

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC10-1360
District Court Case No. 3D08-2841**

JEANINE McCOLE, AS TRUSTEE

PETITIONER,

vs.

**CITY OF MARATHON, a Political Subdivision of the State
of Florida, and the STATE OF FLORIDA,**

RESPONDENTS.

PETITIONER'S JURISDICTIONAL BRIEF

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REGULATIONS

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I. STATEMENT OF THE CASE AND THE FACTS

In 1978, Mr. and Mrs. McCole purchased a platted lot (the “Property”) in an area that was, at the time, in unincorporated Monroe County (the “County”). The Property was zoned RU-1, single-family residential.

In 1986, Monroe County adopted a new comprehensive plan,¹ as required by the 1979 designation of the Florida Keys as an “area of critical state concern.” While the zoning designation of the McColes’ property remained unchanged, the 1986 Plan added wetland protection measures to the County’s land development regulations. With the adoption of the 1986 plan came the *Beneficial Use Determination* (“BUD”) process. The BUD process allowed the County to modify land development regulations and take measures so that the implementation of the 1986 plan did not result in an unconstitutional taking of a landowner’s property.

In 1989, the McColes sought authorization from the Florida Department of Environmental Regulation (“DER”) to build a home on the Property. DER denied the McColes’ application in 1989, noting that its inspection of the Property showed the presence of various types of wetlands vegetation. The denial specified that “in lieu of the residence and driveway, it may be possible to construct a pile supported, four foot wide boardwalk on the lot in order to gain access to the canal” and advised the McColes that administrative and judicial review were available to parties whose interests were affected by the permit denial.

¹ The opinion below calls this the “State Plan.” While the 1986 comprehensive plan was mandated by the legislature, and subsequently modified by state agencies, it was first adopted by Monroe County. *See* § 380.0552, F.S.

Approximately one month after the DER's denial, the County's Growth Management Department denied a separate application by the McColes to build a single-family house on the Property. The County's letter stated only "*[i]t is felt that a single family residence cannot be permitted.*" The County cited the existence of wetland vegetation as the reason for denying the permit and also noted that any decision rendered was subject to appeal. The McColes took no action to appeal the permit denial or file a BUD application until fourteen years later.

In September 2003, Ms. McCole filed a BUD application asserting the loss of all beneficial use of the Property because of the wetland-related prohibitions on development. In August 2005, a proposed denial of BUD was issued by a Special Master after a hearing, primarily because of the McColes' lack of action with respect to the development of the Property. Approximately one month later, the City of Marathon, incorporated in 1999, adopted the proposed order and denied the BUD application. In December 2005, Ms. McCole filed a complaint for inverse condemnation against the City.

In January 2007, Ms. McCole submitted a new permit application to Florida's Department of Environment Protection ("DEP"), the DER's successor, seeking permission to build a single-family home on the Property. The State denied the 2007 Application, citing environmental concerns. Ms. McCole sued the State for inverse condemnation in December 2007. In 2008, summary judgment was entered in favor of the State and the City after the trial court found that the claims were time-barred by the statute of limitations.

Monroe County and its cities are unique in that the Beneficial Use Determination process allows landowners to obtain a determination of whether they have been deprived of all beneficial use of their property. If the BUD finds that the local ordinances are confiscatory, the local governments may alter *any* land development regulation, as necessary, to avoid an unconstitutional taking.

The Third DCA found it “potentially problematic” that the BUD process does not set forth a clear limitations period for the filing of a BUD application, holding: “as such, landowners may be left in a situation similar to that of the McColes’ whereby they obtain permit denials but take no further action for several years.” The Third DCA concluded that, even though the BUD process provides no specific limitations period, the four-year statute of limitation must be triggered by a building permit denial.²

Monroe County’s 1986 Beneficial Use Determination ordinance 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). It has been invoked sparingly in the past 24 years, yet no Monroe County government has imposed a time limitation for seeking a BUD. Marathon’s BUD ordinance, cited in

² In *Beyer v. City of Marathon*, 35 Fla. L. Weekly D 1305 (Fla. 3d DCA 3D08-2864, June 9, 2010) a companion to *McCole*, the Third DCA held that, once a BUD application has been filed, the statute of limitation is tolled. Otherwise, the local government could stall until the four years elapses.

Shands v. City of Marathon, 999 So. 2d 718, 721 n. 5 (Fla. 3d DCA 2008), reads in part as follows.

City of Marathon Code of Ordinances, Art. 18, Beneficial Use Determinations. Section 102.99 (2008). Purpose and Intent.

A. If a landowner in the City has applied for and been denied a development permit and is of the opinion all beneficial use of the landowner's property has been denied by applying the LDRs, the procedures listed in this section shall be used *prior to seeking relief from the courts* in order that any denial of beneficial use of property may be remedied through a non-judicial forum.

B. The beneficial use determination is a process by which the City evaluates the allegation that no beneficial use remains and can provide relief from the regulations by granting additional development potential, providing just compensation or if it so determines, extending a purchase offer for the property. However, this article also intends that such relief not increase the potential for damages to health, safety, or welfare of future users of the property or neighbors that might reasonably be anticipated if the landowner were permitted to build.

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).

Marathon's Beneficial Use Determination ordinance gives the City the authority to waive or modify *any* of its land development regulations or comprehensive plan provisions, as necessary, to avoid a regulatory taking claim. As an alter-

native, the City may “offer to purchase” the subject property. Ms. McCole argues that only a BUD decision can ripen a regulatory taking claim in Marathon. A permit denial is not the “final decision” required 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 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 Ms. McCole’s regulatory taking claim “ripened” when she was denied a building permit in 1989.³ 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).

³ While the District Court’s opinion also discusses the landowner’s applications for State wetland fill permits, it fails to mention that the basis for DEP’s 2007 denial was that a the State cannot issue a permit that would conflict with a Marathon regulation. Therefore, DEP’s 2007 denial was not on the merits.

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.⁴ *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.*

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

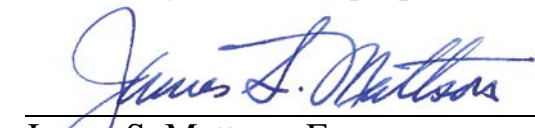
... resort to the procedure for *obtaining variances would result in a conclusive determination* by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it 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.*

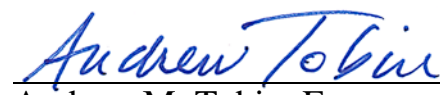
Williamson County, *supra* n. 2, at 192-93. [Emphasis added.]

After Ms. McCole's building permit was denied in 1989, 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 – or after 1999, from the City – as part of a Beneficial Use Determination.

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

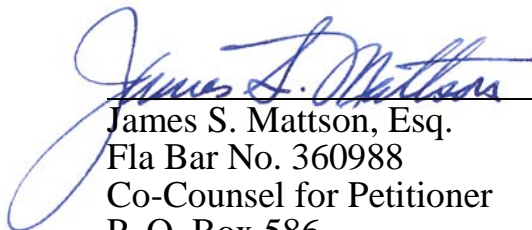
The Third DCA's opinion in this case effectively holds that a Florida Keys landowner is *not* required to exhaust the variance process that the BUD provides – and that *Williamson County* and the Fourth and Fifth DCA opinions, *supra*, mandate. Following that reasoning, a landowner could ripen her regulatory taking claim by simply applying for a building permit and getting a permit denial, without ever seeking relief clearly available by way of a BUD. The opinion below would effectively defeat the purpose of the Beneficial Use Determination ordinance.


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V. CERTIFICATE OF SERVICE

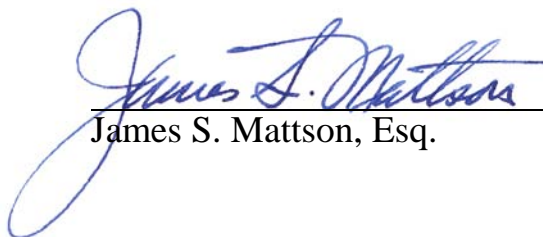
I certify I served copies of the foregoing by first class mail, postage prepaid, on **ADAM M. SCHACHTER, ESQ. and MARK D. SOLOV, ESQ.**, Stearns Weaver, et al., Attorneys for Defendant City of Marathon, 150 West Flagler St. Ste 2200, Miami, Florida, 33130 and **JONATHAN A. GLOGAU, ESQ.**, Attorney for the State of Florida, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, this 19th day of July 2010.



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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.



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APPENDIX

McCole v. City of Marathon
and the State of Florida