

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT**

**CASE NO. 3D07-1603
Lower Tribunal No. CA-M-04-379 (Audlin, J.)**

**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.
RADENHAUSEN; FRANK J. SCHNEIDER, MARY ANN
RICKLIN, and ROSEMARY RIORDAN, T/C; HUBERT TOST
and MARILYN TOST, T/E., AND SAMUEL I. BURSTYN, P.A.,**

APPELLANTS,

vs.

**MONROE COUNTY, a Political Subdivision of the State of Florida,
and the STATE OF FLORIDA,**

APPELLEES.

INITIAL BRIEF OF APPELLANTS

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I. STATEMENT OF THE CASE AND THE FACTS

A. Statement of the Case

- (1) *Landowners initiated administrative claims for Beneficial Use Determinations (BUDs) on January 3, 1997, and received final orders between March 20, 2002, and March 17, 2004.***

Through the collective efforts of Monroe County, the Department of Community Affairs (“DCA”), and the Administration Commission, a substantial portion of Monroe County’s Year 2010 Comprehensive Plan went into effect on January 4, 1996. This partial plan included newly-enacted Vested Rights and Beneficial Use Determination (“BUD”) provisions. Each of the 11 Landowners¹ filed BUD Petitions on January 3, 1997.²

After several delays, Landowners’ BUD petitions were heard by a Hearing Officer on December 18, 2000. The County presented memoranda signed by its Planning Director, Marlene Conaway. Ms. Conaway recommended the Hearing Officer find the subject properties had been rendered unusable by the Comprehensive Plan and Land Development Regulations. Ms. Conaway recommended that the County acquire the subject properties. *RIII: 524-622.*

After waiting years for the Hearing Officer’s Recommended Orders, the Board of County Commissioners (“BOCC”) rendered final BUD decisions for all

¹ Several Landowners are joined by spouses or siblings, making the number of individuals greater than 11; some own more than one parcel; but there are 11 landowning “entities.”

² There was a one-year deadline for filing Vested Rights petitions, but no deadline on filing BUD petitions.

11 Landowners on March 20, 2002 (Del Valle and Burstyn), July 17, 2002 (Collins, Davis, Johnson, Magrini, and Radenhausen), and March 17, 2004 (Hill Family, Schneider Heirs, Tost, and Lomrance). The BOCC determined that each Landowner had been deprived of “all economic use” of the subject property by the County’s Year 2010 Plan and LDRs. *RIII: 524-622*.

(2) *Landowners initiated this lawsuit on November 22, 2004, eight years after they had applied for Beneficial Use Determinations.*

On November 22, 2004, nearly eight years after applying for Beneficial Use Determinations, all of the Landowners had received essentially identical Resolutions from the Monroe County Commission, and they commenced this lawsuit against the County. There is nothing about the Landowners’ properties that makes them physically unsuitable for development. The only reason they cannot be developed is the Draconian land use regulations adopted by DCA and the County.³ Those regulations can be overridden by the County at any time through the BUD process. There is no other variance procedure that can waive the County’s environmental criteria, and the BUD process can be used to waive *any* restriction, of any kind, in the County’s Comprehensive Plan, zoning map, or Land Development Regulations (LDRs).

³ As their claims are as-applied regulatory takings, nothing prevents the County from changing its mind and offering building permits to any BUD Petitioner. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3rd DCA 1992).

The County answered Landowners' Complaint on January 31, 2005, *RI: 31-44*, then filed a Third-Party Complaint against the State on February 22, 2005. *RI:45-65*. On March 4, 2005, Landowners moved for Summary Judgment on Liability based on the language of the BUD resolutions – that Landowners had been deprived of “all” economic use by the County’s Plan and LDRs. *RI: 66-148*. That sounds like the criterion for a regulatory taking. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). On June 9, 2005, Landowners filed affidavits and appraisals in support of their Summary Judgment motion. *RII: 155-394*. In August 2005, Defendants filed cross-motions for Summary Judgment. *RIII: 407-474 and 475-622*.

Landowners informed the Court, during a case management conference in mid-2005, that they would not pursue their motion for Summary Judgment on Liability, but would prefer a bench trial on liability as a liability order following a trial would go to the Court of Appeal clothed with a presumption of correctness.

On November 30, 2005, former Chief Judge Richard Payne presided over a five-hour hearing on Defendants' cross-motions for Summary Judgment. Following that hearing, Judge Payne requested Memoranda of Law on two Statute of Limitations issues. On February 3, 2006, Landowners filed affidavits opposing Defendants' cross-motions for Summary Judgment. *RIV: 637-690*.

Judge Payne held a case management conference on September 26, 2006, at which he set a second hearing on Defendants' motions for Summary Judgment for October 30, 2006. *RV: 851*. Five days before that hearing, Defendants attempted to withdraw their once-argued Summary Judgment motions. *RV: 852-53*. Judge

Payne would not allow Defendants to withdraw their motions at this point in the case. Monroe County's *pro hac vice* counsel filed a Joint Emergency Petition for Writ of Prohibition in the Third District Court of Appeal on September 27, 2006. Said Petition was dismissed before the end of the day. Case No. 3D06-2660, *petition denied*, October 27, 2006.

The second hearing on Defendants' Summary Judgment motions went forward as scheduled, on October 30, 2006. *RV: 859-60*. Judge Payne observed that, if Defendants could withdraw their Summary Judgment motions at any time, they could just as easily re-file them in January after the Judge retired from the bench. The Court invited oral argument from the parties but Defendants' counsel refused to speak, stating only that they had properly withdrawn their Summary Judgment motions. The transcript of the October 30, 2006, hearing was filed and is included in the Record on Appeal. *RVI: 1079-1184*.

On November 9, 2006, Judge Payne denied Defendants' Motions for Summary Judgment. *RV: 867-73*. That was the last action taken by Judge Payne in this case. He retired on December 31, 2006. On January 1, 2007, Judge Payne was succeeded by Judge David Audlin. On February 20, 2007, Judge Audlin set the bench trial on liability for June 18, 2007. *RV: 874-78*.

On March 27, 2007, Judge Audlin conducted a brief case management conference, *RV: 890*, during which he intimated that he was prepared to reconsider all non-final orders rendered by Judge Payne. Defendants' counsel interpreted Judge Audlin's remarks as an invitation to re-file their Summary Judgment motions, without the need to move for reconsideration, setting out what had happened since

November 9, 2006, that should prompt a successor judge to reconsider his predecessor's orders. The State and County re-filed their Summary Judgment motions on April 27, 2007. *RV: 927-970*.

Judge Audlin presided over a two-hour case management conference on May 15, 2007, at which numerous pre-trial motions – including Defendants' re-filed Summary Judgment motions – were argued. Landowners objected to the Court entertaining said motions without notices and motions for reconsideration.

The May 15, 2007, case management conference can best be described as log-rolling. The Court paid scant attention to the pretrial motions, including an emergency motion filed a month earlier by Landowners, asking the Court to require Monroe County to reduce its witness list from the 102 named witnesses (including 14 experts), so that the 3-day trial set by the Court could go forward. *RV: 898-911*. In the event the Court did not rule on the pretrial motions, Landowners had also moved for a continuance of the trial.

Landowners' counsel filled a 3-ring binder with previously filed memoranda of law in opposition to Defendants' summary judgment motions, as well as Judge Payne's November 6, 2006, order denying same, and sent the binder by overnight mail to Judge Audlin. The package was received by the Judge's Judicial Assistant on May 20, 2007. The cover letter and table of contents was filed with the Clerk, and was served on opposing counsel on May 19, 2007. *See also RVI: 1017-37*.

On June 6, 2007, Judge Audlin entered an order granting Summary Judgment to Defendants on "ripeness" grounds, *and* dismissing the case, an appealable order. *RVI: 1208-10*. Landowners appealed. *Pro hac vice* counsel for the County

moved to amend the final order, *RVI: 1211-13*, as counsel did not believe the order was appealable, and because the Court's statement regarding which regulations had "taken" Landowners' properties did not apply to nine of the 11 Landowners.

On June 26, 2007, Judge Audlin entered an amended order granting the State's "Motion for Summary Judgment: Ripeness," and entered a separate final judgment. *RVI: 1218-22*. Landowners filed an amended Notice of Appeal.

B. Statement of the Facts

- (1) *The only facts relevant to the court's final order granting summary judgment on ripeness grounds are the Beneficial Use Determination Resolutions themselves, along with the Hearing Officer's Recommended Orders and the Planning Department's memoranda to the Hearing Officer.*

The Monroe County BUD Resolutions, with the Hearing Officer's Recommended Orders attached, are appended to Landowner's Motion for Summary Judgment on Liability. *VI: 66-148*. The Resolutions and Recommended Orders are at *VI: 84-115*. The staff memoranda are at *VI: 117-148*. The Table on the next page summarizes the rationales given for the BUDs in each instance. The following abbreviations are used for zoning designations. DU = Dwelling Unit; OSR = "Open Space Ratio" (*i.e.*, 100% OSR = 100% open space, no development); IS = Improved Subdivision (1 DU/Lot); CFSD-5 = Commercial Fishing Special District 5 (3 DUs/acre or Commercial Use); NA = Native (1 DU/4 acres); SS = Sparsely Settled (1 DU/2 acres).

Landowner	Parcel type: Zoning	Reason(s) Given for Inability to Use
Burstyn, P.A.	Platted dry lot: IS	“Red Flag” Wetlands: 100% OSR ⁴
Collins	2 Platted canal lots: IS	Development moratorium, HCP will reduce development potential further
Davis	Platted canal lot: IS	Development moratorium, HCP will reduce development potential further
Del Valle	Platted dry lot: IS	“Red Flag” Wetlands: 100% OSR
Hill Family	3 Platted dry lots: CFSD-5 ⁵	“Red Flag” wetlands: 100% OSR
Johnson	2 Platted canal lots: IS	Development moratorium, HCP will reduce development potential further
Lomrance	4 Platted dry lots: NA	Inadequate area; need 4 acres to build 1 DU; 4 lots total ½ acre; 80-100% OSR
Magrini	Platted canal lot: IS	Development moratorium, HCP will reduce development potential further
Radenhausen	Platted canal lot: IS	Development moratorium, HCP will reduce development potential further
Schneider Heirs	2 Platted waterfront lots: NA	Mangrove and Salt Marsh Wetlands: 100% OSR
Tost	8 waterfront acres: SS/NA	Mangrove and Salt Marsh Wetlands: 100% Open Space Ratio, zoned SS & NA

⁴ “Red Flag” is a designation given to wetlands of high functionality. Red Flag wetlands were tentatively identified in an EPA-sponsored research project in the mid-1990’s, but no maps of these wetlands have been issued or published. See *Banks v. United States* (“*Banks IX*”), 76 Fed. Cl. 698 (Fed. Cl. 2007) (to put landowner on notice for purpose of claim accrual, information must be “issued” and made public, citing *Banks v. United States* (*Banks II*), 314 F.3d 1304, 1310 (Fed. Cir. 2003))

⁵ Staff report has zoning = SR (Suburban Residential, 1 DU/acre). That is wrong.

II. SUMMARY OF ARGUMENT

A. ISSUE 1: RIPENESS

A landowner must take “reasonable and necessary” steps to let regulatory agencies exercise discretion deciding what uses will be allowed on the property. When the entity charged with implementing the regulations reaches a final decision on their application to the property, an as-applied regulatory taking claim is ripe. Monroe County’s BUD proceeding maximizes the government’s ability to avoid taking claims, while providing landowners with the “final decision” required by *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

B. ISSUE 2: CLAIM ACCRUAL

A regulatory taking claim accrues at the same time that it ripens. Landowners BUD Resolutions ripened their regulatory taking claims. Therefore, the 4-year Statute of Limitations began to run on the dates the BUD Resolutions were rendered. A takings claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the Landowner to institute an action. Accordingly, a regulatory takings claim will not accrue until the claim is ripe. *Royal Manor, Ltd. v. U.S.*, 69 Fed. Cl. 58, 61 (Fed. Cl. 2005), and cases cited therein.

C. ISSUE 3: PER-SE REGULATORY TAKINGS.

The BUD resolutions stating Landowners were deprived of *all* “economic use” of the subject properties are admissions that the subject properties were the subjects of *per se* regulatory takings.

III. ARGUMENT

A. ISSUE 1: RIPENESS. Under ripeness principles, a landowner must take “reasonable and necessary” steps to let regulatory agencies exercise discretion deciding what uses will be allowed on the property. When the entity charged with implementing the regulations reaches a final decision on their application to the property, an as-applied regulatory taking claim is ripe. Monroe County’s Beneficial Use Determination proceeding maximizes the government’s ability to avoid taking claims, while providing landowners with a final decision.

(1) *Standard of review*

The trial court dismissed Landowners’ as-applied takings claims as unripe. When a court holds a claim unripe, it is declining to exercise jurisdiction.⁶ The standard of review for a ripeness determination is *de novo*.⁷

(2) *The trial court’s order granting summary judgment to defendants*

The trial court’s grant of summary judgment to defendants, *RVI: 1218-1220*, dismissing Landowners’ as-applied takings claims as unripe, reads as follows.

Landowners assert that the Resolutions of the Board of County Commissioners granting them beneficial use determinations constitute final determinations by the Board as to what the Landowners could do with their property. They also assert that the Resolutions constitute as-applied takings without full compensation.

⁶ See, e.g., *Sartori v. United States*, 67 Fed. Cl. 263, 268 (Fed. Cl. 2005). “Ripeness is a justiciability doctrine designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” ... Ripeness limitations are “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” [Citations omitted.]

⁷ *Lost Tree Village Corp. v. Vero Beach*, 838 So. 2d 561, 569 (Fla 4th DCA 2002).

The Court however, specifically finds that the BUD resolutions do not constitute the meaningful applications necessary to ripen an as-applied takings claim. In *Glisson v. Alachua County*, 558 So.2d 1030, 1036 (Fla. 1st DCA 1990), the Court held:

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. [Emphasis added.]

The court therefore must treat the claims in this case as facial takings. Ripeness is not an issue in facial takings.

(3) *Florida's courts have adopted the federal courts' ripeness policies in regulatory takings.*

Florida courts have adopted the federal ripeness policy of requiring a “final determination from the government as to the permissible uses of the property.”⁸

(4) *Federal and state ripeness decisions do not require landowners to “apply for a permit” to ripen a regulatory taking claim. Monroe County's Beneficial Use Policy does not require a permit denial before it will process application for relief.*⁹

The Monroe County Beneficial Use Determination process is a *super-variance*. It allows the BOCC to vary *anything* in the Comprehensive Plan and

⁸ *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), citing, among others, *Key West v. Berg*, 655 So. 2d 196 (Fla. 3rd DCA 1995), *rev. denied*, 663 So. 2d 629 (Fla. 1995), *DER v. Mackay*, 544 So. 2d 1065 (Fla. 3rd DCA 1989).

⁹ The trial court's decision does not say what a *meaningful application* is, but the only summary judgment motion raising a ripeness defense argues that only *applying for a permit* can ripen a regulatory taking claim. *RV: 960-66*. In ruling on a summary judgment motion, the court is limited to the grounds raised in the motion. *Christian Relief Svc. v Walton*, 943 So. 2d 869 (Fla 1st DCA 2006).

LDRs – allow me to repeat, *anything*. The relief provision in Policy 101.18.5 (3), *infra* at p. 16, reads as follows.¹⁰

Development approved pursuant to Beneficial Use determination [sic] shall be consistent with all other objectives and policies of the Comprehensive Plan and the Land Development Regulations unless specifically exempted from such requirements in the final Beneficial Use determination.

Three panels of this court have reviewed portions of Monroe County’s, or the City of Key West’s, BUD processes in the past 15 years,¹¹ and this Court knows nothing is impossible when a Florida Keys landowner applies for a BUD. The BOCC can waive or modify any restriction preventing landowners’ beneficial use of real property. There could not be a more liberal variance regulation.

Neither Federal nor Florida courts’ ripeness policy *require* a permit application. Often one cannot request a variance without first applying for a permit, but in Monroe County that is not the case. Ripeness requires a *final decision*, by whatever means. In *Sartori v. U.S.*, 67 Fed. Cl. 263, 268 (Fed. Cl. 2005), the court states:

As the Supreme Court has cautioned, it is “important to bear in mind the purpose the final decision requirement serves.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 622, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). “*Ripeness*

¹⁰ The Florida Department of Community Affairs, via the Administration Commission’s rulemaking authority, drafted this language. *See* the text, *infra*.

¹¹ *Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3rd DCA 1992) (1986 BUD process did not include authority to issue building permits; taking found); *Key West v. Berg*, 655 So. 2d 196 (Fla. 3rd DCA 1995), *rev. denied*, 663 So. 2d 629 (Fla. 1995) (His plans rejected by the city six times, Berg declined to pursue newly enacted BUD process identical to County’s 1996 BUD; 3rd DCA held unripe); *Clay v. Monroe County*, 849 So. 2d 363 (Fla. 3rd DCA 2003), *rev. denied*, 870 So. 2d 820 (Fla. 2004) (BUD hearing for 21 landowners *with permit allocations* but could not build; BOCC granted permits to all 21.)

doctrine does not require a landowner to submit applications for their own sake,” but instead as an aid to the courts in deciding whether a regulation has gone “too far” and become a compensable taking. *Id.* The Court has held, “*While a landowner must give a land use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development ... a takings claim is likely to have ripened.*” *Id.* at 620. [Emphasis added.]

In the oft-cited ripeness opinion, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 139 (1985) (“*Williamson County*”), the Court stated:

[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. [Emphasis added.]

Williamson County requires *final decisions*; not *permit applications*. A variance denial is a *final decision*; a permit denial is not. *Williamson County* notes:

Respondent has submitted a plan for developing its property.... [R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission’s finding that the plat did not comply with the zoning ordinance and subdivision regulations. *It appears that variances could have been granted to resolve at least five of the Commission’s eight objections to the plat.*

Williamson County, 473 U.S. at 187-88. [Emphasis added.]

Among the factors of particular significance in the [regulatory takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position* regarding how it will apply the regulations at issue to the particular land in question.

Williamson County, 473 U.S. at 191 [Emphasis added.].

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 117 S. Ct. 1659 137 L. Ed. 2d 980 (1997) (“*Suitum*”), the Court held:

Leaving aside the question of how definitive a local zoning decision must be to satisfy *Williamson County's* demand for finality, *two points about the requirement are clear: it applies to decisions about how a taking Landowner's own land may be used, and it responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer.* As the Court said in *MacDonald*, "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." ... When such flexibility or discretion may be brought to bear on the permissible use of property as singular as a parcel of land, a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conform to the terms of the general use regulations.

Suitum, 520 U.S. at 739. [Emphasis added.]

In *Palazzolo v. Rhode Island*, 533 U.S. 606, 619-22, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) ("*Palazzolo*"), the state supreme court had dismissed Palazzolo's claim on ripeness grounds. The Supreme Court disagreed, holding:

The court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wetlands." ... It relied upon this Court's observations that the final decision requirement is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. ... The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. *Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.*

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. Winnapaug Pond is classified ... as a Type 2 body of water. ... A landowner, as a general rule, is prohibited from filling or building residential structures on wetlands adjacent to Type 2 waters, ... but may seek a special exception from the Council to engage in a prohibited use.... The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area.

.... Th[is] case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted. *See MacDonald, supra*, at 342 (denial of 159-home residential subdivision); *Williamson County*, 473 U.S. at 182 (476-unit subdivision);

.... 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*. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. ... *Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision*. [Emphasis added.]

... Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. ***Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.***

- (5) ***The Beneficial Use Determination procedure, adopted by Monroe County and the Administration Commission as part of the county's Year 2010 Comprehensive Plan, does not require any prior applications for a particular use, and may be invoked by a landowner at any time.***

The 1996 BUD provision (Policy 101.18.5) in the County's Year 2010 Comprehensive Plan, in effect since January 4, 1996, reads as follows.

MONROE COUNTY YEAR 2010 COMPREHENSIVE PLAN
BENEFICIAL USE PROCEDURES AND CRITERIA

Objective 101.18: Monroe County hereby adopts the following procedures and criteria for the determination of Vested Rights and Beneficial Use, for the effect of such determinations.

Policy 101.18.5:

1. It is the policy of Monroe County that neither the provisions of this Comprehensive Plan nor the Land Development Regulations shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of adoption of this Comprehensive Plan. Accordingly, Monroe County shall adopt a Beneficial Use procedure under which an owner of real property may apply for relief from the literal application of applicable land use regulations of this plan when such application would have the effect of denying all economically reasonable use that property unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare to its citizens under Florida Law. For the purpose of this policy, all reasonable economic use shall mean the minimum use of the property necessary to avoid a taking within reasonable time as established by current land use case law.* Adopted pursuant FAC Rule 28-20.100(16).

2. The relief to which an owner shall be entitled may be provided through the use of one or a combination of the following:

- a) Granting of a permit for development which shall be deducted from the Permit Allocation System;
- b) Granting of use of Transferable Development Rights (TDRs);
- c) Government purchase of all or a portion of the lots or parcels upon which all beneficial use is prohibited. This alternative shall be the preferred alternative when beneficial use has been deprived by application of Division 8, of the Land Development Regulations;
- d) Such other relief as the County may deem appropriate and adequate.

3. Development approved pursuant to Beneficial Use determination shall be consistent with all other objectives and policies of the Comprehensive Plan and the Land Development Regulations unless specifically exempted from such requirements in the final Beneficial Use determination. *Adopted pursuant FAC Rule 28-20.100(17).

B. ISSUE 2: CLAIM ACCRUAL. A regulatory taking claim accrues at the same time that it ripens. Landowners' Beneficial Use Determination Resolutions ripened their regulatory taking claims. Therefore, the 4-year Statute of Limitations began to run on the dates the Beneficial Use Determination Resolutions were rendered.

(1) *Standard of Review:*

The date a claim accrues, and the statute of limitations begins to run, is a pure legal issue. The standard of review is *de novo*.

(2) *A takings claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the Landowner to institute an action. Accordingly, a regulatory takings claim will not accrue until the claim is ripe.*

In *Royal Manor, Ltd. v. U.S.*, 69 Fed. Cl. 58, 61 (Ct. Cl. 2005), the Court of Federal Claims recently re-stated the accepted principle.

... the court agrees with the government that a regulatory takings claim accrues at the same time that it ripens.... As with any other type of claim, a takings claim accrues within the meaning of 28 U.S.C. §2501 (2000) "when all events have occurred that fix the alleged liability of the Government and entitle the Landowner to institute an action." *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478 1481, (Fed. Cir. 1994) (citing *Japanese War Notes Claimants Ass'n v. United States*, 373 F.2d 356, 358, 178 Ct. Cl. 630 (Ct. Cl. 1966)). Accordingly, a regulatory takings claim will not accrue until the claim is ripe. *See Bayou des Familles*, 130 F.3d at 1038 (referring to the ripening of a takings claim as starting the "statute of limitations clock").

C. ISSUE 3: PER-SE REGULATORY TAKINGS. The Beneficial Use Determination resolutions rendered by the Board of Commissioners of Monroe County, Florida, stating that each Landowner had been deprived of *all* "economic use" of their subject properties, constitute admissions that the subject properties had been the subjects of *per se* regulatory takings as of the dates of said resolutions.

(1) *Standard of Review*

This is a purely legal issue. The standard of review is *de novo*.

A Court may enter summary judgment for a non-moving party when it denies summary judgment to a moving party. As the District Court's review is *de novo*, it can make the same determinations that the trial judge could make. Landowners posit that the County's BUD Resolutions mean what they say; that the subject properties were completely unusable, as of the date of the resolutions, and that all economic use of the land had been eliminated by the County's regulations. It is equally clear that this situation had not changed when this lawsuit was filed in November 2004.¹²

When a landowner has been denied *all* economically beneficial use of a parcel of land, there has been a *per se* taking. In a *per se* taking the Court does not consider either the owner's investment-backed expectations, or the economic effect of the taking – two of the three prongs in the *Penn Central* “less-than-total-taking” analysis.¹³ The only issue the Court considers is whether the activity being precluded is a common law nuisance.¹⁴ No court in this country has ever held the

¹² The government will note that two Landowners (Collins and Magrini) received building permits after this lawsuit was filed. These are not record facts. It is asserted by counsel for the State in his Summary Judgment motion, RV: 960-66. In any event, Collins and Magrini would be entitled to temporary taking damages. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

¹³ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

¹⁴ *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

building of a single-family home to be a common law nuisance. Therefore, there has been a *per se*, as-applied regulatory taking of all of the parcels in this lawsuit.

Just as the Supreme Court held in *Lucas*:

Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See *First English Evangelical Lutheran Church*, 482 U.S. at 321. But “where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” *Ibid.*

Lucas, 505 U.S. at 1030 n. 17.

IV. CONCLUSION AND RELIEF SOUGHT

Appellants pray for an order REVERSING the summary final judgment in this case, and REMANDING this case to the trial court WITH INSTRUCTIONS:

A) To reinstate the “Order Denying Defendants’ Monroe County and State of Florida’s Cross-Motions for Summary Judgment,” entered by Judge Richard Payne on November 6, 2006;


B) To enter a “Partial Summary Judgment for Landowners on Liability” for *per se*, as-applied, (Lucas) regulatory takings; and

C) To set this case down for a jury trial on compensation within 60 days.

FURTHERMORE, Appellants have serious doubts regarding the possibility that Circuit Judge Audlin can exercise impartiality in this matter, or other similar matters. Judge Audlin’s “invitation” to Defendants to re-submit their summary judgment motions for his reconsideration without so much as a motion for reconsideration setting forth grounds for doing so, his grant of summary judgment to Defendants on almost frivolous ripeness grounds (even the County’s attorneys

would not support the State's ripeness theory), and his lack of attention to the details of the liability trial in this case, including his refusal to timely – or ever – rule on Landowners' motion to require the County to reduce its witness list from 102 witnesses to a rational number of witnesses for a 3-day trial. These actions do not seem normal, even for a judge who has been on the bench less than six months. Appellants are concerned that Judge Audlin may be more concerned with protecting the public fisc than he is with being an impartial judicial officer.

WHEREFORE, Landowners pray that this Court request the Chief Judge of the 16th Judicial Circuit to submit a request to the Chief Judge of the Florida Supreme Court, for the assignment of a Senior Judge to this case until its conclusion.




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V. CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by first class mail, postage prepaid, on **Robert Shillinger, Esq.**, Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, **Derek Howard, Esq.**, Paul Hastings et al., 875 15th St NW, Washington, DC 20005-2221, **Stephen J. Moore, Esq.**, 1500 Traders on Grand Bldg, 1125 Grand Blvd, Kansas City, MO 64106-2511, and **Jonathan A. Glogau, Esq.**, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, with courtesy copies sent by e-mail, this 13th day of November 2007.



James S. Mattson, Esq.

VI. CERTIFICATE OF FONT COMPLIANCE

I certify that the foregoing brief was prepared with Microsoft Word 2003, using 14-point, Times Roman font.



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