

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

CASE NO: 2004-CA-379-M

THOMAS F. COLLINS and PATRICIA
COLLINS, T/E; DONALD DAVIS;
AURELIA DEL VALLE and MARIA DEL
VALLE, T/E; HILL FAMILY INVESTMENTS,
INC.; RICHARD J. JOHNSON and
JOANN C. JOHNSON, T/E; ROBERT A.
LOMRANCE; JOSEPH MAGRINI and
ELDA S. MAGRINI, T/E; KEITH P.
RADENHAUSAN; FRANK J. SCHNEIDER,
MARY ANN RICKLIN, and ROSEMARY
RIORDAN, T/C; and HUBERT TOST and
MARILYN TOST, T/E.,

Plaintiffs

Vs.

MONROE COUNTY, a political subdivision
Of the State of Florida,

Defendant

Vs.

STATE OF FLORIDA,

Third Party Defendant

**ORDER DENYING DEFENDANTS' MONROE COUNTY AND
STATE OF FLORIDA'S CROSS MOTIONS FOR SUMMARY JUDGMENT**

THIS CAUSE having come on to be heard on Defendants' Cross-Motions for Summary Judgment, (the Plaintiffs having withdrawn their Motion), and the court having heard argument of counsel and being otherwise advised in the premises, it is thereupon,

ORDERED and ADJUDGED that said Motions be, and the same are hereby denied.

The court finds that neither the four year statute of limitations provided by Florida Statute Section 95.11(3)(p) or the 90 day limitation provided by Florida Statute 380.085 bar the recovery Plaintiffs seek and accordingly the Defendants' Cross-Motions for Summary Judgment are denied for the reasons which are more fully set forth as follows:

Defendant's Cross-Motions argue that what had occurred here was a facial taking which occurred upon enactment of the Defendants' Comprehensive Land Use Plan in 1996 and that the 90-day limitation for action as well as the 4 year statute of limitations of 95.11 were triggered upon enactment of Comprehensive Plan in 1996.

The court finds that the record is susceptible to a factual interpretation that what had occurred here with regard to Plaintiffs' various properties was an "as applied" taking in each case as opposed to a "facial" taking in which case the taking does not ripen for litigation until the Plaintiffs have applied for and received a final determination from the local government permitting authority. See City of Key West v. Berg (Fla. App. 3Dist. 1995) 655 So.2d 196 rev. den. 663 So.2d 629 (Fla. 1995).

An excellent discussion of the two forms of taking is found at Lost Tree Village v. City of Vero Beach (Fla. App. 4Dist. 2002) 838 So.2d 561 wherein the doctrine of ripeness is explained thusly:

In the case of an "as applied taking"..."a landowner may not establish a taking before a land use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claims 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. As a general rule, until these ordinary processes have been followed the extent of the restriction on the property is not known and a regulatory taking has not yet been established...." Page 571.

Defendants have not cited the court to the exact definitive language contained in the Comprehensive Plan which they claim would have notified the Plaintiffs that their respective parcels would no longer have any economic value.

The court can find no such definitive language – at best the language of the Comprehensive Plan speaks in general terms that the County should enact future rules and regulations to implement the goal of protecting endangered species such as Key deer and to protect fresh water and or salt water wetlands, all laudable goals.

The language of the Plan is such that at best a landowner may suspect that his or her right to put their property to some economic use might have been impaired under the Comprehensive Plan. Suspicion however is not the equivalent of having definite and certain knowledge and of course hope springs eternal that under the beneficial use provisions of the Plan that the land owner may be granted some use by the Commission.

The Comprehensive Plan of 1996 itself gives landowners the right to ask for a beneficial use determination from the County. Therefore, until the landowner resorts to this adjudication it cannot be known if the property has lost all or a substantial beneficial use. The *Lost Tree Village* ripeness doctrine requires that a landowner first ripen his cause of action by receiving a final determination with regard to their property from local authorities who may grant them some relief for their property.

Each Plaintiff herein petitioned for and received an unfavorable beneficial use determination before bringing the instant civil action seeking compensation for their loss.

Upon a review of the grounds cited in the various resolutions adopted by the County Commission to commemorate and finalize the County's determination as to each Plaintiff, it is apparent that several Plaintiffs were denied economical and beneficial use based upon the results of a physical survey conducted by the County of Plaintiffs' property revealing that said properties were located either in a Key Deer habitat or a fresh water or a salt water wetland.

It is also clear that the 1996 Comprehensive Plan did not specifically identify or specifically reference the properties cited in this action, nor where any of Plaintiffs' respective parcels identified by tier maps or zoning maps which had been duly adopted and became maps available to the general public so that Plaintiffs could see for themselves if the 1996 regulations prohibited use of their properties.

The Plan itself contains statements that direct the County to implement future policies and regulations to prohibit the destruction of Key Deer habitat and to enact regulations and other laws to protect such habitat. Key Deer habitat is said to be all of Big Pine Key and No Name Key. Therefore, it

appears that before more can be done under the Plan additional laws were contemplated to accomplish the goals of the Plan.

It appears that subsequent to the enactment of the Comprehensive Plan in 1996 the County chose to use its Rate of Growth Ordinance (ROGO) to implement the various provisions of the Comprehensive Plan. This was done by allocating the annual allocation of single family building permits in accordance with a point system – the higher point total one receives the more likely the issuance of a building permit – the lower the number of points the less likely one is to receive a permit. Whether or not one receives one of the annual 225 permits depends on a complex array of circumstances which are unpredictable at the outset.

Under the ROGO system properties located in a Key Deer Habitat receive a minus 10 points as opposed to the plus points that property located outside of such habitat receive. Property located in a fresh water wetland might receive a negative 52 points. Property owners can receive positive or plus points for various reasons, for example, for agreeing to provide for certain infrastructure a property owner may receive a positive 10 points; a property owner owning two lots side by side may obtain 3 positive points by agreeing to aggregate the two lots so that only one single family permit will ever be required. A property owner owning another parcel not located adjacent to his lot may receive 2 positive points if he or she agrees to dedicate that lot to conservation. Additionally, for each year a property owner fails to obtain one of the allocated building permits that property owner will receive positive points the following year, in theory then eventually enough points could be accumulated to be competitive for a building permit.

Plaintiff LOMRANCE's property was found to lie in an undisturbed hammock and wetlands area. Under ROGO the LOMRANCE property scored out a -52 points, highly uncompetitive when approximately +25 points would be needed.

Plaintiff JOHNSON's property in Big Pine Key consisted of 2 lots in a platted subdivision found to be Key Deer Habitat.

The RODRIGUEZ-HILL 17 lots were found to be mangrove and salt water marsh wetlands – “red flag wetlands” – no permit to build could be issued for any lot located therein.

Plaintiffs DEL VALLE's property in Center Island Duck Key was found to be fresh water wetlands where no construction will be allowed.

It is evident that it was only through the complex interplay of the ROGO permit allocation system that the Comprehensive Plan adopted in 1996 is implemented thus resulting in an "as applied" taking of the subject properties as said Plan used general language calling for the protection of certain habitat and lands leaving to the future a way to accomplish this goal.

It is only after a physical survey and inventory of any given parcel may a determination be made as to the beneficial use that a landowner may be permitted for their property.

Plaintiffs DAVIS and COLLINS ran afoul of the Key Deer Habitat protection implemented by ROGO and Plaintiff BURSTYN property on Center Island, Duck Key was found to be a fresh water wetland.

In conclusion, there is evidence in the record susceptible to a determination that "as applied taking has occurred" as opposed to a "facial taking" so that it could be said that the two Statutes of Limitation commenced running after the beneficial use determination by Monroe County.

It is now argued by way of Defendant Monroe County's Supplemental Memorandum of Facts and Law filed April 12, 2006 that Plaintiffs' being intervening parties in the case of *Ambrose v. Monroe County*, a Chapter 80 declaratory judgment action filed in this circuit in September of 1997 (Case No: 97-20-636-CA-18) in which the original Plaintiffs made allegations seeking relief alleging that each owned platted single family residential lots in Monroe County on record before Chapter 380 (Critical Concern) for which the provision of F.S. 380.05(18) provided that nothing stated in Chapter 380 or any subsequent land use regulation promulgated to implement Chapter 380 shall affect their right to build a home upon said platted lot. The District Court disagreed with Plaintiffs holding that more than just owning such a lot was required to vest the right to build – that Plaintiffs must first show that they did some act in reliance upon the provisions of F.S. 380.05(18) which detrimentally affected them. *Monroe County v. Ambrose* (Fla. App. 3Dist. 2003)866 So.2d 707. Cert. Den. 880 So.2d 1209) entered July 9, 2004.

It is not known whether these Plaintiffs or any of the *Ambrose* Plaintiffs could make that showing as none have ever attempted to do so but it is clear that until the *Ambrose* case was concluded (Cert. Denied July 9, 2004) they could not know that these regulations would affect the use of their properties. Plaintiff would have at earliest, four years from the date of issuance of the Mandate in *Ambrose* by the District Court (March 5, 2004) or four years from the date that the Florida Supreme Court denial of the grant of discretionary certiorari: July 9, 2004.

As stated by the District Court in Ambrose:

“To the extent that these regulations render any of the landowners’ property practically useless, the landowners are entitled to compensation. Section 380.08, Florida Statutes (1997) provides that the government cannot adopt a rule or regulation that constitutes a taking without providing full compensation...”

It appears undisputed by the record in this case that by official resolution, duly enacted by the Board of County Commissioners of Monroe County, Florida, each Plaintiff was denied beneficial use for their land and was invited by said resolution to seek compensation in the courts for the taking of their property. Within a very short time after receipt of said resolution each Plaintiff filed its civil action as instructed by the County as a way to receive compensation for their loss, said action was filed within 30 days of enactment of the respective resolutions and accordingly was not barred by the Statute of Limitations cited in the Defendants’ motions.

Further, with respect to the 90 day statute of limitations provided by F.S. 380.085(1)(a) and (2), the court finds that said provisions are inapplicable to the instant action by reason that the statute applies only to permit denials made by agencies of state government whose determinations are also subject to review under Chapter 120 Florida Statute. Monroe County is not such an agency. See Hill v. Monroe County 581 So.2d 225 (Fla. 3DCA 1991) and Florida Water Services Corp. v. Robinson 856 So.2d 1035 (Fla. 5DCA 2003).

The court finds that the factual issues raised by the Defendants’ motions not specifically addressed herein are issues deemed rejected by the court as legally insufficient or were found to be otherwise lacking merit and are denied.

This court hereby denies Monroe County’s and the State of Florida’s Motions for Summary Judgment.

DONE and ORDERED in Chambers at Key West, Monroe County, Florida, this 6th day of November, 2006.


CIRCUIT JUDGE

cc: Robert H. Freilich, Esq.
Robert Shillinger, Esq.
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