

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC10-1266
District Court Case No. 3D08-3185**

GENEVA SUTTON,

PETITIONER,

vs.

MONROE COUNTY, a Political Subdivision of the State of Florida,

RESPONDENT.

PETITIONER'S JURISDICTIONAL BRIEF

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July 6, 2010

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I. STATEMENT OF THE CASE AND THE FACTS

In 1971, Geneva Sutton and her late husband acquired one and a half adjacent oceanfront lots in the Florida Keys. They acquired the other half lot in 1984. When the Suttons purchased the lots, each was platted for a single-family home. On September 15, 1986, their lots were rezoned “Native,” a land use district in which development was discouraged.¹

For two decades, Ms. Sutton tried to determine what she *could* build on the two lots. In 1996, she applied for a permit to build a single-family residence on Lot 8, but her application was rejected for environmental reasons. In 1997, she appealed the rejection to the Monroe County Planning Commission, but the Planning Commission only had authority to correct errors – it could not grant her a *variance*. Only the County Commission could do that, in the context of a Beneficial Use Determination (“BUD”). The Planning Commission’s decision concluded: “[t]he staff recommends denial of the appeal and also *recommends that Ms. Sutton seek relief via the beneficial use process.*”

Monroe County’s Beneficial Use Determination ordinance was adopted concurrently with its 1986 land development regulations. It was a novel form of administrative relief, and was probably a response to this court’s decision in *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984) (confiscatory zoning ordinances are unconstitutional on due process grounds). The BUD process has

¹ As mandated by the Florida Keys Area of Critical State Concern designation in 1979, Monroe County and the Florida Department of Community Affairs implemented new land use regulations for the Keys in 1986. *See* § 380.0552, F.S.

been invoked sparingly in the past 24 years, and no Monroe County government body has ever imposed a time limitation for requesting a BUD. The BUD is part of the County's Comprehensive Plan, and is implemented by County ordinances. The County's Comprehensive Plan BUD provision reads as follows:

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).

After the Planning Commission's decision in 1997, Ms. Sutton did not immediately apply for a Beneficial Use Determination. She applied for a BUD in January 2005, which is the crux of this Petition for Discretionary Review. The 3rd District Court of Appeal effectively elevated Ms. Sutton's 1997 Planning Commission appeal to the equivalent of a final decision by the Board of County Commissioners (BOCC) – which is the only County body with authority to invoke the limitless power of a Beneficial Use Determination.

The BUD Special Master rendered Ms. Sutton's recommended order on July 19, 2006, concluding:

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 cited by the County. Neither the Code nor the Plan establishes a deadline to apply for such relief.

On November 15, 2006, the Monroe County BOCC adopted the Special Master's recommended order as its Resolution 602-2006, stating: "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." The BOCC's BUD Resolution included an offer to purchase Ms. Sutton's two lots for \$37,000, their fair market value on September 14, 1986 (the day before the lots were downzoned), plus statutory interest.

Ms. Sutton filed her complaint on May 23, 2007, within the four-year statute of limitation that governs regulatory taking actions. The trial court dismissed her taking claim on a motion to dismiss, agreeing that the statute of limitation began to run when the Planning Commission affirmed the denial of her building permit in 1997, not when the Board of County Commissioners rendered its Beneficial Use Determination in 2006. The Third District Court of Appeal affirmed with an opinion, and denied Ms. Sutton's motions for rehearing and rehearing *en banc*.

II. SUMMARY OF ARGUMENT

The decision below conflicts with the decisions of the Fourth and Fifth District Courts in *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), *Gardens Country Club v. Palm Beach County*, 717 So. 2d 398 (Fla. 4th DCA 1998), *pet. denied*, 719 So. 2d 287 (Fla. 1998), *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), *City of Riviera Beach v. Taylor*, 659 So. 2d 1174 (Fla. 4th DCA 1995), and *De Land v. Lowe*, 544 So. 2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So. 2d 461 (Fla. 1989).

Monroe County's Beneficial Use Determination ordinance gives the BOCC the authority to waive or modify *any* County land development regulation or comprehensive plan provision, if necessary to avoid a regulatory taking claim. As an alternative, the BOCC may "offer to purchase" the subject property. Ms. Sutton argues that only a BUD decision can ripen a regulatory taking claim in Monroe County. A permit denial, followed by an appeal to the Planning Commission, is not the "final decision" set out by the Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172

(1985) (“*Williamson County*”), a decision that has been adopted by the nearly all of Florida’s District Courts of Appeal.

III. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW

This is a regulatory taking action. The court below determined that the Plaintiff’s regulatory taking claim “ripened” when she was denied a building permit in 1996, and said denial was affirmed in an appeal to the Monroe County Planning Commission in 1997. This holding directly conflicts with the Fourth DCA’s holdings in *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), *Gardens Country Club v. Palm Beach County*, 717 So. 2d 398 (Fla. 4th DCA 1998), *pet. denied*, 719 So. 2d 287 (Fla. 1998), *Taylor v. N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), *Riviera Beach v. Taylor*, 659 So. 2d 1174 (Fla. 4th DCA 1995), and the Fifth DCA’s holding in *De Land v. Lowe*, 544 So. 2d 1165 (Fla. 5th DCA 1989), *rev. denied*, 551 So. 2d 461 (Fla. 1989).

1. In *Lost Tree Village*, citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Fourth DCA, at 838 So. 2d 570-71, held:

The ripeness inquiry thus centers on whether the landowner “obtained a final decision from the [regulatory agency] determining the permitted use for the land.” ... (“Florida courts have adopted the federal ripeness policy.”)

And, citing *Palazzolo*:

These cases stand for the important principle that *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 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. [Emphasis added.]

2. In *Gardens Country Club*, the Fourth DCA, 712 So. 2d at 401, held:

The ripeness doctrine requires, as an essential prerequisite to a regulatory takings claim, a final and authoritative determination of the type and intensity of development legally permitted on the subject property. See *MacDonald, Sommer & Frates v Yolo County*, 477 U.S. 340, 348 ... (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 ... (1985).

3. In *Taylor v. N. Palm Beach*, the Fourth DCA, 659 So. 2d at 1173, held:

A governmental entity must arrive at a "final, definitive position," *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 ... (1985), on the "nature and extent of permitted development" before a court may adjudicate the "constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates*, 477 U.S. at 351. Florida courts have adopted the federal ripeness policy of requiring a "final determination from the government as to the permissible uses of the property." [Citations omitted.] A final determination requires at least one meaningful application. *Glisson*, 558 So. 2d at 1035. As we recently noted, "ripeness requires a firm delineation of permitted uses so that the extent of the taking can be analyzed." *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 526 (Fla. 4th DCA 1994).

The trial court properly recognized that the requirement of ripeness enhances the potential for an administrative or political resolution of a dispute, without the need for intervention by a court and additionally assists the trial court in determining whether a taking has occurred. As we explained in *Tinnerman*, the ripeness doctrine serves two functions:

First, the doctrine recognizes decisions are subject to change based on input from various and competing interests. *It provides for an administrative or political resolution to disputes*. Second, the ripeness requirement of a "final decision" enables a court to determine whether a taking has occurred and, if so, its

extent. Without a final decision, it is impossible to determine whether the land has retained any reasonable beneficial use, or if expectation interests have been destroyed. *Williamson*, 473 U.S. at 189-91 n.11.

641 So. 2d at 525. [Emphasis added.]

4. In *Riviera Beach v. Taylor*, 659 So. 2d at 1180, the Fourth DCA held:

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? *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 ... (1985)

5. In *DeLand v. Lowe*, 551 So. 2d at 1168-69, the Fifth DCA held:

It was error for the trial court not to dismiss this action without prejudice because Lowe failed or refused to exhaust his administrative remedy of appeal to the Board of Adjustment prior to filing a section 1983 action against the City. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 ... (1985); [Citation omitted.] The City quotes from *DeCarlo v. Town of West Miami*, 49 So.2d 596, 597 (Fla. 1950):

The administrative boards usually provided for the consideration and review of zoning problems are made up of local people, having the advantage of full local information as to the reasons behind the various zoning regulations. Their findings, while not conclusive, are indeed helpful in the ultimate determination of the rights of the parties. Moreover, the inequalities of a zoning ordinance, if called to the attention of such local administrative boards, may frequently be adjusted at that level. Such boards should, at least, be given an opportunity to afford such relief, or state their reasons for not doing so.

The trial court found that the City intended denial of the building permit for Lot 19 as “final city action.” There is no record support for this finding, and it is directly controverted by the specific notice from the City to Lowe of his right to appeal the denial.

Under the applicable City ordinances, the Board of Adjustment, not the city administration, has final say over zoning decisions, subject only to appeal to a court of competent jurisdiction.

As Professor Eagle explains in his treatise on regulatory takings, the Supreme Court does not consider a regulatory taking claim ripe because a specific *application* has been denied. Rather, the Court requires planners and regulators to come to a *final determination* regarding *the property*, rather than *the application* for a specific project that was placed before them.² *Williamson County* holds that administrative appeals are “remedial,” *do not ripen a claim*, and need not be exhausted by a landowner. A regulatory taking claim *ripens* after any *variance* procedures have been exhausted. That portion of *Williamson County* reads as follows.

.... While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, ... respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission’s rejection of the preliminary plat to the Board of Zoning Appeals, *because the Board was empowered, at most, to review that rejection, not to participate in the Commission’s decisionmaking.*

... resort to the procedure for *obtaining variances* would result in a *conclusive determination* by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission’s refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission’s *denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.*


Williamson County, *supra* n. 2, at 192-93. [Emphasis added.]


² Steven J. Eagle, REGULATORY TAKINGS, Ch. 8, § 6(b), pp. 1184-85 (4TH ED., Matthew Bender (2009) (LexisNexis Matthew Bender).

In 1997, after Ms. Sutton’s building permit was denied and she pursued a “remedial” *appeal* that affirmed the denial, she was in the very position described in the last sentence quoted above – “*a denial of [a building permit] approval ... is not a final, reviewable decision.*” The only way she could ripen her taking claim was to seek the variances that could only come from the County Commission as part of a Beneficial Use Determination (only the County Commission could have varied the habitat open space ratios).

IV. THIS COURT SHOULD EXERCISE ITS DISCRETION TO HEAR THIS CASE

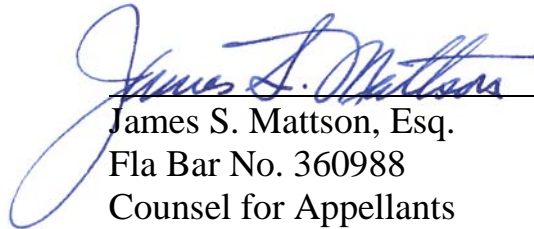
The Third DCA’s opinion in this case effectively holds that a Florida Keys landowner is *not* required to exhaust the variance process that the BUD provides – and that *Williamson County* and the Fourth and Fifth DCA opinions, *supra*, mandate. Following that reasoning, a landowner could ripen her regulatory taking claim by applying for a building permit, getting a permit denial, and appealing that denial to the Planning Commission – despite the fact that the Planning Commission has no authority to do anything but affirm or reverse the denial. Such a “remedial” appeal would not ripen a claim under *Williamson County*, but would become a ripening event in the Florida Keys if the *Sutton* decision stands. It would also defeat the purpose of the Beneficial Use Determination ordinance.


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V. CERTIFICATE OF SERVICE

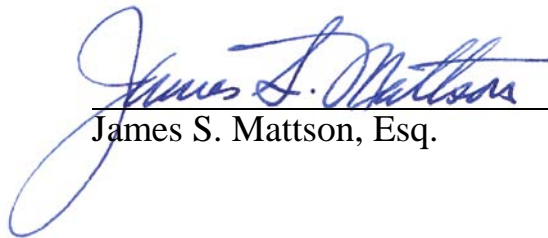
I certify I served copies of the foregoing by first class mail, postage prepaid, on **Derek Howard, Esq.**, Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, this 6th day of May 2009.



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VI. CERTIFICATE OF FONT COMPLIANCE

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



James S. Mattson, Esq.

APPENDIX
Sutton v. Monroe County