Just Compensation for Florida Vacation Rental Owners

In response to the COVID-19 pandemic, on March 27, 2020, Florida Governor Ron DeSantis issued Executive Order Number 20-87. This order suspended vacation rental operations for 14 days and prohibited vacation rentals from making new reservations or checking-in new guests for the duration of the order. On April 10, 2020, Governor DeSantis issue Executive Order Number 20-103, extending the vacation rental ban until April 30, 2020.

Under the Fifth Amendment of the U.S. Constitution (applied to states through the Fourteenth Amendment), Article X, Section 6(a) of the Florida Constitution, and Section 252.43, Florida Statutes, the state owes property owners just compensation for the prohibition of vacation rentals. In legal terms, the ban on vacation rentals is a temporary regulatory taking of private property requiring payment.

A group of vacation rental owners is looking for additional plaintiffs to join a lawsuit for damages caused by the vacation rental ban.

Relevant Law – Takings Claims

The Fifth Amendment of the U.S. Constitution states in part, "nor shall private property be taken for public use, without just compensation." This provision is known as the Takings Clause. The Takings Clause is unique from other constitutional rights because it does not prohibit the government from taking private property; to the contrary, it permits takings provided the government gives the property owner just compensation. So when the government takes and pays, it is not violating the Constitution at all.

Just Compensation

In takings claims, just compensation is usually determined by a jury. However, courts typically agree that private property owners are entitled to payment of the fair value for the use of a given property or the value of the property rights lost.

For vacation rentals in the present situation, it is reasonable to suggest that just compensation would include factors such as the monetary value of guest bookings that were cancel and refunded during the vacation rental ban and the value of potential bookings that were lost. The months of March and April are the high season for vacation rentals in Florida, so the total amount of just compensation owed to vacation rental owners across Florida is substantial.

If our facts got to the U.S. Supreme Court, we would very likely see a 5-4 opinion on the side of property owners.

Precedent Cases Supporting the Constitutional Right of Property Owners to Just Compensation

In the hallmark case of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), the U.S. Supreme court unequivocally endorsed the requirement that temporary takings of property still require the government to pay a property owner just compensation. In this case,

the County of Los Angeles passed an ordinance that prohibited a church from erecting buildings on their property because it was prone to flooding. The U.S. Supreme Court held that the Takings Clause requires the government to pay just compensation for temporary takings even if the government regulation is ultimately removed.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the U.S. Supreme Court validated the rule that regulatory actions of the government are compensable under the Takings Clause. In this case, South Carolina enacted legislation that barred a property owner from erecting any permanent habitable structures of residentially zoned beachfront land. The Supreme Court ruled the state was required to pay the property owner just compensation for the loss of property rights. In doing so, the Court ruled that there are two discrete categories of regulatory deprivations that are compensable under the Fifth Amendment without a case-specific inquiry into public interest advanced in support of regulatory restraint on property rights: (1) regulations that compel a property owner to suffer a physical invasion of their property, and (2) situations in which regulation denies all economically beneficial or productive use of land.

For the second category, the court determined "[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable investment-backed expectations." In support of this standard the court continued "[w]e think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon the sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

In the Penn Central Transportation Company v. City of New York case, the courts says each case rests on its peculiar facts. The landowner lost in Penn Central when a landmark law denied the owner's right to build a 50-story high-rise above the Grand Central train terminal in Manhattan. The zoning laws would have allowed it but for the landmark designation law blocking the new building.

The court admits that "taking" analysis requires the court to determine if the entire public should share in the financial burden when a law deprives one or a few owners of the use of their property that they otherwise could have used. The courts says that there is no limitation on the list of factors that can be thrown into the pot and that a court makes a legal decision based on its view of those factors.

In the Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency case, they refer to the Penn Central standard and use "other areas we cannot now foresee" language. This case highlights how each may depend on its own set of factors but the overall legal standard is that a temporary taking does not always have to be compensated and a court is supposed to evaluate the Penn Central case to guide it.

In Keshbro, Inc. v. City of Miami, 801 So.2d 864 (Fla. 2001), the Florida Supreme Court built on the ruling in Lucas and reasoned that there is no meaningful distinction between retroactively temporary regulatory takings and those that are prospectively temporary regulatory takings. The court concluded that both types of takings should be subject to the categorical treatment described in Lucas. This court ruling involved two lower court cases, in which property owners brought takings claims after the cities of Miami and St. Petersburg issued injunctions to abate public nuisances allegedly caused by the owner's property.

In defense of the takings claims, the cities contended "that the property owners were not deprived all economically beneficial or productive uses of the property because they had other uses available to them under the terms of the closure orders." The Florida Supreme Court disagreed with this defense and stated "[t]he orders closing the properties in question rendered the properties economically idle, which impact is all the more onerous with regards to property that has already been dedicated to a particular use[.]"

In the City of Miami case, the city closed a motel for a six-month period to abate criminal activity. The court ruled that Miami acted reasonably in closing the motel and did not owe the property owner compensation under the Takings Clause. The court relied on the fact that drug and prostitution activity on the property had become part and parcel of the operation of the motel and that the persistent nuisance activity had become inextricably intertwined with the motel.

In the City of St. Petersburg case, the city prohibited rental and business activities at an apartment complex for one year after the apartment complex had been the site of cocaine sales on two occasions. For this property owner, the court ruled that the closure was a takings and that St. Petersburg was required to pay just compensation. The court reasoned the closure of the apartment complex was not specifically tailored to abate the drug nuisance found to exist at the property.

In these two situations, the court placed its determination of a compensable taking on the reasonableness and specific tailoring of the abatement orders and their ability to stop objectionable conduct without unnecessarily infringing upon the conduct of a lawful enterprise.

In Drake v. Walton County, 6 So.3d 717 (Fla. 1st DCA 2009), a property owner brought takings to claim against Walton County based on the County's diversion of floodwater through the owner's land. The County diverted the water flow across the upper portion of the subject property to protect a neighbor's home and property. The court ruled that a takings occurred and that the County owed the property owner just compensation. In this litigation, the County attempted the claim that they were statutorily immune from the claim because an emergency caused by Hurricane Opal necessitated their actions. In ruling on this issue, the court stated "Appellant concedes that the County's actions constituted a proper public purpose, arguing only that regardless of the legitimacy of the County's actions in diverting water across her property under its police power, she is entitled to compensation for the taking and that the County does not enjoy statutory immunity during an emergency… We agree with Appellant and hold that section 252.43(6) does not grant the County immunity during an emergency and thus preclude Appellant, as an innocent property owner, from initiating takings claims." So, even in an emergency, the government's authority must yield to the U.S. and State constitutions and compensate property owners.

This requirement is also iterated in Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23 (Fla. 2012), which involved a similar government flooding of land. When ruling in favor of the property owner, the U.S. Supreme Court emphasized that "The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Here is a good article on the matter: https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/

Current Situation

Road to Recovery

With the case law discussed above in mind, it is clear that Governor DeSantis' executive orders banning vacation rentals constitute a taking of private property. To streamline the takings on behalf of all vacation rental owners in Florida, a representing entity, such as the VRMA should pursue a class action claim against the state on behalf of all vacation rental owners.

In order to have a ripe and valid takings claim property owners must first demand compensation from the government. Section 252.43(4), Florida Statutes, states, "Any person claiming compensation for the use,

damage, loss, or destruction of property under ss. 252.31-252.60 shall file a claim therefor with the division in the form and manner that the division provides."

This statute refers to the Division of Emergency management. When the division was informally contacted about vacation rental owner compensation via phone, the operator stated that compensation should be sought through SBA COVID-19 loan program. This is not just compensation for the ban of vacation rentals. Likewise, the division's website is unsurprisingly devoid of any content speaking to COVID-19 related compensation for vacation rental owners. Florida did not contemplate the obligation to pay owners for the ban on vacation rentals.

Once the ban on vacation rentals has been ruled takings for which the government owes just compensation. Valuation of damages owed to property owners will likely have to be adjudged on an individual basis through separate jury trials, in which the court would likely award attorney fees.

I agree there would be no set formula (like Penn Central) in evaluating if the prohibition against NEW rentals is a government takings. The ability to engage in short term rentals is just one strand in the bundle of property rights.

On the other hand, our argument is that the court need not use the Penn Central analytical tools when evaluating if the money refunded to paid-in-full guests is a government taking. Here, the government action forced the forfeiture/surrender/destruction of identifiable property separate from the real estate. The entire bundle of property rights in the money was taken. Per teeming's rental agreement, transactions with guests checking in during the ban were final. Separate property had been created.

Justice Rehnquist articulates this concept in his dissenting opinion in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987):

Our decisions establish that governmental action short of physical invasion may constitute a taking because such regulatory action might result in “as complete [a loss] as if the [government] had entered upon the surface of the land and taken exclusive possession of it.” United States v. Causby, 328 U.S. 256, 261, 66 S.Ct. 1062, 1065, 90 L.Ed. 1206 (1946). Though the government's direct benefit may vary depending upon the nature of its action, the question is evaluated from the perspective of the property holder's loss rather than the government's gain. See ibid.; United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945); Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 (1910). Our observation that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government,” Penn Central Transportation Co. v. New York City, supra, 438 U.S., at 124, 98 S.Ct., at 2659, was not intended to alter this perspective merely because the claimed taking is by regulation. Instead, we have recognized that regulations—unlike physical invasions—do not typically extinguish the “full bundle” of rights in a particular piece of property. In Andrus v. Allard, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979), for example, we found it crucial that a prohibition on the sale of avian artifacts destroyed only “one ‘strand’ of the bundle” of property rights, “because the aggregate must be viewed in its entirety.” This characteristic of regulations frequently makes unclear the breadth of their impact on identifiable segments of property, and has required that we evaluate the effects in light of the “several factors” enumerated in Penn Central Transportation Co.: “The economic impact of the regulation on the claimant, ... the extent to which the regulation has interfered with investment-backed expectations, [and] the character of the governmental action.” 438 U.S., at 124, 98 S.Ct., at 2659.

*517 No one, however, would find any need to employ these analytical tools where the government has physically taken an identifiable segment of property. Physical appropriation by the government leaves no doubt that it has in fact deprived the owner of all uses of the land. Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property, for the effect of this action on the holder of the property is indistinguishable from the effect of a physical taking.5 Thus, it is clear our decision **1259 in Andrus v. Allard, supra, would have been different if the Government had confiscated the avian artifacts. In my view, a different result would also follow if the Government simply prohibited every use of that property, for the owner would still have been "deprive[d] of all or most of his interest in the subject matter." United States v. General Motors Corp. supra, 323 U.S., at 378, 65 S.Ct., at 359.