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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,536

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

CHASE FEDERAL HOUSING CORP., et al.,

Respondents.

AMENDED INITIAL BRIEF OF PETITIONER METROPOLITAN DADE COUNTY

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INTRODUCTION

This is a petition to invoke the discretionary jurisdiction of this Court to review the Third District Court of Appeal decision of *Metropolitan Dade County v. Chase Federal Housing Corp.*,[1] which passed upon a question certified by the district court to be of great public importance. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Fla.R.App.P.

The Third District's opinion establishes a new legal standard for determining when legislation is to be given retroactive effect by the courts, in the absence of any express statutory language requiring such retroactive application. Apparently drawing upon the doctrine of implied preemption, the Third District concluded that the legislative intent to apply the Act's provisions retroactively could be judicially inferred from the "comprehensive" nature of the Act as a whole and of the particular provisions under consideration.

As applied to the immunity provisions of the Florida Drycleaning Contamination Cleanup Act[2] at issue in this case,

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[1] ___ So.2d ___, 23 Fla.L.Weekly D322 (Fla. 3d DCA 1998).

[2] The Drycleaning Contamination Cleanup Act was first enacted in 1994 and became effective July 1, 1994. In its present form, the act contains three immunity provisions. The first immunity provision is contained in the first paragraph of § 376.3078(3), Fla. Stat. (1997), the second is in *[Footnote continued]*

the Third District's Opinion has the effect of providing a statewide grant of retroactive immunity to members of the drycleaning industry for all liabilities resulting from environmental violations, notwithstanding that these liabilities accrued and enforcement actions were commenced long before the enactment of the Act. As will be fully discussed, the retroactivity standard employed by the Third District is without legal support and, as applied in this case, serves only to bestow an unintended financial windfall upon the drycleaning industry at the public's expense, while frustrating the Act's purpose of expediting the cleanup of the industry-wide, historic contamination that exists throughout the state.

STATEMENT OF THE CASE AND FACTS

PARTIES

The petitioner is Miami-Dade County (hereafter "County"). The respondents are: 1) Suniland Associates, a Florida general partnership comprised of Howard Scharlin, Gerald Katcher, and Harry Corash (hereafter "Suniland Associates"), and 2) Jay M. Gottlieb and Northern Trust Bank of Florida, N.A., as Personal Representatives of the Estate of Charles Gottlieb (hereafter

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subsection (3)(o) and the last is in subsection (9). As originally enacted the Act contained only the first referenced immunity provision. The latter two were added by the 1995 amendments to the Act. See, Ch. 94-355 and 95-239, Laws of Florida.

"Gottlieb"), and 3) Chase Federal Housing Corp., a Florida corporation (hereafter "Chase").

The County was the plaintiff in the trial court in this environmental enforcement and cost recovery action. The actions by the Respondents that gave rise to the claims of the County occurred in 1991-1993. The trial court granted Respondents' Motions for Summary Judgment based upon the retroactive application of the immunity allegedly conferred by § 376.3078, Fla. Stat. (1997). The Third District affirmed the decision thereby giving retroactive immunity to members of the drycleaning industry for liabilities resulting from past environmental violations.

FACTS

Respondents are landowners of shopping centers along US-1 in the Suniland area of Dade County, which have had drycleaners as tenants.[3] In 1991, drycleaning solvent contamination was discovered in the private drinking water wells of homes in the neighborhoods adjacent to the shopping centers. Drycleaning solvent contamination was also discovered in the septic tank systems of the shopping centers. The Respondents were issued Notices of Violation by the County's Department of Environmental Resources Management (DERM) for

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[3] The facts set forth are taken directly from the Stipulations of Fact entered by the parties. Those Stipulations are contained in the County Appendix at pages 6-21. (hereafter "App.") As such, no references to the record are included.

the contamination, and in each instance, the Respondents conducted environmental assessments and cleanups of their property.[4] However, the contamination that had migrated off site was not recovered, nor was it reasonably recoverable.

The County, in its complaint, alleged that the contamination at the shopping centers was the source of the contamination in the private drinking water wells. As a result of the contamination of the private drinking water wells in the area, the County was required to install drinking water mains in the entire area at great expense to the County. These water mains were installed and complete by 1993. In addition, the County expended large sums in the investigation of the contamination, including laboratory fees to test the drinking water of many of the residents in the area to determine the extent of the contamination, all expended prior to 1993.

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[4] The Suniland Associates cleanup after 4½ years of cleanup effort, has proceeded to completion. The Gottlieb and Chase cleanups are in a "monitoring only" stage after 4 years of active assessment and cleanup activity. In such a stage, the cleanup has been completed, however, the groundwater is monitored for a period to ensure that the cleanup remains effective.

THE CASE BELOW

The County filed this action in the Circuit Court on December 19, 1994. The County's First Amended Complaint includes four counts: 1) Injunctive relief to require cleanup of the contamination both on and off site at the properties; 2) Damages for the costs of installing the drinking water mains to the surrounding areas; 3) Penalties as provided for in Chapter 24 of the Metropolitan Dade County Code; and 4) Attorney's fees and administrative costs as provided for in Chapter 24 of the County Code.[5] In its Summary Judgment, the trial court denied the County relief under all four counts of the complaint.

Initially, the defendants, including these Respondents, had moved to dismiss the action based on a claimed immunity retroactively conferred by the Drycleaning Contamination Cleanup Act. Rather than ruling on the Motions to Dismiss, the court stayed the case to allow the drycleaning program to be set up by the state and the respondents to thereafter apply to the program. In the order granting the stay, the trial court set forth conditions under which it intended to grant

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[5] It is not in dispute that prior to the effective date of the Act, the County had the lawful authority to compel rehabilitation of contaminated properties and to recover any enforcement expenses, as well as those expenses it incurred in the rehabilitation of a contaminated property or the replacement of a potable water source. §§ 24-55, 24-57(a) & (g) Dade County Code (copies of these code sections are contained in App. 22-26); *Seaboard System Railroad, Inc. v. Clemente*, 467 So.2d 348 (Fla. 3d DCA 1985).

dismissal of the action with prejudice. (The order, which is styled Order Granting in Part, And Denying in Part, Motions to Dismiss Complaint is contained at App. 12-16.) In this regard, the order provided that dismissal would be granted provided the defendants showed that they had been subsequently determined eligible for the state operated drycleaning contamination cleanup program. In response, Respondents, more than six months later, filed Motions for Summary Judgment including documentation showing acceptance into the state operated program.[6] The grounds for summary judgment were the same as those raised in the Motions to Dismiss and addressed by the trial court in its November 27, 1995 order granting the stay.

The trial court granted Respondents' Motions for Summary Judgment upon a finding that they had received retroactive immunity from the Drycleaning Act by virtue of their inclusion in the program. (The Summary Judgments are contained at App. 32-39).

The Third District Court of Appeal affirmed the trial court finding that the Act retroactively cut off all of the County's claims. In so doing, the Third District certified the following question as being of great public importance:

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[6] More than six months elapsed between the time the trial court entered the stay order and the time when the Respondents' were determined eligible for the state operated drycleaning contamination cleanup program.

ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE 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 DRYCLEANING ACT

The express purpose of the Act is to prevent delays in the cleanup of widespread, historic drycleaning solvent contamination and otherwise provide for expeditious cleanups. § 376.3078(1)(c), Fla. Stat. (1997). The Act seeks to address the problem of industry-wide, historic contamination that is causing on-going pollution as it continues to leach, or seep, into the state's groundwater. Groundwater cleanups, like the ones conducted by the Respondents, often span several years.

The Drycleaning Contamination Cleanup Act was enacted by the 1994 legislature and became effective July 1, 1994.[7] The Legislature expressly recognized the significant danger posed by historic drycleaning solvent contamination and the statewide critical impact this contamination has on the drinking water supplies of the state: "(a) Significant

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[7] The Drycleaning Contamination Cleanup Act has been codified predominantly within Chapter 376 Fla. Stat. The portions that are in contention in this suit are contained in § 376.3078, Fla. Stat. (1997).

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 to the quality of the groundwater and inland surface waters of this state." § 376.3078(1), Fla. Stat. (1997).

The primary, if not singular, intent of the Legislature in passing the Act was the elimination of delays which had plagued the cleanup of contaminated drycleaning sites throughout the state. In this regard, the Act again provides express legislative findings: "Where contamination of the ground water or surface water has occurred, remedial measures have often been delayed for long periods ..." (emphasis added) § 376.3078(1)(c) Fla. Stat. (1997). "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." (emphasis added) § 376.3078(1)(d) Fla. Stat. (1997). Accordingly, the clearly expressed purpose of the Act is to eliminate delays and expedite cleanups.

To achieve its stated purpose, the Act creates a state operated cleanup program to take over cleanup tasks at contaminated drycleaning sites once they have met the

eligibility requirements of the statute, filed a complete application and been accepted into the program.[8] Once a site is accepted into the program, the extent to which the state cleanup program undertakes actual cleanup measures, if at all, is dependent upon the significance of the threat posed by the site and the availability of funding. § 376.3078(4), Fla. Stat. (1997).

Contained within § 376.3078, Fla. Stat. (1997) are the three immunity provisions.[9] These provisions variously provide immunity, to eligible owners and operators of drycleaning facilities and landowners, from actions to force cleanups of contamination or to recover the costs of cleanups of contamination. The trial court and Third District interpreted these immunity provisions to apply retroactively, so as to defeat claims by the County to recover large sums it

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[8] The program has limited funding and only receives approximately $8 million per year from a modest tax imposed upon the drycleaning industry. To date, over 1100 sites have applied for eligibility. The cost of cleaning up these sites has been estimated to average $250,000 to $500,000 per site. At current funding levels, the most conservative estimates indicate that it will take in excess of 40 years to pay for the cleanup of all currently contaminated sites. *See Interim Project Report 97-P-16*, The Florida Senate Committee on Natural Resources, September 1997 contained at App. 40-46.

[9] The 1994 version of § 376.3078 only contained the immunity provision in the first paragraph of subsection (3). In 1995, the Legislature amended § 376.3078 to add the immunity provisions in subsections (3)(o) and (9), relating only to real property owners, as well as various other changes not germane to this appeal. The 1995 amendments became effective October 1, 1995.

was forced to expend for investigations and the replacement of drinking water supplies contaminated by drycleaning solvents from the Respondents' properties long before the Act's enactment.

SUMMARY OF THE ARGUMENT

This case presents a narrow issue of statutory construction with potentially far-reaching adverse effects for the environment. The Third District's Opinion holds that the immunity provisions contained in the Florida Drycleaning Contamination Cleanup Act are to be applied retroactively, so as to bar various pre-act environmental enforcement and cost recovery claims by the County. In so holding, the Third District announces what amounts to a new legal doctrine of implied retroactivity.

This represents a sharp departure from the well established law of this state that "[a] substantive statute is presumed to operate prospectively rather than retrospectively unless the Legislature clearly expresses its intent that the statute is to operate retrospectively." *Alamo Rent-A-Car, Inc, v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994). Notwithstanding the absence of any such legislative expression of intent that the Act's provisions be applied retroactively, the Third District inferred such an intent from what it termed the "comprehensive" nature of the Act and of the language of the immunity sections.

There is absolutely no precedent or legal authority for such an approach. Nor did the Third District's opinion provide any reason for drawing a correlation between the comprehensiveness of an act and the legislative intent that it be applied retroactively. The established law requires a

clearly stated expression of such intent and this requirement is understood by the legislature. It would appear that the Third District has simply confused the standard for retroactivity with the standard for implied preemption, which does consider the comprehensiveness of a regulatory scheme. *See Tribune Company v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984), *rev. dismissed* 471 U.S. 1096 (1985).

The Third District's new retroactivity standard is not only plainly at odds with well established law, its misapplication to the immunity provisions of the Drycleaning Act is made readily apparent by the most fundamental rule of statutory construction; namely, the plain meaning rule. When the plain meaning of the language used in the immunity provisions is read in the light of the Act's express purpose of preventing further delays in the cleanup of contaminated sites, it becomes abundantly clear that applying the Act's immunity provisions retroactively frustrates this very purpose. Ultimately, it is the Act's purpose of preventing delays in the cleanup of contaminated drycleaning sites that must serve as the yardstick by which any proffered interpretation is measured.

The Third District's opinion expressly acknowledges that the immunity provisions of the Act provide only "conditional immunity." Accordingly, until statutory preconditions are met, there is no immunity provided under the Act and cleanup efforts at contaminated sites are to continue. Yet, under the

Third District's reading that the immunity provisions are to apply retroactively, drycleaning facilities, in anticipation of receiving retroactive immunity, are actually discouraged from continuing with cleanup measures during the lengthy period before a site is determined eligible for the state operated cleanup program. As a result, during this pre-eligibility period, contaminated drycleaning sites will sit unattended and the solvent contamination will continue to spread into the surrounding soils and groundwater. This, of course, is the very evil which the Act was intended to prevent.

Since the spread of the contamination is on-going and because groundwater cleanups often span several years, it is important that cleanup efforts likewise be ongoing. Delaying these efforts until a site is determined eligible for the state operated cleanup program, when responsibility for continuing these efforts then shifts to the state, serves only to provide the drycleaning industry an unintended financial windfall, while increasing the cost and decreasing the efficacy of subsequent cleanup effort by the already severely underfunded state program.

The Third District's opinion is plainly at odds with the well established law on when legislation is to be applied retroactively. Moreover, an application of the plain meaning rule of statutory construction to the immunity provisions of the Act make clear that they are to have prospective effect.

ARGUMENT

I.

IT WAS ERROR FOR THE THIRD DISTRICT TO INFER THAT THE LEGISLATURE INTENDED THE ACT'S IMMUNITY PROVISIONS TO APPLY RETROACTIVELY BASED SOLELY UPON THE "COMPREHENSIVE" NATURE OF THE ACT

It is well established law that "[a] substantive statute is presumed to operate prospectively rather than retrospectively unless the Legislature clearly expresses its intent that the statute is to operate retrospectively." (citations omitted) *Alamo Rent-A-Car, Inc, v. Mancusi*, 632 So.2d 1352, 1358 (Fla. 1994); *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475 (Fla. 1995); *Young v. Altenhous*, 472 So.2d 1152 (Fla. 1985); *Anderson v. Anderson*, 468 So.2d 528 (Fla. 3d DCA 1985). The Third District and the Respondents have accepted that this statutory scheme is substantive in nature and that, therefor the presumption against retroactivity applies.

Despite the absence of any expression of retroactivity in the Act, and the Third District's acknowledgment that the presumption against retroactivity can only be overcome if clearly expressed by the legislature, the Third District nonetheless concluded that the Act is to be retroactively applied. The Third District reached this conclusion, without citation to any supporting authority, due to what the court termed the "comprehensive" nature of the Act as a whole and

the immunity sections in particular.[10] Solely on the basis of the Act's purported comprehensiveness the Third District inferred "that the legislature has clearly expressed its intention that the Act is to be retroactively applied." *Metropolitan Dade County v. Chase Federal Housing Corp.*, 23 Fla.L.Weekly at D323.

There is no legal support for using the comprehensiveness of an act, or its provisions, as a gauge of the Legislature's intention to apply the act retroactively, in the absence of an express statement. The Third District evidently confused the standard for implied preemption with the standard for retroactivity.[11] Nor is there any reason for the courts to

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[10] In this regard, the opinion of the Third District is also internally inconsistent. While relying upon the purported comprehensiveness of the immunity provisions to support its conclusion that they be applied retroactively, the Third District expressly acknowledges that these provisions provide only "conditional immunity to various entities when they meet certain eligibility requirements."(emphasis supplied).

[11] The standard for implied preemption was stated by this Court in *Tribune Company v. Cannella*, 458 So.2d 1075, 1077 (Fla. 1984), rev. dismissed 471 U.S. 1096 (1985) ("...if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme...")(quoting dissenting opinion below with approval).

It is noteworthy that the Third District has had occasion to apply the doctrine to the provisions of this very Act, when it correctly affirmed a trial court's determination that the Act does not expressly or impliedly preempt, or otherwise conflict with, the County's local enforcement actions. *Food Spot Corp. v. Renfrow*, 668 So.2d 1053 (Fla. 3d DCA 1996) (per curiam), aff'g sub nom., *Neighborhood Cleaners Association v. Renfrow*, No 95-2302-CA-08 (Fla. 11th Cir. Ct. 9/14/95)

imply such legislative intent. The established law requires a clearly stated expression of such intent and this requirement is understood by the legislature, as evidenced by another provision within the same legislative scheme, which begins: "Effective July 1, 1996, and operating retroactively to March 29, 1995, ...". § 376.308(5) (1997).

The Third District did not articulate a rationale for what amounts to a new legal doctrine of implied retroactivity. To the contrary, the Third District expressly accepted that the Act affected the County's "substantial rights" and that "its provisions can only be applied retroactively if the legislative intent to that end is clearly expressed."

Simply put, there are no provisions of the Act containing express language of retroactivity. Yet, the Third District inferred such a legislative intent from the purported comprehensive nature of the Act and its immunity provisions. This novel proposition of implied retroactivity is without precedent or legal support.

As will be fully discussed below, even if such a legal doctrine of implied retroactivity did exist, neither the Act, nor its grant of "conditional immunity" are comprehensive in nature. And, most importantly, the Third District's retroactive interpretation of the immunity provisions serves to frustrate the Act's stated purpose of preventing delays and expediting the cleanup of contaminated drycleaning sites.

II.

THE ACT'S PURPOSE AND THE PLAIN MEANING OF THE LANGUAGE EMPLOYED REQUIRE THAT THE ACT'S IMMUNITY PROVISIONS BE GIVEN PROSPECTIVE APPLICATION

A. The Grant of "Conditional Immunity" Contained In § 376.3078(3), Fla. Stat. (1997) Requires Prospective Application

The immunity provision contained within the first paragraph of §376.3078(3), Fla. Stat. (1997) states:[12]

> 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 cost 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. (emphasis supplied)

In accordance with the above-emphasized language, the Third District correctly construed the above provision as

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[12] The 1995 amendments to this provision did not materially modify the provision, which respect to the issues in this case.

providing "conditional immunity to various entities when they meet certain eligibility requirements." Accordingly, subsection (3)'s grant of immunity is expressly conditioned upon an eligibility determination and anticipated delays in the promulgation of rules for the prioritization of sites. With respect to the latter requirement, subsection (4)(a) expressly requires, "The department shall adopt rules to establish priorities for state-conducted rehabilitation at contaminated drycleaning ▒ sites . . . ".

This interpretation is consistent with the Third District's prior affirmance of a trial court's determination that a drycleaning facility has a continuing obligation to conduct a lawfully required cleanup of its contaminated property until its eligibility has been determined. *See* REPORT OF GENERAL MASTER AND NOTICE OF FILING, *Neighborhood Cleaners Association v. Renfrow*, Case No. 95-2302 CA (08) aff'd sub nom. *Food Spot Corp. v. Renfrow*, 668 So.2d 1053 (Fla. 3d DCA 1996); Omnibus Order *Dryclean U.S.A., Inc., v. Renfrow*, Case No. 65-126-CIV- MOORE U. S. District Court, Southern District of Florida (Contained at App. 47-56 & 57-64, respectively). In other words, 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.

Accordingly, by its very nature, subsection (3)'s conditional grant of immunity is prospective.

The conditional immunity provision under subsection (3) is the only immunity given to the drycleaning facility. [13] The scope of the immunity granted under subsection (3) ultimately will define the parameters of the cleanup task to be undertaken by state operated cleanup program. Obviously, the retroactive application of this provision would substantially broaden the role of and burden upon the already seriously underfunded state program.

Under subsection (3) of the Act, eligibility is to be determined by the State of Florida Department of Environmental Protection (Department). Applicants must submit a "completed application package," which is reviewed pursuant to an application and eligibility determination process. That application process was specifically required by the legislature to be prescribed by rule. *See* § 376.3078(3)(k) Fla. Stat. (1997). In so doing, the legislature clearly knew that a considerable period of time would elapse before the rules implementing this program would be adopted. In fact, the rules setting forth the application and eligibility requirements were not adopted until March 13, 1996, almost two

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[13] Subsections (3)(o)and (9), the other immunity provisions, are solely for the benefit of the landowner.

years after this immunity provision was enacted. *See* Fla.Admin.Code R. 62-781.100 et seq.

Of course, even after the adoption of the required rules by the Department, a facility must still go through the application process of the Act and actually meet the eligibility requirements before the immunity applies. In this case, the Respondents applied for eligibility soon after the March 13, 1996 adoption of the required rules, but were not determined eligible until June and July of 1996.[14] During the time necessary for the rules to be adopted and for the Respondents to thereafter apply for and be determined eligible, no immunity attached and the Respondents remained under a continuing legal duty to continue with their cleanup efforts, pursuant to the requirements of state and local laws.

The obviously extensive period of time, contemplated by the legislature, between the adoption of the legislation and when the immunity is to become effective, strongly suggests that the legislature intended for this immunity provision to be applied prospectively. It can hardly be said that an immunity provision that was intended to become effective at a future time, significantly after the statute was enacted, is a clear expression by the Legislature of its intention that the

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[14] Suniland was determined eligible on June 12, 1996, Gottlieb on July 12, 1996 and Chase on July 26, 1996.

act should be applied retroactively. Had the Legislature intended this provision to have retroactive effect, it would not have made the provision conditional or it simply would have expressed its intention that subsection (3) be applied retroactively. The Legislature obviously knows how to make immunity expressly retroactive when that is its intention. See § 376.308(5), Fla. Stat. (1997).

Given the Act's express purpose of expediting cleanups, subsection (3)'s conditional and prospective grant of immunity, and the continuing legal duty to conduct cleanup measures until accepted into the state program, it is virtually inconceivable that the Legislature intended that the provision would be applied retroactively. This strained interpretation merely serves to encourage facilities to cease all cleanup efforts in anticipation of acceptance into the state program with its attendant grant of immunity. Such a result would, of course, be in direct contravention of the Act's purpose of expediting cleanups and the continuing legal duty of facilities to conduct cleanup measures until the site is accepted into the program.

The likelihood that facilities not yet accepted into the program will delay cleanups and take a wait-and-see approach is made even more likely by a recent final order by the Department narrowly construing of the eligibility exclusion

provisions in § 376.3078(3)(c), Fla. Stat. (1997).[15] *Metropolitan Dade County v. Redds' Cleaners*, 19 F.A.L.R. 3564 (Fla. Dept. Envt'l Prot. 1996). While one might think that a facility's failure to conduct a lawfully required cleanup would exclude the site from eligibility for the program, the Department has determined to the contrary. *Id.* Accordingly, a facility may intentionally refuse to comply with its legal duty to undertake cleanup measures, be determined eligible for the program, and then under the Third District's opinion be granted immunity retroactively.

Why would any drycleaning facility ever undertake cleanup activities whether or not it had been determined eligible for the program? What is now conditional immunity would become absolute. There simply would be no reason why a facility would undertake to perform its legal duty to continue with remedial work during the pre-eligibility period. To the contrary, any facility that did continue with cleanup efforts would simply be placing itself at a financial disadvantage with non-complying competitors. Delayed cleanups would become the rule and the Act's purpose would have been turned on its head, as contamination would be allowed to spread and further degrade the groundwater.

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[15] §376.3078(3)(c) provides, in pertinent part, for the exclusion of sites from the program for "...a willful violation of local, state, or federal law or rule regulating the operation of a drycleaning facilities...".

B. Section 376.3078(9)'s Limited Grant Of Immunity Is Not Retroactive

A look at Chapter 95-239, Laws of Florida, which enacted § 376.3078(9), reveals a similar intent on the part of the legislature.[16] § 376.3078(9) reads as follows:

> A real property owner is authorized to conduct site rehabilitation activities at any time pursuant to department rules, either through agents of the real property owner or through responsible response action contractor or subcontractors, whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program. A real property owner or any other party that conducts site rehabilitation may not seek cost recovery from the department or the Hazardous Waste Management Trust Fund for any such rehabilitation activities. 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....

This provision does three things: 1) It authorizes a real property owner to conduct a cleanup, whether or not the site has been determined eligible for the state program 2) It

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[16] It should be noted that the immunity provision included in subsection (9) was enacted and became effective after the suit in this matter was instituted, whereas the immunity provision found in subsection (3) was enacted and became effective prior to the County's suit.

provides that the cost of any such cleanup shall not be recovered from state cleanup funds, and 3) It provides the real property owner with certain immunities if the cleanup is conducted voluntarily, and the owner meets three additional statutory requirements.

The first part makes clear that the legislature did not intend the state cleanup program to provide the exclusive means for effecting cleanups of contaminated drycleaning sites, but rather that cleanups can and should continue outside the program. This further buttresses the interpretation that facilities remain under a continuing legal duty to continue with cleanup efforts while the eligibility is being determined, and that the Act's immunity is not absolute. And again, this is contrary to any suggestion of a clear intent that the immunity is to be applied retroactively.

The second part is obviously the product of the Legislature's recent experience with the similarly underfunded petroleum cleanup program, which very nearly was depleted of cleanup funds due to an earlier cost reimbursement provision.[17] Having learned from that experience, the Drycleaning Contamination Cleanup Act does not provide reimbursement, from state funds, of any costs incurred by

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[17] The petroleum cleanup program, until 1995, allowed unlimited reimbursement for expended costs. Costs in that program are now reimbursable only if pre-approved by the Department. *See* § 376.30711, Fla. Stat. 1997).

persons who conduct cleanups. Significantly, these two parts are not limited to voluntary cleanups, while the third part's grant of immunity is.

Subsection (9)'s grant of immunity is limited to only those landowners who conduct a voluntary cleanup. Clearly, the *quid pro quo* for the immunity is to conduct a cleanup that is not otherwise required by law. One of the three statutorily enumerated requirements for a real property owner to meet in order to qualify for this voluntary cleanup immunity, is that the owner: "(b) Conducts such site rehabilitation in a timely manner according to a rehabilitation schedule approved by the department." Obviously, in order for a cleanup to be conducted in accordance with a department-approved schedule, the department must first develop and approve such rehabilitation schedules. Again, this is a provision where the legislature contemplated future implementation. Yet, under the Third District's reading, was also intended to be applied retroactively. Needless to say there is an inherent tension and contradiction in reading the immunity provisions in this fashion.

It is important to understand how a cleanup, that a real property owner is lawfully required to conduct, becomes voluntary. This only occurs after the immunity provided by subsection (3) comes into play and the owner is no longer under a lawful obligation to undertake cleanup measures. Then, and only then, can a cleanup become voluntary and, therefore, qualify for the subsection (9)'s immunity. Once again, this

provision is prospective in nature. There is no reason or rule of construction that supports an inference that the provision was also intended to be applied retroactively.

The Third District clearly erred in holding that § 376.3078(9) is to be applied retroactively, and thereby gratuitously relieving Respondents of what is otherwise their lawful obligation to undertake cleanup measures.

C. Under The Plain Meaning Of The Language Of The Immunity Provisions No Immunity Is Granted As To Actions For Penalties, Administrative Costs Or For Recovery Of Funds Expended To Replace Contaminated Drinking Water

Assuming, arguendo, that the immunity provisions are retroactive, in granting summary judgments as to all counts of the County's complaint, the trial court far exceeded the scope of the immunity provisions under a plain reading of their terms. Subsection (3) prohibits actions "... to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination..." Subsection (9) prohibits actions "... 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..."

Nowhere do these provisions prohibit the recovery of funds expended to replace a drinking water source, or administrative costs and attorney fees expended in the investigation or prosecution of case. While subsection (9) contains protection against the collection of fines and penalties, it is expressly limited to those "regarding

rehabilitation," as opposed to penalties for other distinct violations. Nor is there any language that would make it apply retroactively to past violations. The scope of these provisions is narrowly limited to forcing rehabilitation or the recovery of cost and penalties related to rehabilitation.

The term rehabilitate is defined in the American Heritage Dictionary, Second College Edition as follows: "To restore to a former state or condition." The legislature has defined "Site rehabilitation" as follows: "'Site rehabilitation' means the assessment of site contamination and the remediation 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).[18] The term rehabilitate does not include replacement of a water supply. It does not include the investigation and prosecution of this case. It does not include historic penalties or those assessed for environmental violations unrelated to site rehabilitation.

The Third District's extension of the immunities to bar the County's claims for the costs of installing water mains and to recover administrative cost, attorney fees and

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[18] The County acknowledges that this definition was added by the legislature in 1996 and is not binding on this case. It is however instructive of the intent of the legislature in regards to this statutory scheme.

penalties is contrary to the plain language of those provisions and should be reversed.

CONCLUSION

The Third District's opinion is contrary to the well established law concerning when legislation is to be applied retroactively. Moreover, an application of the plain meaning rule of statutory construction to the Act, and the immunity provisions in particular, makes clear that the Third District's retroactive application of those provisions is contrary to the plain meaning of the language employed in those provisions and serves only to frustrate the Act's purpose of preventing further cleanup delays.

Accordingly, it is respectfully requested that the opinion of the Third District Court of Appeals be reversed.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon David Ashton, Esquire, and Robert M. Brochin, Esquire, Morgan, Lewis & Bockius, LLP, 5300 first Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131-2330; Harris C. Siskind, Esquire, Coll, Davidson, Carter, Smith, Salter & Barkett, P.A., 3200 Miami Center, 201 South Biscayne Boulevard, Miami, Florida

33131-2312 and Kirk L. Burns, Esquire, Douglas Halsey, P.A., 4980 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131, on this 8th day of April, 1998.

Respectfully submitted,

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Appendix

INDEX TO APPENDIX

INDEX TO APPENDIX
(continued)

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 CORP., et al.,	**	97-49
Appellees.	**	LOWER TRIBUNAL 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.

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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

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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.

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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:

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11

DISTRICT COURT OF APPEAL
THIRD DISTRICT

METROPOLITAN DADE COUNTY,

Appellant,

v.

SUNILAND ASSOCIATES, JAY M. GOTTLIEB AND NORTHERN TRUST BANK, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES GOTTLIEB,

Appellees.

_____/

Case No. 97-00049
Consolidated with
Case No. 97-00050

STIPULATED STATEMENT OF FACTS

Appellant, Metropolitan Dade County ("Dade County"), Appellees, Jay M. Gottlieb and Northern Trust Bank, N.A., as Co-Personal Representatives of the Estate of Charles Gottlieb ("Personal Representatives"), stipulate to the following Statement of Facts for the purpose of this appeal:

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

2. The Estate of Charles Gottlieb ("the Estate") is the owner of a section of the Suniland Shopping Center, located at 11701-11751 South Dixie Highway, Miami, Florida. The Estate has been the owner of its section in the Suniland Shopping Center since 1987. Prior to that time, said section of the Suniland Shopping Center was owned by Charles Gottlieb.

3. An independent entity has always leased space to operate a drycleaner business at the Suniland Shopping Center. Neither Charles Gottlieb, the Estate or the Personal Representatives participated in the operation of or had any ownership interest in any drycleaner business at the Suniland Shopping Center.

4. On November 12, 1991, Dade County, through the Department of Environmental Resources Management ("DERM"), issued the Personal Representatives an Emergency Order to Correct Sanitary Nuisance. The Emergency Order stated that toxic organic compounds had been discovered in a septic tank at the Suniland Shopping Center. Prior to receipt of the Emergency Order, the Personal Representatives did not know that dry cleaning chemicals had been discharged into a septic tank at the Suniland Shopping Center. At no time prior to issuance of the Emergency Order, did the Personal Representatives ever see, or hear about, a tenant or any other person improperly storing, handling, or disposing of drycleaning chemicals, or chemicals of any kind, at the Suniland Shopping Center.

5. After being notified by DERM about the contamination, the Personal Representatives retained environmental consultants to perform assessment and remediation work at the site. During initial assessment activities, the septic tank system at the Suniland Shopping Center was pumped out and the contents were properly disposed of by a licensed contractor. Following

installation of a public sanitary sewer system at the site, the septic tank system structure and drainfield were removed from the ground and disposed of in accordance with applicable regulatory requirements. Additionally, a groundwater treatment system was designed and installed and has been operating to remediate the groundwater contamination since installation in 1993.

6. Between November 1991, and July 15, 1996, the Personal Representatives have spent in excess of $289,000.00 for the assessment and cleanup of the drycleaning chemicals contamination discovered at the Suniland Shopping Center. All phases of the assessment and remediation have been performed with DERM's prior approval. The Personal Representatives continue to remediate the groundwater at the Suniland Shopping Center.

7. In 1994, the Florida Legislature enacted the Florida Drycleaning Solvent Contamination Cleanup Act, ("Drycleaning Act") Laws of Florida 94-355, which created a trust fund to be used for the assessment and cleanup of drycleaning 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 drycleaning solvents. Fla. Stat. § 376.3078(3) (1994). The Drycleaning Act became effective on July 1, 1994.

8. On December 19, 1994, after the Drycleaning Act became effective, Dade County sued the Personal Representatives and others alleging that drycleaning chemicals had been detected on real property owned by the Personal Representatives, and real property owned by others, and as a result of the alleged drycleaning chemical contamination, Dade County incurred expenses in installing and servicing drinking water mains in the nearby neighborhood where the drycleaning chemicals were allegedly also detected. 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).

9. 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, conducts site rehabilitation 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 drycleaning solvents, or to pay any fines or penalties regarding the rehabilitation. Fla. Stat. § 376.3078(9)(1995).

10. On or about March 19, 1996, the drycleaner tenant at the Suniland Shopping Center and the Personal Representatives jointly filed a Drycleaning Solvent Cleanup Program Application with the Florida Department of Environmental Protection ("FDEP") for eligibility under Florida Statutes § 376.3078 et seq.

11. On July 12, 1996, FDEP determined that the Suniland Shopping Center was an eligible facility under the Drycleaning Act.

12. On July 31, 1996, the Personal Representatives filed their Motion for Final Summary Judgment based on the immunity provisions of Florida Statutes §§ 376.3078(3) and (9).

13. On December 12, 1996, the Court entered Summary Final Judgment for Defendants the Personal Representatives based on the immunity provisions of Florida Statutes § 376.3078(3).

14. On January 3, 1997, Dade County filed a notice of Appeal of the Summary Final Judgment entered in favor of the Personal Representatives.

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

METROPOLITAN DADE COUNTY,

Appellant,

v.

CHASE FEDERAL HOUSING CORP., ET AL.,

Appellees,

CASE NOS.: 97-00857
97-00050
97-00049
CONSOLIDATED

LOWER TRIBUNAL NO. 94-23486

STIPULATED STATEMENT OF FACTS

Appellant, Metropolitan Dade County ("Dade County"), and Appellee, Chase Federal Housing Corp., ("Chase") stipulate to the following Statement of Facts for the purpose of this appeal:

1. Dade County is a political subdivision of the State of Florida.

2. Dade County Department of Environmental Resources Management ("DERM") is an agency of Dade County which is empowered to control and prohibit pollution and protect the environment within Dade County pursuant to Article VIII, Section 6 of the Florida Constitution, Section 403.182, Fla. Stat., the Dade County Home Rule Charter, and Chapter 24 of the Dade County Code ("Dade Code").

3. Miami-Dade Water and Sewer Authority Department ("WASA") is an agency of Dade County which is empowered to construct and operate the water and sewer systems within Dade County pursuant to Chapters 2 and 32 of the Dade Code.

4. Chase was the real property owner of a shopping center known as the Southpark Centre located at 12651 South Dixie Highway, Miami, from June 1990 through December 1992.

5. Space in the shopping center was leased to Brito Enterprises, Inc. ("Brito") beginning March 8, 1985 by the predecessor owner to Chase. Brito was and is the owner and operator of a drycleaning facility at Southpark Centre known as Southpark Cleaners, 12671 South Dixie Highway, Miami. Southpark Cleaners is the only drycleaning facility that has operated from Southpark Centre.

6. In 1991 hazardous waste drycleaning solvent contamination was discovered in water wells in a neighborhood in the vicinity of the shopping center. In January 1992 DERM discovered drycleaning solvent contamination at a storm drain at the shopping center. By letter dated February 24, 1992, DERM issued to Chase an Emergency Order to Correct a Sanitary Nuisance directing it to investigate the contamination discovered at its property and, if necessary, take appropriate remedial action.

7. Drycleaning solvents released to the environment are regulated as hazardous materials and pollutants under Chapter 24 of the Dade County Code and as hazardous wastes and pollutants under Florida and federal law.

8. In light of the DERM notice, Chase retained environmental consultants to assess the drycleaning contamination and develop a remedy for it. After assessing the extent of the contamination Chase installed and operated a groundwater treatment system in December 1993. By letter dated July 30, 1996, DERM concluded that active remediation could be

discontinued and water quality monitored periodically to confirm natural attenuation of any residual contamination.

9. At no time did Chase own or operate a drycleaning facility at the shopping center or participate in the management or operation of Southpark Cleaners. Beginning operation in March 1985, Southpark Cleaners was the only drycleaning facility operated at the shopping center. Prior to DERM's discovery of drycleaning solvent contamination in a storm drain at the shopping center, Chase was unaware that hazardous wastes had been discharged at the shopping center. Chase had no knowledge of any improper management of drycleaning solvents at the shopping center and did not acquiesce in any polluting activities at the drycleaning facility.

10. On December 19, 1994, Dade County sued Chase claiming that as a result of the discovery of area drycleaning solvent contamination, WASA had incurred substantial expense in installing and servicing drinking water mains in nearby neighborhoods. Dade County sued Suniland area drycleaners and their landlords, including Brito, Chase and the other landowners involved in this consolidated appeal. Dade County's complaint contained four counts based on Chapter 24 of the Dade County Code. In Count I Dade County sought injunctive relief compelling the drycleaners and their landlords to assess and clean up on- and off-facility drycleaning solvent contamination. Count II sought damages for the costs of installing the drinking water mains to the neighboring areas. Count III sought civil penalties for violations of Chapter 24. And Count IV sought attorney's fees and administrative costs.

11. Chase and the other landowner defendants moved to dismiss Dade County's complaint based upon its failure to state a claim and the litigation bar contained in the

Drycleaning Cleanup Program of the Drycleaning Solvent Contamination Cleanup Act. By order dated November 27, 1995, the trial court ruled that because there was nothing apparent in Dade County's complaint to indicate Chase would not qualify for the statutory drycleaning cleanup program, the litigation bar of the Drycleaning Cleanup Act would shield Chase from Dade County's claims and thus the action would be temporarily stayed to allow Chase to qualify the drycleaning contamination for the program. The trial court also held, however, that the Act's litigation bar did not preclude Dade County from repleading and pursuing a claim for containment of drycleaning solvents.

12. Dade County subsequently amended its complaint to allege that the contamination continues to exist in the groundwater of the County, and will continue to remain in the groundwater unless contained and/or removed by the defendants and to seek injunctive relief requiring the defendants to properly assess the extent of the contamination and to remediate the contamination at the property, 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, and to prevent further spread of contamination.

13. Between May 6, 1992 and January 17, 1997, Chase has incurred in excess of $100,000.00 for the cleanup of the drycleaning solvent contamination discovered by DERM. All phases of this cleanup were done with DERM's approval.

14. Based upon Brito and the current real property owner's application for the Drycleaning Cleanup Program of March 1996, by letter dated July 26, 1996 the Florida Department of Environmental Protection ("FDEP") determined that the environmental

contamination stemming from the drycleaning operations of Southpark Cleaners was eligible for state-funded cleanup under the program.

15. By Order dated March 5, 1997, the trial court ruled that Dade County's claims against Chase were barred under Section 376.3078(3), Florida Statutes, and entered final summary judgment in favor of Chase. Dade County's claims against Brito are still pending.

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Dated: 7/29/97

ordinances heretofore enacted by Metropolitan Dade County which are stricter than the rules and regulations incorporated herein.
(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 72-76, § 9, 10-31-72; Ord. No. 75-27, § 36, 5-7-75; Ord. No. 82-109, § 1, 12-7-82; Ord. No. 91-61, § 6, 5-21-91; Ord. No. 92-50, § 2, 6-2-92)

Sec. 24-55. Enforcement; procedure, remedies.

It shall be unlawful for any person to violate any of the provisions of this chapter, any lawful rules and regulations promulgated under this chapter, any lawful order of the Director of the Department of Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit. It shall be the duty of all County and municipal officials and employees to enforce the provisions of this chapter. No building permit shall be issued for the installation of any improvements or facilities governed by the provisions of this chapter without the prior approval of the Director, Environmental Resources Management or his designee. In addition to any other remedies provided by this chapter, the Director, Environmental Resources Management, shall have the following judicial remedies available to him for violations of this chapter, any lawful rule or regulation promulgated under this chapter, any lawful order of the Director of the Department of Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit:

(a) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the County caused by such violation.

(b) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to impose and recover a civil penalty for each violation in an amount of not more than twenty-five thousand dollars ($25,000.00) per offense. However, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense.

(c) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to seek injunctive relief to enforce compliance with or prohibit the violation of this chapter, any lawful rules or regulation promulgated under this chapter, any lawful order of the Director, Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit; and to seek injunctive relief to prevent injury to the air, waters, and property, including animal, plant, and aquatic life of the County, and to protect human health, safety, and welfare caused or threatened by any violation.

(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 72-76, § 10, 10-31-72; Ord. No. 74-34, § 1, 5-21-74; Ord. No. 75-27, § 37, 5-7-75; Ord. No. 83-108, § 3, 11-15-83; Ord. No. 86-95, § 6, 12-2-86)

Sec. 24-56. Penalties generally.

If any person shall fail or refuse to obey or comply with, or violates any of the provisions of this chapter, or any lawful rule or regulation promulgated hereunder, or any lawful order of the Director, Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit; issued or rendered under and pursuant to the provisions of this chapter, such person, upon conviction of such offense, shall be punished by a fine not to exceed five hundred dollars ($500.00), or by imprisonment not to exceed sixty (60) days in the County Jail, or both in the discretion of the court. Each day of continued violation shall be considered as a separate offense.
(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 70-44, § 12, 6-2-70; Ord. No. 75-27, § 38, 5-7-75; Ord. No. 83-108, § 4, 11-15-83)

Sec. 24-57. Civil liability; joint and several liability; attorneys' fees.

(a) Whoever commits a violation of this chapter or any lawful rule or regulation promulgated

ordinances heretofore enacted by Metropolitan Dade County which are stricter than the rules and regulations incorporated herein.
(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 72-76, § 9, 10-31-72; Ord. No. 75-27, § 36, 5-7-75; Ord. No. 82-109, § 1, 12-7-82; Ord. No. 91-61, § 6, 5-21-91; Ord. No. 92-50, § 2, 6-2-92)

Sec. 24-55. Enforcement; procedure, remedies.

It shall be unlawful for any person to violate any of the provisions of this chapter, any lawful rules and regulations promulgated under this chapter, any lawful order of the Director of the Department of Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit. It shall be the duty of all County and municipal officials and employees to enforce the provisions of this chapter. No building permit shall be issued for the installation of any improvements or facilities governed by the provisions of this chapter without the prior approval of the Director, Environmental Resources Management or his designee. In addition to any other remedies provided by this chapter, the Director, Environmental Resources Management, shall have the following judicial remedies available to him for violations of this chapter, any lawful rule or regulation promulgated under this chapter, any lawful order of the Director of the Department of Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit:

(a) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the County caused by such violation.

(b) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to impose and recover a civil penalty for each violation in an amount of not more than twenty-five thousand dollars ($25,000.00) per offense. However, the court may receive evidence in mitigation. Each day during any portion of which such violation occurs constitutes a separate offense.

(c) The Director, Environmental Resources Management, may institute a civil action in a court of competent jurisdiction to seek injunctive relief to enforce compliance with or prohibit the violation of this chapter, any lawful rules or regulation promulgated under this chapter, any lawful order of the Director, Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit; and to seek injunctive relief to prevent injury to the air, waters, and property, including animal, plant, and aquatic life of the County, and to protect human health, safety, and welfare caused or threatened by any violation.

(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 72-76, § 10, 10-31-72; Ord. No. 74-34, § 1, 5-21-74; Ord. No. 75-27, § 37, 5-7-75; Ord. No. 83-108, § 3, 11-15-83; Ord. No. 86-95, § 6, 12-2-86)

Sec. 24-56. Penalties generally.

If any person shall fail or refuse to obey or comply with, or violates any of the provisions of this chapter, or any lawful rule or regulation promulgated hereunder, or any lawful order of the Director, Environmental Resources Management or his designee, or any condition, limitation or restriction which is part of an operating permit; issued or rendered under and pursuant to the provisions of this chapter, such person, upon conviction of such offense, shall be punished by a fine not to exceed five hundred dollars ($500.00), or by imprisonment not to exceed sixty (60) days in the County Jail, or both in the discretion of the court. Each day of continued violation shall be considered as a separate offense.
(Ord. No. 67-95, § 1, 12-19-67; Ord. No. 70-44, § 12, 6-2-70; Ord. No. 75-27, § 38, 5-7-75; Ord. No. 83-108, § 4, 11-15-83)

Sec. 24-57. Civil liability; joint and several liability; attorneys' fees.

(a) Whoever commits a violation of this chapter or any lawful rule or regulation promulgated

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under this chapter is liable to Metropolitan Dade County for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the County and for reasonable costs and expenses of the County in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the County to their former condition, and furthermore is subject to the judicial imposition of a civil penalty for each offense in an amount of not more than twenty-five thousand dollars ($25,000.00) per offense. Each day during any portion of which such violation occurs constitutes a separate offense. Nothing herein shall give the Director, Environmental Resources Management, the right to bring an action on behalf of any private person.

(b) Whenever two (2) or more persons pollute the air or waters of the County in violation of this chapter or any lawful rule or regulation promulgated under this chapter or any order of the Director, Environmental Resources Management, so that the damage is indivisible, each violator shall be jointly and severally liable for such damage and for the reasonable cost and expenses of the County incurred in tracing the source of discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters and property, including the animal, plant and aquatic life of the County to their former condition. However, if said damage is divisible and may be attributed to a particular violator or violators, each violator is liable only for that damage attributable to his violation.

(c) In assessing damages for fish killed, the value of the fish is to be determined in accordance with a table of values for individual categories of fish which has been promulgated by the Florida Department of Environmental Regulation.

(d) All the judicial remedies in this chapter are independent and cumulative.

(e) The following sums recoverable by the County shall be deposited in a separate County fund:

(1) The compensatory and punitive damages recoverable by the County pursuant to Section 24-55(a) of the Code of Metropolitan Dade County.

(2) The civil penalties recoverable by the County pursuant to Section 24-55(b) of the Code of Metropolitan Dade County.

(3) The compensatory damages, punitive damages, costs, expenses and civil penalties recoverable by the County pursuant to Section 24-57(a) of the Code of Metropolitan Dade County.

(4) The sums recoverable by the County pursuant to Section 24-57(b) of the Code of Metropolitan Dade County.

(5) The sums recoverable by the County as reimbursement pursuant to Section 24-37(2) of the Code of Metropolitan Dade County.

(6) Notwithstanding subsections (e)(1) through (5) hereinabove, any sums recoverable by the County pursuant to any of the foregoing provisions of Chapter 24 of the Code of Metropolitan Dade County which qualify for deposit in the Biscayne Bay Environmental Enhancement Trust Fund shall be deposited in said Biscayne Bay Environmental Enhancement Trust Fund.

(7) Notwithstanding subsections (e)(1) through (6) hereinabove, any sums recoverable by the County pursuant to any of the foregoing provisions of Chapter 24 of the Code of Metropolitan Dade County which qualify for deposit in the Tree Trust Fund shall be deposited in said Tree Trust Fund.

This fund may only be used to pay for the following:

(1) Tracing, controlling and abating of air pollution, water pollution, nuisances and sanitary nuisances in the County.

(2) Enforcement of this chapter.

(3) Restoration of the air, waters, property, animal life, aquatic life, and plant life of the County to their former condition.

(4) Reimbursement of sums given to the County by the State of Florida or the United States of America, or both, as reimbursement for expenditures by the County to trace, control and abate air pollution, water pollution, nuisances and sanitary nuisances

in the County and to restore the air, waters, property, animal life, aquatic life and plant life of the County to their former condition. Said reimbursement to the State of Florida or the United States of America, or both, from this fund shall not in any case exceed the amount of monies actually recovered and collected by the County from the persons liable for the particular air pollution, water pollution, nuisances and sanitary nuisances and furthermore shall not include any monies recovered by the County from said persons liable as compensatory damages, punitive damages or civil penalties. Said reimbursement of sums by the County to the State of Florida or the United States of America, or both, shall be upon such terms and conditions deemed appropriate and approved by the Board of County Commissioners.

(f) Each mangrove tree unlawfully trimmed, cut or altered shall constitute a separate violation of this chapter.

(g) Whenever a violation of this chapter occurs or exists, or has occurred or existed, any person, individually or otherwise, who has a legal, beneficial, or equitable interest in the facility or instrumentality causing or contributing to the violation, or who has a legal, beneficial, or equitable interest in the real property upon which such violation occurs or exists, or has occurred or existed, shall be jointly and severally liable for said violation regardless of fault and regardless of knowledge of the violation. This provision shall be construed to impose joint and severable liability, regardless of fault and regardless of knowledge of the violation, upon all persons, individually or otherwise, who, although said persons may no longer have any such legal, beneficial or equitable interest in said facility or instrumentality or real property, did have such an interest at any time during which such violation existed or occurred or continued to exist or to occur. This provision shall be liberally construed and shall be retroactively applied to protect the public health, safety, and welfare and to accomplish the purposes of this chapter.

(h) Any person violating any provision of this chapter shall immediately restore the air, water, and property, including but not limited to animal, plant, and aquatic life, affected by said violation to the condition existing prior to the violation.

(i) Owners of real property shall be liable for the sums expended by the County pursuant to Section 24-5(30) when the violation of this chapter occurred or continued to exist or appeared imminent upon the real property aforesaid, regardless of fault and regardless of knowledge of the aforesaid violation. All sums expended by the County pursuant to Section 24-5(30) of this Code shall constitute and are hereby imposed as special assessments against the real property aforesaid, and until fully paid and discharged or barred by law, shall remain liens equal in rank and dignity with the lien of County ad valorem taxes and superior in rank and dignity to all other liens, encumbrances, titles and claims in, to or against the real property involved. All such sums shall become immediately due and owing to the County upon expenditure by the County and shall become delinquent if not fully paid within sixty (60) days after the due date. All such delinquent sums shall bear a penalty of fifteen (15) percent per annum. Unpaid and delinquent sums, together with all penalties imposed thereon, shall remain and constitute special assessment liens against the real property involved for the period of five (5) years from due date thereof. Said special assessment liens may be enforced by the Director by any of the methods provided in Chapter 85, Florida Statutes, or, in the alternative, foreclosure proceedings may be instituted and prosecuted by the director pursuant to the provisions of Chapter 173, Florida Statutes, or the collection and enforcement of payment thereof may be accomplished by any other method provided by law. All sums recovered by the County pursuant to this provision shall be deposited by the County into the fund from which said sums were expended.

(j) Upon the rendition of a judgment or decree by any of the courts of this state against any person and in favor of the Director of the Department of Environmental Resources Management under any of the provisions of this chapter, the trial court, or, in the event of an appeal in which the Director of the Department of Environmental Resources

Management prevails, the appellate court, shall adjudge or decree against said person and in favor of the Director of the Department of Environmental Resources Management a reasonable sum as fees or compensation for the Director of the Department of Environmental Resources Management's attorney prosecuting the suit in which the recovery is had. Where so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case. This provision shall apply to all civil actions, legal or equitable, filed after the effective date of this ordinance by the Director of the Department of Environmental Resources Management pursuant to this chapter. Cessation of a nuisance, sanitary nuisance or of any other violation of any of the provisions of this chapter whatsoever, prior to rendition of a judgment or of a temporary or final decree, or prior to execution of a negotiated settlement, but after an action is filed by the Director of the Department of Environmental Resources Management under any of the provisions of this chapter, shall be deemed the functional equivalent of a confession of judgment or verdict in favor of the Director of the Department of Environmental Resources Management, for which attorneys' fees shall be awarded by the trial court as set forth hereinabove.

(k) Each tree that is not exempt under this chapter and is unlawfully effectively destroyed or removed shall constitute a separate violation of this chapter for which liability shall attach in accordance with the provisions of Section 24-57 and Section 24-60(4), (5), and (6). Trees destroyed or effectively destroyed by an Act of God shall not constitute a violation of this chapter.

(l) In assessing damages for tree(s) or understory unlawfully removed, the value of the tree(s) or understory shall be based upon the cost of the tree(s) or understory and all costs associated with planting. At a minimum, the value of the tree(s) or understory, including the cost of planting, shall be two (2) times the current wholesale price of the tree(s) or understory based upon the largest available size or actual size of the tree(s) or understory removed, whichever is smaller, as set forth in recognized nursery publications.

(m) Whenever a mangrove tree is unlawfully trimmed, cut or altered, any person who authorized, permitted, suffered, or allowed said violation or whose agent, employee, servant, or independent contractor caused or contributed to the violation or who has a legal, beneficial or equitable interest in the real property upon which such violation occurs or exists, shall be jointly and severally liable for said violation regardless of fault and regardless of knowledge of the violation. This provision shall be construed to impose joint and several liability, regardless of fault and regardless of knowledge of the violation, upon all persons, individually or otherwise, who, although said persons may no longer have a legal, beneficial or equitable interest in said real property or may no longer have a relationship with such agent, employee, servant or independent contractor, did have such an interest or relationship at any time during which such violation existed or occurred or continued to exist or occur. This provision shall be liberally construed and shall be retroactively applied to protect the mangrove tree resources of Dade County and to accomplish the purposes of this chapter.

(Ord. No. 74-34, § 2, 5-21-74; Ord. No. 75-27, § 39, 5-7-75; Ord. No. 82-39, § 1, 5-4-82; Ord. No. 83-61, § 2, 7-19-83; Ord. No. 83-108, § 7, 11-15-83; Ord. No. 83-110, § 2, 11-15-83; Ord. No. 84-13, § 1, 2-7-84; Ord. No. 86-95, § 7, 12-2-86; Ord. No. 88-61, § 1, 7-5-88; Ord. No. 88-92, § 4, 9-22-88; Ord. No. 88-95, § 5, 10-4-88; Ord. No. 89-6, § 1, 1-17-89; Ord. No. 89-8, § 7, 2-21-89; Ord. No. 94-131, § 3, 6-21-94)

Editor's note—Ord. No. 89-8, § 7, adopted Feb. 21, 1989, amended § 24-57(e)(7) and § 24-57(g) to read as herein set out, and added § 24-57(j) and (k) which have been redesignated at the discretion of the editor as § 24-57(k) and (l) pursuant to the previous addition of § 24-57(j) by Ord. No. 88-61, § 1, adopted July 5, 1988.

Cross reference—Biscayne Bay Environmental Enhancement Trust Fund, § 7-5.1.

Sec. 24-57.1. Pollution Prevention Trust Fund.

(1) The Pollution Prevention Trust Fund is created for use in developing, promoting and conducting environmental workshops, expositions, symposia, conferences and other forms of public information for the purpose of educating industry, government and the public about pollution pre-

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 94-23486 CA 11

METROPOLITAN DADE COUNTY,

Plaintiff,

v.

JAY M. GOTTLIEB, et al.,

Defendants.
_____/

ORDER GRANTING IN PART, AND DENYING IN PART, MOTIONS TO DISMISS COMPLAINT

This matter came before the Court on October 3, 1995 upon the following motions: (1) Defendants' Gary Salzman, Marc Reynolds, as Personal Representative of the Estate of Bertha Salzman and Chase Federal Housing Corp.'s Motion to Dismiss or for More Definite Statement; (2) Defendants', Jay M. Gottlieb and Northern Trust Bank of Florida N.A., as co-Personal Representatives of the Estate of Charles Gottlieb, Motion to Dismiss Complaint; and (3) the Motion to Dismiss Complaint by Defendants, Suniland Associates, Gerald Katcher, Howard Scharlin and Harry Corash. Having considered the motions and heard argument of counsel, and otherwise being duly advised in the premises, the Court finds and rules as follows:

1. The Complaint alleges that the movants are owners or former owners of shopping centers which leased space to commercial drycleaning establishments (the "Landowner Defendants"). The Complaint further alleges that at each of the

shopping centers, drycleaning solvents were detected in the underlying groundwater and that these solvents were contaminating the private water wells of nearby residents. As a result of the drycleaning solvent contamination, Plaintiff, Metropolitan Dade County ("Dade County"), alleges it was forced to install and to service drinking water mains in the affected neighborhood. Pursuant to the strict liability provisions of Chapter 24, Metropolitan Dade County Code Dade County seeks (1) injunctive relief compelling Landowner Defendants to assess and remediate the contamination emanating from respective shopping centers (Count I), (2) an award of damages for the cost of installing the water mains (Count II), (3) civil penalties (Count III), and (4) attorneys' fees and administrative costs (Count IV).

2. In 1994, the Florida Legislature enacted the Drycleaning Contamination Cleanup Act ("Drycleaning Act"), codified in Chapter 376, Florida Statutes. The Legislature amended the Drycleaning Act in 1995 by Chapter 95-239, Laws of Florida. The Drycleaning Act, as amended, protects property owners from judicial and administrative actions by local governments such as this one filed by Dade County. The first immunity is contained in section 376.3078(3), Florida Statutes:

> (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, and no wholesale supplier 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. . . .

In addition, section 3 of the Chapter 95-239, Laws of Florida (to be codified at Section 376.3078(9), Florida Statutes) provides that any real property owner who voluntarily conducts site rehabilitation 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. . . .

The 1995 amendments also protect certain innocent real property owners from suit even when it is alleged that the drycleaner tenant has caused contamination as a result of gross negligence or violation of the State's hazardous waste management rules. 1995 Fla. Laws ch. 239 §3 (to be codified at Fla. Stat. § 376.3078(3)(o)). Because Dade County's Complaint does not allege any gross negligence or violation of State hazardous waste rules, this third level of immunity for property owners provided by § 376.3078(3)(o), Florida Statutes, is inapplicable to this action.

3. The eligibility criteria for receiving a state-funded cleanup under the Drycleaning Act are set forth in section 376.3078(3), Florida Statutes, as amended by Chapter 95-239, Laws

of Florida. Provided the Landowner Defendants are eligible under the Drycleaning Act, or have remediated their property in accordance with the terms of the Drycleaning Act, Dade County is barred from seeking an order compelling them to undertake the assessment and remediation of their properties, or from seeking civil penalties, attorney fees or costs, for failure to cleanup. Furthermore, because Dade County is a political subdivision of the State of Florida, the provisions of the Drycleaning Act preclude Dade County from recovering the cost of installing the public water system, including costs incurred prior to the date of enactment of the legislation. The Drycleaning Act does not, however, preclude Dade County from repleading and pursuing a claim for onsite containment of drycleaning solvents. In all other respects, the Drycleaning Act bars local government enforcement action against landowners of eligible sites when drycleaning solvents have been discharged.

4. In light of the foregoing, and in the interest of judicial economy, this action is temporarily stayed until April 3, 1996, to allow the Florida Department of Environmental Protection to promulgate the rules to implement the Drycleaning Act and to allow the Landowner Defendants time to be declared eligible under the Drycleaning Act.

5. A final judgment of dismissal with prejudice shall be entered dismissing Dade County's Complaint if, by April 3,

1996, the Landowner Defendants submit to the Court either (1) documentation demonstrating that their respective sites or the drycleaning contamination with which they have been associated are eligible under the Drycleaning Act, or (2) documentation demonstrating entitlement to the protection of the voluntary cleanup immunity provision, 1995 Fla. Laws ch. 239 §3 (to be codified at Fla. Stat. § 376.3078(9)).

DONE AND ORDERED in Miami, Dade County, Florida, this 27th day of November, 1995.

W. THOMAS SPENCER
CIRCUIT COURT JUDGE

cc: All counsel of record

TMR

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-23486 CA 28

METROPOLITAN DADE COUNTY,

Plaintiff,

vs.

JAY M. GOTTLIEB, et al.,

Defendants.
_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE having come before the Court this 9th day of December, 1996, upon the Motion for Final Summary Judgment filed by Defendant, Suniland Associates, a Florida general partnership comprised of Howard Scharlin, Gerald Katcher, and Harry Corash ("Suniland Associates"), and the Court having reviewed the affidavits, pleadings, and depositions filed in this matter, having heard argument of counsel and considered this Court's November 27, 1995 Order Granting in Part, and Denying in Part, Motions to Dismiss, and otherwise being duly advised in the premises, finds and rules as follows:

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. 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.

3. 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 properly disposed of. 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, a temporary air stripper was installed at the property in July 1992. Suniland Associates continued to operate the groundwater treatment system until November 2, 1994.

4. 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.

5. By letter dated February 27, 1996, Dade County determined that the cleanup of the Shopping Center was completed and issued its "No Further Action" letter to Suniland Associates. 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 made with Dade County's prior approval.

6. 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.

Based upon the foregoing, it is

ORDERED and ADJUDGED:

1. **Suniland Associates has established that the State of Florida Department of Environmental Protection has determined that its facility is eligible to participate in the Florida Drycleaning Solvent Contamination Cleanup Program and, as a result, it is**

entitled to the protections afforded pursuant to Section 376.3078(3), Florida Statutes (1995).

2. Suniland Associates has established that it has remediated its property in accordance with the voluntary cleanup provisions of the Drycleaning Act and, as a result, it is entitled to the protections afforded pursuant to Section 376.3078(9), Florida Statutes.

3. Accordingly, Suniland Associates' Motion for Final Summary Judgment is granted. Final Judgment is hereby entered in favor of Suniland Associates and against Metropolitan Dade County, who shall take nothing by this action, and Suniland Associates shall go hence without day.

4. The Court reserves jurisdiction to award costs to Suniland Associates.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 11 day of Dec, 1996.

BERNARD S SHAPIRO
CIRCUIT JUDGE

Circuit Court Judge

Copies furnished to:

Counsel of Record

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-23486 CA 11

METROPOLITAN DADE COUNTY,

Plaintiff,

vs.

JAY M. GOTTLIEB. et al.,

Defendants.
_____/

SUMMARY FINAL JUDGMENT FOR DEFENDANTS THE PERSONAL REPRESENTATIVES

THIS CAUSE having come on before the Court for hearing on December 9, 1996, on the Motion for Final Summary Judgment Pursuant to Court Order of Defendants, Jay M. Gottlieb and Northern Trust Bank of Florida, N.A., as Co-Personal Representatives of the Estate of Charles Gottlieb ("Personal Representatives"), and the Court having considered the Motion and the Affidavit of Jay M. Gottlieb, this Court's November 27, 1995 Order Granting in Part, and Denying in Part, Motions to Dismiss, and this Court's May 15, 1996 Agreed Order Enlarging Stay, and having concluded that there is no genuine issue of material fact and that the Personal Representatives are entitled to judgment as a matter of law, it is hereby

ORDERED AND ADJUDGED:

1. This record establishes that the Personal Representatives are eligible under the Drycleaning Solvent Cleanup Program, established by the Florida Drycleaning Contamination Cleanup Act, Florida Statutes § 376.3078 et seq. ("Drycleaning Act"), which eligibility bars Plaintiff's claims in this action against these Defendants, pursuant to Florida Statute § 376.3078(3).

2. Accordingly, the Motion for Summary Judgment is GRANTED, and Summary Final Judgment is hereby entered in favor of the Personal Representatives and against Plaintiff, Metropolitan Dade County, and Plaintiff shall take nothing by this action and Defendants. the Personal Representatives. shall go hence without day.

3. The Court reserves jurisdiction to award costs to the Personal Representatives upon submittal of an appropriate motion.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 2 day of December, 1996.

BERNARD S. SHAPIRO
CIRCUIT JUDGE

CIRCUIT COURT JUDGE

Copies furnished to:
All counsel of record

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 94-23486 CA 11

METROPOLITAN DADE COUNTY,

Plaintiff,

v.

JAY M. GOTTLIEB, et al.,

Defendants.
_____/

SUMMARY FINAL JUDGMENT FOR DEFENDANT CHASE FEDERAL HOUSING CORP.

THIS CAUSE having come on before the Court for hearing on March 5, 1997, on the Motion for Final Summary Judgment Pursuant to Court Order, of Defendant, Chase Federal Housing Corp. ("Chase"), and the Court having considered the Motion and the Court's November 27, 1995 Order Granting in Part, and Denying in Part, Motions to Dismiss, and this Court's May 15, 1996 Agreed Order Enlarging Stay, and having concluded that there is no genuine issue of material fact and that Chase is entitled to judgment as a matter of law, it is hereby

ORDERED AND ADJUDGED:

1. This record establishes that Chase is eligible under the Drycleaning Solvent Cleanup Program, established by the Florida Drycleaning Contamination Cleanup Act,

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Florida Statutes § 376.3078 et seq., which eligibility bars Plaintiff's claims in this action against this Defendant, pursuant to Florida Statute § 376.3078(3).

2. Accordingly, the Motion for Summary Judgment is GRANTED, and Summary Final Judgment is hereby entered in favor of Chase Federal Housing Corp. against Plaintiff, Metropolitan Dade County, and Plaintiff shall take nothing by this action and Defendant, Chase Federal Housing Corp. shall go hence without day.

3. The Court reserves jurisdiction to award costs to Chase upon submittal of an appropriate motion.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 5 day of MARCH, 1997.

BERNARD S. SHAPIRO
CIRCUIT JUDGE

CIRCUIT COURT JUDGE

Copies furnished to:
All Counsel of Record

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The Florida Senate

Interim Project Report 97-P-16 *September 1997*

Committee on Natural Resources Senator Jack Latvala, Chairman

REVIEW OF THE STATE'S DRYCLEANING SITE CLEANUP PROGRAM

SUMMARY

In 1994, the Legislature enacted the drycleaning contamination cleanup program which was modeled somewhat after the underground petroleum storage tank program. Unlike the underground petroleum storage tank cleanup program, the drycleaning site cleanup program was never designed as a reimbursement program without prior DEP approval of costs. The program is funded primarily from a 2 percent gross receipts tax which is levied on drycleaning facilities and a $5-per-gallon tax on perchloroethylene used by drycleaners. The gross revenue from these taxes is approximately $8 million a year. These moneys are deposited into the Water Quality Assurance Trust Fund and are to be used to pay for the cleanup of contaminated drycleaning sites. Depending on when application for the program was made, certain deductibles apply. Applications for the program may be made through December 31, 2005. Until that time, it is difficult to determine the actual number of sites which may be ultimately eligible for cleanup under the program. Also, there is a difference of opinion between the drycleaning industry and the DEP as to the average cost to clean up a drycleaning contaminated site and the total number of sites that would be eligible for cleanup under the program. For these reasons, the scope of the problem and the ultimate financial burden to the state cannot be determined with certainty. In order to control costs and define the scope of the problem, the deadline for eligibility for the program should be moved up to December 31, 1998. The DEP should have specific statutory authority to use RBCA principles and innovative cleanup technologies. Also, certain legal issues regarding gross negligence when used to determine eligibility and certain third party liability issues should be addressed. The DEP's staffing should be realigned to correspond to the annual revenue to maximize funds for cleanups. Also, there should be some additional incentives to encourage voluntary cleanups.

BACKGROUND

Since 1983, there has been an increased focus and dedication toward cleaning up sites contaminated by hazardous wastes, hazardous substances, and other pollutants in order to protect Florida's drinking water supply and its fragile natural resources. The 1983 Water Quality Assurance Act established the Water Quality Assurance Trust Fund to provide a source of funding for hazardous waste contaminated sites.

In 1986, the Legislature further acknowledged that a major threat to Florida's drinking water was caused by contamination from leaking underground petroleum storage systems. As a result, the Legislature created the Inland Protection Trust Fund to finance the clean-up of petroleum contaminated sites throughout Florida.

In 1994, serious concerns were expressed regarding the contamination and potential health and environmental risks as a result of the discharge of solvents commonly used in the drycleaning process. Due to the nature of drycleaning solvents, cleanup of these types of contaminated sites was expected to be both difficult and costly. As a result, small, independent owners of drycleaning facilities may not have the financial resources to investigate, clean up, and monitor these sites. Drycleaning solvents are considered to be hazardous substances under both state and federal law; therefore, the owner or operator of a drycleaning facility may be subject to third party liability as a result of damages resulting from a discharge of drycleaning solvents. Drycleaning solvent contaminated sites were not eligible for cleanup under the underground petroleum storage tanks program, and the Water Quality Assurance Trust Fund did not have the financial resources to address the problem. As a result, the 1994 Legislature established the drycleaning contamination cleanup program which was modeled somewhat after the underground petroleum storage tank program.

The solvent of choice for drycleaners is perchloroethylene, or PERC. PERC accounts for 80-85 percent of all drycleaning fluid used nationwide. In Florida, PERC accounts for about 90 percent of the solvent used by drycleaners. It is a colorless, nonflammable liquid. Currently, the demand in the U.S. for PERC is declining due to solvent recycling and reduced demand for chorofluorocarbons. The drycleaning industry is the largest U.S. user of PERC. PERC, however, also has a variety of other uses such as in vapor degreasing and metal cleaning operations; as an additive to aerosol formulations, solvent soaps, printing inks, adhesives, sealants, polishes, lubricants, and silicones; and as an ingredient in typewriter correction fluid and shoe polish.

PERC evaporates when exposed to air and dissolves only slightly when mixed with water. Most releases of PERC to the environment are to the air. This is why the EPA, pursuant to the Clean Air Act Amendments of 1990, regulates the emissions of PERC as one of 189 toxic chemicals. When a PERC release occurs on the ground, it does not bind well with the soil and can move through the ground and into the ground water, making cleanup costly and difficult.

METHODOLOGY

Staff met with the Department of Environmental Protection (DEP) personnel responsible for administering the program and the Department of Revenue regarding the tax and fee collections for this program. Staff also worked with the staff of the Finance and Taxation Subcommittee of the Senate Ways and Means Committee regarding cost and revenue projections for the program. On September 9, 1997, a workshop was held with all interested persons including representatives of the drycleaning industry, DEP officials, Department of Revenue officials, Senator Latvala and Senator McKay.

FINDINGS

Statutory Provisions

Section 376.3078, F.S., is Florida's law pertaining to the drycleaning site rehabilitation program. The program is administered by the DEP. Funding for the program comes from three main sources: a 2-percent tax on the gross receipts on each drycleaning facility [s. 376.70, F.S.]; a $5-per-gallon tax on perchloroethylene used in the drycleaning process [s. 376.75, F.S.]; and an annual registration fee of $100 for each drycleaning facility or wholesale supply facility owned and currently in operation [s. 376.303(1)(d), F.S.]. The proceeds from these revenue sources are deposited into the Water Quality Assurance Trust Fund and are used for the rehabilitation of contaminated drycleaning sites.

Owners or operators of drycleaning facilities, wholesale supply facilities and real property owners were required to jointly register with the DEP each facility owned and in operation by June 30, 1995. New businesses must register within 30 days after the start of operation of a new business. Each year the DEP issues an invoice for the annual registration fees by December 31.

Section 376.3078(3)(a), F.S., provides the eligibility criteria for facilities to qualify for participation in the program. Those criteria include:

- The facility must be registered with the DEP.
- The facility is determined by the DEP to be in compliance with the department's drycleaning rules on or after November 19, 1980 [the date on which the federal Resource Conservation and Recovery Act (RCRA) hazardous waste regulations went into effect.]
- The facility has not been operated in a grossly negligent manner at any time on or after November 19, 1980.
- The facility is not listed or qualified for listing on the National Priority List (Superfund).
- The facility is not under an order from the EPA pursuant to RCRA and does not have or is required to have a hazardous waste treatment, storage, or disposal facility permit, a postclosure permit, or a permit pursuant to the federal Hazardous and Solid Waste Amendments of 1984.

Further, the real property owner or the owner or operator of the drycleaning facility or the wholesale supply facility must not have willfully concealed the discharge of drycleaning solvents, has remitted all taxes due, has provided evidence of contamination by drycleaning solvents pursuant to DEP rules, and has reported the contamination prior to December 31, 2005.

Generally, the program provides that the cleanup costs are to be absorbed at the expense of the drycleaning funds available in the Water Quality Assurance Trust Fund. However, for contamination reported to the DEP by June 30, 1997, the applicant must pay a $1,000 deductible per incident. For contamination reported from July 1, 1997, through June 30, 2001, the deductible increases to $5,000 per incident; for contamination reported to the department from July 1, 2001, through December 31, 2005, the deductible increases to $10,000 per incident; and for contamination reported after December 31, 2005, no cleanup costs will be absorbed at the expense of the drycleaning restoration funds. In other words, contamination reported after this date must be cleaned up at the expense of the reporting entity.

As stated in s. 376.3078 (3)(j), F.S., it is not the intent of the Legislature to become the owner or operator of a drycleaning facility or wholesale supply facility by engaging in state-conducted cleanup.

The owner, operator, and real property owner may apply for the drycleaning contamination cleanup program by jointly submitting a completed application to the DEP. Eligibility applies to the drycleaning facility or wholesale supply facility and is not affected by any conveyance of ownership of the facility or the real property on which the facility is located. However, a facility not otherwise eligible cannot become eligible as a result of any such conveyance.

Section 376.3078 (3)(m), F.S., provides that if funding for the drycleaning contamination rehabilitation program is eliminated, the provisions of this subsection, relating to eligibility, deductibles, etc., do not apply.

Drycleaning facility owners or operators, wholesale supply facilities, and real property owners are afforded certain liability protections and are not subject to administrative or judicial action brought by or on behalf of any person or state or local government for drycleaning solvent discharges provided certain specified conditions are met.

Section 376.3078(4), F.S., requires the DEP to establish a priority ranking system for the use of the drycleaning facility restoration funds based on certain specified criteria which is based on human health and safety, the area affected by the contamination, the present and future uses of the affected aquifer or surface waters, and the effect of the contamination on the environment.

Section 376.3078(7), F.S., requires owners and operators of drycleaning facilities to have installed dikes or other containment structures around each machine or item of equipment in which drycleaning solvents are used by January 1, 1997. These dikes or containment structures must be capable of containing 110 percent of the capacity of the machine or storage area. New drycleaning facilities must install, beneath each machine or item of equipment in which drycleaning solvents are used, a rigid and impermeable containment vessel capable of containing 110 percent of the total tank capacity of each machine.

Whenever there is a spill outside of a containment structure of more than 1 quart of drycleaning solvent, the owner or operator is required to report the spill to the state through the State Warning Point pursuant to s. 403.161(1)(d), F.S., immediately upon discovery of the spill and immediately initiate and complete actions to abate the source of the spill; remove product from all indoor and outdoor surface areas; remove product and dissolved product from any septic tank or catch basin in which the solvent has accumulated; and remove affected soil, if any. The costs incurred by the owner or operator for such response actions, up to a maximum of $10,000 in the aggregate of all spills at a single facility, will be credited to the owner or operator against the future gross receipts tax and the tax on PERC. Failure to comply with these provisions constitutes gross negligence with regard to determining site eligibility.

Each owner or operator of a currently operating drycleaning facility must obtain third-party liability insurance for $1 million.

The stated legislative intent in s. 376.3078(3), F.S., is that the DEP must initiate and facilitate as many cleanups as possible utilizing the resources of the state, local governments, and the private sector. As a result, a real property owner may conduct a voluntary cleanup pursuant to department rules, either through agents of the real property owner or through responsible response action contractors, whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program. A real property owner or any other party that conducts such voluntary cleanup, however, may not

seek cost recovery from the department or the Water Quality Assurance Trust Fund, but is immune from liability to any person, or state or local government, to compel 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 complies with certain specified conditions.

Issues

Administration

While originally patterned somewhat after the underground petroleum storage tank cleanup program, the drycleaning contaminated site cleanup program was never designed as a reimbursement program without prior DEP approval of costs. All of the drycleaning site rehabilitation work is conducted by state contractors who must have prior approval before any work is done. On November 17, 1995, the DEP initiated procurement of the cleanup contractors for the program. The first state contractors for this program were selected in November, 1996. Currently, the department has four prime drycleaning contamination cleanup only contractors and six other contractors who also conduct other hazardous waste cleanup. Prior approval for the work to be done consists of a detailed work plan and the work is assigned on a task basis. Further, a payment schedule is established to correspond to the work plan.

For each project, the department assigns a DEP employee as a project manager to go out and oversee the work. The DEP administers the program directly and does not have the authority to delegate the program to the "local environmental programs."

Currently, the department has begun work on 85 of the highest priority eligible sites. Pursuant to the 1997 General Appropriations Act, the DEP may only use $10 million from the Water Quality Assurance Trust Fund for the drycleaning site contamination cleanup program in FY 1997-1998. Further, proviso language in the 1997 General Appropriations Act prohibits the DEP from initiating any work or activity on any other additional sites. It is not clear why this provision was included, but it may have stemmed from concerns that the Legislature needed to review the program and determine if adequate funding and adequate cost controls are in place.

Whenever work on a site involves digging up the site and disposing of the contaminated material, DEP personnel will be on the site to directly supervise the activities. This is because the contaminated material is designated by the EPA as a hazardous material and as such is subject to regulation pursuant to the Resource Conservation and Recover Act (RCRA). Disposal of hazardous materials must be in an EPA approved and regulated hazardous waste disposal facility or landfill. Manifests must be signed when the hazardous material leaves the site and also signed when the material arrives at the hazardous waste disposal facility or landfill. However, it is anticipated that most of the treatment will be done on-site.

Scope of Problem

The actual number of sites which may ultimately be eligible for cleanup under the drycleaning contamination site cleanup program is difficult to predict and is subject to debate between the industry and the DEP. One reason for this is that a facility may apply for eligibility in the program through December 31, 2005. For reasons not fully known, several facilities have delayed applying for inclusion in the program. Such delays, however, can be costly for the facility since over the life of the program the deductibles that must be paid by the applicant increase. There appears to be a pattern of increased applications for inclusion in the program each time a statutory deadline occurs regarding the increase in the deductibles the applicant must pay. Currently, applicants to the program are subject to a $5,000 deductible for the cleanup costs. On July 1, 2001, the deductible increases to $10,000, and after December 31, 2005, the applicant must bear the full cost of the cleanup, thereby closing the program to new applicants and sites.

The DEP has estimated that there may be up to 2,800 potential cleanup sites over the life of the program. The industry has questioned the validity of this estimate since it includes sites which have not yet applied for the program and dry-drop sites where there may have been no solvent use. As of August, 1997, there were 1648 active drycleaning facilities registered with the DEP and another 914 dry drop facilities which may have a history of solvent use on the premises, and therefore may be contaminated. In addition, there are 181 former drycleaning facilities registered and 18 wholesale supply facilities registered. As of August, 1997, there were 1130

applications to the program. Of this number, 707 have been deemed eligible.

There appears to be considerable support from the drycleaning industry and the DEP to close the application period within the next 12 to 18 months. Only then can the magnitude of the problem and the universe of eligible contaminated sites be determined.

Revenue Needs and Funding

The average cost to clean up a drycleaning contaminated site is also subject to much debate between the drycleaning industry and the DEP. The DEP has estimated that the average cost to cleanup a site contaminated with drycleaning solvents is $500,000. This $500,000 cost-per-site estimate includes an up-front assessment of $60,000; engineering costs of $20,000; construction costs of $120,000; and operation and maintenance costs of $25,000 per year for 12 years. The operation and maintenance costs would span several years because, unlike petroleum-contaminated sites, drycleaning solvent-contaminated sites are typically not excavated, but rather the soil and ground water are treated *in situ*. If the soil is excavated, it must be disposed of in an EPA-approved hazardous waste facility such as the one in Emil, Alabama. The industry has asserted that the cost to rehabilitate a contaminated drycleaning site is considerably less than $500,000, perhaps half that amount.

Assuming that the number of eligible sites may be as high as 2,800 and using the cost estimate of $500,000 per site, the DEP estimates that it will take $1.4 billion to rehabilitate these sites. If the number of eligible sites is one-half of the DEP estimate, or 1,400 sites, and the average cleanup cost per site is one-half, or $250,000, the total amount needed for the program would be $350 million. At the current rate of $8 million a year, the total revenues available for the program over the next 20 years is expected to be approximately $160 million.

When the program was created in 1994, funding was to come primarily from a gross receipts tax of 1.5 percent on drycleaning, laundry, and linen supply facilities, and a $5-per-gallon tax on PERC. In 1995, the law was amended to increase the gross receipts tax to 2 percent on January 1, 1996; however, laundry and linen supply facilities were exempted from the tax and subject to a refund of any taxes paid. Also, users of PERC other than drycleaning facilities were no longer subject to the $5-per-gallon PERC tax. The Department of Revenue had estimated the total revenues for FY 1994-1995 at $7.9 million and for FY 1995-1996, at $13 million. The industry had maintained that the estimated revenues generated by the program would be between $10 and $12 million per year.

According to information received from the Department of Revenue, the gross revenues received for the program to date are:

FY 1994-1995 (November 1994-June 1995)	$ 5,314,914
FY 1995-1996	8,871,567
FY 1996-1997	8,721,274

From these amounts, the Department of Revenue deducts $190,400 for their administrative costs and 7 percent of the gross amount must be deposited into the General Revenue Fund as a service fee that is charged for all trust funds. Therefore, the approximate amounts that should have been deposited into the Water Quality Assurance Trust Fund and available for use by the DEP for this program to date are:

FY 1994-1995	$4.7 million
FY 1995-1996	8 million
FY 1996-1997	7.9 million

Information received from the DEP indicates that the revenues from the taxes that were deposited into the Water Quality Assurance Trust Fund are as follows:

FY 1994-1995	$4,447,773
FY 1995-1996	7,446,919
FY 1996-1997	7,632,017

In addition, the DEP collected the following registration fees that were also deposited into the Water Quality Assurance Trust Fund:

FY 1995-1996	$131,450
FY 1996-1997	102,100

The DEP currently has 26 positions dedicated to administering this program. The majority of those positions are in Tallahassee and involved in determining eligibility, establishing priority rankings, and managing contractors. The administrative costs for the DEP range from $1.3-1.4 million annually. The

DEP is currently staffed based on the original revenue estimates of $10-$12 million for the program. At this level of staffing, they are capable of administering a program with $12 million a year to spend. For FY 1997-1998, the Legislature appropriated $10 million to the DEP for the program. However, annual revenues are expected to remain constant at about $8 million.

Concerns have been expressed that the Department of Revenue is not collecting all of the taxes due and payable from the drycleaning gross receipts tax and that there are not sufficient penalties available to compel the drycleaning entities to pay this tax fully and in a timely manner. Section 376.70(5), F.S., provides that the Department of Revenue shall generally administer, collect, and enforce the gross receipts tax pursuant to the procedures for administration, collection, and enforcement of the general state sales tax imposed under ch. 212, F.S. For the drycleaning gross receipts tax, if the taxpayer is late with his returns and payments, a late penalty is assessed at 10 percent of the amount of the tax owned per month, not to exceed 50 percent. Interest is assessed on unpaid tax at 1 percent per month prorated per day. A minimum penalty is assessed on late returns, even if no tax is due. Since collection of the tax has only been in effect for about 3 years, the Department of Revenue has not yet had the opportunity to conduct audits pertaining to this tax.

It has been suggested that, in order to reduce the number of contaminated sites that would be paid for under this program, the lowest ranked sites (those scoring 20 and under and posing little threat to the drinking water supply) may be issued a "No Further Action" letter by the DEP and removed from the list. This may not be a feasible alternative because all sites must have at least an initial assessment to determine the extent of the contamination. The cost for each assessment is $60,000 and must be done by the state. Each assessment would use money that would otherwise be spent on remediating higher priority sites, thereby effectively spending money on the low priority sites at the expense of the high priority sites.

A percentage of the sites eligible for state cleanup may actually be cleaned up voluntarily at the owner's expense. Currently, cleanup can be done on any priority site on a voluntary basis. However, such cleanup must conform to the DEP's cleanup rules and criteria and must receive prior approval for the tasks. In return for using his own money, the applicant enjoys the same liability immunity provisions afforded eligible sites cleaned up using the Water Quality Assurance Trust Fund.

Cleanup Technologies and the use of RBCA

The cleanup methods and strategies involved in a drycleaning site rehabilitation are varied and often unique to the conditions of the site. Many of these sites are ongoing concerns and the contamination may be present directly under the premises, making excavation or pump-and-treat technologies not feasible. As a result, s. 376.3078(4), F.S., specifically allows the DEP to use certain innovative technologies. The DEP has indicated that the department's goal is to have each site for which work has begun to be through the construction phase and on to the operation and maintenance phase within 12 to 24 months. To do this, the DEP has indicated that they intend to use Risk Based Corrective Action (RBCA) principles, where applicable, to reduce cleanup costs. Over time, the costs to rehabilitate a contaminated drycleaning site may decrease as economies of scale come into play and natural attenuation and other efficient and effective innovative approaches are proven to be feasible.

The statutes seem to imply that the DEP has the authority to proceed with applying RBCA principles to the cleanup of these sites. This authority is specifically authorized for the underground petroleum storage tank program and the brownfield site rehabilitation program. It seems appropriate, therefore, to specifically authorize the DEP by statute to use the RBCA concepts for the rehabilitation of drycleaning sites and to provide guidelines to the DEP and the specific authority to use institutional and engineering controls to minimize the health and safety risks and to protect the drinking water supplies.

Legal Issues

Since the program was first established in 1994, several local governments have expressed serious concerns regarding their ability to administer and enforce their local environmental regulations as they relate to drycleaning facilities. In 1994, some of the larger counties, particularly Dade and Broward Counties, had several enforcement actions and consent orders pending against drycleaners in their jurisdictions to compel cleanup. The drycleaning legislation provided eligibility for state cleanup of those drycleaners against

whom enforcement actions were taken. As a result, the counties were prohibited from compelling the drycleaners to clean up the site with their own funds in advance of the state cleaning up the site. The counties have been in litigation over this issue and often at odds with the DEP. Dade County has expressed grave concerns over the fact the program is grossly underfunded and many of these sites will have no cleanup activity initiated on them for several years. Meanwhile, Dade County's drinking water supply is threatened because of its dependence on a sole source aquifer.

In 1997, legislation was introduced to clarify the issue regarding gross negligence as it pertained to the operation of a drycleaning facility for purposes of determining eligibility for the cleanup program. This term has been the subject of judicial interpretation. The proposed legislation, which failed to pass, would have clarified and codified that term and addressed DEP's considerations when denial for eligibility is based on such negligence.

A potentially significant issue exists regarding the liability and rights of property owners adjacent to a contaminated drycleaning site onto which the plume of contamination has spread. The drycleaning facility owner or operator and the real property owner have certain liability and immunity protections regarding the cleanup of that site if it is deemed eligible and accepted into the program. However, the adjacent property owner does not have such protections and could possibly be subject cleanup enforcement actions. This issue should be clarified statutorily.

RECOMMENDATIONS

The first 85 sites are now nearing the completion of the first task in the rehabilitation process. As more experience is gained cleaning up and remediating these sites, it is anticipated that both the remediation costs and the time necessary to clean up these sites will decrease. To further these efforts, the DEP needs to have clear and specific statutory direction to use innovative approaches to cleanup efforts and the authority to use RBCA principles for these sites. Although the ultimate penalty for failing to register a drycleaning facility with the DEP is ineligibility for the cleanup program, penalties for failure to register with the DEP should be imposed to assure that these facilities promptly register and pay the appropriate registration fees timely. The time period in which a facility may apply to the program should be shortened to December 31, 1998, in order to provide more predictability as to the number of sites requiring rehabilitation and bring some closure to the program and assure that the state is committed to cleaning up only contamination that has occurred prior to the requirements for secondary containment rather than new spills which may be the result of negligence or failure to install such measures. The concept of gross negligence should be clarified for purposes of eligibility determinations for the program. In order to meet the legislative intent of maximizing cleanups, additional incentives should be provided to encourage voluntary cleanup. Such incentives could include tax incentives and streamling and expediting the cleanup approval process. The DEP's staffing of the program should be realigned with the actual revenues in order to maximize the funds available for actual cleanups.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
Committee on Natural Resources, 414 Senate Office Building, Tallahassee, FL 32399-1100, (850) 487-5372 SunCom 277-5372

MEMBER OVERSIGHT
Senator Latvala and Senator McKay

NEIGHBORHOOD CLEANERS ASSOCIATION

PLAINTIFF(S)

VS

JOHN W. RENFROW, ETC.

DEFENDANT(S)

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 95-2302 (08)

REPORT OF GENERAL MASTER AND NOTICE OF FILING

The Plaintiff seeks declaratory as well as injunctive relief, however, inasmuch as this is only at the stage of a hearing on Motion for Preliminary Injunction, it is premature in terms of staging to permit the drawing of any conclusions that might lead to "declarations". By its post-hearing memorandum in opposition to Plaintiff's application for injunctive relief, the County requests the injunctive relief be denied but has further requested that the declaratory relief prayed for in its counterclaim likewise be declared. This, too, is premature; especially so in view of the fact that there is no affirmative application by the Defendant County in connection with the matters noticed for the instant hearing.

The instant hearing is not technically directed to evaluation of pleadings; nevertheless, consideration of the Plaintiff's Amended Verified Complaint for the Entry of a Declaratory Judgment and Preliminary and Permanent Injunctive Relief necessarily must be considered in part. In this connection, I would note, sua sponte,

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that the said complaint tests the outer limits of Rule. 1.110(b) which calls, inter alia, for "...a short plain statement of the ultimate facts showing the pleader is entitled to relief..."; in short, the complaint is replete with impassioned argument which scarcely meets the stated standard.

With full realization that the scope of this ruling is recommendatory only, and equally aware of its interstitial character because directed solely to the matter of a preliminary injunction, (leaving, therefore, the matter of final hearing on the merits and grant or denial of a permanent injunction outstanding), I deem it helpful to the Court that I set forth some of the salient factors involved in my finding and recommendation that the Plaintiff's present Motion for Preliminary Injunctive Relief be denied.

The parties are in agreement that purely legal issues emerge in this litigation; they concern the constitutionality and construction of the Florida Drycleaning Contamination Clean-Up Act ("Act"). [1]

Because the case presents purely legal issues and by reason of extensive pleadings and memoranda filed herein, I dispense with the customary discussion of the background of this case.

Basically, the Plaintiff contends that pending and threatened enforcement actions by Defendant, Metropolitan Dade County ("County") against certain Drycleaner

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[1]Fla. Stat. §376.3078 contains essential provisions of the Act and those most directly in dispute in these proceedings. Periodic reference herein may be made by the use of the term "Drycleaner" as reference to owners and operators of drycleaning facilities and wholesale supplies.

owners and operators are expressly preempted by the Act and, indeed, are in all respects otherwise in conflict with the Act. At its core, the dispute centers upon a provision in Subsection (3) of the Act providing, in pertinent part:

> ***"In accordance with the eligibility provisions of this Section, no person who owns or operates or who otherwise would be liable as a result of the operation of a drycleaning facility, and no wholesale supplier, shall be subject to administrative or judicial action brought by or on behalf of any State or local government or any person to compel rehabilitation or pay the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents."***

The Plaintiff contends that Subsection (3)'s prohibition on administrative and judicial action against drycleaners *completely* excludes the County from any regulation or enforcement efforts concerning contaminated drycleaner sites in Dade County. According to the Plaintiff (Memo P. 43), the case is "really about conflict and preemption."

The County, however, contends first, the denial of access to Court provision in Subsection (3) is facially unconstitutional under Article I, §21 of the Florida Constitution which provides:

> **"Access to Courts - - - The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."**

In support of its position, County relies upon Psychiatric Associates v Siegel, 610 So. 2d 419, 424 (Fla. 1992), that the right of access to Court is a "fundamental right", and that the history of the provision shows an intention to construe the right

liberally to guarantee broad access to the Courts for resolving disputes.

Further, in Kluger v White, 281 So. 2d 1, 4 (Fla. 1973):

> *"... [W]here such right has become a part of the common law of the State pursuant to Fla. Stat. §2.01 the legislature is without power to abolish such right without providing a reasonable alternative to protect the rights of the people of the State to redress to injuries, unless the legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."*

If, as the Plaintiff contends, Chapter 24 of the County Code was the sole well-spring of authority upon which the County could seek to redress environmental harm resulting from contaminated drycleaner sites, such argument might impair Kluger; however, Chapter 24 is not the sole source but rather an expression of Dade County's plenary home rule powers, neither intended to nor effectively limiting the extent of the County's broad police powers to address any nuisance condition as at common law, including, of course, environmental contamination.[2]

The constitutionality of all or any part of a Statute, however, ought not be addressed if alternative methods or bases of resolution are otherwise apparent. Because such alternative approaches are extant in the instant matter, the County's challenge to the denial of Court access provision of Subsection (3) need not and will not be further addressed.

Upon careful consideration and review of the parties excellent oral

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[2]Article VIII, Sec. 11, Constitution of the State of Florida (1885), as incorporated into Article VIII, Sec. 6(e) of Constitution of the State of Florida (1968).

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arguments, written memoranda, and supporting appendices, I am impelled to recognize two significant factors: (1) legal analysis presented by defendants in substantial portions of its Memorandum of Law in Opposition to Declaratory and Injunctive Relief sets forth the apparent and controlling principle of law by which this dispute must be governed; and (2) the lucid presentation of applicable and governing legal principles could scarce be better stated by the undersigned. For these reasons, the following excerpted portions from the defendant's memorandum, as modified, are adopted as the ratio decidendi of the within recommended ruling:

Preemption

The legal issue before the Court seems more one of conflict that of preemption. The doctrine of preemption is concerned with whether a senior legislative body has reserved a particular subject matter to itself for legislative and regulatory purposes. Tribune Co. v Cannella, 485 So. 2d 1075, 1077 (Fla. 1984). Here, subsection (3), the provision relied upon by the Plaintiff in support of its claim of preemption, is simply a flat prohibition of judicial and administrative actions against a class of people. it is not an exclusive reservation by the State of the subject matter of drycleaning to itself for legislative and regulatory purposes. The principal legal issue before the court, therefore, is whether the County's environmental enforcement program is legally in conflict with subsection (3)'s prohibition.

However, even if analyzed in terms of preemption principles, the Act does not

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preempt all local authority to act in this area. Under Florida law, there is a "more restrictive application of the preemption doctrine, precluding preemption and leaving "home rule" to municipalities unless the legislature has expressly said otherwise." (emphasis supplied). Tribune Co., 458 So. 2d at 1077; City of Venice v Valente, 429 So. 2d 1241, 1244 (Fla. 2d DCA 1983) ("... we agree, that there must be "express preemption" by the legislature before a municipality may be prohibited from acting in a given area. See, City of Miami Beach v Ricio Corp., 404 So. 2d 1066 (Fla. 3d DCA 1981)".

The Plaintiff has argued that the requirement of "express preemption" only applies to municipalities because it is contained in Section 166.021(3)(c), which relates to the powers of municipalities. Plaintiff's contention that the home rule powers of municipalities are broader than those of Dade County must fail for at least two reasons. First, Section 6 (f) of Article VIII of the Florida Constitution in 1968 explicitly provides, in pertinent part, that "..., the Metropolitan Government of Dade County may exercise all of the powers conferred now or hereafter by general law upon municipalities." Therefore, all of the provisions of Section 166.021 are equally applicable to Dade County. Second, the county equivalent of Section 166.021(3)(c) is Section 125.01(w) which provides that counties have the power, inter alia, to "... exercise all powers and privileges not specifically prohibited by law." (emphasis supplied). Accordingly, the more restrictive application of the preemption doctrine, requiring "express preemption"

by the Legislature, applies equally to municipalities and counties.

As stated by the Court in Hillsborough County v Florida Restaurant Association, Inc., 603 So. 2d 587, 590 (Fla. 2d DCA 1992),

> "To find a subject matter expressly preempted to the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred."

No such express preemptive languages was employed in Section 376.3078.

As noted, the principal legal issue presented by Plaintiff's challenge seems to be whether the County's environmental enforcement program legally conflicts with the prohibition contained in subsection (3). Consider the well-established test as to what actually constitutes a conflict under Florida law. In Jordan Chapel Freewill Baptist Church v Dade County, 334 So. 2d 661, 664 (Fla. 3d DCA 1986), cert. denied, 348 So. 2d 949 (Fla. 1977), the Third District court of Appeals stated the tests as follows:

> "[T]he sole test of conflict for purposes of preemption is the impossibility of co-existence of the two laws. Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible." (Court's emphasis).

To determine if, or to what extent, the County's local enforcement efforts irreconcilably conflict with the provisions of subsection (3), it is necessary to first examine subsection (3)'s scope of operation. The first full paragraph of subsection (3), which contains the prohibition on judicial and administrative actions, provides, as follows:

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(3) REHABILITATION LIABILITY. --- In accordance with the eligibility provisions of this section, no person who owns or operates, or who otherwise could be liable as a result of the operation of, a drycleaning facility, and no wholesale supplier, shall be subject to administrative or judicial action brought by or on behalf of any state or local government or 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 paragraph (4) (a) 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 owner or operator of the drycleaning facility or the wholesale supplier. (emphasis supplied).

The above emphasized language underscores three express qualifications to subsection (3)'s prohibition against administrative or judicial actions. First, the prohibition is to be "in accordance with the eligibility provisions", which subsection (3)(a) requires State DEP to adopt by rule. In other words, subsection (3)'s liability exemption is only to be afforded to those drycleaners who meet eligibility requirements to be established by State DEP rules in the future. Until those rules are promulgated by DEP then subsection (3)'s liability exemption provision, by its own terms, is not effective. Next, the above-quoted passage likewise expressly conditions the expenditure of moneys from the clean-up fund and recourse against drycleaners upon DEP's future adoption of rules which prioritize sites for clean-up. Accordingly, until the DEP also adopts rules that prioritize contaminated sites for clean-up, fund monies are not to be expended and recourse against drycleaners for the cost of cleaning up contaminated sites is permitted.

These two preconditions to the liability exemption provision going into effect are

not only clearly stated, but any other reading might only frustrate the legislative purpose of addressing the problem of delay in site clean-up. If the liability exemption became effective prior to DEP's rule establishing eligibility criteria, it might arguably cast a protective cloak of immunity around all drycleaners, even those who ultimately fail to meet the eligibility criteria. This result would be directly contrary to the very requirement that DEP establish eligibility criteria. Therefore, until DEP adopts the required rules for drycleaner eligibility and site prioritization then, by its own terms, the subsection (3)'s liability exemption provision is inoperative.

The last qualification need not be addressed for purposes of the instant hearing.

Under "impossilbity of co-existence" test for conflict, it is readily apparent that the County and State programs can co-exist within their own respective spheres of operation. The Act's prohibition against administrative and judicial actions, does not become effective until the State DEP adopts rules for eligibility criteria and site prioritization. Until then, at the very least, the County retains enforcement authority.

For the foregoing reasons, I recommend the Plaintiff's Motion be denied.

WHEREFORE, the undersigned files this Report with the Office of the Clerk of the Court.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this date to Loren S. Granoff, Esq., 200 S. Biscayne Boulevard, Miami, FL 33131; Thomas Robertson, Assistant County Attorney, 111 NW 1st Street, Miami, Fl

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33128.

Dated at Miami, Dade County, Florida, this 9th day of June, 1995.

JOHN R. FARRELL

General Master

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 95-126-CIV-MOORE

DRYCLEAN U.S.A., INC., a Nevada Corporation,

Plaintiff,

vs.

JOHN W. RENFROW, Director Dade County Department of Environmental Resources Management, for and on behalf of Metropolitan Dade County,

Defendant.
_____/

OMNIBUS ORDER

THIS CAUSE came before the Court upon (1) Defendant's Motion to Dismiss (DE # 21) and (2) Plaintiff's Motion for a Preliminary Injunction (DE # 3).

THE COURT has considered the Motions, responses, oral argument presented to the Court on March 10, 1995 and March 14, 1995, Chapter 376.3078 of the Florida Statutes, and the pertinent portions of the record, and being otherwise fully advised in the premises, it enters the following Order.

I. Motion to Dismiss

The Court will first address Defendant's Motion to Dismiss. Defendant asserts several arguments in support of his motion to dismiss: (1) there is no true diversity jurisdiction, (2) the Court should abstain because there are pending state court actions which are also addressing the statute in question, (3) the Court is precluded from granting the injunctive relief requested by Plaintiff by the Anti-Injunction Act, and (4) any

ruling made by this Court interpreting the Florida state statute in question will not be binding on the state courts. At the hearing conducted in March, the Court indicated that it was unpersuaded by Defendant's arguments in support of his Motion to Dismiss. The Court remains unpersuaded.

There is diversity jurisdiction between these parties. Plaintiff is incorporated in Nevada and its principal place of business is Ohio. The fact that it conducts extensive business in Florida and that some of its officers and/or directors reside in Florida does not change its principal place of business to Florida.

Defendant makes a number of arguments in favor of abstention in this case. Defendant argues that the Court should abstain according to the tenets of the Pullman abstention doctrine. The Pullman abstention doctrine is inapplicable to the case at bar, however, because there are no constitutional questions presented by this controversy. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643 (1941).

The Younger abstention doctrine is equally inapplicable. Younger abstention applies when there is an ongoing state court case in which issues of state law enforcement are being litigated. Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). In the case at bar, the federal litigation was filed prior to the state litigation, thereby minimizing the comity concerns. Moreover, the pending state case is not about the enforcement of

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state law, but about the enforcement of a county ordinance. Accordingly, Younger abstention does not apply to this case.

Defendant also argues that this Court should abstain from hearing this case based on the Burford abstention doctrine. Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098 (1943). The Burford abstention doctrine applies when there is a complex state regulatory scheme addressing public policy which the state has a significant interest in applying coherently. The Florida Drycleaning Contamination Cleanup Act ("FDCCA") is part of a broad based environmental code addressing safety and environmental issues specific to Florida surface and ground waters. The FDCCA provides, in part, for state-wide enforcement and cleanup mechanisms as they relate to the drycleaning industry. The statute, on its face, is neither complicated nor ambiguous. The reason that the parties are before this Court today is that the rules and regulations which will determine eligibility standards for drycleaners were not promulgated at the time the Act became effective. Retention of jurisdiction by this Court over this case will not jeopardize the State's goals of coherent application of this statute. The State's goals regarding the cleanup of dryclean contaminants have been clearly set forth in the FDCCA. Therefore, any ruling by this Court which applies the FDCCA to the parties before it will aid the State of Florida in establishing coherent policy in this area.

The Anti-Injunction Act is also inapplicable to the case at bar. 28 U.S.C. § 2283 (1948). Plaintiff was not forum shopping; Plaintiff filed its case in federal court before there was litigation in state court. Moreover, the relief requested by the federal Plaintiff is the application of the FDCCA; that the application of the FDCCA might have the effect of barring the state court litigation does not render the Anti-Injunction Act applicable to the case at bar.

Lastly, Defendant argues that it is inappropriate for this Court to proceed since any ruling it will make will not have a binding effect on the Florida state courts. Defendant, perhaps, fails to recognize that while a ruling by this Court may be merely advisory precedent for the Florida state courts, it will have a binding effect on the parties presently before it. Therefore, retention of jurisdiction over the present controversy is not, as Defendant puts it, "a purely academic enterprise." (Def.'s Mot. Dismiss at 7.)

II. Motion for Preliminary Injunction

In its motion for a preliminary injunction, Plaintiff moves this Court to enjoin Defendant from taking any administrative or judicial action against Plaintiff's two contamination sites.[1] Plaintiff argues that the Florida Drycleaning Contamination

[1] The two locations litigated herein are 20355 Biscayne Boulevard, Miami, Florida and 7240 S.W. 88th Street, Miami, Florida.

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Cleanup Act ("FDCCA") precludes Defendant from enforcing its environmental policies against Plaintiff. Plaintiff is entitled to a preliminary injunction if it shows: (1) a substantial likelihood of prevailing on the merits of its claim at trial; (2) a substantial threat of irreparable injury if injunctive relief is denied; (3) the injury to Plaintiff outweighs the harm an injunction may cause to the Defendant; and (4) the injunction will serve the public interest. Fed. R. Civ. P. 65(b). See Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989). See also E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc., 756 F.2d 1525, 1530 n.13 (11th Cir. 1985); BellSouth Advertising & Publishing Corp. v. Real Color Pages, Inc., 792 F. Supp. 775, 780 (M.D. Fla. 1991); Burger King Corp. v. Lee, 766 F. Supp. 1149, 1154 (S.D. Fla. 1991). "[N]o particular quantum of proof is required as to each of the four criteria." Louis v. Meissner, 520 F. Supp. 924, 925 (S.D. Fla. 1981).

A close examination of the language of the statute in question reveals that Plaintiff is unlikely to prevail on the merits of its claim against Defendant. The FDCCA provides in pertinent part:

> (3) Rehabilitation liability -- In accordance with the eligibility provisions of this section, no person who owns or operates, or who otherwise could 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 any person to compel rehabilitation or

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> 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 or the wholesale supplier.
>
> (a) With regard to drycleaning facilities . . . at the time the department adopts rules regulating the operation and maintenance of drycleaning facilities or wholesale suppliers, any contamination by drycleaning solvents at such facilities shall be eligible under this subsection regardless of when the drycleaning contamination was discovered, provided that the drycleaning facility . . .:
>
> 1. Has registered with the department;
>
> 2. Is determined by the department to be in compliance with the department's rules regulating drycleaning facilities or wholesale suppliers, within a reasonable period of time after such rules are adopted . . . .

Fl. Stat. ch. 376.3078 (1994). This Act has been effective as of July 1, 1994. It is undisputed that Plaintiff has complied with the Act insofar as it has been paying its taxes and it has complied with the registration requirements. Plaintiff has not, however, been determined to be eligible for the benefits available under the Act because the regulations which will determine the requirements for eligibility have yet to be promulgated. Plaintiff argues that it should be considered eligible for coverage until it is found to be ineligible. Defendant argues that all drycleaners must be considered ineligible until each can be shown to have satisfied the requirements for eligibility. According to Defendant, therefore, Plaintiff must be considered ineligible until the eligibility

regulations are enacted and Plaintiff successfully satisfies those requirements. The Court agrees with the Defendant.

Section 3 of chapter 376.3078 begins with the conditional language, "[i]n accordance with the eligibility provisions of this section." Therefore, this entire section is applicable only to those drycleaners which have satisfied the eligibility requirements. By its plain language, this section is inapplicable until such time as the eligibility requirements are established. Furthermore, in order to qualify to have its contamination costs paid from the fund into which Plaintiff is admittedly paying, subsection (a) imposes some additional requirements, one of which is that the drycleaner in question "[i]s determined by the department to be in compliance with the department's rules regulating facilities or wholesale suppliers." Fla. Stat. ch. 376.3078(3)(a). Here again, a drycleaner cannot be found to be in compliance with regulations which are non-existent.

The statute itself expressly contemplates a delay between the receipt of benefits under the Act and the effective date of the Act. Section 3 of chapter 376.3078 provides that "[s]ubject to the delays that may occur as a result of prioritization . . . costs shall be absorbed at the expense of the drycleaning fund." Fla. Stat. ch. 376.3078(3). The only logical inference is that during the delays engendered by the prioritization, the costs will not be paid for from the drycleaning restoration fund.

Reading the statute as a whole, the Court finds it unlikely that Plaintiff would be entitled to have its contamination cleanup costs paid for by the drycleaning facility restoration fund until such time as it is determined that Plaintiff is eligible for such benefits. Having found that Plaintiff has failed to demonstrate that it is likely to prevail on the merits of its case, the Court need go no further in its analysis. Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Dismiss is DENIED; and

2. Plaintiff's Motion for Preliminary Injunction is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of February, 1996.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:

Alan M. Grunspan, Esq.
Teresa A. Woody, Esq.
Bruce E. Cavitt, Esq.