

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

THOMAS F. COLLINS, *et al.*

Plaintiffs,

vs

MONROE COUNTY,

Defendant,

vs

STATE OF FLORIDA,

Third Party Defendant.

Case No. CA-M-04-379

**THIRD PARTY DEFENDANT, THE STATE OF FLORIDA'S, MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS'
MAIN CLAIM**

Plaintiffs in this case have sued Monroe County in inverse condemnation, asserting that the (temporary) taking occurred upon filing of their Beneficial Use Determination ["BUD"] applications. [1st Amended Complaint, ¶ 40] Plaintiffs go on to allege that on the date of trial in this case or the date of acquisition of fee simple title by the County, a permanent taking will have occurred. As will be shown below, there is no support for a theory by which a regulation that constitutes a taking is temporary until the date of trial or acquisition and upon that occurrence the taking becomes permanent entitling Plaintiff to temporary taking damages for the time between the initial taking and the trial and full fair market value as damages for a permanent taking on the date of trial. If a taking occurred at all in this case, it was a permanent taking on the date alleged in ¶ 40 of the Complaint (or some other date as a matter of law) which could become temporary if the County grants a permit, thereby "giving the property back." As to whether a taking has occurred at all, the State will address that in its response to Plaintiffs' motion for summary judgment.

The undisputed facts supporting this motion show:

- This action was filed more than 90 days after the resolutions of the Board of County Commissioners adopting the Plaintiffs' Beneficial Use Determinations, the final decision of the County.
- Only Plaintiffs Collins and Magrini have ever made a meaningful application for development of their properties; the Beneficial Use Determinations do not qualify as such an application since the Plaintiffs stipulated away the County's

ability to grant development relief. In the absence of a meaningful application, these Plaintiffs' claims can only be facial claims which were not filed within four years of the adoption of the allegedly offending regulations.

- As to the wetlands Plaintiffs, those regulations make no allowance for a variance from their requirements. Therefore, if a taking has occurred, it necessarily occurred upon passage of the allegedly offending regulations and would amount to a facial taking. This case was not filed within four years of that date.
- Only Plaintiffs Collins and Magrini have ever made a meaningful application for development of their properties; these applications have never been denied and issuance of those permits is imminent. Failure to make meaningful application or have a meaningful application denied on its merits makes the Plaintiffs' claims unripe.

THE 90 DAY STATUTE OF LIMITATIONS BARS ALL PLAINTIFFS' CLAIMS

The Florida Keys have been designated an Area of Critical State Concern by the State of Florida (ACSC). § 380.0552, Fla. Stat. Because of its unique geography and sensitive natural environment, it was the expressed intent of the Legislature that this designation would serve, among other purposes:

- (a) To establish a land use management system that protects the natural environment of the Florida Keys.
- (c) To establish a land use management system that promotes orderly and balanced growth in accordance with the capacity of available and planned public facilities and services.

By designating the Keys an ACSC, the Legislature made all of the provisions of chapter 380, with enumerated exceptions not relevant here, apply to all development activity there. § 380.0552(5), Fla. Stat. The statute further provides that no development can occur in the ACSC except in accordance with chapter 380. § 380.05(16), Fla. Stat. For development permits issued (or denied) in an ACSC, § 380.085, Fla. Stat., provides:

Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation.

This statute provides a landowner 90 days in which to file a taking claim against an agency based on final agency action. *Monroe County v. Ambrose*, 866 So. 2d 707, 712 n.5 (Fla. 3rd DCA 2003) ("Section 380.085, Florida Statutes (1997), enables a person substantially af-

fect by the denial of a permit to build, to initiate an action in circuit court on the grounds that an area of critical state concern development order effects a taking without compensation.”) In *Joint Ventures, Inc. v. Department of Transp.*, 519 So. 2d 1069, 1073 (Fla. 1st DCA 1988), the First DCA said about this statute:

In order to protect a property owner from a noncompensated taking caused by denial of a development permit, Section 380.085, Florida Statutes, provides specific judicial remedies: If the owner desires to contest the denial of same, the owner may seek review of such administrative decision in circuit court for the purpose of determining whether the agency action is an unreasonable exercise of the state’s police power and constitutes a taking without just compensation

See also, Caloosa Property Owners Asso. v. Palm Beach County Bd of County Comm’rs, 429 So. 2d 1260, 1264 (Fla. 1st DCA 1983) (citing § 380.085 and holding that lack of a remedy under § 370.07(2), Fla. Stat., does not abrogate the right of such parties to seek redress in court, caused by a taking of their property); *Fox v. Treasure Coast Regional Planning Council*, 1983 Fla. App. LEXIS 18891, 15-16 (Fla. 1st DCA 1983) (Among the remedies a land owner has upon issuance of a final order of the County Commission is to “seek review in circuit court of the Commission’s order, pursuant to Section 380.085, Florida Statutes.”); *Manatee County v. Estech General Chemicals Corp.*, 402 So. 2d 75, 75-76 (Fla. 2nd DCA 1981) (complaint filed alleging a taking pursuant to § 380.085, Fla. Stat.).

When dealing with permitting decisions under chapter 380, including developments of regional impact and areas of critical state concern, § 380.085, Fla. Stat., provides the mechanism for challenging government action as a taking. The Legislature has the power and discretion to provide the mechanism for judicial review of administrative agency action. So long as one adequate method is established, due process does not require that the courts provide another and the statutory method should be followed. *Fla. Welding & Erection Service, Inc. v. American Mutual Ins. Co.*, 285 So. 2d 386 (Fla.1973).

Identical language can be found in other statutes and construction of their meaning is transferable to this case. Section 253.763, Fla. Stat., is one of those identical statutes. In *Bowen v. Florida Dep’t of Environmental Regulation*, 448 So. 2d 566 (Fla. 2nd DCA 1984), the court ad-

dressed the question of the timing of administrative appeals of a permitting decision in relation to the filing of a taking claim. The court held:

Thus, if an administrative appeal is instituted under 253.76, the “taking” issue may not be heard by the circuit court until the section 253.76 proceedings are completed. The **ninety-day time limitation** on bringing inverse condemnation actions in the circuit court, contained in 253.763(2), is automatically tolled until the agency completes the review process. **Where no appeal to TIIF is taken, the inverse condemnation suit must be filed within ninety days of the DER decision.**

Id. at 568 (e.a.). *See also, Albrecht v. State*, 444 So. 2d 8, 11 (Fla. 1984) (Section 253.763, Florida Statutes (Supp. 1978), provides a means of bringing a taking without compensation issue in circuit court.)

The Fifth District Court of Appeal had occasion to interpret § 373.617, Fla. Stat., another provision identical to § 380.085, Fla. Stat., in *Grin v. St. Johns River Water Management Dist.*, 409 So. 2d 208, 210 (Fla. 5th DCA 1982), where the court held: “If [an aggrieved party] claims the agency action constitutes an “unconstitutional taking” of property, it **must** file an action in the circuit court, pursuant to section 373.617(2).” (e.a.) *See also, St. Johns River Water Mgmt Dist. v. Koontz*, 2005 Fla. App. LEXIS 9774 (Fla. 5th DCA 2005) (taking case filed under § 373.617, Fla. Stat.).

The supreme court and the 1st, 2nd, 3rd, and 5th DCAs have uniformly interpreted these identical provisions as being the mandatory mechanism for bringing taking claims arising from final agency action under those statutes. Plaintiffs aggrieved by final agency action have options – they can accept the action of the agency as proper but constituting a taking or they can attack the validity of the agency’s decision on the merits. In an area of critical state concern, governed by the provisions of chapter 380, relating to the actions of the County Commission in this case, those options are (1) seek a writ of certiorari in the circuit court within 30 days challenging the merits of the decision¹; (2) appeal to the Florida Land and Water Adjudicatory Commission

¹ *Board of County Comm’rs v. Snyder*, 627 So. 2d 469 (Fla. 1993).

within 45 days to challenge the merits of the decision²; or (3) file a complaint for inverse condemnation pursuant to § 380.085, Fla. Stat., within 90 days of the Board's decision.

Plaintiffs in this case have simply failed to avail themselves of *any* of the possible remedies within the mandatory time limits. They have not challenged the merits of the BUD determinations by certiorari or FLAWAC appeal, thereby tolling the 90 days. *See, Bowen*, 448 So. 2d at 568. And, they have failed to file their inverse condemnation claim within the 90 day limit in the statute. These facts are undisputed. The resolutions of the Board of County Commission were adopted on March 20, 2002 for Burstyn and Del Valle; on July 17, 2002, for Collins, Davis, Johnson, Magrini, and Radenhausen; and on March 17, 2004 for Hill, Lomrance, Schneider, and Tost. [Complaint ¶¶18-29] The complaint in this case was filed on or about November 22, 2004. Since the 90 days ran at the latest on or about June 17, 2004, all of Plaintiffs' claims are barred and this case should be dismissed with prejudice.

THE FOUR YEAR GENERAL STATUTE OF LIMITATIONS BARS ALL OF THESE TAKINGS CLAIMS WHICH ARE FACIAL CLAIMS DUE TO LACK OF A PERMIT APPLICATION OR DENIAL

The undisputed facts in this case show that all of the Plaintiffs, save two, have failed to apply for any development permits - either ROGO or building permits or variances. [building permits - Depos of Johnson - 23, 34; Aurelio Del Valle - 8, 36, 41-2; M. Del Valle - 7; M. Tost - 14; H. Tost 56; Lomrance - 16, 44; D. Hill - 14, 16, 25, 30; Radenhausen - 7, 75. ROGO - depositions of Aurelio Del Valle - 42 ;H. Tost - 33-4; Lomrance - 16, 44; D. Hill - 25, 30; D. Davis - 13; Radenhausen - 27, 76. variance - depositions of Aurelio Del Valle - 41; H. Tost - 56] Having never applied for permits, or as in the cases of Collins and Magrini, having never been denied a permit, these taking cases can only be analyzed as facial takings. In *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990), the court held:

² § 380.07(2), Fla. Stat.

The record in this case reflects that since adoption of CPA-5-87 and Ordinance 88-11, no individual appellant-landowner has applied for or been denied a development proposal, rezoning request, or variance from the development regulations. Therefore, appellants' challenge to the current land use regulations is a facial challenge.

When a facial taking is alleged, it is "the mere enactment of the regulation [that] constitutes the taking of all economic value to the land." *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 571 (Fla. 4th DCA 2002) citing *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990).

In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed.

Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994) (In a facial taking, the harm is singular and discrete, occurring only at the time the statute is enacted.

The statute of limitations for a facial takings claim commences from the date of enactment of the statute alleged to have caused the taking. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) ("Such "facial" challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed....") *See Lost Tree Village v. City of Vero Beach*, 838 So. 2d 561, 571 (Fla. 4th DCA 2002) (Since the alleged taking occurred with the enactment of the Plan, the statute of limitations for the take commences on the date the Plan was adopted.)

Absent statute like § 380.085, Fla. Stat., the general statute of limitations for taking cases is four years. § 95.11(3)(p), Fla. Stat. *Sarasota Welfare Home v. City of Sarasota*, 666 So. 2d 171, 172 (Fla. 2nd DCA 1995); *Baker v. Gulf & Western Indus.*, 850 F.2d 1480, 1481 (11th Cir. 1988). The Plan was adopted by the County on January 4, 1996. Because there have been no permit applications or denials alleged, this is a facial taking predicated on the enactment of the Plan, which occurred on January 4, 1996. All of Plaintiffs' facial takings challenges are time barred by Florida's 4-year statute of limitations for such claims. The statute of limitations to file this claim expired on January 4, 2000, many years prior to Plaintiffs filing their complaint in 2004. This complaint should be dismissed with prejudice.

Plaintiffs will assert that the Beneficial Use Determination application is the meaningful application for either a permit or a variance, thereby making this an as applied taking claim governed by the four year statute of limitations measured from the dates of the Board of County Commission [“BOCC”] resolutions. [Complaint, ¶¶ 30-33] The BUD applications in this case constitute neither a permit nor variance application. Under § 9.5-129 of the County’s Land Development Regulations [“LDRs”], the BOCC has several options with regard to property that has been determined eligible for relief under the BUD process. These include building permit, variance, rezoning, transfers of development rights, ROGO credits or purchase. BUD applicants have been given building permits when the BOCC had that flexibility. *See, Clay v. Monroe County*, 849 So. 2d 363, 365 (Fla. 4th 2003):

While this case was pending on appeal, Monroe County initiated a proceeding before a special hearing officer for a beneficial use determination on behalf of the owners of the twenty-one properties on Big Pine Key which had been held in abeyance because of the substandard service level on U.S. Highway 1. Relying on the County’s ROGO ordinance, the County requested a ruling authorizing the issuance of building permits to the twenty-one adversely affected owners. The special master recommended that the relief be granted, and in June 2002, the County Commission unanimously approved the special master’s recommendation.

At the same time that the Hill Family Investment application was submitted, two other applicants who are not Plaintiffs in this lawsuit were also considered for BUD relief. Those persons, as a result of their application and hearing, have already received building permits.

Rather than give the BOCC the full flexibility afforded them in the ordinance allowing them the option of granting development relief, Plaintiffs “stipulated” that the relief would be purchase. Absent that stipulation, the BUD application *might* have been considered a permit or variance application; but the constraint placed on the BOCC by the stipulation made that process nothing more than an attempt to disadvantage the BOCC in any future taking claim by having a resolution on record seeking to purchase the property. This stipulation was made even though there is clear testimony from many of the Plaintiffs that all they wanted at that time, and even now, is a permit. [Depos of Johnson - 26, 27, 30; Aurelio Del Valle 25; Lomrance - 38; D. Hill - 42; D. Magrini - 25, 28; D. Davis - 40, 44, 46; Radenhausen - 17]

No effective applications have ever been filed, or in the cases of Collins and Magrini, denied. This facial challenge is time barred and should be dismissed with prejudice.³

THE FOUR YEAR GENERAL STATUTE OF LIMITATIONS BARS PLAINTIFFS' TAKING CLAIMS BASED ON THE LIMITATIONS ON RED-FLAGGED WETLANDS

Certain of the Plaintiffs have property which constitutes "red-flagged" wetlands that are facially required by the Plan to be maintained as 100% open space. These Plaintiffs are Aurelia and Maria Del Valle; Hill Family Investment, Inc.; Samuel L. Burstyn, P.A.; Robert A. Lomrance; Frank J. Schneider, Marry Ann Ricklin, and Rosemary Riordan; and Hubert and Marilyn Tost. The recommended order on these Plaintiffs' BUD applications, adopted by the BOCC, stated:

The provisions of Policy 102.11 of the Plan and Section 9.5-343 of the Code imposes 100% open space requirement for freshwater wetlands. The terms of the Memorandum, which implements the above provisions, expressly prohibits all development under any circumstances in red - flag wetlands. Thus, the lots have been rendered unbuildable by operation of the plan, the code and the memorandum, and Applicants have been deprived of all reasonable economic use of their lots.

See Special Master's Report, attached to Plaintiffs' Complaint. This finding was adopted by the BOCC in the resolutions adopted for each Plaintiff. None of these Plaintiffs appealed the final action of the BOCC either to the FLAWAC or to the circuit court. Failure to appeal and subsequent filing of a taking claim necessarily constitutes acceptance by the Plaintiffs of the findings and conclusions of the order. *Atlantic International Inv. Corp. v. State*, 478 So. 2d 805, 807 (Fla. 1985) ("[O]nce a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper.")

The finding cited above unmistakably places the claims of the owners of the wetlands in the facial category. The classification prohibits all development and no variances are available. As explained at pg 9-10 above, the statute of limitations on facial taking claims starts to run

³ In the alternative, Plaintiffs attempt to state a claim for "as applied" takings, alleging in paragraph 40 of their complaint that the taking "began on the dates Plaintiffs applied for Beneficial Use Determinations." Even if we allow that these are ripe, as-applied takings, the undisputed facts show that the applications were filed in January, 1997. The four year statute of limitations also bars these claims.

when the allegedly offending regulation is adopted – here on January 4, 1996. The statute of limitations on these claims ran on January 4, 2000, almost four years prior to the filing of this case.

Plaintiffs will argue that the claims were not ripe until the BOCC resolutions adopted in the BUD process and that therefore the statute of limitations has not run. [Complaint ¶¶ 30-33] Ripeness is, however, not an issue in facial takings claims. In *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 571 (Fla. 4th DCA 2002), the court held:

The ripeness requirement, however, does not apply to facial takings, as the mere enactment of the regulation constitutes the taking of all economic value to the land. *See Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990).

See also, Ventura Mobilehome Cmty. Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1052 (9th Cir. 2004) (Ripeness requirement does not apply to facial takings claims because they, by definition, derive from the ordinance's enactment.) These Plaintiffs' claims accrued and were fully ripe for adjudication upon adoption of the plan. These claims were filed many years after the statute of limitations ran and should be dismissed with prejudice.

PLAINTIFFS' AS-APPLIED TAKING CLAIMS ARE NOT RIPE

To the extent that Plaintiffs attempt to assert “as-applied” taking claims, such claims are not ripe. 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. *Lost Tree*, 838 So. 2d at 572. In order for such a claim to be ripe, it is essential that the landowner has given the permitting authority the opportunity to exercise whatever discretion is built into the process and determine how the regulation will be applied to the property. The United States Supreme Court held in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001) that:

Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.

The United States Supreme Court laid out the ripeness requirement as it relates to takings in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Williamson County*, the court held that

a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. at 186.

Applying this principle, the First DCA held in *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990):

Although the final decision prerequisite also may be satisfied by proof that attempts to comply would be futile, futility is not established until at least one meaningful application has been filed. *Unity Ventures*, 841 F.2d at 775; *Kinzli*, 818 F.2d at 1454.

Even if Plaintiffs try to assert that it would have been futile to apply, under *Glisson* the claim is not ripe until they make at least one attempt. Citing to *Glisson* and other Supreme Court cases, the Fourth DCA held in *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995):

[G]enerally a land use agency can make a final decision only when it has an application before it. Normally, unless there has been at least one “meaningful application,” the claim cannot be said to be ripe for review. *Glisson*, 558 So. 2d at 1030 (adopting *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 n.8, 91 L. Ed. 2d 285, 106 S. Ct. 2561, *reh’g denied*, 478 U.S. 1035, 107 S. Ct. 22, 92 L. Ed. 2d 773 (1986)); see also *Wynn*.

See also, *City of Key West v. Berg*, 655 So. 2d 196 (Fla. 3rd DCA 1995); *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) where the court held:

A governmental entity must arrive at a “final, definitive position,” *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S. Ct. 3108, 3119, 87 L. Ed. 2d 126, 141 (1985), on the “nature and extent of permitted development” before a court may adjudicate the “constitutionality of the regulations that purport to limit it.” *MacDonald, Sommer & Frates*, 477 U.S. at 351. Florida courts have adopted the federal ripeness policy of requiring a “final determination from the government [**19] as to the permissible uses of the property.” *Glisson*, 558 So. 2d at 1035-36; *Department of Env’tl. Reg. v. Mackay*, 544 So. 2d 1065, 1066 (Fla. 1989); *City of Jacksonville v. Wynn*, 650 So. 2d 182, 186-88 (Fla. 1st DCA 1995); *Lee County v. Morales*, 557 So. 2d 652 (Fla. 2d DCA),

review denied, 564 So. 2d 1086 (Fla. 1990). A final determination requires at least one meaningful application. *Glisson*, 558 So. 2d at 1035. As we recently noted, “ripeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed.” *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 526 (Fla. 4th DCA 1994).

The undisputed facts in this case show that, except for Collins and Magrini, no Plaintiff has ever applied for a development permit. As explained above, the BUD applications cannot qualify as a meaningful application because the Plaintiffs waived the ability to get relief from the application of the regulations. All they sought was compensation – not development permits, thereby preventing the BOCC from making a “final determination ... as to the permissible uses of the property.” *Glisson*, 558 So. 2d at 1035-36. Collins and Magrini have made application, but still do not have the necessary final determination necessary to find a taking. In fact, they are both in line to get permits in the foreseeable, if not immediate, future. Finally, the wetlands plaintiffs have no “as applied” claim as described above.

In addition to the failure to comply with the most basic of requirements for a taking claim – apply for a permit – Plaintiffs have failed to exhaust their administrative remedies.

Where a landowner is aggrieved by a land use ruling, the owner must exhaust the administrative remedies which are reasonably available before initiating a taking claim.

Clay v. Monroe County, 849 So.2d 363 (Fla. 3rd DCA 2003). Where a project applicant can seek alternative avenues to develop and fails to pursue those possibilities, court have continually held the claims are not ripe.

We agree with the trial court and with North Palm Beach that the failure of landowner to request an amendment to the plan to permit other uses and present North Palm Beach with a meaningful development proposal is fatal to her takings claim as applied to her property. The ripeness doctrine, which requires a claimant to exhaust administrative remedies before resorting to a judicial solution, is not just a technical requirement; it has a very practical application to takings cases.

Taylor, 659 So. 2d at 1172-73). Once again, as stated above, the truncated BUD process in these cases cannot serve to satisfy the exhaustion doctrines. Those applications were not meaningful because they constrained the BOCC from granting *true* administrative relief where it may have been available. We cannot know what relief might have been offered to these Plaintiffs if they

had in fact truly applied for and exhausted their available remedies. Except for the illusory BUD applications, Plaintiffs did not file a single appeal or question a single decision made by the County. For all of the above reasons, Plaintiffs' claims are not ripe and this case should be dismissed.

PLAINTIFFS' CLAIMS FOR TEMPORARY TAKING DAMAGES AND PERMANENT TAKING DAMAGES ARE UNSUPPORTABLE AS A MATTER OF LAW

Plaintiffs claim that beginning with the filing of their BUD applications, a temporary taking began which will end on the date of the final judgment in this case or upon fee title acquisition by the County. [Complaint ¶ 41] At the time of judgment or acquisition, Plaintiffs also claim that they will be entitled to damages for the temporary taking from the BUD application dates to the date of trial *and* the fair market value of the property on the date of final judgment. [Complaint ¶ 45] This double liability theory arises from a 1995 law review article. Stein, Gregory M., *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953 (1995). Careful reading of this article reveals that there is **no** case that actually applies this theory of recovery. In fact, the author acknowledges that in *Volusia Co. v. Pickens*, 439 So. 2d 276 (5th DCA 1983), Florida has rejected it, stating:

The trial court believed that the Effective Moment of a temporary taking occurred in 1976 and that the temporary taking ceased and was converted into a permanent taking in 1981. That court determined the value of the property for each separate taking as of its own Effective Moment and awarded appropriate interest on the award for the earlier, temporary taking. The appeals court disagreed, found the taking to have been permanent from the outset, valued the property as of the one and only Effective Moment, and awarded interest from that point forward.

Stein at 1009-1010. As will be set forth more fully below, the decision in *Pickens* is exactly the analysis applicable in this case.

The basic concept underlying temporary takings is that some action of the government – either condemnation of a leasehold for a term of years, a physical invasion that is removed, or a regulatory taking where the offending regulation is rescinded or relaxed – works a taking of the

owner's property⁴ and at some time in the future the property is returned to the owner. Early temporary taking cases appeared after World War II. Pursuant to § 201 of Title II of the Second War Powers Act of 1942, the War Department condemned property for use during the war. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), the issue before the court was the proper measure of compensation for such a condemnation. The Court held on that issue:

the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in the two recent cases dealing with temporary takings. *United States v. General Motors Corp.*, 323 U.S. 373; *United States v. Petty Motor Co.*, 327 U.S. 372.

* * *

It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss, like the cost of moving, is denied compensation as consequential. See *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676.

Kimball Laundry, 338 U.S. at 7, 11-12. The facts in all of these temporary taking cases involve the government condemning the property for use during the war and then *giving it back*.

In the situation where the government (or a corporation with the power of eminent domain) invades someone's property, the usual fact pattern is that the condemnor institutes eminent domain proceedings after the taking has occurred. The dispute then arises as to what is the date for calculation of damages. The answer generally is the date that the invasion works the taking. In *Basic Energy Corporation v. State of Florida*, 709 So. 2d 124, 128 (Fla 1st DCA 1998), the court held:

In many ways the instant situation in which compensation is being given after a wrongful taking is like an inverse condemnation proceeding in which the date of valuation for compensation purposes is the date the property was wrongfully appropriated. The Florida Bar, *FLORIDA EMINENT DOMAIN PRACTICE & PROCEDURE* § 9.31 (1996) (citing *Crig-*

⁴ In the case of a regulatory taking, on the date of the taking when the government action destroys the reasonable beneficial use or the entire value, the government "takes" the fee. It is analogous to the government building a road on the property - the government right or wrong becomes the fee owner. The inverse condemnation action merely formalizes this ownership as of the date of taking and provides the necessary compensation to the owner. One of the misperceptions that leads Mr. Stein to his temporary/permanent taking theory is his understanding that "a temporary regulatory taking resembles a forced lease." 70 WASH. L. REV. at 958.

ger v. Florida Power Corp., 469 So. 2d 941 (Fla. 5th DCA 1985) and *County of Volusia v. Pickens*, 439 So. 2d 276 (Fla. 5th DCA 1983)).

This holding, and others like it, are consistent with the idea that the initial taking is permanent and the damages are calculated based on the value of the property on the date of the wrongful taking. *See also, Casa Loma Springs Development Company v. Brevard County*, 112 So. 60 (Fla. 1927) (Where road department invaded property prior to instituting condemnation, proper date of valuation was time of unlawful appropriation.); *Crigger v. Florida Power Corporation*, 469 So. 2d 941 (Fla. 5th DCA 1985) (The proper date of taking would be the date Florida Power first wrongfully appropriated the property.) There is no legal authority for a determination that there has been a temporary taking for which compensation is due up to the time of the condemnation proceeding (or inverse condemnation verdict) with, in addition to the temporary taking damages, full compensation for a permanent taking awarded at that time.

This case is an alleged regulatory taking. It is asserted that a taking occurred (or in the words of the Plaintiffs “started”) on January 2 or 3, 1997, the dates of the BUD applications. If a taking did occur on that date, it was a permanent one. The facts of this case do not fit at all into the scenarios addressed by the courts as temporary takings.

The United States Supreme Court began addressing the remedy for temporary regulatory takings in 1981 in *San Diego Gas & Electric Co. v. City of San Diego et al.*, 450 U.S. 621 (1981). In that case, San Diego Gas had plans to build a nuclear power plant on land it owned and which was properly zoned for that purpose. The City downzoned the property and adopted an open space plan. The company sued claiming that the city had taken its property without just compensation in violation of the Federal and State Constitutions on the theory that the city had deprived it of the beneficial use of the property.

The trial court awarded damages and the appeals court affirmed. On the strength of its opinion in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P. 2d 25, *aff'd on other grounds*, 447 U.S. 255, which was decided in the interim, the California Supreme Court remanded for further consideration. In *Agins*, the California court held that an owner deprived of the beneficial use of his land by a zoning regulation is not entitled to damages for inverse condemnation, but that his exclu-

sive remedy is invalidation of the regulation in an action for mandamus or declaratory relief. *Agins*, 598 P. 2d at 26. On reconsideration, the appeals court reversed the trial court, holding that there is no damages remedy available and that San Diego Gas' remedy was to have the regulations invalidated. *San Diego Gas*, 450 U.S. at 630.

The case then went to the U.S. Supreme Court where, in a 4-1-4 decision, Justice Brennan introduced us to the idea of damage awards for temporary takings. The holding of the court by Justice Blackmun was that there was no jurisdiction to hear the appeal. Justice Brennan's dissent, joined by three others, found jurisdiction and addressed the remedy question raised but not answered in the U.S. Supreme Court's decision in *Agins*. 447 U.S. 255. Justice Rehnquist concurred, writing:

If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U S. C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of JUSTICE BRENNAN.

San Diego Gas, 450 U.S. at 634. Effectively writing for a majority of five justices, Justice Brennan wrote in his dissent:

Having determined that property may be "taken for public use" by police power regulation within the meaning of the Just Compensation Clause of the Fifth Amendment, the question remains whether a government entity may constitutionally deny payment of just compensation to the property owner and limit his remedy to mere invalidation of the regulation instead

* * *

In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

* * *

As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and "'the self-executing character of the constitutional provision with respect to compensation,' . . . is triggered.

* * *

Just as the government may cancel condemnation proceedings before passage of title, ... or abandon property it has temporarily occupied or invaded, ... it must have the same power to rescind a regulatory "taking." As the Court has noted: "[An] abandonment does

not prejudice the property owner. It merely results in an alteration of the property interest taken – from full ownership to one of temporary use and occupation.... In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.” *Ibid.*; see *Danforth v. United States*, 308 U.S. 271, 284 (1939).

450 U.S. at 653-58. This opinion addresses the proper remedy for a landowner where a government regulation “takes” his property and the government subsequently rescinds or amends the offending regulation – in other words, where the regulation works a taking and the government takes action to *give it back*. In *Agins*, the California Supreme Court held that simple rescission is the remedy. Justice Brennan said that is insufficient – once there is a taking, compensation is required even if the property is, either actually or figuratively, returned.

This remedy question presented itself to the Court repeatedly without resolution due to procedural problems. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340; *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172; *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621; and *Agins*. In 1987, the Court was finally presented with a case postured properly for decision of this issue. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), Justice Brennan’s *San Diego Gas* dissent finally became law, with the Court holding that invalidation of an ordinance, application of which constitutes a taking, without payment of fair value for the use of the property during the period the owner is denied its use would be a constitutionally insufficient remedy. *Id.* at 322. When the decision in *First English* is properly read in the context of the Court’s repeated attempts to address the holding of the California Supreme Court in *Agins*, it becomes clear that the only issue addressed is whether compensation is due for the period during which an offending regulation is in force when, either through voluntary action or a declaration of a court, the regulation no longer constitutes a taking – i.e. when the government *gives the property back*. First, the Court stated that:

[It] has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. See, e. g., *Kirby Forest Industries, Inc. v. United States*, *supra*; *United States v. Dow*, 357 U.S. 17, 26 (1958). Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a “temporary” taking be deemed a permanent taking. But *we*

have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land.

Id. at 317,⁵ and that:

In *United States v. Dow*, *supra*, at 26, though rejecting a claim that the Government may not abandon condemnation proceedings, the Court observed that abandonment “results in an alteration in the property interest taken – from [one of] full ownership to one of temporary use and occupation.... In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.

Id. at 318. It then held that:

Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a “temporary” one, is not a sufficient remedy to meet the demands of the Just Compensation Clause.

Id. at 319. Implicit in this holding is the understanding that the Court is addressing a situation where the initial taking is permanent unless and until the offending regulation is rescinded or amended – exactly the opposite of the theory posited by the Plaintiff and Mr. Stein. Finally, in a footnote, the Court refers to *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984), for the proposition that, “Where Government physically occupies land without condemnation proceedings, “the owner has a right to bring an ‘inverse condemnation’ suit to recover the value of the land on the date of the intrusion by the Government”.” *Id.* at 320 n.10.

This exposition of the history of temporary takings in the Supreme Court is consistent with the only Florida precedent directly addressing the issue presented. In *County of Volusia, v. W. R. Pickens*, 439 So. 2d 276 (Fla. 5th DCA 1983), the trial court had directed the jury:

to value the property as of the date the trial on damages took place (1981), rather than the date of taking (1976), and [to] allow[] Pickens to recover a sum for lost income (rents), together with interest from the date of taking to the date of the trial on compensation.

Id. at 277. This is exactly what Plaintiff here seeks. The appeals court reversed both *as* to the date of the taking and the allowance of rents, holding that there had been a permanent taking in

⁵ This statement should not be read to indicate that the taking was temporary from the start. In context, the statement says that the taking was initially permanent and was converted by the government’s decision to discontinue the take. Where the government makes that decision (one which has *not* been made in this case), the owner cannot insist that he is entitled to damages for a permanent taking and will be entitled to damages for the temporary taking *only*.

1976 for which Plaintiff was entitled to fair market value as of that date plus prejudgement interest. The *Pickens* court held:

[T]he public body must pay:

Just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.

Behm v. Division of Administration, Department of Transportation, 383 So.2d 216, 218 (Fla. 1980) (quoting *United States v. Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 123, 58 S. Ct. 799, 801, 82 L. Ed. 1219, 1223 (1938)). Since *Pickens*' property was taken in 1976, no damages for loss of rental income would be included as just compensation after that date because, **in legal theory, *Pickens* suffered his loss of the property in 1976, and thereafter it belonged (albeit wrongfully appropriated) to the county.**

439 So. 2d at 278 (emphasis added). The same is true here. If there was a taking, it occurred in 1997 and thereafter the land belonged to the County, even if wrongfully appropriated.

Plaintiffs have alleged that a taking occurred on the date the BUD applications were filed. If that is so, then it was a permanent taking and Plaintiffs are due only the fair market value on that date plus interest.⁶ The Constitution does not provide for double recoveries. The court should grant summary judgment finding that there was no temporary taking for which damages are due.

Plaintiffs claim that the delay between the BUD applications and the final orders (resolutions) was so extraordinarily long so as to constitute a temporary taking. As set forth above, if a taking occurred on the date of application, then there is no basis for damages. The delay in the BUD process cannot anyway be construed as a temporary taking. First, by challenging the choice of the special master, Plaintiffs were at least partially responsible for the delay. Second, the delay caused no one damage. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994) (map of reservation struck down in *Joint Ventures* not a *per se* taking but a plaintiff must show "the extent of the interference or deprivation of economic use.") Plaintiffs were not deprived of any right to apply for any permit or take any other action towards de-

⁶ As stated above, if this is the date of taking, the claim is barred by the four year statute of limitations.

velopment of their property by the pendency of the BUD process. There simply is no allegation that the delay itself harmed any plaintiff. The Magrinis in fact had applied for a permit before their BUD application was filed and currently are in line for issuance of a permit at any time. Having sustained no damages from the length of the proceeding, Plaintiffs cannot claim that the delay was a taking.

Plaintiffs' temporary taking claims have no basis in law or the undisputed facts and should be dismissed with prejudice.

CONCLUSION

For the above stated reasons, summary judgment should be granted to the Defendants and third party defendants and this case should be dismissed with prejudice.

Respectfully submitted this 29 Day of July, 2005.

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL

Jonathan A. Glogau
Chief, Complex Litigation
Fla. Bar No. 371823
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300, ext. 4817

_____/s/
Attorney