

Property Rights and Hurricane Evacuation

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Constitutional Claims

- Fifth Amendment to U.S. Constitution
 - Fair compensation
 - Exhaust state remedies first
- Art. X, § 6 of Florida Constitution
 - Full compensation includes payment of property owner's fees if prevails

Types of Takings Cases

- Direct Condemnation
- Inverse Condemnation
- Bert J. Harris Act

What is Inverse Condemnation?

“Where a government agency, by its conduct or activities, has effectively taken private property without a formal exercise of the power of eminent domain”

Rubano v. FDOT, 656 So.2d 1264 (Fla. 1995).

Types of Inverse Condemnation Cases

- Facial Taking
- Temporary Taking
- As Applied Taking
- Exaction
- Physical Occupation

Facial Takings

- Mere enactment of regulation precludes all development of property & owner deprived of all reasonable economic use of property
- Clear from the text of the regulation
- Takings claim immediately ripens
- Four year statute of limitations immediately starts to run
- No more ROGO units, no other changes.

Temporary Takings

- Moratorium of unreasonable duration
 - No bright-line rule for duration
 - *Tahoe-Sierra* held 32-month planning moratorium not a temporary taking
- Complete prohibition on development
- Statute of limitations starts to run when the moratorium is lifted

As Applied Takings Claim

- Application of a regulation to property denies substantially all reasonable economic use
- Requires at least one denial of a meaningful building permit application
- *Penn Central* factors
 - Reasonable investment backed expectations
 - Economic impact on claimant
- Statute of limitations runs from a final denial of that meaningful application

As Applied Takings Claim

Slide 2

- Economic Impact Prong
 - Requires evidence on the change in FMV of the property caused by the regulatory imposition
 - i.e., comparison of (a) FMV of the property with the complained of regulation as of alleged date of taking and (b) FMV of the property without the complained of regulation as of same date.
 - Owner may be denied highest and best use of property
 - For example, remaining “ROGO lot” value of vacant property has precluded finding of takings

Exaction

- Restriction on using private property for public benefit
- Unconstitutional – 2 questions to ask
 1. Essential nexus between legitimate state interest & permit condition?
 2. Permit condition proportional to projected impact of the proposed development?
- Hurricane evacuation context
 - Conditioned new ROGOs on purchasing too many additional lots.
 - Need to be proportional to impact of development

Physical Occupation

- Usually temporary & emergency situations
- Occupation without prior permission
- Classic example is flooding of fields to handle storm water
- In hurricane context, examples include:
 - Evacuation or return holding areas
 - Temporary shelters & command posts
 - Post disaster supply depot
 - Debris collection & processing sites

Typical Defenses in Takings Cases

- No Taking
- Statute of Limitations & Laches
- Ripeness
- Third Party Liability

Defenses -- No Taking

- Other economically viable uses
- No reasonable investment backed expectations
- Owner opting not to recoup initial investment in face of regulatory limitations
- Nuisance
- Development expectations not defeated by government regulation

Nuisance

- Nuisances not compensable takings
- Nuisances includes those uses of property that are threats to public harm & welfare
- Is the threat to public safety once the ability to safely evacuate County in event of a hurricane a nuisance?
 - Unanswered question
 - Cases point to nuisance specific to property

Statute of Limitations & Laches

- Statute of Limitations
 - Four years
 - Runs from the date of accrual
- Laches
 - Equitable
 - No set time limits
- “Too Late”

Ripeness

- No meaningful permit application with governmental entity being sued
- Failure to apply for permits from other governmental entities that could oppose development
- Failure to Exhaust Administrative Remedies
 - Beneficial Use Determination (BUD Process)
 - Administrative Relief
- Puts off claim until later
- “Too Early”

Third Party Liability

- Superior sovereign responsible
 - State government
 - Federal government
- Non-governmental entity
 - Home owners association
 - In reality, no taking

Bifurcated Trials

- Liability Phase – Was there a taking
 - Bench Trial before a Circuit Court Judge
 - Only landowner has right of appeal if loses
- Damages Phase – How much is owed
 - Jury Trial before 12 person Jury
 - Both sides may Appeal any issue

Bert J. Harris Act Claims

- Statutory remedy adopted in 1995 -- “Takings Light”
- Govt. Action which “Inordinately Burdens”
 - Existing Use
 - Vested Right to a Future Use
- Excludes
 - Temporary Takings less than 1 year
 - Enforcement of Federal Regulations
- Opportunity to Settle by Modifying Regulation
- Orders on liability are immediately appealable
- Modifiable by the Legislature & Governor

The Build Out Question

- @ 8,800 parcels of privately owned property in the unincorporated area of Monroe County
- 197 County ROGO allocations per year
- 197 ROGOs + number of lots purchased = number of potential takings cases resolved

Land Acquisition Trends

- Since 1994, govt. buys 340 parcels/year
 - Last 5 years, govt. buys 156 parcels/year
 - Last 3 years, govt. buys 67 parcels/year so
264 potential takings cases resolved/year
- *** Leaves 33 years of ROGO at current rate

Reducing ROGO Rate Alone Won't Solve the Problem

- Current Rate (197 ROGOs + 67 acquired) x 5 years = 1,320 7,480 lots left to purchase
- 50% (99 + 67) x 10 years = 1,660
7,140 lots left
- 25% (49 + 67) x 20 years = 2,320
6,480 lots left

Reduce ROGOs & 100 Purchases / Year

- Current rate $297 \times 5 \text{ years} = 1,485$
Leaves 7,315 lots left
- 50% $199 \times 10 \text{ years} = 1,990$
Leaves 6,810 lots left
- 25% $149 \times 20 \text{ years} = 2,980$
Leaves 5,820 lots left

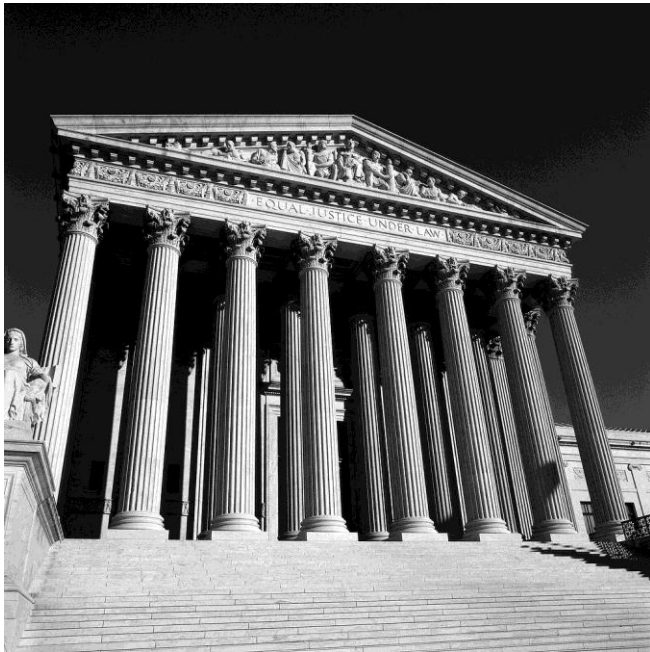
To Get to Zero Lots at the End

- 5 years @ 197 ROGOs, must buy 1,563/year
- 10 years @ 99 ROGOs, must buy 781/year
- 20 years @ 49 ROGOs, must buy 391/year

Options to Consider as Approach 24 hours

- Slow rate of growth
- Increase purchases
- Reward land dedications & lot aggregations
- Transferable ROGO rights
- Encourage other uses that don't impact hurricane evacuation

The End



- Case law changes over time
- Pendulum swings
- Driven by state and federal courts