

LAND USE PLANNING & ZONING

Land Use Planning & Zoning: Comprehensive Plan Consistency

Save the Homosassa River Alliance, Inc. v. Citrus County,
2 So. 3d 329 (Fla. 5th Dist. App. 2008)

To challenge a development order as inconsistent with a comprehensive plan under Section 163.3215 of the Florida Statutes, a plaintiff must plead facts that demonstrate how the alleged inconsistency affects an interest that is unique to the plaintiff and greater than a general interest in the good of the community.

FACTS AND PROCEDURAL HISTORY

The Homosassa River is designated as an Outstanding Florida Waterway by the Florida Department of Environmental Protection and is an essential manatee habitat. Homosassa River Resort, LLC (Resort) owns property adjacent to the Homosassa River on which fifteen condominium units are located. The Resort submitted an application to Citrus County (County) to change the applicable land development code to permit the development of eighty-seven condominium units, retail space, amenities, and parking on the property. The County enacted an ordinance to approve the Resort's application and to amend the County's land development code accordingly.

In response, Save the Homosassa River Alliance, Inc. (Alliance) and three individuals who owned property near the Resort site filed a lawsuit against the County pursuant to Section 163.3215 of the Florida Statutes. These plaintiffs challenged the County's approval of the Resort's application because of its inconsistency with the County's Comprehensive Land Use Plan. The County filed a motion to dismiss, arguing that the plaintiffs failed to plead sufficient facts to establish standing. The trial court granted the County's motion and gave the plaintiffs twenty days to amend.

The plaintiffs filed an amended complaint containing lengthy allegations to support their standing, including a description of each of the plaintiffs and a discussion of the interests that would be harmed by the alleged inconsistency with the comprehensive

plan. These affected interests included the river's water quality, the endangered manatee population, water and wastewater infrastructure, land use distribution, and the character of Old Homosassa.

The trial court dismissed the amended complaint, concluding the plaintiffs failed to establish that their interests were affected in a manner distinguishable from those of the general public or that there was a sufficient nexus between the alleged comprehensive plan violations and their interests. On appeal, the Fifth District Court of Appeal disagreed with the trial court's analysis, reversed the order dismissing the case with prejudice, and remanded the matter to the trial court for further proceedings.

ANALYSIS

Under Florida law, all development must be consistent with the county's comprehensive land use plan. Prior to 1985, a third party that wished to challenge a development order on the basis of inconsistency with the comprehensive plan had to allege special damages that could be distinguished from those suffered by the community at large. However, in 1985, the Florida Legislature moved away from this common law standard when it enacted Section 163.3215 of the Florida Statutes. The stated purpose of this statute was to provide standing for any person who "will suffer an adverse effect to an interest protected or furthered by the . . . comprehensive plan." Fla. Stat. § 163.3215(2) (2007).

The court noted that the statute contains no requirement that the plaintiff suffer *harm* that is unique relative to the general population but rather that the plaintiff must have an affected *interest* that is unique. To require that a plaintiff demonstrate unique harm, the court concluded, would defeat the statute's intended purpose. With that distinction in mind, the court laid out the following three-part test for standing under Section 163.3215:

- (1) whether the interests the person alleges are protected or furthered by the local government comprehensive plan; if so,
- (2) whether those interests exceed in degree the general interest in community good shared by all persons; and
- (3) whether the interests will be adversely affected by the challenged decision.

Save the Homosassa River Alliance, 2 So. 3d at 337 (citations and internal quotations omitted).

Rejecting the unique harm-based analysis used by the trial court, the Fifth District focused on whether the plaintiffs had demonstrated an interest that was more than merely being a citizen interested in the environment. The court reasoned that the amended complaint established that the plaintiffs had a legitimate concern for the purposes of the comprehensive plan and that the plaintiffs' interests were more than a general interest in community welfare. The court concluded that this was sufficient to establish standing under Section 163.3215.

Judge Pleus wrote a dissenting opinion, arguing that the majority's reading of the Statute contravened its plain language. Rejecting the majority's unique-interest reading of Section 136.3215(2), Judge Pleus argued that the Statute's language must be read to require a particularized harm to establish standing. Judge Pleus also objected to the majority's decision on the grounds that it would open the floodgates of litigation, leading to spurious complaints challenging rezoning because of alleged violations of the comprehensive plan.

SIGNIFICANCE

Save the Homosassa River Alliance created a three-part test to determine whether a plaintiff has established standing under Section 136.3215 of the Florida Statutes. This test focuses on the plaintiff's ability to demonstrate how the alleged comprehensive plan violation would adversely affect its interests—interests that must be greater than a general interest in the good of the community. This approach rejects a reading of the Statute that would require the plaintiff to demonstrate a unique harm to establish standing.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* §§ 118, 138 (Westlaw database updated Aug. 2008).

Brett B. Pettigrew

**Land-Use Planning & Zoning:
Comprehensive Plan; Noncompliance**

CNL Resort Hotel v. City of Doral,
991 So. 2d 417 (Fla. 3d Dist. App. 2008)

Challenges to a city's comprehensive plan alleging a failure to consider landowners' private property rights and claiming non-compliance with the State comprehensive plan do not rise to the level of a constitutional takings claim. Therefore, an administrative law judge has jurisdiction over claims by aggrieved property owners that their private-property rights have been deprived by a city's comprehensive plan.

FACTS AND PROCEDURAL HISTORY

CNL Resort Hotel (CNL) purchased 620 acres within Miami-Dade County for use as a resort. The City of Doral (City) subsequently adopted a comprehensive development plan. The Department of Community Affairs (DCA) petitioned the Department of Administrative Hearings challenging the plan's compliance with applicable planning and zoning criteria, and CNL intervened. DCA settled with the City, and CNL filed a second petition as a sole petitioner. CNL's petition asserted the following claims: (1) that the plan deprived CNL of its property rights while benefiting surrounding landowners who were allowed to develop their property; (2) that the plan exacerbated urban sprawl; and (3) that the plan was internally inconsistent because it claimed to protect private property rights and to discourage urban sprawl while failing to accomplish either. The City moved to dismiss count one and portions of count three, arguing that CNL attempted to present a constitutional takings claim, which the Administrative Law Judge (ALJ) lacked jurisdiction to review.

The ALJ dismissed count one, explaining that it was essentially a constitutional takings claim and that CNL's principal arguments concerning "reverse spot" and "specific use" were irrelevant in determining compliance with the comprehensive plan. The ALJ dismissed the portions of count three regarding property rights protection. CNL sought review of the decision. On appeal, CNL argued that the ALJ incorrectly concluded that CNL alleged a constitutional takings claim and that consideration of private

property rights is essential to determining compliance with zoning and planning criteria.

ANALYSIS

The Third District first considered whether it had jurisdiction to review the ALJ's non-final order. The court held that it did have jurisdiction because the final agency review would not provide CNL with an adequate remedy. Further, Florida Statutes Section 120.68 provides that a preliminary, procedural, or intermediate order of the agency or of an ALJ is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Here, CNL would be deprived of an adequate remedy and would suffer irreparable injury due to the City allowing surrounding landowners to develop their property while CNL's progress was delayed. The surrounding neighbors would attempt to develop their land and consume the roadway capacity. Consequently, once the roadway capacity was consumed, CNL would not be granted a permit, and its development rights would be effectively terminated. Thus, the court concluded that CNL had established jurisdiction for the court's immediate review.

Regarding the merits of the case, the court explained that the ALJ erred in characterizing counts one and three together as a takings claim. The court explained that although consideration of private property rights is part of the goals and policies of a comprehensive development plan, a challenge to a comprehensive plan is distinct from a takings claim in which a property owner asserts that the government is taking property without just compensation. A taking occurs where a governmental regulation or action substantially denies a landowner of all economically beneficial or productive use of his or her land. Both the United States Constitution and the Florida Constitution require just compensation for property taken by the government. CNL asserted that the City's plan abrogated CNL's property rights without proper consideration; however, CNL did not assert that the City took its property without compensation. The court agreed with CNL and held that the ALJ improperly dismissed CNL's property rights claims as a constitutional takings claim because "consideration of private property rights is part of the goals and policies of a comprehensive development plan." *CNL Resort Hotel*, 991 So. 2d at 421. Accordingly, the ALJ's dismissal improperly denied CNL the

opportunity to develop and present evidence regarding any alleged inconsistency or disparate impact on CNL's—and all surrounding landowners'—property rights. Therefore, the ALJ's dismissal was quashed and the case remanded to afford CNL the opportunity to demonstrate why the City's plan did not comply with the State Comprehensive Plan.

SIGNIFICANCE

CNL Resort Hotel contrasts claims against municipalities for failing to consider private property rights in developing comprehensive plans with the broader ambit of constitutional takings claims for just compensation. This distinction solidifies ALJs' authority to compel municipalities to consider private property rights and to permit affected landowners to present evidence when municipalities develop comprehensive plans.

RESEARCH AND REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 68 (2008).
- 2 Fla. Jur. 2d *Administrative Law* § 390 (2008).

Matthew Ransdell

Land Use Planning & Zoning: Condemnation

Suarez v. City of Tampa,
987 So. 2d 681 (Fla. 2d Dist. App. 2008)

Causes of action for inverse condemnation and continuing trespass against a municipality begin accruing at the time the aggrieved party demonstrates awareness of damage to his or her property. Continuing damages do not create a continuous tort once the trespass that caused the damage has ended.

FACTS AND PROCEDURAL HISTORY

From 1965 to 1966, the City of Tampa (City) dumped garbage on private property owned by the Suarez family (Owner). In the 1980s, the Owner attempted to sell the property, but the Owner was unsuccessful because potential buyers were concerned about the garbage on the land. As a result, in 1988, the Owner's attorney wrote a letter notifying the City of the problems the Owner

was having selling the land and asserting that the City should help with the cleanup effort. Ten years later, in 1998, the Owner expressly requested that the City remove the garbage from the property.

In 2002, the Owner filed suit against the City, alleging the following: (1) inverse condemnation; (2) continuing trespass; and (3) cleanup costs under Florida Statutes Section 376.313(3). The circuit court granted summary judgment for the City, holding that the statute of limitations barred all claims. The Owner appealed, raising the following question: when does the statute of limitations begin to run in inverse condemnation and continuing trespass actions against municipalities?

ANALYSIS

Each of the three causes of action—inverse condemnation, continuing trespass, and cleanup costs under Florida Statutes Section 376.313(3)—is subject to a four-year statute of limitations. Although the dumping took place from 1965–1966, a suit was not filed until 2002. On appeal, the Owner argued that there was a dispute of material fact as to when the causes of action accrued.

As to the inverse condemnation claim, the Owner argued that the date of accrual should be 1998, the time at which the Suarez family affirmatively asked the City to remove the garbage from the property. The Owner relied on the stabilization doctrine established by the Supreme Court in *United States v. Dickinson*. There, the Court held that in the case of an ongoing governmental invasion of property, an owner may be permitted to postpone filing suit until the action has been completed or stabilized. 331 U.S. 745, 749 (1947). However, the *Suarez* court held that stabilization occurred in 1966, at the time the City stopped dumping, because the City had not undertaken any physical action on the property since that time. The court further explained that “knowledge of harm arising from governmental action ordinarily is sufficient to trigger accrual of a cause of action for inverse condemnation,” and therefore, at the very latest, the statute of limitations began to toll in 1988 when the Owner first expressed awareness of the problem. *Suarez*, 987 So. 2d at 684.

As to the continuing trespass claim, the Owner argued that it did not withdraw its consent to the trespass until 1998, when the

Owner sent a letter to the City demanding removal of the garbage. The court rejected this argument, holding that the action for trespass began accruing no later than 1988 when the Suarez family sent its initial letter informing the City of its concerns. The court explained that the 1988 letter was the “retraction of permission to use [the] property,” which then “triggered the accrual of a cause of action for trespass.” *Id.* at 686. Consequently, the statute of limitations also barred this action. Finally, the court explained that once the act that caused the damage was complete, namely the dumping, a continuous tort was not created solely because damage caused by the completed act worsened.

SIGNIFICANCE

The court in *Suarez* held that the statute of limitations for inverse condemnation and continuing trespass actions stemming from municipal dumping on private property begins to run when a complaining party makes a municipality aware of the problem. However, it remains unclear whether the statute of limitations may be applied against a landowner who is aware of the problem but does nothing to inform a municipality. The court also made clear that worsening damages following a completed act do not create a continuous tort.

RESEARCH REFERENCES

- Fla. Stat. § 95.11 (2008).
- 21 Fla. Jur. 2d *Eminent Domain* § 196 (2005 & Supp. 2008).

April Justus

Land Use Planning & Zoning: Separation of Powers

*Crowley Museum & Nature Center v. Southwest
Florida Water Management District,*
993 So. 2d 605 (Fla. 2d Dist. App. 2008)

A court can use its equity power to provide injunctive relief in the limited circumstance where an administrative agency has committed a public wrong or violated a property owner’s substantive rights without providing any reciprocal benefit. Although the separation-of-powers doctrine prevents a court from compelling

an administrative agency to perform its duties in a specific way, a court may require an agency to control offensive uses as long as the agency has flexibility in the implementation of preventative actions.

FACTS AND PROCEDURAL HISTORY

Crowley Museum and Nature Center (Nature Center) is a nonprofit corporation which owns property located on the Myakka River. The Southwest Florida Water Management District (District) owns Flatford Swamp, which is upstream from the Nature Center's property. The District issued permits to several farming operations in the area around Flatford Swamp to practice flood irrigation. The excess water from the operations' flood irrigation practices filtered into the Flatford Swamp. When the swamp filled, water overflowed and made its way downstream, killing a large number of trees on the Nature Center's property. Accordingly, the Nature Center filed a suit against the farming operations and added the District as a defendant, bringing claims against the latter for trespass, private nuisance, and inverse condemnation for which the Nature Center sought damages and injunctive relief.

The District moved to dismiss, and the trial court granted its motion, holding that injunctive relief against the District required an allegation of either fraud or gross abuse. Moreover, any judicial intervention that attempted to correct the flooding problem would violate the separation-of-powers doctrine. Additionally, with respect to damages, the trial court determined that the District's sovereign immunity required the dismissal of the Nature Center's claim.

The Nature Center appealed to the Second District Court of Appeal, challenging only the trial court's finding on its ability to obtain damages from its inverse condemnation claim and the trial court's decision regarding its inability to grant injunctive relief.

ANALYSIS

With respect to the Nature Center's claim for damages, the court held that the District's defense of sovereign immunity did not preclude the Nature Center's inverse condemnation claim. Contrary to the trial court's conclusion, nothing in Florida Statutes Section 373.443—the statute that provides the District with

sovereign immunity in certain instances—barred the Nature Center's inverse condemnation claim. The Nature Center even conceded this point.

Next, the court focused on the trial court's dismissal of the Nature Center's claim on the basis that it could not grant injunctive relief against the District. The court noted that the trial court was correct in its assertion that courts cannot use their equity power to interfere with an agency's legislative authority; it is well-settled under Florida law that courts should generally abstain from substituting their judgment for that of an agency's unless fraud or gross abuse of discretion is present. The court articulated that in exceptional cases, its equity power can be used to provide injunctive relief where "an administrative agency commits a public wrong or violates substantive rights without giving an equal benefit in return." *Crowley Museum*, 993 So. 2d at 609.

The court held that the trial court failed to recognize that the Nature Center's complaint alleged sufficient allegations against the District for this exception to apply. As evidence, the court explained that flooding and water flow onto another's property may qualify as a public wrong or violation of a property owner's substantive rights. Because the Nature Center's allegations fell within the public-wrong exception, the trial court's dismissal of the motion was improper.

Moreover, the court ruled that the trial court could have entered an injunction without violating the separation-of-powers doctrine. While the trial court correctly noted that an injunction requiring the District to act in a specific manner would violate the separation-of-powers doctrine, this proposition should not have been the end of the trial court's inquiry. If a court affords an administrative agency flexibility in reaching a particular result, the doctrine is not implicated. Therefore, the court held that the injunctive relief sought was acceptable because "the Nature Center's complaint does not require the District to manage the lands in Flatford Swamp in a particular way but gives the District the flexibility to choose the means by which to manage its lands." *Id.* at 610.

In the instant case, the Nature Center's complaint provided the court with three different methods by which an injunction could remedy the flood water problem. Because the District had several choices concerning the methods it could employ to manage

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the floodwater problem, the trial court incorrectly concluded that an injunction would violate the separation-of-powers doctrine.

SIGNIFICANCE

The court's opinion reinforces the authority of a court to use its equity power to grant injunctive relief. The trial court attempted to dismiss the action using a generally accepted rule but failed to acknowledge the exception's potential application. Moreover, the court clarified that when an agency is permitted to choose the methods that it will employ to comply with an injunction, the separation-of-powers doctrine is not violated; a court can enter an injunction so long as the agency has some flexibility in complying with it.

RESEARCH REFERENCE

- P.H. Vartanian, *Liability of Municipality or Other Governmental Subdivision in Connection with Flood-Protection Measures*, 5 A.L.R.2d 57 (1947 & Supp. 2008).

Scott Feather

Land Use Planning & Zoning: Takings

Drake v. Walton County,

2009 WL 981218 (Fla. 1st Dist. App. Apr. 14, 2009)

A county engages in a taking when it diverts water across property during an emergency and allows the diversion to continue after the emergency passes. Under these circumstances, Florida Statutes Section 252.43(6) does not grant a county immunity from a takings claim.

FACTS AND PROCEDURAL HISTORY

In 1992, William and Patricia Hemby (Hembys) purchased property in Walton County (County) adjacent to a lake. In 1988, State authorities created a ditch to prevent lake water from flowing onto the property. Thereafter, no water flowed across the property until 1995, when the County diverted water onto the property after Hurricane Opal. Between 1996 and 1999, the County unsuccessfully attempted to redirect the water flow off the

property. The County successfully redirected the water flow in 2004. However, in 2005 the County again diverted the water flow over the property under emergency conditions.

Based on the 1995 and 2005 water diversions, the Hembys brought two inverse condemnation claims against the County. The County asserted that it diverted the water flow onto the Hembys' property in order to save other properties and that the diversions simply restored the natural flow existing in 1988 prior to the Hembys' purchase. The trial court agreed, reasoning that because the County responded to emergencies under Florida Statutes Section 252.43(6), and because the diversion restored the natural flow existing in 1988, the County's action did not effect a taking of Hembys' property. The trial court also found that the Hembys could not reasonably rely on the fact that the State stabilized the water flow in 1988. The Hembys' daughter, Cozette R. Drake (Drake), appealed the trial court's decision as trustee for the Hembys' trust. On November 21, 2008, the First District Court of Appeal reversed, holding that the County's action constituted a taking. Further, on April 14, 2009, the court withdrew its initial opinion and substituted a corrected opinion. *Drake*, 2009 WL 981218 at *1. The corrected opinion is substantially the same and clarifies only that "two takings occurred when the County diverted water across Appellant's property—the first taking occurred during the period of 1995 through 2004, and the second from 2005 to the present date." *Id.* at *4.

ANALYSIS

The court emphasized that the State stabilized the water flow in 1988 before the Hembys purchased the property. The court then recognized that the County's actions in response to the hurricane caused the flooding on the Hembys' property. According to the court, the fact that water previously flowed onto the property was not legally relevant. The court reasoned that the Hembys could rely on the 1988 stabilization and thus when the County diverted the water on to their property, it resulted in a taking. The court also pointed out that a government may not utilize the power of eminent domain unless it furthers a public purpose, and concluded that the water diversion remained on the Hembys' property as a drainage easement, which conferred a public benefit on other property owners. Further, the court added that the water

diversion was a physical invasion rendering the property useless and depriving the Hemby's from enjoying the property.

The court also discussed the applicability of Florida Statute Section 252.43(6), which provides counties with a right to excavate drainage paths during an emergency and limits compensation to property owners. The court assumed that the County's actions were authorized under the Statute. Drake argued that the County did not have statutory immunity during an emergency regardless of the legitimacy of its water diversions. The court agreed and held that "[S]ection 252.43(6) does not grant the county immunity during an emergency and thus preclude Appellant, as an innocent property owner, from initiating a takings claim." *Drake*, 2009 WL 981218 at *3. The court reasoned that the County's statutory right under Florida Statutes Section 252.43(6) must yield to the Hembys' constitutional right under Article 10, Section 6 of the Florida Constitution, which requires compensation for an adversely affected property owner. Therefore, because the court found the Hembys were not precluded from bringing a takings claim, it reversed the trial court's decision and remanded the case for entry of judgment in favor of the property owner.

Judge Edward T. Barfield wrote a dissenting opinion, in which he provided a detailed recitation of the facts and criticized the majority's reliance on particular cases. Additionally, according to Judge Barfield, the majority appeared to hold that a servient tenement may force a dominant tenement to divert the natural flow of water into an artificial channel and require the dominant tenement to maintain the artificial flow. Judge Barfield argued that this outcome is in direct conflict with the Florida Supreme Court's decision in *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*, which adopted a reasonableness rule for diverting surface waters over servient property. 542 So. 2d 959 (Fla. 1989). Judge Barfield also concluded that there was no legal support for the majority's decision to dismiss as irrelevant the fact that the property at issue had historically been subject to the lake's natural water flow. Judge Barfield therefore explained that he would have affirmed the trial court's decision.

SIGNIFICANCE

Drake declares that a county engages in a taking when it diverts water across property during an emergency and allows the

diversion to continue after the emergency passes, even if the diversion restores a natural water flow that existed on the property prior to its purchase. Further, *Drake* declares that under these circumstances, Florida Statutes Section 252.43(6) does not grant a county immunity from a takings claim. To the extent that *Drake* holds a servient tenement can divert the natural flow of water from a dominant tenement into an artificial channel and then require the dominant tenement to maintain the artificial flow, *Drake* may conflict with the Florida Supreme Court's decision in *Westland*.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 62 (2008 & Supp. 2009).
- 21 Fla. Jur. 2d *Emergency* § 11 (2008 & Supp. 2009).

Matthew E. Kahn

Land Use Planning & Zoning: Takings

Shands v. City of Marathon,
999 So. 2d 718 (Fla. 3d Dist. App. 2008)

Under Florida Statutes Section 95.11(3)(p), the four-year statute of limitations for an as-applied takings claim begins to run when the government entity charged with implementing the challenged land use regulation renders a final decision regarding its application.

FACTS AND PROCEDURAL HISTORY

Dr. R.E. Shands acquired Little Fat Deer Key in 1956 before any state land use policies existed. In 1985, Dr. Shands' children (the Shands) acquired title to the property, now known as Shands Key. At the time, Monroe County had jurisdiction over Shands Key and allowed owners to develop one unit per acre. However, in 1986, Monroe County adopted the State Comprehensive Plan (Plan), which altered Shands Key's zoning status and reduced allowable development. Furthermore, although Shands Key was within the City of Marathon's (City) jurisdiction when it incorporated in 1999, Shands Key's zoning status remained unchanged because the City adopted the Plan.

In 2004, the Shands filed an application for a dock permit, which the City denied based on its development moratorium on certain natural areas. The Shands then filed a Beneficial Use Determination (BUD) application, as required by the City of Marathon Code of Ordinances, which sets forth the procedures a landowner must use before seeking relief from the courts. After a BUD hearing, the Special Master recommended that the City grant a building-permit exemption or purchase the Shands' property. The City rejected the recommendation and denied the BUD application. In response, the Shands brought an inverse condemnation action against the City.

At the trial court, the Shands claimed that the City's decision to reject their application resulted in an as-applied regulatory taking in violation of state and federal law. The trial court dismissed both claims, finding that the state claim was time-barred because it was a facial takings claim and that the federal claim was not ripe for review. On appeal, the Third District Court of Appeal held that the Shands brought an as-applied takings claim within the applicable four-year statute of limitations and that the federal claim was ripe.

ANALYSIS

The catch-all four-year statute of limitations provision found within Florida Statutes Section 95.11(3)(p) governs inverse condemnation actions. The City argued that as a facial takings claim, the limitations period began to run either in 1986 (when Monroe County altered Shands Key's zoning status) or in 1999 (when the City adopted the Plan).

In its analysis, the court first rejected the argument that the Shands presented a facial takings claim. The court explained that the standard of proof for a facial taking is whether a regulation has resulted in deprivation of all economically beneficial use of a party's land, whereas the standard for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations. The court concluded that the Plan did not eliminate all economically beneficial use, noting that the current Shands Key zoning designation permits some residential uses. Moreover, although the court concluded that the Shands' investment-backed expectations were minimal, it recognized that the Shands had the opportunity to

obtain land use credits indicating that some economic value remained. Therefore, the court held that the Shands presented an as-applied takings claim.

Concerning the as-applied takings claim, the court first held that the federal claim was ripe. The court explained that a plaintiff must obtain a final decision regarding a regulation's application in order for an as-applied takings claim to be ripe. The court added that when a claim is ripe, it becomes clear that the agency lacks the discretion to permit any development. Based on the development moratorium, the court noted that the City had no discretion to grant a variance. The court also noted that that a "final determination" requires at least one meaningful application, which the Shands provided when filing for a dock permit and the BUD application. Accordingly, the court concluded that the City's decision was final and held that the federal claim was ripe.

Regarding the state claim, the court held that it was timely filed within the four-year statute of limitations under Florida Statutes Section 95.11(3)(p). The court reasoned that because the Shands presented an as-applied takings claim as opposed to a facial takings claim, "it follows that the statute of limitations did not begin to run until February 27, 2007, when the City of Marathon rejected with finality the Special Master's BUD recommendation and denied the Shands' BUD application . . ." *Shands*, 999 So. 2d at 727. Therefore, the court reversed the trial court's order and remanded for further proceedings.

SIGNIFICANCE

Shands declares that the four-year statute of limitations for an as-applied takings claim under Florida Statutes Section 95.11(3)(p) begins to run when the government entity charged with implementing the challenged land use regulation renders a final decision regarding its application. In effect, the limitations period starts to run when the as-applied takings claim becomes ripe for judicial review.

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RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 66 (2005 & Supp. 2009).
- 35 Fla. Jur. 2d *Limitations and Laches* § 41 (2005 & Supp. 2009).

Matthew E. Kahn