STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCOTT AND TONI BEAUCHAMP,

Petitioners,

vs. Case No. 13-4632GM

MONROE COUNTY PLANNING COMMISSION,

Respondent.
_____/

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on May 23, 2014, at video teleconferencing sites in Tallahassee and Marathon, Florida.

APPEARANCES

For Petitioners: Andrew M. Tobin, Esquire
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For Respondent: Derek V. Howard, Esquire
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STATEMENT OF THE ISSUE

The issue is whether to approve Petitioners' application for a beneficial use determination (BUD) on their property

in Key Largo, Florida, and if approved, to determine the type of relief that is appropriate.

PRELIMINARY STATEMENT

This proceeding was initiated after Petitioners were advised by the Monroe County Planning Commission (Commission) that they could not build a single-family residence on their property because of zoning restrictions adopted by Monroe County (County) in 1986. Pursuant to section 102-105, Monroe County Code (M.C.C.), Petitioners filed an application for a BUD, claiming that the 1986 regulatory action by the County constitutes a compensable taking of their property. This administrative remedy, the current version of which was adopted by the County in 2007, is available to property owners to secure relief through a non-judicial process when they believe that a land development regulation (LDR) or comprehensive plan policy has deprived them of all beneficial use of their property. See § 102-102, M.C.C.; Future Land Use Element Policy 101.18.5. Pursuant to a contract, the application was referred by the Commission to DOAH for a hearing before a special magistrate (administrative law judge). See § 102-105, M.C.C.

At the hearing, Scott D. Beauchamp testified on his own behalf and presented the testimony of Emily Schemper, County Principal Planner; Randolph D. Wall, a builder and former

Planning Commissioner; and Robert A. Smith, an environmental consultant and accepted as an expert. The County presented the testimony of Emily Schemper, who was accepted as an expert. County Composite Exhibit 1 was also received.

There is no transcript of the hearing. Proposed Recommended Orders were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioners purchased their property in September 2006 for $60,000.00 (or at the peak of the Florida housing boom). The parcel is located at the corner of Meridian Avenue and Lycaloma Avenue, mile marker 94.5, on the Gulf of Mexico side of U.S. Highway 1 in Key Largo. It is also identified as Block 9, Lot 1, Section 3 of the Bay Haven Subdivision, an older, partially-developed subdivision comprised of four sections and several hundred lots.

2. Since September 15, 1986, the subdivision, including Petitioners' lot, has been zoned Suburban Residential (SR), which allows only one residential unit per two acres. No challenge to that action was taken by any person, and no contention has been made that the County failed to follow the established procedure for adopting its LDRs. A challenge to the

validity of the LDRs is now barred by the statute of limitations.[1] See § 95.11(3)(p), Fla. Stat.

3. The Bay Haven Subdivision is located in South Key Largo and was first platted after World War II. Building permits for all existing homes in the subdivision were applied for before the zoning change became effective in September 1986. Due to the SR restrictions, around 250 lots remain vacant at this time, including 99 in Section 3 where Petitioners' lot is located. Many of these vacant lots have been deeded by their owners to the County for conservation purposes in exchange for points that can be used with a Rate of Growth Ordinance (ROGO)[2] allocation to develop other property in the County.

4. Petitioners' corner lot lies at the intersection of two streets and has an irregular shape with a large radius at the intersection. It is bordered on two sides by single-family homes, measures 8,276 square feet, or around 0.19 acres, and is somewhat larger than the typical subdivision lot size of 5,000 square feet.

5. Mr. Beauchamp, who resides in Wisconsin, testified that he purchased the property with the expectation of building a home when he retired as an air traffic controller. Before purchasing the property, he assumed that it was zoned Improved

Subdivision (IS) because this was the zoning incorrectly shown on the multiple listing service sheet provided by his realtor.

6. Neither Mr. Beauchamp nor his realtor was familiar with County zoning classifications or permissible uses for the parcel.[3] Sometime in 2006 they visited a County office to secure further information. Mr. Beauchamp says they spoke with two unidentified "planners," who told them that a single-family home could be built on the property. However, nothing was confirmed in writing, and there is no record of the meeting. Other than this meeting, neither Mr. Beauchamp nor his realtor took any other steps to verify the zoning on the property and/or any development restrictions that might apply. Based solely on the oral advice given by these two unnamed County employees, the Beauchamps purchased the lot.

7. According to Petitioners' expert, Robert Smith, before purchasing a vacant lot in the Keys, normal due diligence would require a prospective purchaser to arrange a pre-application conference with Planning Department staff and secure a written Letter of Understanding confirming the rights of the property owner. See § 110-3, M.C.C. However, Petitioners (and their realtor) did not complete appropriate due diligence; they simply checked with an unidentified County employee and without any other assurance purchased the property.[4]

8. In May 2012, Petitioners' agent, Randy Wall, a builder and former Planning Commissioner but not an attorney, met with a representative of the County Building Department to begin the process of securing approval to build a single-family residence on the property. Mr. Wall was advised that the zoning on the property was SR, which allows only one dwelling unit per two acres. This was confirmed in an email dated July 13, 2012, from the Assistant Director of Planning, which stated as follows:

> The parcel has a zoning designation of SR which requires Two (2) acres per residential unit. As noted by planning staff, this parcel does not have sufficient land area for the zoning and associated density.

9. At the meeting, Mr. Wall also inquired about the possibility of changing the zoning on the property from SR to IS (which would allow construction of a single-family home), but decided not to pursue that option because he recognized the poor prospects of securing a zoning change for a single lot in a large subdivision, when scores of other lots were subject to the same restriction. He assumed, probably correctly, that this might invite a spot zoning challenge.

10. Other than having a discussion with County representatives, Mr. Wall did nothing more. He did not file an application for a residential dwelling unit allocation under the County's ROGO process, or any other formal application for

relief, such as a change in the zoning district or land use designation, a variance, or an exception.

11. Believing that the County staff would "fix the problem" because the County had made "a mistake" in reclassifying the entire subdivision as SR, Mr. Wall prepared and filed a BUD application, which was eventually deemed to be complete on September 27, 2013. The BUD process is intended "to provide a means to resolve a landowner's claim that a [LDR] or comprehensive plan policy has had an unconstitutional effect on property in a nonjudicial forum." § 102-103(a), M.C.C.

12. An applicant for a BUD must include a statement "describing the [LDR], comprehensive plan policy, or other final action of the county, which the applicant believes necessitates relief under this division." § 102-105(b)(5), M.C.C. The application at issue simply stated that "the adoption of the land use designation of SR for the subdivision of Bay Haven constituted a compensable taking." The application did not refer to any comprehensive plan policy or final action taken by the County. As relief, the application requested that the County take one of the two following actions: (a) change the Future Land Use Map and zoning designations to allow a residence to be built on the lot; or (b) notwithstanding the SR zoning, issue a permit for development.

13. The BUD process requires applicants to state whether they are alleging a facial or as-applied regulatory taking as the basis for administrative relief. See § 102-104, M.C.C. Unless a landowner asserts that a LDR or comprehensive plan provision, on its face, has caused a taking of his property, relief is permitted only after "the landowner has received a final decision on development approval applications from the county, including building permit allocation system allocations, appeals, administrative relief pursuant to section 138-54, and other available relief, exceptions, or variances." Id.

14. Mr. Wall did not formally apply for any type of development approval and received no final decision, as contemplated by the Code. However, Mr. Wall testified that he "understood" the County was waiving that requirement in this instance. He also stated in the application that "Joe Haberman contracted [sic] the Beauchamps and informed them that staff had deemed this phase unnecessary and to move directly to submitting a [BUD] application." Other than this assertion, there is no evidence to confirm this understanding, and the County's Principal Planner testified that a waiver had not been granted. She also confirmed that no development approval application had been filed, and no final decision had been made, both required by the Code in order to seek relief under an "as applied"

theory. Therefore, rightly or wrongly, as plainly stated in the application, Petitioners' basis for relief is that the LDR on its face constitutes a taking of their property.[5]

15. Besides a single-family home, which is impermissible here due to size limitations of the lot, two other uses are permitted as of right in the SR district: community parks and beekeeping. See § 130-94, M.C.C. Also, a property owner may apply for a minor conditional use, subject to approval by the Planning Director. Permissible minor conditional uses include public or private community tennis courts and swimming pools; public buildings and uses; parks and community uses; institutional uses; and churches, synagogues, and houses of worship. Id. However, Mr. Beauchamp testified that he is not interested in any of these uses since he believes most, if not all, would be offensive to a residential neighborhood or simply impractical due to the size of his lot. The property can also be sold to the owners of adjacent Lot 11 to be used as a side yard, its use before being purchased by Petitioners. Finally, the Principal Planner testified that there are transferable development rights (TDRs) on the property, whose value at this time is unknown. See § 130-160, M.C.C. Therefore, the Beauchamps are not deprived of all economically beneficial use of their property. Cf. § 102-110(c), M.C.C. ("[t]he highest,

common, or expected use, is not intended as an appropriate remedy, unless expressly required by applicable statute or case law").

16. There was no evidence from a property appraiser on the fair market value of the parcel, as encumbered by the regulation.

CONCLUSIONS OF LAW

17. Pursuant to a contract with DOAH, after a BUD application is determined to be complete, it is transmitted to a special magistrate (administrative law judge) to set a hearing date. See § 102-105(d)(2), M.C.C. The hearing process is governed by the following broad guidelines established in subsection 102-106(b):

> At the hearing, the landowner or landowner's representative shall present the landowner's case and the planning director or the planning director's representative shall represent the county's case. The special magistrate may accept briefs, evidence, reports, or proposed recommendations from the parties.

18. Section 102-109(a) provides that relief under the BUD process:

> may be granted where a court of competent jurisdiction likely would determine that a final action by the county has caused a taking of property and a judicial finding of liability would not be precluded by a cognizable defense, including lack of investment-backed expectations, statute of

limitations, laches, or other preclusions of relief."

19. The applicant has the burden of showing that relief is appropriate. See § 102-109(b), M.C.C.

20. An applicant must allege and then prove (a) that the enactment of a LDR or comprehensive plan provision, on its face, constitutes a taking of the property; or (b) that "other final action" has been taken on a development approval application, which results in a taking of the property.

21. The statute of limitations for the two remedies begins to run at different times. For a facial takings claim, it begins to run on the date of the enactment of the regulation effectuating the alleged taking. Collins v. Monroe Cnty., 999 So. 2d 709, 713 (Fla. 3d DCA 2008). For an as-applied takings claim, it does not begin to run until the property owner has obtained a final decision from the land use authority regarding the application of the regulations to the property. See Beyer v. City of Marathon, 37 So. 3d 932, 934 (Fla. 3d DCA 2010).

22. If the statute of limitations has run, or the zoning ordinance does not preclude all development of the property, a takings claim must necessarily fail. Beyer at 934; Collins at 713. Here, the four-year statute of limitations accrued with the enactment of the 1986 zoning ordinance and precludes a finding of liability on the part of the County. See § 102-109,

M.C.C. While the parties dispute the economic productivity of the other uses allowed on the property, it was not disputed that the Code permits other uses; the parcel can be sold to the owners of adjacent Lot 11 to be used as a side yard; and there are TDRs associated with the parcel that can be used for other purposes. Therefore, even if the claim had been timely filed, the mere enactment of the regulation did not constitute a taking of all economic value of the land.

23. For an as-applied takings claim to be considered ripe, a property owner must have taken reasonable and necessary steps to allow the County to exercise its judgment regarding development plans, including the opportunity to grant waivers and variances or other relief. See Collins at 716; § 102-104, M.C.C. Petitioners suggest, however, that given the circumstances here, the filing of a development application would be futile. Although the final action prerequisite may be satisfied by proof that attempts to comply would be futile, futility is not established until at least one meaningful application has been filed. Glisson v. Alachua Cnty., 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990)(quoting Unity Ventures v. Lake Cnty., 841 F.2d 770, 775 (7th Cir. 1987)). It is undisputed that no "meaningful application" has been filed, and no final action has been taken. Also, there is insufficient proof to

establish that the County intended to waive this requirement. Therefore, even if the Beauchamps' application does not implicate a facial takings claim, an as-applied claim is not yet ripe and should be denied.

24. In summary, a court of competent jurisdiction likely would determine that a final action of the county has not caused a taking of property and a judicial finding of liability would be precluded by a cognizable defense. See § 102-109, M.C.C. Therefore, the application should be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of County Commissioners deny Petitioners' application for relief under the BUD Ordinance.

DONE AND ENTERED this 10th day of July, 2014, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2014.

ENDNOTES

[1] Even though the County gave timely and proper notice that a new zoning code and comprehensive plan were being adopted, Petitioners' agent, Mr. Wall, opined that many property owners, including himself, were unaware of the ramifications of the changes and failed to contest the LDRs or otherwise take any interest in the amendment process.

[2] At the direction of the State, the ROGO was implemented in order to provide for the safety of residents in the event of a hurricane evacuation and to protect the significant natural resources of the County. ROGO is a competitive permit allocation system whereby those applications with the highest scores are awarded building permits. Even though there are currently more than 8,000 privately owned vacant lots in unincorporated Monroe County, Florida Administrative Code Rule 28-20.140 allows the County to issue only 197 building permits per year for new residential development within unincorporated Monroe County in order to maintain established hurricane evacuation clearance times. This limitation on ROGO permits extends through the year 2023. See County Ex. 1, Staff Report, pp. 12-13.

[3] The undersigned finds it puzzling that a licensed realtor in the Keys would be unfamiliar with zoning districts, related development restrictions, and the appropriate steps necessary to verify that information.

[4] The record does not show how many times the property was sold between 1986 and 2006. In any event, the undersigned assumes the latest sellers failed to disclose the SR zoning restrictions when they sold the property to the Beauchamps in 2006.

[5] At hearing, and in their Proposed Recommended Order, Petitioners took the position that their application implicated an as-applied takings claim. They did not directly respond to the County's treatment of the application as a facial takings claim.

COPIES FURNISHED:

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NOTICE OF FURTHER RIGHTS

This Recommended Order will be considered by the Board of County Commissioners at a public hearing. See § 102-108, M.C.C. The time and place of such hearing will be noticed by the County.