No. 04-13610-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELIZABETH J. NEUMONT, et al.,

Plaintiffs/Appellants,

v.

STATE OF FLORIDA, et al.,

Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Honorable James C. Paine, District Judge

APPELLANTS' MOTION TO CERTIFY STATE-LAW QUESTIONS TO THE FLORIDA SUPREME COURT AND TO POSTPONE BRIEFING PENDING CERTIFICATION

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27(a) and 11th Circuit Rule 27-1, Plaintiffs/Appellants Elizabeth J. Neumont and others (Plaintiffs) hereby move the Court for a procedural order certifying the following two questions to the Florida Supreme Court pursuant to Article V, § 3(b) of the Florida Constitution:

1. Whether, for purposes of Florida Statutes § 125.66(4)(b)), a "substantial or material change" in a proposed ordinance during the enactment process (i.e., the kind of change that would require a county to start that process over) is confined to a change in the "original general purpose" of the proposed ordinance, or whether a substantial or material change includes (i) a change to the "actual list of permitted, conditional, or prohibited uses within a zoning category," or (ii) a change necessary to secure legislative passage of the ordinance.

2. Whether, for purposes of Florida Statutes § 380.05(6), a "challenge to the [state land planning agency's final] order is resolved pursuant to chapter 120" upon completion of *administrative* review, or whether a challenge is resolved pursuant to chapter 120 only upon exhaustion of later *judicial* review pursuant to Florida Statutes § 120.68.

As explained below, these questions meet the Florida constitutional prerequisites for certification, and certification is manifestly appropriate and undoubtedly warranted under the standards established by this Court.

FACTS AND PROCEDURAL HISTORY

The facts in this case, which are essentially undisputed, are set forth in detail in two opinions of the district court. *See* Exh. 2 at 4-11 (setting forth 44 undisputed facts); Exh. 3 at 3-8 (setting forth 27 additional undisputed facts); *see also* Exh. 4 at 3 n.2 (ruling that the court need not "make additional findings of fact regarding the Monroe County Code and subject ordinance," because "these documents speak for themselves").[1]

[1] The portions of the record necessary to understand this motion are attached hereto as exhibits and cited by tabbed exhibit number and internal page number.

This class action is a challenge to Ordinance 004-1997, enacted on February 3, 1997 by Defendant/Appellee Monroe County, Florida (Monroe County).[2] As stated by the district court, the Ordinance "places restrictions on certain uses of properties as vacation rentals." Exh. 2 at 2. Plaintiffs are a certified class of "property owners in Monroe County subject to the Ordinance." *Id.* By their action, they seek a declaratory judgment that the Ordinance is void ab initio, injunctive relief against further enforcement of the Ordinance, and money damages for injuries they have suffered as a result of the enactment and enforcement of the Ordinance.

After class certification and various other amendments, the operative complaint alleges essentially six claims against Monroe County. Three of these "aris[e] under the Constitution . . . of the United States" within the meaning of 28 U.S.C. § 1331:

> (1) Ordinance 004-1997 was enacted in a manner that deprived Plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment, *see* Exh. 1 at 39-43;
>
> (2) the Ordinance was prematurely enforced (before March 16, 2000) in a manner that deprived Plaintiffs of their property without due process of law, in violation of the Fourteenth Amendment, *see* Exh. 1 at 26-27; and
>
> (3) both on its face and as applied to Plaintiffs, the Ordinance effected a taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments, *see* Exh. 1 at 30-34.

[2] Although the State of Florida is the first-named Defendant/Appellee in the style of this appeal, the State was dismissed early in the district court proceedings, and Plaintiff does not here challenge that dismissal. Therefore, this motion will not further refer to the State.

The remaining three claims are "so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution" within the meaning of 28 U.S.C. § 1367(a):

> (4) the Ordinance is void ab initio because it was enacted in violation of Florida Statutes § 125.66(4), *see* Exh. 1 at 37-39;
>
> (5) the Ordinance was prematurely enforced (before March 16, 2000), in violation of Florida Statutes § 380.05(6), *see* Exh. 1 at 21-22; and
>
> (6) both on its face and as applied to Plaintiff, the Ordinance effected a taking of private property without just compensation, in violation of Article X, § 6(a) of the Florida Constitution, *see* Exh. 1 at 35-37.

As to Claim (1)—whether the enactment of Ordinance 004-1997 violated federal procedural due process—the district court ruled against Plaintiffs on the merits. That is, the court held that Plaintiffs were "required to allege and establish that post-deprivation remedies [under Florida law] were unavailable or inadequate." Exh. 4 at 5. Both because Plaintiffs "failed to allege that a post-deprivation remedy was not made available in this instance," *id.*, and because Plaintiffs in fact "had a remedy—indeed multiple remedies—for any procedural error [in the Ordinance's enactment], of which they did not avail themselves, they suffered no deprivation of due process," *id.* at 6 (citing Fla. Stat. §§ 120.57, 380.05).

As to Claim (2)—whether the premature enforcement of Ordinance 004-1997 violated federal procedural due process—the district court determined to "exercise its discretion under the Declaratory Judgment Act [28 U.S.C. § 2201(1)] to dismiss" Plaintiffs' claim. Exh. 2 at 13 (dismissing Count I of the complaint on this basis); *see also id.* n.9 (dismissing Counts II, III, and IV because they were "dependent on a declaration of premature enforcement"). The court took this path notwithstanding that only one of the four counts of Plaintiffs' complaint relating to the premature enforcement issue actually sought a declaratory judgment, whereas the remaining three sought money damages and injunctive relief for violations of federal and state law. *See* Exh. 1 at 21-29 (Counts I through IV of complaint). *Cf. Maryland Casualty Co. v. Knight*, 96 F.3d 1284, 1289 & n.6 (9th Cir. 1996) (noting that district courts have no discretion to decline to hear a claim for money damages filed with a declaratory relief claim).

As to Claim (3)—whether Ordinance 004-1997 effected a compensable taking of private property without just compensation under the United States Constitution—the district court agreed with Monroe County that Plaintiffs had "failed to exhaust their state remedies," such that this claim "should be dismissed as unripe." Exh. 2 at 13-14. In this regard, the court accepted—and found dispositive—Monroe County's sole assertion that "[n]one of the plaintiffs in the instant action has sought state court remedies for inverse condemnation based on [the County's] adoption and enforce-

ment of the subject Ordinance." *Id.* at 14. The district court thus rejected Plaintiffs' arguments concerning the "inadequacy of process" in the state courts for obtaining just compensation with respect to the Ordinance. *Id.*[3]

As to Claim (4)—whether the Ordinance 004-1997 was void ab initio because it was enacted in violation of Florida Statutes § 125.66(4)—the district court again ruled against Plaintiffs on the merits.[4] As the court correctly observed, Florida law embodies "notice requirements for proposed ordinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category," Exh. 3 at 8 (citing Fla. Stat. § 125.66(4)(b)), and a "[f]ailure to follow the state statutory notice requirements render[s] a zoning ordinance void," *id.* (quoting *Southern Entertainment Co. v. City of Boynton Beach*, 736 F. Supp. 1094, 1102 (S.D. Fla. 1990)). Having determined that Ordinance 004-1997 is subject to these notice requirements, *see id.* at 4 (Undisputed Fact No. 3), the court agreed with the parties that, pursuant to

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[3] Although this is not the place to address the substance of the ripeness issue, Plaintiffs presented serious and substantial arguments that their federal takings claim was ripe under *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), which decided that a property owner pleads a ripe takings claim if he alleges that although state law *appears* to provide a process for obtaining just compensation, "due to state court interpretation"—"the trial court's and/or the appellate court's"—*in fact* "the process is inadequate." *Id.* at 1231 & n.6. Plaintiffs demonstrated that Florida courts have already rejected an attempt—by members of the plaintiff class—to obtain just compensation *for Ordinance 004-1997 itself.*

[4] At an earlier stage of the litigation, the district court thoughtfully analyzed—but ultimately rejected—Monroe County's arguments that the court should engage in *Pullman* abstention with respect to this issue. *See* Exh. 2 at 15-16.

§ 125.66(4), "if *substantial or material changes* were made to the proposed ordinance during the enactment process, [Monroe County] would be required to renew the enactment process," Exh. 3 at 9 (emphasis added).

While the parties did not dispute the facts regarding the changes that Monroe County actually made to Ordinance 004-1997 during the lengthy enactment process (those changes being a matter of public record), the parties did "disagree, however, on the definition of substantial or material change." *Id.* Whereas Plaintiffs argued that a substantial or material change includes "any change to a proposed ordinance that would change the actual list of permitted/prohibited uses," Monroe County contended that "a substantial or material change is [limited to] a change to the original purpose of the proposed ordinance." *Id.* Relying primarily on a Florida Attorney General opinion, the district court resolved this legal disagreement in the County's favor: "this court finds guidance in the underlying Florida AGO, which indicates that a substantial or material change is one which alters 'the original general purpose of a measure.' " *Id.* at 11 (referring to Fla. Att'y Gen. Op. 82-93 (1982)). Concluding that "the original purpose of the Ordinance remained the same throughout the enactment procedure"—that is, "the regulation of vacation use"—the court concluded that "there were no substantial or material changes made to the Ordinance." *Id.* Therefore, the court agreed with Monroe County that "it complied with Section 125.66 in enacting the Ordinance." *Id.* at 8.

As to Claim (5)—whether Monroe County "prematurely" enforced Ordinance 004-1997 in violation of state law—the district court had to apply Florida Statutes § 380.05(6), which provides 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*" (emphasis added). The parties agreed that "[p]roceedings approving the Ordinance are subject to the provisions of Section 380.05(6)," and that the applicable "state land planning agency" (the Department of Community Affairs) "entered a Final Order . . . approving the Ordinance" on December 4, 1998. Exh. 2 at 4 (Undisputed Fact No. 3 and No. 4). The parties also agreed that, subsequently, various third parties "timely initiated an Appeal of the Department's Final Order, as provided by . . . Section 120 of the Florida Statutes." *Id.* at 6 (Undisputed Fact No. 11). In that proceeding, the Florida District Court of Appeal affirmed the Department's final order, and the Florida Supreme Court denied discretionary review on March 16, 2000. *See Rathkamp v. Department of Community Affairs*, 740 So. 2d 1209 (Fla. 3d Dist. Ct. App. 1999), *rev. denied*, 762 So. 2d 917 (Fla. 2000).

The district court opined that this "appeal of the [Department's] Final Order beyond the Notice of Appeal with the [Department]" was, in the court's view, some species of "appellate review" that did *not* constitute "the [Chapter] 120 challenge"

referred to in Florida Statutes § 380.05(6). Exh. 2 at 13 n.9. The primary basis for this view was the fact that the *Department* had "indicated that 'the chapter 120 challenge was resolved' " during *administrative* review. *Id.* Moreover, the court found it "likely" that in denying the *Rathkamp* appellants' request for an explicit stay of enforcement, "the District Court of Appeal was [impliedly] making a determination on the premature enforcement issue," specifically, a determination that "permitted the enforcement of the Ordinance" prior to the exhaustion of judicial review. *Id.* at 13. Nonetheless, despite these seemingly emphatic views, the district court dismissed this claim on the same ground as it had dismissed closely related Claim (2), namely, by "exercis[ing] its discretion under the Declaratory Judgment Act." *Id.*; *see also supra* p. 5 (discussing Claim (2)).

Finally, as to Claim (6)—whether Ordinance 004-1997 effected a compensable taking of private property without just compensation under the Florida Constitution —the district court dismissed that claim when it dismissed Plaintiff's closely related federal takings claim. *See* Exh. 2 at 14 (dismissing all takings-related counts of the complaint "on ripeness grounds").

On the basis of the foregoing rulings, the district court entered a final judgment in favor of Monroe County as to all claims on June 21, 2004. *See* Exh. 5. Plaintiffs timely filed their notice of appeal on July 15, 2004. *See* Exh. 6.

ARGUMENT

Consistent with their obligation to assert at one time all of their claims arising out of the enactment and enforcement of Monroe County Ordinance 004-1997, and consistent also with their right under Acts of Congress to assert all of those claims in federal district court, Plaintiffs assert both federal and state claims in this litigation. At this stage of the proceedings, it is both permissible and manifestly appropriate to seek the authoritative views of the Florida Supreme Court regarding two important issues that are dispositive of two of Plaintiffs' three state-law claims. In particular, this Court should certify to the Florida Supreme Court, pursuant to Article V, § 3(b) of the Florida Constitution, the questions concerning Florida Statutes § 125.66(4)(b) and Florida Statutes § 380.05(6) set out on page 2 above. As explained below, these two questions satisfy the prerequisites for certification under the state constitution, and certification is thoroughly in accord with—indeed, virtually compelled by—this Court's prior decisions concerning certification.

I. THE STATE CONSTITUTIONAL PREREQUISITES TO CERTIFICATION ARE SATISFIED HERE.

Article V, § 3(b) of the Florida Constitution permits the Florida Supreme Court to "review a question of law certified by . . . a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the

supreme court of Florida." *Accord* Fla. Stat. § 25.031; Fla. R. App. P. 9.150(a). The two questions that Plaintiffs propose above meet both of these prerequisites.

First, the Florida Supreme Court's answers to the two proposed questions will be determinative of the respective state-law claims.[5] As to their claim under Florida Statutes § 125.66(4)(b), Plaintiffs concede that if a "substantial and material change" is confined to a change in the "original general purpose" of the proposed ordinance, the claim must fail for the reasons expressed by the district court. *See* Exh. 3 at 11. On the other hand, if a substantial or material change includes either (i) a change to the actual list of permitted, conditional, or prohibited uses within a zoning category, or (ii) a change necessary to secure legislative passage of the ordinance, then Plaintiffs' claim must succeed, for it is undisputed that Monroe County made these kinds of such changes to Ordinance 004-1997 during the course of the enactment process. *See* Exh. 3 at 5-6 (Undisputed Fact No. 11, listing changes to prohibited uses); *id.* at 7-8 (Undisputed Fact Nos. 17-26, describing enactment-day changes made to secure passage by a three-to-two vote)).

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[5] Plaintiffs note that neither this Court nor the Florida Supreme Court has construed Article V, § 3(b) to require that the certified question(s) be "determinative" of the entire litigation, as opposed to one particular claim or cause of action. *See, e.g., Freeman v. First Union National*, 329 F.3d 1231 (11th Cir. 2003) (certifying question only as to an "aiding and abetting a fraudulent transfer" claim while ruling on a separate negligence claim); *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004) (per curiam) (agreeing that the certified question was "determinative of a cause pending in [the Eleventh Circuit]" and answering the question).

As to their claim under Florida Statutes § 380.05(6), Plaintiffs concede that if a "challenge to the [state land planning agency's final] order is resolved pursuant to chapter 120" upon completion of *administrative* review, then the claim must fail because Monroe County waited until the completion of administrative review to begin enforcing Ordinance 004-1997. On the other hand, if a challenge is resolved pursuant to chapter 120 only upon exhaustion of later *judicial* review pursuant to Florida Statutes § 120.68, then Plaintiffs' claim must succeed, for it is again undisputed that enforcement of the Ordinance commenced prior to the exhaustion of judicial review on March 16, 2000. *Compare* Exh. 2 at 5 (Undisputed Fact No. 6 that the Ordinance was first enforced on December 15, 1998), *with Rathkamp v. Department of Community Affairs*, 762 So. 2d 917 (Fla. 2000) (denying review on March 16, 2000).

Second, there is no "controlling precedent" of the Florida Supreme Court on these two issues. As to Plaintiffs' claim under Florida Statutes § 125.66(4)(b), the district court was forced to rely on a 1982 Florida Attorney General opinion (which itself relied on *out-of-state* authorities), *see* Exh. 3 at 9-11 (discussing Fla. Att'y Gen. Op. 82-93 (1982)), along with an unreported decision of a *federal* court, *see* Exh. 3 at 10-11 (discussing *Lamar Advertising v. City of Lakeland*, No. 97-721-CIV-T-17A, 1999 WL 335590589 (M.D. Fla. Apr. 15, 1999)). Plaintiffs themselves also relied on *Lamar*, as well as Florida authorities that postdated (and contradicted) the Attorney General opinion, namely, *Love Our Lakes Association v. Pasco County*, 543 So. 2d

855, 857 (Fla. 2d Dist. Ct. App. 1989), and *Webb v. Town Council*, 766 So. 2d 1241 (Fla. 1st Dist. Ct. App. 2000); however, none of these decisions is Florida Supreme Court precedent. As to Plaintiffs' claim under Florida Statutes § 380.05(6), the district court could cite only the Florida District Court of Appeal's unpublished order denying a motion for a stay in a separate action. *See* Exh. 2 at 13 n.9. Again, while Plaintiffs could adduce relevant precedent of the Florida District Courts of Appeal, *see, e.g., Hill v. Division of Retirement*, 687 So.2d 1376, 1377 (Fla. 1st Dist. Ct. App. 1997), controlling precedent of the Florida Supreme Court is not to be had.

Therefore, the requirements of Article V, § 3(b) of the Florida Constitution are satisfied in this case. It remains to examine whether certification is appropriate under this Court's precedents.

II. THIS COURT'S STANDARDS FOR CERTIFICATION TO A STATE SUPREME COURT ARE ALSO SATISFIED.

This Court has repeatedly cited its statement in *Mosher v. Speedstar Division*, 52 F.3d 913, 916-17 (11th Cir. 1995), that "[w]here there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." This Court's general policy favoring certification is especially strong in cases where the resolution of the state-law issue will reverberate in other cases and where courts have issued irreconcilable decisions

regarding that issue. Both of these circumstances obtain in the present case. Moreover, as set out below, other considerations militate in favor of certification.

First, the proper interpretation of Sections 125.66(4)(b) and 380.05(6) of the Florida Statutes "presents an important issue of Florida law," *Trans Coastal Roofing Co. v. David Boland, Inc.*, 309 F.3d 758, 760 (11th Cir. 2002), that will "have wide ranging and profound implications in Florida," *Warner v. City of Boca Raton*, 267 F.3d 1223, 1227 (11th Cir. 2001). Section 125.66(4)(b) governs all "cases in which the proposed ordinance or resolution [of a county] changes the actual list of permitted, conditional, or prohibited uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more." That is, the statute governs notice requirements for nearly every instance in which a county in Florida sets land use policy.[6]

Furthermore, because Section 125.66(4)(b) is identical in essence to Section 166.041(3)(c)(2) (which applies to municipalities), the interpretation of the former will definitively establish the required notice procedures for setting land use policy by *all local governments in Florida*. The importance of obtaining a proper interpretation of these statutes is magnified by the undisputed rule in Florida that "[f]ailure

[6] The importance of notice requirements to state land use policy is exemplified by a recent decision of the Virginia Supreme Court, which granted relief to property owners challenging a county ordinance for failure to satisfy state statutory requirements with respect to notice. *See Glazebrook v. Board of Supervisors*, 587 S.E.2d 589 (Va. 2003).

to follow the state statutory notice requirements render[s] a zoning ordinance void." *Southern Entertainment Co. v. City of Boynton Beach*, 736 F. Supp. 1094, 1102 (S.D. Fla. 1990) (citing Florida appellate decisions)). Section 380.05(6) statute applies to "area[s] of critical state concern." It is obviously important in such "critical" areas —indeed, important to Florida's comprehensive land planning scheme in general— to know at exactly what point a proposed land development regulation "becomes effective." Certification will garner that knowledge from an authoritative source.

Second, certification is especially appropriate to reconcile conflicting decisions regarding the interpretation of Florida's statutory notice requirements for the enactment of ordinances. In *Keener v. Convergys Corp.*, 312 F.3d 1236, 1240 (11th Cir. 2002), this Court identified an intra-Circuit dispute on a question of state law; it then certified that question in order to "seek the guidance of the [state supreme court] to settle this dispute." *See also United States v. Pepper's Steel & Alloys, Inc.*, 289 F.3d 741, 743 (11th Cir. 2002) (certifying question in order to "reconcile the conflicting language" in Florida intermediate appellate court decisions); *Buse v. Kuechenberg*, 325 F.3d 1249, 1251-52 (11th Cir.) (same), *vacated on other grounds*, 337 F.3d 1250 (11th Cir. 2003).

Here, the decision below is in obvious conflict with the decision in *Lamar Advertising, Inc. v. City of Lakeland*, 189 F.R.D. 480 (M.D. Fla. 1999), notwithstanding the district court's purporting to find *Lamar* "instructive." Exh. 3 at 11. Whereas the

court below opined that "a substantial or material change is one which alters 'the original general purpose of a measure,' " *id.* (quoting Fla. Att'y Gen. Op. 82-93 (1982)), *Lamar* ruled that a "change may be substantial . . . without being substantive," 189 F.R.D. at 490 (applying Florida Statutes § 166.041(3)(c)(2), which as noted above is virtually identical to Florida Statutes § 125.066(4)(b)). Moreover, *Lamar* determined that two ordinances that had begun the enactment process as one ordinance—which was then divided into two without otherwise changing the text at all, in order to gain the votes needed for passage) were "void ab initio." *Id.* at 489. It is difficult to conceive how these two ordinances voided by the *Lamar* court could fail to be upheld by the court below under the unexacting "original general purpose" test it adopted.

Third, certification in this case would accord with "the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided." *Alltel Communications, Inc. v. City of Macon*, 345 F.3d 1219, 1221 n.2 (11th Cir. 2003) (per curiam) (quoting *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. 2002)). In the *Alltel* case, this Court certified state-law questions precisely in order to avoid reaching federal constitutional questions if possible. *See id.* In the present case, although certification will not completely dispose of all federal constitutional questions (see below), a decision by the Florida Supreme Court in favor of Plaintiffs on the certified questions would very likely dispose of the two federal procedural due

process claims (*see supra* p. 3), including all of the bases for declaratory and injunctive relief under federal law. Accordingly, just as in *Alltel*, certification would permit this Court to "first decide whether the ordinance[is invalid under] Florida state law before considering" whether it violates federal law. 345 F.3d 1219, 1221 n.2.

Fourth, in considering whether to certify Plaintiffs' proposed questions to the Florida Supreme Court, this Court ought to resist the temptation to imagine that the state-law issues in this case can simply be avoided altogether. In some cases, federal courts can avoid state-law issues by employing *Pullman* abstention, but the present litigation was not (and still is not) one of those cases. As noted above, the district court thoughtfully considered, but ultimately decided against, abstaining here. *See supra* n.4. That decision, which is reviewed only for an abuse of discretion, *see, e.g., Pittman v. Cole*, 267 F.3d 1269, 1285 (11th Cir. 2003), was well within the court's discretion. Among other reasons, "the question[s] of state law must be dispositive of the case or would materially alter the constitutional question presented." *Id.* at 1286 (quoting *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000)). In this litigation, resolution of the questions arising out of Sections 125.66(4)(b) and 380.05(6) of the Florida Statutes will not finally dispose of, or even materially alter, Plaintiffs' federal takings claim. Moreover, "the fact that the case has already been in litigation for a long time"—here, some *five years*—further weighs against abstention. *Id.* (quoting *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983)).

Indeed, this Court's recent decision in *Pittman v. Cole* affirmatively counsels in favor of certification as opposed to abstention. In that case, this Court reversed the district court's decision to abstain (for some of the reasons set forth in the previous paragraph) but nevertheless agreed with the district court that "there exist important unsettled issues of state law that are likely to shape, alter, or moot the federal constitutional issues raised by the plaintiffs' claims." *Id.* at 1288. In that situation, opined this Court, "[i]nstead of a *Pullman* abstention, . . . the preferable way to obtain state court resolution of those state law issues is through the certification process established by the [state supreme court]." *Id.* In other words, "[c]ertification of questions to a state's highest court, where the procedure is available, offers *substantial benefits* over the traditional *Pullman* abstention method." *Id.* at 1289 (emphasis added). In light of these pronouncements, and because the certification procedure is available here, the Court should again conclude that "certification will do the job in this case." *Id.* at 1290; *accord Cate v. Oldham*, 707 F.2d 1176, 1184-85 (11th Cir. 1983) (finding abstention inappropriate but certifying questions to the Florida Supreme Court).[7]

Therefore, certification to the Florida Supreme Court is manifestly appropriate under this Court's precedents, as well as authorized by the Florida Constitution.

[7] This Court in *Pittman* remanded the case to the district court for *that court* to certify questions to the Alabama Supreme Court, a rarity made possible by the Alabama rule permitting certification from *any* federal court. *See* 267 F.3d at 1290-91 (citing Ala. R. App. P. 18). That course is unavailable here, for Florida Constitution Article V, § 3(b) does not permit certification from district courts.

III. BRIEFING IN THIS CASE SHOULD BE POSTPONED PENDING RESOLUTION OF THIS MOTION.

In *Alltel Communications, Inc. v. City of Macon*, this Court decided to "certify a question of law to the Supreme Court of Georgia and [to] postpone any further consideration of the appeal in this case until we receive an answer from that court." 345 F.3d at 1221 n.2. That course was sound for the Court then, and it is sound for the Court and the parties now. If certification is actually to accomplish its stated goal of "sav[ing] time, energy, and resources," *Pittman*, 267 F.3d at 1289 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)), then parties should not be made unnecessarily to brief issues in this Court that are properly briefed in the state court—or that need not be briefed at all depending on the answers to the certified questions. Thus, Plaintiffs respectfully request that, pending the resolution of this motion, the Court "postpone any further consideration of the appeal." In practical terms, postponement means potentially deferring the briefing schedule under which Appellants' Opening Brief is now due on November 8, 2004. *See* Exh. 7.

Accordingly, Plaintiffs respectfully request that the deadline for the filing of Appellants' Opening Brief be deferred until the later of either November 8, 2004 or forty days after the Court acts on the instant motion or, if the motion is granted and questions are certified, forty days after the Florida Supreme Court issues its opinion answering the certified questions.

CONCLUSION

For all of the foregoing reasons, Plaintiffs/Appellants respectfully request that this Court certify the following two questions to the Florida Supreme Court:

> 1. Whether, for purposes of Florida Statutes § 125.66(4)(b)), a "substantial or material change" in a proposed ordinance during the enactment process (i.e., the kind of change that would require a county to start that process over) is confined to a change in the "original general purpose" of the proposed ordinance, or whether a substantial or material includes (i) a change to the "actual list of permitted, conditional, or prohibited uses within a zoning category," or (ii) a change necessary to secure legislative passage of the ordinance.
>
> 2. Whether, for purposes of Florida Statutes § 380.05(6), a "challenge to the [state land planning agency's final] order is resolved pursuant to chapter 120" upon completion of *administrative* review, or whether a challenge is resolved pursuant to chapter 120 only upon exhaustion of later *judicial* review pursuant to Florida Statutes § 120.68.

Plaintiffs further request that the deadline for the filing of Appellants' Opening Brief be deferred until at least forty days after the Court acts on this motion or forty days after the Florida Supreme Court issues its opinion answering the certified questions.

DATED: September 15, 2004.

Respectfully submitted,

ERIC GRANT
HAROLD E. WOLFE, Jr.

By ____________________________
ERIC GRANT

Counsel for Plaintiffs/Appellants

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court in good standing and counsel of record for Plaintiffs/Appellants Elizabeth J. Neumont, et al.

I further certify that a copy of the foregoing document, namely,

APPELLANTS' MOTION TO CERTIFY STATE-LAW QUESTIONS
TO THE FLORIDA SUPREME COURT

were served this date upon the following person by the means indicated thereunder:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2004.

____
ERIC GRANT

Counsel for Plaintiffs/Appellants