IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
LAKELAND, FLORIDA

Case No. 2D14-4249

CHARLOTTE COUNTY,

Appellant/Cross-Appellee,

v.

ANDRESS FAMILY FLORIDA, L.P., et al.,

Appellees/Cross-Appellants.

On Appeal from the Circuit Court, Twentieth Judicial Circuit,
in and for Charlotte County, Florida
(Hon. Joseph G. Foster, Case No. 10-639-CA)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure Rule 9.370, Pacific Legal Foundation (PLF) respectfully requests this Court's permission to submit this brief amicus curiae in support of Appellees and Cross-Appellants, Andress Family Florida, LP, et al. (Andress).

INTEREST OF AMICUS CURIAE

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Horne v. Department of Agriculture*, __ S. Ct. __ (June 22, 2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state courts across the country, including Florida. *See, e.g.*, *Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27 (Fla. 5th DCA 2013), *rev.*

denied, 139 So. 3d 299 (Fla. 2014); *Dep't of Agric. & Consumer Servs. v. Bogorff*, 35 So. 3d 84 (Fla. 4th DCA 2010).

PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a constitutional issue that is of vital importance to Florida's property owners. Specifically, the case asks whether the guarantee that the government must pay "full compensation" when it appropriates private property for public use requires courts to consider competing methods for calculating compensation when the parties disagree about the amount due. Fla. Const. art. X, § 6. The answer is yes. For compensation to be full and just, "the landowner must be completely paid for that which is taken, and compensated for the whole loss." *Dep't of Transp. of State v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984); *see also United States v. Miller*, 317 U.S. 369, 373 (1943) (Just compensation must put the owner in "as good position pecuniarily as he would have occupied if his property had not been taken."). To satisfy this requirement, courts must consider which of the competing compensation methodologies offered by the parties will make the owner whole.

In the decision below, the trial court concluded that Charlotte County deprived Andress of any economically viable use of its residential zoned land for a period of five years, after the County broke the sewer system providing service to the property,

failed to restore service, and denied Andress permits to build septic systems.[1] During the compensation phase of the trial, Andress asked the court to award compensation for (1) actual costs—including sewer repair fees and excess property taxes—and (2) the loss in value of the property caused by the County's actions (known as "before-and-after valuation").[2] The trial court, however, ruled that binding precedent required the court to consider a single methodology for determining the amount of compensation due for a temporary regulatory taking, which excluded much of the compensation sought by Andress. *See* April 14, 2014 Order Determining Measure of Damages (citing *City of Tampa v. Redner*, 852 So. 2d 270, 272 (Fla. 2d DCA 2003) (applying the market rate of return test set out in *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) (*Wheeler III*)). Based on its reading of *Redner*, the trial court declined to consider alternative methodologies that would have included the damages sought by the landowners. As a result, the court did not allow the jury to consider the all of the pertinent facts, including the actual damages to Andress's

[1] January 24, 2014 Order on Liability at 7, ¶ 22 (incorporating January 8, 2010 Order on Liability in Rotunda I at ¶¶ 4, 11).

[2] Answer Brief and Initial Brief on Cross Appeal at 47, 52.

property.[3] The lower court's decision violates the Florida Constitution's requirement that government pay full compensation when it takes property and must be reversed.

ARGUMENT

I

THE FULL COMPENSATION REQUIREMENT IS INTENDED TO MAKE THE OWNER WHOLE

The trial court ruled that, under *Redner*, compensation for a temporary regulatory taking can only be calculated under the market rate return methodology set out in *Wheeler III*. The lower court's ruling, however, is neither supported by a fair reading of *Redner*, nor by other full compensation case law. Temporary takings, like perpetual takings, take an interest in property, "for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987).[4] The only difference with regard

[3] *See* July 15, 2014 Order Denying Plaintiffs' Motion in Limine and Granting Defendant's Motion in Limine Regarding MSBU Damages.

[4] Florida courts rely on federal cases to interpret the state takings clause, because the courts "interpret[] the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, 133 S. Ct. 2586 (2013).

to compensation is that, when the government appropriates private property for a limited duration of time, it is obligated to pay "fair value for the *use* of the property," rather than paying for it outright. *Id.* at 322 (emphasis added).

Calculating the amount of compensation due for a taking requires that courts focus on the unique facts of each case because there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 (cautioning against the use of per se rules in a takings case). Accordingly, courts have long recognized that "[t]here is no formula or artificial measure of damages applicable to all condemnation cases." *Poirier v. Grand Blanc Twp.*, 481 N.W.2d 762, 766 (Mich. App. 1992) (omitting quotations); *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009) ("[T]here is no magic number or formula in takings cases.").

Indeed, a bedrock principle of regulatory takings jurisprudence is that fairness and justice require that courts consider the unique circumstances of each case rather than relying on rigid, per se rules, such as the rule adopted by the trial court below.

> The concepts of "fairness and justice" . . . underlie the Takings Clause, [but] of course, are less than fully determinate. Accordingly, we have eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. The outcome instead depends largely upon the particular circumstances [in that] case.

Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring) (citations and quotations

omitted), *quoted in Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Planning Agency*, 535 U.S. 302, 336 (2002). For that reason, courts regularly employ a variety of methodologies to determine compensation in temporary regulatory takings cases, including fair rental value, option value, interest on lost profit, before-and-after valuation, market rate of return, the equity interest approach, and the public benefits approach. *See SDDS, Inc. v. South Dakota*, 650 N.W.2d 1, 14 (S.D. 2002); J. Margaret Tretbar, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. Kan. L. Rev. 201, 217-18 (1993).

A. No Single Formula Can Make Owners Whole in Every Case

No single methodology—not the one used in *Wheeler III*, nor any other case—can accurately calculate the amount of compensation due in every situation. *See* Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 523 (2010) ("The compensation questions in temporary taking cases appear to be too fact-specific for the courts to develop one formula, or even a small number of formulas, that they can apply in most or all cases."); *see also* Joseph P. Mikitish, *Measuring Damages for Temporary Regulatory Takings: Against Undue Formalism*, 32 Ariz. L. Rev. 985, 1002 (1990) (No single methodology is "optimal" in all temporary regulatory takings cases, but "several . . . work well" when applied in appropriate circumstances.).

Instead, the particular facts of each case must drive the trial court's

determination of which methodology is most appropriate. *Corrigan v. City of Scottsdale*, 720 P.2d 513, 518-19 (Ariz. 1986); *Lucas v. S. Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (on remand). That is because facts about "whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting" may combine to render any given methodology little more than a "'guessing game' between too little compensation on the one hand and providing a windfall on the other." *Corrigan*, 720 P.2d. at 518; *see also* Tretbar, *Calculating Compensation*,42 U. Kan. L. Rev. at 241 ("Courts should look to the facts of each case" when determining which formula to apply.).

In this case, rather than considering which methodology would work best to provide full compensation, the lower court held that *Redner* had adopted the market rate of return methodology in *Wheeler III* as the "exclusive method for calculating the damages a landowner incurs in a temporary regulatory taking of property." April 14, 2014 Order Determining Measure of Damages ¶ 2. But *Redner* does not say that. In fact, the court indicated that it would have considered a different formula under different circumstances. *Redner*, 852 So. 2d at 272. ("[T]here was no claim that the dry zoned property was without any value whatsoever nor that it could not produce some income. Accordingly, the proper measure of damages is [the *Wheeler III* method].").

Likewise, the Eleventh Circuit has never held *Wheeler III* to be the exclusive compensation method for temporary regulatory takings. The court actually endorsed two compensation methodologies in the *Wheeler* line of cases. In *Wheeler III*, the Eleventh Circuit determined that "the landowner should be awarded the market rate of return, computed over the period of the temporary taking, on the difference between the property's fair market value [without the regulatory restriction] and its fair market value [with the restriction]." *Id.* at 271. Yet on appeal after remand, the same court used a "quite different" methodology, known by scholars as the "equity interest approach." *See* Siegel, *Temporary Takings*, 11 Vt. J. Envtl. L. at 516. Under that test, the court looked to the return the landowner would have made on his equity without the regulation for the time of the taking. *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (*Wheeler IV*). Later, in *A.A. Profiles, Inc. v. City of Fort Lauderdale*, the court advised that when calculating compensation "there are no absolute standards outside of the requirement that the compensation paid for a taking be 'just.'" 253 F.3d 576, 583-84 (11th Cir. 2001).

Indeed, scholars have criticized the *Wheeler III* formula as failing to provide adequate compensation to the property owner affected by a temporary regulatory taking.

> The *Wheeler* formula fails to compensate lost development interests, increased construction costs, or the expenditures made for development. The rental return measure arguably provides a better solution because it

> considers all property uses, while the modified version of the before-after-value rule awards merely the market return rate on the difference.

Cynthia J. Barnes, Comment, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in* Wheeler v. City of Pleasant Grove, 74 Iowa L. Rev. 1243, 1256 (1989). Thus, while the test in *Wheeler III* is helpful in some regulatory takings cases, it cannot accommodate the virtually infinite factors that can cause a temporary taking. Strict adherence to a single methodology in every case would undercut the Constitution's "full compensation" requirement. *See Nalven*, 455 So. 2d at 307; *United States v. Miller*, 317 U.S. 369, 373 (1943).

B. Courts Must Look to the Facts of the Case To Award Full Compensation

The facts of the case must ultimately drive the compensation analysis, not blind adherence to one methodology. *Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 570 So. 2d 892, 895 (Fla. 1990) (" 'the proper valuation method or methods for any given case are inextricably bound up with the particular circumstances of the case' ") (quoting *Dade Cty. v. Gen. Waterworks Corp.*, 267 So. 2d 633, 639 (Fla. 1972)); *see also Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 873 (Fla. 2001) (improper to "elevate form over substance" in a manner that "defies economic realities" of the properties at issue). Strict adherence to any one methodology would in many cases miss compensable damages and fail to fully compensate property owners for the taking of their property.

In *Kimball Laundry Co. v. United States*, for example, the Supreme Court demonstrated how specific facts should drive the court's compensation analysis. 338 U.S. 1 (1949). There, the federal government took temporary possession of Kimball Laundry to clean military clothes during World War II. *Id.* at 3. The laundry could not serve its customers for the entire duration of the taking—a period of three-and-a-half years. *Id*. The trial court awarded rent for the time of the taking, plus interest, and additional compensation for damage to the plant and machinery beyond regular wear and tear. *Id.* at 5. But the trial court denied damages for the loss of "going concern" (*i.e.*, customer base, goodwill, earning potential), because such damages had not been awarded in earlier temporary takings cases: *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945); and *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946). *Kimball Laundry*, 338 U.S. at 4. The Supreme Court reversed, holding that the facts of the case warranted the inclusion of "going concern" business damages as part of the compensation award. *Id.* at 16. The Court explained that *Petty Motor* and *General Motors* had only involved the temporary taking of leases; whereas, the taking of Kimball Laundry had "completely . . . appropriated the laundry's opportunity to profit" from its established customer base for the duration of the occupation, leaving the laundry with far fewer customers when the property was eventually returned. *Id.* at 14. Because the goal of the Takings Clause is to restore the owner to "as good position pecuniarily as he would have occupied if his property

had not been taken" (*Miller*, 317 U.S. at 373), the Court held that the government had to pay Kimball Laundry for damage to its earning power, customer base, and goodwill. *Kimball Laundry*, 338 U.S. at 16.

As demonstrated in *Kimball Laundry*, the facts of a case sometimes dictate that compensation must also include actual damages caused by the taking. *See* 338 U.S. at 7; *see also Petty Motor*, 327 U.S. at 379-80 (fair market rent for temporary use of a lease would have to also factor in the costs of temporarily moving the plaintiff's equipment from the property). Even though these types of damages are not ordinarily available in permanent takings, they are often essential to making the property owner whole after a temporary taking. *See Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) ("[D]amages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking occurred.").

For example, in *Primetime Hospitality, Inc. v. City of Albuquerque*, the court awarded actual damages as part of the compensation for a taking caused by a broken city waterline that encroached on the plaintiff's hotel construction site. 206 P.3d 112, 114-15 (N.M. 2009). The compensation included the rental value (determined by lost profits) for the 142 days that the project was delayed as well as the increased construction costs caused by the city's temporary taking. *Id.* at 115, 119 (including the costs of repairing water damage, delayed construction, and constructing a buttress

wall). Similarly, in *Lopes v. City of Peabody*, a city regulated the plaintiff's land so that it had no economically viable use for fourteen years. 718 N.E.2d 846, 849 (Mass. 1999). In addition to compensation for the lost use of the property, the court also awarded "the same type of refund of property taxes that he would receive if his land had been permanently taken," because it was the only way to ensure that the property owner was fully and fairly compensated for his loss. *Id.* at 852.

In *Arkansas Game & Fish Comm'n v. United States*,[5] the Federal Circuit affirmed compensation that was determined based solely on the actual harm to the plaintiff's property. 736 F.3d 1364, 1369 (Fed. Cir. 2013). In that case, federal water management decisions caused temporary flooding that destroyed timber on the plaintiff's land. *Id.* The court awarded the plaintiff the value of the lost timber—$5.6 million—as well as nearly $200,000 for "regeneration efforts in areas severely affected" by the flooding. *Id*. The trial court arrived at these figures by reasoning that, since fair market value for the use of the government's flowage easement could only be reached by guessing, the actual costs imposed on the plaintiff were the most "basic measure of monetary relief to which the Commission is entitled." *Arkansas Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 634-35 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd and remanded*, 133 S. Ct. 511 (2012), *and aff'd*,

[5] This decision was on remand from the Supreme Court's decision that the United States effected a temporary taking by flooding the plaintiff's land.

Arkansas Game & Fish Comm'n, 736 F.3d 1364 (Fed. Cir. 2013).

Here, ensuring compensation for all lost value and actual damages suffered by the owner should drive the compensation analysis. Charlotte County effected a temporary taking through its regulatory scheme, and its actions and inactions toward the sewer system. The taking ended only when Andress agreed to pay to repair the sewer system through a municipal service fee. By strictly applying *Wheeler III*, without consideration of all of the case's facts and other compensation methodologies, the lower court failed to provide the owners full compensation. Indeed, the award was for less money than the owners' cost to fix the sewer system, leaving them worse off than before the County took the property.[6] The lower court's decision to limit the methodologies available for determining full compensation violates the Florida Constitution and must be reversed.

CONCLUSION

To protect the rights of all property owners, this Court should hold that no single formula can determine compensation in every case, and that facts of a case must ultimately drive the court's compensation analysis.

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[6] *E.g.*, *compare* Final Judgment for Andress Family Florida, LP, at 2 (awarding $104,653 in damages, plus statutory interest), *with* Composite Exhibit A to Plaintiffs' Motion in Limine to Include MSBU Fees at 1 (stating that Andress Family Florida, LP, paid $101,598.50 in the first 7 years of the tax), and January 24, 2014 Order on Liability at 15 (Plaintiffs will be paying these MSBU fees for another 15 years).

DATED: July 6, 2015.

Respectfully submitted,

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By /s/ Christina M. Martin

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES/CROSS-APPELLANTS was electronically served upon the following via the Florida Courts E-Filing Portal, the 6th day of July, 2015:

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