

Orlando Bar Grp., LLC v. DeSantis, No. 5D21-1248, 2022 WL 1051484 (Fla. 5th DCA 2022):

Florida Fifth DCA Holds that Temporary COVID-19 Restrictions on Bars Did Not Amount to a Compensable Physical Taking or Valid Inverse Condemnation Claim

Appellants, Orlando Bar Group, LLC, brought suit against various state and local officials, including Governor Ron DeSantis (“DeSantis”), seeking damages for inverse condemnation in response to restrictions placed on the operation of bars in 2020.

In March of 2020, in response to the COVID-19 pandemic, Governor DeSantis (“DeSantis”) issued an executive order that temporarily suspended all sales of alcoholic beverages for vendors who derived more than fifty percent of their gross revenue from the sale of alcoholic beverages. Days later, DeSantis issued another executive order that suspended the sale of alcohol for on-premises consumption, but allowed for the sale of sealed, unopened alcoholic beverages for off-premises consumption. Later orders limited the operation and capacity of bars and restaurants to half of the normal occupancy. After some time, bars were able to resume normal operations. Appellants claimed that the temporary closure and subsequent restrictions constituted a governmental taking that amounted to inverse condemnation. The trial court dismissed the complaint with prejudice, and Appellants filed a timely appeal. The issues addressed by the Fifth DCA are: (1) whether the regulations amounted to a “per se” physical taking; (2) whether the regulations denied all economic benefits or productive use of the land; and (3) whether a compensable taking occurred under the *Penn Central* test.

The Fifth DCA began its analysis by restating the distinction between a physical taking and a regulatory taking. A physical taking occurs when the government formally condemns a property through its eminent domain power. A regulatory taking occurs when the government imposes regulations that restrict the use of an owner’s property. When a physical taking occurs, the government is required to pay for what it takes. When a regulatory taking occurs, the court typically applies the flexible test developed in *Penn Central*, so long as that regulatory taking does not result in a physical appropriation of the property amounting to a per se physical taking.

First, the Fifth DCA rejected Appellants’ claim that the regulations amounted to a per se physical taking. The COVID orders did not violate Appellants’ right to exclude; rather, the orders prevented Appellants from having patrons on their premises and temporarily suspended the sale of alcohol. Thus, there was no physical appropriation requiring the government to pay for its taking. Thus, the trial court was correct to employ the *Penn Central* test and treat this as a regulatory taking.

Second, the Fifth DCA rejected Appellants’ contention that the inverse condemnation claim should have survived because the government regulation “denie[d] all economically beneficial or productive use of land.” This rule, derived from *Lucas v. South Carolina Coastal Council*, was later explained by the Supreme Court to apply to “extraordinary circumstance[s] when *no* productive or economically beneficial use of land is permitted.” Here, the impact of the COVID orders

amounted to a complete prohibition on alcohol sales for seventeen days, after which they were permitted to resume limited sales. A return to normal operations was permitted approximately six months after the initial suspension of sales. A temporary limitation on a business is not a complete or permanent loss of the land's economic benefits that would entitle the landowner to compensation.

Lastly, the Fifth DCA rejected Appellants' argument that even if the *Penn Central* test applies, an application of the test shows that the governmental action amounted to a taking. The three factors to apply under this test are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Taking these factors in turn, the Fifth DCA held: (1) the Appellants were financially impacted by the COVID orders along with numerous other businesses; (2) the sale of alcohol is a highly regulated business, and the Governor, by statute, may halt the sale thereof during an emergency; and (3) the COVID orders represented a valid use of the state's police power to protect the general welfare. Thus, the COVID orders did not amount to a compensable taking under any of the theories advanced by Appellants.