

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC09-423  
District Court Case No. 3D07-1603**

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**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.**

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**RESPONDENTS' AMENDED JURISDICTIONAL BRIEF**

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## I. STATEMENT OF THE CASE AND THE FACTS

This is an inverse condemnation action alleging multiple regulatory takings. Landowners first obtained Beneficial Use Determinations (“BUDs”) from Monroe County in order to ripen their claims for judicial review. The issue before the District Court was whether the BUD procedure meets the finality/ripeness test established by the Supreme Court in *Williamson County*.<sup>1</sup> The trial court said it does not. The Third District Court of Appeal held it does.<sup>2</sup> Petitioners argue the District Court’s decision “expressly and directly” conflicts with the decisions in *Glisson v. Alachua County*<sup>3</sup> and *Taylor v. Village of N. Palm Beach*.<sup>4</sup>

Monroe County has had an administrative “takings avoidance” procedure – the BUD – since 1986.<sup>5</sup> In 1996, the County and the Florida Administration Commission adopted comprehensive plan standards for the BUD process.<sup>6</sup> In 1997, Landowners filed the subject BUD petitions.<sup>7</sup> BUD hearings were conducted by a Special Master in 2000.<sup>8</sup> Following the Planning Director’s advice, the Special Master determined Landowners’ properties had been “deprived of all use and

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<sup>1</sup> *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985) (“*Williamson County*”).

<sup>2</sup> *Collins v. Monroe County*, 999 So. 2d 709, 717 (Fla. 3d DCA 2008) (“*Collins*”).

<sup>3</sup> 558 So. 2d 1030 (Fla. 1<sup>st</sup> DCA 1990) (“*Glisson*”).

<sup>4</sup> 659 So. 2d 1167 (Fla. 4<sup>th</sup> DCA 1995) (“*Taylor*”).

<sup>5</sup> *Collins*, 999 So. 2d at 711 n.2.

<sup>6</sup> *Id.* at 711 n.3.

<sup>7</sup> *Id.* at 711.

<sup>8</sup> *Id.*

value,” and recommended the County acquire the properties.<sup>9</sup> Between 2002 and 2004, the County Commission adopted the proposed orders by Resolution.<sup>10</sup>

Landowners initiated this action in 2004.<sup>11</sup> The trial court held Landowners’ as-applied taking claims were not ripe and, characterizing Landowners’ claims as facial takings, barred by the four-year statute of limitation.<sup>12</sup> The District Court reversed, holding the BUD resolutions ripened Landowners’ as-applied regulatory taking claims and started the statute of limitation clock.<sup>13</sup>

## II. SUMMARY OF ARGUMENT

*Collins* cannot conflict with *Glisson* and *Taylor* because Monroe County’s land use regulations are markedly different from those in Alachua County and the Village of North Palm Beach. Monroe County’s administrative “takings avoidance” ordinance allowed landowners to petition for a BUD *without* applying for development approval. Nothing resembling Monroe County’s BUD process is mentioned in either *Glisson* or *Taylor*.

Petitioners would have Landowners ripen their claims *twice*. Having obtained a *Williamson County* final decision by way of the BUD process, petitioners would require Landowners to start all over again, submitting applications for de-

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<sup>9</sup> *Id.* at 711-12.

<sup>10</sup> *Id.* at 712.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 712-713.

<sup>13</sup> *Id.* at 717-18.

velopment approvals as if the BUD process had never taken place. This tactic runs afoul of the Court’s statement in *Palazzolo* that: “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>14</sup>

Landowners’ assert the District Court properly considered *Collins*, *Glisson*, and *Taylor* in light of the Supreme Court’s ripeness holdings in *Williamson County* and its progeny. The District Court’s opinion recognized the BUD’s unique provenance, and states: “We limit this holding to actions filed pursuant to the Monroe County Beneficial Use Determination ordinance that encompasses both *per se* and as-applied determinations and provides for appropriate relief.”<sup>15</sup>

### **III. ARGUMENT**

#### **A. Standard of Review**

This court’s direct conflict jurisdiction is limited to instances where the decisions of two district courts, or a district court and the Florida Supreme Court, “expressly and directly conflict.” Art V., § 3(b)(3), Fla. Const. The leading Florida opinion on what this means is *Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960). *Nielsen* described conflict jurisdiction as follows.

[T]he principal situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a

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<sup>14</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 698 (2001) (“*Palazzolo*”), emphasis added.

<sup>15</sup> *Collins*, *supra* n.2, at 717 n.13.

different result in a case which involves substantially the same controlling facts as a prior case ....

Even if *Nielsen* conflict exists – as the supreme court held recently, in *Aravena v. Miami-Dade County*, 928 So. 2d 1163, 1166 (Fla. 2006) – the holdings of the two courts must be *irreconcilable* before conflict jurisdiction attaches.

**B. Petitioners’ have not shown the *Collins* decision “expressly and directly conflicts” with *Glisson* and/or *Taylor*.**

Petitioners’ briefs do not identify a rule of law in *Glisson* and *Taylor* that is affected by the *Collins* decision. The government simply contends Monroe County landowners should not be able to ripen regulatory taking claims via a BUD, because Alachua County and North Palm Beach landowners had to request – and be denied – a building permit, variance, rezoning, or other development order to ripen *their* regulatory taking claims. Petitioners overlook the differences in land use regulations in the three jurisdictions.

The Third DCA held – in *Key West v. Berg*<sup>16</sup> and *Bauknight v. Monroe County*<sup>17</sup> – that Monroe County landowners *must* utilize the BUD process to ripen a taking claim. *Collins* and *Shands v. City of Marathon*<sup>18</sup> are consistent with *Berg* and *Bauknight*. Petitioners’ argument, if accepted, would require Monroe County landowners to ripen twice, once by denial of some form of development order, and

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<sup>16</sup> 655 So.2d 196 (Fla. 3d DCA), *rev. denied*, 663 So. 2d 629 (Fla. 1995).

<sup>17</sup> 994 So. 2d 362 (Fla. 3d DCA 2008).

<sup>18</sup> 999 So. 2d 718 (Fla. 3d DCA 2008), decided the same day as *Collins*.

a second time by a BUD. Florida courts have adopted Federal takings law, and no Federal (or Florida) decision requires a landowner to ripen twice.<sup>19</sup>

*Williamson County* ripeness/finality could potentially have as many variations as there are local governments. Florida has 477 local governments, and nothing prevents each of them from developing a unique ripeness/finality process. Monroe County adopted its first BUD process in 1986,<sup>20</sup> and Key West and Marathon followed suit with their own variations of the BUD.<sup>21</sup>

Monroe County's BUD functions both as a sword and a shield. The government uses it as a shield, preventing landowners from challenging facially confiscatory land use regulations on constitutional grounds.<sup>22</sup> Landowners use the BUD as both shield and sword. The BUD shields them from the four-year statute of limitation on what would otherwise be facial takings and, when exercised, will either provide them with regulatory relief or ripen their taking claim.

Both *Glisson* and *Taylor* involved regulatory taking claims by landowners whose properties had been rezoned to lower intensity uses. Federal takings law recognizes a "futility exception" to the *Williamson County* finality rule, as do Flor-

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<sup>19</sup> *Ripeness* and *finality* are intertwined. See *Williamson County*, *supra* n.1., at 186: "[A] claim that the application of government regulations effects a taking of a property interest is not *ripe* until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the property at issue."

<sup>20</sup> *Collins*, 999 So. 2d at 711 n.2.

<sup>21</sup> *Berg*, *supra* n.16 (Key West); *Shands*, *supra* n.18 (Marathon).

<sup>22</sup> See *Dade County v. National Bulk Carriers*, 450 So. 2d 213 (Fla. 1984).

ida courts.<sup>23</sup> The *Glisson* and *Taylor* landowners argued that applying for permits, variances, and the like, would be futile. The *Glisson* and *Taylor* courts held the landowners could not invoke futility to ripen their claims when there was a *possibility* that *some* development may be allowed, or when they had not even made “one meaningful application” for a permit, rezoning, variance, or other development approval. In Monroe County, the Beneficial Use Determination petition is the “one meaningful application.”<sup>24</sup> There is no indication in *Glisson* or *Taylor* that Alachua County or the Village of North Palm Beach had a “takings avoidance” procedure analogous to Monroe County’s BUD process

In *Palazzolo*, the Court softened the ripeness language in *Williamson County* – suggesting some government authorities might engage in repetitive or unfair land use procedures to avoid taking claims – as follows.

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. .... 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>25</sup> [Emphasis added.]

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<sup>23</sup> See, e.g., *Gardens Country Club v. Palm Beach County*, 590 So. 2d 488 (4<sup>th</sup> DCA), *rev. denied*, 719 So. 2d 287 (Fla. 1998) (... there is a futility exception to the ripeness doctrine. See *Tinnerman v. Palm Beach County*, 641 So. 2d 523 (Fla. 4th DCA 1994); *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) . .... Based on the futility exception, we find that the case is ripe for review.).

<sup>24</sup> *Collins*, 999 So. 2d at 717.

<sup>25</sup> *Palazzolo*, *supra* n.14, at 621; cited in *Collins*, 999 So. 2d at 716.

Petitioners may have overlooked *Riviera Beach v. Shillingburg*, 659 So. 2d 1174 (Fla 4<sup>th</sup> DCA 1995),<sup>26</sup> decided the same day as *Taylor*, by the same panel, and Mrs. Taylor a party in both cases. The *Shillingburg* decision states: “... where the government agency effectively concedes that any other development would be impermissible, this can negate the requirement of pursuing further administrative remedies and the governmental action is effectively treated as a *final decision*.”<sup>27</sup> The *Collins* panel reached a similar conclusion, stating “once it becomes clear that the government authority ‘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 ripe.”<sup>28</sup>

After analyzing the BUD process in light of *Williamson County* and *Palazzolo*, as well as *Glisson*, *Taylor*, and numerous other Florida decisions, the *Collins* panel concluded:

*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....*<sup>29</sup>

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<sup>26</sup> 659 So. 2d 1174 (Fla 4<sup>th</sup> DCA 1995).

<sup>27</sup> Citing *Greenbriar, Ltd. v. City of Alabaster*, 881 F. 2d 1570, 1576 (11<sup>th</sup> Cir. 1989). The Fourth District Court repeated this statement verbatim in *Taylor v. City of Riviera Beach II*, 801 So. 2d 259, 263 (Fla. 4<sup>th</sup> DCA 2001), *rev. denied*, 821 So. 2d 293 (Fla. 2002).

<sup>28</sup> Citing *Palazzolo*, *supra* n.14, at 620.

<sup>29</sup> *Collins* at 716, emphasis added.

In this case, the BOCC concluded, pursuant to the BUD Ordinance and after public hearing, that there was no further beneficial use of the properties and that the County should purchase them. Those BUD Resolutions were a final decision from the appropriate governmental entity as to the nature and extent of the development that will be permitted.<sup>1</sup> Once the BOCC rendered a final decision on the BUD applications, the Landowners' claims became ripe.<sup>30</sup>

As neither Alachua County nor the Village of North Palm Beach had takings avoidance procedures akin to Monroe County's BUD, neither the *Glisson* nor the *Taylor* panel had this issue before it – making “conflict” with *Collins* impossible.

#### IV. CONCLUSION

Neither *Glisson* nor *Taylor* dealt with local government land development regulations with an administrative takings relief proceeding such as the BUD before the Third District Court of Appeal in *Collins*. Petitioners are asking this court to require Monroe County landowners ripen their taking claims twice. Their position epitomizes the basis for the warning in *Palazzolo*, that “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>31</sup>



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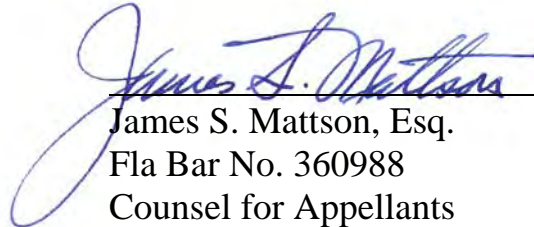
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<sup>30</sup> *Collins*, at 716-17, footnote omitted.

<sup>31</sup> *See supra* n.25.

## V. 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 6<sup>th</sup> day of May 2009.

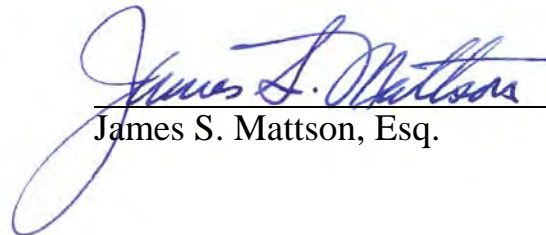


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## VI. CERTIFICATE OF FONT COMPLIANCE

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



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James S. Mattson, Esq.