

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-423

MONROE COUNTY, a political subdivision of the
State of Florida and **THE STATE OF FLORIDA**,

Petitioners

v.

THOMAS F. COLLINS, et al.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL, THIRD DISTRICT CASE NO. 3D07-1603

**PETITIONER, STATE OF FLORIDA'S
BRIEF ON JURISDICTION**

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STATEMENT OF THE CASE AND FACTS

Plaintiffs below jointly filed inverse condemnation actions against Monroe County claiming that a number of unrelated parcels of property had been taken by operation of the provisions of the Monroe County Year 2010 Comprehensive Plan (“Plan”) and the implementing land development regulations. Prior to the filing of this suit, Plaintiffs petitioned the County for a Beneficial Use Determination (“BUD”) pursuant to the Plan. A BUD petition requires an applicant to demonstrate that the comprehensive plan and land development regulations in effect at the time of the BUD application deprive the applicant of all reasonable economic use of the property. Other than this BUD application, all but two² of the Plaintiffs had, at that time, never filed any other application for development of their properties through the County’s Rate of Growth Ordinance (“ROGO”). Ultimately, the County granted what was, according to the Plan, the preferred relief under the BUD provisions - an offer to purchase the property.

The State of Florida was brought into this action by third party complaint by the County because of its role in regulating land uses in Monroe County which is designated an area of critical state concern. § 380.0552(3), Fla. Stat. The County and the State moved for summary judgment asserting that the action should be

² Collins and Magrini both had applications for development pending when they received their BUD resolutions and subsequently received development permits. *Collins v. Monroe County*, 34 FLW D 64, 65 n.9 (Fla. 3rd DCA Dec. 31, 2008).

treated as a “facial taking” which accrues upon passage of the allegedly offending regulation and that the four year statute of limitations had run barring it. The trial court did not find that a facial taking had occurred, but rather that the case should be treated as an allegation that such a taking had occurred based on the holding in *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990). Since any alleged facial taking would have accrued in 1997, when the Plan became effective, it was barred by § 95.11(3)(p), Fla. Stat.

On appeal, the Plaintiffs argued that the case was actually an “as applied” taking and that the statute had not run since the cause of action for an as applied taking only accrued and was ripe when the County adopted the BUD resolutions. Since this was within the four year period, the Plaintiffs argued, the case was not barred. On appeal, the Third District Court reversed and remanded the case for a determination of whether in fact a taking had occurred and if so the compensation due.

Although there is no finding in the summary judgment that a facial taking had in fact occurred, the District Court held that there was no facial taking.⁴ The

⁴ Although taking cases are ad hoc decisions based on the unique facts of each case, the District Court made this determination for all of the plaintiffs based on the availability of development permits for two of the Plaintiffs. *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871 (Fla. 2001)(Takings analysis is an ad-hoc factual inquiry.) Had the Court required development permit applications, then the County would have had an opportunity to evaluate each property and determine which were developable and which were not. It was never given the chance because of the actions (or inactions) of the Plaintiffs and the decision below.

court went on to determine that the BUD application was the “one meaningful application” and the BUD resolutions were the “final decision” required by the cases to ripen an as applied taking case. These findings were made in spite of the fact that most of the Plaintiffs had never filed any actual development applications at the time of the BUD and the two Plaintiffs, Collins and Magrini, who did file meaningful development applications *were issued permits* after the BUD resolutions were adopted.

Petitioners, Monroe County and the State of Florida timely filed their Notice to Invoke this Court’s discretionary jurisdiction after the District Court disposed of Plaintiffs’ Motion for Clarification.

SUMMARY OF THE ARGUMENT

The decision of the court below conflicts with the decisions of the First and Fourth Districts in *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) and *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995). Both of these cases held that in order to ripen an as applied taking claim, a landowner must make at least one meaningful application for development of the property in order to allow the local government to exercise its full discretion in the application of its land use ordinances and come to a final, definitive position on the nature and extent of permitted development. On facts that, for all intents and purposes, are identical to those in *Glisson* and *Taylor*, the court below, in direct

conflict with this critical element of inverse condemnation cases, determined that the Plaintiffs' claims were ripe in the absence of *any* applications for development.

Monroe County is designated an Area of Critical State Concern and its land development policies are governed by the "Florida Keys Area Protection Act." § 380.0552, Fla. Stat. Inverse condemnation actions are integral to the land use regulation process because they are the ultimate protection of landowners' rights under the state and federal constitutions. The conflict generated by this case will make it impossible for the County and the State to continue their efforts to regulate land use in the Florida Keys effectively. Allowing landowners to bring inverse condemnation cases without making applications for development will paralyze local governments, afraid they may frustrate unknown development expectations and provide monetary windfalls or landowners who made no attempts to make use of their property. This Court should exercise its discretion, consider this case because of its statewide importance, and reverse.

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

This is an inverse condemnation action. The court below determined that the Plaintiffs had alleged as applied taking claims and that said claims were ripe for adjudication based on the BUD resolutions. This holding directly conflicts with the holdings in *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) and *Taylor v. Village of N. Palm Beach*, 659 So. 2d 1167 (Fla. 4th DCA 1995), which both required one meaningful development application, at a minimum, in order to ripen such a claim.⁵ *Cf. Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223 (Fla. 5th DCA 1992) (denial of permit ripened taking claim). Although no meaningful application was filed in this case, the Third DCA found that Plaintiffs' as applied taking claims were ripe. Thus this court has jurisdiction to resolve this conflict.

In *Glisson*, the court was faced with a challenge to the newly enacted Alachua County land use plan. The court treated the claims as facial because "no evidence was presented that any development proposal had been processed to completion under CPA-5-85, [and therefore] the only question as to this court is

⁵ The Fourth had previously held that "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). Given that two Plaintiffs received development permits after receiving BUD relief, the opinion below violates this principle.

whether the mere enactment of CPA-5-85 denied appellants all economically viable uses of their property.” 558 So. 2d at 1038. Similarly, in *Taylor*, the court held “that the failure of landowner to request an amendment to the plan to permit other uses and present North Palm Beach with a meaningful development proposal is fatal to her takings claim as applied to her property.” 659 So. 2d at 1173. It was fatal because the failure to present a development application prevented the claim from being ripe. The same is true in this case; the taking allegations are not based on the denial of any development application. In contrast to an application proposing an actual development plan, “a BUD petition requires an applicant to demonstrate that the comprehensive plan and land development regulations in effect at the time of the BUD application deprive the applicant of all reasonable economic use of the property.” *Collins*, 34 FLW at D64.

Where it has spoken on this issue, the U.S. Supreme Court has required that a governmental entity 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 v. Yolo County*, 477 U.S. 340, 351 (1986). Florida courts have adopted the federal ripeness policy of requiring a “final determination from the government as to the permissible uses of the property.” *Glisson*, 558 So. 2d at

1035-36; *Department of Env'tl. Reg. v. Mackay*, 544 So. 2d 1065, 1066 (Fla. 1989).

The *Glisson* court held that the final decision may be shown by (1) a rejected development plan, **and** (2) a denial of a variance. 558 So. 2d at 1036.⁶ The court recognized, however, that although the one meaningful development application is necessary in all cases, variances and similar administrative relief can be avoided if the applicant can show that it would be futile to proceed. “Although the final decision prerequisite also 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.” *Id.*

In the case below, there was no rejected development plan, no denial of a variance and, as a matter of fact as shown by the Court’s opinion, no final decision at all. The BUD resolutions found that Plaintiffs had been denied all beneficial use of their property in the absence of any development proposals and granted the Plaintiffs the relief they requested - purchase of their property in order to settle allegations of a facial taking in the BUD application. After the issuance of the Resolutions, two of the Plaintiffs received development permits. “Magrini and

⁶ *Glisson* relied on *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988)(A final decision must be demonstrated by a development plan submitted, considered, and rejected by the governmental entity.) and *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L. Ed. 2d 861 (1988) ([T]he “final decision” which inflicts a concrete injury on the plaintiff and is ripe for adjudication as a claim of a regulatory taking, even if the claim is brought under 42 U.S.C. § 1983, requires at least two decisions against the Kinzlis: (1) a rejected development plan, and (2) a denial of a variance.) for this proposition and it is clear from those cases that the “and” is conjunctive.

Collins received building permits after they received their final BUD resolutions from the County. Magrini received a building permit on April 12, 2006; Collins received a building permit on March 12, 2007.” *Collins v. Monroe County*, 34 FLW D 64, 65 n.9 (Fla. 3rd DCA Dec. 31, 2008).

By allowing as applied taking claims to ripen without requiring the filing and denial of development proposals, the opinion of the court below is in direct conflict with the decisions of the First and Fourth DCAs.

THIS COURT SHOULD EXERCISE
ITS DISCRETION TO HEAR THIS CASE

The conflict here is worthy of this court’s attention. If this opinion stands, then landowners in the Third DCA can bring inverse condemnation claims without ever having made any attempt to develop their property. Everywhere else, one meaningful development proposal is required. Such proposals are necessary because they set forth a measure of the reasonable expectations of the landowner, *Taylor*, 659 So. 2d at 1174, and they give local governments the opportunity to exercise their full discretion in the permitting process. *Lost Tree Vill. Corp. v. City of Vero Beach*, 838 So. 2d 561, 571 (Fla. 4th DCA 2002). Finally, a development application is necessary to allow the court to know how the regulation will ultimately be applied to the property.

Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land [retains] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190, n. 11 (1985).

Macdonald, 477 U.S. at 349.

By designating the Florida Keys an Area of Critical State Concern, the legislature has recognized the importance of maintaining the natural environment of this area. In *Monroe County v. Ambrose*, 866 So. 2d 707, 711 (Fla. 3rd DCA 2003), the court recognized the "significant legislation and regulations designed and enacted for the purpose of preserving our most precious lands," and that land use decisions in Monroe County "have a statewide impact." All Monroe County land use decisions are reviewed by the State in furtherance of this goal. If this opinion stands, both the County and the State will have to make land use decisions in the future without the benefit of knowing the development expectations of the landowners affected by those decisions. Essential land development regulation will be hampered by the possibility of landowners receiving windfall awards for development expectations that never existed. *See e.g., Ambrose*, 866 So. 2d at 711 (It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land.)

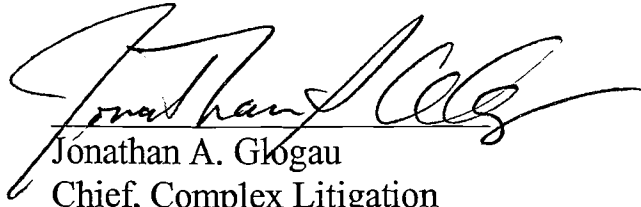
This opinion will have effects beyond the land use decisions of Monroe County. All permitting agencies operating in the Third DCA's jurisdiction now have to operate in the blind when dealing with landowners. The Department of Environmental Protection can now be sued for inverse condemnation without ever having the opportunity to review a development proposal and possibly make changes that would allow issuance of the permit. Agencies must have a development proposal upon which they can exercise their full discretion before being brought into court to defend against a taking claim.

CONCLUSION

This court should exercise its jurisdiction, accept this case, and reverse thereby reinstating the summary judgment of the trial court.

Respectfully submitted this 12th Day of March, 2009.

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CERTIFICATE OF SERVICE

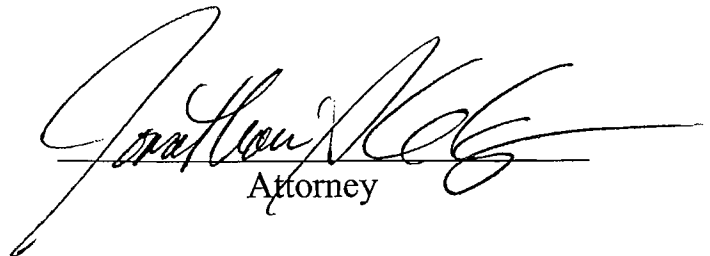
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