

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. SC10-1266

District Court Case No. 3D08-3185

GENEVA SUTTON,

Petitioner,

vs.

MONROE COUNTY, a political subdivision of the State of Florida,

Respondent.

RESPONDENT MONROE COUNTY'S JURISDICTIONAL BRIEF

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II. SUMMARY OF ARGUMENT

There is no basis for this Court to exercise its conflict jurisdiction because the Third District's decision below does not conflict with any of the decisions of the Fourth and Fifth District Courts identified by Petitioner. The Third District correctly concluded that Petitioner's taking claim was time barred because if she had a claim, it accrued in 1997 following the administrative appeal of the County's denial of her building permit application. The permit denial and subsequent administrative appeal left no doubt that the subject property was unbuildable due to the County's environmental regulations and therefore satisfied the decisional finality requirement set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ("*Williamson County*"), and followed in the Fourth and Fifth District decisions identified by Petitioner.

The Third District correctly rejected Petitioner's argument that her alleged taking claim accrued in 2006 when the Board of County Commissioners (BOCC) decided her application for a Beneficial Use Determination (BUD). This is because the only relief available to Petitioner under the BUD ordinance was exactly what she received from the BOCC—an offer to purchase the subject property. Petitioner's Jurisdictional Brief does not include a single citation to the BUD ordinance that it wildly misrepresents. The BUD ordinance did not authorize

the BOCC to grant a variance from the environmental regulations upon which the denial of her building permit application was based.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

A. Standard of Review

In order to establish conflict jurisdiction, Petitioner must show that the decision below is in direct and express conflict with a decision of this Court or another District Court of Appeal on the same issue of law. *See, Art. V, § 3(b)(3), Florida Constitution.* “[T]his Court’s discretionary review jurisdiction can be invoked only from a district court decision that expressly addresses a question of law within the four corners of the opinion itself by contain[ing] a statement or citation effectively establishing a point of law upon which the decision rests” *Persaud v. State*, 838 So.2d 529, 532 (Fla. 2003). A litigant’s mere declaration of a conflict is insufficient for this Court to exercise its discretionary jurisdiction. Instead, this Court must determine if the holding below is irreconcilable with the holdings of the Fourth and Fifth Districts identified by the Petitioner. *Aravena v. Miami-Dade County*, 928 So.2d 1163, 1166 (Fla. 2006) (noting whether the holdings at issue are “irreconcilable” is one of the tests for the Florida Supreme Court's conflict jurisdiction).

B. The BUD ordinance did not allow Petitioner to obtain a variance.

Petitioner argues that *Williamson County* required her to ripen her taking claim by seeking variances through the County's BUD process. *Petitioner's Br.* at 9. The threshold question of whether the BUD ordinance provided Petitioner an opportunity to seek a variance from the environmental regulations upon which the denial of her building permit application was based must be answered in the negative.

Petitioner's Jurisdictional Brief does not include a single citation to the BUD ordinance and instead wildly misrepresents the ordinance as granting the BOCC "limitless power." *Petitioner's Br.* at 3. The BUD ordinance expressly limits the relief the BOCC may grant when environmental regulations are at issue. The BOCC had no authority to grant Petitioner variances from the environmental regulations upon which the denial of her building permit application was based.¹ Section 9.5-173(a)(1) of the BUD ordinance allows only for an award of just compensation if beneficial use has been deprived because of the County's environmental regulations.² Because the regulations at issue were environmental, Section 9.5-173(a)(2) of the BUD ordinance did not allow the BOCC to grant Petitioner relief in the form of exemptions or variances. The BOCC granted

¹ Petitioner concedes that her "[building permit] application was rejected for environmental reasons" in 1996. *Petitioner's Br.* at 1.

² The County's BUD ordinance is published *Collins v. Monroe County*, 999 So.2d 709, 716, n. 11 (Fla. 3rd DCA 2008).

Petitioner the only relief that was available to her under the BUD ordinance—an offer to purchase her property.

C. The Third District’s decision does not conflict with the ripeness decisions of the Fourth District.

The Third District’s holding is not irreconcilable with the four holdings of the Fourth District identified by the Petitioner. All of the holdings affirm that the Florida courts have adopted the federal ripeness policy set forth in *Williamson County*. The Third District correctly concluded that Petitioner’s alleged taking claim was barred by the statute of limitations because if she had a claim, it accrued in 1997 following the administrative appeal of the County’s denial of her building permit application, and not in 2006 when she received BUD relief in the form of an offer to purchase. The 1997 administrative appeal met the decisional finality requirement in *Williamson County* because it left no doubt that the subject property was unbuildable due to the County’s environmental regulations.

The Fourth District’s holding in *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla. 4th DCA 2002) does not support Petitioner’s argument that her claim ripened when she obtained a BUD in 2006. As *Lost Tree Village* makes clear, “[w]hen a regulatory takings claim is ripe, ‘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.’” 838 So.2d at 570 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001)). Thus, in

Palazzolo, even though the landowner’s applications did not request special exceptions, variances, or explore every possible development use of the property, his claim was held to be ripe because the regulatory agency’s decisions left no doubt as to the permitted use of the property. *See* 533 U.S. at 621. The Court explained:

Williamson County’s final decision requirement responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed 980 (1997). 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.

533 U.S. at 620.

The Third District’s finding that Petitioner’s alleged regulatory takings claim would have ripened in 1997 is consistent with the Fourth District’s holding in *Lost Tree Village Corp.*, which noted *Williamson County* “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.” 838 So.2d at 571. Here, Petitioner filed an application to build a single-family home—the only available use of the subject property. After the conclusion of Petitioner’s administrative appeal of the denial of that building permit application, it became clear that the Planning Department lacked the

discretion to permit any development because of the environmental regulations. In fact, the memo to the Planning Commission from staff of the Planning Department concluded that the property was unbuildable.

Petitioner's reliance on the Fourth District's decisions in *Gardens Country Club, Inc. v. Palm Beach County*, 712 So.2d 398 (Fla. 4th DCA 1998); *Taylor v. Village of North Palm Beach*, 659 So.2d 1167 (Fla. 4th DCA 1995); and *Riviera Beach v. Shillingburg*, 659 So.2d 1174 (Fla. 4th DCA 1995) ("*Shillingburg*") to establish conflict jurisdiction is also misplaced. All three of those holdings confirm that there is a futility exception to the decisional finality requirement, and that a takings claim can therefore ripen when a development application is denied without subsequent applications for variances or alternative development. *Gardens Country Club*, 712 So.2d at 401 ("[T]here is a futility exception to the ripeness doctrine."); *Taylor*, 659 So.2d at 1174; *Shillingburg*, 659 So.2d at 1181 ("A limited exception to the ripeness requirement might exist where, by virtue of past history, repeated submissions would be futile. . . . Further, where the governmental 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.").

Even if this Court were to accept Petitioner's argument that the BUD ordinance effectively means that the BOCC is the only County body that can

render final decisions regarding property development, the Third District's decision can still be reconciled with the aforementioned Fourth District holdings because of the futility exception to the ripeness doctrine. As explained above in Section I(B), the BUD ordinance did not authorize the BOCC to grant Petitioner a waiver or variance from the environmental regulations upon which the denial of her building permit application was based. Obviously, it would have been futile to require Petitioner to seek a variance from the BOCC before ripening her taking claim. The fact that the BOCC was authorized to grant relief in the form of an offer to purchase has no bearing on ripeness. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 746 (1999) (Scalia, J., concurring) ("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.").

The facts of this case are distinguished from those that rendered the taking claims in *Taylor* and *Shillingburg* unripe. Unlike the Petitioner in this case, the landowners in *Taylor* and *Shillingburg* never filed applications specifying the proposed uses of their properties. *Taylor*, 659 So.2d at 1174 ("[H]ere landowner has not filed 'one meaningful application' specifying her proposed uses for the property."); *Shillingburg*, 659 So.2d at 1181 ("[L]andowners did not . . . submit a plan of proposed development."). Both the *Taylor* and *Shillingburg* holdings

noted that the landowners had not applied for land use plan amendments to permit more intensive uses. However, the Fourth District later clarified in *Taylor v. City of Riviera Beach* that such applications are unnecessary to ripen a takings claim:

In *Shillingburg*, this court in reviewing the record found that Taylor had not submitted a meaningful application regarding her use of the land. . . . Riviera Beach's argument that *Shillingburg* mandated that Taylor submit an application for amendment to the Plan is not persuasive. There is no language in *Shillingburg* requiring that Taylor submit such an application for amendment of the Plan. *Shillingburg* only requires a meaningful application for intended use of the land.

801 So.2d at 263 (Fla. 4th DCA 2001). *Taylor v. City of Riviera Beach* also expressly refutes Petitioner's assertion at page 9 of her Jurisdictional Brief that the denial of a building permit application cannot constitute a final, reviewable decision. 801 So.2d at 263 (" . . . Taylor's 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. Riviera Beach's denial of her building permit application constituted final agency action with regards to how Riviera Beach would apply the Plan to her property, rendering the case ripe for judicial review.").

D. The Third District's decision does not conflict with the ripeness decisions of the Fifth District.

Petitioner's reliance on *City of DeLand v. Lowe*, 544 So.2d 1165 (Fla. 5th DCA 1989) to establish conflict jurisdiction is perplexing for several reasons. First, the holding does not involve a takings claim; rather, the holding involved a

statutory civil rights action under 42 U.S.C. § 1983 against the city following the city's refusal to rezone landowner's lot from residential to commercial. 544 So.2d at 1166. The issue before the court was whether the landowner ripened his statutory civil rights action. 544 So.2d at 1168. Second, assuming this Court finds that issue and its resolution relevant to the issue of when Petitioner ripened her takings action against the County, the Fifth District's decision supports the Third District's decision below. According to Petitioner, the Third District's decision is erroneous because "*Williamson County* holds that administrative appeals are 'remedial,' do not ripen a claim, and need not be exhausted by a landowner." *Petitioner's Br.* at 8. This argument is blatantly contradicted by the *City of DeLand* holding when it cites *Williamson County* in support of its finding that "[i]t was error for the trial court not to dismiss this action without prejudice because Lowe failed or refused to exhaust his administrative remedy of appeal to the Board of Adjustment prior to filing a section 1983 action against the City." 544 So.2d at 1168. This is reconcilable with the Third District's holding that also cited *Williamson County* in support of its finding that if Petitioner had a taking claim, it ripened after her building permit application was denied and she exhausted her administrative appeal to the Planning Commission.

Finally, the Fifth District's later decision in *Koontz v. St. Johns River Water Management District*, 720 So.2d 560 (Fla. 5th DCA 1998) eliminates any doubt

that *City of DeLand* did not establish precedent on ripeness in the Fifth District district that would mandate a different holding than the one the Third District rendered. In *Koontz*, the property owner sued the river management district following the district's denial of his application for a permit to dredge wetlands. In pertinent part, the Fifth District held as follows:

Koontz made a specific application to the District for permits that would permit him to develop a fraction of his property.. . . The District turned him down. It made a final decision on the application before it.. . . There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court. If the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain approval, the issue is ripe.

720 So.2d at 562. In so holding, the Fifth District effectively dismisses Petitioner's argument at page 8 of her Jurisdictional Brief that a regulatory taking claim cannot become ripe when a specific application has been denied.

IV. CONCLUSION

Petitioner has failed to articulate grounds that would justify this Court's exercise of its conflict jurisdiction. Accordingly, Monroe County urges the Court to deny the Petition and decline to exercise its jurisdiction.

Respectfully submitted this 2nd day of August, 2010.

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V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on August 2, 2010, a copy of the foregoing was delivered to: James S. Mattson, Esq., P.O. Box 586, Key Largo, Florida 33037-0586 and Andrew M. Tobin, Esq., P.O. Box 620, Tavernier, Florida 33070-0670.

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VI. CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY THAT this brief complies with the font requirements set forth in Fla.R.App.P. 9.210(a)(2).

/s/
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