

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC09-423  
DISTRICT COURT NO. 3D07-1603**

---

**MONROE COUNTY, a Political Subdivision of the State of Florida, and the  
STATE OF FLORIDA,**

**PETITIONERS,**

**vs.**

**THOMAS F. COLLINS and PATRICIA COLLINS, T/E; DONALD DAVIS;  
AURELIA DEL VALLE and MARIA DEL VALLE, T/E; HILL FAMILY  
INVESTMENTS, INC.; RICHARD J. JOHNSON and JOANN C. JOHNSON,  
T/E; ROBERT A. LOMRANCE; JOSEPH MAGRINI and ELDA S.  
MAGRINI, T/E; KEITH P. RADENHAUSEN; FRANK J. SCHNEIDER,  
MARY ANN RICKLIN, and ROSEMARY RIORDAN, T/C; HUBERT TOST  
and MARILYN TOST, T/E., AND SAMUEL I. BURSTYN, P.A.,**

**RESPONDENTS.**

---

**RESPONDENTS' JURISDICTIONAL BRIEF**

James S. Mattson, Esq.  
Florida Bar No. 360988  
Co-Counsel for Appellants  
P. O. Box 586  
Key Largo, FL 33037-0586  
(305) 451-3951

Andrew M. Tobin, Esq.  
Florida Bar No. 184825  
Co-Counsel for Appellants  
P.O. Box 620  
Tavernier, FL 33070-0620  
(239) 659-3251

April 20, 2009

## TABLE OF CONTENTS

I.	STATEMENT OF THE CASE AND THE FACTS .....	1
II.	ARGUMENT .....	2
	A. The <i>Kinzli – Unity Ventures</i> ripeness theory relied on by Petitioners ..	3
	B. Current Federal ripeness doctrine .....	4
	C. Landowners’ as-applied regulatory taking claims are ripe .....	6
III.	CONCLUSION .....	7
IV.	CERTIFICATE OF SERVICE.....	I
V.	CERTIFICATE OF FONT COMPLIANCE.....	I

## TABLE OF AUTHORITIES

### CASES

<i>Bauknight v. Monroe County</i> , 994 So. 2d 362 (Fla. 3 <sup>rd</sup> DCA 2008) .....	7
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 526 U.S. 687 (1999).....	4, 6
<i>Clay v. Monroe County</i> , 849 So. 2d 363 (Fla. 3 <sup>rd</sup> DCA 2003), <i>rev. denied</i> , 870 So. 2d 820 (Fla. 2004) .....	7
<i>Collins v. Monroe County</i> , 919 So. 2d 709 (Fla. 3 <sup>rd</sup> DCA 2008) .....	1, 2, 3, 7
<i>Eide v. Sarasota County</i> , 908 F. 2d 716 (11 <sup>th</sup> Cir. 1990), <i>cert. denied</i> , 498 U.S. 1120 (1991) .....	4
<i>Glisson v. Alachua County</i> , 558 So. 2d 1030 (Fla. 1 <sup>st</sup> DCA 1990) .....	passim
<i>Key West v. Berg</i> , 655 So. 2d 196 (Fla. 3 <sup>rd</sup> DCA 1995), <i>rev. denied</i> , 663 So. 2d 629 (Fla. 1995) .....	7
<i>Kinzli v. City of Santa Cruz</i> , 818 F.2d 1449 (9th Cir. 1987), <i>cert. denied</i> , 484 U.S. 1043 (1988) .....	3, 4
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992) .....	4, 5
<i>MacDonald, Sommer &amp; Frates v. County of Yolo</i> , 473 U.S. 340 (1986).....	4, 5, 6
<i>Monroe County v. Gonzalez</i> , 593 So. 2d 1143 (Fla. 3 <sup>rd</sup> DCA 1992).....	1, 7
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001).....	4, 5, 6
<i>Shands v. City of Marathon</i> , 999 So. 2d 718 (Fla. 3 <sup>rd</sup> DCA 2008).....	7
<i>Taylor v. Village of N. Palm Beach</i> , 659 So. 2d 1167 (Fla. 4 <sup>th</sup> DCA 1995) ...	passim
<i>Unity Ventures v. Lake County</i> , 841 F.2d 770 (7th Cir. 1988), <i>cert. denied</i> , 488 U.S. 891 (1988).....	3, 4
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank</i> , 473 U.S. 172 (1985).....	4, 5, 6, 7

**OTHER AUTHORITIES**

Gregory Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 98 (1995).....7

**TREATISES**

Steven J. Eagle, *REGULATORY TAKINGS, THIRD ED.*, Matthew-Bender (2005) .....5

## I. STATEMENT OF THE CASE AND THE FACTS

In this proceeding, Monroe County and the State of Florida have petitioned for discretionary review of *Collins v. Monroe County*,<sup>1</sup> a decision of the Third District Court of Appeal (“DCA”), alleging express and direct conflict with the First DCA’s 1990 decision in *Glisson v. Alachua County*,<sup>2</sup> and the Fourth DCA’s 1995 decision in *Taylor v. Village of N. Palm Beach*.<sup>3</sup>

Monroe County has had an administrative “takings avoidance” process since 1986.<sup>4</sup> The County’s 1996 Comprehensive Plan requires – and its Land Development Regulations (“LDRs”) include – an administrative Beneficial Use Determination (“BUD”) procedure. The BUD process allows the County to waive *any* Comprehensive Plan provision or LDR to avoid a regulatory taking. In the alternative, the County may purchase the property or provide other forms of relief.<sup>5</sup>

Landowners filed 11 BUD petitions in 1997. They had to prove the Comprehensive Plan or LDRs deprived them of all reasonable economic use of the subject property. A hearing was conducted in 2000, and from 2001 to 2003, the Special Master’s recommended orders found the properties unbuildable. From 2002 to 2004, the County Commission adopted the Special Master’s proposed orders by Resolution. Neither the Comprehensive Plan nor the BUD ordinance require the

---

<sup>1</sup> 919 So. 2d 709 (Fla. 3<sup>rd</sup> DCA 2008).

<sup>2</sup> 558 So. 2d 1030 (Fla. 1<sup>st</sup> DCA 1990).

<sup>3</sup> 659 So. 2d 1167 (Fla. 4<sup>th</sup> DCA 1995).

<sup>4</sup> *See Monroe County v. Gonzalez*, 593 So. 2d 1143 (Fla. 3<sup>rd</sup> DCA 1992).

<sup>5</sup> Opinion below at 13-15, n. 11 & n. 12; 919 So. 2d at 716 n. 11 & n. 12.

County to initiate eminent domain proceedings if the parties cannot agree on a purchase price, and Landowners initiated this regulatory taking lawsuit in 2004.<sup>6</sup>

The trial court dismissed this action on summary judgment, 2-½ years after it was filed, ruling that a 4-year statute of limitations had run on Landowners' "facial" taking claims (which they had not pled), and that their "as-applied" taking claims (which they had pled) were unripe. The Third DCA reversed, holding that the BUD resolutions ripened Landowners' "as-applied" claims.

## II. ARGUMENT

Petitioners argue the opinion below conflicts with *Glisson* and *Taylor*.<sup>7</sup> The alleged conflict is that nine of the eleven *Collins* Landowners did not apply for building permits to develop their property before (or possibly after) filing their 1997 BUD petitions. This allegedly conflicts with the opinions in *Glisson* and *Taylor* that require the submission of at least "one meaningful application" to ripen an as-applied regulatory taking claim. Conflict is alleged notwithstanding the fact that neither the Comprehensive Plan nor the BUD ordinance required such applications.

The opinion below holds that the BUD application and administrative adjudication comprise the "meaningful application," as follows.

*Ordinarily*, before a takings claim becomes ripe, a property owner is required to follow "*reasonable and necessary*" steps to permit the land use authority to exercise its discretion in considering development plans, "including the opportunity to grant any variances or waivers allowed by law." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). The requirement is

---

<sup>6</sup> Opinion below at 3-4; 919 So. 2d at 712.

<sup>7</sup> Fn. 2 and n. 3, *supra*.

*usually* met when the property owner files an application for a development permit with the local land use authority and receives a grant or denial of the permit. ... Once it becomes clear that the government authority “lacks the discretion to permit any development, or [that] the permissible uses of the property are known to a reasonable degree of certainty,” it is only then that a takings claim is likely ripe. *Palazzolo*, 533 U.S. at 620 .

*The Monroe County BUD Ordinance itself answers the ripeness question. The BUD Ordinance was designed as a way to avoid constitutional takings lawsuits by providing other means of compensating for total or partial regulatory loss of economically beneficial use of property. In this way, 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 ....*<sup>8</sup>

The Third DCA clearly considered the issue raised by Petitioners, and distinguished the *Collins* regulatory regime from those in *Glisson* and *Taylor* – that had no administrative takings relief procedures.

**A. The *Kinzli* – *Unity Ventures* ripeness theory relied on by Petitioners**

Petitioners cite to two phrases in *Glisson*: first, that “*a final decision may be shown by (1) a rejected development plan, and (2) a denial of a variance,*” and second, that “*futility is not established until at least one meaningful application has been filed,*”<sup>9</sup> citing *Kinzli v. City of Santa Cruz*<sup>10</sup> and *Unity Ventures v. Lake County*.<sup>11</sup> Both of the phrases relied on by Petitioners first appeared in *Kinzli*, where the Ninth Circuit attributed the quoted language to the Supreme Court’s

---

<sup>8</sup> Opinion below at 12-13; 919 So. 2d at 716. [Emphasis added.].

<sup>9</sup> The “one meaningful application” phrase in *Taylor v. City of N. Palm Beach*, that Petitioners identified as the conflict with *Taylor*, is a direct quote from *Glisson*. Therefore *Taylor* warrants no further analysis.

<sup>10</sup> 818 F.2d 1449, 1454 (9<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)

<sup>11</sup> 841 F.2d 770 (7<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 891 (1988).

opinions in *Williamson County*<sup>12</sup> and *MacDonald*.<sup>13</sup> The Seventh Circuit attributed its “futility [requires] one meaningful application” language, in *Unity Ventures*, to *Williamson County*, *MacDonald*, and *Kinzli*.

Petitioners’ reliance on *Glisson* (and *Taylor*, which relies on *Glisson*) is misplaced. Several Supreme Court “taking” decisions have been rendered since 1990, including *Lucas* (1992),<sup>14</sup> *Del Monte Dunes* (1999),<sup>15</sup> and *Palazzolo* (2001).<sup>16</sup> These recent opinions, particularly *Palazzolo*, have clarified the Court’s opinions in *Williamson County* and *MacDonald*. The ripeness theories in *Kinzli* and *Unity Ventures* – that no other Circuits adopted – are inconsistent with current Supreme Court takings law.<sup>17</sup>

## **B. Current Federal ripeness doctrine**

The core of the Federal ripeness doctrine established in *Williamson County* is the *final decision* requirement, that reads as follows.

[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with imple-

---

<sup>12</sup> *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>13</sup> *MacDonald, Sommer & Frates v. County of Yolo*, 473 U.S. 340 (1986).

<sup>14</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>15</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

<sup>16</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) .

<sup>17</sup> In *Eide v. Sarasota County*, 908 F. 2d 716 (11<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991), the Eleventh Circuit declined to adopt the *Kinzli – Unity Ventures* “one meaningful application” ripeness theory.

menting the regulations has reached a *final decision* regarding the application of the regulations to the *property* at issue.<sup>18</sup>

In his dissent in *MacDonald*, Justice White stated:<sup>19</sup>

[T]he final decision requirement is necessary to ensure that “the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” ... Nothing in our cases, however, suggests that the decisionmaker’s definitive position may be determined only from explicit denials of property-owner applications for development. *Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.*

Moreover, I see no reason for importing such a requirement into the “final decision” analysis. A decisionmaker’s definitive position may sometimes be determined by factors other than its actual decision on the issue in question. For example, if a landowner applies to develop its land in a relatively intensive manner that is consistent with the applicable zoning requirements and if the governmental body denies that application, explaining that all development will be barred under its interpretation of the zoning ordinance, I would find that a final decision barring all development has been made – even though the landowner did not apply for a less intensive development. *Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures.*

In his treatise, REGULATORY TAKINGS, THIRD ED., Matthew-Bender (2005), § 8-6(d)(3) at 1086-87, Professor Steven J. Eagle states:

The futility exception serves to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.”<sup>1</sup> As the Supreme Court added in *Lucas*, there is no need for a landowner to submit a “pointless” development application.<sup>20</sup>

In *Palazzolo v. Rhode Island*, the Supreme Court tempered the *Williamson County* ripeness test with a “rule of practicality” that fortifies *Williamson County*’s futility exception. Once an administrative agency makes its ruling clear, further pursuit of administrative remedies may serve no purpose.

---

<sup>18</sup> n. 12, *supra*, at 473 U.S. 186. [Emphasis added.]

<sup>19</sup> n. 13, *supra*, at 477 U.S. 359. [Emphasis added.]

<sup>20</sup> n. 14, *supra*, 505 U.S. at 1013 n.3 (1992).

The Supreme Court has addressed the very issue raised by Petitioners; whether, having issued final determinations of what Landowners can do with their property, the County can require Landowners to apply for permits to develop what the County has already said they could not develop. In *Palazzolo*, the Court held:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted. *See MacDonald, supra*, at 342 (denial of 159-home residential subdivision); *Williamson County*, 473 U.S. at 182 (476-unit subdivision); ....

*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. ... Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision.*<sup>21</sup>

*Palazzolo*, n. 16, *supra*, 533 U.S. at 620-21. [Emphasis added.]

### **C. Landowners' as-applied regulatory taking claims are ripe**

Petitioners argue the BUDs rendered by the Monroe County Commission between 2002 and 2004 do not meet the "final decision" requirement in *William-*

---

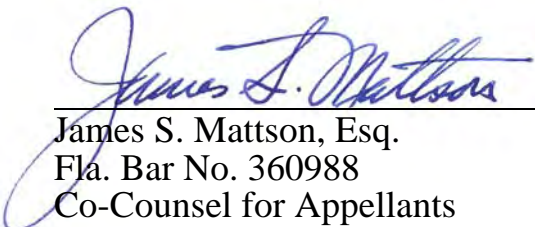
<sup>21</sup> Citing *Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 (1999).

son County.<sup>22</sup> However, neither *Glisson* nor *Taylor* dealt with local government land development regulations that incorporated an administrative takings relief proceeding such as that before the Third DCA in *Collins*.

Five panels of the Third DCA have reviewed Monroe County's – and its municipalities' – BUD processes since 1992.<sup>23</sup> Petitioners ask this Court to require Landowners ripen their taking claims twice. Petitioners' position is simply wrong. Professor Gregory Stein was on the right track when he noted, “stalling is often the functional equivalent of winning on the merits.”<sup>24</sup>


### III. CONCLUSION

Respondents pray for an order denying discretionary review.



---

James S. Mattson, Esq.  
Fla. Bar No. 360988  
Co-Counsel for Appellants



---

Andrew M. Tobin, Esq.  
Florida Bar No. 184825  
Co-Counsel for Appellants

---

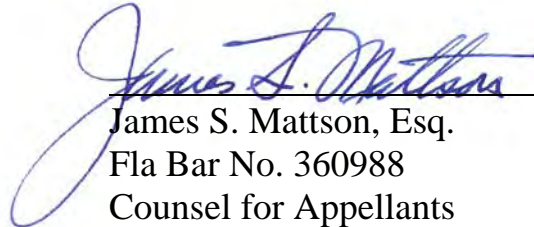
<sup>22</sup> Pg. 5, *supra*.

<sup>23</sup> *Gonzalez* (1992) n. 4, *supra*; *Key West v. Berg*, 655 So. 2d 196 (Fla. 3<sup>rd</sup> DCA 1995), *rev. denied*, 663 So. 2d 629 (Fla. 1995); *Clay v. Monroe County*, 849 So. 2d 363 (Fla. 3<sup>rd</sup> DCA 2003), *rev. denied*, 870 So. 2d 820 (Fla. 2004); *Bauknight v. Monroe County*, 994 So. 2d 362 (Fla. 3<sup>rd</sup> DCA 2008); and *Shands v. City of Marathon*, 999 So. 2d 718 (Fla. 3<sup>rd</sup> DCA 2008).

<sup>24</sup> Gregory Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 98 (1995)

#### **IV. CERTIFICATE OF SERVICE**

I certify I served copies of the foregoing by first class mail, postage prepaid, on **Derek Howard, Esq.**, Assistant Monroe County Attorney, P.O. Box 1026, Key West, FL 33041-1026, and **Jonathan A. Glogau, Esq.**, Special Counsel, PL-01 The Capitol, Tallahassee, FL 32399-1050, this 20<sup>th</sup> day of April 2009.

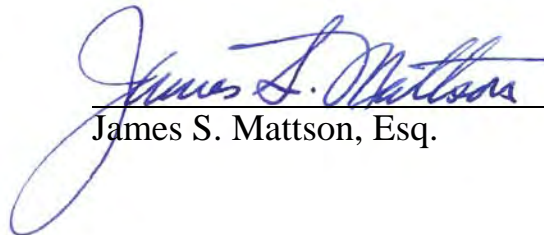


---

James S. Mattson, Esq.  
Fla Bar No. 360988  
Counsel for Appellants  
P. O. Box 586  
Key Largo, FL 33037  
(305) 451-3951

#### **V. CERTIFICATE OF FONT COMPLIANCE**

I certify that the foregoing brief was prepared with Microsoft Word 2003, using 14-point, Times Roman font.



---

James S. Mattson, Esq.