

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA J. EDWARDS AND HENRY A.
OLYNGER, JR./TIC,

Petitioners,

vs.

Case No. 17-6177GM

MONROE COUNTY PLANNING
COMMISSION,

Respondent.

_____ /

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, Francine M. Ffolkes, on January 16, 2018, at video teleconferencing sites in Tallahassee and Key West, Florida.

APPEARANCES

For Petitioners: Van D. Fischer, 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 the Petitioners' application for a beneficial use determination (BUD) regarding

their property on Ramrod Key, Florida, and if approved, to determine the type of relief that is appropriate.

PRELIMINARY STATEMENT

In 2016, the Petitioners filed a BUD application under section 102-102, et. seq., Monroe County Code. In 2017, the Petitioners filed an Amended BUD Application. The Petitioners asserted that a December 4, 2015, denial of their single-family residential building permit application constituted an as-applied taking of their property. The denial stated that the property did not constitute a "lot" for purposes of density. As relief, the Petitioners seek to have the property awarded a density allocation for development of one dwelling unit and a building permit issued.

Pursuant to a contract, the BUD Application was referred by the Respondent, Monroe County Planning Commission (County), to DOAH for a hearing before a special magistrate (administrative law judge). See § 102-105, Monroe Cnty. Code. The parties filed their Joint Pre-hearing Stipulation on January 2, 2018, in which the parties separately listed their exhibits and the Petitioners indicated that they were not calling any witnesses.

At the start of the hearing, the County lodged hearsay objections to two appraisals that were identified as Attachments 10 and 11 to the Amended BUD Application in the Petitioners' list of exhibits. The County followed up with objecting to the

entire Amended BUD Application as hearsay since the Petitioners were not presenting any direct evidence that would be corroborated by the Amended BUD Application. The undersigned ruled that the Amended BUD Application was not admitted into evidence for the truth of the matters asserted therein, but only admitted to show that an Amended BUD Application was submitted to the County.^{1/}

Despite not being listed as a witness in the Joint Pre-hearing Stipulation, the undersigned allowed Henry A. Olynger, Jr., to testify on behalf of the Petitioners. The County presented the testimony of Kevin Bond, Monroe County Planning and Development Review Manager, who was accepted as an expert in land planning. A November 9, 2017, memorandum to the Special Magistrate was accepted into evidence.

Neither party hired a court reporter to preserve the record of the hearing. Therefore, there is no transcript of the proceeding. The Petitioners filed a written Closing Argument and the County filed a motion to strike the Petitioners' Closing Argument. The County's motion to strike is denied.

Proposed Recommended Orders were filed by the parties, and they were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The following findings of fact are taken from the parties' joint pre-hearing stipulation, and the direct evidence adduced at the hearing.

The Property

1. The Petitioners' property is located at 475 Brown Drive, Ramrod Key, in Monroe County. According to the Monroe County Property Appraiser, the size of the site is 0.95 acres. The property is vacant and contains disturbed and undisturbed wetland habitat. The property's immediate vicinity is described as residential development of single-family units to the west and south, environmentally sensitive lands to the south and east, and open water to the north.

2. The property is legally described as "being a portion of Tract 'A', Ramrod Shores Third Addition, according to the plat thereof, as recorded in Plat Book 6, Page 108 of the Public Records of Monroe County, Florida" having real estate number 00209971-004600. The property's current Land Use Map Zoning Districts are Improved Subdivision (IS) and Native Area (NA). The property's Future Land Use Map (FLUM) designations are Residential Medium (RM) and Residential Conservation (RC). The Tier Designation is Tier III Infill Area.

Relevant Prior County Actions

3. On December 19, 1972, the Monroe County Board of County Commissioners (BOCC) passed Resolution No. 146-1972 approving the Plat of Ramrod Shores Third Addition and filed for record in Plat Book 6 at Page 108 of the Public Records of Monroe County. The landowner was James M. Brown, as Trustee. The subject property is within Tract A of this plat.

4. In 1986, Monroe County adopted a revised set of zoning regulations via Ordinance No. 33-1986. Ordinance No. 33-1986 also approved a revised series of zoning maps (also known as the Pattison Maps) for all areas of the unincorporated county by reference. With the adoption of the 1986 Land Development Regulations and zoning maps, most of the Petitioners' property was designated as IS zoning with a small portion as NA.

5. In 1992, a revised series of zoning maps were approved (also known as the Craig Maps) for all areas of the unincorporated county. With the adoption of the revised (Craig) zoning maps, the Petitioners' property remained designated as IS with a small portion as NA.

6. In 1993, the County adopted a set of FLUM maps pursuant to a joint stipulated settlement agreement and section 163.3184, Florida Statutes. BOCC Ordinance No. 016-1993 memorialized the approval. The FLUM maps took effect in 1997 after approval from the state land planning agency. With the adoption of the FLUM

maps, the Petitioners' property was designated as RM and a small portion as RC.

7. On March 23, 2015, the Petitioners were provided a Letter of Current Site Conditions for the subject property. The letter summarized the environmental habitats on the property and the applicable portions of the Comprehensive Plan and Land Development Code. The letter stated the KEYWEP score for disturbed portions of the wetland was 4.45. The score of 4.45 means the property was buildable, disturbed wetlands. The undisturbed wetlands consist of tidal mangroves and were by definition "red flag" wetlands. Disturbed wetlands may be developed under section 118-10, Monroe County Code. Development is not permitted in undisturbed wetlands where 100 percent open space is required.

8. On November 24, 2015, the Petitioners applied for a building permit to construct a single-family detached residential dwelling unit. On December 4, 2015, the County's Planning and Environmental Resources Department (the Department) sent the Petitioners a notice that the Department denied their building permit application number 15106233. The notice informed the Petitioners that the Department's decision may be appealed within 30 calendar days. No appeal was filed to challenge the propriety of the Department's decision.

9. The Department's December 4, 2015, notice stated that the Ramrod Shores Third Addition Plat shows that the Petitioners' property is located within Tract A. Although Tract A was subdivided into seven parcels, this was never shown as lots on an approved and duly recorded plat. The Department determined that the property did not meet the definition of "lot" in section 101-1, Monroe County Code, and did not meet the residential density requirements of the IS Land Use District in order to allow the proposed development of a dwelling unit. See § 130-157, Monroe Cnty. Code.

10. On December 7, 2016, the Department received the agent's BUD Application, File No. 2016-202. On December 22, 2016, the Department sent the agent a Notice of Deficiencies pursuant to section 102-105, Monroe County Code, after the application was reviewed by staff to determine if the application was complete and included the materials and information listed in section 102-105(b). On January 6, 2017, the Department received additional materials and information from the agent. On January 27, 2017, the Department notified the agent that the application was determined to be sufficient.

11. On March 28, 2017, the Department forwarded the BUD application to DOAH for adjudication. After the Petitioners sought to amend their application with a new basis for relief, DOAH relinquished its jurisdiction.

12. On June 12, 2017, the Petitioners submitted an Amended BUD Application to the Department. After sending a second Notice of Deficiencies and receiving additional materials and information from the agent, the Department determined that the application was sufficient.

13. The Amended BUD Application was suspended for 60 days, pursuant to BOCC Resolution No. 214-2017, as a temporary emergency measure after Hurricane Irma made landfall in the Florida Keys on September 10, 2017. On November 9, 2017, the Department forwarded the BUD Application to DOAH for adjudication.

Petitioners' Actions

14. The Petitioners purchased the subject property on April 23, 1990. Between 1990 and 1991, the Petitioners submitted an application to the Department of Health and Rehabilitative Services (HRS) for an on-site aerobic septic system. At first, the HRS denied the application based on lot size issues. The HRS Variance Review Board recommended disapproval of the septic system application on June 7, 1991, on the grounds of insufficient lot size and an illegal canal.

15. After the Petitioners failed to obtain HRS approval in 1991, they took no further steps to develop the property until they submitted an application for a Letter of Current Site

Conditions on January 30, 2015, and an application for a single-family residence on November 24, 2015.

16. Mr. Olynger testified that the Petitioners purchased the property because of the ocean view and expected to build a house on the property. He testified that after the HRS denials in the early 1990s, he started the process of trying to develop the property again in 2014 because central sewer was now available.

IS Land Use District

17. Due to the density requirements for the IS Land Use District of one dwelling unit per lot, the Petitioners are unable to construct a single-family home, which is an as-of-right use in the IS Land Use District.

18. The IS Land Use District permits other as-of-right and conditional uses. While Mr. Olynger disputed the economic productivity of some of these uses, it was not disputed that the property could potentially be used for (a) recreational purposes; (b) a community park; (c) beekeeping; (d) wastewater system; (e) Rate of Growth Ordinance (ROGO) points or transferable development rights (TDRs); or (f) sold to a neighbor for open space, yard expansion or an accessory use, such as a pool.

19. Mr. Bond testified that that the County's Comprehensive Plan and Code allow landowners competing for the

limited number of building allocations in the point-based ROGO to buy and donate vacant parcels such as the subject property to increase their ROGO scores. The subject property qualifies as a ROGO Lot and there is an active secondary market of people buying and trading ROGO Lots in Monroe County.

20. Mr. Bond also testified that the Petitioners could apply for Future Land Use Map and Land Use (Zoning) District Map amendments to a category that would allow for the construction of a single-family dwelling based upon an adopted acreage density standard. The Petitioners have not made any such applications.

21. There was no direct evidence on the fair market value of the property, as encumbered by the regulation.^{2/}

CONCLUSIONS OF LAW

22. 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), Monroe Cnty. Code. The hearing process is governed by the following broad guidelines set forth 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 his or her representative shall represent the county's case. The special magistrate may accept briefs, evidence, reports, or proposed recommendations from the parties.

23. Section 102-109(a) provides:

[R]elief . . . 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, statutes of limitation, laches, or other preclusions to relief.

24. The Petitioners have the burden of showing that relief is appropriate. See § 102-109(b), Monroe Cnty. Code. The Petitioners have alleged an as-applied regulatory taking.

25. Section 101-104, Monroe County Code, defines when a landowner can apply for BUD relief:

Relief under this division cannot be established until the landowner has received a final decision on development approval applications from the county, including building permit allocation system applications, appeals, administrative relief pursuant to sections 138-27 [ROGO] and 138-54 [NROGO], and other available relief, exceptions, or variances, unless the applicant asserts that a land development regulation or comprehensive plan policy, on its face, meets the standards for relief in section 102-109.

26. The BUD process requires the Petitioners to receive a final decision on various forms of relief listed in section 102-104 before applying for relief under the BUD process. The evidence established that the Petitioners did not appeal the denial of their building permit, did not apply for administrative relief under the ROGO provisions, and did not

apply for any zoning district map or future land use map amendments to a category that would allow for the construction of a single-family dwelling based upon an adopted acreage density standard. See § 102-104, Monroe Cnty. Code.

27. 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 v. Monroe Cnty., 999 So. 2d 709, 716 (Fla. 3d DCA 2008); § 102-104, Monroe Cnty. Code.

28. Under the provisions of the Monroe County Code, this Amended BUD Application fails to comply with the exhaustion requirement of section 102-104 and applicable case law. Therefore, the Petitioners' as-applied claim is not ripe and should be denied.

29. A court of competent jurisdiction likely would determine that the Petitioners' as-applied claim is not ripe, which is a cognizable defense precluding a judicial finding of liability. See § 102-109, Monroe Cnty. Code.

RECOMMENDATION

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

RECOMMENDED that the Board of County Commissioners deny the Petitioners' application for relief under section 102-104, Monroe County Code.

DONE AND ENTERED this 27th day of March, 2018, in Tallahassee, Leon County, Florida.



FRANCINE M. FFOLKES
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 2018.

ENDNOTES

^{1/} Hearsay alone cannot form the basis for a finding of fact. See § 120.57(1)(c), Fla. Stat. (2017) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

^{2/} Appraisals were specifically objected to by the County as hearsay documents. The appraisals were attachments to the BUD application, which was not admitted into evidence for the truth of the matters asserted therein. Since direct evidence

regarding appraised values was not presented by the Petitioners, no finding of fact can be made using only hearsay as the basis. Id.

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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, Monroe Cnty. Code. The time and place of such hearing will be noticed by the County.