Shands v. City of Marathon, No. 3D21-1987, 2023 WL 3214154 (Fla. 3d DCA 2023)

Florida Third DCA Holds that Limiting Property to Beekeeping and Personal Camping Makes Property Economically Idle Constituting a Regulatory Taking Under *Lucas*.

In 1956, Dr. R.E. Shands purchased an offshore island called Shands Key to develop a single family home. This acquisition occurred prior to any state land use policies. The island was then inherited by his wife and she conveyed title to their children, the Appellants, in 1985. In 1986, the zoning status for the island changed from General Use ("GU") to Conservation Offshore Island ("OS"). In 2004, Appellants filed an application for a dock permit, which was denied. Then, they filed a Beneficial Use Determination ("BUD") application. The Special Master found that the Appellants had reasonable economic investment-backed expectations that they could build a family residence on the island, as was planned in the late 1950s, and the Special Master recommended the City of Marathon (the "City") grant a building permit for a single family home. The City of Marathon City Council (the "City Council") rejected the Special Master's recommendations and denied the BUD application. The Appellants then sued the City, claiming that the City's acts resulted in an as-applied regulatory taking of their property without just compensation.

Based on the seminal case *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Appellants argued that the City's refusal to grant a building permit for a single family home amounted to a per se, as-applied challenge. Appellants provided sworn testimony establishing that the zoning change from GU to OS effectively limited the use of the island to beekeeping or personal camping. Appellants argued that this limitation rendered the island "economically idle" under *Lucas*. The City argued that the award of transferred development rights ("TDRs"), infused the property with value and precluded a per se finding under *Lucas*. The trial court denied the motion. After a non-jury trial, the trial court found appellants failed to establish a taking.

In *Lucas*, the Supreme Court held that, "when the owner of real property has been called upon to 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." 544 U.S. at 539. Under *Lucas*, the "determinative factor" is whether the regulation effectively eliminates any economic use associated with the property. *Id.*

The issue of whether TDRs affect a regulatory takings analysis is a hotly contested issue. Some legal experts have opined that TDRs are irrelevant to takings because they do not impact the nature and extent of the property interest that is taken by the government. Others have said that TDRs necessarily mitigate the economic impact of regulation by infusing property with value; therefore, they should be considered before determining whether the government has effectuated a taking. In *Suitum v. Tahoe Regional Planning Agency*, the Supreme Court in a concurrence stated that a "TDR [is] a peculiar type of chit which enables a third party not to get cash from the government but to use his land in ways the government would otherwise not permit, relates not to taking but to compensation." 520 U.S. 725, 747 (1997). Since a TDR applies to compensation for the taking and not to the taking itself, the City was being overly burdensome.

Based on the Supreme Court's concurring opinion in *Suitum*, the Third DCA disagreed with the trial court and held that the Appellants did suffer a regulatory taking. The Third DCA held that only allowing beekeeping and personal camping on the property was overly burdensome government regulation

depriving Appellants of “all economically beneficial uses” of their property as required under *Lucas* and they were entitled to their partial summary judgment on their per se as-applied *Lucas* claim.