28 So.3d 71
District Court of Appeal of Florida,
First District.

M & H PROFIT, INC., a
Florida corporation, Appellant,
v.
CITY OF PANAMA CITY, a Florida
municipal corporation, Appellee.

No. 1D08–4983.
|
Dec. 14, 2009.
|
Rehearing Denied Feb. 18, 2010.

Synopsis

Background: Property owner brought action against city pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act, claiming the enactment of ordinance imposing height restriction and additional setbacks on structures in general commercial zone had caused a significant loss of value in its property. City moved to dismiss. The Circuit Court, Bay County, Hentz McClellan, J., granted motion. Property owner appealed.

Holdings: The District Court of Appeal, Wolf, J., held that:

in a matter of first impression, Act was limited to "as-applied" challenges, and did not provide for facial challenges based on the mere enactment of a new ordinance, and

owner's informal discussions with city planning manager regarding application of ordinance did not constitute a specified application of ordinances that gave rise to an action under Act.

Affirmed.

Thomas, J., dissented and filed opinion.

Procedural Posture(s): Motion to Dismiss.

Attorneys and Law Firms

***73** Margaret L. Cooper of Jones, Foster, Johnson & Stubbs, P.A., West Palm Beach; W. Douglas Harris, Ft. Walton Beach; Joseph Anthony Morris of Morris, Cary, Andrews, Talmadge, Jones & Driggers, Dothan, Alabama, for Appellant.

David A. Theriaque, Brent Spain and Leslie E. Bryson of Theriaque, Voreck & Spain, Tallahassee, for Appellee.

Opinion

WOLF, J.

We decide for the first time whether a property owner can state a cause of action under section 70.001, Florida Statutes (2006), otherwise known as the "Bert J. Harris, Jr., Private Property Rights Protection Act" (Bert Harris Act), based upon mere adoption of an ordinance of general applicability pursuant to the police powers of a city in a situation where that municipality has taken no further action concerning application of the ordinance to a particular piece of property. We determine the specific language of the Bert Harris Act does not contemplate facial challenges to general, health, safety, and welfare ordinances of a municipality. In addition, any attempt to broadly extend the application of the Bert Harris Act to these circumstances would unduly constrain the exercise of municipal home rule pursuant to article VIII, section 2 of the Florida Constitution. We, therefore, affirm the decision of the trial court.

Facts and Procedural History

Appellant, M & H Profit, Inc. (M & H), purchased the subject property on Highway 98 in Panama City in February 2005, when the property was zoned General Commercial (GC–1) with no height or setback restrictions. M & H intended to build a 20–story residential condominium building on the property.

Approximately six weeks after M & H purchased the property, the City of Panama City (the City) passed an ordinance which was subsequently codified in its Land Development Regulation Code. The new ordinance imposed a 120–foot height restriction with additional setbacks and an absolute 150–foot limit on structures in the GC–1 zoning district. At the time the ordinance was passed, M & H had not filed a development application with the City.

In October 2005, M & H participated in an informal pre-application conference with the City Planning Manager. According to M & H, such informal conferences were the City's customary way of handling the construction permitting process. M & H alleged that it is the City Planning Manager's

duty and authority to make determinations on informal applications before the filing of a formal building application. M & H asserted that for many years the City Planning Manager had held such informal pre-application meetings to review conceptual plans as a matter of custom in order to avoid unnecessary expenses.

Following informal discussions, the City Planning Manager sent a letter to M & H stating, "After a cursory review of the submittal, it is clear that it will not meet the pertinent requirements ... as they relate to setbacks and height." Months later, M & H wrote the City Attorney asking "if there is some other action [M & H] could take that might overrule [the City's] letter of Oct. 25, 2005?" The City replied that "[a]ny variance ... must be approved by the Board of Architects and the City Commission."

In March 2007, less than one year after receiving the City's latest letter, M & H submitted a Notice of Intention to File a Claim under the Bert Harris Act, along with appraisals supporting its claimed loss in the property's fair market value. The City sent a Ripeness Determination to M ***74** & H, stating M & H's Notice of Claim did not fall within the scope of the Bert Harris Act.

M & H then filed a complaint in Bay County Circuit Court pursuant to the Bert Harris Act, claiming the enactment of the relevant ordinance had caused a significant loss of value in its property. M & H alleged (1) it purchased the property in reliance on the GC–1 zoning classification, which then had no height or setback restrictions; (2) M & H's reasonable investment-backed expectations were to develop the property "in accordance with the local rules and regulations for GC–1 zoning as then administered by the [City], which created an 'existing use' in the Subject Property as defined in F.S. § 70.001(3);" and (3) the City had "applied its new Ordinance to the Subject Property and/or take[n] the position that the new Ordinance is applicable" to the property.

The City filed a Motion to Dismiss for failure to state a cause of action under the Bert Harris Act, arguing the Act pertains only to as-applied challenges, not facial ones, and M & H never applied for a development order or building permit. Thus, the City argued, the mere enactment of the ordinance was not a legally sufficient ground to state a cause of action under the Act. In addition, the City pointed out that a 20–story residential condominium was not an "existing use" under the Act because the City's Comprehensive Plan did not allow residential uses of the property in the GC–1 zone, nor did M & H have a vested right in its plan to develop the project merely by virtue of purchasing the property in February 2005. * Moreover, the City argued, M & H had no reasonable investment-backed expectation that it could develop a 20–story residential condominium project on the property.

* In light of our ruling, it is unnecessary for us to reach this issue.

The trial court granted the City's Motion to Dismiss, finding the mere passage of the ordinance was a general action, not a specific governmental action which is required to trigger the Act.

Nature of Ordinance at Issue

The ordinance at issue in the present case sets general standards applicable throughout an entire zoning category; in this particular instance, it sets height and setback requirements. The ordinance does not change the land use classification or zoning category on any particular piece of property.

District-wide height and setback restrictions are normally considered to be enactments related to the general welfare of the community. *WCI Cmtys., Inc. v. City of Coral Springs,* 885 So.2d 912, 915 (Fla. 4th DCA 2004); *Moviematic Indus. Corp. v. Bd. of County Comm'rs of Metro. Dade County,* 349 So.2d 667, 669 (Fla. 3d DCA 1977).

Applicability of the Bert Harris Act

A trial court's ruling on a motion to dismiss is subject to *de novo* review. *See Extraordinary Title Servs., LLC v. Fla. Power & Light Co.,* 1 So.3d 400, 402 (Fla. 3d DCA 2009). We consider whether the trial court's order dismissing the case for failure to state a cause of action is correct as a matter of law.

We quote the Bert Harris Act at length to properly analyze the Legislature's intent regarding its enforcement:

> (1) ... The Legislature recognizes that some ... ordinances of the ... political entities in the state, *as applied,* may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitu ***75** tion.... Therefore, it is

> the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a[n] ... ordinance of ... a political entity in the state, *as applied,* unfairly affects real property.
>
> (2) When a *specific action of a governmental* entity has inordinately burdened an *existing use of real property or a vested right* to a specific use of real property, the property owner of that real property is entitled to relief....
>
> (3) For purposes of this section:
>
> ....
>
> (b) The term "existing use" means an actual, *present use or activity on the real property,* including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses, which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.
>
> ....
>
> (d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.
>
> (e) The terms "inordinate burden" or "inordinately burdened" mean that an action of [a] ... *governmental entit[y] has directly restricted or limited the use of real property* such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large....

§ 70.001(1)-(3), Fla. Stat. (2006) (emphasis added).

It is well settled that legislative intent is the polestar that guides a courts statutory construction analysis. *See Knowles v. Beverly Enters.-Fla., Inc.,* 898 So.2d 1, 5 (Fla.2004). To discern legislative intent, courts must look first and foremost at the actual language used in the statute. *See Borden v. East–European Ins. Co.,* 921 So.2d 587, 595 (Fla.2006). "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984) (quoting *A.R. Douglass, Inc. v. McRainey,* 102 Fla. 1141, 137 So. 157, 159 (1931)). Courts are not at liberty to add words that were not placed there by the legislature. *See Hayes v. State,* 750 So.2d 1, 4 (Fla.1999); *see also Karell v. Miami Airport Hilton/Miami Hilton Corp.,* 668 So.2d 227, 229 (Fla. 1st DCA 1996) ("Our task is to interpret and apply the statutes as written ... and not as one party or the other would like to have them written.").

As reflected above, the plain and unambiguous language of the Bert Harris Act establishes the Act is limited to "as-applied" challenges, as opposed to facial challenges. Indeed, section 70.001(1), Florida Statutes, states the Bert Harris Act provides for relief "when a new law, rule, regulation, or ordinance ..., *as applied,* ***76** unfairly affects real property." (Emphasis added); *cf. Taylor v. Village of N. Palm Beach,* 659 So.2d 1167, 1170–73 (Fla. 4th DCA 1995) (explaining a facial challenge is based on the mere enactment of a regulation, whereas an as-applied claim is based on a specific application for development).

Legal commentators, including those involved in drafting the Bert Harris Act, have also recognized the Bert Harris Act is limited to "as-applied" challenges and does *not* provide for facial challenges based on the mere enactment of a new ordinance or regulation:

> The Harris Act authorizes compensation *only for as-applied challenges* to governmental actions. This limitation can been [sic] seen in several provisions. For example, the statement of legislative intent makes clear that the Harris Act provides compensation "when a new law, rule, regulation, or ordinance of the state or a political entity in the state, *as applied,* unfairly affects real property."
>
> Accordingly, *the Harris Act may not be used to bring a facial challenge* to a statute, rule, regulation, or ordinance; the governmental entity must specifically apply the statute, rule, regulation, or ordinance to the owners property in order for the owner to have a Harris Act claim.

David L. Powell, et al., *A Measured Step to Protect Private Property Rights,* 23 Fla. St. U.L. Rev. 255, 289 (Fall 1995) (emphasis added); *see also* Ronald L. Weaver, *1997 Update*

on the Bert Harris Private Property Protection Act, 71 Fla. Bar J. 70, 72 (Oct. 1997) ("The governmental action in question must have been 'applied' to the subject real property because the act does not apply to facial attacks.").

Simply put, until an actual development plan is submitted, a court cannot determine whether the government action has "inordinately burdened" property:

> Without the benefit of an actual development application and expert staff review to determine how the general requirement applies to a particular property, how can the impact of a density limitation be determined? It is common to find that a particular piece of property cannot develop to the maximum extent theoretically permitted by the code, when all of the setbacks, landscaping requirements, preservation of environmentally sensitive areas, traffic flow and parking requirements, etc., are taken into account. In that event, the financial effect of a downzoning could be overstated if it is measured with respect to the theoretical maximum density and not the density actually achievable on the property.
>
> The actual achievable density cannot be known until one does the work of applying the regulations to the property. If claims are to be allowed under the act based on the mere enactment of a general density limitation, and the owner has not done this work, is the government now forced to site plan the property for the owner in order to figure it out? That seems to go beyond what should reasonably be expected of government....

Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims,* 78 Fla. B.J. 61, 63–64 (July/Aug. 2004); *see also* Ronald L. Weaver and Joni Armstrong Coffey, *Private Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation,* Florida Environmental & Land Use Law at 30.3–8 (June 2007) (stating the plain language of the Bert Harris Act supports the conclusion that "a jurisdiction-wide piece of legislation would not become ***77** actionable under the Act until a property owner has applied for development approval and been denied under the provisions of the legislation"). Thus, the trial court properly held the mere enactment of a general police power ordinance or regulation does not give rise to a Bert Harris Act claim.

The decision not to broadly construe the Bert Harris Act in a manner which would expand its scope beyond its literal terms is also supported by basic principles of municipal home rule. In adopting article VIII, section 2 of the Florida Constitution, the citizens of this state expressed a desire that municipalities have broad home rule powers to protect the general health, morals, safety, and welfare of the residents of the municipality. *Boca Raton v. Gidman,* 440 So.2d 1277 (Fla.1983). In 1973, the Legislature implemented the will of the people and made clear its intent to allow broad exercise of home rule powers granted by the constitution. The Municipal Home Rule Powers Act, section 166.021(4), Florida Statutes (1979), provides in part that

> [i]t is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes *not expressly prohibited* by the constitution, general, or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so *expressly prohibited.*

(Emphasis added).

Thus, an interpretation of state statutes which would impede the ability of local government to protect the health and welfare of its citizens should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action. *See Pinellas County v. City of Largo,* 964 So.2d 847, 853–54 (Fla. 2d DCA 2007) (rejecting use of implied preemption where the State legislation was not so pervasive as to evidence an intent to be the sole regulator); *Phantom of Clearwater, Inc. v. Pinellas County,* 894 So.2d 1011, 1019–20 (Fla. 2d DCA 2005) (finding that state fireworks regulation was not so pervasive as to suggest implied preemption); *GLA & Assoc., Inc. v. City of Boca Raton,* 855 So.2d 278, 282 (Fla. 4th DCA 2003) (finding the Florida Beach and Shore Preservation Act did not so pervasively legislate the area of beach conservation as to preempt local protective ordinances); *Palm Beach County v. Bellsouth Telecomm., Inc.,* 819 So.2d 876, 878 (Fla. 4th DCA 2002) (finding local ordinance charging Bellsouth a land occupation fee was not impliedly preempted by State legislation); *Lowe v. Broward County,* 766 So.2d 1199, 1207 (Fla. 4th DCA 2000) (finding a county ordinance recognizing

domestic partner relations and allowing for benefits to be paid to domestic partners of county employees was not impliedly preempted by state marriage laws), *rev. denied,* 789 So.2d 346 (Fla.2001).

The protection of the welfare of the local citizenry through the adoption of generally applicable land development regulations has been exclusively within the province of local government. Implied constraints within these particular areas should be even more carefully scrutinized. *Cf. HTS Ind., Inc. v. Broward County,* 852 So.2d 382 (Fla. 4th DCA 2003) (recognizing that in areas historically legislated by the states, the courts must narrowly construe any express preemption clauses so that if an ambiguity exists as to preemption, non-preemption should be found).

Applying the sanctions of the Bert Harris Act to local governments for the mere passage of ordinances dealing with the general police power needs of its citizens will severely limit the willingness of local ***78** government to act. This clearly was not the intent of the people in adopting article VIII, sections 1 and 2 of the Florida Constitution. We decline to tie local governments' hands in this matter, especially in light of the express language of the Bert Harris Act indicating its applicability to as applied challenges only.

Appellant also urges us to adopt the position that its informal discussions with the City Planning Manager and receipt of a letter constituted a specific application of the city ordinances to its particular property. We decline to do so for several reasons. First, these were informal communications with the City. Second, they constituted nothing more than statements that the general restrictions throughout the zoning district applied to appellant's property just as they applied to every other property within the zoning classification. These statements did not constitute an application or a specific action as to a particular piece of property.

Finally, appellant argues this case is controlled by *Citrus County v. Halls River Development, Inc.,* 8 So.3d 413 (Fla. 5th DCA 2009). It is unnecessary for us to address the correctness of that decision because we find it inapplicable in this case. *Citrus County* involved an amendment to a comprehensive plan which reclassified the land use category on a *particular piece of property.* In this case, we are dealing with adoption of a general land development regulation effective throughout an entire zoning district. *Citrus County* is, therefore, not controlling.

We AFFIRM.

PADOVANO, J., concurs; THOMAS, J., dissents with opinion.

THOMAS, J., dissenting.

I respectfully dissent. I would hold that the City's enactment of the ordinance, and the informal conceptual denial of the building plan, can form the basis of a cause of action under the Bert Harris Act. I see no conflict between the statute and Article VIII, section 2 of the Florida Constitution. The Bert Harris Act simply requires local governments to compensate a property owner where the governmental entity enacts a law or acts to reduce the property value to the extent defined by the Legislature. I think the Legislature has the authority to require compensation for private property owners whose property is unfairly burdened by local ordinances. I do not express a view, however, whether M & H can establish an existing use, as required by the Act, nor do I think we need to decide whether the ordinance of general applicability has imposed a burden on M & H's use of the property that is disproportionate to the public at large.

The City asserts the Act's language expressly limits claims challenging specific governmental actions affecting the subject property, not facial challenges. Conversely, M & H maintains, *sub judice,* that the informal pre-application conceptual review process constitutes specific action by the City.

I disagree with the City's view because, under some circumstances, it is possible that a governmental ordinance or regulation can provide grounds for a cause of action under the Bert Harris Act. The plain language of the statute applies to more than specific government actions denying development requests. The Act defines "action of a government entity" as "*including* action on an application or permit." § 70.001(3)(d), Fla. Stat. (2006) (emphasis added). Thus, this definition can apply where a law, ordinance or regulation so adversely affects a property owner that the owner is inordinately burdened. *See Citrus County v. Halls River Dev., Inc.,* 8 So.3d 413, 422–23 (Fla. 5th DCA 2009) ***79** (finding that amendment to a comprehensive plan which reclassified property was sufficient governmental action to start the one-year time requirement for a property owner to seek relief under the Act because the impact of the change was "readily ascertainable").

Furthermore, as argued by M & H, the Bert Harris Act specifically provides that claims made under it are separate and distinct from the law of takings. § 70.001(1), Fla. Stat. The Act envisions compensation for losses that need not meet the threshold of inverse condemnation or regulatory-taking claims. Thus, court decisions in takings claims, which require a claimant to demonstrate deprivation of all economically beneficial uses of the property, are not relevant in analyzing a Bert Harris Act claim.

I note, however, that due to its failure to file any type of site plan, building permit application or variance request, M & H's intended property use could be challenged as speculative, which the statute specifically excludes from protection. *See Palm Beach Polo, Inc. v. Vill. of Wellington,* 918 So.2d 988, 995 (Fla. 4th DCA 2006) (finding that a property owner could not show a "reasonable investment-backed expectation" for an existing use). In addition, the City's Comprehensive Plan prevails over conflicting zoning regulations. *See Halls River,* 8 So.3d at 420–21 (citing § 163.3167(1), Fla. Stat. (2005), and *Machado v. Musgrove,* 519 So.2d 629, 631–32 (Fla. 3d DCA 1987)).

Regardless, I think M & H is entitled to attempt to establish the facts necessary to prevail in its claim under the Bert Harris Act.

The Act establishes broad protection for property owners who suffer economic loss from governmental property regulations and actions that attempt to impose societal costs onto property owners. I do not think we have the authority to evaluate the merits of this policy enacted by the Legislature, but we must simply enforce the plain terms of the statute. Where the government enacts laws which reduce a property owner's value, in my view, that is an "action of a governmental entity" that can "inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution...." § 70.001(1)-(3), Fla. Stat.

It seems quite clear to me that this legislation has not excluded an ordinance of general applicability, and the majority opinion does not cite to any such language. I would reverse the trial court's order dismissing the complaint.

All Citations

28 So.3d 71, 34 Fla. L. Weekly D2554

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246 So.3d 501
District Court of Appeal of Florida, Fourth District.

GSK HOLLYWOOD DEVELOPMENT GROUP, LLC, Appellant,
v.
The CITY OF HOLLYWOOD, Florida, a Florida municipal corporation, Appellee.

No. 4D16–3453
|
May 2, 2018

Synopsis

Background: Developer filed suit against city, seeking compensation under Bert J. Harris, Jr. Private Property Rights Protection Act after city enacted height ordinance with height restriction that burdened developer's use of property. Following bench trial, the Circuit Court for the Seventeenth Judicial Circuit, Broward County, L.T. Case No. 09–032688 (13), William W. Haury, Jr., J., entered judgment for developer on Harris Act claim and for city on substantive due process claim. Parties appealed.

The District Court of Appeal, Kuntz, J., held that developer was not entitled to compensation.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Judgment.

***502** Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case No. 09–032688 (13).

Attorneys and Law Firms

Harvey W. Gurland, Jr., Scott H. Marder and Lida Rodriguez–Taseff of Duane Morris LLP, Miami, for appellant.

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Opinion

Kuntz, J.

GSK Hollywood Development Group, LLC filed a two-count complaint against the City of Hollywood ("City"), asserting a violation of the Bert J. Harris, Jr. Private Property Rights Protection Act (the "Harris Act") [1] and a violation of its substantive due process rights. The circuit court entered a final judgment in favor of GSK on its Harris Act claim, and in favor of the City on the substantive due process claim. On appeal, both parties challenge the court's findings.

1 *See* § 70.001, Fla. Stat. (2010).

We find merit in the City's argument on cross-appeal. [2] The then-existing version of the Harris Act required "action of a governmental entity." Because GSK never asked the City to act through a permit or variance application, a waiver request, or otherwise, it was not entitled to recover under the Harris Act. We reverse the court's judgment against the City.

2 We affirm, without further discussion, the issues raised by GSK on direct appeal as moot based on our resolution of the City's cross-appeal.

503** ***Background

In 2002, GSK purchased two parcels of real property located on Hollywood Beach, intending to develop the Mirador Project, a luxury 15–story condominium, on the property. The property was zoned to permit construction of up to 150 vertical feet and up to 25 residential units per acre. Before purchase, GSK spoke to the City's Director of Planning and Zoning, who orally confirmed the zoning.

In 2004, while working on conceptual plans, GSK presented the Mirador Project to various city leaders at an informal event. Following this presentation, the mayor informed GSK that residents of Summit Towers Condos, a neighboring condominium association, were voicing opposition to the project. At trial, GSK presented evidence that the mayor was receptive to Summit's residents. The mayor responded to their emails, writing that she had "protected the Summit from every bad project that has come down the pike" and that "when the presentations are made and the vote is taken, I'm sure my vote will make my friends at Summit happy ... as they always have."

Subsequently, the mayor introduced a proposal at a city commission meeting to reduce building-height limits from 150 feet down to 65 feet. Though the commission did not adopt the proposal, it ordered the City to begin a study on building heights.

After completing the study, the City's Planning and Zoning Board proposed a step-down ordinance, which would maintain the 150–foot height restriction, but gradually reduce building height approaching the beach. The commission rejected this plan on first reading while also rejecting the mayor's renewal of her proposal to immediately reduce building-height limits to 65 feet.

Days later, the mayor again placed her proposal on the agenda for the next commission meeting and, at her request, the city attorney prepared a new height ordinance limiting building height to 65 feet. At that meeting, the commission rejected the step-down ordinance proposed by the City's Planning and Zoning Board on second reading but the Mayor's new height ordinance passed on first reading. The commission formally approved the new 65 foot height ordinance at a later meeting.

GSK then filed its lawsuit against the City. GSK's complaint alleged the City violated its rights under the Harris Act by enacting a height ordinance with a height restriction that burdened its use of the property. The City moved for summary judgment on the basis that GSK's failure to submit an application to develop the property precluded it from establishing the City had applied a law or ordinance in a manner that burdened GSK's property.[3] The motion for summary judgment was denied without explanation.

3 In 2010, after filing the lawsuit in 2009, GSK formally submitted a preliminary site review plan to the City. Due to changes in the real estate market, this plan was substantially different than the plan at issue in this lawsuit. Regardless, the City's Technical Advisory Committee found GSK's project was "substantially compliant with the requirements of preliminary review." However, GSK informed the City it would not be seeking a height variance and the City's Planning and Development Services Department refused to sign-off on the project and schedule it for public hearing until either the application was amended to indicate a height variance or a settlement agreement was entered into regarding the project's proposed height.

The case went to trial. The City again argued GSK failed to apply for a permit or variance, which precluded recovery under the Harris Act. The court heard extensive testimony on the City's motion for directed verdict and again when the City renewed ***504** its motion. The court, however, did not orally rule on the issue. Instead, the record suggests the court informed the parties three separate times that a ruling on the motion would be forthcoming.

After oral argument, because of concerns that the issue was not preserved, we ordered the parties to direct the Court to any indication in the record showing the circuit court's ruling. The parties responded and disagree about how the circuit court conveyed its ruling. GSK asserts the court announced its oral ruling on liability during its instructions to the jury. The City argues the court announced its ruling during an unscheduled conference call from the court to the parties and later included its ruling on liability in the final judgment awarding damages. Regardless, both parties agree the court rejected the City's arguments and found the City liable under the Harris Act.

The City appeals the court's ruling at summary judgment and at trial, which rejected its argument that GSK's failure to apply for a permit, variance, or other formal relief precluded recovery under the Harris Act.

Analysis

We review the court's ruling on the City's motion for summary judgment, and the legal rulings during trial, *de novo*. *Ioannides v. Romagosa*, 93 So.3d 431, 433 (Fla. 4th DCA 2012).

In 1995, the "Legislature recognize[d] that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution." § 70.001(1), Fla. Stat. (2006). As a remedy, it enacted the Harris Act, and specifically stated in the statutory text:

> [I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief,

> or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Id.

In this case, we are tasked with determining whether a property owner can state a claim under the Harris Act when he or she never formally applied to develop the property. We conclude the answer is no. A claim relating to building restrictions under the then-existing version of the Harris act does not accrue unless the property owner formally applied to develop the property; thus, allowing the governmental entity to specifically apply the law or ordinance to the property in question.

The plain language of the statute supports our conclusion. The statute contains several references to laws, regulations, and ordinances "as applied," as well as the "specific action of a governmental entity" and the "specific use" of real property.

The first subsection of the Harris Act states that the "Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, *as applied*, may inordinately burden, restrict, or limit private property rights ...." § 70.001(1), Fla. Stat. (2006) (emphasis added). It also states that "the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, *as applied*, unfairly affects real property." *Id.* (emphasis added).

The second subsection focuses on "*specific action* of a governmental entity," and "*specific use*" of real property. *Id.* § 70.001(2) (emphasis added). Similarly, ***505** the third subsection provides that the "term '*action* of a governmental entity' means a *specific action* of a governmental entity which affects real property, including *action* on an application or permit." *Id.* § 70.001(3) (emphasis added). And the "terms 'inordinate burden' or 'inordinately burdened' mean that an *action* of one or more governmental entities has *directly* restricted or limited the use of real property ...." *Id.* § 70.001(3)(e) (emphasis added).

Finally, a later subsection provides that a "cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is *first applied by the governmental entity to the property at issue*." *Id.* § 70.001(11) (emphasis added).

Thus, the statute's plain language establishes that a claim under the Harris Act does not ripen until the governmental entity specifically applies the law or ordinance to the property in question. Because the plain language of the statute answers the question presented, we need not resort to the rules of statutory construction. *14269 BT LLC v. Village of Wellington*, 240 So.3d 1, 2–3, 2018 WL 443899 (Fla. 4th DCA Jan. 17, 2018).

While the facts here are materially different, the issue here is nearly identical to the issue addressed en banc by the First District in *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015). In *Smith*, the majority explained that the "dispositive issue ... is whether a property owner may maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property." *Id.* at 888–89.

The Smiths filed a lawsuit under the Harris Act, claiming their property was inordinately burdened by the city's rezoning of an adjoining piece of land, which resulted in the construction and operation of a fire station next door. *Id.* at 889. Because it had taken no direct action against the property, the City argued the Smiths failed to state a claim. *Id.* On appeal, the en banc majority agreed. *Id.* at 894. The First District concluded that direct action by the government as to the property in question was required for a claim under the Harris Act to ripen. *Id.* Allowing a claim to be presented when the governmental entity took no direct action "broadens the scope of the Harris Act far beyond its intended purpose and has the potential to open the floodgates for claims under the Act against state, regional, and local governmental entities whenever they approve development on one property (or conduct activities on their own property) that adversely impacts the value of another property." *Id.* at 894.

Judge Makar's dissent in *Smith* provides further support for our conclusion in this case. In his dissent, Judge Makar argued that "facial claims directed to the mere enactment of a law, for example, are not permissible until the law is applied to the property in question. Thus, jurisdiction-wide enactments of general applicability cannot be challenged; to do so would constitute a 'facial' challenge, which the Act prohibits." *Id.* at 909 (Makar, J., dissenting). Judge Makar continued, stating "[u]ntil a government action is actually applied in a specific

situation, the Act is dormant and merely inchoate. Contrarily, when an enactment is first applied to a property, it constitutes governmental action that may be subject to the Act in an 'as applied' context." *Id.* As discussed, GSK did not request a variance from the City to deviate from the ordinance. The ordinance at issue was never applied to the property, leaving the Harris Act claim "dormant" and "inchoate."

***506** We also acknowledge, as the Fifth District recognized in *Citrus County v. Halls River Development, Inc.*, 8 So.3d 413, 420 (Fla. 5th DCA 2009), the requirement that a property owner apply to develop property is not absolute. In *Citrus County*, the Fifth District explained the difference between a comprehensive plan and a zoning regulation. A "comprehensive plan is similar to a constitution for all future development within the governmental boundary"; whereas, "zoning involves the exercise of discretionary powers within limits imposed by the comprehensive plan." *Id.* at 420–21. In that case, the property owner argued the Harris Act claim could not be presented until an actual plan was submitted and rejected. *Id.* at 422. The court disagreed with the property owner and held that a change to a comprehensive plan can give rise to a claim under the Harris Act because a later zoning decision "that is not in accordance with the comprehensive plan is unlawful." *Id.* at 421. In other words, there was no action that could be taken to escape the effect of the "law or regulation" after the comprehensive plan was implemented.

This case is distinguishable from *Citrus County*. *See also M & H Profit, Inc. v. City of Panama City*, 28 So.3d 71, 78 (Fla. 1st DCA 2009) ("*Citrus County* involved an amendment to a comprehensive plan which reclassified the land use category on a particular piece of property. In this case, we are dealing with adoption of a general land development regulation effective throughout an entire zoning district. Citrus County is, therefore, not controlling."). Furthermore, GSK could have acted to escape the zoning height requirement and, had it done so, the City may have granted it a variance allowing the property to be built. Because GSK failed to make a formal application to develop the property, the City did not apply the ordinance to the property at issue. Thus, the claim under the Harris Act was not ripe.

Finally, we again note that the statute has been amended and now uses different language than the language used in the version of the statute governing this dispute. Our holding applies to the case before us and the version of the statute that governs this case. We express no comment about whether the statutory amendments would have affected GSK's claims.

Conclusion

GSK failed to seek a permit, variance, or other formal relief from the City before filing its Harris Act claim. As such, the City took no specific action on GSK's property and the claim was not yet ripe. If the Legislature intended to allow a claim in such a circumstance, it is for the Legislature to do so. The judgment in favor of GSK is reversed with instructions to enter judgment in favor of the City.

Reversed and remanded.

Warner and Conner, JJ., concur.

All Citations

246 So.3d 501, 43 Fla. L. Weekly D981

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241 So.3d 181
District Court of Appeal of Florida, Fourth District.

OCEAN CONCRETE, INC.
and George Maib, Appellants,
v.
INDIAN RIVER COUNTY, BOARD OF COUNTY COMMISSIONERS, Appellee.

No. 4D16–3210
|
[March 14, 2018]

Synopsis

Background: Landowner and his concrete company brought action against county for a violation of the Bert J. Harris, Jr. Property Rights Protection Act, regulatory taking, and violation of their due process rights after county denied their application to develop and run a concrete batch plant following a change to the zoning code from a light industrial zone to a general industrial zone. After a joint jury and bench trial, the 19th Judicial Circuit Court, Indian River County, No. 312007CA011589, Cynthia L. Cox, J., entered judgment for county. Plaintiffs appealed.

Holdings: The District Court of Appeal, Damoorgian, J., held that:

the planned concrete plant was an existing use under the Act;

use of property as a concrete plant was per se compatible with the surrounding land uses; and

plaintiffs' investment-backed expectations were reasonable.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Judgment.

***183** Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Cynthia L. Cox, Judge; L.T. Case No. 312007CA011589.

Attorneys and Law Firms

Stephen B. Burch, Geoffrey D. Smith and Susan C. Smith of Smith & Associates, Melbourne, for appellants.

Paul R. Berg of Vocelle & Berg, L.L.P., and Dylan Reingold, Vero Beach, for appellee.

Opinion

Damoorgian, J.

Appellants, Ocean Concrete, Inc. and its principal, George Maib, appeal a final judgment entered in favor of Indian River County (the "County") in Appellants' property rights related lawsuit against the County. The substance of this appeal is comprised of the following issues: (1) whether the court erred in its conclusion that Appellants failed to prove entitlement to relief under the Bert J. Harris, Jr. Property Rights Protection Act; [1] (2) whether the court considered irrelevant factors in reaching its conclusion that the County did not effectuate a regulatory taking of Appellants' property interests; and (3) whether the court made certain evidentiary rulings which require a retrial on Appellants' procedural due process violation claim. We affirm the second and third issues without further comment. As for the first issue, we conclude that the trial court reversibly erred and remand for further proceedings.

1 The Bert J. Harris, Jr. Property Rights Protection Act is codified in section 70.001 of the Florida Statutes (2008). For purposes of this opinion, it will be referenced to as the "Harris Act."

Factual Background

In 2002, Mr. Maib began formulating a plan to develop and run a concrete batch plant in the Treasure Coast area. A key element of the plan was acquiring a parcel of land with railway access which would ***184** allow him to keep costs down by importing raw material in bulk via freight train. With this is mind, Mr. Maib scouted the subject land, an 8.5+ acre parcel located near the city limits of the City of Sebastian in Indian River County. The parcel was zoned light industrial ("IL") under the County's zoning code which, at that time, provided that concrete batch plans were an allowed use in IL zoned districts. The lands surrounding the parcel, however, were primarily zoned for residential and limited commercial use. An aerial view of the parcel showed that the surrounding land was undeveloped.

In 2004, Mr. Maib entered into a contract to purchase the property for $575,000 with a 120 day inspection period. Mr. Maib retained an engineer to ascertain the feasibility of developing a concrete batch plant on the property. The

engineer testified that after reviewing all relevant documents, he had no concerns about the feasibility of the project from either an engineering or development standpoint. The engineer drafted a conceptual, pre-application site plan for County review. Mr. Maib and his engineer attended a meeting with County planning staff where the staff represented that a concrete batch plant was a permitted use as a matter of right under the zoning code and provided feedback about the project. Mr. Maib and his engineer left the meeting believing that the development of the plant was feasible and that none of the feedback from the planning staff would prohibit the development. Based on the foregoing, Mr. Maib purchased the property.

In 2005, Mr. Maib filed a site plan application for review by the County's Technical Review Committee ("TRC"). The TRC responded to the application in writing by listing out several "discrepancies" which needed to be addressed before moving forward with the application. The TRC's discrepancy letter also noted that a concrete batch plant was a permissible use of the property as a matter of right, the discrepancies were not significant, and that no second TRC meeting would be required for reconsideration of the application. Mr. Maib then underwent efforts to remedy those discrepancies and also began improving the property. Specifically, Mr. Maib obtained permits to install storm water systems, installed wells, cleared and graded the property, planted a landscape buffer, and began to install a rail spur. He also formed Ocean Concrete, Inc., began developing a detailed business plan, and sought out financing for the project. During this process, Mr. Maib realized that it was going to take an additional two years to meet all of the technical requirements for approval of the site plan. Therefore, he let the site plan application expire in November of 2006 with the intent of filing a new site plan application and requesting a one year extension. Mr. Maib filed a new site plan application on December 6, 2006.

Thereafter, the TRC issued another discrepancy letter identifying the discrepancies in the site plan application which Mr. Maib was required to address, in writing, before proceeding. This discrepancy letter again noted that the "site is zoned IL, Light Industrial. Concrete batch plants are a use permitted by right in the IL district" and that "the discrepancies do not appear to be significant, therefore, no second TRC meeting will be required for reconsideration of the proposal." Mr. Maib continued to address the discrepancies but, as he did, the project began garnering public and governmental opposition.

The nearby City of Sebastian issued a resolution imploring the County to deny approval for the proposed Ocean Concrete project. Around this same time, a group of citizens formed an organization called "Stop Ocean Concrete." The leader of this ***185** organization appeared at a Board of County Commissioners ("BCC") meeting and asked the BCC to amend the zoning code to eliminate heavy process uses from the IL zoning district. The BCC then directed the planning staff to analyze the issue and shortly thereafter, the County's planning director issued a memo recommending that the BCC change the zoning code to "restrict industrial uses such as concrete plants and paper mills that process large quantities of materials, produce dust and noise, and have outdoor activities to the IG (General Industrial) district." At its next meeting, the BCC voted to have the staff change the zoning code as recommended.

Following the BCC's vote, County staff began the process of amending the zoning code. Inevitably, the impact of any changes on Mr. Maib's existing site plan application was a point of heavy discussion. A May 8, 2007 memo written by a senior planner noted:

> The Ocean Concrete project is opposed by many residents of Sebastian and the north county, as evidenced by petitions and letters of objection submitted to staff. That project's application will expire on December 6, 2007 if it is not approved by that date. Because that site plan application is active, changes to the IL district regulations will not affect that application unless special effective date provisions are added to the amendment ordinance. At this time, the County Attorney has not issued an opinion as to whether or not the county can legally apply the proposed amendment to an existing application. The proposed changes will certainly affect applications to develop IL zoned sites submitted after the changes are adopted.

During this time and unbeknownst to Mr. Maib, the county attorney and the planning director were engaged in a

discussion about whether the proposed change to the zoning code would apply to the Ocean Concrete project. After the attorney opined that the change would apply to the project, the Planning and Zoning Commission voted to recommend approval of the changes to the zoning code. Thereafter, the BCC unanimously voted to adopt the amendments to the zoning code "void of any exception or merit for grandfathering of vested rights."

Appellants filed a declaratory action in the circuit court seeking clarification of their rights to proceed under the site plan application. They also filed a request for a one year extension with the County on their pending application. The County denied the extension and based on the expiration of the application, denied Appellants' application. Appellants administratively appealed and amended their declaratory action complaint to add a cause of action for violation of the Harris Act. Appellants' administrative appeals were denied, causing Appellants to file a petition for writ of certiorari with the circuit court sitting in an appellate capacity. The circuit court determined that the County must either grant the extension, state a valid reason for denial, or deny the site plan on its merits. The BCC voted to grant Appellants a one year extension under the "old code" provisions.

Following the reinstatement of Appellants' application, the County staff approved the site plan application under the old zoning code conditioned on a finding by the Community Planning Director of a vested right of development under the old code. The Community Planning Director, found that there was no vested right and denied Appellants' site plan application under the new code. Mr. Maib appealed the denial to the Planning and Zoning Commission but, while his appeal was pending, lost the property to foreclosure. The Planning and Zoning Commission then dismissed ***186** Appellants' appeal as moot. At this point, Appellants added a cause of action for a regulatory taking and violation of their due process rights to the declaratory action.

The matter proceeded to a simultaneous bench/jury trial with the court considering Appellants' regulatory taking, Harris Act, and substantive due process claims and a jury considering the procedural due process claim. At trial, Appellants presented expert testimony from a real property appraiser and construction business valuators. Appellant's experts valued the property with a completed concrete batch plant at $10 million. In turn, the County presented its own experts who opined that market value of the property before the zoning amendment was $1 million and that the change in the zoning amendment only reduced the property's value by 3.5%. The County also presented evidence to support its contention that operating a concrete batch plant on the property was not economically feasible.

At the conclusion of the trial, the jury found that the County did not violate Appellants' procedural due process rights. The trial court found that Appellants did not prove that the County effectuated a regulatory taking, violated the Harris Act, or violated Appellants' substantive due process rights. Holding that the court erred in finding no violation of the Harris Act, we reverse and remand.

Analysis

The Harris Act was enacted by the Florida Legislature in 1995 as a mechanism to protect and compensate any landowner whose property is affected by government action not rising to the level of a taking. §°70.001(1), Fla. Stat. (1995). To prevail under the Harris Act, the property owner must prove that "a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property." § 70.001(2), Fla. Stat. (2008). Accordingly, when a claim under the Harris Act is presented for judicial review, the court must first consider whether a claimed "existing use of the real property" or a claimed "vested right to a specific use of the real property" actually existed. If it finds either, it must next determine whether the government action inordinately burdened the property. § 70.001(6)(a), Fla. Stat. If the court also finds that that there was an inordinate burden, then it must impanel a jury to determine the total amount of compensation to the property owner for the loss caused by the inordinate burden to the property. § 70.001(6)(b), Fla. Stat. The party seeking relief under the Harris Act bears the burden of proof. *See Town of Ponce Inlet v. Pacetta, LLC*, 120 So.3d 27, 29 (Fla. 5th DCA 2013).

In this case, the court found Appellants did not establish that the use of the property as a concrete batch plant was an existing use. Alternatively, it found that the County's actions did not inordinately burden the property. We review these determinations de novo. *City of Jacksonville v. Coffield*, 18 So.3d 589, 594 (Fla. 1st DCA 2009).

a) Existing Use

The term "existing use" is defined by the Harris Act as:

[1] an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or

[2] such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the ***187** property greater than the fair market value of the actual, present use or activity on the real property.

§ 70.001(3)(b), Fla. Stat. (2008) (spacing and numbers added).

Because a concrete batch plant did not exist on the property, the court applied the second part of the "existing use" definition. Neither of the parties contend that this was improper. With this parameter in mind, the court then found that because a concrete batch plant was a permitted use as a matter of right under the County's old zoning code, it was a reasonably foreseeable use of Appellants' property. However, the court went on to find that a concrete batch plant was not a non-speculative use. This finding was rooted in economics, and more particularly, the court's determination that the project was not financially viable. The court also concluded that the use was not compatible with adjacent lands. For the reasons set forth below, we hold that the court's non-speculative use and compatibility analysis was legally incorrect.

i) Reasonably Foreseeable, Nonspeculative Use

Applying a plain language reading analysis to the statute leads us to conclude that the term relates to whether the actual **land use** is nonspeculative without concern to economics. The phrase "nonspeculative" appears in the definition of "existing use" as follows:

"reasonably foreseeable, nonspeculative land uses ..."

§ 70.001(3)(b), Fla. Stat. (2008).

The noun in the above phrase is "land uses." The terms "reasonably foreseeable" and "nonspeculative" are adjectives modifying the noun "land use." Thus, based on the grammatical structure, the key inquiry for the court is whether a concrete batch plant, as a **land use**, was foreseeable and nonspeculative at the time the County amended its zoning code. Notably, at least one appellate judge has arrived at the same conclusion. In his dissent in *City of Jacksonville v. Smith*, 159 So.3d 888, 913 (Fla. 1st DCA 2015),[2] Judge Makar wrote:

> The point of subsection 2 [within the existing use definition] is not to preclude "speculation" in the financial sense; if that were the case, no privately-held real property would qualify because land ownership always involves an element of financial risk. Instead [the definition] is designed to limit possible future land uses to only those that are within reason, i.e., "reasonably foreseeable" and "nonspeculative." Stated differently, future uses that are merely theoretical or hypothetical do not qualify; they are speculative in the sense of these two terms.

2 Our citation to the dissent in *Smith* is in no way meant to distinguish the majority holding as it is not applicable to the instant case. In *Smith*, the majority held that a landowner whose property abutted a vacant lot rezoned to allow a fire station was not entitled to relief under the Harris Act because the landowner's property "was not itself subject to any governmental regulatory action." 159 So.3d at 889. Based on this holding, the court did proceed to engage in an existing use or inordinate burden analysis under the Harris Act.

The plain language of the Harris Act is clear: the term "nonspeculative" refers to the land use and, therefore, a "nonspeculative use" analysis really only comes into play when a party is arguing that it may have been able to use its land in the future for a purpose not expressly provided for by the zoning code at the time of the government action. Conversely, when the use was expressly provided for, as it was here, there is no need for a speculation analysis. Accordingly, based on the plain language of the Act, the court erred ***188** in concluding that a concrete batch plant was not a nonspeculative land use when making its "existing use" determination.[3]

3 *See* David L. Powell, Robert M. Rhodes & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995). Discussing the definition of the term "existing use" at play in the Harris Act the authors (who happened to work on the legislation), stated:

> As a legal concept for an existing land use, the alternative definition is well-grounded in the law of eminent domain. In a condemnation proceeding, valuation of the property is based upon the highest and best use. The highest and best use is not limited to those uses authorized under the existing land development regulations. If on the date of taking there is a reasonable probability of a land use change, that probability may be taken into account in determining valuation. An important factor in determining the highest and best use of property is whether the property is suitable for that proposed future use. However, such a future use may not be wholly speculative....
>
> The proof necessary to establish that a future land use is reasonably foreseeable could come from such authorities as an adopted local comprehensive plan, local land development regulations, or a credible appraisal which relies at least in part on nonexisting but reasonably expected future uses.

Id. at 267–68 (footnotes omitted).

ii) Compatible with Adjacent Land Uses

In addition to finding that Appellants did not meet the "nonspeculative land use" prong of the "existing use" definition under the Harris Act, the court also found that Appellants failed to establish that a concrete batch plant was compatible with adjacent land uses at the time the code was amended. The court's conclusion was based on the fact that the land west of the property and half of the land south of the property was zoned for residential use. Although much of that land remained vacant, the court concluded that based on east to west wind patterns, the residential areas would experience noise and dust pollution from the property if it was developed into a concrete batch plant. The court also gave weight to the County's determinations during the code amendment process that "heavy process uses such as concrete plants which involve outdoor storage and handling of large quantities of material that result in noise and dust impacts are more compatible with and appropriately located in IG [General Industrial] districts, removed from concentrations of residential areas and separated from commercial uses and light 'clean' industry."

It is axiomatic that if an area is zoned for a particular use, that use is deemed compatible with surrounding uses. *See Nostimo, Inc. v. City of Clearwater*, 594 So.2d 779, 781 (Fla. 2d DCA 1992) (holding that use of property was compatible with surrounding or adjacent uses because it was a permitted use under the zoning code). Before the County amended the code, concrete batch plants were a permitted use on Appellants' property. Therefore, the use of the property as a concrete batch plant was *per se* compatible with the surrounding land uses. With this in mind, none of the County's evidence established that anything about the adjacent land uses changed between the time the old IL zoning description was created and the time it was amended. Accordingly, the court erred when it concluded that a concrete batch plant was not an "existing use" for the property because a concrete batch plant was not compatible with adjacent land uses at the time the code was amended.

b) Inordinate Burden

The Harris Act provides that the terms "inordinate burden" or "inordinately burdened" mean:

> ***189** [T]hat an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large....

§ 70.001(3)(e), Fla. Stat. (2008).

Here, although the court denied Appellants relief under the Harris Act based on its existing use analysis, it also cursorily addressed the inordinate burden prong of a claim under the Act, ruling that Appellants could not demonstrate a "reasonable, investment-backed expectation." The court's ruling on this point referenced its takings ruling, wherein the court found that Appellants did not establish that they had a reasonable, investment-backed expectation in developing a concrete batch plant because the "property contained site-specific conditions that entailed significant practical and financial impediments to its development as a concrete batch plant."

There are only two reported cases interpreting the phrase "reasonable, investment-backed expectations" in the specific context of the Harris Act. This Court's opinion in *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So.2d 988 (Fla. 4th DCA 2006), provides the most guidance. In that case, a developer made a Harris Act claim with respect to a wetland nature preserve which a local government required the developer to "restore, enhance, and preserve" as part of a Planned Unit Development. *Id.* at 990. On appeal, we held that the developer's claim under the Act was "frivolous" because, based on the physical characteristics and regulatory history of the preserve, there could be no reasonable expectation that the preserve would be used for anything other than conservation. *Id.* at 995. Citing our holding in *Palm Beach Polo, Inc.*, the First District later found that a landowner did not have a "reasonable, investment-backed expectation" of developing a parcel of land into a multi-family development after he learned that the only road leading to and from the property was being permanently closed. *Coffield*, 18 So.3d at 595, 599. These cases establish that whether a landowners expectations for development are "reasonable" and "investment-backed" depends on the physical and regulatory aspects of the property.

Despite the foregoing authority, the court relied on case law from the takings context when analyzing whether Appellants had a "reasonable, investment-backed expectation" of developing the property as a concrete batch plant. The court did so because the term "investment-backed expectations" is found in the test articulated by the United States Supreme Court for regulatory takings. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Although, based on the foregoing, it would seem reasonable to rely on takings cases, the Harris Act itself proclaims that it is "separate and distinct ... from the law of takings" and, to that end, also provides that "[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking." §§ 70.001(1); 70.001(9), Fla. Stat. (2008). Thus, we hold that the court's reliance on federal takings cases as opposed to Florida law interpreting the Harris Act was misplaced.

***190** Applying the applicable law, nothing about the physical or regulatory aspects of the property at the time of the government regulation made Appellants' expectations for the development of a concrete batch plant unreasonable. A concrete batch plant was a permitted use under the zoning code as a matter of right and throughout the site-plan approval process, Mr. Maib was led to believe that approval was inevitable. Further, Mr. Maib obtained the services of an expert engineer who told him that the development was feasible. Finally, the property abutted a railroad and Mr. Maib was able to install a spur to facilitate the importation and exportation of materials. That the overall undertaking may have been expensive and a significant task does not invalidate the fact that, based on the property itself, Appellants' investment-backed expectations were reasonable.

Based upon the foregoing, we reverse and remand this matter for a trial on damages suffered by Appellants under the Harris Act.

Affirmed in part, reversed in part and remanded.

Taylor and May, JJ., concur.

All Citations

241 So.3d 181, 43 Fla. L. Weekly D577

918 So.2d 988
District Court of Appeal of Florida,
Fourth District.

PALM BEACH POLO, INC., Appellant,
v.
The VILLAGE OF WELLINGTON, Appellee.

No. 4D04–2839.
|
Jan. 18, 2006.

Synopsis

Background: Village brought declaratory judgment action against developer that purchased large tract of land at a bankruptcy auction, seeking to enforce development plan requiring the preservation and restoration of a forest located within the tract, and developer counterclaimed for inverse condemnation. The Fifteenth Judicial Circuit Court, Palm Beach County, Catherine M. Brunson, J., after a bench trial, entered judgment in favor of village. Developer appealed.

Holdings: On motion for clarification, the District Court of Appeal, Warner, J., held that:

developer was not entitled to compensation pursuant to Bert J. Harris, Jr., Private Property Rights Protection Act;

development plan was not unconstitutional as applied to forest due to its failure to define terms; and

development plan did not constitute a regulatory taking of the forest.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***990** Larry A. Zink of Zink, Zink & Zink Co., L.P.A., for appellant.

Claudio Riedi and Anthony J. O'Donnel, Jr. of Lehtinen, Vargas & Riedi, P.A., Miami, for appellee.

On Motion for Clarification

WARNER, J.

We grant appellee's motion for clarification, withdraw our previously issued opinion and substitute the following in its place.

The Village of Wellington filed a declaratory action and also requested injunctive relief against appellant Palm Beach Polo, Inc. in connection with the 1972 Wellington Planned Unit Development. Pursuant to the PUD, Wellington sought to have Polo restore, enhance, and preserve an area known as Big Blue Reserve. Polo counterclaimed for inverse condemnation and violation of the Bert J. Harris, Jr., Private Property Rights Protection Act, claiming that the "Conservation" designation of Big Blue in Wellington's Code, as well as Wellington's insistence that Polo "preserve" and "restore" the area, constituted an "as applied" taking. Because the PUD agreement with Polo's predecessor-in-title contemplated the preservation of Big Blue and made specific provisions therefore, and because the developmental densities were transferred from the area in exchange for higher densities elsewhere, we conclude that no taking has occurred. We affirm the trial court's final judgment.

Big Blue Reserve or Forest is an undeveloped tract of land, approximately ninety-two acres in size, in the Village of Wellington. It contains wetlands and many old-growth cypress trees, some more than 300 years old. Big Blue is the focus of this appeal.

In 1971 most of the Village of Wellington was owned by AlphaBeta, Inc. and Breakwater Housing Corp. Desiring to develop Wellington, they entered into a Planned Unit Development with Palm Beach County. The result became the Wellington PUD.

A Planned Unit Development is a zoning device used to permit flexibility in design and use of property. *See Frankland v. City of Lake Oswego,* 267 Or. 452, 517 P.2d 1042 (1973). It is an agreement between the land owner and the zoning authority, and the terms of development are negotiated between the parties in accordance with the conditions set forth in the governing ordinances. A PUD plan, in compliance with zoning regulations, is submitted to the county for approval.

In 1972, the Zoning Resolution for Palm Beach County provided that, with respect to the Wellington PUD, "The intent and purpose of this section is to provide an alternative means of land development and to provide design latitude for the site planner." That year, the county approved the Wellington PUD submitted by AlphaBeta and Breakwater. It covered the development plan for 7400 acres. At the hearing approving the plan, several conditions were placed upon the approval. These included:

> Developer proposes an overall average of 2 dwelling units per acre with public open space of over 25%. Development expected to take at least until year 2000;
>
> ***991** Will enhance and preserve big blue areas and pine tree forests. Will develop a ring of water around it for protection. Will increase water level 1 foot (back to its original condition) and animal life can be restored to its original condition.
>
> Will preserve natural vegetation.
>
> A planned community of open spaces, bicycle paths, golf course and recreation areas, with restoration and preservation of big blue pristine forest areas.

The notes of the commission meeting reflect that as a reason for approval, the property, as zoned, could be developed with single-family dwellings with a density of four units per acre. However, the developer committed to an overall density of two units per acre, which was made one of the conditions of the plan. Big Blue was given an OS–R designation, meaning Open Space–Reserve, in an Agricultural/Residential zoning district.

A year later, in connection with an application for a binding letter of interpretation, the developer submitted an informational package to the State Department of Administration. In that package the developer stated the following regarding Big Blue:

> This 120–acre pristine forest containing some yet unnamed fern specimens, has been explored recently by a team of hardy souls who have ventured into this area to determine how best this untouched area can be preserved in its natural state.
>
> There have been claims of ferns 15 feet and higher as well as cypress trees reaching 85 to 100 feet in height flourishing in this wilderness area, along with abundant animal life. There is a definite contrast between the deafing [sic] quietness within the forest and the pure shrill sounds of literally dozens of species of birds.
>
> You can now walk into the Big Blue, very carefully, with proper guides; no vehicles will be allowed on the path. The Big Blue is a "must" evidencing an appreciation of the conservation, preservation and environmental attitude that is typical of the Wellington project.

In addition, the application by the Acme Improvement District for surface water management for the Wellington area noted that the environmental considerations upon most of the Wellington PUD property were not significant because it was abandoned agricultural land, *except for* Big Blue. In its application the District noted that Big Blue "will be preserved in its existing state...."

In 1987 the surface water permit plan was modified with a particular emphasis on the Big Blue. This was done based upon application of the Landmark Land Company of Florida, Inc. The South Florida Water Management analysis refers to the proposed modification as completing the berm around Big Blue. The review stated, "The restoration of the Big Blue is dependent upon the perimeter berm being completed and constant inundation being maintained.... Constant inundation will kill most of the Brazillian Pepper [exotic vegetation present] and prevent further invasion."

The county adopted its Comprehensive Plan in 1988. The next year, the developer asked for another modification of the Wellington PUD. In the ordinance approving the modification, the county made it conditional upon the amending of the tabular data of the plan to reflect the "acreage of the OS–R natural reserve known as Big Blue reserve."

Landmark experienced financial difficulties and went into bankruptcy. In 1993, Palm Beach Polo's sister company purchased Landmark's interest in Wellington, including the Big Blue Reserve at a bankruptcy ***992** auction. Prior to the purchase, it received and reviewed a five volume Due Diligence Report regarding the entire property. Prepared by the bankruptcy trustee, the report conceded that it had not exhausted all information available about the property, but it included the Wellington Master Plan which designated the Big Blue Reserve as OS–R. The Surface Water Management Permits were also referenced in the report. However, no one on behalf of Polo contacted Palm Beach County Planning and Zoning Department or the county records to check the local land use regulations and other resolutions or permits. The

sister company purchased the property essentially "as is." It then transferred the property to Polo in November 1993.

Prior to trial, Wellington and Polo submitted a joint pretrial stipulation, in which they stated:

> As of 1993, the zoning designation of the land in the Wellington PUD as a whole, which included Big Blue, was and is AR–SE (PUD), which stands for Agricultural/Residential subject to a Special Exception for a Planned Unit Development. The Wellington PUD Master Plan in 1993, and still today, designated Big Blue as "OS–R," which means Open Space–Recreation. Big Blue has remained undeveloped until today.

Wellington became incorporated after the purchase by Polo. In 1999, it adopted its own comprehensive plan which essentially followed the Palm Beach County Comprehensive Plan. The 1999 Wellington plan included a "conservation" designation for Big Blue. According to its officials, this was merely a restatement of the property's longstanding OS–R designation under the PUD. It imposed no duties that were not in existence prior to its designation as conservation.

Polo protested the conservation designation in the plan, making a claim under the Bert J. Harris Act, and Wellington responded with a letter reciting its position that no change would be made to the comprehensive plan designation for Big Blue. Polo then invited the council members to visit the site. At a subsequent meeting, the Polo president offered to give Wellington fifty acres of the site, but based on the council members' responses at the meeting, he believed that the proposed plan had no chance of approval.

Wellington then filed its own suit for declaratory judgment seeking to enforce the requirements of the 1972 PUD regarding Big Blue for flooding of the property and removal of exotic vegetation. Polo answered, contending that it had no legal obligation to preserve Big Blue. It asserted that the preservation boundaries were not legally described and that the restorative measures were too general in the original 1972 PUD to be enforced, nor were they properly implemented prior to Polo's acquisition in 1993. It counterclaimed for inverse condemnation, contending that the requirements for preserving Big Blue constituted an unlawful taking and a violation of the Bert J. Harris Act.

After a lengthy trial with voluminous exhibits, the court found in favor of Wellington. Specifically, the court determined, in part:

> 4. Florida law has no requirement that zoning regulations be recorded in the chain of title to be enforceable against a property owner. An owner is legally obligated to examine the public records of the zoning authority and is on constructive notice of the ordinances, resolutions, and filed plans and restrictions governing a parcel of property. *Metropolitan Dade County v. Fontainebleau Gas & Wash,* 570 So.2d 1006 (Fla. 3DCA 1990); *Town of Lauderdale–by–* ***993** *the–Sea v. Meretsky,* 773 So.2d 1245 (Fla. 4DCA 2000). In the present case, all of the land regulations, restrictions and obligations were set forth or referenced in the Due Diligence Report provided to and reviewed by Polo prior to its acquisition of the property in 1993. As Polo presented no contrary or competing case law this Court finds that Polo was obligated to comply with the zoning regulations in existence as the time of the purchase.
>
> 5. This court further finds that the conditions preserving Big Blue as a natural open space under the PUD Master Plan are enforceable zoning regulations, as interpreted by Wellington's zoning director, to be followed by Polo. As required by law, this Court defers to the interpretation given to the regulations by the agency responsible for its administration. See *Las Olas Tower Co. v. City of Ft. Lauderdale,* 742 So.2d 308 (Fla. 4DCA 1999); *Department of Environmental Regulation v. Goldring,* 477 So.2d 532 (Fla.1985).
>
> 6. Wellington presented testimony that in 1993, the PUD Master Plan included conditions and restrictions applicable to Big Blue that required the purchaser to "preserve and enhance" Big Blue; "increase the water level 1 foot" within Big Blue; and maintain Big Blue as an "open space" natural reserve with no residential units assigned to it and no other development or alteration permitted. The terms "preserve" and "open space" are specifically defined in Wellington's Uniform Land Development Code. Further, Wellington presented the testimony of its zoning director, Paul Schofield, that he interpreted the terms "preserve" and "open space" in accordance with their code definitions and plain dictionary meanings. He also interpreted the terms "enhance" and to "increase the water

level 1 foot" in accordance with their plain dictionary meanings as permitted by the Uniform Land Development Code. Polo offered no alternative interpretations or any authority that allowed some other agency official to render an interpretation. This Court concludes that Polo, as the purchaser of the property was required to comply with the zoning regulations.

7. The uncontradicted testimony at trial clearly established that the PUD Master Plan restrictions on the use of Big Blue existed many years prior to Polo's acquisition and were compensated for by allocation of any development rights of Big Blue to other parcels within the boundaries of the Wellington PUD tract. As a result, Polo failed to establish any reasonable investment-backed expectations with respect to development of the Big Blue property. Accordingly, Polo's alleged inability to develop this PUD parcel does not constitute an unconstitutional taking or inverse condemnation. *City of Riviera Beach v. Shillingburg,* 659 So.2d 1174 (Fla. 4DCA 1995); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

8. The uncontradicted evidence established that the PUD Master Plan allowed for a total of 14,625 residential units within its boundaries at density of approximately two dwelling units per acre. Said units were allocated to specific parcels to create a plan of development of different parcels containing a variety of different densities and uses. This planned allocation resulted in some parcels having a higher density than two dwelling units per acre, some having a lower density and some, such as the Big Blue Parcel, having no density at all. Each parcel has a specific number of residential units assigned on the overall ***994** plan, but the total residential density of the entire PUD tract was required to be below two units per acre in accordance with the property's LR–2 designation under Palm Beach County's comprehensive plan. The average two units per acre residential density given Big Blue under the comprehensive plan's LR–2 designation was completely transferred out of Big Blue under the PUD Master Plan and allocated to other parcels in the development so that the owner received compensating development rights for its agreement to preserve Big Blue as a natural, open space reserve.

As to Polo's takings claims, the court determined that Polo had not presented a meaningful application for an amendment to the comprehensive plan such that the issue was ripe for adjudication. *See Taylor v. City of Riviera Beach,* 801 So.2d 259 (Fla. 4th DCA 2001); *Tinnerman v. Palm Beach County,* 641 So.2d 523 (Fla. 4th DCA 1994).

In reference to Polo's claim that Big Blue was not legally described in the 1972 plan, the court found:

12. As an affirmative defense, Polo asserts that the preservation areas were not legally described in the original 1972 PUD resolution. The evidence showed that the PUD Master Plan, golf course site plans and residential subdivision plats adopted to implement the Wellington PUD after its initial conceptual approval in 1972 progressively refined the size and boundaries of Big Blue. Resolution 87–522 adopted in 1977 expressly set forth the requirement that the PUD Master Plan be revised to reflect the PUD's preservation areas and that the boundaries of preservation areas be "platted concurrent with adjacent residential tracts". See Resolution No. R–87–522; Due Diligence Report; Exhibit E; Plf. EX 51. The evidence clearly established that the boundaries have been refined over the years as the property has developed. Accordingly, this defense is without merit.

With respect to Polo's claim that the preservation requirements had not been enforced, the court dismissed this claim as follows:

13. Polo further asserted as a defense that the PUD zoning requirements were not properly implemented or enforced prior to Polo's acquisition in 1993. Florida law provides that a local government is authorized to enforce its regulations even if it has not previously done so by either mistake or delay. *Metropolitan Dade County v. Fontainebleau Gas & Wash, supra; Town of Lauderdale-by-the-Sea v. Meretsky, supra.* Local governments have the right to enforce duly adopted regulations. Hence, this affirmative defense is contrary to established Florida law.

As relief, the court required Polo to comply with the PUD Master Plan's restrictions by preserving Big Blue and protecting it from alteration and development activities, to

enhance it by removing exotic vegetation, and to preserve and enhance it by increasing the property's water levels by one foot above existing levels. Polo appeals this judgment.

We dispose first of Polo's claim that it is entitled to compensation under the Bert J. Harris Act, section 70.001, Florida Statutes. That statute creates a cause of action where a law, regulation, or ordinance, as applied inordinately burdens, restricts, or limits use of property without amounting to a taking. Section 70.001(2) provides:

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, ***995** the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value....

Section 70.001(3)(e) provides, in part:

> The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

The statute defines "existing use" in section 70.001(3)(b) as follows:

> The term "existing use" means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

We think it is fairly obvious from the abundant history of Big Blue that there was no "reasonable, investment-backed expectation" for an existing use of Big Blue at all. From 1972 forward it was designated as a natural reserve and extraordinary efforts were made to preserve this important pristine forest. As part of the PUD, any development density available to the acreage in Big Blue was transferred to other property in the Wellington PUD. At the time Polo purchased the Wellington property, Big Blue was designated as a nature reserve. Wellington's redesignation of it as a "conservation area" in its comprehensive plan changed nothing regarding the property. Polo failed to establish that at any time it was entitled to build on the property. In sum, Polo's claim that a violation of the Bert J. Harris Act occurred is frivolous.

Polo next argues that the 1972 Wellington PUD Master Plan is unconstitutional as applied to the Big Blue property because it is overly broad and vague, lacking definition of critical "technical" terms. It includes in those "technical" terms the words "big blue areas," "preserve," "restoration," "enhance," and the like. Even if we were to agree that these are "technical" terms, which we do not, both Polo's predecessors-in-title, as well as the regulating agencies, have given specific meanings to them.

"Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. Of course, that deference is not absolute, and when the agency's construction of a statute amounts to an unreasonable interpretation, or is clearly

erroneous, it cannot stand." *Las Olas Tower Co. v. City of Fort Lauderdale,* 742 So.2d 308, 312 (Fla. 4th DCA 1999) (citations omitted) (holding that interpretation of word in city code by agency responsible for its administration was a reasonable interpretation and therefore lower court applied correct law in determining that agency did not depart from essential requirements of law). Here, the Director of the Department of Zoning testified ***996** at length to the interpretation of these terms. Some terms were defined in the zoning code, and some required the ordinary dictionary definition of the term. In its final judgment, the trial court also noted that Polo offered no alternative interpretations for the terms.

At the time Polo acquired the property, the Palm Beach County Comprehensive Plan, its ordinances, and resolutions controlled the property. The Comprehensive Plan contained an entire element on conservation which included policies with respect to the preservation of natural resources. The plan also defined "preservation" as "the perpetual maintenance of areas in their original state." Subsequently, the Wellington Code also provided definitions, and stated that these definitions "shall be liberally construed in order that the true intent and meaning of the Board of County Commissioners as established in the Comprehensive Plan may be fully carried out." The Code defines the terms "preserve" as follows:

> Preserve or preserve area means that portion of native vegetation which is required to be set aside from development or other alteration activities, protected from the removal of any native plant species, managed to maintain viability for wildlife habitat, and maintained free of non-native plant species.

William Boose, the director of the Palm Beach County Planning and Zoning Department in 1972, testified that at the time he approved the PUD plan, he understood the term "preserve," as it related to Big Blue, as "the long term preservation of the area in its natural state without man-made alteration except for exotic vegetation removal, which would have been recommended." Further, Guerry Stribling, the president of Breakwater Housing Co., which was one of the original applicants for the 1972 PUD, testified that it was his intention to preserve Big Blue in its natural state.

The trial court was correct in deferring to the agency's interpretation of its zoning code. The entire history of Big Blue and its regulation by the county and then the Village of Wellington shows that the meanings of the terms were well understood by all parties. Not only were they understood generally, but substantial evidence shows that specific requirements were also understood. The South Florida Water Management District Surface Water Management Permits are quite specific in the berming of Big Blue to inundate the property and also to remove exotic vegetation.

It is particularly appropriate to rely upon the interpretation of the zoning director, which was confirmed by *both parties* who negotiated the terms of the PUD, as to this conditional use designation. As noted in *Westminster Homes, Inc. v. Town of Cary Zoning Board of Adjustment,* 354 N.C. 298, 554 S.E.2d 634, 638 (2001):

> [C]onditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's *agreement* to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.... [T]he only use which can be made of the land which is conditionally rezoned is that which is specified in the conditional use permit.

[Citations omitted]. [Emphasis supplied].

In *Westminster,* petitioners challenged a conditional permit which limited their ability to install fences on their property. The court upheld the permit's restrictions and held that:

> The permit is a result of a compromise bargain, an agreement for higher density development by Westminster in exchange ***997** for additional privacy protection for Harmony Hill.... Harmony Hill residents would be left with substantially less than the privacy for which they bargained if gates were permitted under the

> permit, after giving the full benefit of greater development to Westminster and petitioners.

Id. at 641.

Similarly, in this case, the original developers of the PUD property, AlphaBeta, Inc. and Breakwater Housing Co., included in their 1972 PUD application the specific conditions regarding Big Blue that were ultimately adopted and incorporated into the 1972 PUD plan. Stribling testified that in working up the PUD application he had several meetings with the Palm Beach County Planning and Zoning Board in which there was an exchange of information and ideas. Breakwater's and AlphaBeta's intentions were to preserve Big Blue and restore it to its original state. In return, the county permitted them to have great flexibility in their development plans, and the trial court found that the owner received compensating development rights for the preservation of Big Blue. It would be contrary to the original agreements to allow Polo to now avoid the obligations that its predecessors in title consented to, and which it had actual knowledge of through the extensive history in the public documents regarding the Wellington PUD.

Finally, we need not spend further time or effort in analyzing a takings claim. Although the Big Blue property will be flooded and thus unusable for development, that is precisely the condition of the property that Polo's predecessors agreed to in exchange for developing other property with higher densities. In *City of Riviera Beach v. Shillingburg,* 659 So.2d 1174 (Fla. 4th DCA 1995), a regulatory takings case, this court explained that the denial of use of some of a landowner's property does not itself constitute an unlawful taking, because the property must be considered in its entirety. In determining if a portion of the land should be considered as a whole or treated separately, the factors to be considered are whether the land is contiguous and whether there is unity of ownership. *Id.* at 1183. Whether there is a taking of Big Blue property requires a consideration of what occurred when the PUD was originally developed on the 7400 acres of Wellington in 1972. It was at that time that the owners bargained for development of vast sections at higher densities in return for preservation of Big Blue. This was an agreed restriction, compensated by the transfer of development rights to other property. No taking has occurred.

The trial court's judgment was thorough and correct. We affirm it in its entirety.

KLEIN and TAYLOR, JJ., concur.

All Citations

918 So.2d 988, 31 Fla. L. Weekly D202