

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

THOMAS F. COLLINS, et al.,

Plaintiffs,

vs.

MONROE COUNTY,

Defendant,

vs.

The STATE of FLORIDA,

Third-party Defendant.

CASE NO. CA-M-04-379

**MONROE COUNTY’S REPLY BRIEF ON THE LIMITED ISSUE OF
STATUTE OF LIMITATIONS IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT**

I. INTRODUCTION

As set forth in Monroe County’s (the “County’s”) Memorandum of Law on the Limited Issue of Statute of Limitations (the “Statute of Limitations Brief”), summary judgment must be entered in the County’s favor because Plaintiffs failed to bring their inverse condemnation claims prior to the expiration of the statute of limitations. With their claims exposed as what they truly are – i.e., claims that their properties were taken by the very enactment of the 2010 Plan and Land Development Regulations (collectively, the “2010 Plan”) – those claims are barred by the four-year statute of limitations. If, on the other hand, their claim is that their properties were taken by the application of the 2010 Plan to their properties, then the claims are barred by the ninety-day statute of limitations because Monroe County is an “Area of Critical State Concern” under Chapter 380 of the Florida Statutes.

For the reasons discussed below, Plaintiffs’ supplemental memoranda on the County’s four-year statute of limitations defense (“Pls.’ Four-Year Supp. Mem.”) and ninety-day statute of limitations defense (“Pls.’ Ninety-Day Supp. Mem.”) do nothing to overcome the statute of limitations bar.

Moreover, Plaintiffs' supplemental memoranda establish that Plaintiffs' claims are not ripe because Plaintiffs failed to exhaust their administrative remedies, specifically, by failing to appeal the County's determination to the Florida Land and Water Adjudicatory Commission ("FLWAC"). Plaintiffs' singular focus on whether they obtained a final decision by the County paints an incomplete picture of what ripeness requires under the law.

II. PLAINTIFFS' CLAIMS ARE OF A FACIAL TAKING AND ARE THUS BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS.

A. Plaintiffs' "Final Determination" and "Futility" Arguments Belie Their Position that the Alleged Taking Was Not Facial.

Plaintiffs' inverse condemnation claims are facial because they are based on the allegation that the taking occurred by operation of the regulations themselves from the time of their enactment. Plaintiffs filed their applications in the first place based on this notion, and the Special Master and the Board of County Commissioners ("BOCC") agreed when they determined that Plaintiffs had been "deprived of all reasonable economic use" because the 2010 Plan rendered the lots "unbuildable."

Plaintiffs now reinforce the facial character of the alleged taking in their supplemental memoranda. Throughout their memoranda, Plaintiffs emphasize the finality of the BOCC Resolution, in support of their contention that the determination was the ultimate resolution of the matter – the end of the line as to all things relating to Plaintiffs' use of their properties. (Pls.' Four-Year Supp. Mem., in 2.1, 3.1 and 3.1.2.) *By its plain language that determination was that the restrictive effects of the 2010 Plan existed from the time of its inception!* Since Plaintiffs are relying on the BOCC Resolution to evidence a taking, they must also concede – and the Court must conclude – that that taking was facial.

Equally telling is Plaintiffs' "futility" argument (Pls.' Four-Year Supp. Mem., ¶ 3.1.1) (quoting *City of Rivera Beach v. Shillingburg*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995)) for the proposition that the ripeness requirement need not be fulfilled where the pursuit of further administrative remedies would be futile. The only possible reason the pursuit of further remedies

would indeed be futile would be that the 2010 Plan from its inception meant that Plaintiffs (using their words) “can do absolutely nothing economically beneficial on their property.” (Pls.’ Four-Year Supp. Mem., ¶ 3.1.2.) Again, this means a facial take.

The fact that the 2010 Plan includes mechanisms to avoid takings, along with the prohibition against taking mandated by Florida Statute Section 380.08 (*see* Pls.’ Four-Year Supp. Mem., ¶ 3.2.5) does not detract from the facial character of Plaintiffs’ claims. Plaintiffs’ entire claim is that, regardless of what variances might have been available on paper, in reality the County, by the state’s mandatory provision of the 2010 Plan (§ 380.08), has no discretion to issue permits to owners of wetlands or habitats due to the County’s status as an Area of Critical State Concern. Thus, according to Plaintiffs, the only reason for a landowner to enter the BUD process is to obtain a formal determination that his or her property was taken. Plaintiffs cannot base their claim on a facial take, and at the same time, in order to avoid the consequences of that strategy, argue that the regulations purport to not effectuate a facial take. The latter becomes irrelevant, so far as the statute of limitations is concerned, in the face of Plaintiffs’ theory of the case.

Since Plaintiffs apparently claim that the County’s adoption of the 2010 Plan effectuated a taking without compensation, they could have attacked the validity of the 2010 Plan on the alleged ground that it violated Section 380.08’s prohibition against uncompensated takings. Or, they could have attacked the constitutional validity of the 2010 Plan for allegedly not containing the constitutionally-required mechanisms for compensating landowners whose property is taken. Instead, they filed an inverse condemnation suit seeking damages for a facial taking, and are subject to the four-year statute of limitations applicable to that claim. The four year statute of limitations ran from January 4, 1996, and their claims are now barred.

B. The Fact that Plaintiffs Applied for Beneficial Use Determinations, Along with Their Tax Assessments and the Public Availability of the 1986 Existing Land Condition Maps, Put Plaintiffs on Notice of the Character of Their Properties Under the 2010 Plan.

As the County has stated, as a matter of law the four-year statute of limitations applicable to Plaintiffs' facial taking claims began to run upon the enactment of the statute in January 1996. Nevertheless, even if the Court looks to the time at which Plaintiffs became on actual notice of the 2010 Plan, this too occurred more than four years before Plaintiffs brought their claims.

First, Plaintiffs obviously never would have filed beneficial use applications in January of 1997, asserting at that time that their properties were unbuildable wetlands or scarified lands under the 2010 Plan, if they were not on "notice" of their properties' status as such. Plaintiffs cannot claim that they lacked the necessary information (i.e., the wetland or scarified land status of their properties) to assert their rights within the limitations period, when in fact they used this very information as the premise of their administrative applications. Plaintiffs had to be on notice based on one source or another. This notice was more than four years earlier than the filing of this action on November 22, 2004.

Second, as detailed in the County's Statute of Limitations Brief, Plaintiffs were unmistakably on notice by virtue of the dramatic reassessments of their property values all prior to 1997; something Plaintiffs do not deny in their supplemental memoranda.

Third, the six wetlands plaintiffs¹ acknowledge that the 1986 Existing Conditions Maps were incorporated in 1996 as a part of the 2010 Plan (Pls.' Four-Year Supp. Mem., 113.2.2, subp. 7), that they were made available to the public (id. at subp. 14; 3.2.3), and that the maps depicted Plaintiffs' properties as wetlands. (Id., subp. 11.) Plaintiffs misconstrue the concept of notice when they emphasize the accuracy and reliability of the 1986 maps. Plaintiffs offer no evidence that the maps were not in fact accurate and reliable in their depiction of Plaintiffs' properties as wetlands. Instead, Plaintiffs merely argue, purely in the abstract, that in general the maps are of questionable accuracy and reliability. (Pls.'

¹ Specifically, Plaintiffs Burstyn, Del Valle, Tost, Hill, Schneider and Lomrance.

Four-Year Supp. Mem., ¶ 3.2.2, subp. 19.) More importantly, accurately or not, the maps showed the Plaintiffs’ properties as wetlands. That is all that matters.

It would be one thing if the maps mistakenly showed the opposite of what Plaintiffs contend here – i.e., that the Plaintiffs’ properties were not wetlands, and yet the County was trying to assert that the maps put Plaintiffs on notice that the properties were wetlands. As it is, however, Plaintiffs’ position makes no sense. Plaintiffs cannot credibly contend that the reason they failed to act within the statute of limitations is that they thought the maps were unreliable. Plaintiffs have offered no evidence of this, and in any event no court could countenance the position that a party adversely affected by a statute can escape the running of a notice-based limitations period by claiming that, although he received notice of the accrual of his claim, he had reason to suspect that that notice was unreliable.

III. IF PLAINTIFFS’ CLAIMS ARE AS-APPLIED, THEY ARE BARRED BY THE NINETY-DAY STATUTE OF LIMITATIONS.

The ninety-day statute of limitations imposed by Florida State Section 380.085 applies to Plaintiffs’ inverse condemnation claims because it overlays all proceedings concerning development in the places the State of Florida has designated as Areas of Critical State Concern pursuant to Florida State Section 380.0552. Thus, it is clearly the reality – and not the County’s “illogical stand” – that Chapter 380 is indeed “part of a legislative plan to strengthen the state’s ability to protect the Florida Keys.”

(Pls.’ Ninety-Day Supp. Mem., ¶ 1.) With certain exceptions not relevant here, when the Legislature designated the Florida Keys as an Area of Critical State Concern, it made the entirety of Chapter 380 apply to all development activity in this area. Florida State Section 380.0552(5).

And yes, Chapter 380 is nothing if not a limitation on property owners’ rights to develop their land. Thus, it should be no shock that the designation of the Florida Keys as a specially protected environmentally sensitive area mean that the rights of property owners in the Florida Keys do differ from the rights of property owners elsewhere, though still protected by basic constitutional rights to due process and just compensation.

A. There Is No Issue as to Whether Chapter 380 Provides the Exclusive Remedy for Inverse Condemnation.

Plaintiffs miss the mark when emphasizing the non-exclusive and cumulative nature of Chapter 380. The County certainly agrees that Chapter 380 is not the only vehicle for an inverse condemnation claim. However, if Plaintiffs utilized the BUD process approved by the State under Chapter 380 and incorporated in the 2010 Plan, then Chapter 308 is the only vehicle that permits an inverse condemnation claim to be brought without first appealing to FLWAC. As set forth in the County's Statute of Limitations Brief, this is the inescapable rule observed by a multitude of Florida opinions. Whether or not Plaintiffs *intended* to proceed under Chapter 380, *they did* so as a matter of law.

Contrary to Plaintiffs' assertion, the requirement for a FLWAC appeal does not implicate the *First English* or *Mailmen* opinions, as neither those opinions, nor any others, prevent a Legislature from requiring, as a prerequisite to resorting to the courts, that a landowner pursue certain administrative remedies.

Similarly, Plaintiffs are off the mark in arguing that Chapter 380 would be unconstitutional if it were the exclusive remedy because the government would have the discretion to deny compensation. Again, the County is not contending that Chapter 380 is the exclusive remedy. It is just the only remedy that allows landowners to proceed directly to the Circuit Court on an inverse condemnation claim without first appealing the decision to FLWAC. Plaintiffs had a choice upon the rendering of the BOCC Resolution: either file their inverse condemnation claims in the Circuit Court within ninety days, or appeal to FLWAC within forty-five days.

B. There Is No Issue as to Whether Local Governments Are Subject to the Administrative Procedures Act.

There is no relevance to Plaintiffs' observation that the Florida Administrative Procedures Act ("APA") (Fla. Stat. Chapter 120) does not apply to actions by county commissions. The County has never contended to the contrary, except where the APA is made expressly applicable to local government actions by statute or other law (e.g., Fla. Stat. Section

380.07(4), stating that FLWAC hearings are to be conducted pursuant to Chapter 120; *see Young v. Dep't of Cmty. Affairs*, 625 So. 2d 831, 837 (Fla. 1993) (conc. op.) (“Local governments are not agencies for purposes of the Administrative Procedure Act absent an express provision in general or special law or existing judicial decisions.”).

What does apply, however, because we are in the Florida Keys, is Chapter 380 – including Section 380.085’s ninety-day limitations period for inverse condemnation suits. Plaintiffs’ reference to Justice Barkett’s concurring opinion in *Young* (Pls.’ 90-Day Supp. Mem., 3.1.1) should be taken only for what it is: a statement that unless made expressly applicable, Chapter 120 does not apply to local governments. Justice Barkett does not say anything negating the County’s position that Chapter 380, including Section 380.085’s ninety-day limitations period, applies to all land use proceedings within Areas of Critical State Concern.

IV. PLAINTIFFS’ CLAIMS ARE BARRED BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDY OF APPEALING THE BOCC DETERMINATION TO FLWAC.

If Plaintiffs’ claims are deemed not to be facial, they are barred because they are not ripe. Plaintiffs’ emphasis on a “final decision” by the County notwithstanding, the law in fact requires not just a final decision, but the exhaustion of available administrative remedies. In this case, that meant appealing to FLWAC. Plaintiffs failed to exhaust their judicial remedies or obtain a “final decision” because they neglected to bring such an appeal within the forty-five-day limitations period, or at all.

A. FLWAC Appeal Was Available to Plaintiffs.

Florida Statute Section 380.07, which creates FLWAC, provides in subd. (1) that FLWAC may adopt the rules governing development within Areas of Critical State Concern such as Monroe County. Subdivision (2) provides:

Whenever any local government issues any development order in any area of critical state concern, or in regard to any development of regional impact, copies of such orders as prescribed by rule by the state land planning agency shall be transmitted to the state land planning agency, the regional planning agency, and the owner or developer of the property affected by such order. The state land planning agency shall adopt rules

describing development order rendition and effectiveness in designated areas of critical state concern. *Within 45 days after the order is rendered, the owner, the developer, or the state land planning agency may appeal the order to the Florida Land and Water Adjudicator*) Commission by filing a notice of appeal with the commission. The appropriate regional planning agency by vote at a regularly scheduled meeting may recommend that the state land planning agency undertake an appeal of a development-of-regional-impact development order.

(Emphasis added.) The statute further provides:

Prior to issuing an order, the Florida Land and Water Adjudicatory Commission shall hold a hearing pursuant to the provisions of Chapter 120. *The commission shall encourage the submission of appeals on the record made below in cases in which the development order was issued after a full and complete hearing before the local government or an agency thereof* . . . The [commission] shall issue a decision granting or denying permission to develop pursuant to the standards of this chapter and may attach conditions and restrictions to its decisions.

Id. at subds, (4)-(5) (emphasis added).

As observed by the Florida Supreme Court in *Young v. Department of Community Affairs*, 625 So. 2d 831, 833 n.3. (Fla. 1993), because the Legislature has designated the Florida Keys as an Area of Critical State Concern, “[development] permits issued . . . by Monroe County [are] subject to the procedures of section 380.7.” Further, “the Legislature has also statutorily determined that development in the Florida Keys will have an adverse impact if not in accordance with chapter 380, the local development regulations, and the local comprehensive plan.” *Id.* at 834.

Thus, Plaintiffs had another level of appeal available to them, which could have resulted in a determination by the State that a variance or other mitigation of the restrictions of the 2010 Plan should be given. The State had a very real interest in the outcome of the administrative process, as evidenced by the fact that it is a party to this lawsuit. Plaintiffs have submitted no evidence that an appeal would have been futile.

B. Without a FLWAC Appeal, There Was No “Final Decision” or Exhaustion of Remedies.

Plaintiffs were required to pursue such an appeal before filing their inverse condemnation claim, in order to exhaust administrative remedies. As stated in *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So. 2d 593, 596 (Fla. 5th DCA 2001):

As a general rule, parties are required to pursue administrative remedies before resorting to the courts to challenge agency action. The exhaustion rule serves a number of policies, including promoting consistency in matters which are within agency discretion and expertise, permitting full development of a technical issue and factual record prior to court review, and avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors and possibly moot the need for court action.

(Citations omitted.) *See, also De Carlo v. Town of West Miami*, 49 So. 2d 596 (Fla. 1950) (Florida Supreme Court discusses the practicality and necessity of the requirement that administrative remedies be exhausted.) In the instant case, the agency with the superior knowledge necessary to further the goals articulated by the Florida Supreme Court in *De Carlo*, above, is FLWAC, which oversees all development standards in Areas of Critical State Concern, including Monroe County.

Even under Plaintiffs' "final decision" analysis, they were required to appeal to FLWAC in order to ripen their claims. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), the Supreme Court emphasized that in order for the developer's claim to be ripe, it was not sufficient that it merely obtain a denial of its application for plat approval by the Regional Planning Commission. Rather, the plaintiff was required to have thereafter sought a variance, because that "would result in a conclusive determination" as to whether the developer could develop the property as desired. *Id.* at 193. The Supreme Court contrasted this with the sort of appeal where the developer would not be able to obtain the exact relief it sought, but rather, would only be able to obtain a review of the Commission's order. *Id.* Thus, the requirement is not simply that the plaintiff obtain a final decision at the level he has pursued, but that he pursue whatever available levels are capable of issuing relief. *See also Lee County v. New Testament Baptist Church of Fort Myers, Fla., Inc.*, 507 So. 2d 626, 628 (Fla. 2d DCA 1987) (emphasizing that the goal of the exhaustion of remedies requirement, under *Key Haven Associated Enters., Inc. v. Bd. of Trs. of Internal Imp. Trust*, 427 So. 2d 153, 157-58 (Fla. 1st DCA 1981), is to place the dispute before "an administrative agency [that] could amend the rule to eliminate [any] constitutional problem" before resort to the courts becomes necessary).

Although in *Monroe County v. Gonzales*, 593 So. 2d 1143, 1445 (Fla. 3d DCA 1992), the Court concluded that a decision at the County level was sufficiently “final” for purposes of the exhaustion or remedies requirement, that case is readily distinguishable because it was an “[o]pen [s]pace [r]equirements” zoning case. *Id.* at 1143. For any one of a multitude of possible reasons, the Court in *Gonzales* did not address the issue as to whether the State was in a position to offer any relief that could not be provided at the County level. Not so here. In this case, an appeal to FLWAC would have entitled Plaintiffs to an actual determination as to what use would be permitted on their properties, which might have resulted in relief from the 2010 Plan’s restrictions. In accordance with *Williamson*, their claims are unripe for having failed to pursue this remedy. *See also Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995) (“Florida courts have adopted the federal ripeness policy of requiring a ‘final determination from the government as to the permissible uses of the property’.”)

Plaintiffs cannot divorce the 2010 Plan from the State’s statutes and regulations by pursuing administrative remedies at the County level only. As detailed in the County’s Statute of Limitations Brief and as conceded by Plaintiffs (Pls.’ Four-Year Supp. Mem., 3.2.5 (“Monroe County’s ‘Beneficial Use Determination’ procedure was adopted for the sole purpose of compliance with § 380.08.”)), the 2010 Plan and the related Florida statutes are completely intertwined. The very existence of the 2010 Plan is due to the mandate of Florida Statute Section 380.05 subdivision (1)(a) (Areas of Critical State Concern), which provides:

The [state land planning agency] shall recommend actions which the local government and state and regional agencies must accomplish in order to implement the principles for guiding development. These actions may include, but shall not be limited to, revisions of the local comprehensive plan and adoption of land development regulations, density requirements, and special permitting requirements.

C. There Are No Constitutional Issues Relevant to the Statute of Limitations Analysis Here.

An appeal to the State would not, as Plaintiffs argue, raise constitutional issues so as to remove Plaintiffs from the exhaustion of remedies requirement (Pls.’ Four-Year Supp. Mem., ¶ 3.3) because the appeal would present no need to address whether the 2010 Plan effectuates a

taking. *See, e.g., Central Fla. Invs., Inc. v. Orange County Code Enforcement Bd.*, 790 So. 2d 593, 597 (Fla. 5th DCA 2001). The issue on appeal to FLWAC would be, simply, what uses would be permitted for Plaintiffs' properties. In fact, Plaintiffs admit that the appeal procedure set forth in Section 380.07(2) gives them a de novo review. (Pls.' Four-Year Supp. Mem., ¶ 3.3.2.)

Plaintiffs also assert that if their claims did not ripen as a result of the BOCC Resolution, then the 2010 Plan must be stricken as unconstitutional. (Pls.' Four-Year Supp. Mem., ¶ 3.1.3.) This is incorrect.

First of all, as set forth above, the combined local and State statutory scheme affords landowners the ability to obtain a final decision. Second, under *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 305 (1987), when a regulation is unconstitutional only in the sense that it fails to afford adequate means of compensation for takings, the remedy is an inverse condemnation suit seeking damages, not the striking of the regulation. The government is still free to retain the "invalidated" regulation and pay compensation for takings effectuated by it. This was true even in the pre-*First English* days of *Agins v. City of Tiburon*, 24 Cal. 3d 266, 271 (1979), under which compensation was required if "the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." *First English*, 482 U.S. at 308-09. *See also Tampa-Hillsborough County Expressway Auth. v. A. G. W.S. Corp.*, 640 So. 2d 54, 57-58 (Fla. 1994) (Contrary to widespread

confusion over the concept; "[r]egulations found by the courts to be invalid because they deprive landowners of substantially use all of their property without compensation are not ordinarily struck down as unconstitutional [, but rather,] [t]he government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation.").

Contrary to Plaintiffs' characterization, the view of Florida's Third District Court of Appeal is no different. In *Monroe County v. Gonzales*, 593 So. 2d 1143, (Fla. 3d DCA 1992), the court was merely saying that the zoning regulation's failure to provide for adequate

compensation rendered it “invalid” as applied to that landowner, meaning the landowner was entitled to damages for inverse condemnation. The government had the option of withdrawing the “invalid” regulation, but it also was free simply to pay compensation for the taking. *Id.* (“Once a court has determined that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.”) (quoting *First English*, 482 U.S. at 2389). The opinion did not mean that the regulation itself was unconstitutional, in fact, to the contrary. See *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994) (application of right-of-way provisions of official map statute does not render official maps unconstitutional so as to potentially create as-applied takings claims and landowner’s sole remedy is to claim compensation under the as-applied Penn Central test).

V. CONCLUSION

If there has been a taking of Plaintiffs’ properties, it was a facial taking by the very enactment of the 2010 Plan on January 4, 1996; and the applicable four-year statute of limitations ran from that date as a matter of law. Even if the Court concludes that the statute did not commence running until Plaintiffs were on actual notice of the 2010 Plan’s applicability to their properties, Plaintiffs were unquestionably on actual notice thereof well more than four years before they filed suit. Plaintiffs’ inverse condemnation action is barred by the four-year statute of limitations applicable to facial takings claims.

Should the Court alternatively conclude that the alleged taking resulted from the County’s application of the 2010 Plan to Plaintiffs’ properties, Chapter 380 subjects Plaintiffs’ “as-applied” takings claims to a ninety-day statute of limitations.

That period expired before Plaintiffs filed suit, and their inverse condemnation claims are thus time-barred. Additionally, Plaintiffs’ as-applied claims are barred for lack of exhaustion of administrative remedies.

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