

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-10054-CIV-PAINE/VITUNAC

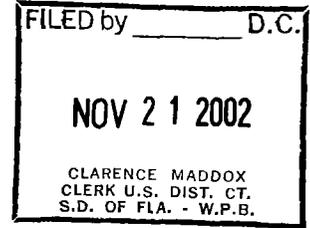
ELIZABETH J. NEUMONT, et al,

Plaintiffs,

vs.

MONROE COUNTY, FLORIDA

Defendant.



_____/

ORDER ADOPTING IN PART REPORT AND RECOMMENDATION

This matter is before the court on two Reports and Recommendation issued by the Honorable Ann E. Vitunac: an Omnibus Report and Recommendation dated May 18, 2001 (D.E. #232), and an Amended Omnibus Report and Recommendation dated August 27, 2001 (D.E. #248). Said reports covered the following motions:

1. Plaintiffs' Motion for Partial Summary Judgment as to Count I (D.E. #94);
2. Defendant's Cross-Motion for Summary Judgment as to Count I (D.E. #99);
3. Defendant's Motion for Partial Summary Judgments as to Counts II, V, VI, VII, VIII, and IX (D.E. #124);
4. Plaintiffs' Motion for Partial Summary Judgment as to Count X (D.E. #171).

The undersigned conducted a limited hearing on the objections to said Reports and Recommendations on February 12, 2002. For the reasons set forth below, the court finds that the recommendations of the Magistrate Judge should be adopted in part.

PROCEDURAL HISTORY

This class action case focuses on a Monroe County Ordinance (Ordinance 004-1997). This

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ordinance, adopted in 1997 and enforced beginning December 15, 1998, places restrictions on certain uses of properties as vacation rentals. Plaintiffs are mostly property owners in Monroe County subject to the Ordinance, and have brought thirteen claims against defendant Monroe County. These claims are as follows:

- Count I: Declaratory Judgment as to whether the Ordinance was prematurely enforced between December 15, 1998 (first day of its enforcement) and March 16, 2000 (when the Florida Supreme Court denied review of the Ordinance)
- Count II: Compensation for temporary taking resulting from the premature enforcement (alleged in Count I)
- Count III: Violation of Civil Rights under color of state law as a result of the premature enforcement (alleged in Count I)
- Count IV: Other damages resulting from the premature enforcement (alleged in Count I)
- Count V: Declaratory Judgment as to the existence of a compensable taking by the enactment of the Ordinance
- Count VI: Inverse Condemnation based upon a facial violation of the Fifth Amendment
- Count VII: Inverse Condemnation based upon as-applied violation of the Fifth Amendment
- Count VIII: Inverse Condemnation based upon facial violation of Art.X, § 6(a) of the Florida Constitution
- Count IX: Inverse Condemnation based upon as-applied violation of Art.X, § 6(a) of the Florida Constitution
- Count X: Declaratory Judgment as to whether Ordinance is void ab initio because enacted in violation of Florida Statutes § 125.66
- Count XI: Compensation for Taking of private property without due process of law
- Count XII: Violation of Civil Rights under color of state law as a result of violation (Alleged in Count X)
- Count XIII: Other damages resulting from wrongful enactment of Ordinance

SUMMARY JUDGMENT STANDARD

The procedure for disposition of a summary judgment motion is well established. According to the Federal Rules of Civil Procedure, summary judgment is authorized only when:

the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56.

The party moving for summary judgment has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In applying this standard, the Adickes Court explained that when assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non- movant. Id.

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir.1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir.1969). If reasonable minds might differ

on the inferences arising from undisputed facts, then the court should deny summary judgment. Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir.1982). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

UNDISPUTED FACTS

As to Plaintiffs' Motion for Partial Summary Judgment as to Count I (D.E. #94) and Defendant's Cross-Motion for Summary Judgment as to Count I (D.E. #99)

1. Ordinance 004-1997 (“the Ordinance”) is a Land Development Regulation (“LDR”) within the meaning of Fla Stat. 380.031(8). Under Chapter 380, the Department of Community Affairs (the “Agency”) serves as the “State land planning agency.” § 380.031(18), Fla. Stat. (1998). Under the statutory scheme, the Agency reviews any LDR and rejects, approves, or approves with modification any LDR.

2. The Agency is an “agency” within the meaning of Chapter 120 of the Florida Statutes. As such, the Agency is governed by the provisions of the Administrative Procedures Act, codified at § 120.52(1)(b), Fla. Stat.

3. Proceedings approving the Ordinance are subject to the provisions of Section 380.05(6) of the Florida Statutes, which states, in pertinent part:

No proposed land development regulation within an area of critical state concern becomes effective under this section until the state land planning agency issues its final order or, if the final order is challenged, until the challenge to the order is resolved pursuant to Chapter 120. Fla. Stat. § 380.05(6).

4. The Ordinance was passed by the Monroe County Commissioners and then submitted to the Agency for review as required by Chapter 380. On December 4, 1998, the Agency entered its Final Order, Order No. DCA98-OR-184 (the “Agency’s Final Order”), approving the Ordinance as

consistent with the Principles for Guiding Development.

5. The Agency's Final Order contained a "Notice of Rights," which provided, in pertinent part:

The parties are hereby notified of their right to seek judicial review of the Final Order pursuant to Section 120.68 Florida Statutes, and Florida Rules of Appellate Procedure 9.030 (b)(1)(c) and 9.110. To initiate an appeal, a Notice of Appeal must be filed with the Department's Clerk of Agency Proceedings, and with the appropriate District Court of Appeal within thirty (30) days of the filing of this Final Order with the Department's Clerk of Agency Proceedings.

6. Defendant admittedly began enforcing the Ordinance on or about December 15, 1998. See Defendant's Amended Admission at 2(n&o).

7. The first actual citation was issued by Defendant on February 26, 1999. See Affidavit of Tom Simmons; see also Schaffer Citation issued February 26, 1999.

8. The Ordinance was enforced against both property owners and vacation rental managers through both civil and criminal sanctions. See Affidavits of Wayne W. Erickson, Lisa M. Poponea, and Wendy J. Sullivan-Glenn.

9. After the Agency's Final Order was issued, certain interested persons (the "Rathkamp Petitioners") filed a Motion for Stay, requesting the Department stay its Final Order pending appeal. See Notice of Administrative Appeal, dated December 23, 1998, filed in Case No. 98-3383/R 982043 (Third District Court of Appeal, Florida). In filing this Motion for Stay, the Rathkamp Petitioners were exercising their legal options pursuant to Chapter 120.

10. On January 22, 1999, the Agency issued an order denying said Motion for Stay, which stated, in pertinent part:

Although the Ordinance was adopted by the Monroe County Commission on February 3, 1997, the Ordinance did not become effective until the Petitioner's chapter 120 challenge was resolved by issuance of the Department's Final Order. See Agency' Order Denying Motion for Stay.

11. On December 23, 1998, the Rathkamp Petitioners timely initiated an Appeal of the Department's Final Order, as provided by the Notice of Rights and Section 120 of the Florida Statutes.

12. The Rathkamp Petitioners filed a Motion for Stay of Enforcement and Request for Emergency Hearing with the District Court of Appeals, Third District on January 27, 1999. This Motion specifically argued to the court that:

[Pursuant to Section 380.05(6), Florida Statutes]. . . a stay of the Department's [Agency's] Final Order approving Monroe County Ordinance 004-1997 will prevent the Ordinance from becoming effective or from being enforced or implemented by Monroe County. See Motion for Stay, filed January 27, 1999, at 3.

13. On January 28, 1999, the District Court of Appeals, Third District issued an Order denying both the Motion for Stay and the Request for Emergency Hearing. See January 28, 1998, Order.

14. On August 4, 1999, the District Court of Appeals, Third District, affirmed the Department's Final Order¹.

15. On October 20, 1999, the Third District denied rehearing on the Rathkamp challenge².

16. On November 16, 1999, the Rathkamp Petitioners filed Notice to Invoke Discretionary Jurisdiction with the Florida Supreme Court. On March 16, 2002, the Florida Supreme Court issued its ruling declining jurisdiction³.

As to Defendant's Motion for Partial Summary Judgments as to Counts II, V, VI, VII, VIII, & IX

17. The court adopts Undisputed Facts #1-78 of Plaintiffs' Concise⁴ Statement of Facts in Support of Plaintiffs' Response in Opposition to Defendant's Motion for Partial Summary Judgment

¹The Third District's Order has been judicially noticed by this Court.

²The Third District's Order has been judicially noticed by this Court.

³The subject order has been judicially noticed by this Court.

⁴The court considers "concise" a misnomer.

(D.E. #206).

18. None of the plaintiffs in the instant action has sought state court remedies for inverse condemnation based on Defendant's adoption and enforcement of the subject Ordinance. See Plaintiffs' Response to Defendant's Request for Admissions (filed under D.E. #187).

As to Plaintiffs' Motion for Partial Summary Judgment as to Count X

19. Article VIII, Section 1 (f&g) of the Constitution of the State of Florida grant both charter and non-charter county governments the power to enact ordinances. Defendant Monroe County is covered by said provision of the Constitution of the State of Florida.

20. Florida Statutes § 125.66 governs the procedures by which a county is empowered to enact ordinances.

21. Prior to enacting the Ordinance, and pursuant to the requirements of § 125.66, Defendant advertised and held two required public hearings on the proposed ordinance. These hearings were held during meetings of the BOCC on December 10, 1996 (the "First Hearing") and February 3, 1997 (the "Second Hearing")⁵.

22. On or about November 7, 8, & 9, 1996, Defendant published its Notice of the First Hearing on the proposed ordinance. See Exhibit "B" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment (D.E. #172).

23. The Notice of First Hearing published in November 1996 stated that "[c]opies of the proposed changes are available at the Planning Department offices in the Upper and Middle Keys during normal business hours." See Exhibit "C" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.

24. At the time the Notice of First Hearing was published, the only available draft of the

⁵Transcripts of said hearings have been judicially noticed by this Court.

proposed ordinance was the September 17, 1996 draft (the “September 17th draft”)⁶. See Exhibit “H” of Plaintiffs’ Concise Statement of Facts in Support of Plaintiffs’ Motion for Partial Summary Judgment.

25. At the First Hearing, the BOCC considered and discussed a draft ordinance dated December 10, 1996 (the “Dec. 10th draft”) rather than the September 17th draft⁷. See Exhibit “H” of Plaintiffs’ Concise Statement of Facts in Support of Plaintiffs’ Motion for Partial Summary Judgment.
26. The December 10th draft was not completed until December 10, 1996, and was not distributed to the BOCC until after the start of the First Hearing. See Exhibit “H” of Plaintiffs’ Concise Statement of Facts in Support of Plaintiffs’ Motion for Partial Summary Judgment; see also Dec. 10th Mtg. Tr. at 21:4-6.
27. The December 10th draft was different than the September 17th draft in the following respects:
 - (a) The September 17th draft proposed a ban on vacation rentals throughout Monroe County, while the December 10th draft took a district-by-district approach to the ban;
 - (b) The September 17th draft prohibited vacation rentals in some select districts and allowed an option to create a sub-district where vacation rentals would be permitted, while the December 10th draft eliminated the sub-district option for these select districts;
 - (c) The September 17th draft proposed to create regulations of vacation rentals

⁶The September 17th draft has been judicially noticed by this Court.

⁷The December 10th draft has been judicially noticed by this Court.

where allowed, while the December 10th draft substantially added to the quantity of regulations and the difficulty of meeting the regulatory burdens. See and compare September 17th draft and December 10th draft; see also Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment at Exhibit "I," FN 6 & 7.

28. On or about January 11, 12 & 16, 1997, Defendant published Notice of the Second Hearing on the proposed ordinance. See Exhibit "D" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.
29. The Notice of Second Hearing published in January 1997 stated that "[c]opies of the proposed changes are available at the Planning Department offices in the Upper and Middle Keys during normal business hours." See Exhibit "E" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.
30. At the Second Hearing, the BOCC considered and discussed a draft ordinance dated January 29, 1997 (the "January 29th draft")⁸. See Feb. 3rd Tr. at 7:18-20.
31. The January 29th draft was not distributed to the press and public until Friday, January 31, 1997. See Feb. 3rd Tr. at 7:18-20, 8:2-6.
32. At the Second Hearing the BOCC also considered and discussed certain changes to the January 29th draft contained in a document entitled an "Errata Sheet." See Exhibits "G" and "H" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.

⁸The January 29th draft has been judicially noticed by this Court. The court recognizes that there are multiple versions of this draft in the record. However, at the November 12, 2002, hearing held on this matter, parties stipulated that the operative version for the purposes of resolution of pending summary judgment motions is that supplied by Defendant pursuant to its Corrected Motion for Judicial Notice (D.E. #239).

33. The Ordinance was officially enacted by Defendant at the Second Hearing. See Plaintiff's Complaint at Exhibit 13.
34. The Ordinance passed by a vote of three to two. See Exhibit "H" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.
35. Commissioners Freeman and London voted with the three person majority to pass the Ordinance but, prior to the vote, expressed reservations about how the Ordinance would affect the various fishing districts; and both indicated that they did not want to vote on the Ordinance until further study of the issue. See Exhibit "G" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment at 195:4-196:4, 210:24-211:7, 211:8-18.
36. At the Second Hearing, the BOCC voted to change the status of vacation rentals in Sparsely Settled Residential Districts from permissive to prohibited. See Exhibit "H" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.
37. Both the December 10th draft, considered at the First Hearing, and the January 29th draft, considered at the Second Hearing, permitted vacation rentals in Sparsely Settled Residential Districts. The Ordinance as enacted prohibits vacation rentals in Sparsely Settled Residential Districts.
39. At the Second Hearing, the BOCC voted to eliminate any reference whatsoever to twenty-two (out of twenty-three total) Commercial Fishing Districts in Monroe County. See Exhibit "H" of Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment.
40. The December 10th draft, considered at the First Hearing, and the January 29th draft, considered at the Second Hearing, each addressed vacation rentals in most of the twenty-two fishing districts that the BOCC voted to eliminate from the Ordinance at the Second Hearing.

41. The Ordinance as enacted makes no reference to the Commercial Fishing Area District, Commercial Fishing Village District, or any of the twenty Commercial Fishing Special Districts.
42. No reference was made to the Commercial Fishing Residential District in the September 17th draft, the December 10th draft, or the January 29th draft. The first and only mention of the Commercial Fishing Residential District was in the Errata Sheet introduced at the Second Hearing. See Subject Drafts and Errata Sheet.
43. The BOCC voted to approve the changes to the proposed ordinance contained in the Errata Sheet, including the prohibition against vacation rentals in Commercial Fishing Residential District. See Exhibit “H” of Plaintiffs’ Concise Statement of Facts in Support of Plaintiffs’ Motion for Partial Summary Judgment.
44. The Ordinance as enacted prohibits vacation rentals in Commercial Fishing Residential District.

ANALYSIS

Count I: Premature Enforcement

In Count I, plaintiffs seek a declaratory judgment regarding whether the Ordinance was prematurely enforced during the time period of December 15, 1998 (the undisputed date Defendant began enforcement) through March 16, 2000 (the date the Florida Supreme Court denied review). Essentially, plaintiffs contend that the Rathkamp Petitioners initiated a “challenge” of the Agency’s Final Order, which was unresolved until the Florida Supreme Court declined to exercise discretionary jurisdiction on March 16, 2000. Defendants counterclaimed for summary judgment on this count, asserting three alternate positions (1) res judicata bars plaintiffs’ claim for declaratory relief on the premature enforcement issue; (2) the court should decline to rule on the issue of premature enforcement under the Buford abstention doctrine; and/or (3) plaintiffs’ claim on the

premature enforcement issue is not ripe for judicial review.

The court begins by noting a statement proffered by Rathkamp Petitioners in their Motion for Stay of Enforcement and Request for Emergency Hearing with the District Court of Appeals, Third District on January 27, 1999. On page 3, paragraph 6 of this document, the Rathkamp Petitioners note:

Pursuant to Section 380.05(6) of the Florida Statutes:

No proposed land development regulation within an area of critical state concern becomes effective under this section until the state land planning agency issues its final order or, if the final order is challenged, until the challenge to the order is resolved pursuant to Chapter 120.

Therefore, a stay of the Department's Final Order approving Monroe County Ordinance 004-1997 will prevent the Ordinance from becoming effective or from being enforced or implemented by Monroe County. Motion for Stay, filed January 27, 1999, at 3 (emphasis supplied).

This statement recognizes that, without a stay, Ordinance 004-1997 would become effective and enforced or implemented by Monroe County. When the District Court of Appeal, Third District, denied the Rathkamp Petitioners' Motion to Stay, it inherently permitted the enforcement of the Ordinance.

With this as a preface, the court will turn to the recommendation of the Magistrate Judge. In the Amended Omnibus Report and Recommendation, the Magistrate Judge correctly noted that the Declaratory Judgment Act authorizes a district court to grant declaratory relief, but such a determination is discretionary. Under the Act, codified at 28 U.S.C. § 2201(1), a "court may declare the rights and other legal relations of any interest party seeking such declaration whether or not further relief is or could be sought" (emphasis supplied). Furthermore, a district court should consider denying declaratory relief if the claims of all parties can be adjudicated in state court proceedings. See Magnolia Marine Transport Co., Inc. v. LaPlace Towing Corp., 964 F.2d 1571,

1581(quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942)).

In this instance, the issue of premature enforcement could certainly have been adjudicated in state court proceedings. Without reaching a determination on the res judicata argument offered by Defendant, the court is inclined to believe that the Rathkamp Petitioners began to interject the theory of premature enforcement in their efforts to obtain a stay pending appellate review of the Agency's Final Order. Indeed, the Rathkamp Petitioners directly acknowledged that without a stay, the Ordinance could be enforced by Defendant. It is likely that inherent in the denial of this Motion to Stay, the District Court of Appeal was making a determination on the premature enforcement issue.

Nonetheless, at the suggestion of Magnolia Marine, and upon recommendation by the Magistrate Judge, the court will deny both motions for summary judgment on Count I, and exercise its discretion under the Declaratory Judgment Act to dismiss Count I⁹. In a similar fashion, and as more fully explained in the Amended Omnibus Report and Recommendation, the court will also exercise its discretion under the Declaratory Judgment to dismiss Count V.

Counts VI, VII, VIII, and IX

Defendant moved for summary judgment on Counts II, V, VI, VII, VIII, and IX contending that because plaintiffs have failed to exhaust their state remedies, the aforementioned claims should

⁹Because the court is exercising its discretion under the Declaratory Judgment Act, it need not reach the substantive arguments set forth by the parties. However, the court is inclined to note that, at the very least, the Rathkamp Petitioners' appeal of the Agency's Final Order beyond the Notice of Appeal with the agency is likely appellate review and not directly linked to the 120 challenge. Indeed, even prior to the Agency's review, in denying the Rathkamp Petitioners' Motion for Stay, the Agency indicated that "the chapter 120 challenge was resolved." See Order Denying Motion for Stay at 1. The issue of what constitutes a chapter 120 challenge is best-suited for the Florida legislature.

Since Counts II, III, and IV are dependent on a declaration of premature enforcement, which this court has declined to consider, the court will also abstain from deciding these counts, pursuant to the authority cited by the Magistrate Judge in the Amended Omnibus Report and Recommendation.

be dismissed as unripe¹⁰. Plaintiffs claim that while the state law may provide a process for obtaining just compensation, issues of material fact remain as to whether that process is inadequate pursuant to Agripost¹¹ and its progeny.

Defendant had the burden of proof on this point, and defendant met its burden with its single factual statement: “None of the plaintiffs in the instant action has sought state court remedies for inverse condemnation based on Defendant’s adoption and enforcement of the subject Ordinance.” In response to this statement, plaintiffs attempted to overcome summary judgment by creating an issue of fact as to the inadequacy of the state process. This attempt has failed.

The court has analyzed the Magistrate Judge’s Report and Recommendation on its Ripeness recommendation, and finds the recommendation to be squarely on point. While the court is cognizant of plaintiffs attempts to utilize the Drossel and Romanoff¹² cases as illustrations of inadequacy of process¹³, the fact remains that no plaintiff has attempted to test the limits of the subject ordinance in the state court forum. Despite plaintiffs’ litany of facts citing the nuance involved in the procedural history of this case and Drossel and Romanoff, defendant’s one undisputed fact is enough to grant summary judgment on Counts VI, VII, VIII, and IX on ripeness grounds.

Count X

¹⁰Count V was addressed supra, and Count II will be addressed infra.

¹¹Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225, 1231 (11th Cir. 1999).

¹²Drossel v. Monroe County, Case No. 96-520-CA-1 (Fla. 16th Jud. Cir.); Romanoff v. Monroe County, Case No. 94-1306-CA-18 (Fla. 16th Jud. Cir.).

¹³The court recognizes the Magistrate Judge’s observation that the Romanoff plaintiffs did not assert any inverse condemnation claims, and the Drossel action, although it involved inverse condemnation claims, was never appealed to the District Court of Appeal, Third District. Thus, these cases are not “tried and true” examples of inadequacy of process with respect to the subject ordinance.

Plaintiff moved for summary judgment on Count X, contending that Defendant did not adhere to the guidelines of Florida Statutes § 125.66 in enacting the Ordinance, and, therefore, the Ordinance must be declared *void ab initio*. In the Amended Omnibus Report and Recommendation, the Magistrate Judge recommends that the court should exercise abstention as to this count (and related Counts XI, XII, and XIII). Upon careful review of the issues, this court disagrees with the Magistrate's Recommendation on this matter for the reasons set forth below.

Application of Pullman abstention is triggered by the existence of two criteria: (1) the case presents an unsettled question of state law, and (2) the question of state law is dispositive of the case, or would avoid or substantially modify the Constitutional question presented. See Duke v. James, 713 F.2d 1506 (11th Cir. 1983). In this instance, Counts X through XIII are based on Plaintiffs' assertions that the Defendant failed to properly adopt the subject ordinance as required by § 125.66. While these counts contain Constitutional claims, such claims are predicated on Plaintiffs' assertion that the Defendant failed to meet the statutory requirements of § 125.66.

Regarding the first element of Pullman abstention, the Eleventh Circuit has declared that a question of state law is "unsettled" if it is "fairly subject to an avoiding construction." Id. at 1510. An available state law interpretation that moots federal Constitutional claims is an "avoiding construction," triggering application of Pullman abstention. See International Eateries of America, Inc. v. Board of County Commissioners of Broward County, 838 F.Supp. 580, 582 (S.D. Fla. 1993). The question of state law presented under Count X (and related Counts XI, XII, and XIII) is whether the subject ordinance was enacted in violation of Florida Statutes § 125.66(4) regarding notice requirements of the ordinance enactment procedure. Plaintiffs contend that the nature of Florida law regarding notice requirements is well-settled. The court is inclined to agree with Plaintiffs'

characterization of Florida law on this matter¹⁴. Accordingly, the court finds that, with respect to Count X (and related counts XI, XII, and XIII), Pullman abstention is not the appropriate course of action¹⁵.

Thus, the court must evaluate Plaintiff's Motion for Summary Judgment as to Count X on its merits. Essentially, Plaintiffs have moved for summary judgment on Count X, citing multiple violations of Florida Statutes § 125.66 on the part of the Defendant, including violations of the hearing requirement (both under statute and caselaw) and violations of notice requirements. The court finds there to be existing issues of material fact regarding, *inter alia*, whether substantial and material changes were made during the enactment process, precluding summary judgment at this stage.

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion for Summary Judgment as to Count I (D.E. #94) is DENIED;
2. Defendant's Cross-Motion for Summary Judgment as to Count I (D.E. #99) is DENIED;
3. Counts I, II, III, IV, and V are DISMISSED;
4. Defendant's Motion for Partial Summary Judgment as to Counts II, V, VI, VII, VIII, and IX (D.E. #124) is GRANTED IN PART;
5. Counts VI, VII, VIII, and IX are DISMISSED AS UNRIPE;

¹⁴ See generally First Assembly of God of Naples, Florida v. Ollier County, Florida, 20 F.3d 419; Speer v. Olson, 367 So. 2d 207 (Fla. 1978); 3299 N. Federal Highway, Inc. v. Board of County Comm'rs of Broward County, 646 So. 2d 215 (Fla. 4th DCA 1994); T.J.R. Holding Co., Inc. v. Alachua County, 617 So. 2d 798 (Fla. 1st DCA 1993); Linville v. Escambia County, 436 So. 2d 293 (Fla. 1st DCA 1983).

¹⁵In addition to the fact that this court finds Florida law well-settled regarding notice requirements in the ordinance enactment procedure, the court also finds that Pullman abstention would be inappropriate in this instance because, as noted by Plaintiffs at the February 12, 2002, hearing, the statute of limitations has run in this matter. Thus, plaintiffs would be without an adequate forum in the state courts.

6. Plaintiffs' Motion for Partial Summary Judgment as to Count X (D.E. #171) is DENIED;
7. Counts X, XI, XII, and XIII remain.

DONE AND ORDERED at West Palm Beach, Florida, this 21st day of November, 2002.

James C. Davis
UNITED STATES DISTRICT JUDGE

cc:

Honorable Ann E. Vitunac
Karen K. Cabanas, Esq.
James H. Hicks, Esq.
Harold E. Wolfe, Jr., Esq.