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Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure

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I. Introduction

If maps and boundaries came to life, then the drive down the 113-mile stretch of the Overseas Highway for the tourists who fuel the local economy would reveal the jurisdictional odyssey that is Monroe County. The Florida Keys were designated as an Area of Critical State Concern (ACSC) by the Florida Legislature in 1979.[2] Its landmass includes over 13 state and federal parks, and habitat for over 30 land and water species protected under the Endangered Species Act (ESA).[3] "Federal and State government involvement in Monroe County land use planning and decision-making is extensive due to the presence of these aquatic and terrestrial resources that are of regional and national significance."[4]

All of Monroe County is considered a coastal floodplain subject to the Federal Emergency Management Administration's (FEMA) National Flood Insurance Program (NFIP) requirements.[5] The jurisdictional interplay within the County was highlighted by the *Florida Key Deer* litigation in federal court. The litigation was commenced in 1990 by conservation groups against FEMA, seeking to compel the agency to comply with its obligations under Section 7 of the ESA to consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that its administration of the NFIP would not jeopardize the continued existence of the Key Deer and other endangered species.[6] The *Key Deer* plaintiffs successfully convinced the court of the causal relationship between the availability of federal flood insurance and new development, and obtained an injunction enjoining FEMA from providing any insurance for new development in the suitable habitat of listed species pending further consultation with USFWS.[7] In a later inverse condemnation valuation trial involving property that was ineligible for federal flood insurance, the Director of the Monroe County Growth Management Division testified that the impacts of the injunction affecting nearly 50,000 parcels were monumental in halting development.[8] The injunction remained in effect until September 13, 2012, after the County agreed to implementing new procedures for limiting and approving development in endangered species habitat.[9]

Despite its regulatory complexities, the Florida Keys still beckon those searching to live out their favorite Jimmy Buffett song in new primary and second homes. With only one road in and out of the island chain, however, not everyone can stay or play at the same time due in part to hurricane evacuation concerns, which were recently heightened by Hurricane Irma. In order to provide for adequate hurricane evacuation clearance time, the State limits the number of residential dwelling units and non-residential floor area that may be built each year. Residential property owners compete for the limited number of building allocations through the point-based Rate-of-Growth Ordinance (ROGO) that was adopted by the County in 1992.[10]

Not everyone who wants a ROGO allocation gets one, and the jurisdictional interplay of federal, state, and local regulations in Monroe County has dashed dreams and given rise to numerous inverse condemnation actions against the County.[11]

This article examines some of the defenses and strategies available to a local government that has been sued for a regulatory taking where state and federal regulations are also at play. It includes discussion of issues at each phase of an inverse condem-

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nation suit, including: ripeness, joinder and impleader, liability determinations and apportionment, and valuation. The article is intended to assist the local government in ensuring that liability and damages are equitably apportioned to prevent the cost of the protection of nationally significant resources from falling on the backs of local taxpayers.

II. Pre-Trial Issues

A. Ripeness

A local government's land use regulations may try to complement or effectuate the intent of state and federal statutes such as the Clean Water Act (CWA) or ESA. In some cases, as with Monroe County, such regulations may be compelled by FEMA as a condition for the local government's continued participation in the NFIP.[12] A frustrated landowner who is unable to develop may be eager to obtain his first "no" to ripen a taking claim and enter the courthouse door. A local government should be cautious not to stand in the shoes of the state or federal government and substitute itself as the governmental entity that first says "no."

A review of a regulatory taking claim begins with determining whether a facial or as-applied taking has been alleged "because the dates of those events will fix the start of the limitations period in relation to the date of the Landowners' filing suit. There is an important distinction between the two types of claims and each raises different ripeness and statute of limitations issues."[13] "The ripeness requirement . . . does not apply to facial takings, as the mere enactment of the regulation constitutes the taking of all economic value to the land."[14]

For as-applied taking claims "[t]o be ripe for judicial review the Landowners must show a final determination from the government as to the permissible use, if any, of the property. If there has not been a final determination, the Landowners' attempt to seek redress from the court is premature."[15] "The ripeness requirement is usually met when the property owner files an application for a development permit with the local land use authority and receives a grant of denial of the permit."[16] Although there is a futility exception to the decisional finality requirement, that exception can only apply where at least one meaningful application has been filed.[17]

If an as-applied taking claim is alleged, the local government should examine whether development approval would be required from other levels of government. Where the plaintiff's claim is not ripe for failure to obtain a decision from another level of government, the local government should assert ripeness as an affirmative defense and tee up a motion for summary judgment.

Supporting authority for local governments on the issue of ripeness and liability includes *City of Riviera Beach v. Shillingburg,*[18] and *Karatinos v. Town of Juno Beach*.[19] In *Shillingburg*, the landowners sought permission to fill submerged lands running between Singer Island and the intracoastal waterway, described as "mangroves and special estuarine bottom lands . . . protected by federal, State and local agencies involved in the wetlands preservation."[20] The owners sued the City in 1992, challenging the City's comprehensive land use plan as a regulatory taking of its submerged lands. The Fourth District Court of Appeal (4th DCA) reversed the grant of summary judgment against the City, holding that that landowners' claims were not ripe for review.

In pertinent part, the *Shillingburg* court explained "there is an additional sound reason for requiring landowners to take the necessary steps and apply for the use that they claim is an economically viable use of their property. Any further development would necessarily involve filling the submerged lands, and thus, requests for an amendment to the plan and a request to fill the submerged lands would not solely be the decision of Riviera Beach but would require approval from state agencies, including the DER."[21] Continuing, the court went stated that "Riviera Beach should not be held responsible in damages for a regulatory taking where it has not unequivocally prevented all economically viable use of the property, especially where the decision as to the intended uses is not solely its to make and where it appears that other agencies may indeed be responsible for opposing any further development."[22]

In *Karatinos*, the landowners of unimproved oceanfront property sued the Town of Juno Beach and the Florida Department of Natural Resources (DNR) in 1981 contending that the landowners were being deprived of all use of their property.[23] After DNR purchased their property in 1991 and was dismissed from the case, the landowners continued their suit arguing the town was liable for a temporary taking from 1982, when the town first turned their project down, to 1985, when the town approved two units.[24]

The town essentially argued that it could not be held liable for damages because DNR's regulations trumped the town's, and those regulations would not have permitted development. At trial, "a coastal engineer with DNR who administered Florida's coastal construction regulatory program during the years involved here, testified that DNR would never have permitted any building seaward of the Coastal Construction Control Line on this property."[25]

The trial court "found as a matter of fact that the Karatinos would never have gotten approval from DNR . . . and that accordingly the Karatinos' project 'was doomed, regardless of the Town's action.'"[26] The trial court therefore found that the town ordinance was not the result of owners' damages, and the appellate court affirmed.

In cases in which land development would also require state or federal approval, one possible strategy for the local government to use in avoiding takings liability is to require that the State or federal approval be obtained before the local permit application is decided. The Town of Juno Beach employed this strategy, for example, in its setback variance process that was available to the Karatinos.[27] The strategy is not without risk, however. The landowner could obtain state or federal permit approval, in which case the decision of whether to prohibit development, as well as possible takings liability if development is prohibited, would fall back on the local government. Additionally, the landowner could be caught in "a classic Catch-22" if the state or federal authority refuses to process an application until local approval is obtained, as the DNR did in *Karatinos*.[28]

A variation of this strategy was also employed in *Clay v. Monroe County.*[29] In this case, a group of landowners on Big Pine Key filed an action against

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the county seeking a writ of mandamus to compel the issuance of building permits, as well as for a declaratory judgment and damages for permanent and temporary takings of their land, owing to the withholding of building permits due to concurrency requirements. The trial court ruled in favor of Monroe County. While the case was pending appeal, Monroe County agreed to issue the permits, with the following condition: "If required, each property owner shall obtain a letter of coordination from the U.S. Fish and Wildlife Service and submit it to the Building Department prior to the issuance of the building permit, unless the Habitat Conservation Plan for Big Pine Key is approved and eliminates this requirement."[30] The County then argued that the mandamus issues in the appeal were moot. The owners disagreed that the County's decision rendered their action moot, and asked the court to direct that a writ of mandamus be issued.[31]

In declining to grant the relief the owners sought, the Third District Court of Appeal (3rd DCA) stated that the condition was "appropriate," "derives from the federal agency's jurisdiction under federal law," and that the court could not "override the jurisdiction of the U.S. Fish and Wildlife Service . . .."[32]

B. Necessary and Indispensable Parties; Third-Party Practice

In addition to asserting a ripeness defense where development approval would require a decision from another governmental entity, a local government should consider asserting the landowner's failure to join the other governmental entity as an "indispensable party" as an affirmative defense. "An 'indispensable party' is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder."[33] Indispensable parties must be included in the litigation, and if they are not added under Fla. R. Civ. P. 1.250(c), then the action is subject to dismissal.[34]

Local governments should not be held liable for a regulatory taking where the regulation is imposed by the state or federal government.[35] If a higher level of government imposed a confiscatory regulation on the local government, then another option available to the local government is to file a third-party complaint against the higher governmental entity. Third-party practice, also referred to as impleader, was introduced in 1965 by Florida Rule of Civil Procedure 1.180. This rule states that a defendant may assert a claim against "a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, and may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of plaintiff's claim."[36]

In the inverse condemnation cases of C*ollins* and *Galleon Bay*, for example, Monroe County brought in the State of Florida as a third-party defendant.[37] The property at issue in *Galleon Bay* involved 14 platted lots along the Big Spanish Channel that surrounded a 2.05 acre landlocked lake.[38] The lots were zoned Commercial Fishing Village (CFV).[39] "The property owner, over the course of several decades, proceeded with numerous efforts to improve its land including, but not limited to, having its subdivision platted, having the zoning district changed, extensively negotiating with the County, and revising its plat."[40] In 2002—after failing to obtain allocations for its lots under ROGO—Galleon Bay filed its inverse condemnation action against the County. Galleon Bay's "odyssey of disappointment", which caused the 3rd DCA to mandate that the trial court find liability in the landowner's favor, included a denial by the Florida Department of Environmental Regulation ("DER") of the owner's application for a permit to dredge a channel from the lake to the Florida Bay, and an appeal of the County's approval of its plat by the Florida Department of Community Affairs.[41] The County cited all of these facts in its third-party complaint against the State for indemnification, subrogation, and contribution.[42] In a nutshell, the County's third-party complaint argued that ROGO—the offending regulation alleged to have taken the property—was imposed by the State in its exercise of regulatory oversight pursuant to the County's ACSC designation.

While joinder and impleader can be useful tools for getting other potentially liable entities at the table to assist in litigation and share in the apportionment of damages, governmental entities cannot simply point the finger at one another to avoid liability.[43] In *Lost Tree Village*, the landowner sought to develop a residential community upon its islands and submerged lands.[44] Development had been blocked, however, because the City of Vero Beach had an ordinance prohibiting the construction of a new bridgehead and the Town of Indian River Shores had an ordinance prohibiting residential development without bridge access.[45] Because the property at issue was located partially within the Town and partially within the City, the landowner could not build a bridge and, therefore, could build no houses.[46] The landowner's taking claim therefore relied "upon the combined effect of the City's 'no bridgehead' ordinance with the Town's 'no development without bridge' ordinance, which effect deprives it from using its property in an economically viable manner."[47] The City and Town pointed fingers, "each argu[ing] that because their respective regulations do not solely deprive Lost Tree from using its property, neither can be liable for payment of compensation."[48]

The 4th DCA rejected their argument that liability could not be based on the combined effect of the City's and Town's regulation. The court cited *Ciampetti v. United States*, for the proposition that "[a]ssuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking."[49] "Multi-government action, of which the combined effect deprives a landowner, constitutes a taking: 'As a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights.... Government decisions are not produced in a vacuum.')."[50] The court concluded that "[w]hile there may be issues of damage apportionment in such a case, that does not bar the claim and permit the taking without compensation. The Constitution entitles the landowner to a remedy."[51]

A local government with more stringent development regulations than the governmental entity it is seeking to join should be cautious of

Golf Club of Plantation v. City of Plantation.[52] In that case, the landowner purchased 214 acres of "property with the expectation that it could be converted to a single-family residential usage."[53] "Approximately half of it [was] being used as a golf course, with the remaining half lying undeveloped."[54] The property "was designated commercial recreation under the Comprehensive Land Use Plans of both the City and Broward County, permitting uses such as golf courses, tennis clubs, sports arenas, marina, and dog or horse racing facilities."[55] The landowner filed its inverse condemnation action against the City after the City denied its applications to amend the land use designation to low residential use to permit rezoning of the property and the development of a single-family residential subdivision.[56]

"The City moved for summary judgment, arguing that it could not be liable for taking Owner's property because Owner had failed to obtain the County's approval to amend its land use plan and that the Owner had failed to sue the County before the expiration of the statute of limitations."[57] The trial court granted the City's motion for summary judgment, holding in part that the County was an indispensable party.[58]

On appeal, the Fourth DCA held that the County was not an indispensable party, agreeing with the Owner that "it is only the City against whom an inverse condemnation claim could or should be made."[59] The court explained: "There is no suggestion by the City that its policy of barring all conversions of golf courses to any other uses has been imposed on it by Broward County. In fact, the record shows that the County has no such policy. As Owner pointed out at oral argument, if the City approved an alternative use that complied with the County's comprehensive plan, there is a strong probability that County would approve the City's change of its own plan."[60]

III. The Liability Phase

"The standard of proof for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations."[61] If an as-applied taking is determined to be ripe and proceeds to a liability determination, the local government should ensure that regulations imposed at other levels of government are taken into consideration when making the ad-hoc *Penn Central* inquiry.

A. Investment-Backed Expectations

"Consideration of expectations is central to resolution of a regulatory takings claim. . .. The lack of a reasonable investment-back expectation is determinative of a takings claim."[62] An unreasonable investment-backed expectation cannot sustain a regulatory taking claim.[63] Lack of reasonable investment backed-expectations proved fatal to the taking claims of Florida Keys developers in *Good* v. *United States*[64] and *Collins v. Monroe County*.[65]

Based on *Good*, if regulation of property is pervasive at all levels of government, the local government can argue that it is unreasonable for a developer to purchase the property and continue making an investment in seeking local development approval. Mr. Good sought to develop his Lower Sugarloaf Key property that contained salt

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and freshwater wetlands and "provided habitat for several endangered species, including the Lower Keys marsh rabbit, the mud turtle and silver rice rat."[66] The property was heavily regulated at both the County and State levels, and several negotiations, development plan modifications, permit denials, and appeals ensued.[67] There was a flurry of activity at the federal level as well, with USFWS playing a role in the permitting decision pursuant to its obligations under the Fish and Wildlife Coordination Act (FWCA) of 1934,[68] and the later adopted ESA. In 1994, "the Corps denied plaintiff's 1990 application on endangered species grounds."[69] Mr. Good, who remains something of a Florida Keys legend, was not a happy man and filed suit against the Corps. He alleged that the Corps' denial of his 1990 permit application to dredge and fill wetland and access navigable waters resulted in a taking.

In determining if Mr. Good had reasonable investment-backed expectations, the court noted that (a) his initial purchase investment was predated by "pervasive federal and state regulation" of "ecologically sensitive areas" such as his property (b) by the time he chose to invest in development, the complained of regulation was already in place.[70] These facts proved fatal to Mr. Good's claim. The court explained that "[t]he reasonable investment-backed expectations factor of the *Penn Central* test properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime. In part, the rationale for this rule is that one who invests in property with the knowledge of the restraint assumes the risk of economic loss."[71] *Good* stated that "state and local restrictions must be considered in determining the presence or absence of reasonable investment-backed expectations to engage in the proscribed use."[72] The court further stated that "in a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset when development is restricted or proscribed." The court concluded that "the pervasiveness of the regulatory regime at the time plaintiff purchased Sugarloaf Shores deprives him of a reasonable expectation to effect his development plans."[73]

In addition to examining the application of state and federal regulations and if it was objectively reasonable for the landowner to purchase the property and invest in it notwithstanding these regulations, the actual efforts of the landowner must be examined. While this is important to the issue of ripeness and whether the landowner has obtained final decisions from all levels of government, it is also important to the issue of whether the landowner can demonstrate an investment-backed expectation. For example, if development of the property would require a Section 404 permit under the Clean Water Act (CWA) or an Incidental Take Permit (ITP) under the ESA, but the landowner has not made the necessary applications, then the local government could argue that this demonstrates that the landowner has no real investment-backed expectation.

In *Collins*, the failure of landowners to "take meaningful steps toward the development of their respective properties, or seek building permits, during their sometimes decades-long possession of their properties" proved fatal to their as-applied regulatory taking claims.[74] The 3rd DCA stated earlier that "[i]t would be unconscionable to allow the Landowner to ignore evolving and existing land use regulation under circumstances when they have not taken any steps in furtherance of developing their land."[75] Whether the landowners took steps to develop their property is an inquiry under the investment-backed expectations prong of *Penn Central*. The *Collins* court clarified: "Here, the evidence presented at trial showed relatively passive landowners who took minimal action towards the improvement or development of their respective properties and invested little into the development other than their initial purchase costs. Under these facts, the trial court correctly found in favor of the appellees under the reasonable investment-backed expectation prong of *Penn Central.*"[76] The failure of the landowners to take steps to develop their property was also fatal to the landowners' claims in *Beyer*.[77]

B. Economic Impact

The economic impact prong of *Penn Central* requires evidence "on the change in fair market value of the subject property caused by the regulatory imposition."[78] This is done by comparing, as of the alleged date of taking, (a) the fair market value (FMV) of the subject property *with* the offending regulation ("Scenario A") and (b) the FMV of the subject property *without* the offending regulation ("Scenario B").

The key for the local government in litigating the economic impact prong of *Penn Central* is to ensure that the landowner is not attempting to hold the local government liable for any diminutions in FMV that are attributed to regulations other than the one alleged to have caused the taking. Through discovery, the local government must carefully examine the landowner's appraisal evidence that is necessary to demonstrate an economic impact, and ensure that the landowner's appraiser properly considered state and federal regulations that would apply to the use valued under both Scenarios A and B, and that none of those regulations were improperly disregarded. The purpose of the economic impact prong—to isolate the percentage in the diminution in FMV caused by the offending regulation—would be thwarted if Scenario B also assumed state and federal regulations did not apply to development. Their exclusion would have the effect of artificially inflating the value of the use under Scenario B, and thereby the impact of the local regulation being tested.

If the landowner wishes to disregard an applicable state or federal land development regulation under Scenario B, then that landowner should properly allege that the regulation also contributed to the taking, and be forced to join the agency responsible for the regulation as a party to the litigation. This would help minimize the local government's liability and damages exposure.

As a matter of policy, local taxpayers should not shoulder the burden of protecting resources that are of regional or national importance. The cost of protecting such resources should be spread out at the state and national levels. This is consistent with the design of the Fifth Amendment, which is to avoid having "some

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[79]

IV. Valuation Phase

If a local government is found liable for a regulatory taking and proceeds to the valuation stage, it will still want to ensure that federal and state regulations are accounted for, and that their impact is not excluded, which would have the effect of inflating the fair market value of the property at issue, and therefore, the compensation paid by the local government.

Prior to a valuation trial, the local government may want to file a motion in limine to prohibit the introduction of any appraisal evidence that does not properly consider applicable state and federal regulations. In *Galleon Bay*, for example, the County filed a motion in limine seeking to prohibit the landowner from presenting any "[v]aluation of the property absent any regulation other than ROGO," which was the County's regulation found to have taken the property.[80] The motion was filed because discovery and previous motions indicated that Galleon Bay sought to introduce an appraisal that did not properly consider application of the ESA and USFWS's opposition to residential development (the alleged highest and best use being valued by Galleon Bay's appraiser), nor did it consider regulations prohibiting the issuance of federal flood insurance because of the property's location in a unit of the CBRS.

Galleon Bay, in fact, filed its own motion in limine in which it sought "to exclude any statement, evidence, or comment that suggests the [ESA] or any federal regulations that protects endangered or threatened species or their habitat is relevant to the valuation or the payment of just and full compensation."[81]

The trial court denied Galleon Bay's motion in limine but granted the governments'. Specifically, the court held that "[a]ny appraisal of the subject property as of [the date of taking], introduced into evidence or testified to must consider all applicable federal, state and local regulations other than [ROGO], which is the regulation alleged and found to have taken the property."[82] The trial court's decision is currently on appeal in the 3rd DCA.[83]

The trial court's decision is consistent with *Palazzolo v. Rhode Island*.[84] The Supreme Court in that case addressed the "concern . . . that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged."[85] The Court deemed this "a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit development."[86] The Court clarified, however, that "[t]he mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value [. . .]—an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations."[87]

V. Conclusion

Local governments are often the first line of defense in protecting natural resources. In fulfilling this obligation to provide for the welfare of their citizens, as well as satisfying State and federal mandates, local governments will continue to be subject to inverse condemnation actions by landowners within their jurisdictions. In accounting for State and federal regulations, however, there are defenses and strategies available to the local government to minimize its liability and damages exposure, and to ensure that the costs of protecting natural resources are equitably spread with the benefit.

Endnotes

1 Mr. Howard is an Assistant County Attorney in the Monroe County Attorney's Office and a member of the Florida Bar.
2 Monroe County, *Year 2030 Comprehensive Plan Policy Document*, 1 (2016) (citing Section 380.0552, F.S.).
3 *Id.*
4 *Id.*
5 *An Examination of FEMA's Limited Role in Local Land Use Development Decision, Hearing Before the House Committee on Transportation and Infrastructure* (2016) (Testimony of Heather Carruthers)
6 *Fla. Key Deer v. Stickney*, 864 F. Supp. 1222 (S.D. Fla. Aug. 25, 1994) ("Key Deer I");
7 *Fla. Key Deer v. Brown,* 364 F. Supp. 2d 1345 (S.D. Fla. Mar. 29, 2005) ("Key Deer II"); *Fla. Key Deer v. Brown*, 365 F. Supp. 2d 1281 (S.D. Fla. Sept. 12, 2005) ("Key Deer III").
8 *Galleon Bay v. Monroe County* (Trial Tr. Vol. 5, 497, Feb. 8, 2016.)
9 Hurley Rev. Aff. (July 7, 2014), filed in *Galleon Bay v. Monroe County*, Case No. CAK-02-595 (Fla. 16th Jud. Cir.).
10 Monroe County, Florida Ordinance 16-1992 (June 22, 1992).
11 *See, e.g., Clay v. Monroe County,* 849 So.2d 363 (Fla. 3rd DCA 2003); *Bauknight v. Monroe County,* 994 So.2d 362 (Fla. 3rd DCA 2008); *Sutton v. Monroe County,* 34 So.3d 22 (3rd DCA 2009); *Emmert v. Monroe County,* 83 So.2d 703 (3rd DCA 2012); *Galleon Bay v. Monroe County,* 105 So.3d 555 (Fla. 3rd DCA 2012); *Collins v. Monroe County,* 118 So.2d 872 (Fla. DCA 2013).
12 "The NFIP allows FEMA to make federal flood insurance available only in those areas where the appropriate public body of the community has adopted adequate land use regulations for its flood-prone areas.. . . Monroe County . . . has in fact adopted such a land-use ordinance so that it may receive the benefits of the NFIP as a regulated community." *Fla. Key Deer*, 864 F.Supp. at 1229.
13 *Collins v. Monroe County*, 999 So.2d 709, 713 (Fla. 3rd DCA 2008) ("A facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owners of all reasonable economic use of the property.. . . In an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact of the regulation on a particular parcel of property.")
14 *Lost Tree Village Corp. v. City of Vero Beach,* 838 So.2d 561, 570 (Fla. 4th DCA 2002) (citing *Glisson v. Alachua County,* 558 So.2d 1030, 1036 (Fla. 1st DCA 1990)).
15 999 So.2d at 715 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186-94, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985))
16 *Collins,* 999 So.2d at 716 (citing *Glisson v. Alachua County*, 558 So.2d 1030, 1036 (Fla. 1st DCA 1990).
17 *See Lost Tree Village Corp v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002); *Tinnerman v. Palm Beach County*, 641 So.2d 523 (Fla. 4th DCA 1994).
18 659 So.2d 1174 (Fla. 4th DCA 1995).
19 621 So.2d 469 (Fla. 4th DCA 1993).
20 *Shillingburg*, 659 So.2d at 1178.
21 *Id.*
22 *Id.*
23 *Karatinos*, 621 So.2d at 470 ("Their claim against DNR was for inverse condemnation, and their claim against the town was for declaratory relief and damages pursuant to 42 U.S.C § 1983.")
24 *Id.* at 470-471.
25 *Id.* at 471.
26 *Id.*
27 *Id.* at 470 ("The town setback ordinance had a procedure for obtaining modification; however one of the requirements was approval from DNR.")
28 *Id.* ("The Karatinos then filed an application with DNR for permission to build over the Coastal Construction Control Line, but DNR refused to process the application until the Karatinos received approval from the town. A classic Catch-22.").

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29 *Clay,* 849 So.2d 363 (Fla. 3rd DCA 2003).
30 *Id.* at 365.
31 *Id.*
32 *Id.*
33 *State, Dept. of Health & Rehabilitative Services v. State*, 472 So. 2d 790 (Fla. 1st DCA 1985).
34 Fla. R. Civ. P. 1.140(b) provides that the pleader may raise the defense of failure to join indispensable parties by motion to dismiss rather than in a responsive pleading. The motion must be made before the pleading. However, if the facts supporting the motion are not apparent in the allegation of the complaint, then a motion to dismiss for failure to joint an indispensable party may not be appropriate. Under such circumstances, the matters should be raised as an affirmative defense in the answer. *See LeGrande v. Emmanuel*, 889 So.2d 991 (Fla. 3rd DCA 2004) ("Although Rule 1.140 certainly provides that the failure to join indispensable parties may be raised by motion, we believe that the question of whether [there] are indispensable parties to this suit would be better raised as a matter of an affirmative defense in an answer.. . . That is because on a motion to dismiss, the trial court's function is to determine whether the allegation contained in the four corners of the complaint state a cause of action.. . . Unless affirmative defenses appear on the face of the complaint, they may not be considered on a motion to dismiss.").
35 *See Good v. United States*, 39 Fed. Cl. 81, 104, n. 43 ("Plaintiff does not argue here that the state and county restrictions were mandated by the federal regulatory regime. Where the state has effected the alleged taking action under order of the federal government, liability will rest, if at all with the federal government."); *Golf Club of Plantation v. City of Plantation*, 847 So.2d 1028 (Fla. 4th DCA 2003) ("There is no suggestion by the City that its [regulation] has been imposed on it by Broward County."); *Hendler v. United States*, 952 F.2d 1364, 1379 (Fed. Cir. 1991) (holding that takings liability for the state installation of groundwater monitoring wells would properly rest with the federal government where the state acted under federal order.")
36 Fla. R. Civ. P. 1.180.
37 *Galleon Bay v. Monroe County*, 105 So.3d 555, 563-564n (Fla. 3rd DCA 2012) ("In May 2002, while it was pursuing administrative relief, Galleon sued the Board of County Commissioners ("BOCC") for inverse condemnation. The State of Florida was later sued as a third-party defendant."); *Collins v. Monroe County*, 118 So.3d 872, 874 (Fla. 3rd DCA 2013) ("In 2004, the Landowners filed an inverse condemnation action against the County "seeking just compensation for the alleged permanent constitutional taking of their property." The County, in turn, filed a third-party action against the State of Florida.") (internal citation omitted).
38 *Galleon Bay,* 105 So.2d at 557-558.
39 *Id.* at 558.
40 *Collins*, 118 So.3d at 875 (citing *Galleon Bay,* 105 So.3d at 555–61.)
41 *Galleon Bay,* 105 So.3d at 557-558.
42 "A claim for indemnification, subrogation, or contribution must be brought as part of any third-party action under [Fla. R. Civ P. 1.180]." *New York Buffett, Inc. v. Certain Underwriters at Lloyd's London*, 950 So.2d 438 (Fla. 4th DCA 2007)(citing *Leggiere v. Merrill Lynch Realty/Florida*, 544 So.2d 240 (Fla. 2nd DCA 1989)).
43 *Lost Tree Village Corp. v. City of Vero Beach and Town of Indian River Shores,* 838 So.2d 561 (Fla. 4th DCA)
44 *Id.* at 565–66.
45 *Id.* at 568.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Lost Tree Village*, *id.* at 568, quoting *Ciampetti v. United States*, 18 Cl.Ct. 548, 556 (Cl. Ct.1989).
50 838 So.2d at 569 (quoting Charles E. Harris, *Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-Government Action,* 25 U. Fla. L.Rev. 635, 683 (1973)). *See also Anhoco Corp. v. Dade County,* 144 So.2d 793, 797 (Fla.1962) (holding that multiple governmental units engaged in a cooperative effort to obtain property can all be liable for the taking of property).
51 *Lost Tree Village*, 838 So.2d. at 568-569.
52 847 So.2d 1028 (Fla. 4th DCA 2003)
53 *Id.* at 1029.
54 *Id.*
55 *Id*. at 1029.
56 *Id.*
57 *Id*. at 1029-1030.
58 *Id.* at 1030.
59 *Id.* at 1030.
60 *Id.* at 1031.
61 *Collins,* 999 So.2d at 713 (citing *Penn Cent. Transp. v. City of New York*, 438 U.S. 104 (1978)) *See also Collins v. Monroe County,* 118 So.3d 872 (Fla. 3rd DCA 2013)("As we have previously set forth, "[i]n addressing whether a 'taking' has occurred, the United States Supreme 'Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.'")
62 *Good v. U.S*., 39 Fed. Cl. 81, 114 (1997). *See also Good v. U.S*., 189 F.3d 1355, 1360 (Fed. Cir. 1999) ("Because we find the expectations factor dispositive, we will not further discuss the character of the government action or the economic impact of the regulations."); *Fla. Dept. of Envtl. Prot. v. Burgess*, 772 So.2d 540, 544 (Fla. 1st DCA 2000) (affirming judgment based on Appellee's failure to demonstrate that he had reasonable, distinct, investment-backed expectations without any discussion of property values).
63 *Forest Properties Inc. v. U.S.* 177 F.3d 1360, 1366 (C.A. Fed. 1999) (holding it is not enough for the claimant to prove that he had an investment-backed expectation; he must also prove that the investment-backed expectation is reasonable).
64 *Good,* 39 Fed. Cl. 81, 114 (1997).
65 118 So.2d 872 (Fla. 3rd DCA 2013).
66 *Good,* 39 Fed. Cl. at 85
67 *Id*. at 85-90
68 16 U.S.C. §§662-666 (1994)
69 *Good,* 39 Fed. Cl. at 93
70 *Id.*
71 *Id*. (citing *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir 1994) and *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir 1994)). The court further explained "[t]his inquiry is informed not only by whether the specific regulatory restrictions at issue were in place at the time of purchase, but also by the regulatory climate at that time, and whether plaintiff's investment in purchase and development can be considered objectively reasonable in light of that climate." *Id.*
72 *Good, id.*
73 *Id.* at 111 ("While plaintiff was free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken.")
74 *Collins,* 118 So.3d at 875.
75 *Collins I,* 999 So.2d at 718 (quoting *Monroe Cnty. v. Ambrose,* 866 So.2d 707, 711 (Fla. 3d DCA 2003).
76 *Collins,* 118 So.3d at 875 n. 7 (Noting in contrast, "*Galleon Bay* involved a landowner who expended hundreds of thousands of dollars in an effort to develop its property and in pursuit of its reasonable investment-backed expectations.").
77 *Beyer v. City of Marathon*, 197 So.3d 563, 566 (Fla. 3rd DCA 2013) (Affirming the trial court's grant of summary judgment in City's favor, stating: "To be sure, the record is devoid of evidence that—not only at the time of purchase but in all the intervening years—the Beyers pursued any plans to improve or develop the property. They provided no evidence of investment-backed expectations at or since the time the property was purchased, nor demonstrated any reasonable expectation of selling the property for development.")
78 *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004) ("In other words, the court must compare the value that has been taken from the property with the value that remains in the property."). *See also Forest Properties,* 177 F.3d at 1367 ("The economic impact of the regulation upon the claimant is measured by the change, if any, in the fair market value caused by the regulatory imposition.") The question in a takings case is not whether the owner can use its property for the most profitable use or even its planned or desired use. *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1031 (3d Cir. 1987) ("Although there has been a substantial diminution in value, this property retains a substantial value that establishes the existence of residual economically feasible uses. The Supreme Court has made it clear that general land use regulation may deprive an owner of the best use or uses of his property without compensation."); *Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1072-73 (11th Cir. 1996) ("The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land.") Rather, the question is whether there is any viable economic use available.
79 *Armstrong v. United States*, 364 U.S. 40, 49 (1960)
80 Def. [s'] Mot. in Limine (Apr. 6, 2015), Case No. CAK-02-595.
81 Pl. ['s] Mot. in Limine No. II: Endangered Species (April 8, 2015), Case No. CAK-02-595.
82 Order on Motions (Aug. 19, 2015), Case No. CAK-02-595.
83 *Galleon Bay v. Monroe County*, Case No. 3D16-1502 (Fla. 3rd DCA)
84 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed 592 (2001) (internal citations omitted).
85 *Id.* at 625.
86 *Id.*
87 *Id.*