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.

ANSWER BRIEF OF APPELLEE MONROE COUNTY

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II. STATEMENT OF THE CASE AND FACTS

Landowner purchased a portion of the subject property in 1971 for approximately $27,000 and the remaining portion in 1984 for approximately $60,000-$64,000. [R: 1-13; ¶ 2, Proposed Beneficial Use Determination [hereinafter "Proposed BUD".[1]] The subject property includes a salt marsh and buttonwood area totaling 10,783 square feet and a hammock area totaling 11,841 square feet. The remainder of the subject property consists of mangrove. [R: 1-13; ¶ 5, Proposed BUD.]

Effective on September 15, 1986, Monroe County adopted a new land use plan (hereinafter, "1986 Comp Plan"). [R: 1-13; ¶ 9, Complaint.] After adoption of the 1986 Comp Plan, the subject property became "subject to environmental and wetland regulations" that rendered the subject property "unbuildable." [R: 1-13; ¶ 10, Complaint.]

In 1996, Landowner applied for a building permit to construct a single family residence on the subject property. [R: 1-13; ¶ 4, Proposed BUD.] The application was denied in 1997. [Id.] Landowner then appealed the denial to the Monroe County Planning Commission. [Id.]. In a staff report submitted to the

[1] As Landowner correctly points out in her Initial Brief at Footnote 54, Resolution No. 602-2006, and the Proposed Beneficial Use Determination it adopted, were attached to the Complaint.

Planning Commission, planning staff concluded that the lots were not buildable. [Id.]

Following the denial of Landowner's administrative appeal of the development permit application denial, Landowner "conceded that she . . . made no further attempts to obtain building permits or relief" until she filed an application for a BUD in 2005. [R: 1-13; ¶ 4 of the Proposed BUD.]

On January 7, 2005, Landowner filed an application for a Beneficial Use Determination ("BUD"). On July 19, 2006, the Special Master who presided over the BUD hearing entered his Proposed BUD. Among the Special Master's Conclusions of Law were the conclusion that the regulations Landowner complained of denied her "all reasonable economic use of the [subject] Lot" and that "[i]t was only when the Lots became unbuildable that a potential claim ripened." [R: 1-13; ¶¶ 11 and 12, Proposed BUD.] The Proposed BUD "recommend[ed] to the [BOCC] that a final [BUD] be entered awarding just compensation to the Applicant to be determined as of 1986 when the Lots became unbuildable by operation of the [1986 Comprehensive] Plan and Code." [Id., p. 5.]

On November 15, 2006, the BOCC adopted Resolution No. 602-006, approving the Special Master's Proposed BUD and requesting the Monroe County Land Authority make a purchase offer based on the fair market value of the subject property as of September 14, 1986, for $113,423., inclusive of interest. [Id., p. 2.]

The Resolution expressly provided that "the acceptance and approval of the recommendations of the Special Master are not to be construed as an admission of an unlawful taking of Applicant's property." [Id.].

Landowner's complaint set forth constitutional claims for inverse condemnation pursuant to Amendment 5 of the United States Constitution and Article X, section 6, of the Florida Constitution. Landowner attached two exhibits to her complaint: a) Resolution No. 602-2006 of the Board of County Commissioners of Monroe County ("BOCC"), which approved of and adopted the Special Master's Proposed BUD for Landowner; and b) the Proposed BUD which the Special Master rendered.[2]

III. SUMMARY OF THE ARGUMENT

If there was a taking of the subject property, then the taking must have been a facial one that accrued with the adoption of Monroe County's 1986 Comprehensive Plan—more than twenty years before Landowner filed her inverse condemnation claim. None of the factors that the *Collins, et. al. v. Monroe County,* 999 So.2d 709 (Fla. 3rd DCA 2008) Court cited as evidencing development potential precluding facial takings claim treatment are present in the case at bar.

Even if the taking at issue is properly treated as an as-applied taking, then the trial court's decision must be affirmed because the claim is still barred by the

[2] *See* Initial Brief at 14, n. 54.

four (4) year statute of limitations found within § 95.11(3)(p), Fla. Stat. This is because the claim would have become ripe when Landowner's building permit application was denied and she sought administrative relief from that decision in 1997. The BUD Ordinance did not, nor could it have, revived the otherwise extinguished as-applied taking claim.

If this Court were to accept Landowner's argument that her "claim ripened and accrued when BOCC Resolution 602-2006 was recorded in the Public Records on December 14, 2006" the holding of the trial court should nonetheless be affirmed based on the "tipsy coachman" rule. As Landowner concedes, her "action was filed 160 days later, on May 23, 2007." This is beyond the ninety (90) day statute of limitations found in § 380.085, Fla. Stat.

IV. ARGUMENT

A. Landowner's claim is barred by the four (4) year statute of limitations.

1. The standard of review is *de novo*.

This case was decided on a motion to dismiss. [R: 159.] The standard of review is therefore *de novo*.

2. If there was a taking of Landowner's property, it was a facial taking that accrued in 1986—more than twenty (20) years before Landowner filed her inverse condemnation claim.

This Court's review "must necessarily begin with determining whether there has been a [possible] facial taking . . . or an as-applied taking because the dates of

those events will fix the start of the limitations period in relation to the date of the Landowner[´]s filing suit. There is an important distinction between the two types of claims and each raises different ripeness and statute of limitations issues." *Collins, et. al. v. Monroe County,* 999 So.2d at 716. Most significantly, if the alleged regulatory taking is facial, then the inverse condemnation claim is ripe for review upon enactment of the offending regulation. *Id.* at 715 (recognizing the *Williamson County* ripeness requirements do not apply to facial takings "because in a facial taking the mere enactment of the regulation constitutes the taking of all economic value to the land.")(citing *Lost Tree Village Corp. v. City of Vero Beach,* 838 So.2d 561, 571 (Fla. 4th DCA 2002)).

If there was a taking of the subject property, then the taking must have been a facial one that is barred by the four (4) year statute of limitations. In *Collins,* this Court treated the property owners' claims therein as "as-applied" regulatory takings claims because of "strong evidence" that the subject properties retained development potential, such as the issuance of building permits, sales of the properties, and differing regulations (including *moratoria*). 999 So.2d at 714-715. The *Collins* Court thus concluded that neither the County's 1986 Comprehensive Plan nor the 1996 Comprehensive Plan deprived the property owners of *all* beneficial use of their properties. *Id.* at 715.

In the present case, none of the factors that the *Collins* Court cited as evidencing development potential precluding facial takings claim treatment are present. To the contrary, the record below is comprised of facts demanding facial takings claim treatment. First, Landowner alleged in her complaint that she submitted a BUD application, "believing she had been denied all reasonable economic use of her property . . .." [R: 119-132; First Amended Complaint at ¶ 21.] She further alleged:

> Effective September 15, 1986, Monroe County adopted a new land use plan. After September 15, 1986 . . . [t]he property was also subject to environmental and wetland regulations, which according to the report by then County Biologist Robert Smith, made the property unbuildable.

Second, the granting of an offer for just compensation pursuant to Landowner's application for a BUD also supports treating her claim as a facial one because relief pursuant to the BUD process can only be granted if the applicant makes the threshold showing that the taking is facial.[3] Section 9.5-173(a) of the BUD Ordinance provided:

> In order to establish that the applicant is entitled to relief, an applicant for a beneficial use must demonstrate that

[3] Based on the categorical taking (*i.e.* "facial") language in § 9.5-173(a) of the applicable BUD Ordinance (published at Footnote 11 of the *Collins* decision), Monroe County respectfully submits that this Court misapprehended the standard for BUD relief in *Collins* when it stated, "the BUD Ordinance differs from land use regulations in other jurisdictions in that it accounts for both facial and as-applied takings . . .." No relief would have been available had the Landowner not demonstrated a deprivation of *all* reasonable economic use of the property.

> the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application deprive the applicant of all reasonable economic use of the property.

See Collins, 999 So.2d at 716, n. 11.

Finally, it was in fact based on Landowner's allegations that the Special Master who presided over the BUD hearing "recommend[ed] to the Board of County Commissioners that a final beneficial use determination be entered awarding just compensation to the Applicant to be determined as of 1986 when the Lots became unbuildable by operation of the [Monroe County] Plan and Code." [R: 1-13; Proposed BUD, p. 5][4]

3. **Even if the taking at issue is an as-applied taking, then it would have accrued in 1997—more than ten (10) years before Landowner filed her inverse condemnation claim.**

a. The *Williamson County* Ripening Requirement

If this Court were to conclude that Landowner's claim was not to be treated as a facial one, then "[t]he next question to be answered as part of this [statute of limitations] analysis is whether the Landowner[]'[s] cause of action for an as-applied taking [was] ripe for judicial review" in 1997—the date after Landowner's building permit application was denied and she sought administrative relief from that decision. *Collins,* 999 So.2d at 715. As the *Collins* decision explained:

[4] According to the Special Master: "It was only when the Lots became unbuildable that a potential claim ripened." [R: 1-13; ¶ 11, Proposed BUD.]

> To be ripe for judicial review the Landowners must show a final determination from the government as to the permissible use, if any, of the property. If there has not been a final determination, the Landowners' attempt to seek redress from the court is premature. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Williamson County*, the Supreme Court held that an "as-applied" Fifth Amendment takings claim against a municipality's enforcement of its regulations is not ripe until (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" (the "rule of finality"), and (2) "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Florida courts have adopted this federal ripeness requirement. *See*, *City of Jacksonville v. Wynn*, 650 So.2d 182 (Fla. 1st DCA 1995); *Tinnerman v. Palm Beach County*, 641 So.2d 523, 526 (Fla. 4th DCA 1994); *Glisson v. Alachua County*, 558 So.2d 1030, 1034 (Fla. 1st DCA 1990).

999 So.2d at 715.

In her Initial Brief, Landowner correctly notes that "State court claims need only meet the first ripeness prong" of *Williamson County Reg. Plan. Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). [*Initial Br.* at 9.] Still, in arguing that the BUD is the process by which an as-applied taking claim was ripened, Landowner fundamentally confuses the separate and distinct ripeness requirements of decisional finality and exhaustion of administrative remedies. In *Williamson County,* the Court cleared up the confusion by succinctly explaining

how the decisional finality and exhaustion of administrative remedies requirements are separate and distinct:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 193.

In the instant case, Landowner's as-applied taking claim became ripe for judicial review in 1997 after her administrative appeal of Monroe County's denial of her application for a building permit—not in 2006 when her BUD was rendered. This is because Landowner's application for a building permit was denied based on the environmental policies and regulations of Monroe County, and the BUD process thus afforded her only the opportunity to seek just compensation for the denial.[5] As correctly clarified by Justice Scalia in his concurring opinion in *Suitum v. Tahoe Regional Planning Agency*:

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[5] Section 9.5-173(a)(1) of the BUD Ordinance provided:

(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") . . ..

> The focus of the 'final decision' inquiry is on ascertaining the extent of the governmental restriction on land use, not what the government has given the landowner in exchange for that restriction. When our cases say, as the Court explains ante, at 1665, that without a "final decision" it is impossible to know whether the regulation "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), they mean "goes too far in restricting the profitable use of the land," not "goes not far enough in providing compensation for restricting the profitable use of the land." The latter pertains not to whether there has been a taking, but to the subsequent question of whether, if so, there has been just compensation.

520 U.S. 725, 746 (1997) (underlined emphasis added). In this case, the BUD process was about what the County wanted to give Landowner in exchange for its regulatory restrictions, and not about whether a specific property use would be allowed. The administrative appeal that Landowner took of her building permit denial in 1997 was, in sharp contrast, about ascertaining the extent of the governmental restriction on the use of Landowner's property. In short, the 1997 administrative appeal satisfied the decisional finality requirement of *Williamson County* and ripened Landowner's as-applied regulatory taking claim for judicial review. The statute of limitations began to run at this time.

b. **Landowner's reliance on *Royal Manor, Ltd. v. U.S.* is misplaced.**

Landowner's reliance on *Royal Manor, Ltd. v. U.S.*, 69 Fed. Cl. 58 (Ct. Cl. 2005) is misplaced because plaintiff's allegation in that case involved the "taking

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Collins, 999 So.2d at 716, n. 11.

of a contractual right," and not real property that is at issue in the case at bar. The contractual right alleged to have been taken by the plaintiff in *Royal Manor* was the right to prepay its HUD-insured mortgage by application of the Low Income Housing Preservation and Resident Ownership Act (LIHPRHA). 69 Fed. Cl. 58, 62. The court disagreed with the government's position that the company's taking claim accrued with the passage of the LIHPRHA in 1990. It held that the alleged claimed accrued when owner was unable to prepay its mortgage on its 20th anniversary date in 1993 due to the Act's prepayment prohibition clause. 69 Fed. Cl. at 60. This is because plaintiff's "as-applied regulatory takings claim for economic damages" did not ripen until "the plaintiff suffer[ed] actual economic injury" and ". . . until the plaintiff could exercise its prepayment right, the court could not evaluate the economic impact or the interference with the investment-backed expectations." 69 Fed. Cl. at 61-62.

c. ***Taylor v. City of Riviera Beach* governs the outcome of this case.**

According to this Court in *Collins,* "[t]he [ripeness] requirement is usually met when the property owner files an application for a development permit with the local land use authority and receives a grant or denial of the permit." 999 So.2d at 716 (citing *Glisson v. Alachua County,* 558 So.2d 1030, 1036 (Fla. 1st DCA 1990)). The case at bar represents this usual situation because Landowner filed an application for a building permit in 1996 and received a denial in 1997

when her administrative appeal of the denial of her building permit application was denied by the Planning Commission.

Because this case involved the application for and denial of a building permit, it is distinguished from *Royal Manor, Ltd.*, and more akin to *Taylor v. City of Riviera Beach,* 801 So.2d 259 (Fla. 4th DCA 2001). *Taylor* similarly involved a real property taking claim and development permit denial. In *Taylor*, the Fourth District Court of Appeal rejected a municipality's argument that an inverse condemnation claim was not ripe after the City had denied Plaintiff's application for a permit to construct a single family residence. In highly pertinent part, the *Taylor* Court held as follows:

> Taylor applied for a permit to build a single family residence. On October 23, 1997, Riviera Beach sent Taylor a letter notifying her that her building permit application had been denied, stating:
>
> > The reason for this action is because the "Future Land Use Map" in the City of Riviera Beach Comprehensive Plan (1989), as amended, designates the area of submerged lands in which this property is located as "Special Preservation." Policy 1.8.1 of the Future Land Use Element in the City's comprehensive plan does not allow the construction of single or multi-family residential development in areas with a Special Preservation land-use designation. This policy also indicates that "permits must be obtained from all other applicable regulatory agencies." Such permits from the state and county were not submitted with the above application.

801 So.2d at 261.

> Taylor raised an as-applied takings claim in her second amended complaint. As this court noted in *Shillingburg*, "Any analysis in an as-applied regulatory taking claim must start with the threshold question of ripeness: Has there been a final decision from the appropriate governmental entity as to the nature and extent of the development that will be permitted?" Generally, a land use agency can make a final decision only when it has an application before it and unless there has been at least one "meaningful application," the claim is not ripe for review.

Id. at 262 (citations omitted).

> In this case, Taylor's application for a building permit to construct a single-family residence constituted a meaningful application, as it set forth her intended use of the land. Riviera Beach's denial of her building permit application constituted final agency action with regard to how Riviera Beach would apply the Plan to her property, rendering the case ripe for judicial review.

Id. at 263.

Similarly, Landowner's claim was ripe after Monroe County denied her application for a permit to construct a single family residence, rejected her appeal, and notified her that the property was unbuildable. [R:1-13; ¶ 10, Complaint.]

Landowner's reliance on *Collins* is misplaced because the landowners in *Collins* had not filed applications for building permits, and therefore did not go through the typical development review process to ripen their takings claims. Instead, they sought to ripen their takings claims through the BUD process. Their

first "development applications" were in fact applications for BUDs.[6] In the present case, the fact that the decision on Landowner's building permit application was a final ripening decision is buttressed by the fact that the building permit denial was administratively appealed [R: 1-13; ¶ 4, Proposed BUD]—a fact that was glaringly omitted from the Initial Brief and distinguishes this case from *Collins.*

d. The BUD Ordinance cannot revive extinguished constitutional claims.

Landowner concedes that she waited nearly ten years to seek a BUD upon the denials of her building permit application and administrative appeal. [*Initial Brief* at 3-4.] It is true that, as it existed at the time, the BUD Ordinance allowed a Monroe County property owner to request a BUD at any time, and that the BUD process was not subject to the limitations set forth in Florida Statute Chapter 95. However, this is not relevant to the issue before the Court. Monroe County did not assert below that Landowner's BUD application was time barred, but instead maintained that the civil cause of action for inverse condemnation was time barred by the four (4) year statute of limitations under § 95.11(3)(p). The fact that the BUD Ordinance had no limits was by the good graces of the legislative body of

[6] In *Collins,* this Court properly noted that two landowners actually applied for and then received building permits. 999 So.2d 714, n.9. "Those property owners who received development permits may have no further cause of action for just compensation for the as-applied taking of their properties . . .." 999 So.2d at 714.

Monroe County. However, this does not revive an extinguished constitutional claim. As the Supreme Court of Florida explained in *Wood v. Eli Lilly & Co.*, 701 So.2d 344, 346 (Fla. 1997):

> Moreover, this Court has held that once a claim is extinguished by the statute of limitations, it cannot be revived as a result of a subsequent court decision, *In re Estate of Smith*, 685 So.2d 1206, 1210 (Fla.), cert. denied, 520 U.S. 1265, 117 S.Ct. 2434, 138 L.Ed.2d 195 (1997), or as a result of legislative action, *Wiley v. Roof,* 641 So.2d 66, 68-69 (Fla.1994). This is because after an action has been time barred, the defendant possesses a constitutionally protected property interest to be free from that claim.

Countenancing Landowner's delay would also run contrary to this Court's holding in *Monroe County v. Ambrose* 866 So.2d 707 (Fla. 3rd DCA 2003):

> Furthermore, the purpose of Chapter 380 is to protect the natural resources and environment of the state, preserve water resources, and facilitate orderly and well planned development. *See Compass Lake Hills Dev. Corp. v. Dep't of Cmty. Affairs*, 379 So.2d 376 (Fla. 1st DCA 1980); § 380.0552, Fla. Stat. (1997). The reason Monroe County was designated an area of critical state concern was to provide for an increased state role in decisions which have a statewide impact. *See* § 380.021, Fla. Stat. (1997). Allowing Landowners who have not taken any steps to develop their property to obtain vested rights would be contrary to legislative intent. The result would clearly subvert significant legislation and regulations designed and enacted for the purpose of preserving our most precious lands.

B. Landowner's Claim Is Alternatively Barred by the Ninety (90) Statute of Limitations in § 380.085, Fla. Stat.

1. The "tipsy coachman" rule applies.

Even if this Court were to accept that Landowner's "claim ripened and accrued when BOCC Resolution 602-2006 was recorded in the Public Records on December 14, 2006," *Initial Br.* at 7, the holding of the trial court should nonetheless be affirmed based on the "tipsy coachman" rule. *See Dade County Sch. Bd. v. Radio Station WQBA,* 731 So.2d 638, 644 (Fla. 1999)("If a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record."). As Landowner concedes, her "action was filed 160 days later, on May 23, 2007." *Initial Br.* at 6. This is beyond the 90 day limitation found in § 380.085, Fla. Stat.

2. The ninety (90) day statute of limitations.

Where a constitutionally valid method is established, such method must be followed to the exclusion of any other system of review. *Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co.,* 285 So.2d 386 (Fla. 1973). When dealing with development decisions under Chapter 380 of the Florida Statutes, § 380.085 provides the mechanism for challenging government action as a taking. The Florida Legislature has the power and discretion to provide the mechanism for judicial review of government decisions.

In 1979, the Florida Legislature enacted Section 380.0552 and designated Monroe County as an area of critical state concern (ACSC). *Ambrose*, 866 So.2d 707 (Fla. 3rd DCA 2003). By designating the Keys an ACSC, the Florida Legislature made all of the provisions of Chapter 380, with enumerated exceptions not relevant here, apply to all development activity in the Keys. § 380.0552(5), Fla. Stat.[7] For development permits issued (or denied) in an ACSC, § 380.085(2), Fla. Stat., provides in pertinent part:

> Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation.

In *Ambrose*, this Court specifically recognized that this statute provides a landowner 90 days within which to file a taking claim against Monroe County based on the "denial of a permit to build," stating:

> Section 380.085, Florida Statutes (1997), enables a person substantially affected by the denial of a permit to build, to initiate an action in circuit court on the grounds

[7] 380.0552(5), Fla. Stat., provides: "APPLICATION OF THIS CHAPTER— Section 380.05(1)-(5), (9)-(11), (15), (17), and (21) shall not apply to the area designated by this section for so long as the designation remains in effect. Except as otherwise provided in this section, s. 380.045 shall not apply to the area designated by this section. All other provisions of this chapter shall apply, including s. 380.07.

> that an area of critical state concern development order effects a taking without compensation.

866 So.2d 707, 712, n.5. A building permit or BUD *is* an ACSC "development order." Section 380.031, Fla. Stat., provides:

> (3) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.
>
> (4) "Development permit" includes any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter.[8]

Section 380.04(1), Fla. Stat., provides:

> The term "development" means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

In *Joint Ventures, Inc. v. Dep't of Transp.,* 519 So.2d 1069, 1073 (Fla. 1st DCA 1988), the following was stated about Section 380.085, Fla. Stat.:

> In order to protect a property owner from a noncompensated taking caused by denial of a development permit, Section 380.085, Florida Statutes, provides specific judicial remedies: If the owner desires to contest the denial of same, the owner may seek review of such administrative decision in circuit court for the purpose of determining whether the agency action is an

[8] According to Landowner, "[t]he 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." [*Initial Br.* at 11.]

> unreasonable exercise of the state's police power and constitutes a taking without just compensation.

See also Caloosa Prop. Owners Assoc. v. Palm Beach County Bd. of County Comm'rs, 429 So.2d 1260, 1264 (Fla. 1st DCA 1983)(citing § 380.085 as the remedy for a taking of property); *Fox v. Treasure Coast Reg'l Planning Council,* 442 So.2d 221 (Fla. 1st DCA 1983)(landowner can "seek review in circuit court of the Commission's order, pursuant to Section 380.085, Florida Statutes.. . . "); *Manatee County v. Estech Gen. Chem. Corp.,* 402 So.2d 75, 75-76 (Fla. 2nd DCA 1981) ("The complaint alleged a taking of Estech's land without just compensation and sought damages, both apparently pursuant to the judicial review provisions of Section 380.085, Florida Statutes.").

3. <u>The applicable rules of statutory construction</u>

"It is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially meaningless." *Ellis v. State,* 622 So.2d 991, 1001 (Fla. 1993). The ninety (90) day statute of limitations does apply to state agencies, despite any argument by Landowner to the contrary. This Court in *Ambrose* clearly agreed with the County's position. An argument to the contrary would improperly render the statute meaningless, since all DRI development orders and all development permits in an ACSC under Chapter 380—decisions to which the Florida Legislature clearly meant the statute to apply—would be immune because they are issued by local governments, not state agencies.

It is true that § 380.085, Fla. Stat., provides: "Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120." However, this does not evidence that the ninety (90) day limitation applies only to permits issued by state agencies subject to Chapter 120 (the Administrative Procedures Act). This argument would ignore the provisions of § 380.07, Fla. Stat. that provide in pertinent part:

> 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 Adjudicatory Commission [and that] Prior to issuing an order, the Florida Land and Water Adjudicatory Commission shall hold a hearing pursuant to the provisions of chapter 120.

When read as a whole, it is clear that the statute provides that a landowner may challenge the merits of a denial of a development order in an ACSC only by appeal to FLAWAC. This appeal is governed by Chapter 120, Fla. Stat. If, however, the landowner accepts the validity of the decision, the landowner can file an inverse condemnation claim in circuit court *within 90 days.*

Finally, based on the cumulative remedies language in § 380.085, Fla. Stat., it cannot by argued—as Landowner may attempt to do—that the statutory provisions are exclusive and, therefore, the four (4) year statute of limitations on a common law inverse condemnation claim applies. Again, acceptance of this argument would improperly render the statute meaningless. In effect, the argument

would hold that even though the statute adopts a 90 day statute of limitations, it is acceptable not to file within that time because one can file the identical claim under the general 4 year statute. Section 95.11(3)(p), Fla. Stat., provides the general statute of limitations. It applies to "[a]ny action not specifically provided for in these statutes." Inverse condemnation claims based on denial or issuance of development approvals in ACSC are "specifically provided for" in § 380.085, Fla. Stat. The 4 year limitation therefore cannot apply to an as-applied taking claim based on an ACSC development decision. To hold otherwise would be contrary to the "long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute." *State Farm Mut. Auto Ins. Co. v. Nichols,* 932 So.2d 1067, 1073 (Fla. 2006). It would also be contrary to the well-settled rule that when two statutes are in conflict, the more recently enacted statute controls the older statute. *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273, 1287 (Fla. 2000). Section 380.085, Fla. Stat. is both more specific and more recent[9] than § 95.11(3)(p), Fla. Stat.

A cumulative remedies clause preserves *other remedies;* the inverse condemnation claim of the Landowner is the *same claim* as provided in § 380.085,

[9] Section 380.085(2), Fla. Stat. was enacted in 1978, *see* § 2, ch. 78-85, Laws of Florida; Section 95.11, Fla. Stat., has contained text identical to F.S. 95.11(3)(p) since 1974, *see* § 7, ch. 74-382, Laws of Florida, and substantially similar text since 1943 at the latest, *see* ch. 21892, Laws of Florida, 1943.

Fla. Stat. *Bowen v. Florida Dep't of Environmental Regulation,* 448 So.2d 566, 568 (Fla. 2nd DCA 1984) (Section 253.763 expressly authorizes the inverse condemnation action in the circuit court). The Florida Supreme Court addressed a cumulative remedies clause found in § 403, Fla. Stat., in *Flo-Sun, Inc. v. Kirk,* 783 So.2d 1029, 1035 (Fla. 2001). Plaintiffs had brought a common law nuisance claim for pollution under Chapter 823, Fla. Stat. Flo-Sun argued that Chapter 403 superseded the nuisance cause of action. The Court agreed, holding:

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

The statutory remedy for violation of the State's pollution laws is different from common law nuisance.

4. <u>The construction and application of identical language in other statutes provides guidance.</u>

Identical language can be found in other Florida statutes and construction of their meaning has import for the case at bar. Section 253.763, Fla. Stat., is one of those identical statutes. In *Bowen v. Florida Dep't of Environmental Regulation,* 448 So.2d 566 (Fla. 2nd DCA 1984), the court addressed the question of the timing of administrative appeals of a development decision in relation to the filing of a taking claim, holding:

> [I]f an administrative appeal is instituted under 253.76, the "taking" issue may not be heard by the circuit court until the section 253.76 proceedings are completed. The ninety-day time limitation on bringing inverse condemnation actions in the circuit court, contained in 253.763(2), is automatically tolled until the agency completes the review process. Where no appeal to THH is taken, the inverse condemnation suit must be filed within ninety days of the DER decision.

Id. at 570.

In *Griffin v. St. Johns River Water Management Dist.,* 409 So.2d 208, 210 (Fla. 5th DCA 1982), the Fifth District Court of Appeal also had occasion to interpret § 373.617, Fla. Stat.—another provision identical to § 380.085, Fla. Stat. The Court in that case held: "If [an aggrieved party] claims the agency action constitutes an 'unconstitutional taking' of property, it must file an action in the circuit court, pursuant to section 373.617(2)." *See also St. Johns River Water Mgmt. Dist v. Koontz,* 2005 Fla. App. LEXIS 9774 (Fla. 5th DCA 2005) (taking case filed under § 373.617, Fla. Stat.).

This Court, the Supreme Court of Florida, and the 1st, 2nd and 5th DCAs have all uniformly interpreted these identical provisions as being the mandatory mechanism for bringing taking claims arising from final action under those statutes. Property owners aggrieved by these final decisions have options—they may accept the decision as proper but constituting a taking or they can attack the validity of the decision on the merits. In an ACSC that are governed by the

provisions of Chapter 380, relating to the actions of the BOCC in this case, an aggrieved landowner can appeal to the Florida Land and Water Adjudicatory Commission within 45 days to challenge the merits of the decision[10] or acquiesce in the propriety of the decision and file a complaint for inverse condemnation pursuant to § 380.085, Fla. Stat., within 90 days of the Board's decision.

5. **The ninety (90) day statutes of limitations should be applied to affirm the trial court's holding.**

Landowner in the case at bar seeks to bring the same inverse condemnation cause of action, but avoid the statutory provisions limiting the time for bringing it. This she cannot do; the provisions of § 380.085, Fla. Stat., are adequate to provide redress for any alleged violation of the Landowner's constitutional rights and that procedure must be followed. *Fla. Welding & Erection Service, Inc.,* 285 So.2d 386. If Landowner is permitted to ignore the procedure set forth in § 380.085, Fla. Stat., in favor of the general four (4) year statute of limitations, then this Court will be allowing her to read the Statute out of existence. The remedy Landowner seeks is not cumulative, but would result in the common law repealing of a Statute—an outcome for which there is no precedent.

This Court should refuse to allow Landowner to read the 90 day statute of limitations out of existence because it serves an important public policy goal. A similar limitation in California was enforced by the California courts. In *Hensler*

[10] § 380.07(2), Fla. Stat.

v. City of Glendale, 8 Cal. 4th 1, 22 (Cal. 1994), the California Supreme Court held that "Government Code section 66499.37 establishes a 90-day period of limitation for these [inverse condemnation] actions," and that "[t]he 'patent legislative objective' of [§ 66499.37] is to ensure that judicial resolution of Subdivision Map Act disputes occurs 'as expeditiously as is consistent with the requirements of due process of law.'" More recently, a California appeals court examined the purpose behind the 90 day limitation and found that its salutary purpose is "to provide certainty for property owners and local governments regarding [local zoning and planning decisions]." *Save Our NTC, Inc. v. City of San Diego,* 105 Cal. App. 4th 285, 291 (Cal. Ct. App. 2003).

This case is demonstrative of the need to implement the ninety (90) day statute of limitations and the policy behind it. Monroe County has been hamstrung in the implementation of its land use decisions because it has been held hostage to inverse condemnation claims. In addition, Landowner sat idly by and waited years before filing her inverse condemnation claim while watching property values in the Keys escalate. She should not be permitted to achieve a financial windfall because of the ten or more years of inactivity.

V. CONCLUSION AND RELIEF SOUGHT

For all of the above reasons, this Court should affirm the trial court's Order granting final judgment in favor of Monroe County, including an award of attorney's fees and costs. All relief sought by Landowner should be denied.

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CERTIFICATE OF SERVICE

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I certify that the foregoing Answer Brief was prepared using Times New Roman 14-point font.

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