IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D12-777

(L. T. No. CA-05-313-M)

GORDON BEYER and MOLLY BEYER, Trustees,

Plaintiffs-Appellants,

vs.

CITY OF MARATHON, FLORIDA, and the STATE OF FLORIDA,

Defendants-Appellees.

MOTION FOR REHEARING AND REHEARING EN BANC

Appellants GORDON BEYER and MOLLY BEYER, Trustees, move for rehearing, and for rehearing *en banc*, pursuant to rules 9.330(a) and 9.331(a). The basis for Appellant's motion for rehearing *en banc* is the Courts opinion is contrary to the law of takings, and inconsistent with other decisions of the Third District Court of Appeals and the Florida Supreme Court.[1]

I. THE COURT'S OPINION

This Court rejected the Government's laches argument (waited too long to develop), yet affirmed the summary judgment based on the "Tipsy Coachman"

[1] *Robertson v. State*, 829 So. 2d 901 (Fla. 2002); *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001), and with other panels of this Court, *i.e., Hope v. Citizens Property Insurance Corp.*, 114 So. 3d 457 (Fla. 3rd DCA 2013), and *Agudo, Pineiro & Kates, P.A. v. Harbert Construction Co.*, 476 So. 2d 1311 (Fla. 3rd DCA 1985).

concept. Although the issue was not raised in the motion for summary judgment, this Court concluded that Plaintiffs had not been denied all reasonable economic use of their nine acre island, because:

> The City assigned the Beyers sixteen points under its Residential Rate of Growth Ordinance, having a value of $150,000. The award of ROGO points, coupled with the current recreational uses allowed on the property, reasonably meets the Beyers' economic expectations under these facts. Thus, under an "as applied" takings analysis, the Beyers were not deprived of all economically beneficial use of the property.

II. THE ISSUES ON REHEARING

Before addressing the errors raised in this motion, Appellants respectfully refer this Court to a comment from *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d 1377, at 1384 (Fla. 4th DCA 1994), to the effect that errors are understandable given that 'takings' law is one of the most confused areas in American jurisprudence.

Issues in this Motion

A. This Court incorrectly relied on the "Tipsy Coachman" rule to adjudicate issues that were not even raised in the Government's motion for summary judgment – including whether "ROGO points" had – or have – any market value.

B. This Court's reliance on a non-judicial Special Master's guess as to the value of "points." There was a complete absence of *any* evidence to support the administrative finding of value. And Courts should not give preclusive

effect to property values *established by local governments* – when those values give rise to the constitutional claim of inverse condemnation.

C. Ignoring the U.S. Supreme Court's holding in *Lucas v. South Carolina Coastal Council,*[2] and *Keshbro, Inc. v. City of Miami,*[3] this Court concluded that a recreational use is a productive use of land or an economically beneficial use sufficient to avoid a taking.

III. ARGUMENT

A. "TIPSY COACHMAN" RULE CANNOT BE APPLIED TO ISSUES NOT RAISED IN THE SUMMARY JUDGMENT MOTION

The "Tipsy Coachman rule," or "right for the wrong reason," cannot be applied to an issue that was not raised in a motion below, *i.e.,* for summary judgment. The rule can only apply if there is evidence in the record to support the finding *or* if an alternative theory supports the judgment.[4] In *Hope*[5] and *Agudo*[6] the Third District Court of Appeals recognized that the "right for the wrong reason" appellate maxim does not apply in summary judgment proceedings where the issue was never raised in the motion for summary judgment."

Rule 1.510(c) requires the motion for summary judgment to state with particularity the grounds upon which it is based and the substantial matters of law to

---

[2] 505 U.S. 1003, 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992).

[3] 801 So. 2d 864 (Fla. 2001).

[4] *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).

[5] *Hope v. Citizens Property Insurance Corp.,* 114 So. 3d 457 (Fla. 3rd DCA 2013).

[6] *Agudo, Pineiro & Kates, P.A. v. Harbert Construction Co.*, 476 So. 2d 1311 (Fla. 3d DCA 1985) (rejecting Tipsy Coachman in summary judgment).

be argued. The purpose of this rule is to eliminate surprise and to provide parties a full and fair opportunity to argue the issues.[7] The burden of proving the existence of genuine issues of material fact does not shift to the opposing party until the moving party has met its burden of proof.

The law of summary judgment has been repeated in numerous cases, but never as succinctly as in *Petruska,*[8] where the Fifth District Court of Appeal explained the benefit and limitations of a summary judgment, as follows.

> The great benefit derived from summary judgment is that it puts an end to useless and costly litigation where there is no genuine issue of material fact to present to a jury. But no matter how enticing, it must never be utilized to unjustly deprive a litigant of a jury trial to resolve material issues of fact that exist in a case. Therefore, the courts have placed rather strict conditions on its availability and restrictions on its use. The standard the courts have adopted to determine the propriety of summary judgments is an amalgam of venerable rules consistently applied for many years. Together, these rules form a benchmark by which application of this procedural method of pre-trial disposition in any given case may be judged. We are bound to fairly and accurately apply these rules.

In this case, the Government raised two grounds in its motion for summary judgment. R:352. The doctrine of laches and the failure to produce evidence of a distinct investment backed expectation. The Court erred by applying the Tipsy

---

[7] *Lee v. Treasure Island Marina, Inc.*, 620 So. 2d 1295 (Fla. 1st DCA 1993).

[8] *Petruska v. Smartparks-Silver Springs*, 914 So. 2d 502 (Fla. 5th DCA 2005).

Coachman rule to the issue of value of points which was not raised in the Government's motion for summary judgment. The failure to "point" to evidence of a distinct investment backed expectation was not raised in the Court's opinion. It was fully brief in the Reply brief. The Court's reliance on *Penn Central* and Footnote 8 in *Lucas* will be addressed Section C.

B. THE ADMINISTRATIVE FINDING OF THE VALUE OF POINTS SHOULD BE DISREGARDED

In *Cumberland Farms v. Town of Groton*, 808 A.2d 1107 (Conn. 2002), the Connecticut Supreme Court reversed the trial court's decision to dismiss an inverse condemnation case based on the Town's administrative finding that the owner had not been denied of reasonable use of its property. The Court discussed several reasons why the Court should be careful in applying the doctrine, the most persuasive being:

> . . . to accord preclusive effect to the board's findings in the context presented would be to vest the board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim and, in effect, would give the board the authority to settle the issue raised by that claim. Under such a regime, local zoning boards would have the power to decide virtually all inverse condemnation actions that are predicated on a claim that the denial of a variance application constitutes a practical confiscation. Such a result would run counter to the well established common-law principle that administrative agencies lack the authority to determine constitutional questions.

The Connecticut Supreme Court reinforced its conclusion by explaining that

the doctrine of administrative collateral estoppel should never be applied when the administrative finding itself gives rise to the constitutional claim.

(1) *Points have no value*

Because the point system was not an issue in the Governments' motion for summary judgment, it is fair to proffer the reason that points have no market value. Marathon issues a limited number of building permits each year under its Rate of Growth Ordinance (ROGO). Building permit applications are assigned "points" for such factors as habitat sensitivity, whether the land is located in a platted subdivision, etc. Applicants can receive extra "points" and improve their ranking in the queue by dedicating land. However, the vast majority of persons who have applied for building permits since ROGO was adopted in 1992, have not dedicated land for extra points. Most are content to wait in the queue for a building permit.

Apparently some (wealthy and/or impatient) owners purchased lots to dedicate for extra points. That however does not constitute a true market. In his deposition, Marathon's appraiser, Lee Waranker, testified that buying land with the expectation of selling the land for points was not a good investment.

The frailty of the point system – and the lack of a market – is the result of the following factors:

- Marathon's BPAS system allows the City to deny building permits to anyone, including those who dedicated land for extra points;
- Marathon can amend the BPAS ordinance to eliminate the point system or reduce the value of a point, as was the case when Monroe County decided to sell "points" without requiring applicants to buy land for dedication; and

- No reasonably prudent investor would buy Plaintiff's island for anywhere close to its appraised value. Such a buyer would have no reasonable expectation of ever building or any vested right to sell the island for points.

While some courts have recognized that a *real* TDR (i.e., a transferable development right that actually allows additional density, not just an improved score) may have real market value (and may be considered in the damage phase of the case) the issue of the value of Marathon's points should not have been adjudicated under the guise of the Tipsy Coachman rule.

Neither the fair market value of "points" – nor the fair market value of the Beyers' island – were raised in the Government's summary judgment motion.[9] This Court erred by holding the Beyers received just compensation in the form of the right to sell their land to someone who wants to improve their score.

(2) ***No competent, substantial evidence supports the finding of value***

As the transcript of the BUD hearing shows, the only "evidence" of value came from the City's planner who testified that someone said a "two-point ROGO lot can generate anywhere from 25 to $40,000. R: 365-410, Exh. 6, Tr: p. 10-11. Marathon's City Attorney conceded that the planner was not an expert in real estate matters and "*we certainly haven't gone out in the marketplace*.... R: 365-410, Exh. 6, Tr.: p. 11 and 15 ("We're not real estate experts.").

Even though the Special Master sustained the Beyers' objection to the in-

---

[9] The issue of "points" could not have been decided by summary judgment, neither in the liability phase, nor the compensation phase.

troduction of the hearsay evidence [Tr. p. 17], the Special Master included the value of 16 points in his recommended order, which the City adopted as its BUD. In addition, the Special Master was constrained by the City's BUD ordinance to value the island "immediately before the City's Comprehensive Plan was adopted." By that time, the value of Bamboo Key had been substantially depressed. R: 365-410, Exh. 6, Tr: p. 49–57.

Clearly, that is not the type of evidence that should control the outcome of a constitutional claim for just compensation.

C. DENIAL OF ALL PRODUCTIVE USE IS A CATEGORICAL TAKING EVEN IF THE PROPERTY HAS VALUE

This Court, on pg. 5 of its Opinion, cited *both* fn. 8 of *Lucas v. South Carolina Coastal Council* and *Penn Central Transportation v. City of New York* as authority for conducting an "as applied" analysis.[10] **This was error.**

In *Lucas v. South Carolina Coastal Council*,[11] the Supreme Court recognized that a regulation results in a categorical taking when *no productive use of land is permitted, e.g.*:.

---

[10] This court, in *Shands v. Marathon*, 999 So. 2d 718, made the same error. However, the reliance on Fn. 8 was not readily apparent and was actually dictum because the Court sided with the Shands by finding the BUD procedure resulted in an "as applied" challenge, not a facial challenge. This court continues to confuse the terminology by referring to a "partial taking" as an "as applied" taking. The proper distinction at this juncture is a "partial taking" vs. a "total or categorical taking."

[11] Fn. 2, *supra*.

> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.[12]

Lucas stands for the proposition that when the government prevents all productive use of land, compensation is due. Fn 8 of *Lucas* was an attempt by Justice Scalia – writing for the majority – to ward off criticism from the dissenting justices who opposed the new categorical rule. The footnote was *not* intended to reapply the *Penn Central* analysis. *Accord: Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997).

In *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 869-870 (Fla. 2001), our Supreme Court explained *Lucas* [including fn. 9 of *Lucas*] as follows:

> In *Lucas*, the Supreme Court acknowledged the recognition in its takings jurisprudence of at least two forms of regulatory action which require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint: (1) where the regulation compels the property owner to suffer a physical invasion, or (2) ***where the regulation "denies all economically beneficial or productive use of land.***" [emphasis supplied] *Lucas*, 505 U.S. at 1015. In the latter case, the State can resist compensation only if the regulation "proscribe[s] use interests [which] were

---

[12] *See Agins*, 447 U.S. at 260; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981). *Lucas, supra* at 1015 –1016.

not part of [the property owner's] title to begin with." *Id.* at 1027. Accordingly, a regulation which amounts to a deprivation of all use "must . . . do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Id. at 1029. This has been labeled the "nuisance exception."[13]

Lucas and its progeny are clear. Partial takings are to be analyzed using the "ad hoc" factors set out in *Penn Central* (not to be confused with the elements of a cause of action). Categorical takings, like the Beyers, are entitled to just compensation.

---

[13] *Keshbro* explains Fn.9 of Lucas as follows:

> The *Lucas* court explained its categorical treatment of regulations effecting the deprivation of all economically beneficial or productive use of property by stating:
>
> We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. [F]or what is the land but the profits thereof [?]" Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned. And the functional basis for permitting the government, by regulation, to affect property values without compensation-that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,"- does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses. *Lucas*, 505 U.S. at 1017-18 (citations omitted). (Fn 9 in original)

See also *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d 1377 (Fla. 4th DCA 1994), *rev. denied,* 651 So. 2d 1197 (Fla. 1995), where the Fourth District affirmed the rule of law that a *denial of all permits for development is an indirect method of dedicating property to a public purpose*, resulting in a total taking; *Vatalaro v. Dept. of Environ. Regulation*, 601 So. 2d 1223 (Fla. 5th DCA) *rev. denied*, 613 So. 2d 3 (Fla. 1992) (holding permit denial was taking requiring compensation where language used in denying permit made it clear that *only use for ecologically sensitive land was to look at it*); and *Dept. Environ. Protection v. Burgess*, 667 So. 2d 267 (Fla. 1st DCA 1995) ("constitutional taking can occur when a *regulation deprives the property owner of substantially all economically beneficial or productive use of the property.*")

Based on *Lucas* and *Keshbro*, this Court erred by relying on *Penn Central,* which only applies to partial takings. Even if this *were* a partial taking, the *ad hoc* factual inquiry discussed in *Penn Central* does not support the Government's argument that the Beyers are *required to prove* a distinct investment-backed expectation. *Penn Central* does not mandate treating the factors as an "element" of a cause of action that a landowner must prove.

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed

expectations are, of course, relevant considerations. [citation omitted] So, too, is the character of the governmental action.[14]

The Beyers – like the Shands – bought offshore islands at a time when Monroe County zoning laws allowed one home per acre on those islands, thereby meeting the *objective, reasonable man* standard. The Government's insistence that a particular buyer must prove a particular use has never been the law, and should not be adopted by this Court at the expense of persons with Alzheimer's disease like Mr. Beyer who have no memory (Mr. Beyer died two years ago) or unknowledgeable surviving widows like Mrs. Beyer, or unknowing heirs or donees.

Finally, the continued reference to *Ambrose v. Monroe County* is puzzling, as neither the Beyers, nor the Shands, are claiming damages or compensation for the loss of a particular vested right, *i.e.*, a building permit or PUD.

IV. CONCLUSION AND RELIEF SOUGHT

Because Marathon's BUD clearly states that no development will be allowed, the District Court should find as a matter of law, the regulations "go too far" resulting in a categorical (Lucas) taking. Based on that finding, the District Court should vacate its prior opinion, and reverse the trial court's summary judgment with instructions to schedule a jury trial forthwith to comply with the constitutional mandate to pay just compensation to those persons whose property has been pressed into public use.

---

[14] *Penn Central, supra* at 123.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court, and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: *Hope v. Citizens Property Insurance Corp.*, 114 So. 3d 457 (Fla. 3rd DCA 2013); and *Agudo, Pineiro & Kates, P.A. v. Harbert Construction Co.*, 476 So. 2d 1311 (Fla. 3d DCA 1985).

Andrew M. Tobin, Esq.

CERTIFICATE OF SERVICE

I CERTIFY THAT a true copy of the foregoing was furnished to **JOHN HERIN, ESQ.** and **JEFFREY T. KUNTZ, ESQ.** Attorneys for the City of Marathon, Florida, and **JONATHAN A. GLOGAU, ESQ.** Chief, Complex Litigation, Attorney Generals Office, PL-01, The Capitol, Tallahassee, FL 32399-1050, by EMAIL on this 21 day of November 2013.

Andrew M. Tobin, Esq.

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. [citations omitted] When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 at 716 (1999).

Respectfully submitted by:

s/ Andrew M. Tobin, Esq.
Bar No. 184825
Andrew M. Tobin, P.A.
Co-Counsel for Appellant
P.O. Box 620
Tavernier, FL 33070
(305) 852-3388;

and

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