

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D08-2819

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
on behalf of the BOARD OF TRUSTEES
OF THE INTERNAL IMPROVEMENT
FUND,

Appellant,

vs.

EVERETT G. WEST, et al., R. FURMAN
RICHARDSON, and UNCIA TRADING
CORPORATION,

Appellees.

L.T. Case No. CA-P-95-165

APPELLEES' RESPONSE TO APPELLANT'S MOTION FOR REHEARING AND
CERTIFICATION OF CONFLICT

I. Appellees' Response to Motion for Rehearing

Appellant merely reargues the issue raised in its briefs, that the panel “overlooked” the trial court’s condemnation blight order, where it “determined” that a “categorical, *Lucas*-type, taking” occurred in 1982. As its reliance on *Basic Energy v. Dep’t of Corrections*¹ indicates, the State makes the common error of trying to apply physical taking principles to a regulatory taking. As the Answer Brief notes, physical taking principles do not apply to regulatory takings.²

Appellees’ analysis of relevant regulatory taking decisions exposes Appellant’s erroneous interpretation of the law. The regulations at issue are *development moratoria* that the Supreme Court has held are *temporary* takings.³ *Temporary* regulatory takings – even if they deprive a landowner of all beneficial use – are never *categorical* takings. Furthermore, temporary taking claims, whether physical or regulatory, do not accrue (or “ripen”) until the temporary taking ends.⁴ Finally, courts do not utilize physical taking

¹ 709 So. 2d 124 (Fla. 1st DCA 1998).

² Answer Brief at p. 16.

³ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330-32 (2002).

⁴ *Creppel v. United States*, 41 F. 3d 627, 633 (Fed. Cir. 1994).

principles in regulatory taking cases.⁵ Appellant’s categorical regulatory taking theory is inconsistent with takings law.

The Supreme Court emphasized this point in *Tahoe-Sierra*:

[The] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it *inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a “regulatory taking,” and vice versa*. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims.⁶

As Appellant considers the trial court’s statements the equivalent of a *Lucas*-style, categorical taking, this Court might compare the facts in this case to those in *Lucas*.⁷ In *Lucas*, the South Carolina legislature had adopted a Beachfront Management Act, which included an *absolute, permanent* prohibition on any construction waterward of a coastal baseline. This “had the direct effect of barring [Mr. Lucas] from erecting any permanent habitable structures on his two parcels.”⁸ The Beachfront Management Act had no exceptions.⁹ There was nothing temporary about Mr. Lucas’ predicament.

On February 9, 1982, the Monroe County Commission adopted a 90-day moratorium on major developments. After that moratorium expired, the Commission adopted new moratoria five times – by voice votes – until it adopted a moratorium by ordinance, to end on October 1, 1983. When that ordinance expired, there was a 48-day gap that presumably allowed landowners to apply for major development approvals. The County adopted six more ordinances and a resolution, precluding major development applications from November 18, 1983, to September 15, 1986.¹⁰ The September 15, 1986, Comprehensive Plan included a one-year moratorium on

⁵ *Tahoe-Sierra, supra*, at 331-32.

⁶ *Tahoe-Sierra, supra* n.3, at 322-24. [Footnotes omitted, emphasis added.]

⁷ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

⁸ *Id.*, at 1007.

⁹ *Id.*, at 1009.

¹⁰ The major development moratoria are set out in a Table, in Appellees’ Answer Brief at p.7.

most development on North Key Largo, followed by a second, one-year moratorium to allow the State to acquire those North Key Largo properties it wished to own.¹¹

In *Tahoe-Sierra*,¹² the Supreme Court flatly rejected landowners' argument that a temporary development moratorium is a *categorical* taking. Justice Stevens held:

[A] permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, *a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.*¹³

Furthermore, temporary taking claims, whether physical or regulatory, do not *accrue* until the temporary taking ends. As *Reed Island-MLC, Inc. v. United States*,¹⁴ explains: "a temporary taking differs from a permanent taking primarily because a temporary taking is limited in duration or is acknowledged to be readily reversible."¹⁵ For that reason alone – assuming that a regulatory taking began on February 9, 1982, the landowners' temporary taking claims "accrued," and the statute of limitation clock began to run, when the State converted its "slow-take" to a "quick-take" in 2004.

II. Appellees' Response to Motion for Certification of Conflict

Basic Energy, supra, is a novel *physical* taking case, in which title to the property shifted back to the original owner after a successful appeal of the eminent domain action. By then, the State had built a prison on the subject property – to which it no longer held title. Looking for a windfall, the landowner wanted to be paid for both the land *and the State prison*. What the landowner apparently did not know is that § 73.041, Fla. Stat.,¹⁶ provides for a more sensible

¹¹ Answer Brief, at p. 8. The "one-year" moratorium adopted in 1986 is still in effect.

¹² *Tahoe-Sierra, supra*, at 332-27.

¹³ *Tahoe-Sierra, supra*, at 331-32. [Emphasis added.]

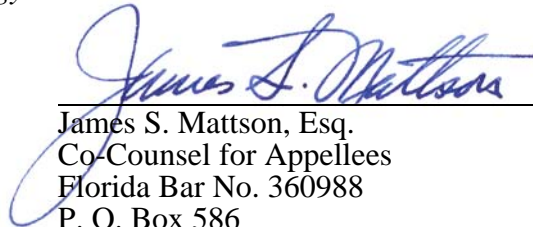
¹⁴ 67 Fed. Cl. 27, 33-34 (Fed. Cl. 2005). *See also, Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 641-42 (Fed. Cir. 1987).

¹⁵ *Id.*

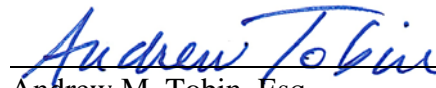
¹⁶ F. S. 73.041 Acquiring or perfecting title after appropriation. – In any instance, where the petitioner has not acquired the title to or a necessary interest in any lands which it is using, or if at any time after an attempt to acquire such title or interest, it is found to be defective, the petitioner may proceed under this chapter [Chapter 73 Eminent Domain] to acquire or

approach to the problem. Sec. 73.041 provides, in those circumstances where a condemning authority is “using” (read “occupying”) the property without color of title, compensation shall be determined as of the date the authority “appropriated” it. That is how physical “takings” differ from regulatory takings.

There is no conflict with *Basic Energy*.



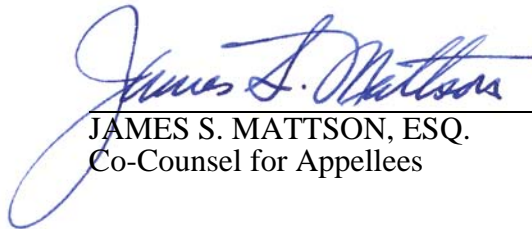
James S. Mattson, Esq.
Co-Counsel for Appellees
Florida Bar No. 360988
P. O. Box 586
Key Largo, FL 33037
(305) 451-3951



Andrew M. Tobin, Esq.
Co-counsel for Appellees
Florida Bar No. 184825
P. O. Box 620
Tavernier, FL 33070
(305) 852-3388

CERTIFICATE OF SERVICE

I certify I served a copy of the foregoing by first class mail, postage prepaid, on **J. A. Spejenkowski, Esq.**, Assistant Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this 16th day of November 2009.



JAMES S. MATTSON, ESQ.
Co-Counsel for Appellees

perfect such title or interest; provided, however, that the compensation to be allowed the defendants shall be determined as of the date of appropriation.