

# Federal Takings

New Developments and the Effects in  
Florida

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# Federal Takings Claims

- Federal Constitutional Claims

- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) - 2 types of categorically inverse condemnation claims: 1) physical invasion; denies all economically beneficial or productive use of land.
- *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) – case specific claims based on 1) economic impact of regulation on reasonable investment backed expectation; 2) character of government action; 3) whether government action acquires resources for uniquely public functions.



# Penn Central Factors

*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) – case specific claims based on

- 1) economic impact of regulation on reasonable investment backed expectation - *Lemon Bay Cove, LLC v. United States*, 160 Fed. Cl. 593 (2022)(knowledge of existing regulatory restraint can vitiate RIE).
- 2) character of government action – motivation of the legislation is not relevant. *South Grande View Development Company, Inc. v. City of Alabaster, Al.*, 1 F.4<sup>th</sup> 1299 (11<sup>th</sup> Cir. 2021).
- 3) whether government action acquires resources for uniquely public functions.



# Takings Claims in Florida

- State Constitutional Claims –

Florida's constitutional takings clause is analyzed the same way as the federal takings clause. *Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach, Florida*, 593 F. Supp. 3d 1129, 1137 (M.D. Fla. 2022).



# Procedural Vehicle for Takings Claims

Proper procedural vehicle to raise federal takings claim:

- *DeVillier v. Texas*, 601 U.S. 285 (2024) – questions vehicle by which federal takings claims must be raised.
- *Rivadeneira v. University of South Florida*, 2022 WL 445661 (M.D. Fla. Feb. 14, 2022). Denied takings claim under Sec. 1983, because state agency was not a “person.”



# Too Soon or Too Late?

- Too Soon – Ripeness
- *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) – claim that application of government regulations effect a taking of property interest is not ripe until government has reached a final decision regarding application of regulations at issue. (note *Knick v. Township of Scott*, P.A. 588 U.S. 180 (2019)(overruling as to exhaustion of state claims)
- *South Grande View Development Company, Inc. v. City of Alabaster, Al.*, 1 F.4<sup>th</sup> 1299 (11<sup>th</sup> Cir. 2021) – specific city-wide ordinance with no ambiguity doesn't require a permit application first.



# Too Soon or Too Late?

- Too Soon – Ripeness
- Futility is an exception to permit application requirement.
  - Futility applies where prior application history and/or public statements by the agency make clear that future applications will be fruitless. *Jamieson v. Town of Fort Myers Beach*, 352 So.3d 1260 (Fla. 2d DCA 2022)(extensive history of application).
  - *Golfrock v. Lee County*, 247 So.3d 37 (Fla. 2d DCA 2018) – a declaratory judgment action seeking to establish futility, dismissed because elements for dec action not established.



# Too Soon or Too Late?

- How many permit applications do you need?
- *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11<sup>th</sup> Cir. 1994)(in most cases at least one).
- *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)(one grandiose plan that leaves open lesser development options isn't sufficient).
- *Doyle v. United States*, 165 Fed. Cl. 161 (Fed. Cl. Ct. 2023)(failure to submit complete application renders claim unripe but acknowledging extraordinary delay exception)



# Too Soon or Too Late?

- What about waiver/variance/rezoning/comprehensive plan changes?
- Waiver – must be considered first. *Stewart v. Brevard County*, 2024 WL 3252923 (M.D. Fla. Jul. 1, 2024).
- Variance – must be considered first. *Williamson*, 473 U.S. 172 (1985); *Collins v. Monroe County*, 999 So.2d 709 (Fla. 3d DCA 2008)(citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).
- Rezoning – *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. 1<sup>st</sup> DCA 1990)(included rezoning).
- Comprehensive plan – *Taylor v. Village of North Palm Beach*, 659 So.2d 1167 (Fla. 4<sup>th</sup> DCA 1995).



# Too Soon or Too Late?

- Too Soon – Administrative Exhaustion
  - Do you need to appeal initial decisions administratively?  
*Pakdel v. San Francisco*, 594 U.S. 474 (2021).
  - *Coles v. City of Jacksonville*, 769 Fed. Appx. 851 (11<sup>th</sup> Cir. Apr. 24 2019)(When a municipality's “variance process explicitly provides for an ‘appeal’ to the authoritative local decisionmaker ... the appeal must be fully pursued before any definitive ‘final’ decision occurs.”)
  - What about for unconstitutional conditions claims?  
*Meglodon, Inc. v. Vill. of Pinecrest*, 661 F. Supp. 3d 1214 (S.D. Fla. 2023).



# Too Soon or Too Late?

- Timeliness of Claims
- Statute of limitations on regulatory takings
  - When does it start? SOL for constitutional claims are determined by state law. In Florida, SOL for takings claims is 4 years. *McCole v. City of Marathon*, 36 So.3d 750 (Fla. 3d DCA 2010)(SOL began when building permit was denied).
- Do post-enactment regulations matter? *Mojito Splash v. City of Holmes Beach*, 326 So.3d 137 (Fla. 2d DCA 2021).
- The implications of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) on the timeliness of inverse condemnation challenges to land use decisions.
- Does *Corner Post, Inc v. Bd of Governors of the Federal Reserve System*, No. 22-1008 (July 1, 2024) signal an expansion?



# Nuisance

- Nuisances are unprotected - *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021). See *Dep't Agriculture & Consumer Svcs v. Polk*, 568 So.2d 35 (Fla. 1990)(citrus canker case).
- What does this encompass in terms of land use decisions?
  - *Osceola County v. Best Diversified Inc.*, 936 So.2d 55 (Fla. 5<sup>th</sup> DCA 2006)(denial of permit based on odors from landfill as a nuisance).
  - *Abu-Khadier v. City of Fort Myers*, 312 So.3d 975 (Fla. 2d DCA 2020)(drug activity inextricably intertwined with store operations).



# Background Principles

- The role of background principles in defining rights that can be taken related to land use restrictions.
  - “Background principles” are state law principles, such as nuisance or property law, that independently restrict the owner’s intended use of the property or burden the title. *Lost Tree Village Corp. v. U.S.*, 707 F.3d 1286 (Fed. Cir. 2013); *Lozman v. City of Riviera Beach*, 2023 WL 2911018 (S.D. Fla. Apr. 3 2023).
  - Not simply unlikelihood that project is permissible or developable. See *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11<sup>th</sup> Cir. 2001)(post-taking development irrelevant as to just compensation analysis).



# Economically Beneficial or Productive Use

Two methods of determining value –

lost income approach. *A. A. Profiles, Inc.*, 253 F.3d 576 (11<sup>th</sup> Cir. 2001). Applicable in partial takings or temporary takings.

actual comparable sales. *South Grande View*, 1 F.4<sup>th</sup> 1299, 1314 (11<sup>th</sup> Cir. 2021). Applicable when income is prospective and when taking is permanent/total.

Economic use versus value - *Shands v. City of Marathon*, 2023 WL 3214154 (Fla. 3d DCA May 3, 2023)(availability of TDRs did not prevent a taking).



ANY QUESTIONS?

Thank you!

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