

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 MONROE COUNTY'S
AMENDED BRIEF ON JURISDICTION

Derek V. Howard (FBN 0667641)
Assistant County Attorney
Monroe County Attorney's Office
1111 12th St., Suite 408
Key West, FL 33041
Telephone: (305) 292-3470
Facsimile: (305) 292-3516

TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

 I. Discretionary Jurisdiction Exists Because the Decision Below
 Creates Express and Direct Conflict.....4

 A. The Decision Conflicts With Holdings of the Fourth
 and First Districts Regarding Ripeness.....4

 B. The Decision Conflicts With the Federal Ripeness Policy
 Adopted By Florida Courts.....7

 II. Jurisdiction Should Be Exercised Because the Decision Implicates
 Environmental Resource Protection in the Florida Keys—An Area
 of Critical State Concern.....9

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

CERTIFICATE OF COMPLIANCE.....11

APPENDIX.....Tab A

TABLE OF AUTHORITIES

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980).....9

Ambrose v. Monroe County, 866 So.2d 707 (Fla. 3d DCA 2003).....10

Glisson v. Alachua County, 558 So.2d 1030 (Fla. 1st DCA 1990).....5

Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992).....5

Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050 (Fla. 2003)10

Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997)..... 8

Taylor v. City of Riviera Beach, 801 So.2d 259 (Fla. 4th DCA 2001).....5

Taylor v. Village of North Palm Beach, 659 So.2d 1167
(Fla. 4th DCA 1995).....4, 6, 7

Williamson County Reg. Plan. Comm’n v. Hamilton Bank
of Johnson City, 473 U.S. 172 (1985).....8, 9

Statutes

§ 380.021, Fla. Stat. (1997).....10

Constitutional Provisions

Art. V, § (3)(b)(3), Fla. Const.....4

STATEMENT OF THE CASE AND FACTS

In 1997, Respondents (“Landowners”) filed petitions for Beneficial Use Determinations (BUDs) pursuant to the County’s Year 2010 Comprehensive Plan (“1996 Comp Plan”). Collins, et. al. v Monroe County, 999 So.2d 709, 34 Fla. L. Weekly D64 (Fla. 3rd DCA 2008). The BUD administrative process (then codified at § 9.5-171, *et seq.*, Monroe County Code) provided no mechanism for submission, review, or authorization of specific development proposals. Section 9.5-173(a) provided that “[i]n order to establish the applicant is entitled to relief, an applicant for a beneficial use must demonstrate that the comprehensive plan and land development regulations in effect at the time of the filing of the beneficial use application deprive the applicant of all reasonable economic use of the property.” Id. at D67 n. 11. Between 2002 and 2004, the Board of County Commissioners (“BOCC”) rendered BUDs granting administrative relief in the form of purchase offers, which Landowners previously agreed was the preferred relief. Id. at D65.

In addition to applying for BUD administrative relief, some Landowners also applied for development approval. Id. at D67. All of those Landowners obtained the building permits they requested, even after receiving final BUDs from the BOCC. Id.

In 2004, Landowners filed their action against the County seeking compensation for regulatory takings of their properties alleged to have begun on

the dates their BUDs were rendered. Id. at 65. The trial court subsequently granted a summary judgment on statute of limitations grounds. Id. The trial court determined that “the BUD petitions do not constitute the meaningful applications necessary to ripen an as-applied taking claim” and that “the claims must be treated in this case as facial takings claims.” Id. Landowners’ claims were then dismissed because they were not filed within four (4) years of the adoption of the regulations Landowners alleged in the BUD process to have deprived them of all reasonable economic use of their properties. Id.

The Third District reversed, finding that Landowners’ claims could not be treated as facial claims because “. . . any facial challenges based on just compensation principles must fail as a matter of law.” Id. The Court cited record evidence “that a subset of the Landowners received post-BUD building permits, or even sold their property,” which it regarded as “strong evidence that those particular properties did, in fact, have development value” Id. The Court nonetheless found that Landowners’ allegations stated as-applied taking claims, and that the BUDs constituted “final decisions” that ripened such claims for review when they were rendered in 2002. Id. at D66. The Court concluded that Landowners’ action was timely filed within the four-year statute of limitation. Id.

SUMMARY OF ARGUMENT

The Third District decision that the BUDs ripened an as-applied takings

claims in the absence of applications for development approval is unprecedented, and in direct conflict with holdings of the Fourth and First Districts that require submission of at least one meaningful application proposing specific development before an as-applied claim can be stated. This requirement is critical to determine whether there has been a taking because the property use a property owner proposed is a measure of the owner's investment-backed expectations.

The Third District's decision also conflicts with the Federal ripeness policy adopted by Florida courts in holding that Landowners' applications for administrative relief from alleged *facial* takings also ripened *as-applied* takings claims. Under the Federal ripeness policy, the exhaustion of administrative remedies prerequisite is separate from the decisional finality prerequisite. The BUD process provides an administrative remedy only if the applicant establishes the occurrence of a facial taking. The decisional finality prerequisite cannot be satisfied by resorting to the BUD process alone because that process does not, nor was it ever intended to, review development proposals. The United States Supreme Court has repeatedly clarified that the "one meaningful application" needed to satisfy the decisional finality requirement must propose a specific property use. The Third District's decision allows owners to ripen as-applied claims by satisfying only the exhaustion of administrative remedies requirement.

This Court should exercise its discretionary jurisdiction because the Florida

Courts and Legislature have already determined decisions regarding land use in the Florida Keys “have a statewide impact.” The Third District’s decision makes it possible for property owners who never actually held a development expectation to score financial windfalls by dispensing with the requirement that they first give the appropriate governmental authority an opportunity to consider a specific development proposal before pursuing as-applied takings claims. This will make Monroe County and other local governments reluctant to protect environmental resources through regulation for fear of frustrating unknown development expectations, and thus incurring takings liability.

ARGUMENT

I. Discretionary Jurisdiction Exists Because the Decision Below Creates Express and Direct Conflict

A. The Decision Conflicts With Holdings of the Fourth and First Districts Regarding Ripeness

The Third District held that Landowners’ applications for administrative relief under the BUD process ripened *as-applied* takings claims. In so holding, the Court dispensed with the “one meaningful application” prerequisite to as-applied taking claims that requires the claimant to submit at least one development approval application that sets forth the claimant’s intended use of the property. This is in direct conflict with holdings of the Fourth and First Districts, and gives rise to discretionary jurisdiction. Art. V, § (3)(b)(3), Fla. Const.

In Taylor v. Village of North Palm Beach, 659 So.2d 1167 (Fla. 4th DCA

1995), the Fourth District affirmed that the “one meaningful application” required to ripen an as-applied takings claim must actually propose development. In that case, the Court found the property owner’s reliance on Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992) was erroneous because the owner had not filed an application proposing a property use, whereas the owner in Reahard had. See also Taylor v. City of Riviera Beach, 801 So.2d 259 (Fla. 4th DCA 2001) (“[The] application for a building permit to construct a single-family residence constituted a meaningful application, as it set forth her intended use of the land.”).

In Glisson v. Alachua, 558 So.2d 1030 (Fla. 1st DCA 1990), the First District held that the final decision prerequisite to an as-applied takings claim requires at least one meaningful application that proposes a specific use of the property at issue. “Futility is not established until at least one meaningful application has been filed.” 558 So.2d at 1036. The First District stated that “[a] final decision may be shown by (1) a rejected development plan, and (2) a denial of a variance.” Id. In the case at bar, Landowners who actually submitted applications proposing specific development received building permits. This demonstrates the rationale for the holdings of the Fourth and First Districts qualifying that a meaningful application is one that actually seeks specific development approval. It also shows the BUD process was intended to compensate property owners for facial takings, not approve or disapprove of proposed development projects.

The Third District remanded the case for “consideration of those factors necessary to evaluate an as-applied taking specific to each of the Landowners.” 34 Fla. L. Weekly at D67. The Court correctly states those factors include “the reasonable investment-backed expectations of each Landowner.” Id. However, in holding that Monroe County property owners can successfully state claims for as-applied takings claim in the absence of specific development proposals, the Court eliminated “[o]ne measure of an owner’s reasonable economic expectation.” Taylor v. Village of North Palm Beach, 659 So.2d at 1174 (“[T]he ripeness requirement assists the trial court in determining whether a taking has occurred.”)

Landowners may attempt to minimize the precedential effect of the Third District’s decision based on the statement therein that “. . . the BUD Ordinance differs from land use regulations in other jurisdictions in that it accounts for both facial and as-applied takings, as seen in its bifurcated relief” 34 Fla. L. Weekly at D66. However, when read with reference to other portions of the Decision, this statement reveals that the Court misapprehended the BUD process.

First, the statement blatantly contradicts the Court’s introductory (and correct) finding that the provision setting forth the requisite showing for BUD relief “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.” Id. at 64. This showing

is precisely what the Court later states to be the standard of proof for a facial taking. *Id.* at 65 (“A facial taking . . . occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all reasonable economic use of the property.”) The Court also correctly states, “[t]he standard of proof for as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations.” *Id.* at 65. No BUD provision allows granting of relief where there’s been anything less than a facial taking.

Second, § 9.5-173(a)(1)-(2), set forth at Footnote 11, plainly explains that if the applicant makes the requisite showing of a facial taking by regulation, then relief is bifurcated based on the purpose of the regulation; relief is not bifurcated based on whether there has been a facial or as-applied taking as found by the Court because the BUD process provides no relief for as-applied takings. Finally, there was no evidence relating to the land use regulations of other jurisdictions in the record before the Third District, nor does the decision offer any citation or explanation of how the court reviewed the regulations of other jurisdictions.

B. The Decision Conflicts With the Federal Ripeness Policy Adopted By the Florida Courts

In holding the Landowners’ BUD applications ripened as-applied takings claims, the Third District’s decision also conflicts with the federal ripeness policy adopted by the Florida courts. See Taylor v. Village of North Palm Beach, 659

So.2d at 1173 (“Florida courts have adopted the federal ripeness policy of requiring a final determination from the government as to the permissible uses of property.”). The Third District’s decision confuses the separate and distinct ripeness requirements of decisional finality and exhaustion of administrative remedies. See Williamson County Reg. Plan. Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (“While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.”)

A property owner cannot satisfy the decisional finality prerequisite through the BUD process alone because that process provides a remedy only if the applicant establishes the occurrence of a facial taking. “The focus of the ‘final decision’ inquiry is on ascertaining the extent of the governmental restriction on land use, not what the government has given the landowner in exchange for that restriction.” Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997)(J. Scalia, concurring in part and concurring in the judgment). BUDs are about what the County gives in exchange for its regulatory restrictions, and not about whether a

specific property use will be allowed.

Consistent with the holdings of the Fourth and First Districts, the United States Supreme Court has repeatedly clarified that in order for claimants to succeed in stating as-applied takings claims, they must actually submit a development proposal. Agin v. City of Tiburon, 447 U.S. 255 (1980)(holding the only issue justiciable was whether mere enactment of statute amounted to a taking because the owners “ha[d] not submitted a plan for development of the property of the [challenged] ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions.”); Williamson County, 473 U.S. at 187(acknowledging that “[r]espondent ha[d] submitted a plan for developing its property, and thus ha[d] passed beyond the Agin threshold . . .”). In the case at bar, only some of the Landowners applied for specific development approval and whatever as-applied taking claims they ripened in so doing were mooted when approval was obtained. As for the other Respondents, the holding that they ripened as-applied takings claims conflicts with established Florida law.

II. Jurisdiction Should Be Exercised Because the Decision Implicates Environmental Resource Protection in the Florida Keys—An Area of Critical State Concern

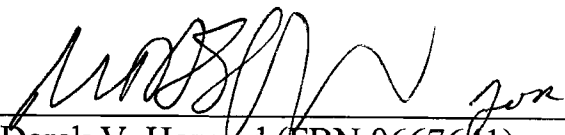
This Court should exercise its discretion to review the Third District’s decision because it unjustifiably increases Monroe County’s exposure to takings liability for “regulations designed and enacted for the purpose of preserving our

most precious lands.” Ambrose v. Monroe County, 866 So.2d 707 (Fla. 3d DCA 2003). The Florida Legislature and Third District have already recognized that decisions regarding land use in Monroe County “have a statewide impact.” Id. (citing § 380.021, Fla. Stat. (1997)). This Court reached a similar conclusion with respect to the statewide importance of the environmental quality of the near shore waters of the Florida Keys. See, Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050, 1056 (Fla. 2003). In dispensing with the requirement that a property owner first file the “one meaningful application” setting forth the owner’s development expectation, the Third District’s decision makes it possible for a landowner who never actually held a development expectation to score a financial windfall. This will contribute to reluctance on the part of Monroe County and other local governments to protect environmental resources through regulation for fear of frustrating unknown development expectations and thus incurring takings liability.

CONCLUSION

For all of the foregoing reasons, Monroe County respectfully urges this Court to accept jurisdiction.

Respectfully submitted this 26th day of March, 2009.



Derek V. Howard (FBN 0667641)
Assistant County Attorney

Monroe County Attorney's Office
1111 12th St., Suite 408
Key West, FL 33041
Telephone: (305) 292-3470
Facsimile: (305) 292-3516

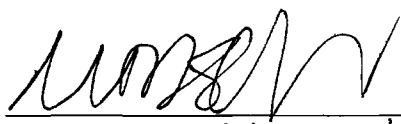
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Jurisdiction Brief was sent by U.S. Mail this 26th day of March, 2009, on:

Jonathan A. Glogau
Office of Attorney General
State of Florida, PL-01
The Capitol

James S. Mattson
Co-Counsel for Respondents
P.O. Box 586
Key Largo, FL 33037

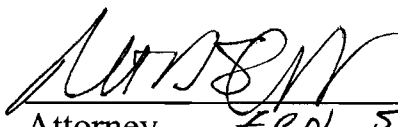
Andrew M. Tobin
Co-Counsel for Respondents
P.O. Box 620
Tavernier, FL 33070-0620.



Attorney Robert Shilling FRN: 58262

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font, and complies with the font requirement of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



Attorney FRN 58262

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

A P P E N D I X
to
Petitioner's Amended Brief on Jurisdiction