

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

CASE NO. 3D08-3185

**GENEVA SUTTON,
Appellant,**

vs.

**MONROE COUNTY, a Political
Subdivision of the State of Florida,
Appellee.**

L. T. Case No. CA-P-07-316

APPELLANT’S MOTIONS FOR REHEARING & REHEARING *EN BANC*

Appellant (“Landowner”) moves for rehearing, and for rehearing *en banc*, pursuant to rules 9.330(a) and 9.331(a). She moves for rehearing on the ground that the court misapprehended controlling ripeness law established by *Williamson County*.¹ The basis of Landowner’s motion for rehearing *en banc* is that the decision is inconsistent with the decisions of another panel of this court in *Collins v. Monroe County*² and *Shands v. Marathon*.³

Landowner takes it as given that (i) Florida courts have adopted the federal ripeness requirement that landowners must meet *Williamson County*’s decisional finality prong before an as-applied regulatory taking claim is ripe for judicial re-

¹ *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (“*Williamson County*”).

² *Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA 2008), *rev. denied*, 2009 Fla. LEXIS 2266 (Fla. July 16, 2009).

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

view,⁴ and (ii) that a statute of limitation on a regulatory taking claim does not attach until the taking claim has ripened.⁵

I. MOTION FOR REHEARING

1. When Landowner applied for a building permit on one of her adjacent parcels (“parcel 8”) in 1976, her application was rejected because County officials concluded, given the parcel’s zoning (Sparsely Settled, or “SS”), habitat, and open space ratios, there was insufficient clearable area in which to construct a single-family home. First Amended Complaint, ¶¶ 10-15, R: 137.

2. She unsuccessfully appealed the denial to the Planning Commission, contending the SS designation *entitled* her to build a single-family residence, the County’s habitat area calculations were wrong, and a denial would deprive her of all economic use of the property. First Amended Complaint, ¶¶ 10-15, R: 137.

3. She did not request a variance from the Planning Commission. There are *no allegations* in the First Amended Complaint – and there is *no evidence* in the record – that Landowner ever sought a variance from the Planning Commission,

⁴ *Collins, supra* n. 2, at 715.

⁵ *See, e.g., Royal Manor v. United States*, 69 Fed. Cl. 58 (Ct. Fed. Cl. 2005) (“[T]he court agrees with the government that a regulatory takings claim accrues at the same time that it ripens.... [A] takings claim accrues ... ‘when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action.’ *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) 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.’”)

which is the *minimum* level of effort required to ripen a claim under *Williamson County*, and to start the statute of limitation.

4. Because Landowner did not pursue a variance in 1997, there is no support for the trial court's determination that Landowner's 1997 *appeal* to the Planning Commission ripened her taking claim and triggered the statute of limitation. The decision below should be reversed. *See, e.g., Pines Properties, Inc. v. Tralins*, 12 So. 3d 888 (Fla. 3d DCA 2009).⁶

5. Pursuant to § 90.202(10), Fla. Stat., Landowner asks the court to take judicial notice of Monroe County Code §§ 9.5-521 and 523, that establish the authority of the Planning Commission, and §§ 9.5-262, 281 and 343, that are referred to in § 9.5-523.⁷ Copies, effective in 1997, are attached to this motion.

6. Section 9.5-523(b) states "no variance shall be granted under this section if such variance would result in an open space ratio less than that required by sec-

⁶ "A motion to dismiss a complaint based on the expiration of the statute of limitation should only be granted 'in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law,'" 12 So. 3d at 889.

⁷ *See, e.g., City of Miami v. F.O.P.*, 571 So. 2d 1309, 1318 n.10 (Fla. 3d DCA 1989), and the citations therein. The ordinance is available as a printed copy, and the copy attached hereto is current through Municipal Code Corporation Supp. No. 63 (Dec. 1997). The face of ordinance sections 9.5-521 and 523 indicate that the sections were last amended in 1993. Therefore, these sections were in effect in 1996-97. Appellant has also attached the table of contents for the land development regulations, referenced in § 9.5-523(a).

tion 9.5-343.” Sec. 9.5-343 establishes minimum open space ratios (“OSRs”) by *habitat*.⁸

7. The Planning Commission had limited authority to reduce some setbacks, but it had no authority to reduce habitat OSRs. Mrs. Sutton’s property consisted of mangrove, salt-marsh-and-buttonwood, and hammock habitat. The two lots combined have 10,783 ft² of salt-marsh-and-buttonwood habitat and 11,841 ft² of hammock; the rest is mangrove habitat. R: 10. Mrs. Sutton needed variances from the habitat OSRs – which the Planning Commission had no authority to give.

8. Mrs. Sutton’s appeal to the Planning Commission did not rise to the level of a ripeness determination. In 1997, she neither requested a variance, nor sought a Beneficial Use Determination. She sought – and was denied – a building permit. A building permit denial has never, without more, ripened a regulatory taking claim.

II. MOTION FOR REHEARING EN BANC

In support of this motion for rehearing en banc, Landowner contends that the panel misapplied the previous rulings of this court in *Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA 2008), *rev. denied*, 2009 Fla. LEXIS 2266 (Fla. July 16, 2009) and *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008).

⁸ Section 9.5-523(b) also authorizes variances from “the open space ratios of § 9.5-182.” Sec. 9.5-182 provides for vested rights determinations, and we assume the correct reference is to § 9.5-262 (Maximum Residential and District Open Space). § 9.5-262 requires land zoned SS, such as Mrs. Sutton’s properties, to have a minimum open space of 80%.

There is no basis for distinguishing between the facts in this case and a landowner who, after reading the County’s land use regulations, concludes it would be waste of time and money to apply for a building permit and, after thinking about it for 10 or 15 years, files an application for a Beneficial Use Determination. The latter was approved by this court in *Collins and Shands, supra*, after the trial court attempted to impose a statute of limitation on those landowners’ “knowledge” that they could not get building permits. Mrs. Sutton’s effort to obtain a building permit, that she abandoned rather than ripening a taking claim by seeking variances, should not be treated any differently.⁹

All local governments in the Florida Keys have adopted Beneficial Use Determination (“BUD”) ordinances that give them discretion to vary *any* zoning regulation, or reach other accommodations with landowners adversely affected by confiscatory regulations, in order to avoid taking claims.¹⁰ To adopt a second method for ripening regulatory taking claims – the mere denial of a building permit application – will create more confusion than anything else. There should be only one ripening process in the Florida Keys, not two.

As this court said, in *Collins*, just over one year ago:¹¹

⁹ A stronger argument – that Landowner made in her briefs and oral argument – is that only a Beneficial Use Determination can ripen a regulatory taking claim in the Florida Keys, as the County Commission has vastly more discretion in a BUD proceeding than the Planning Commission has in issuing variances.

¹⁰ *Collins, supra* n. 2, at 716.

¹¹ *Id.*

The Monroe County BUD Ordinance itself answers the ripeness question. The BUD Ordinance was designed as a way to avoid constitutional takings lawsuits by providing other means of compensating for total or partial regulatory loss of economically beneficial use of property. In this way, the BUD Ordinance differs from land use regulations in other jurisdictions in that it accounts for both facial and as-applied takings, as seen in its bifurcated relief of either outright purchase of the property (in the case of a *per se* taking) or grant of Transferable Development Rights (TDRs), Rate Of Growth Ordinance (ROGO) points, variances and building permits (in the case of an as-applied taking).

MEMORANDUM OF LAW

Williamson County was a variance case arising from denial of a plat approval by the local Planning Commission, for eight reasons.¹² The landowner prevailed below, but the Court reversed as the landowner had not obtained a *definitive, final decision*, which it could have done by requesting variances that may have resolved as many as five of the Planning Commission's eight concerns.¹³

The federal final decision requirement is not limited to variances. Sixteen years after *Williamson County*, in *Palazzolo v. Rhode Island*, the Court held:¹⁴

Williamson County's final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 ... (1997).

... [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first

¹² *Williamson County*, 473 U.S. at 181-82.

¹³ *Id.*, at 187-88.

¹⁴ *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). [Emphasis added.]

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.*”

Many state courts have analyzed the final decision requirement in a wide variety of regulatory taking decisions – where almost all zoning-related taking cases are tried. We include a few here, and the prevailing theme does not support the limited approach taken by this court in *Sutton*. For example, in *Kottschade v. City of Rochester*,¹⁵ landowner took a detour through the federal courts, where his claim was rejected for failure to meet the second ripeness prong – seeking compensation in state court. On losing his federal appeal, he re-filed the taking claim in state court, which found the claim time-barred by the statute of limitation. After reviewing Supreme Court ripeness law, the Court of Appeal reversed.

.... to satisfy finality under *Williamson*, a landowner must pursue *all available local avenues* for determining the scope of what the county will let him build before his claim is ripe. *See id.* at 186-94 ...; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 620¹⁶

In *Mayhew v. Sunnyvale*, 964 S.W. 2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the supreme court analyzed federal ripeness law as follows.

The federal courts have recognized, as a prudential matter, an essential prerequisite to the ripeness of federal regulatory takings and related constitutional claims. *Suitum v. Tahoe Regional Planning Agency*, 137 L. Ed. 2d 980, 117 S. Ct. 1659, 1664-65 & n.7 (1997). This “essential prerequisite” requires “a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *MacDonald, Som-*

¹⁵ 760 N.W. 2d 342 (Minn. App.), *rev. denied*, 2009 MN LEXIS 293 (MN 2009).

¹⁶ Quoting the language from *Palazzolo* quoted, *supra*, starting on p. 6.

mer & Frates v. Yolo County, 477 U.S. 340, 348, 91 L. Ed. 2d 285, 106 S. Ct. 2561 (1986) (citations omitted). In other words, the federal courts have reasoned that a court cannot determine whether a taking or other constitutional violation has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property.

....

Moreover, the term “variance” is “not definitive or talismanic;” it encompasses “other types of permits or actions [that] are available and could provide similar relief.” *Southern Pacific*, 922 F.2d at 503; see also *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir.) (aggrieved landowner must “have sought variances or pursued alternative, less ambitious development plans”), *cert. denied*, 502 U.S. 810, 116 L. Ed. 2d 32, 112 S. Ct. 55 (1991); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 721 (10th Cir. 1988) (claim not ripe until initial permit application denied and some effort made to “compromise” with the city to allow some level of development). The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to “grant different forms of relief or make policy decisions which might abate the alleged taking.” *Southern Pacific*, 922 F.2d at 503.

964 S.W. 2d at 929-30. [Emphasis added.]¹⁷

¹⁷ See also, *City of Houston v. Noonan*, 2009 Tex. App. LEXIS 3547, at 8 (Tex. Ct. App. – Houston, 2009) (“The term ‘variance’ is ‘not definitive or talismanic’; it encompasses ‘other types of permits or actions [that] are available and could provide similar relief.’ *Mayhew*, 964 S.W.2d at 930. The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to ‘grant different forms of relief or make policy decisions which might abate the alleged taking.’”) [Emphasis added.]; *Buffalo Equities, Ltd. v. City of Austin*, 2008 Tex. App. LEXIS 3388, at 21-22 (Tx Ct. App. – Austin, 2008) (“A final decision usually occurs after a development plan has been formally rejected by a city and after the city has rejected the property owner’s request for a variance. ... In this context, the term “variance” is applied flexibly and encompasses permits and other applications that provide relief that is similar to a variance. *City of Houston v. Kolb*, 982 S.W.2d 949, 952 (Tex. App.--Houston [14th Dist.] 1999, *pet. denied*). The purpose behind requiring the denial of a variance or similar requested relief is to give the

In 2004, New Jersey adopted an administrative procedure, similar to the Keys' local governments' BUD procedures, the "Highlands Act."¹⁸ In *OFF, L.L.C. v. New Jersey*,¹⁹ the New Jersey court held "OFF's taking claim should not be entertained because OFF failed to avail itself of the administrative remedy of a hardship waiver application," a Highlands Act provision, as follows.

The Highlands Act establishes an administrative procedure for determination of any claim that its regulatory provisions have resulted in a taking. N.J.S.A. 13:20-33(a) provides in pertinent part that "[t]he [DEP] shall establish a Highlands permitting review program to provide for the coordinated review of any major Highlands development in the preservation area based upon the rules and regulations adopted by the [DEP,]" and N.J.S.A. 13:20-33(b)(3) provides that "[t]he Highlands permitting review program established pursuant to this section shall include... a provision that may allow for a waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation."

To implement N.J.S.A. 13:20-33(b)(3), the DEP has adopted a detailed regulation that governs review of an application for a [*584] hardship waiver to avoid the taking of property without just compensation. N.J.A.C. 7:38-6.8. This regulation provides in part:

(a) In accordance with N.J.S.A. 13:20-33b, *the [DEP] may, on a case by case basis, waive any requirement ... if necessary to avoid the taking of property without just compensation.*

OFF, LLC v. New Jersey, 930 A.2d at 583-84. [Emphasis added.]

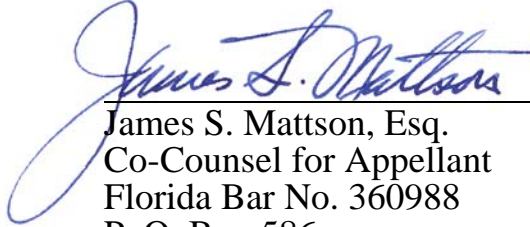
city an opportunity to grant some form of relief or make a policy decision that will abrogate the alleged taking.") [Emphasis added.]

¹⁸ Highlands Water Protection and Planning Act, N.J.S.A. 13:30-1 to -35.

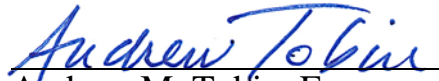
¹⁹ *OFF, L.L.C. v. New Jersey*, 930 A.2d 442 (NJ App 2007), *aff'd*, 963 A.2d 810 (NJ 2008). *OFF, LLC* was cited by this court in *Shands v. City of Marathon*, *supra* n. 3.

RELIEF SOUGHT

Landowner respectfully moves the court for an order granting rehearing en banc pursuant to rule 9.331, or in the alternative, granting rehearing by the panel pursuant to rule 9.330.



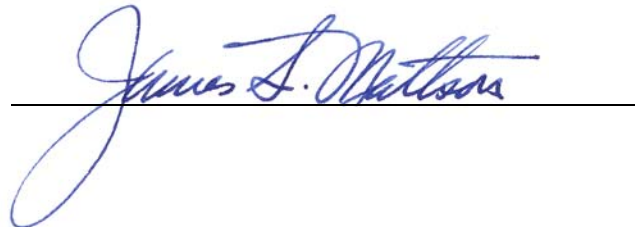
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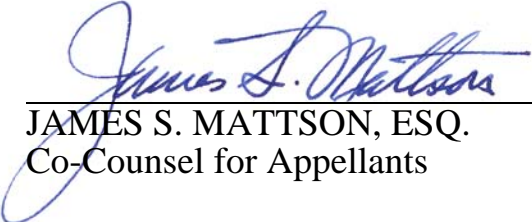
STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court, and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: *Collins v. Monroe County*, 999 So. 2d 709 (Fla. 3d DCA 2008), *rev. denied*, 2009 Fla. LEXIS 2266 (Fla. July 16, 2009) and *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3d DCA 2008).



CERTIFICATE OF SERVICE

I certify I served copies of the foregoing by facsimile transmission, e-mail, and 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, this 7th day of January 2010.



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