

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. SC10-1360

District Court Case No. 3D08-2841

JEANINE I. McCOLE, as Trustee,

Petitioner,

vs.

CITY OF MARATHON, and
STATE OF FLORIDA,

Respondents.

**JURISDICTIONAL BRIEF OF RESPONDENTS
CITY OF MARATHON AND STATE OF FLORIDA**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. SUMMARY OF ARGUMENT	1
II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.....	3
A. Standard of Review	3
B. The Third District’s Decision Does Not Conflict with the Fourth District’s Decisions Petitioner Identifies.....	3
C. The Third District’s Decision Does Not Conflict with the Fifth District Decision Petitioner Identifies	8
III. CONCLUSION.....	10
CERTIFICATE OF SERVICE	12
CERTIFICATE OF COMPLIANCE.....	13

TABLE OF AUTHORITIES

Cases

<i>Aravena v. Miami-Dade County</i> , 928 So. 2d 1163 (Fla. 2006).....	3
<i>City of DeLand v. Lowe</i> , 544 So. 2d 1165 (Fla. 5th DCA 1989)	8, 9
<i>Collins v. Monroe County</i> , 999 So. 2d 709 (Fla. 3d DCA 2008)	5
<i>Gardens Country Club, Inc. v. Palm Beach County</i> , 712 So. 2d 398 (Fla. 4th DCA 1998)	6
<i>Koontz v. St. Johns River Water Management District</i> , 720 So. 2d 560 (Fla. 5th DCA 1998)	9, 10
<i>Lost Tree Village Corp. v. City of Vero Beach</i> , 838 So. 2d 561 (Fla. 4th DCA 2002)	passim
<i>McCole v. City of Marathon</i> , 36 So. 2d 750 (Fla. 3d DCA 2010)	4, 5, 7
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	5
<i>Persaud v. State</i> , 838 So. 2d 529 (Fla. 2003)	3
<i>Riviera Beach v. Shillingburg</i> , 659 So. 2d 1174 (Fla. 4th DCA 1995)	6, 7
<i>Shands v. City of Marathon</i> , 999 So. 2d 718 (Fla. 3d DCA 2008)	5
<i>Taylor v. City of Riviera Beach</i> , 801 So. 2d 259 (Fla. 4th DCA 2001)	5
<i>Taylor v. Village of North Palm Beach</i> , 659 So. 2d 1167 (Fla. 4th DCA 1995)	6, 7

<i>Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,</i> 473 U.S. 172 (1985).....	passim
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Statutes

42 U.S.C. § 1983	8
------------------------	---

Rules

Fla. R. App. P. 9.210(a)(2).....	12
----------------------------------	----

Other Authorities

Art. V, § 3(b)(3), Fla. Const.....	3
------------------------------------	---

I. SUMMARY OF ARGUMENT

In 1989, Petitioner filed two separate applications – one with the State of Florida and one with Monroe County – for permission to build a home on her property. The State and County issued separate, unequivocal denials based on the presence of wetlands on the property, both of which became final after Petitioner failed to appeal or otherwise challenge them. Petitioner then sought and received a substantial reduction in the taxable value of the property down to the nominal value of \$50.

Sixteen years later, in 2005, Petitioner commenced this lawsuit, asserting a takings claim based on the presence of very same wetlands that led to the denials of her building permit applications and the reduction in the taxable value in 1989. The trial court found the claim to be time barred by the four year statute of limitations and entered summary judgment in Respondents' favor. The Third District Court of Appeal affirmed.

The decision below does not conflict with any decision of the Fourth and Fifth District Courts of Appeal as Petitioner contends. In fact, not only did the Third District expressly cite and rely upon the principal Fourth District decision with which Petitioner claims a conflict exists, *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), but it also crafted an opinion that is in complete accord with United States Supreme Court precedent as well as

the other Fourth and Fifth District decisions Petitioner cites as being in conflict.

The Third District correctly concluded that Petitioner's takings claim is time barred because it accrued in 1989, when it became undisputed that no development would be allowed on her property because of the wetlands. Rejecting Petitioner's argument that the takings claim was not ripe for judicial review at that time, the Third District found the claim ripened in 1989 because the twin denials from the State and County 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), and followed by the Fourth and Fifth District decisions identified by Petitioner.

The Third District also rejected Petitioner's argument that her takings claim accrued in 2005, when the City of Marathon denied her application for a Beneficial Use Determination ("BUD"). Once a clear and final determination has been made as to the permissible use of a property – as was the case in 1989 – the limitations period begins to run and any action for judicial relief must have been performed during the four year limitations period. Petitioner's BUD application, and ultimately this lawsuit, was filed *more than ten years after* the expiration of the applicable limitations period. The Third District correctly recognized the BUD process does not revive a claim that expired a decade earlier, and adjudicated the issue accordingly.

II. 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

To establish conflict jurisdiction, Petitioner must show 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 whether the decision below is irreconcilable with the Fourth and Fifth Districts’ decisions Petitioner relies upon to establish conflict. *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 Third District’s Decision Does Not Conflict with the Fourth District’s Decisions Petitioner Identifies

The Third District's holding is not irreconcilable with the holdings of the Fourth District cases Petitioner relies upon. All of the holdings affirm that Florida

courts have adopted the federal ripeness standard set forth in *Williamson County*. The Third District correctly concluded that Petitioner's alleged takings claim was barred by the statute of limitations because it accrued in 1989, following the twin denials from the State and County of her applications to build a home, and not in 2005 when the City denied her BUD application. The 1989 denials, taken together or separately, met the decisional finality requirement in *Williamson County* because the decisions left no doubt Petitioner's property was unbuildable due to the environmental regulations governing wetlands.

The Fourth District's holding in *Lost Tree Village Corp. v. City of Vero Beach*, 838 So. 2d 561 (Fla. 4th DCA 2002), is not at odds with the Third District's reasoning; in fact, the Third District expressly cites to and relies upon *Lost Tree Village* as support for its decision below. See *McCole v. City of Marathon*, 36 So. 2d 750, 752-54 (Fla. 3d DCA 2010). *Lost Tree Village* framed the ripeness inquiry appropriately:

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.

Id. at 570-571. The Third District adopted and re-affirmed this same standard, expressly noting that "other [District Courts of Appeal] have held that a final determination in the form of a permit denial from a municipality is sufficient to

commence the limitations period.” *McCole*, 36 So. 3d at 752 (citing *Lost Tree Village* and *Taylor v. City of Riviera Beach*, 801 So. 2d 259 (Fla. 4th DCA 2001)).

The Third District further explained:

If a landowner obtains a permit denial with a clear indication that all beneficial use has been lost, then any claim must be filed within four years from the time of the permit denial or the resolution of an appeal of the permit denial. Once it becomes clear that the governmental 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.

McCole, 36 So. 3d at 752 (citing *Collins v. Monroe County*, 999 So. 2d 709, 716 (Fla. 3d DCA 2008), and quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001)). See also *Shands v. City of Marathon*, 999 So. 2d 718, 725 (Fla. 3d DCA 2008) (“An as-applied takings claim challenging the application of a land use ordinance is not ripe until the plaintiff has obtained a final decision regarding the application of the regulations to the plaintiff’s property.”) (citations omitted). Accordingly, pursuant to *Williamson County* and its progeny, once it becomes clear through governmental action that regulations prohibit development, the corresponding takings claim is ripe.

The Third District’s finding that Petitioner’s alleged regulatory takings claim would have ripened in 1989 is, therefore, consistent with the Fourth District’s holding in *Lost Tree Village* and prior Third District decisions that follow

Williamson County. Here, Petitioner filed not one but two applications to build a single-family home, and received two corresponding denials. Those denials, taken together or separately, satisfy the *Williamson County* ripeness standard in all respects, as both specifically and fully addressed the threshold issue as to whether the wetlands on the property precluded development, and both reached a definitive and final decision on that issue: development was prohibited. The Third District's conclusion that such denials ripened Petitioner's claim is fully consistent with *Lost Tree Village*.

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), to establish conflict jurisdiction is also misplaced. All three decisions expressly rely upon the *Williamson County* ripeness standard, as did the Third District in its decision below.

Moreover, all three decisions recognize the 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.”). That is precisely what happened in this case - Petitioner elected to neither appeal nor challenge the State and County denials, as doing so would have been futile in light of the unequivocal nature of the denials based upon the presence of wetlands. *McCole*, 36 So. 2d at 754.

The facts of this case are also distinguished from those that rendered the takings claims in *Taylor* and *Shillingburg* unripe. Unlike 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.”). *Taylor v. City of Riviera Beach* also expressly refutes Petitioner’s assertion 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.”).

Importantly, the decision below also correctly rejects Petitioner’s argument that a taking claim can *only* ripen via the City’s BUD process. The case law is uniform that decisional finality does not require resort to the administrative BUD process. As the Third District made clear in its decision below, citing *Williamson County* and *Lost Tree Village*, “once a clear determination has been made . . . as in the case before us with a determination that a single family residence cannot be permitted,” then the claim is ripe and the limitations period begins to run.

C. The Third District’s Decision Does Not Conflict with the Fifth District Decision Petitioner Identifies

Petitioner’s reliance on *City of DeLand v. Lowe*, 544 So. 2d 1165 (Fla. 5th DCA 1989), to establish conflict also fails. To begin with, the case 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. Even assuming, *arguendo*, this Court finds that issue and its resolution relevant to the issue of when Petitioner ripened her takings claim in this case, the Fifth District’s decision supports the Third District’s decision

below. *DeLand* 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 perfectly consistent with the decision below that also cited *Williamson County* in support of its finding that if Petitioner had a takings claim, it ripened after her building permit applications were denied and she failed to appeal or otherwise challenge those denials allowing them to become final.

Moreover, 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 *DeLand* did not establish precedent on ripeness 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:

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 contradicts Petitioner's argument that her claim was not ripe in 1989, when the State and County unequivocally denied her two applications for building permits.

III. CONCLUSION

Petitioner has failed to demonstrate a direct and express conflict between the Third District's decision and a decision of this Court or a decision of another district court of appeal. Consequently, conflict jurisdiction does not exist.^{1/} Accordingly, Respondents City of Marathon and State of Florida respectfully urge the Court to deny the Petition.

^{1/} In the event the Court concludes otherwise, this Court should nonetheless exercise its discretion to refrain from considering the merits of the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served via U.S. Mail on this 12th day of August, 2010, to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements for briefs set forth in Fla. R. App. P. 9.210(a)(2).

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