fla. 301, 137 So. 815, 841 (1931). "Counties, unlike municipalities, are organized as political subdivisions of the

state and constitute a part of the machinery of the state government." Kaulakis v. Boyd, 138 So. 2d 505, 507 (Fla. 1962) (Because they are political subdivisions of the state, counties partake of same sovereign immunity as the state); see also Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113, 1115 (Fla. 1976) ("It has long been held that counties act as arms of the state"); accord Weaver v. Heidtman, 245 So. 2d 295, 296 (Fla. 1st DCA 1971) ("The respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art. VIII, Section 1, of the State Constitution, F.S.A., and accordingly are subject to the legislative prerogatives in the conduct of their affairs"); see also Town of Palm Beach v. City of West Palm Beach, 55 So. 2d 566, 572 (Fla. 1951) ("The power of the Florida Legislature with respect to municipalities is absolutely unlimited except as restrained by the state or federal Constitution").

As political subdivisions of the state, county governments are not regarded as private citizens under the federal and state constitutions. The Fifth Circuit Court of Appeals, in City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976), explained this distinction:

> [E]ver since the Supreme Court's landmark decision in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the

> right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

529 F.2d at 1254 (citations omitted).

The rationale espoused in Safety Harbor has been followed by Florida courts. In Department of Community Affairs v. Holmes County, 668 So. 2d 1096 (Fla. 1st DCA 1996), the First District recognized the distinction between county governments and private citizens in holding that Florida's counties did not have constitutionally protected rights to hurricane relief funds:

> [T]he Fourteenth Amendment to the federal constitution and Article I, Section 9, of the Florida Constitution provide that no "person" shall be deprived of life, liberty, or property without due process of law. Being political subdivisions of the State of Florida, the Plaintiff Counties are not a "person" entitled to protection under the due process clause of the federal or state constitution.

668 So. 2d at 1102.

The Holmes court relied upon Shelby v. City of Pensacola, 112 Fla. 584, 151 So. 53, 55 (1933), and City of Trenton v. New Jersey, 262 U.S. 182 (1923). In Shelby, this Court addressed the constitutionality of a state statute which prohibited municipal governments from reducing wages for city workers employed on or before April 1, 1931. 151 So. at 54. In upholding the statute, the

Court explained that municipal governments were not protected "persons" under the Constitution:

> As a protection of the liberty and property rights of persons against adverse legislative action on the part of the *states*, the clauses of the Fourteenth Amendment to the Constitution of the United States which declares that no *state* shall deprive any *person* of life, liberty, or property without due process of law, or deny any *person* within its jurisdiction the equal protection of the laws, have never been held applicable to municipal corporations on the theory that such public corporations are "persons" within the purview of the language of the Fourteenth Amendment.

151 So. at 55 (emphasis in original).

The same result was reached by this Court in State ex rel. Green v. City of Pensacola, 126 So. 2d 566 (Fla. 1961), a case involving the constitutionality of a state statute exempting the City of Pensacola from taxes on the sale of natural gas. In upholding the statute's validity under the equal protection clauses of the Florida and United States Constitutions, the court held that the Florida legislature's "powers with respect to municipalities is absolutely unlimited except as restrained by the state or federal constitutions." 126 So. 2d at 570 (citations omitted). Accordingly, the court explained, "the 'equality' provisions of the Federal and State Constitutions do not constitute restraints upon the state in the control of its own municipalities." Id. (citing City of Trenton, supra; Shelby, supra).

Holmes, Shelby, and City of Pensacola all relied upon the United States Supreme Court decision in City of Trenton in concluding that county and municipal governments are afforded no protection under the federal and Florida Constitutions. There, the Court addressed the constitutionality of a New Jersey statute imposing a tax on the withdrawal of water from streams and lakes. Prior to enactment of the statute, the City of Trenton had acquired by assignment a State of New Jersey license to withdraw unlimited supplies of water. After its enactment, the City contended that the new tax law violated the contract clause, takings clause, and due process provisions of the United States Constitution.

In rejecting the City's arguments, the Supreme Court first explained that the "state undoubtedly has power, and it is its duty, to control and conserve the use of its water resources for the benefit of all its inhabitants. . . ." 262 U.S. at 185. That authority, moreover, was absolute: "The power to determine the conditions upon which waters may be so diverted is a legislative function. The state may grant or withhold it as it sees fit." Id.

The Court then explained that because the City of Trenton was merely a political subdivision of New Jersey, the latter could, "at its pleasure," take its property without compensation or extend or withdraw powers, conditionally or unconditionally. 262 U.S. at 186. The Court stated:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and a state may withhold, grant, or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will. . . .
>
> The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned.

262 U.S. at 187-88 (citations omitted).

Decisions from other states similarly establish that because counties are creatures of the state, they are subject to absolute dominion by the state and cannot be heard to complain when the legislature seizes county property or impairs their contracts. In Randolph County v. Alabama Power Co., 784 F.2d 1067, 1072 (11th Cir.), modified, 789 F.2d 425 (11th Cir. 1986), for example, the Eleventh Circuit Court of Appeals, applying Alabama law, upheld that state's power to seize real property owned by a county government without paying compensation as required under the Takings Clause. "[T]he county does not have any federally protected right against a state that takes public property without paying compensation." 784 F.2d at 1072.

In Moses Lake School Dist. No. 161 v. Big Bend Comm. College, 503 P.2d 86 (Wash. 1971), the Supreme Court of Washington

upheld a state statute pursuant to which property of a local school district was transferred to a community college without compensation to the school district. In rejecting the school district's challenge under both the United States and Washington Constitutions, the court explained:

> Hunter v. Pittsburgh, 207 U.S. 161, 178-179 (1907), is dispositive of plaintiff's asserted violation of the two foregoing provisions of the federal constitution [impairment of contracts and due process]. Although a possible exception is made for municipal corporations holding property in a private capacity, the United States Supreme Court makes it clear that political subdivisions of a state are created as convenient agencies for exercising such governmental powers of the state as may be entrusted to them. Thus, the state may, at its pleasure, modify or withdraw such powers, may take without compensation such property, hold it itself, or vest it in other agencies.

503 P.2d at 91 (citations omitted). Significantly, the court went on to hold that the transfer of the school district's property did not violate Washington's Takings Clause, which prohibits -- as does Florida's Takings Clause -- the taking of *private property* for public or private use without just compensation. "In this case, however, private property has not been taken. Public property has been transferred from one public agency to another." Id.

In Town of Nottingham v. Harvey, 424 A.2d 1125 (N.H. 1980), a municipality challenged a New Hampshire statute as retroactively restricting its right to regulate mobile homes. In New Hampshire, retroactive laws are expressly prohibited by its Constitution. N.H.Const. Part I, Section 23; 424 A.2d at 1131. In

rejecting the city's argument, the New Hampshire Supreme Court held that the constitutional prohibition against retroactivity only protected private citizens, not the government:

> [T]he provisions of part I of our Constitution, which constitutes our Bill of Rights, are restrictions on government action which protect our private citizens, not the government. The town is, therefore, not entitled to the benefit of N.H. Const. pt. I, art. 23, because it is a mere political subdivision of the State over which the legislature may exercise complete control . . . .

424 A.2d at 898 (citations omitted).

Similarly, in Rouselle v. Plaquemines Parish School Bd., 633 So.2d 1235 (La. 1994), a local school board challenged on retroactivity grounds a new state statute requiring it to rehire school principals who received the endorsement of the Superintendent of Schools, but not that of the school board. In rejecting the school board's appeal, the Louisiana Supreme Court first ruled that the statute did not violate the contract clauses of the United States or Louisiana Constitutions. "The School Board is an agency of the state and is aware of the legislature's broad and pervasive power to regulate public education. Accordingly, it is not protected by the constitutional prohibition against the legislature enacting laws which impair the obligation of contracts." 633 So.2d at 1246-47. The court then held that retroactive application of the statute did not impair the school board's rights:

> This state may constitutionally pass retrospective laws waiving or impairing its own

> rights or those of its subdivisions, or imposing upon itself or its subdivisions new liabilities with respect to transactions already passed, *as long as private rights are not infringed*.

633 So.2d at 1247 (emphasis added) (citations omitted).

Applied to this case, the foregoing authorities unquestionably establish the state's authority to extinguish any cause of action the County may have had against Suniland Associates for costs incurred in responding to the drycleaning solvent contamination. Any such claim is no different from other County property or contract rights which have always been subject to confiscation or impairment by the state without compensation. As illustrated above, if the legislature may impair municipal contracts, seize county real property without compensation, deny federal hurricane relief funds, and invalidate local taxes, no basis exists for the County to assert that the legislature cannot extinguish a cause of action predicated upon the County Code.[11]

---

[11]The County's mistaken belief that it has "rights" which can be asserted to defeat the application of a general law affecting its enforcement authority is presumably based on dicta in Metropolitan Dade County v. Fonte, 683 So. 2d 1117 (Fla. 3d DCA 1996), where the Court suggested that the County could assert the contract clause to the Florida Constitution as a defense to a statute barring local government enforcement of consent orders requiring site rehabilitation. Id. at 1118. The Fonte decision is plainly wrong. As the former Fifth Circuit held in Safety Harbor, supra, "public entities which are subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations. . . ." 529 F.2d at 1254 (applying Florida law); see also Rouselle, 633 So. 2d at 1247. In answering the certified question in the affirmative, this Court should specifically disapprove of the Fonte decision.

B. The conflict between the Drycleaning Act and Chapter 24, Miami-Dade County Code, rendered Miami-Dade County's claim against Suniland Associates void.

Under Section 1 of Article III of the Florida Constitution, the legislature may exercise *any* lawmaking power that is not otherwise forbidden. "The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative acts invalid." Savage v. Board of Public Instruction for Hillsborough County, 101 Fla. 1362, 133 So. 341, 344 (1931); See State ex rel. Collier Land Inv. Corp. v. Dickinson, 188 So. 2d 781, 783 (Fla. 1966); Pinellas County v. Laumer, 94 So. 2d 837, 840 (Fla. 1957); City of Miami Beach v. Crandon, 160 Fla. 439, 35 So. 2d 285, 287 (1948); Stone v. State, 71 Fla. 514, 71 So. 634, 635 (1916).

Section 6 of Article VIII of the Florida Constitution, on the other hand, provides that the County may exercise certain powers of self-government provided they do not conflict with general laws enacted by the Florida legislature:

> Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County . . . and 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 provision of any ordinance enacted pursuant to said [Miami-Dade County] charter and in conflict therewith* . . . .

Art. VIII, § 11(6), Fla. Const. (1885), as amended (emphasis added). The limitations on the County's powers are further reinforced in Art. VIII § 11(9), which provides that "the provisions of this Constitution and general laws which shall relate to the County . . . shall be strictly construed to maintain such supremacy of this Constitution and of the legislature in the enactment of general laws pursuant to this Constitution." Art. VIII, § 11(9), Fla. Const.

The preceding provisions of the Florida Constitution mean that actions taken by a county government in conflict with general law are unconstitutional and void. In Board of County Commissioners of Dade County v. Wilson, 386 So. 2d 556, 559 (Fla. 1980), this Court stated:

> If any provision of the Dade County Charter, or any action taken pursuant to the Charter, contravenes the limitations or prescriptions of article VIII, section 6 of the 1968 Constitution, *it is necessarily unconstitutional and void.*

Id. (emphasis added); see also Dade County v. Mercury Radio Service, Inc., 134 So. 2d 791, 795-97 (Fla. 1962); State ex. rel. Baker v. McCarthy, 122 Fla. 749, 166 So. 280, 282 (1936). As a result, the County never had a "right" or entitlement to regulate drycleaners or groundwater which could not be withdrawn by the

legislature at its discretion at any time. In enacting and enforcing ordinances regulating persons and things within its borders, the County exercised governmental powers. Those powers, however, were always subject to later enacted provisions of general law. See also Sun Harbor Homeowners Ass'n v. Broward County Dep't of Natural Resource Protection, 700 So. 2d 178, 180-81 (Fla. 4th DCA 1997).

In addition, actions taken by the County in contravention of general law are void -- not just voidable. Florida is *not* a federation of 67 separate sovereigns. There is only one sovereign, and subdivisions are mere instrumentalities. Unless limited by the Constitution, the legislature makes the final decision as to what the law in Florida shall be. Because the County is part of the state, it is subservient to the decisions of the legislature, and when the legislature acts, so too, does the County. To hold otherwise would mean that county governments could create "rights" by ordinance which could not be superseded by general law. See, e.g., City of Plantation v. Utilities Operating Co., 156 So. 2d 842 (Fla. 1963) (City cannot by contract usurp legislative authority to set utility rates); Merritt Island Sanitation, Inc. v. Green, 251 So. 2d 132 (Fla. 4th DCA 1971)(same).

Accordingly, when the drycleaner at Suniland South Shopping Center became an eligible facility under the Drycleaning Act, the County no longer had the power to continue its lawsuit

under Chapter 24, Miami-Dade County Code. Section (3) of the Act expressly provides that eligible facilities shall not "be subject to administrative or judicial action brought by or on behalf of any state or local government . . . [to] pay for the costs of rehabilitation of environmental contamination." § 376.3078(3), Fla. Stat. (1997). The County's lawsuit, however, sought to do exactly that. The conflict is clear. As a result, the County's authority to continue its lawsuit against Suniland Associates became unconstitutional and *ultra vires*.[12]

This case does not create an issue of whether the presumption of prospective application applies or does not apply. The authorities cited by the County for the proposition that the Drycleaning Act should not be applied retroactively to the County, all involve claims by *private citizens.* The County is not a private citizen. The County contends that constitutional prohibition against conflicts between general law and local ordinance only applies prospectively. There is no such limitation in Florida law.

---

[12]The conflict between Chapter 24 and Section 376.3078 is clear and express, especially with regard to the immunity provision found in Section (9), the Act's voluntary cleanup provision. There, the legislature provided that a real property owner who conducts a voluntary cleanup of his property "shall be immune from liability" to local governments for the costs of environmental rehabilitation, fines or penalties, regardless of whether the cleanup is "commenced before or on or after October 1, 1995" -- the section's effective date. Because Suniland Associates cleaned up its property, the County's attempt to hold it liable for its rehabilitation costs is in direct conflict with Section (9). See, e.g., City of Miami Beach v. Amoco Oil Co., 510 So. 2d 607 (Fla. 3d DCA 1987) (state statute prohibiting local regulation of sale of beer barred municipal zoning ordinance on same subject.)

The Florida Constitution unambiguously provides that general laws shall supersede any provision of any ordinance enacted pursuant to the Dade County Charter with which it is in conflict. This is an *affirmative* mandate prohibiting local governments from engaging in conduct which the legislature has prohibited. The Constitution and prior decisions of this Court are very clear: once a conflict arises the authority of the County to act is nullified and void. Any qualification of the power of the legislature regarding its subdivisions would run afoul of the plain language of Article VIII.

The County wants this Court to engage in the presumption that the constitutional prohibition against conflicts does not apply unless the legislature indicates otherwise. Nothing in the language of Article VIII supports such a presumption. Absent a savings clause in the Drycleaning Act which preserves existing claims by county governments (thereby avoiding a facial conflict with a general law), the County no longer had authority under Article VIII to continue to sue Suniland Associates. Private citizens (such as Suniland Associates) should be entitled to rely on county governments' abiding by the Constitution and not attempting to regulate matters under ordinances which have explicitly preempted by general law. See Sun Harbor, 700 So. 2d at 181. Accordingly, the decision of the Third District should be affirmed.

II. THE DRYCLEANING ACT CONTAINS CLEAR AND UNEQUIVOCAL LANGUAGE ESTABLISHING RETROACTIVE INTENT.

Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994), and the other authorities cited by the County, generally state that statutes that affect "substantive rights" will apply prospectively, unless the legislature expressly or unequivocally indicates otherwise. 632 So.2d at 1358. There is nothing in the history to this presumption against retroactivity, however, which would suggest that it should be blindly applied to all statutes or in all cases. First, it is important to observe that "[t]he presumption against statutory retroactivity has been consistently explained by reference to the unfairness of imposing new burdens on persons after the fact." Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994). This underlying rationale has no application in a dispute between a state and its political subdivisions. Unlike private citizens, county and municipal governments generally do not have rights and property which cannot be usurped by the state at its discretion. Second, the presumption against retroactivity has not been applied to all statutes. Statutes considered to be "remedial" or "curative" apply to pending lawsuits.[13] See Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) (citing City of

[13]At hearing, Dade County stated that the Drycleaning Act, with the exception of the immunity provisions, is a remedial statute: "You take out Section (3) which is the litigation bar, it is a completely remedial section. But Section (3), which is the only thing we are here on, is not remedial in nature." (R. 500)

Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986)). Usury statutes may also be abated or modified retroactively without a legislative mandate, Tel Service Co. v. General Capital Corp., 227 So. 2d 667 (Fla. 1969), as well as statutes conferring jurisdiction. State ex rel. Arnold v. Revels, 109 So. 2d 1, 3 (Fla. 1959). So, too, may procedural rights, such as burdens of proof or venue statutes. See, e.g., Love v. Jacobson, 390 So. 2d 782, 783 (Fla. 3d DCA 1980); Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 243 (Fla. 1977) (procedural rights are subject to immediate repeal because "no one has a vested right in any given mode of procedure") (citation omitted). Accordingly, this Court has not applied a presumption against retroactivity to all statutes, but instead, selectively extends it to certain categories of statutes based on an examination of the nature and type of rights encompassed by the legislation.

Assuming the Drycleaning Act does affect substantive rights, it nonetheless contains express and unequivocal language reflecting the legislature's intent to allow for its retrospective application in this case. See State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995); Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239, 241 (Fla. 1977). In particular, each of the Act's three immunity provisions contains explicit language plainly and clearly reflecting the legislature's intent that the

Act apply to contamination cases which accrued prior to its July 1, 1994, effective date.

Section (3) Immunity. Section (3) generally provides that, in accordance with the eligibility provisions of that section, no real property owner shall be subject to judicial actions brought by local governments to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. § 376.3078(3), Fla. Stat. (1997). Section (3) expressly applies to "abandoned" drycleaning facilities, such as Daphne's Cleaners, which are defined as those sites which *ceased doing business prior to October 1, 1994*. Provided an abandoned drycleaning facility meets Subsection (3)(b)'s four-part eligibility test (Suniland Associates' eligibility has not been disputed by the County,) the Act provides that "such facilities, at which there exists contamination by drycleaning solvents, shall be eligible under this subsection *regardless of when the contamination was discovered . . . .*" § 376.3078(3)(b), Fla. Stat. (1997) (emphasis added).

Section (3)(o) Immunity. In addition to Section (3)'s immunity provision, Section (3)(o) extends litigation protection to property owners even when their sites have been declared ineligible under Section (3) due to operator misconduct. Section (3)(o) provides:

> A real property owner shall not be subject to administrative or judicial action brought by

> or on behalf of any person or local or state government, or agency thereof, *for gross negligence or violations of department rules prior to January 1, 1990, which resulted from the operation of a drycleaning facility,* provided the real property owner demonstrates that [it did not cause the contamination of the property and did not own or operate the dry cleaning establishment.]

§ 376.3078(3)(o), Fla. Stat. (1997) (emphasis added).

Section (9) Immunity. Finally, Section (9) of the Act extends immunity to real property owners that voluntarily cleanup drycleaning solvent contamination on their property in accordance with federal and state laws. "A real property owner that voluntarily conducts such site rehabilitation, *whether commenced before or on or after October 1, 1995,* shall be immune from liability to any person, state or local government, or agency thereof to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination, or to pay any fines or penalties regarding rehabilitation . . . ." § 376.3078(9), Fla. Stat. (1997) (emphasis added). Suniland Associates' compliance with Section (9) is not disputed. The effective date for the 1995 amendments which created Section (9) was October 1, 1995. Chapter 95-239, Laws of Fla.

As indicated, the Drycleaning Act contains three, separate immunity provisions, each of which extends liability protection to events predating enactment of the statute. In unequivocal terms, the legislature decided that real property

owners shall not be subject to judicial actions for drycleaning solvent contamination: (1) at abandoned sites "regardless of when the contamination is discovered;" (2) at non-eligible sites where the contamination was caused by gross negligence occurring prior to January 1, 1990; and (3) at sites where the contamination has been cleaned up by the property owner, even when the cleanup was commenced before October 1, 1995. These unambiguous provisions expressly contemplate pre-enactment events as triggers to eligibility in the cleanup program and litigation protection afforded under the statute.

The language in Section (9) is particularly compelling. The voluntary cleanup provision was added to the Drycleaning Act in the 1995 amendments which became effective on October 31, 1995. As indicated supra, pursuant to Section (9), any person who cleans up their property "shall be immune from liability," regardless of whether the cleanup was commenced "before or on or after October 31, 1995." § 376.3078(9), Fla. Stat. (1997). Accordingly, Section (9) expressly contemplates judicial immunity for property owners who: (1) discover drycleaning solvent contamination before Section (9)'s enactment; and (2) begin environmental rehabilitation of the solvents at that time. In this case, it is undisputed that Suniland Associates commenced cleanup activities shortly after being notified of the contamination in November, 1991. The cleanup continued through February 27, 1996, at which time the County

notified it that no further action was necessary. All aspects of Suniland Associates' cleanup was done with the County's approval. (App. 9); (R. 643) Now, however, the County contends that rehabilitation costs it incurred between 1992 and 1993 are not covered by Section (9)'s broad grant of judicial immunity. The statute does not support such a strained construction. In accordance with the plain language of the statute, Suniland Associates is now "immune from liability."[14]

The 1998 amendments to the Act further support the conclusion that the County's claims are barred. There, the legislature made it clear that its intent was to encourage voluntary cleanups by property owners and that the immunities afforded under the Act are to be construed in favor of property owners.

> 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.

Ch. 98-189, Laws of Fla.

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[14]Ignoring the plain language in Section (9), the County argues that it applies "only after the immunity provided by Subsection (3) comes into play and the owner is no longer under a lawful obligation to undertake the cleanup measures." Initial Brief at 21. Section (9) states otherwise. "A real property owner is authorized to conduct site rehabilitation activities at any time pursuant to department rules . . . *whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program*." § 376.3078(9), Fla. Stat. (1997).

Presumably, the County opposes any construction that would nullify a cause of action in its favor and against a drycleaning facility that existed as of the Act's effective date, July 1, 1994. This, according to the County, is a retroactive impairment of its "right" to sue. But a cause of action against a drycleaning facility accrues upon discovery of the contamination. Accordingly, the County's analysis would exclude the hundreds of facilities known to have been contaminated as of the effective date of the statute (and which were the impetus for its enactment). To follow the County's analysis would mean that only those properties at which contamination is discovered *after* the Act's effective date would be cleaned up. Not only does this construction defeat the explicit purpose of the legislation to respond to existing contamination, but it expressly contradicts the language in Section (3) of the Act which extends eligibility to sites "regardless of when the contamination is discovered."[15]

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[15]The County also argues that because the Act contemplates an application process pursuant to which site must apply for eligibility and be ranked and scored by DEP, this somehow shows that the legislature intended the Act to be prospective. The mere fact that a facility must apply for eligibility does not make it prospective only. Indeed, without an application process, how would DEP eliminate the intentional polluters from the cleanup program? What is relevant is who the legislature said could participate in the cleanup program, i.e., (1) past drycleaning facilities which stopped doing business as of 1994 and regardless of when the contamination was discovered; and (ii) real property owners who cleaned up their property, regardless of when the cleanup was commenced. This language is unquestionably retroactive in focus.

Here, Suniland Associates fell within two of the Act's immunity provisions: Sections 376.3078(3) and (9). Consistent with those provisions, the Third District affirmed the trial court's decision to dismiss the County's lawsuit because it was a prohibited judicial action by a local government to pay for the costs of environmental rehabilitation.

III. THE DRYCLEANING ACT'S IMMUNITY PROVISIONS EXTEND TO COSTS INCURRED IN THE TREATMENT, RESTORATION, OR REPLACEMENT OF POTABLE WATER SUPPLIES.

The County argues that even if the Drycleaning Act's immunity provisions do apply in this case, they are limited to only pollution cleanup costs, not costs incurred in providing an alternative source of water to the Suniland Estates area, penalties, or administrative costs. This argument was not presented to the trial court and, therefore, should not be considered on appeal. See, e.g., Sierra by Sierra v. Public Health Trust of Dade County, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995); Integrated Container Services, Inc. v. Overstreet, 375 So. 2d 1146, 1147 (Fla. 3d DCA 1979); Ballen v. Plaza Del Prado Condominium Ass'n, Inc., 319 So. 2d 90 (Fla. 3d DCA 1975); Liberty Mutual Fire Ins. Co. v. Kessler, 232 So. 2d 213, 215 (Fla. 3d DCA 1970). Indeed, Suniland Associates has been prejudiced by the County's omission. Had the County timely raised this issue below, Suniland Associates could have demonstrated that funding for alternative water sources was

available under the DEP's Hazardous Waste Management Trust Fund. See, e.g., § 403.755, Fla. Stat. (1991).

The County's new statutory construction argument also ignores the unambiguous language in Section 376.3078, and as such, must be rejected. Section (3) of the Act generally provides that real property owners shall not be subject to judicial actions "to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents." § 376.3078(3), Fla. Stat. (1997). In the second sentence of Section (3), however, the Act states that "[c]osts 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 . . . ." Id. Paragraph (2)(b) of Drycleaning Act lists eight different types of environmental rehabilitation activities. § 376.3078(2)(b), Fla. Stat. (1997). The second item on that list is the "expeditious treatment, restoration, *or replacement of potable water supplies* as provided in § 376.30(3)(c)1." § 376.3078(2)(b)2, Fla. Stat. (1997) (emphasis added). Section 376.30(3)(c)1 further explains that "replacement of potable water supplies" includes the "connection to an alternative source of safe, potable water." § 376.30(3)(c)1.a, Fla. Stat. (1995). Accordingly, because alternative sources of water are specifically identified in paragraph (2)(b) as an item

covered by the cleanup program, the costs of installing water mains in the Suniland Estates area falls within the scope of the Act's immunity provisions.

The County contends that the 1996 amendments to Chapter 376, Florida Statutes, allow it to sue for the costs of installing the water mains. Initial Brief at 27; § 376.301(36), Fla. Stat. (Supp.1996). Effective July 1, 1996, the legislature amended Section 376.301, Florida Statutes, to include a definition for the phrase "site rehabilitation." "Site rehabilitation means the assessment of site contamination and remediation activities that reduce the levels of contaminants at a site through accepted treatment methods . . . ." § 376.301(36), Fla. Stat. (Supp.1996); Ch. 96-277, § 2, Laws of Fla. Using this definition, the County claims that the Act's prohibition against judicial actions to "pay for the costs of rehabilitation of environmental contamination" should be limited to site specific cleanup costs and not alternative sources of potable water.

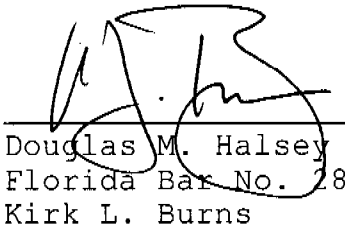
This argument, too, was never raised in the trial court. Moreover, the 1996 amendments to Chapter 376 do not address the Drycleaning Act or drycleaning solvent contamination. Chapter 96-277 deals *exclusively* with the regulation of underground storage tanks and petroleum contamination. There is nothing in this law that remotely suggests a legislative intent to narrow the scope of the Drycleaning Act.

Moreover, as discussed, supra, Section (2)(b) of the Act expressly contemplates DEP's use of drycleaning tax revenues to install alternative sources of potable water. Section (3) further provides that the activities described in Section (2)(b) are to be included in the cleanup program without recovery from the real property owner. Notwithstanding this language, the County contends that the cost of installing alternative sources of water were not intended to be covered by the program. This strained analysis is not supported by the language of the statute. Significantly, the County's analysis eviscerates the protections afforded under the voluntary cleanup provision. If a real property owner voluntarily steps forward and conducts all cleanup activities asked of it by the appropriate regulatory agency, but is nonetheless liable, the Act's litigation bar provides no meaningful protection or incentive to encourage voluntary cleanups. Indeed, in this case having *stipulated* that Suniland Associates' cleanup was complete, the County is estopped from claiming that off-site migration of drycleaning chemicals required it to incur additional costs. See, e.g., § 376.30(10), Fla. Stat. (1998) ("contaminated site" means any *contiguous* land, sediment, surface water, or groundwater areas that contain contaminants.) If remaining contaminants existed in the Suniland area, the County should never have agreed that Suniland Associates' cleanup was complete.

CONCLUSION

Based on the foregoing arguments and authorities, the question certified by the Third District should be answered in the affirmative.

HALSEY & BURNS, P.A.



Douglas M. Halsey
Florida Bar No. 288586
Kirk L. Burns
Florida Bar No. 515711
Evan M. Goldenberg
Florida Bar No. 0087580
First Union Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309
(305) 375-0077
Attorneys for
Suniland Associates

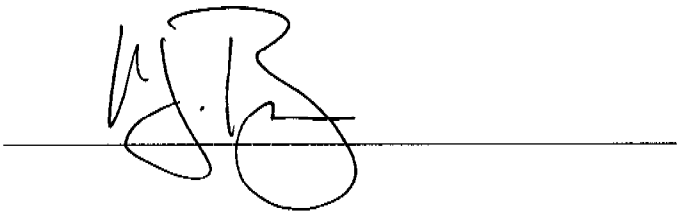
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 1st day of June, 1998, upon:

Harris Siskind
Norman A. Coll
Coll Davidson Carter
Smith Salter & Barkett, P.A.
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131

Thomas H. Robertson
Randy Duvall
Assistant County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. First Street
Miami, Florida 33128-1993

Robert M. Brochin
David Ashton
Morgan, Lewis & Bockius
First Union Financial Center
Suite 5300
200 South Biscayne Boulevard
Miami, Florida 33131



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Appendix

INDEX TO APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

METROPOLITAN DADE COUNTY, **

Appellant, **

vs. ** CASE NOS. 97-857
97-50
CHASE FEDERAL HOUSING ** 97-49
CORP., et al.,

** LOWER TRIBUNAL
Appellees. CASE NO. 94-23486
**

Opinion filed January 28, 1998.

Consolidated appeals from the Circuit Court of Dade County, Bernard Shapiro, Judge.

Robert A. Ginsburg, County Attorney, and Thomas H. Robertson, Assistant County Attorney, for appellant.

Morgan, Lewis & Bockius and Robert M. Brochin and David Ashton; Coll Davidson Carter Smith Salter & Barkett and Harris C. Siskind; Douglas M. Halsey and Kirk L. Burns and Evan M. Goldenberg, for appellees.

Before GERSTEN, FLETCHER, and SHEVIN, JJ.

FLETCHER, Judge.

Metropolitan Dade County [the County] appeals three final summary judgments in several consolidated environmental enforcement

and cost cases. We affirm.

The appellees are owners of shopping centers located along U.S. 1 (South Dixie Highway) in the Suniland area. In 1991, dry cleaning solvent contamination, from drycleaning establishments in the shopping centers, was discovered in the private drinking water wells of homes in the adjacent neighborhoods, as well as in the centers' septic tank systems. The appellees were issued notices of violation by the County and, in each instance, the appellees conducted environmental assessments and cleaned up their property, although the contamination that had migrated off site was not recoverable. As a result of the contamination of the private wells, the County installed water mains in the entire area (connecting them in 1993) at considerable expense.[1] The County also expended large sums in its investigation of the extent of the contamination.

The County subsequently brought suit to enforce the cleanup, to recover its monetary outlay for the water mains, to impose penalties, and to seek attorney's fees and administrative costs. However, the Florida Legislature enacted the "Drycleaning Contamination Cleanup Act" [the Act], ch. 94-355, amended by ch. 95-239, Laws of Florida, which includes section 376.3078, Florida

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[1] The record does not reflect whether the County charged the neighboring homeowners a fee for connecting the homes to the public water supply, thus passing on the expense to the consumer. Presumably the County, if it is the operator of the public water supply system, is charging the residents for their water usage. These matters are not here for consideration, however.

Statutes (1995). This legislation established a comprehensive statewide program for the elimination of contamination previously caused by and presently being caused by the discharge of drycleaning solvents. The legislature established a fund and procedures for carrying out the necessary remedial measures.

Pertinent to this case are the provisions of the Act, found in subsections 376.3078(3)[2] and 376.3078(9)[3], Florida Statutes (1995),

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[2] Which provides in part:

> "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 dry cleaning solvents."

[3] Which provides in part:

> "A real property owner is authorized to conduct site rehabilitation activities at any time pursuant to department rules ... whether or not the facility has been determined by the department to be eligible for the dry cleaning solvent program. . . . A real property owner that voluntarily conducts such site rehabilitation, whether commenced before or on or after October 1, 1995, shall be immune from liability to any person, state or local government, or agency thereof to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination, or to pay any fines or penalties regarding rehabilitation, so long as the real property owner [meets certain conditions]."

which provide conditional immunity to various entities when they meet certain eligibility requirements. Here the trial court concluded that the appellees met the requirements of one or more of the immunity sections and granted summary judgment in favor of the appellees.

The County's appeal is bottomed on their position that the Act's grant of immunity from administrative or judicial action is not intended by the legislature to be retroactive, and thus does not apply to actions to recover expenditures made by the County prior to the enactment of the immunity provisions. We conclude to the contrary, finding that the Act, including its grants of immunity, is retroactive and precludes the County's actions against the appellees.[4]

Accepting for this opinion that the Act affects substantial rights, but see note 4, then its provisions can only be applied retroactively if the legislative intent to that end is clearly expressed. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994). The Act is a comprehensive one intended to resolve the many difficulties involved in eliminating environmental contamination from the multitude of drycleaning sources throughout

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[4] We make two observations here. First, there is no contention on this appeal that the appellees do not meet the statutory conditions for immunity (other than the retroactivity argument). Second, the legislature may eliminate the County's substantive "rights" by legislation retroactive in nature. 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. See the discussion, Sun Harbor, 700 So. 2d at 180-81.

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, see supra notes 2 and 3, is also 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. From this we conclude that the legislature has clearly expressed its intention that the Act is to be retroactively applied.

As we consider this to be a matter of great public importance, we certify the following question to the Florida Supreme Court:

> 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?

The final summary judgments are affirmed; question certified.

DISTRICT COURT OF APPEAL
THIRD DISTRICT

METROPOLITAN DADE COUNTY,

Appellant,

v.

SUNILAND ASSOCIATES,

Appellee.

_____/

Case No. 97-00050

STIPULATED STATEMENT OF FACTS ON APPEAL

Appellant, Metropolitan Dade County ("Dade County"), and Appellee, Suniland Associates, a Florida general partnership ("Suniland Associates"), stipulate to the following facts on appeal.

STATEMENT OF THE FACTS

1. Metropolitan Dade County ("Dade County") is a political subdivision of the State of Florida.

2. Suniland Associates is the owner of the Suniland South Shopping Center located at 12115 South Dixie Highway, Miami, Florida ("Shopping Center"). From 1983 through 1992, a dry cleaner under the name of "Daphne's Cleaners" did business at the Shopping Center.

3. On November 18, 1991, Dade County issued Suniland Associates an Emergency Order to Correct a Sanitary Nuisance. As indicated in the Order, dry cleaning solvent contamination had been

discovered in water wells in a nearby neighborhood and, based upon its test results, Dade County believed the Shopping Center to be a source of the contamination. As a result, Dade County directed Suniland Associates to assess the contamination discovered at its property and, if necessary, take appropriate remedial action.

4. Upon receipt of the order, Suniland Associates retained environmental engineers to begin assessment work and to design and install a groundwater treatment system. The septic system at the shopping center was pumped out and the contents were manifested off site for disposal in 55 gallon drums. The storm drain behind the dry cleaner was analyzed and its contents removed and properly disposed. Pursuant to a Contamination Assessment Report approved by DERM, an air stripping groundwater treatment system was installed at the property in July 1992. Suniland Associates continued to operate the groundwater treatment system until November 2, 1994, at which time Dade County concluded that the system could be shut down while Suniland Associates monitored the water quality at the site for another year.

5. At no time did Suniland Associates ever own or operate a dry cleaning business at the Shopping Center or participate in the management and operation of Daphne's Cleaners. Daphne's Cleaners has been the only dry cleaning establishment to do business at the Shopping Center since its construction in the early 1970s. Prior to the receipt of the order from Dade County, Suniland Associates was unaware that dry cleaning chemicals had been discharged into

the septic tank and storm drain at the Shopping Center and had not seen, or heard about, any of its tenants or other parties improperly storing, handling, or disposing of chemicals at the Shopping Center.

6. In 1994, the Florida Legislature enacted the Florida Drycleaning Solvent Contamination Cleanup Act, Laws of Florida 94-355, which created a trust fund to be used for the assessment and cleanup of dry cleaning contamination throughout Florida. As part of this statutory scheme, the Florida Legislature provided that eligible facilities could not be subject to administrative or judicial action by the State, local government, or third parties to compel the rehabilitation or pay the cost of rehabilitation of environmental contamination resulting from the discharge of dry cleaning solvents. Fla. Stat. § 376.3078(3) (1994). The Drycleaning Act became effective on July 1, 1994.

7. On December 19, 1994, Dade County sued Suniland Associates claiming that as a result of the dry cleaning solvent contamination, it incurred substantial expense in installing and servicing drinking water mains in the nearby neighborhood where the chemicals were detected. Dade County sued Suniland Associates, Daphne's Cleaners (the dry cleaner tenant,) and the owners of three other shopping centers on South Dixie Highway and their dry cleaner tenants. As with Suniland Associates, Dade County alleged that dry cleaning solvent contamination was discovered at the three other shopping centers and that they, too, were to blame for the

groundwater contamination in the nearby neighborhood. Dade County's complaint contained four counts, all of which were based on provisions of Chapter 24, Dade County Code: Injunctive relief (Count I), damages (Count II), civil penalties (Count III), and attorney's fees and administrative costs (Count IV).

8. The Legislature amended the Drycleaning Act in 1995 by Chapter 95-239, Laws of Florida. Included in the 1995 amendments was an additional immunity provision which provided that a real property owner who, prior to or after the October 1, 1995, cleans up dry cleaning solvent contamination at his or her property in a manner consistent with state and federal laws, may not be subject to administrative or judicial action to compel the rehabilitation or pay the cost of rehabilitation of environmental contamination resulting from the discharge of dry cleaning solvents, or to pay any fines or penalties regarding the rehabilitation. Fla. Stat. § 376.3078(9) (1995).

9. Between November 1991 and February 1996, Suniland Associates incurred in excess of $450,000.00 for the assessment and cleanup of the dry cleaning solvent contamination discovered at the Shopping Center. All phases of the assessment and cleanup were approved by Dade County.

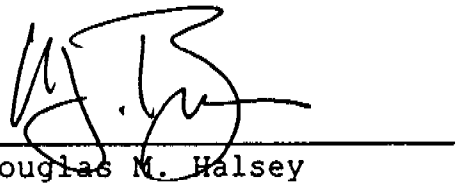
10. By letter dated February 27, 1996, Dade County determined that the cleanup of the Suniland South Shopping Center was completed and issued a "No Further Action" letter to Suniland Associates.

11. By letter dated June 12, 1996, the Florida Department of Environmental Protection ("FDEP") determined that the Shopping Center was an eligible facility under the Florida Drycleaning Solvent Contamination Cleanup Program.

12. Suniland Associates' cleanup of the Shopping Center was done in a timely manner and consistent with state and federal laws.

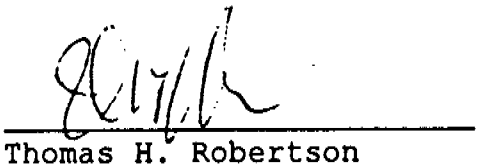
13. By order dated December 11, 1996, the trial court determined that Dade County's claims against Suniland Associates were barred under Sections 376.3078(3) and (9), Florida Statutes, and entered final summary judgment in favor of Suniland Associates and against Dade County. The County's claims against Daphne's Cleaners are still pending.

DOUGLAS M. HALSEY, P.A.



Douglas M. Halsey
Florida Bar No. 288586
Kirk L. Burns
Florida Bar No. 515711
Evan M. Goldenberg
Florida Bar No. 0087580
First Union Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309
Telephone: (305) 375-0077
Attorneys for
Suniland Associates

ROBERT A. GINSBURG
DADE COUNTY ATTORNEY



Thomas H. Robertson
Assistant County Attorney
Florida Bar No. 301991
Stephen P. Clark Center
Suite 2810
111 N.W. First Street
Miami, Florida 33128-1993
Telephone: (305) 375-5151
Attorney for Metropolitan
Dade County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 13th day of MARCH, 1997, upon:

Harris Siskind
Coll Davidson Carter
Smith Salter & Barkett, P.A.
3200 Miami Center
201 South Biscayne Boulevard
Miami, FL 33131

and

Kirk L. Burns
Douglas M. Halsey, P.A.
First Union Financial Center
Suite 4980
200 South Biscayne Boulevard
Miami, Florida 33131-5309

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Florida Department of

Memorandum

Environmental Protection

TO: Waste Program Administrators

FROM: John M. Ruddell, Director
Division of Waste Management

DATE: May 8, 1994

SUBJECT: Suspension of Dry Cleaner Enforcement Cases

House Bill 2817, which establishes a dry cleaning facility restoration program that relieves dry cleaners of tetrachloroethylene cleanup liability, was passed by the Legislature during this year's regular legislative session. However, the bill has not yet cleared the Governor's Office. Consequently, we have adopted an interim policy to deal with dry cleaner cases. Assuming that the bill will become law, the same interim measures will remain in effect until it can be determined whether a particular dry cleaner is eligible for the new program. While it is likely that most of these dry cleaning facilities will be eligible for contamination cleanup pursuant to the new legislation, each facility will need to be evaluated independently. Therefore, all current enforcement actions against dry cleaning facilities and all associated enforcement activities should be temporarily halted until further notice is given.

CC: Doug Jones, BWC
Larry Morgan, OGC
Mary Stewart, OGC

Memorandum

From Department of

Environmental Protection

TO: Directors of District Management
Waste Program Administrators

FROM: John M. Ruddell, Director
Division of Waste Management

DATE: November 28, 1994

SUBJECT: Dry Cleaning Facility Enforcement

Pursuant to the May 8, 1994 memorandum, all current enforcement actions against dry cleaning facilities and all associated enforcement activities were temporarily halted due to House Bill 2817, codified at Section 376.3078, F.S., effective June 3, 1994. This amendment to the May 8 memorandum is intended to provide clarification.

Enforcement actions to compel corrective action associated with hazardous waste management requirements at a dry cleaning facility should continue. Enforcement actions to compel site rehabilitation should be continued or initiated in cases where the Department knows that the dry cleaning solvent was deliberately discharged directly onto the ground or that filters were placed directly on the ground. In cases where the discharge was inadvertent or the Department is not sure how the contamination occurred, enforcement actions to compel site rehabilitation should be suspended. A suspension of enforcement activities at this time does not necessarily mean that the Department will not seek to compel site rehabilitation in the future.

JMR/ms

cc: Doug Jones, BWC
Larry Morgan, OGC