

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

**CASE NO. 3D08-3185
Lower Tribunal No. CA-P-07-316 (Garcia, J.)**

GENEVA SUTTON,

APPELLANT,

vs.

**MONROE COUNTY, A POLITICAL SUBDIVISION OF THE
STATE OF FLORIDA,**

APPELLEE.

APPELLANT'S INITIAL BRIEF

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June 5, 2009

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I. STATEMENT OF THE CASE AND OF THE FACTS

A. **This appeal is from a final judgment dismissing Landowner’s regulatory taking complaint for failure to state a cause of action, on statute of limitation grounds, despite the fact that her cause of action did not *ripen* until 160 days prior to the filing of the complaint.**

Appellant-Landowner filed a complaint for the regulatory taking of two adjacent parcels of oceanfront property, totaling four acres, on Key Largo in unincorporated Monroe County, Florida.¹ The complaint was filed 160 days after the Monroe County Commission rendered a final decision on Landowner’s petition for a Beneficial Use Determination (BUD). The trial court dismissed Ms. Sutton’s complaint as barred by the catch-all, four-year, statute of limitation.²

Monroe County’s BUD process has no time constraints on its application. Yet Appellee maintained that its administrative BUD *ripening* procedure did not prevent an earlier *accrual* date for a regulatory taking claim upon the denial of a building permit application, if that denial is based on confiscatory land use regulations. Landowner’s response was identical to the argument undersigned counsel made in *Collins*,³ that landowners *must* obtain a BUD before their regulatory taking claims will be *ripe* for judicial review, and that regulatory taking claims do not *accrue* until they *ripen*. The lower court rejected that principle. This Court, however, agreed with that argument in *Collins* and *Shands*.⁴

¹ R: 1-13. Both parcels comprise the *subject property* in this appeal.

² Sec. 95.11(3)(p), Fla. Stat. (2008).

³ *Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA 2008), *pet. disc. juris. pending* (Fla. 2009).

⁴ *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008).

B. The Course of Proceedings Below

Landowner's complaint was filed May 23, 2007,⁵ 160 days after her BUD was rendered. Appellee moved to dismiss the complaint on the ground that Landowner's regulatory taking claim was barred by the statute of limitation.⁶ The court granted the motion but did not enter final judgment.⁷ Landowner moved for reconsideration, explaining that a claim *accrues* when it *ripens*.⁸

The court denied the motion for reconsideration,⁹ and Landowner sought leave to file an amended complaint, to add a due process claim.¹⁰ The court granted her motion and simultaneously dismissed amended Count I.¹¹ Subsequently, Landowner voluntarily dismissed her due process count.¹² The trial court entered final judgment on December 1, 2008.¹³ Ms. Sutton filed her notice of appeal on December 15, 2008.¹⁴

⁵ R: 1-13.

⁶ R: 14-17. *See supra*, n.2.

⁷ R: 34-35.

⁸ R: 38-64. The motion was erroneously captioned a motion for rehearing. As no final judgment had been rendered, the motion was one for reconsideration. *See Bettez v. City of Miami*, 510 So. 2d 1242 (Fla. 3d DCA 1987).

⁹ R: 117-18

¹⁰ R: 119-31.

¹¹ R: 133-34.

¹² R: 156.

¹³ R: 159

¹⁴ R: 160-61.

C. Statement of the Facts

Ms. Sutton and her husband acquired Lot 8, and one-half of Lot 9, ocean-front parcels on Key Largo, in 1971, and the other half of Lot 9 in 1984.¹⁵ The subject property, totaling four acres, was zoned General Use when purchased,¹⁶ and was rezoned Native in 1986. In 1988, Landowner was able to obtain a rezoning of a portion of the subject property to Sparsely Settled.¹⁷

From 1989 through 1997, Landowner attempted to determine what could be built on the subject property. In 1996, she applied for a permit to build a single-family residence on Lot 8.¹⁸ Her application was denied, and she appealed the denial to the Planning Commission, without success.¹⁹ According to a 1997 staff report, Landowner had only 300 ft² of buildable area on the subject property, due to restrictive land use regulations. The staff report concluded: “[t]he staff recommends denial of the appeal and also *recommends that Ms. Sutton seek relief via the beneficial use process.*”²⁰

¹⁵ R: 9.

¹⁶ R: 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ R: 124. [Emphasis added.]

Landowner applied for a BUD in January 2005.²¹ In July 2005, a Special Master conducted a hearing in which Monroe County declined to participate.²² During that hearing, the County’s attorney contended that (a) Landowner’s right to relief via the BUD had expired on statute of limitations grounds, (b) because the Lots were buildable at some point during her ownership of the property, the BUD process was not available to Ms. Sutton, (c) Landowner had not proved she had been deprived of all “economic value,” and (d) Landowner had the burden of showing “whether the offending regulations advanced a legitimate governmental interest.”²³ The Special Master rejected counsel’s theories,²⁴ and the County Commission *adopted all* of the Special Master’s conclusions of fact and law.²⁵

The Special Master rendered a recommended order on July 19, 2006.²⁶ His recommended order, citing *Lucas*²⁷ and *Palazzolo*,²⁸ concluded:

11. While it may well have been prudent for the Applicant to pursue relief on a more timely basis, *I conclude that the Applicant is not precluded from seeking relief through the County’s beneficial use determination process as a result of the four year statute of limitations*

²¹ R: 5. Monroe County’s BUD ordinance had no limits on when a landowner could apply, nor did it require a landowner to apply for a building permit in order to apply.

²² R: 9. No testimony was given, nor any evidence presented, by the County.

²³ R: 11, ¶ 7.

²⁴ *See infra*, at p.4.

²⁵ *See infra*, at p.5.

²⁶ R: 9-13.

²⁷ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

²⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

cited by the County. Neither the Code nor the Plan establishes a deadline to apply for such relief. ... I also do not find merit in the argument that because the Lots were buildable at some time during the ownership by Applicant, that relief would not be appropriate. It was only when the Lots became unbuildable that a potential claim ripened. I also conclude that the type of relief requested by the Applicant is not prohibited by the Section 9.5-173.

12. Applying the standard to the facts presented herein, *it has to be concluded that the inability to construct even one single family residence on the combined Lots under the Plan and Regulations in effect at the time the Applicant filed the subject Beneficial Use Application would deny the Applicant all reasonable economic use of the Lot.* There is no disagreement that *all development on the Lots is prohibited* by the operation of Sections 9.5-347 and 9.5-348, though the County did not respond to the proposal of the Applicant as a potential way to build in conformance with the Plan and the Code.²⁹

On November 15, 2006, the Monroe County Commission adopted the Special Master's recommended order as its own, in Resolution 602-2006:³⁰

WHEREAS, the Board of County Commissioners makes the following Findings of Fact:

1. The Board of County Commissioners finds from the record that Special Master John J. Wolfe conducted the Beneficial Use Determination hearing on July 25, 2005, and said Special Master issued his written Proposed Beneficial Use Determination Recommended Order on July 19, 2006.

2. The Board further finds that the Special Master conducted the evidentiary hearing in a manner consistent with Article VI, Monroe County Code, and the Year 2010 Comprehensive Plan. A copy of the Special Master' [sic] Proposed Determination [sic] Recommended Order is hereby appended to, and made a part of, this Resolution.

....

4. The Board of County Commissioners hereby APPROVES the Findings of Fact numbered 1 through 7 as contained in the Recom-

²⁹ R: 12, ¶¶ 11-12. [Emphasis added.]

³⁰ R: 5-8.

mended Order of the Special Master and ADOPTS the Findings of Fact as the findings of the Board.

....

WHEREAS, the Board of County Commissioners makes the following Conclusions of Law:

The Board of County Commissioners hereby APPROVES the Conclusions of Law of the Special Master numbered 8 through 12 as contained in the Recommended Order and ADOPTS the Conclusions of Law as the conclusions of the Board, and

....

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY FLORIDA, as follows

1. That the Board of County Commissioners hereby approves the Proposed Beneficial Use Determination dated July 19, 2006, made by the Special Master and adopts it as the Final Determination of the Board.³¹

Resolution 602-2006 was rendered December 14, 2006,³² when it was recorded by the Clerk of the Board of County Commissioners.³³ The complaint in this action was filed 160 days later, on May 23, 2007.

³¹ R: 6.

³² R: 7.

³³ See *5220 Biscayne Blvd v. City of Miami*, 937 So. 2d 1189 (Fla 3d DCA 2006).

II. SUMMARY OF ARGUMENT

A. Regulatory taking claims do not accrue – nor statutes of limitation attach – until the claims are *ripe* for judicial review.

A regulatory taking claim does not accrue until it ripens. This principle was stated by the Court of Federal Claims in *Royal Manor, Ltd. v. United States*:

[T]he 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 ... “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 *Bayou des Familles Development Corp. v. United States*, cited in *Royal Manor, supra*, the Court of Appeals for the Federal Circuit states: “[t]he controlling question raised on appeal is, therefore, when did BDF’s takings claim become ripe for adjudication, *starting the statute of limitations clock.*”

Ms. Sutton’s claim *ripened* and *accrued* when BOCC Resolution 602-2006 was recorded in the Public Records on December 14, 2006. Her Complaint was filed May 23, 2007, 160 days after the claim accrued. The 4-year Statute of Limitation had not run.

III. ARGUMENT

A. **Regulatory taking claims do not accrue – nor statutes of limitation attach – until the claims are *ripe* for judicial review. *Ripening* requires a *final decision*, or giving the local government “an opportunity to change its mind.” Florida Keys’ governments have Beneficial Use Determination (BUD) procedures that allow them to override *any* land use regulation to avoid taking claims. In the Florida Keys, regulatory taking claims can neither *ripen* nor *accrue*, without obtaining a BUD.**

(1) ***The standard of review is de novo***

This is a question of law and the standard of review is *de novo*. *Wickham v. State*, 998 So. 2d 593, 596 (Fla. 2008).

(2) ***A regulatory taking claim does not “accrue” – nor does the statute of limitation begin to run – until it is “ripe.”***

A regulatory taking claim does not accrue until it ripens. This principle was stated by the Court of Federal Claims in *Royal Manor, Ltd. v. United States*:³⁴

*[T]he 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 ... “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.*³⁵

In *Bayou des Familles Development Corp. v. United States*,³⁶ cited in *Royal Manor, supra*, the Court of Appeals for the Federal Circuit states: “[t]he control-

³⁴ 69 Fed. Cl. 58, 61 (Ct. Cl. 2005) [Emphasis added].

³⁵ Citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (citing in turn, *Japanese War Notes Claimants Ass’n v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1966)). [Emphasis added.]

³⁶ 130 F.3d 1034 (Fed. Cir. 1997).

ling question raised on appeal is, therefore, when did BDF's takings claim become ripe for adjudication, *starting the statute of limitations clock.*"³⁷

In *Williamson County v. Hamilton Bank*,³⁸ the Supreme Court imposed a two-prong ripeness requirement on regulatory taking claimants. State court claimants need only meet the first ripeness prong. *Williamson County's* first ripeness prong means: "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."³⁹ In other words, a state court regulatory taking claim is not ripe until the landowner gives the government the opportunity to "change its mind."

In *Suitum v. Tahoe Regional Planning Agency*,⁴⁰ the 1997 Supreme Court held the *Williamson County* ripeness requirement "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."⁴¹

In *Palazzolo v. Rhode Island*,⁴² the 2001 Supreme Court held:

³⁷ *Id.*, at 1038.

³⁸ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

³⁹ 473 U.S. at 186.

⁴⁰ 520 U.S. 725 (1997).

⁴¹ *Id.*, at 729.

⁴² *Palazzolo*, *supra* n.28.

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.*⁴³

(3) *Ripeness – and, therefore, accrual – of regulatory taking claims in the Florida Keys is controlled by the BUD process*

This appeal is governed by *City of Key West v. Berg*,⁴⁴ *Bauknight v. Monroe County*,⁴⁵ *Collins v. Monroe County*,⁴⁶ and *Shands v. City of Marathon*.⁴⁷ In *Berg*, this Court concluded Mr. Berg's "regulatory 'taking' claim [was] not ripe for judicial determination," as the City's comprehensive plan "allows the City to grant a 'beneficial use' exception to an applicant ... when the literal application of the Plan's provisions would deny all economically reasonable or viable use of the subject property." This Court remanded with instructions to dismiss Mr. Berg's regulatory taking claim as "not being ripe for judicial determination."

This Court also held, in *Bauknight*: "[t]he *Williamson* logic applies here. The owners were obligated to pursue relief under the beneficial use ordinance ... before

⁴³ *Id.*, at 619-22. [Emphasis added.]

⁴⁴ *City of Key West v. Berg*, 655 So. 2d 196 (Fla. 3d DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995).

⁴⁵ *Bauknight v. Monroe County*, 994 So. 2d 362 (Fla. 3d DCA 2008).

⁴⁶ *Collins*, *supra* n.3.

⁴⁷ *Shands*, *supra* n.4.

the owners' taking claims were ripe. With the making of that [BUD] decision, the owners' claims became ripe for judicial consideration.”⁴⁸

In *Collins*, this Court held landowners' “BUD Resolutions were a final decision from the appropriate governmental entity as to the nature and extent of the development that will be permitted. Once the BOCC rendered a final decision on the BUD applications, the Landowners' claims became ripe.”⁴⁹

In *Shands*, this Court held “the statute of limitations did not begin to run until ... the City of Marathon rejected with finality the Special Master's BUD recommendation and denied the Shands' BUD application.”⁵⁰

The BUD is a *super-variance* that allows the local governments of the Florida Keys to vary *anything* in their land use regulations if a landowner maintains it has been denied “all reasonable economic use” of their property. The BUD is part of the County's Comprehensive Plan, and is implemented by County ordinances. The County's Comprehensive Plan provision reads as follows:⁵¹

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

⁴⁸ *Bauknight, supra* n.45, at 365-66.

⁴⁹ *Collins, supra* n.3, at 717.

⁵⁰ *Shands, supra* n.4, at 726.

⁵¹ R: 47. “Adopted pursuant FAC Rule 28-20.100(16)” identifies provisions adopted, by rule, by the Florida Administration Commission, not the County.

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).

The County's BUD ordinance, No. 021-1998, is excerpted at footnote 11 in *Collins*,⁵² reprinted below. It also appears in the Record on Appeal, at R: 49-64.

⁵² *Collins*, *supra* n.46, at 716 n.11.

Monroe County Code, Sec. 9.5-173 - Relief Under Beneficial Use:

- (a) In order to establish that the applicant is entitled to relief, an applicant for a beneficial use must demonstrate that the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use appli-

cation deprive the applicant of all reasonable economic use of the property. The remedies available to an applicant for beneficial use will include issuance of a permit or just compensation by purchase of all or some of the lots or parcels or purchase of the development rights (leaving the lot in private ownership) at the fair market value immediately prior to the comprehensive plan or land development regulations in effect at the time of the filing of the beneficial use application.

(1) Just compensation shall be the preferred option if:

(a) Beneficial use has been deprived by operation of environmental policies or objectives contained in the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application or article VII, division 8 of the land development regulations (“Environmental Criteria”); or

(b) A strict, literal application or enforcement of the comprehensive plan or land development regulations in effect at the time of filing of the beneficial use application prevents all reasonable economic use, but is required to protect the public health, welfare or safety.

(2) If just compensation is not preferred, the determination may allow for additional use(s) or density beyond that allowed by a strict, literal application of the comprehensive plan and land development regulations in effect at the time of filing of the beneficial use application on this particular property (i.e., some additional, reasonable economic use) which may include the granting of an:

(a) Exemption; or

(b) Permit for development despite the offending regulation (an order shall state which offending regulation(s) are inapplicable or waived and such a permit shall be subject to normal construction deadlines and expiration dates under chapter 6 of the Monroe County Code); or

(c) Transferable development rights (TDRs); or

(d) Any combination of the above; or

(e) Any other relief the county determines appropriate and adequate to prevent a taking, i.e., which will allow for reasonable economic use of the subject property or just compensation under the goals, objectives and

- (4) ***The trial court’s determination that Landowner’s regulatory taking claim accrued in 1997, but did not ripen until 2006, is inconsistent with United States regulatory takings law and must be reversed.***

Ms. Sutton’s claim *ripened* and *accrued* when BOCC Resolution 602-2006 was recorded in the Public Records⁵³ on December 14, 2006.⁵⁴ Her Complaint was filed May 23, 2007, 160 days after the claim accrued. The 4-year Statute of Limitation had not run. The trial court’s decision is inconsistent with Florida and United States law, as:

The general rule, as set forth in section 95.031, Florida Statutes (1991), is that “the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues” and that “*a cause of action accrues when the last element constituting the cause of action occurs.*”⁵⁵

The final judgment of the lower court is erroneous and must be REVERSED.

IV. CONCLUSION AND RELIEF SOUGHT

The law is well-settled that, in the Florida Keys, until such time as a beneficial use decision is rendered, a regulatory taking claim has neither accrued nor ripened. The trial court’s dismissal of Landowner’s complaint, based on the erroneous application of the statute of limitation, was erroneous. Appellant prays for an order

policies of the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application.

(Ord. No. 21-1998, §4)

⁵³ See *5220 Biscayne Blvd LLC v. Stebbins*, 937 So. 2d 1189 (Fla. 3rd DCA 2006); see also Fla. R. App. P. 9.020(h) (rendition).

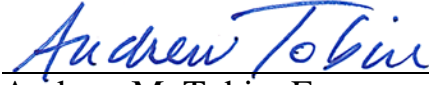
⁵⁴ See certified copy of resolution attached to Complaint.

⁵⁵ 666 So. 2d at 172-73. [Emphasis added.]

REVERSING the Final Judgment below, and remanding for further proceedings consistent with this brief.



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V. CERTIFICATE OF SERVICE

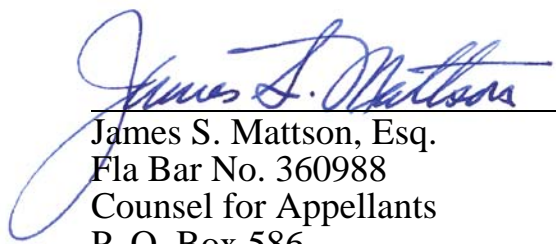
I certify I served copies of the foregoing by first class mail, postage prepaid, on **Robert B. Shillinger, Esq.**, and **Derek V. Howard, Esq.**, Assistant Monroe County Attorneys, 1111 12th Street, Ste 408, Key West, Florida, 33040, and **Michael T. Burke, Esq.**, Special Counsel for Monroe County, Johnson, Anselmo, et al., 2455 East Sunrise Blvd, Ste 1000, Ft. Lauderdale, FL 33034, this 5th day of June 2009.



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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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