

May 7, 2020

Real Estate and COVID-19

The Effect of COVID-19 Orders on Private Property Rights

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A. The Effect of COVID-19 on Private Property Rights

Since COVID-19 is a recent pandemic, there are relatively few cases concerning the effect of COVID-19 emergency orders on private property rights. However, one example of such a case in Florida is *Dodero v. Walton County*, No. 3:30-cv-05358-RV-HTC (N.D. Fla. Apr. 6, 2020).

Dodero v. Walton County

The Dodero plaintiffs are a group of beachfront property owners in Walton County who filed suit after the county closed its beaches by local ordinance. The plaintiffs filed a complaint alleging various causes of action, including a takings claim under the Fifth Amendment to the U.S. Constitution, violation of Florida’s constitutional right to privacy under Article 1, Section 23 of the Florida Constitution, and other claims.

The district court denied plaintiffs’ motion for a preliminary injunction, concluding in its order dated April 17, 2020 as follows:

“Although the plaintiffs want (but are being denied) full access to their privately-owned property all the way down to the mean high water line, they are not the only people who have had their property rights temporarily curtailed during

this national pandemic. To be sure, owners of ‘non-essential’ businesses have had to close their doors completely. I do not find the county’s action to be in violation of the Fourth Amendment or of Florida’s privacy rights (since this is really a property rights issue). I also find that the ordinance is consistent with, and authorized by, the Governor’s Executive Order No. 20-68.” *Dodero v. Walton County*, Order entered Apr. 17, 2020, at p.3.

The district court further stated: “Whatever injury they sustain in not being able to fully access the beach and water behind their homes is temporary and relatively minimal compared to the potential harms that may result if there is increased exposure to this communicable virus.” *Id.* The Dodero court’s order is relatively succinct and does not squarely address the plaintiffs’ takings claim.

Friends of Danny Devito v. Wolf

In contrast, one recent order of the Supreme Court of Pennsylvania does include a detailed analysis of the effect of COVID-19 emergency orders on private property rights. In *Friends of Danny Devito v. Wolf*, No. 68 MM 2020 (Penn. Apr. 3, 2020), the plaintiffs are four businesses and one individual who claim that the Pennsylvania governor's order compelling the closure of the physical operations of all non-life sustaining business to reduce the spread of COVID-19 constitutes a taking of the plaintiffs' private property under the Fifth Amendment to the U.S. Constitution or the Pennsylvania Constitution. *Friends of Danny Devito v. Wolf*, No. 68 MM 2020 (Penn. Apr. 3, 2020). The Supreme Court of Pennsylvania concluded that the plaintiffs did not establish that a regulatory taking had occurred. *Friends of Danny Devito v. Wolf*, Order entered Apr. 13, 2020, at p.37 ("Friends Order").

The Friends of Danny Devito court relied on two cases in support of its decision. First, the court discussed *Tahoe-Sierra Pres. Council, Inc. v.*

Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). In *Tahoe-Sierra*, a regional planning agency imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land-use plan for the area. The *Tahoe-Sierra* court noted that the regulations at issue were temporary measures which specifically stated that they would terminate. The *Tahoe-Sierra* court stated that "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained," as it would apply to numerous delays in obtaining building permits, changes in zoning ordinances, variances, and the like, as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee ... which have long been considered permissible exercises of the police power, which do not entitle the individuals affected to compensation." *Friends Order* at p.36 (quoting *Tahoe-Sierra* at pp. 334-35).



Next, the Friends of Danny Devito court discussed *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57 (3d Cir. 2013). In *Nat'l Amusements*, the borough ordered the closure of an open-air flea market due to safety concerns posed by unexploded munitions left behind when the site had been used as a weapons-testing facility for the military. Relying on the holding in *Tahoe-Sierra*, the Fifth Circuit denied that a regulatory taking had occurred which required the payment of just compensation: “It is difficult to imagine an act closer to the heartland of a state’s traditional police power than abating the danger posed by unexploded artillery shells... Palmyra’s emergency action to temporarily close the market therefore constituted an exercise of

its police power that did not require just compensation.” Friends Order at p.36 (quoting *Nat'l Amusements* at p. 63).

Applying *Tahoe-Sierra* and *Nat'l Amusements* to the facts of *Friends of Danny Devito*, the Supreme Court of Pennsylvania concluded that the plaintiffs failed to establish that a regulatory taking occurred. The governor’s emergency order resulted in a temporary loss of the use of the business premises, and the governor’s reason for imposing the restrictions on the use constituted a “classic example of the police power.” Further, the governor’s emergency order was limited to 90 days unless renewed, and the general assembly could abrogate the order at any time.

B. Commandeering and Utilization of Private Property

Section 252.36, Florida Statutes (2019), grants broad emergency powers to the governor, including but not limited to the issuance of executive orders, proclamations, and rules and the ability to amend or rescind their issuance. “Such executive orders, proclamations, and rules shall have the force and effect of law.” Id. § 252.36(1)(b). In connection with such emergency powers, the governor may “commandeer or utilize any private property” subject to any applicable requirements for compensation under Section 252.43.

Pursuant to Section 252.43(4), “Any person claiming compensation for the use, damage, loss, or destruction of property ... shall file a claim therefor with the division [Division of Emergency Management within the Executive Office of the Governor] in the form and manner that the division provides.”

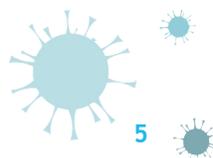
In *Drake v. Walton County*, 6 So. 3d 717 (1st DCA 2009), a private property owner brought an inverse condemnation action against Walton County as a result of the county’s actions during and after declared emergencies. The county had

diverted water across the plaintiff’s private property to prevent flooding of neighboring property, and the county continued the diversion of water on a permanent basis after the emergencies had passed. Drake involved the county’s physical invasion of a property owner’s land in order to divert water from neighboring property, which had a permanent effect after the emergencies.

C. Conclusion

On April 27, 2020, the Friends of Danny Devito plaintiffs filed an application with the U.S. Supreme Court (case no. 19A1032) for a stay of the enforcement of the Pennsylvania governor’s order. On May 6, 2020, the U.S. Supreme Court entered an order denying the plaintiffs’ application. Accordingly, in the absence of the government’s physical commandeering of specific private property, it will be difficult for a private property owner to successfully claim that an emergency order constitutes a regulatory taking where such order is of general application, is limited in duration, and seeks to prevent a public harm.

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