

**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

**THE STATE OF FLORIDA'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

At the recent hearing on the State and County Motions for Summary Judgment, the court requested further briefing on two issues: 1. Whether the 90 day statute of limitation in § 380.085, Fla. Stat., applied to these cases; and 2. When the 4 year statute of limitations began to nm with respect to the red-flagged wetlands properties.

**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. 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.¹ The statute further provides that no development can occur in the ACSC except in accordance with chapter 380. § 380.05(16), Fla. Stat.² 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

¹ § 380.0552(5), Fla. Stat., provides: APPLICATION OF THIS CHAPTER. -- Section 380.05(1)-(5), (9)-(11), (15), (17), and (21) shall not apply to the area designated by this section for so long as the designation remains in effect. Except as otherwise provided in this section,. s. 380.045 shall not apply to the area designated by this section. All other provisions of this chapter shall apply, including s. 380.07.

² § 380.05(16), Fla. Stat., provides: No person shall undertake any development within any area of critical state concern except in accordance with this chapter.

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.

The Third DCA specifically recognized that this statute provides a landowner 90 days in which to file a taking claim against the County based on the "denial of a permit to build" in *Monroe County v. Ambrose*, 866 So. 2d 707, 712 n.5 (Fla. 3rd DCA 2003), where the court stated:

Section 380.085, Florida Statutes (1997), enables a person substantially affected 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 also. v. Palm Beach County Bd. of County Comm'rs, 429 So. 2d 1260, 1264 (Fla. 1st DCA 1983) (citing § 380.085 as the remedy for a taking of property), *Fox v. Treasure Coast Regional Planning Council*, 1983 Fla. App. LEXIS 18891, 15-16 (Fla. 1st DCA 1983) (land owner can "seek review in circuit court of the Commission's order, pursuant to Section 380.085, Honda statute:), *Manatee County v. Estech General Chemicals Corp.*, 402 So. 2d 75, 75-76 (Fla. 2nd DCA 1981) (discovery dispute in a taking case filed 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 government decisions. 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 transferrable [sic] 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 addressed 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 TIF 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 *Gruen 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 action under those statutes. Plaintiffs aggrieved by these final decisions have options - they can accept the decision as proper but constituting a taking or they can attack the validity of the 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 decision³; (2)

³ *Board of County Comm 'rs v. Snyder*, 627 So. 2d 469 (Fla. 1993).

appeal to the Florida Land and Water Adjudicatory Commission within 45 days to challenge the merits of the decision⁴; 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.

Plaintiffs argue that this statute only applies to state agencies, not the County. The Third DCA in *Ambrose* clearly disagreed with that position. That argument also renders the statute virtually meaningless, since all DRI development orders and all development permits in areas of critical state concern under Chapter 380, decisions to which the legislature clearly meant the statute to apply, would be immune since they are issued by local and county governments with jurisdiction, not state agencies.

Plaintiffs go on to argue that the provisions of § 380.085, Fla. Stat., are not exclusive based on the cumulative remedies language in that section and that therefore the 4 year statute of limitations on a common law inverse condemnation claims applies. This argument has no merit.⁵ A cumulative remedies clause preserves other remedies; the inverse condemnation claim of the

⁴ § 380.07(2), Fla. Stat.

⁵ At hearing, Plaintiffs' counsel made reference to the "history" of this statute and its identical cousins. There is no legislative history on which this court can rely and therefore we must take the statute at face value. Plaintiffs' argument that this statute is little used or reported in appellate cases also is no argument for its demise. As long as its on the books, it is the law.

Plaintiffs is the same claim as provided in § 380.085, Fla. Stat. *Bowen*, 448 So. 2d at 568 (section 253.763, [] expressly authorizes the inverse condemnation action in the circuit court.) The supreme court addressed a cumulative remedies clause found in § 403.313, Fla. Stat., in *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1035 (Fla. 2001). Plaintiffs had brought a common law nuisance claim for pollution under chapter 823, Fla. Stat. Flo-Sun argued that chapter 403 superceded [sic] the nuisance cause of action. The court held:

[A] public nuisance cause of action seems to be one of the ‘rights of action or remedies in equity under the common law or statutory law’ which is not abridged or altered by chapter 403 and is cumulative to the remedies provided in that chapter.

The statutory remedy for violation of the State’s pollution laws is different from a common law nuisance. Plaintiffs in this case seek to bring the same cause of action but avoid the statutory provisions limiting the time for bringing the claim. This they cannot do; the provisions of § 380.085, Fla. Stat., are adequate to provide redress for any alleged violation of the Plaintiffs’ constitutional rights in this case and that procedure must be followed. *Fla. Welding & Erection Service, Inc. v. American Mutual Ins. Co.*, 285 So.2d 386 (Fla.1973). If Plaintiffs are permitted to ignore the procedure set forth in § 380.085, Fla. Stat., in favor of the general four year statute of limitations⁶, then the court will be allowing them to read the statute out of existence. The remedy Plaintiffs seek is not cumulative, but would result in the common law repealing a statute - an outcome for which there is no precedent.

THE FOUR YEAR STATUTE OF LIMITATIONS HAS RUN ON THE RED FLAGGED WETLANDS PROPERTIES

The recommended orders of the Special Master, adopted by the Board of County Commissioners with regard to the red-flagged wetlands properties 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**

⁶ The general four year statute of limitations Plaintiffs would apply is found in § 95.11(3)(p), Fla. Stat., which provides: “Any action not specifically provided for in these statutes.” The very language of the statute shows it cannot apply - the 90 day limitation in § 380.085, Fla. Stat., is “specifically provided for in these statutes,” and must govern this case.

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. (e.a.) It is clear from this language that the finding was that the mere enactment of the plan and the code as interpreted and implemented by the Memorandum rendered the property "unbuildable." As such, this can only be treated as a facial taking.

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.)

Generally, a statute of limitations begins to run "when the last element constituting the cause of action occurs." § 95.031(1), Fla.Stat. (1983). Therefore, 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.)

At the hearing on the Defendants' Motions for Summary Judgment, the court questioned whether the landowner must be on actual notice of the restriction on the use of his/her property before the cause of action will accrue. As to Plaintiffs Del Valle, Hill, Lomrance, and Tost, their depositions on file with Defendants' motions clearly show that they did know. Some were no [sic] notice as of the purchase of their property. [Deposition of A. Del Valle - 33; M. Del Valle - 5;

M. Tost - 12; H. Tost - 10, 18, 33, 72-73; Lomrance -11, 13, 14; D. Hill - 14, 15] These Plaintiffs were also made aware of the restrictions through receipt of notice that their tax assessed value had been drastically reduced with dates coinciding with the adoption of the 1986 and 1996 Plans. [Deposition of M. Tost - 6; H. Tost - 17, 59, 87-88; M. Del Valle - 9, 12, 28; Lomrance - 28-30; D. Hill - 25-26].

Regardless of the evidence of actual notice, Plaintiffs were required to keep informed about the status of their properties. “Mere ignorance of the easily discoverable facts which constitute the cause of action will not postpone the operation of the “statute of limitations as to the party plaintiffs.” *Nardone v. Reynolds*, 333 So. 2d 25, 40 (Fla. 1976). It was certainly no secret that in 1986 and 1996 Monroe County was in the process of adopting comprehensive plans that would have a significant effect on the ability to develop land in the Keys. As the affidavits and maps submitted by the County in this case show, Plaintiffs could easily have found out the status of their property by simply asking!

Property owners cannot simply sit around and wait while such regulations are adopted and then, 8 years (or in some cases 18 years) later be heard to complain. See generally, *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Plaintiffs knew, or should have known with reasonable inquiry long prior to November, 2000 (four years prior to the filing of this suit) that the Plan and Code had restricted their ability to build on their property.

Plaintiffs argue that the existence of the BUD process prevents a finding of a facial taking because that process ‘allows for a variance from the 100% open space requirement [sic] The BUD order finds otherwise, stating: “[the] provisions expressly prohibit[] all development under any circumstances in red - flag wetlands.” By alleging a taking in Circuit Court, Plaintiffs have necessarily acceded to the validity of the underlying order and they are estopped from challenging the validity of the finding that the Plan, Code, and Memorandum operated to prevent use.. [sic] *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.”)

Even if Plaintiffs are right, and the BUD process initially allowed a variance from the restrictions on red flagged wetlands, in 1999 the Memorandum made it clear how the 100% open space requirement would be interpreted: The Memorandum explicitly prohibits any development with no variances allowed. [¶ 1.(b)1)a) and b)] If the Memorandum is construed to be the instrument of the facial taking, Plaintiffs' claims are still barred since the Memorandum is dated 1999, more than four years before the filing of this suit.

CONCLUSION

Plaintiffs' claims are barred by the various statutes of limitations applicable to these cases. This case presents a poster child for why these statutes must be applied. These landowners waited in the face of growing restrictions on the use of their property and then, after manipulating the BUD process so they could get an ostensible admission of liability from the County, brought suit. The county is faced with an ever growing danger from overdevelopment and destruction of the natural processes that would otherwise afford some protection from the next big storm. Plaintiffs' claims should be dismissed.