Overview of Takings in Monroe County, FL

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What is a taking?

A continuing physical occupation or ouster of private property, or a deprivation of all or substantially all economically beneficial use of the property.

Constitutional Origins

- **5th Amendment of the U.S. Constitution**
  - Takings clause states private property shall not be taken for public use without just compensation
    - Made applicable to states through the due process clause of the 14th Amendment
- **Article 10, Section 6(a), Florida Constitution**
  - "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."
- **Provisions do not prohibit taking of private property or require owner consent, but place conditions on the exercise of this power.**

Types of Takings

- Physical Occupation or Ouster
  - Intentional use of property by government
  - Loss of Access
  - Flooding
- Regulatory Takings
  - Facial Taking (a/k/a "per se," "categorical," or "*Lucas*" taking) – total take
  - As-Applied Taking – partial take
- Temporary Takings
  - Both physical and regulatory takings can be temporary
- Bert J. Harris Act Claims
  - Statutory remedy for claims of "inordinate burdens" that fall short of takings

Regulatory Takings

- Facial Taking (a/k/a "per se" "categorical," "Lucas")
  - Total elimination of economically viable use upon enactment of regulation
  - *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)
  - **Example – a new ordinance that categorically and permanently prohibits new development (no more ROGO allocations will be issued)**
- As-Applied Taking
  - Less than total elimination of economically viable use when regulation applied
  - *See Penn Central Transp. v. City of New York*, 438 U.S. 104 (1978)
    - Requires ad-hoc factual analysis
      - Economic impact of the regulation on the owner
      - Extent to which regulation has interfered with owner's reasonable investment-backed expectations (held at time of purchase)
      - Character of governmental action
  - Requires at least one development application and final decision from govt.

Eminent Domain v. Inverse Condemnation

- **Eminent Domain** (a/k/a "direct condemnation")
  - Legal proceeding ***instituted by the government*** to assert its power to condemn property.
    - "Quick Take" (Chapter 73)—Allows government to immediately take possession and title to the property by depositing a good-faith estimate of value before jury valuation trial (cannot walk away).
    - "Slow Take" (Chapter 74)—Allows government to decide whether it wants to take possession and title after jury valuation trial (can walk away anytime).

- **Inverse Condemnation**
  - Legal proceeding ***instituted by the owner*** to recover just compensation for a taking through regulation or other action when condemnation proceedings have not been instituted.
    - Most common in Monroe County
    - Bifurcated trials
      - Liability Phase – Was there a taking?
        - Bench trial before a judge
        - Only owner has right to appeal if loses
      - Compensation/Valuation Phase - What is the fair market value of property?
        - Jury trial before 12 person jury
        - Both sides may appeal any issue

Inverse Condemnation Damages

- The Florida Constitution's requirement of "full compensation" applies in both direct *and* inverse condemnation proceedings.
- **Fair market value of the property** as of the date of taking, plus interest until compensation paid (permanent taking)
  - Upon payment of permanent takings compensation, government takes title
  - If only temporary, interest on the fair market value of the property as of the date the taking began until the taking ends
- **Costs**
- **Attorney's Fees**
  - Government may limit award of attorney's fees to the percentage of benefits achieved for the client under § 73.092(1)(c), Fla. Stat., by making a written offer
    - "Benefits" means difference between the final judgment & first written offer after attorney hired
    - 33% of any benefit up to $250k; plus 25% of any portion of benefit between $250k and $1 million; plus 20% of any portion of benefit exceeding $1 million
      - Example: *Galleon Bay* where County made two written offers—$835k in 2001 and $1,520,000 in 2003. Both more than 2016 final judgment of $480,511.60. Zero benefits achieved. No fees paid.

When is a Regulatory Taking Claim "Ripe" for Litigation?

- Before an owner can file a regulatory takings claim, the claim must be "ripe"
  - Facial claims are generally *ripe upon enactment* of the complained of regulation
  - As-applied claims generally require *at least one meaningful application* for development approval, a final decision, and exhaustion of administrative remedies

How is a Regulatory Taking Claim Ripened in Monroe County?

- **In Monroe County, regulatory takings claims (both facial and as-applied) only become ripe after the Beneficial Use Determination (BUD) process is completed.**
  - LDC Section 102-102, et. seq allows an owner to apply for administrative relief if they assert that the adoption or application of an LDC or Comprehensive Plan policy has caused a taking of their property.
  - "The Monroe County BUD Ordinance itself answers the ripeness questions. The BUD Ordinance was designed as a way to avoid constitutional takings lawsuits by providing other means of compensating for total or partial regulatory loss of economically beneficial use of property. In this way, the BUD differs from land use regulations in other jurisdictions in that it accounts for both facial and as-applied takings, as seen in its bifurcated relief of either outright purchase of the property (in the case of a per se taking) or grant of Transferable Development Rights (TDRs), Rate of Growth Ordinance (ROGO) points, variances and building permits (in the case of an as-applied taking). …Once the BOCC rendered a final decision on the BUD applications, the Landowners' claims became ripe." ***Collins v. Monroe County***, 999 So.2d 709 (Fla. 3rd DCA 2008).
  - Facial challenges generally face an uphill battle, especially in Monroe County: "Where the land use ordinance, in this case the BUD Ordinance, leaves open the possibility of reasonable use, a facial challenge will likely be unsuccessful." *Id.*

Bert J. Harris Act Claims

- **Statutory cause of action adopted in 1995 for Government action that "Inordinately Burdens"**
  - **Existing Use**
  - **Vested Right to Specific Use**
    - "Inordinately burden" defined as a government action that directly restricts or limits property use such that the owner is permanently unable to attain the reasonable, investment-backed expectations for the existing or vested use, or where the owner is left with existing or vested uses that are unreasonable such that the property owner permanently bears a disproportionate share of a burden imposed for the public good that should be borne by the public. *See* § 70.001(3)(e), Fla. Stat.
- Excludes
  - Temporary Impacts
  - Nuisances
  - Required Enforcement of Federal Regulations
- Requires 90-day notice period to Government before filing claim in circuit court
  - Allows Government to settle claims through various means
    - Modifying regulation
    - TDRs
    - Land swaps
    - Issuing development approval
    - Purchase

Harris Act Claims in Monroe County

- **41 petitions filed in 2008 alleging inordinate burdens of 81 vacant lots by adoption of Tier System**
  - County responded that the petitions did not comply with statutory requirements because the appraisals required under § 70.001(4)(a), Fla. Stat. were deficient in showing alleged loss in FMV
    - Valued properties before adoption
    - Erroneously presumed building permits were not possible
    - Excluded consideration of non-residential uses
    - Excluded consideration of other applicable state and federal environmental laws
  - Petitions not subsequently pursued
- **1 petition filed in 2008 by Lloyd Good alleging inordinate burden of Lower Sugarloaf Key property by adoption of Tier System**
  - Claim filed in circuit court; later dismissed

Is there takings liability for every vacant lot in Monroe County?

Answer: No

Defenses to Regulatory Takings:

- **No Taking**
  - **Other economically viable uses remain** (Economic Impact prong of *Penn Central*)
    - Standard is not whether owner can do what they want with their property, but whether other economically viable uses remain
      - Focus is on fair market value of the property
        - ROGO dedication lot value
        - TDR value
        - Recreational, Accessory, other use value
        - Sale of property
  - **No reasonable investment-backed expectations**
    - **No meaningful steps taken to develop property**
      - *Collins v. Monroe County*, 118 So.3d 872 (Fla. 3rd DCA 2013)
        - "[T]he Landowners did not take meaningful steps toward the development of their respective properties, or seek building permits, during the sometimes decades-longs possession of their properties.. . . 'Monroe County was designated as an area of critical state concern in 1979, but the first land use regulations were not enacted until 1986. If the landowners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances.' *Collins I*, 999 So.2d at 718 n. 16 (quoting *Monroe Cnty v. Ambrose*, 866 So.2d 707, 711 (Fla. 3d DCA 2003)('It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land.').
        - "The property owner is *Galleon Bay* serves as a suitable contrast to the Landowners in the instant case." Over decades, Galleon Bay spent hundreds of thousands of dollars in its numerous development efforts including re-platting, re-zoning, negotiating, building permit applications
    - **Reasonable delay**
      - In more restrictive regulatory environments such as the Florida Keys, the timetable for developers "must anticipate delays, whether occasioned by holdups in the permitting process, litigation by neighboring land owners, or a temporary development injunction or moratorium. …Close regulation by local government that is merely expensive or time consuming for developers does not arise to a taking" *Bradford Phipps Ltd. Partnership v. Leon County*, 804 So.2d 464 (Fla. 1st DCA 2001)

Timing Defenses to Takings Claims

The timing of when a lawsuit is filed can raise two different defenses to a takings claim:

- **Claim not ripe (claim brought too soon)**
  - Property Owner has not made a meaningful application and been denied
  - Property Owner has not exhausted the administrative remedies provided by the County
    - Beneficial Use Determination
- **Statute of Limitations (claim brought too late)**
  - Claim must be filed within 4 **years** of its accrual
    - A facial or categorical taking claim accrues upon the adoption of the complained of regulation
    - An as-applied taking accrues upon the application (final decision) of the complained of regulation

Third-Party Liability Defense

- ***Liability for regulatory takings flows up*** the levels of government and not down where federal or state agencies exercise superior jurisdiction that precludes development
  - *See* Derek Howard, *Local Regulatory Takings Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure*, Florida Bar Environmental and Land Use Law Section Reporter (December 2017)
    - Monroe County is one of the most regulatory complex jurisdictions in the nation with interplay of numerous federal, state and local regulations that apply to its many aquatic and terrestrial resources
      - **3rd party defenses asserted to ensure Monroe County taxpayers alone are not unfairly shouldering burden of protecting resources of regional and national importance**

- **State**
  - Joint or exclusive liability pursuant to the State's Area of Critical State Concern (ACSC) oversight or Environmental Resource Permitting (ERP) authority
  - County successfully brought State in as a third-party in *Galleon Bay* and *Collins*
    - State has since been a partner alongside the County in jointly defending against takings liability and paying 50% of judgments
  - *Key Haven v. DEP, DEO & Monroe County*
    - Alleged inverse condemnation of 5 partially submerged lots in Lower Keys based on State's denial of ERP permits to fill lots for residential development
    - County prevailed on a motion to dismiss complaint against it; no longer a party
- **Federal Government**
  - Endangered Species Act (ESA), Coastal Barrier Resources System (CBRS), Clean Water Act (CWA)
  - In *Galleon Bay*, the County successfully argued that ESA and CBRS regulations (no federal flood insurance) were obstacles to development that adversely impacted FMV, substantially driving down compensation awarded

Nuisance Exception Defense

- Is the government action creating a benefit for the public at the expense of the regulated owner or preventing a harm to the public?
- **General rule is that no owner has a compensable expectation to use property that constitutes an injurious use or nuisance to others**
- Unanswered Questions
  - Is the public harm created by overdevelopment's impact on hurricane evacuation and safety a nuisance?
  - Is the filling of submerged lots in the face of sea-level rise a nuisance?
    - Raised by State in *Key Haven* litigation
      - As environmental threats increasingly arise or worsen, and individual impacts become more important in the aggregate, private development that constitutes environmental harm may come to be viewed as a nuisance.

Moratoria

"A land use moratorium is a **temporary suspension on the issuance of building and other development permits** in order to allow a local government reasonable time to study and make considered decisions regarding the need to adopt or amend comprehensive land use plans, zoning ordinances, or other land-use regulations, and to avoid the pressure of applicants rushing to submit permit requests before new, and often stricter, regulations are put into place." AMLZONING § 35:1

- May also be used to allow for the planning, financing, and construction of infrastructure or facilities to maintain adequate levels of public services. *Id.*
  - Monroe County utilized this common planning tool in the earlier years when it was developing and implementing its LDRs following State's adoption of local comprehensive planning requirements and 1979 designation of County as an Area of Critical State Concern (ACSC)
    - Remains an option in tackling new complex planning issues

Moratoria

- **Reasonable temporary moratoria are not takings**
  - ***Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency***, 535 U.S. 302 (2002)
    - TRPA adopted moratoria on development covering 32 month-period to maintain status quo while studying impact of development on Lake Tahoe and designing strategy for environmentally sound growth
    - Affected property owners claimed moratoria constituted a taking
    - Supreme Court refused to adopt categorial rule that such moratoria are compensable takings, holding *Penn Central* factors are to be examined on a case-by-case basis
    - Held TRPA moratoria did not constitute taking
  - ***See also WCI Communities, Inc. v. City of Coral Springs***, 888 So.2d 912 (Fla. 4th DCA) (holding City's 9 month moratorium on the processing of multi-family development applications was not a temporary taking of developer's multi-family zoned parcels).
- Factors to determine reasonableness of moratoria
  - Duration
  - Valid public purpose?
  - Whether local government has acted promptly and in good faith to respond to the development problem that created need for moratorium

The Takings Totals So Far
(1987 – present)

- 58 (approximate) takings and Bert Harris cases/petitions
  - Vast majority of the cases/petitions involved multiple lots and owners
    - Only one remains pending against County (*Behmke*)
      - One Beneficial Use Determination application pending
- Prevailed in all closed cases/petitions except 5
  - *Gonzalez* (1991)
  - *Shadek* (1995)
  - *Galleon Bay* (2002)
  - *Davis/Collins* (2004)
  - *Neuman* (2004)
- $6,882,105 (approximate) total just compensation paid
  - $75k in *Gonzalez*
  - $5.9 million in *Shadek*
  - $531,391 in *Galleon Bay* (Approximately $10 million sought)
  - $375,714 in *Davis/Collins* (Approximately $24 million sought)

Takings Litigation History

- **Regulations at Issue**
  - 1987 to 2001
    - **Moratoria** adopted to develop and implement new land use plans and regulations, address infrastructure demands of new development and levels of service
      - *Shadek*, *Clay*, *Good* (and *Bauknight* and *Collins* in 2004)
    - **Density and Open Space Requirements**
      - *Gonzalez*
  - 2001 to 2022
    - **Wetland regulations**—filling prohibitions and setbacks
      - *Emmert*, *Gutierrez*
    - **Submerged lands**—zero density and filling prohibitions
      - *Key Haven*
    - **Rate-of-Growth Ordinance (ROGO)**
      - *Good*, *Galleon Bay*, *Collins*
    - **Tier System**
      - *Good, Lightner, Mitchell*
    - **Endangered Species Act**—Big Pine/No Name Key HPC and ITP
      - *Galleon Bay, Lightner*
  - 2024
    - **Vacation rental regulations**
      - *Behmke*

Takings Litigation History

- ***New Port Largo v. Monroe County*** (filed 1987)
  - In a prior state court action, owner successfully invalidated the 1980 rezoning of its beachfront property from RU-2 (residential duplex use) to PA (private airport use). In its later federal court action, the owner asserted that the property was illegally occupied by the airport operator on advice of and to the benefit of the County, and sought compensation for a temporary taking for the period of time the regulation limiting the property's use was in effect.
  - The 11th Circuit affirmed lower court's judgment in favor of the County. *See New Port Largo v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996). *See also New Port Largo v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993) (holding NPL's regulatory takings claims were not barred by the statute of limitations).
- ***Gonzalez v. Monroe County*** (filed 1991)
  - The owner of a .4 acre lot in an unrecorded subdivision on the 25-acre Cook's Island zoned "Offshore Island" (OS) alleged a taking based on the zoning's density requirement limiting development to 1 dwelling unit for every 10 acres, as well as the applicable 90% open space requirement.
  - The Third District affirmed the trial court's partial final judgment on liability in the owner's favor. *Monroe County v. Gonzalez*, 593 So.2d 1143 (Fla. 3rd DCA).
  - Pursuant to a court-approved settlement agreement, the County agreed to allow the construction of 1 single-family home within a 10 year deadline and pay $75,000 in full settlement of claims for compensation, fees and costs.
- ***Shadek v. Monroe County*** (filed 1995)
  - Alleged inverse condemnation of 145 acre North Key Largo property based on (a) development moratoria between 1982 and 1986 on major development applications while County adopted a new land use plan and developed an HCP for endangered species and (b) County's designation of property as an Area of Critical County Concern.
  - Total compensation County agreed to pay pursuant to settlement agreement: $5.9 million
  - Voluntarily dismissed in 2011

Takings Litigation History

- ***Clay et. al. v. Monroe County*** (filed 1999)
  - Owners of Big Pine Key lots that were subjected to a level of service moratorium filed suit seeking a writ of mandamus requiring issuance of building permits, declaratory judgment and compensation for permanent and temporary takings.
  - Final judgment entered in favor of the County affirmed by Third District. *Clay v. Monroe County*, 849 So.2d 363 (Fla. 3rd DCA 2003) (emphasizing that an owner must exhaust administrative remedies before initiating a taking claim and stating "[a]s the County explained in its application to the special master, thirteen of the twenty-one properties are 'required to obtain an environmental coordination letter from the U.S. Fish and Wildlife Service prior to permit issuance.' This derives from the federal agency's jurisdiction under federal law. It should go without saying that this court cannot override the jurisdiction of the U.S. Fish and Wildlife Service established under federal law. [The environmental coordination letter condition]is appropriate and there is no legal basis on which we can override the jurisdiction of the federal agency.")
- ***Good v. Monroe County*** (filed 2001; Case No. 01-CA-977-K)
  - Alleged inverse condemnation of Lower Sugarloaf Key property as a result of ROGO, NROGO, and associated moratoria
- ***Emmert v. Monroe County and State*** (filed 2002)
  - Alleged *inter alia* that application of County's wetland regulations resulting in a reduced buildable footprint of Ocean Reef lot of 1,800 sq. ft. resulted in inverse condemnation. Sought over a million in compensation.
  - Final Judgment entered in County's favor in 2010 ("Through the BUD process, the County granted variances from the setbacks that it is legally responsible for. The BUD relief provided a sufficient area on the subject property to build a house. If the building regulations and restrictions of ORCA—a private homeowner's association—further reduce this area to such an extreme that Plaintiff cannot build a single-family home, then it is ORCA that has prevented use of the property.")
  - Emmerts ordered to pay $40k in costs to the County

Takings Litigation History

- ***Galleon Bay v. Monroe County and State*** (filed 2002)
  - Alleged inverse condemnation of 13 lots on No Name Key based on ROGO and HCP/ITP
  - Procedural History:
    - Partial Summary Judgment in GB's favor entered 1/30/06
    - 2006 jury valuation of $3 million; GB successfully moved to set it aside because fell below their original demand of $6 million
    - 2006 Partial Summary Judgment vacated by successor judge in 2008
    - Liability bench trial in December 2010. Third District reversed judgment of liability in favor of County and State, remanding with instructions to find taking. *Galleon Bay v. Monroe County*, 105 So.3d 555 (Fla. 3rd DCA 2012).
    - On remand, 7 lots found to be permanently taken, and 6 that received allocation awards found to be temporarily taken
    - 2016 jury valuation of $285,500
    - Final Judgment entered on 5/26/16, in the amount of $480,511 plus statutory interest until paid. GB appealed and judgment was per curiam affirmed. *Galleon Bay v. Monroe County*, 272 So.3d 396 (Fla. 3rd DCAS 2018).
    - GB filed Motion to Declare Final Order Null and Void arguing the judgment was not timely paid pursuant to § 73.111, Fla. Stat.. Third District affirmed the order denying the that motion. *Galleon Bay v. Monroe County*, 314 So.3d 509 (Fla. 3rd DCA 2020) (holding § 73.111 is inapplicable to inverse condemnation proceedings).
    - On 12/20/23, Court approved settlement agreement between parties on issue of fees and costs effectively concluding case
  - Total compensation (including interest) paid: $531,390.67 (50/50 split with State)
  - Total costs paid: $75,000 (50/50 split with State)
  - Total attorney's fees paid: $0
- ***Collins, et. al. v. Monroe County and State*** (filed 2004)
  - 11 groups of plaintiffs sued in a consolidated case alleging inverse condemnation based on moratoria, ROGO and BUDs rendered; counsel valued at $24 million when filed.
  - Only one (Davis) out of 11 Plaintiff groups prevailed
    - Total compensation (including interest) paid to Davis: $375,714.06 (50/50 split with State)
    - Total fee and cost award: $138,654.06 (50/50 split with State)
  - Appeals:
    - 999 So.2d 709 (Fla. 3rd DCA 2008)(Reversing summary judgment in favor of County and State on summary judgment grounds; distinguishing claims and factors that must be examined in as-applied ones.)
    - 76 So.3d 370 (Fla. 3rd DCA 2011) (Affirming summary judgment against Collins and Magrini.)
    - 99 So.3d 961 (Fla. 3rd DCA 2012)(Affirming summary judgment against Riordan.)
    - 118 So.3d 877 (Fla. 3rd DCA 2013) (Affirming judgment in favor of County and State as to all landowners except as to Davis.)

Takings Litigation History Cont'd

- ***Neuman v. Monroe County*** (filed in 2004)
  - Neuman alleged the County effected a temporary regulatory taking from 3/20/02, when the BOCC submitted BUD application on behalf of Neuman and the other Big Pine Key 21 through 4/1/5, when the BOCC made permit available.
  - Final Judgment on liability in Neuman's favor entered on 5/31/13, and subsequently vacated pursuant to settlement
- ***Bauknight et. al. v. Monroe County*** (filed 2004)
  - Alleged temporary takings of Big Pine Key lots as a result of moratorium adopted in 1995 on the approval of building permits affecting the Big Pine Key segment of U.S. 1 due to level of service. In 2002, the Director of the Growth Management Division requested permission from the BOCC to file BUD applications on behalf of the owners and relief was granted in 2002 in the form of permit issuance.
  - Final judgment in favor of the County affirmed by the Third District. *Bauknight v. Monroe County*, 994 So.2d 362 (Fla. 3rd DCA 2008) ("When applications for beneficial use were filed in 2002, relief was provided to the owners. As the delay in obtaining relief was attributable to the owners themselves, there was no taking and can be no damages for delay.")
- ***Lightner et. al. v. Monroe County and State*** (filed 2006)
  - Class action alleging inverse condemnation of Big Pine and No Name Key lots as a result of the BPK/NNK HCP/ITP, the Master Plan for BPK/NNK, Ordinances 24-2005, 25-2005, 28-2005, 29-2005, 8-2006, 9-2006, 11-2006, and 13-2006, and related provisions of the Comp Plan and LDRs
  - Notice of Voluntary Dismissal (with prejudice) filed in 2018
- ***Good v. Monroe County & State*** (filed 2009; 2009-CA-1303-K)
  - Alleged inordinate burden of Lower Sugarloaf property under Harris Act based on the 2007 adoption of the Tier System designating property Tier 1. Owner sought compensation in the amount $9,750,000
  - Notice of Voluntary Dismissal (without prejudice) filed in 2010

Takings Litigation History Cont'd

- ***Mitchell v. Monroe County*** (filed 2012)
  - Alleged inverse condemnation of 26 Hibiscus Park lots based on application of the 2010 Comprehensive Plan, the Future Land Use Maps, the Tier Overlay Regulations and Maps that limit the number of permits in Tier I, the district zoning maps, the habitat clearing regulation and ROGO
  - County's motion for summary judgment granted in 2014 on ripeness grounds
- ***Gutierrez v. Monroe County*** (filed 2012)
  - Alleged temporary taking of Key Largo property (2004-2012) based solely on County's biologists determination in a Letter of Current Site Conditions that the property contained "red-flag" wetlands
  - County's motion for summary judgment granted in 2015 on ripeness grounds
- ***Key Haven Associated Enterprises v. DEP, DEO & Monroe County*** (filed 2022)
  - Alleged inverse condemnation of 5 partially submerged lots in Lower Keys based on State's denial of ERP permits to fill lots for residential development
  - County dropped as a party following granting of its motion to dismiss in 2022

Takings Litigation History Cont'd

- ***Behmke et. al. v. Monroe County*** (filed 2024; County not yet served)
- Current and past Coral Hammock owners allege inverse condemnation based on inability to conduct vacation rentals in their attached units while their code compliance proceedings and appeals were ongoing. Assert action is for damages in excess of 1 million
    - Appellate court reversed Code Compliance Special Magistrate's findings of violation under LDC § 134-1(k)(1), holding the vacation rental use of attached units in the Mixed Use District were not prohibited
        - Holding despite fact LDC § 130-88 only includes express authorization for vacation rental use of detached units and LDC § 130-74(a) states "no structure of land in the County shall hereafter be developed, used or occupied unless expressly authorized in a land use district."
- CAO deems litigation frivolous under § 57.105, Fla. Stat., subjecting both the attorneys and individual plaintiffs to sanctions in the form an attorney's fees award to County.
    - Section 57.105(1), Florida Statutes: "[T]he court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceedings or action in which the court finds that **the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial**: (a) Was **not supported by the material facts necessary to establish the claim** or defense; or (b) Would **not be supported by the application of then-existing law to those material facts**."
        - Other economically viable uses of the attached units remained during alleged takings period, including permanent habitation or long-term rentals
        - Never sought Beneficial Use Determinations based on alleged takings; not ripe
        - Must anticipate litigation and other delays in Monroe County
        - Owners delayed filing required applications for exemptions to the vacation rental permit requirement
        - Statute of limitations
- County will vigorously defend against lawsuit if pursued

One to Watch: *Shands v. City of Marathon*

- On May 3, 2023, panel reversed order denying Shands' motion for summary judgment, remanding with instructions that partial summary judgment be entered in favor of the Shands. ***Shands v. City of Marathon*, ---So.3d---- (Fla. 3rd DCA 2023)("*Shands III*").**
  - June 2023
    - City filed Motion for Rehearing, for Rehearing En Banc, and for Certification ("Rehearing Motion")
    - Monroe County and Village of Islamorada jointly filed an amici curiae brief in support of the City's motion
  - **City of Marathon's Rehearing Motion remains pending. Decision not final.**

- Concerns
  - **Recognizes a new category of takings liability— "per se as-applied regulatory taking"**
    - Increases liability exposure by effectively allowing an owner to revive a per se claim that became extinguished four years after the adoption of the regulation at issue by making an application for development that is facially proscribed by the regulation.
    - Allows as-applied claims cast as per se ones to escape evaluation under *Penn Central* factors
  - **Shifts focus of the takings liability inquiry under *Lucas* from fair market value to whether the property can be used for cultivation and development.**
    - Relying on dated traditional notions of ownership, suggests regulations requiring land to be left in natural state are per se takings
  - **Holds TDRs are not to be taken into account in determining whether a regulatory taking occurred, even if TDRs infuse the property with market value**

- Florida Association of County Attorneys (FACA) and other players watching case and committed to amicus participation in support of City at Florida Supreme Court level.

- *Shands III* highly criticized in 2nd Judicial Circuit Court's 1/30/24 *Key Haven* order denying owner's motion for summary judgment as to inverse condemnation liability.

Conclusion/Recommendation

- Takings liability remains a manageable risk provided there is a meaningful opportunity for additional development through a continuation of the ROGO process
  - Managed, slower growth is o.k.
- BUD process successful in weeding out and resolving claims
- County should continue attempts to retire development rights through land acquisition in partnership with Land Authority