

**BOARD OF COUNTY COMMISSIONERS  
AGENDA ITEM SUMMARY**

Meeting Date: March 19, 2008

Division: County Attorney

Bulk Item: Yes xx No    

Staff Contact Person: Bob Shillinger, x3470

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**AGENDA ITEM WORDING:**

Authorization for the County Attorney to make an offer of judgment in the amount of \$100.00 for the purpose of resolving the matter of *O111 LLC v. Monroe County*, CA P 07-858.

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**ITEM BACKGROUND:**

A limited liability company has sued the county for a temporary taking of a property it owns on Key Largo seeking damages for the 1 year period during which the planning department reviewed and ultimately recognized its right to build a ROGO exempt house on the property. Believing the case to be without any legal merit, County legal staff has moved twice to dismiss the case. An offer of judgment, if rejected, would enable the County to recover its attorney's fees expended after the offer is made provided the County ultimately prevails in the case.

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**PREVIOUS RELEVANT BOCC ACTION:** None.

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**CONTRACT/AGREEMENT CHANGES:** N/A

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**STAFF RECOMMENDATIONS:** Approval.

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**TOTAL COST:** \$100.00

**BUDGETED:** Yes x No    

**COST TO COUNTY:** \$100.00

**SOURCE OF FUNDS:** ad valorem

**REVENUE PRODUCING:** Yes     No x **AMOUNT PER MONTH**     **Year**    

**APPROVED BY:** County Atty xx OMB/Purchasing     Risk Management    

**DOCUMENTATION:** Included xx Not Required    

**DISPOSITION:**    

**AGENDA ITEM #**

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR MONROE COUNTY, FLORIDA  
UPPER KEYS CIVIL DIVISION – JUDGE GARCIA

0111 LLC, a Florida Limited  
Liability Company,

Plaintiff,

v.

Case No.: 2007-CA-858-P

MONROE COUNTY, FLORIDA, a political  
subdivision of the State of Florida

Defendant.

\_\_\_\_\_ /

MOTION TO DISMISS AMENDED COMPLAINT

The Defendant, Monroe County, by and through the Monroe County Attorney's Office and the undersigned attorney, respectfully moves this Honorable Court to dismiss the amended complaint filed in the above-styled matter, and in support thereof states as follows:

1. The Plaintiff has attempted to state a claim for a temporary taking by inverse condemnation as a result of an approximately one year delay in the permitting process while the County's planning department considered its request to declare the property exempt from the ROGO ("rate of growth ordinance") process because a house had previously existed on the property prior to the ROGO census date. See ¶¶ 9-16 of the amended complaint.

2. After the planning director initially rejected the Plaintiff's request to recognize the property as "ROGO exempt", the Plaintiff initiated an administrative appeal of the planning director's decision to the Planning Commission. See ¶¶ 12 and 13.

3. Prior to the hearing before the Planning Commission, the planning director reversed his position and agreed to recognize the property as ROGO exempt, thus granting the Plaintiff the administrative relief which it had been seeking. See ¶ 15.

4. The amended complaint alleges no other delay other than the approximately one year period during which the Plaintiff's ROGO exemption request was being considered by County staff. As such, the amended complaint fails to state a claim for a temporary taking as more fully set forth below.

5. In order to state a claim for temporary taking as a result of permitting delays, the Plaintiff must allege that the delay was extraordinary. See, *Wyatt v. U.S.*, 271 F.3d 1090, 1098 (Fed. Cir. 2001).

6. The U.S. Supreme Court has made clear that merely alleging a permitting delay is not sufficient to state a claim for a temporary taking. See, e.g., *Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d, 517 (2002) (rejecting request for rule that all permitting delays are *per se* temporary takings).

7. Florida Courts have followed this rule as well. See, *Leon County v. Gluesenkamp*, 873 So.2d 460 (Fla. 1<sup>st</sup> DCA 2004) (developer must anticipate delays due to moratoria and permit appeals); and *Bradfordville Phipps LP v. Leon County*, 804 So.2d 464 (Fla. 1<sup>st</sup> DCA 2001) (permitting delays are not compensable as temporary takings).

8. Moreover, takings jurisprudence takes into account the level of complexity of the regulatory environment that exists in the particular permitting

process in question. See, *Wyatt, supra*, 271 F.3d at 1098 (Governmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations.)

9. The development process in the Florida Keys is more complicated and far more regulated than the vast majority of the rest of Florida jurisdictions. See, F.S. 380.0552 (Florida Keys Protection Act which establishes the Florida Keys Area of Critical State Concern); see also, *Schrader v. F.K.A.A.*, 840 So.2d 1050 (Fla. 2003); *Monroe County v. Ambrose*, 866 So.2d 707 (Fla. 3d DCA 2002); and *Rathkamp v. Dept. of Community Affairs*, 740 So.2d 1209 (Fla. 3d DCA 1999).

10. The County's land development regulations contemplate a person desiring to build a new residence on vacant land not being able to obtain a "ROGO allocation" for a period of four years and thus create an administrative relief process so as to avoid a taking. See, e.g., M.C.C. § 9.5-122.2(f). Clearly if the regulatory scheme in the County contemplates a delay of over four years for those seeking to build new residences, the one year period alleged by the Plaintiff falls far short of an "extraordinary delay."

11. It is within this undisputable context that the Plaintiff's claim for a one year permitting delay must be judged. Given the regulatory context for development in the Florida Keys, there are no possible circumstances under which the Plaintiff can set forth a claim for a temporary taking based on a permitting delay lasting one year, as alleged in the amended complaint. In fact,

the undersigned was unable to find a permitting delay case in which a one year delay was found to be a temporary taking, regardless of the regulatory environment, let alone the complex one here in the Florida Keys of Area Critical State Concern.

12. Moreover, in a case that is strikingly similar to the facts alleged in the amended complaint, the Third DCA held that a local government is not liable to a property owner for damages under temporary taking theory or a due process theory just because the property owner ultimately prevails in his or her quest for a building permit over the objections or opposition of the permitting entity. *Mandelstam v. City of South Miami*, 685 So.2d 868 (Fla. 3d DCA 1996). The Court quoted the U.S. Supreme Court's observation that the Constitution does not "impose the utopian requirement that enforcement action may not impose any costs upon the citizen unless the government's position is completely vindicated." *Id.*, at 869 (*quoting Jacobi v. City of Miami Beach*, 678 So.2d 1365 (Fla. 3d DCA 1996) and *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172, 204-5, 105 S.Ct. 3108, 3126, 87 L.Ed.2d 126, 150 (1985)).

13. In the *Mandelstam* case, the claim for a temporary taking based on the permitting delay ran from 1986 when the land owners first applied for a permit until the permit was issued in 1992 for a total of six years. See, *Mandelstam v. City of South Miami*, 539 So.2d 1139 (Fla. 3d DCA 1988) ("*Mandelstam I*," a second tier certiorari proceeding challenging the City's denial of the permit first sought in 1986, which the Circuit Court had upheld after a first tier certiorari

review) and *Mandelstam II, supra*, 685 So.2d at 869 (“Mandelstams subsequently filed suit against the city . . . seeking damages resulting from what the Mandelstams claimed was the temporary taking of their property from the time of their original application for the permit until the time when the permit was issued in 1992”).

14. In *Mandelstam*, the land owners appealed their initial permit denial first to the Circuit Court and then to the Third DCA before obtaining approval for the permits they desired. See, *Mandelstam I, supra*. In the instant matter, the plaintiffs achieved success far earlier in the process than the landowners in *Mandelstam*, having never even had the need to exhaust their administrative appellate remedies through an appeal to the Planning Commission.

15. While it may be an obvious point, it is important to note that the City of South Miami is not located within the Florida Keys Area of Critical State Concern so that regulatory environment for development there is not as complex nor highly regulated as that of Monroe County.

16. Accordingly, it must necessarily follow that if the Third DCA has held that a six year permitting delay in Miami Dade County does not rise to the level of a temporary taking, certainly the one year delay claimed by the Plaintiff cannot set forth a claim for a temporary taking in Monroe County, which is within the highly regulated Florida Keys Area of Critical State Concern.

17. Therefore, under no circumstances can the one year permitting delay alleged in the amended complaint be seen as “extraordinary” and thus rise to the level of a temporary taking.

WHEREFORE, the Defendant Monroe County respectfully requests that the Court enter an Order:

- a. Dismissing the amended complaint with prejudice;
- b. Any other relief deemed just and proper by the Court.

Respectfully Submitted,

MONROE COUNTY ATTORNEY'S OFFICE  
1111 12<sup>th</sup> Street, Suite 408  
Key West, FL 33040  
(305) 292-3470  
(305) 292-3516 (fax)  
Attorney for the Defendant

By: \_\_\_\_\_  
Robert B. Shillinger  
Chief Assistant County Attorney  
FBN: 058262

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Gus H. Crowell, P.A., Counsel for Plaintiff, P.O. Box 777, Tavernier, FL 33070, this \_\_\_\_\_ day of February, 2008.

\_\_\_\_\_  
Robert B. Shillinger, FBN: 058262

IN THE CIRCUIT COURT OF THE  
16TH JUDICIAL CIRCUIT IN AND  
FOR MONROE COUNTY, FLORIDA

CASE NO. 2007-CA-858-P

0111, LLC. a Florida Limited Liability  
Company,

Plaintiff,

vs.

MONROE COUNTY, FLORIDA

Defendant.

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**AMENDED COMPLAINT**

COMES NOW Plaintiff, 0111, LLC., John Sorensen, Manager, by and through the undersigned counsel, files this Complaint against Monroe County, Florida, a political subdivision of the State of Florida, and as grounds alleges as follows:

1. Plaintiff is a Florida Limited Liability Company doing business in Monroe County, Florida.
2. Monroe County is a political subdivision in the State of Florida,
3. This is an action for damages in excess of \$15,000.00, which is otherwise within the jurisdiction of the Circuit Court in and for Monroe County.
4. At all times material to the allegations of this complaint the Plaintiff was the equitable and/or legal owner of certain real property located on Key Largo, Monroe County, Florida described as follows:

Lot 4, Block 14, SUNSET COVE, according to the Plat thereof, as recorded in Plat Book 1 at Page 165 of the Public Records of Monroe County, Florida.

5. The property that was the subject of the facts alleged in this action is located in the Upper Keys, Monroe County, Florida. This property was originally developed as a single family house on a platted lot in a recorded subdivision.

**COUNT I – INVERSE CONDEMNATION**

6. Plaintiff re-alleges and adopts herein, the foregoing paragraphs.

7. The Plaintiff, with profit backed expectations, properly applied to the Defendant to construct a replacement single family home to replace a pre-existing home, originally developed and constructed in the mid 1960s. This original single family home was destroyed by fire.

8. The only feasible, possible and economically viable use for this property is and was as a single family home.

9. The replacement of previously developed property was originally not subject provisions of the Monroe County Rate of Growth Ordinance (ROGO). As a pre-existing use, this house should have been entitled to grandfather status as to any new regulations making aspects of the property non-conforming to the then current regulations.

10. The Monroe County Planning Department adopted an "Administrative Interpretation" (Administrative Interpretation 03-108) which placed additional requirements on pre-existing development for it to be free of the effects of the ROGO Ordinance. This administrative interpretation required that a given development must have physically been present on a date when a population census was taken in the early 1990s in order for it to be considered legally pre-existing. On the date of the census, this house was previously destroyed by fire. This regulation, as written and/or

as applied to Plaintiff's property, took away the building rights of the subject property and any use thereof thereby making it economically worthless.

11. The Defendant decided that the Development rights were lost for this property and that any reconstruction was subject to (ROGO) and also any such construction was subject to newer building, zoning and density regulations.

12. The newer, current building regulations at that time prevented any development on this platted lot since the zoning density had become more restrictive and required two acres of property for a single family home. The house had been on a platted subdivision lot, which is far less than two acres in size and therefor the lot would not useable is the then current regulations were applied to it.

13. The Defendant refused to allow the replacement of the previously existing single family home. This took away and destroyed the only use and economic value of the property. This taking was for the stated public purposes of: a) delaying construction and slowing development via the ROGO ordinance, b) application of more recent and restrictive zoning ordinances and density requirements, to regulate development, prevent or decrease development, decrease density and to preserve property in its native condition and c) public policy reasons.

14. The Defendant, via the Administrative Interpretation 03-108, decided that the established Development rights were lost for this property and that any reconstruction was subject to (ROGO) and also any such construction was subject to newer building, zoning and density regulations.

15. Ultimately, after a significant period of time passed, the defendant allowed the house to be replaced. During the period that Plaintiff was prevented from replacing

the home, the property was subjected to a regulatory taking for the public purpose stated above and its value totally destroyed.

16. The Plaintiff has suffered damages by virtue of loss of all economic and beneficial use of the property for the period of wrongful denial of development rights from at least February, 2006 to February 13, 2007. Plaintiff also suffered special damages by virtue of; a loss of use, rents, profits, carrying costs, increased construction costs and a diminution of market value over the period of wrongful delay.

17. The Plaintiff has also incurred substantial attorneys' fees and professional fees during the appeal process, and resolution of the Defendants actions. These fees and related costs now constitute consequential damages.

18. Plaintiff expended substantial sums of money in pursuing an administrative appeal of the Defendant's wrongful refusal to the Monroe County Planning Commission. The Defendant decided to recognize Plaintiff's development rights for replacement of the home before the administrative appeal was heard by the Planning Commission. The substantial Appeal fees charged by Defendant were never refunded.

19. During the period of delay, the Plaintiff was deprived of all use of the property which was only useable as a single family home. Plaintiff suffered a loss of use, rents, profits, carrying costs and a diminution of value and increased construction costs over the period of wrongful delay. This deprivation constitutes a taking of the property (inverse condemnation) for which the Plaintiff is entitled to compensation.

20. All conditions precedent to bringing this suit have been met, waived or satisfied.

21. The Plaintiff has been required to retain the undersigned counsel, and has


agreed to pay him a reasonable fee for his services. Applicable Florida Statutes and case law provide for Plaintiff to recover their attorney fees.

22. The Plaintiff demands a Jury Trial as provided by law.

Wherefore, the Plaintiff demands judgment for damages together with costs and reasonable attorneys' fees of this action pursuant to the contract and for all such other relief as is just and proper under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to, Robert B. Shillinger, Esq., Asst. County Attorney, P.O. Box 1026, Key West, Florida 33041-1026 this 7<sup>th</sup> day of February, 2008.

  
GUS H. CROWELL, ESQUIRE  
Florida Bar No. 280781  
GUS H. CROWELL, P.A.  
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