SUPREME COURT OF FLORIDA

R. LEE SMITH
and CHRISTY SMITH,

Petitioners,

v.

CITY OF JACKSONVILLE,

Respondent

Case No. SC15-534
L.T. Nos. 1D14-2191
16-2012-CA-7994

REPLY BRIEF

On Petition (Certified Question) From the First District Court of Appeal
Reversing the Order of the Circuit Court for the Fourth Judicial Circuit
In and For Duval County, Florida

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PRELIMINARY STATEMENT

The petitioners, R. Lee Smith and Christy Smith, will be referred to as the "Smiths." The respondent, City of Jacksonville, will be referred to as the "City."

The Bert J. Harris, Jr., Private Property Rights Protection Act, Fla. Stat. § 70.001 (2012), will be referred to as the "Act."

Citations to the initial, answer, and amicus curiae briefs will be made to [I.B. page(s)], [A.B. page(s)], and [A.C.B. page(s)] respectively. Citations to the appendix to the City's initial brief in the First District Court of Appeals will be made to [A. page(s)].

ARGUMENT

The Act focuses on the *effect* government action has on real property. The City contends that government action incidentally affecting property values is not actionable under the Act. This is not the certified question. Rather, the certified question is whether the Act supports a cause of action by real property owners absent a law, regulation, or ordinance being *applied directly* to the owner's real property.[1] [Op. 16]. The Act's plain language imposes no such limitation.

I. THE ACT DOES NOT REQUIRE THAT GOVERNMENT ACTION BE APPLIED DIRECTLY TO AN OWNER'S

[1] This case is before the Court as a matter of great public importance. The City suggests in the answer brief that the "Court need not answer the question of great public importance, as application of the Act going forward has already been clarified by the Legislature . . . ." [A.B. 36]. This is incorrect. The City already made this argument in a suggestion of mootness which the Court denied.

REAL PROPERTY.

The City looks to two sources for its contention that the Act requires the direct application of government action.

A. The government action need only affect, but not be applied to, an owner's real property.

The City contends that the Act's "as applied" language requires a government action to be applied to an owner's real property. [A.B. 15-17]. This argument is misguided.

Subsection 1 of the Act indicates that the Act provides for "as applied" claims. Fla. Stat. § 70.001(1) (2012). The "as applied" term is necessary to distinguish between claims based on a fact-specific effect or impact of a government action on a parcel of real property as opposed to an abstract, "facial" claim against the enactment of a law, regulation, ordinance, or so forth. *See M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 75-76 (Fla. 1st DCA 2009). This is a well-established use of the language. *See Miles v. City of Edgewater*, 190 So. 3d 171, 178 (Fla. 1st DCA 2016) ("An as-applied challenge . . . is an argument that a law which is constitutional on its face is nonetheless unconstitutional as applied to a particular case or party, because of its discriminatory effects; in contrast, a facial challenge asserts that a statute always operates unconstitutionally."); *Collins v. Monroe*, 999 So. 2d 709, 713 (Fla. 3d DCA 2008) ("A facial taking . . . occurs when the mere enactment of a regulation . . . deprives the property owner of all

reasonable economic use of the property . . . . In an as-applied claim, the landowner challenges the regulation in the context of a concrete controversy specifically regarding the impact [i.e. effect] of the regulation on a particular parcel of property.").

Here, the Smiths did not proceed under a theory that the removal of the deed restriction, the rezoning, or the issuance of the building permit, on their face, inordinately burdened the Smiths' adjacent real property. No such claim exists under the Act. Instead, the Smiths alleged and showed that the City's actions under the facts of this particular case (i.e. as applied) adversely and unfairly affected their real property. [A. 55-59, 512-18].

B. The government action must be the direct cause of an inordinate burden on, but need not be directly applied to, an owner's real property.

The basis for the City's contention that the application of a government action must be applied directly to an owner's real property is found in the Act's definition of an "inordinate burden." [A.B. 15-23]. But this again misstates the Act.

The Act entitles a real property owner to relief if a government action inordinately burdens his or her real property. Fla. Stat. § 70.001(2) (2012). The Act defines an inordinate burden in two ways:

> The terms "inordinate burden" and "inordinately burdened":
> 1. Mean [1-a] that an action of one or more governmental entities

> has *directly restricted or limited* the use of real property such [1-b] 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* [2] 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.

Fla. Stat. § 70.001(3)(e) (2012) (emphasis added). The placement of the "directly restricted or limited" clause subjects the provision to two different constructions.

For example, if the provision is read as definitions [1-a] and [2], the language requiring that an inordinate burden directly restrict or limit the use of real property is only included in the first definition. The second definition would not require a direct restriction or limitation. Of note, the trial court relied on the second definition to find that the City's actions inordinately burdened the Smiths' real property. [A. 516-17]. Therefore, under this reading of the Act, the clause requiring a direct restriction or limitation did not apply to the Smiths claim.[2]

However, even if the provision is read as definitions [1-b] and [2], and the direct restriction and limitation clause applies to both definitions, the outcome is the same. The term "direct" in this instance goes to causation. That is, whether the government action was a direct (as opposed to an indirect) cause of the diminished use of the real property. *See* Black's Law Dictionary (10th ed. 2014) (defining

[2] The dissent in the First District indicated that this is grammatically the appropriate construction of the provision. [Op. 43-45].

"direct causation" as "[a] cause that directly produces an event without which the event would not have occurred"; defining "direct" as "[f]ree from extraneous influence; immediate"). In other words, a government action may directly cause a reduction in viable uses of real property although the government action is never itself applied directly to the real property. Here, the City's action was the direct cause restricting and limiting the use of the Smiths' real property and its market value. Namely, while nothing formally prohibited the Smiths from marketing the real property as a premium home site, the existence of the marine fire station had that effect as evidenced by expert testimony in the trial court. [A. 514-18]. The Act requires nothing more.

II. THE ACT, READ AS A CONSISTENT WHOLE, PROTECTS THE OWNER OF ANY REAL PROPERTY INORDINATELY BURDENED BY GOVERNMENT ACTION.

The City next contends that different provisions of the Act can only be read as a consistent whole if relief is limited to owners of real property to which a government action has been directly applied. [A.B. 23-29]. The City predominately targets references to the "subject property" and the "real property at issue" as evidence that the Act is referring to real property subjected to a government action. There is no basis for the City's conclusions.

For example, the Act defines "property owner" as the person holding legal title to the "real property at issue." Fla. Stat. § 70.001(3)(f) (2012). But the real

property at issue is simply the real property affected by the government action.

The Act provides elsewhere that a court may consider the factual circumstances leading to the time lapse between the enactment of a law or regulation and its application to the "subject property" when determining whether an investment-backed expectation has been inordinately burdened. Fla. Stat. § 70.001(3)(e) (2012). But this provision is not mandatory and only highlights a single factor to consider when weighing investment-backed expectations. Courts may or may not consider these facts regardless of whether a law or regulation applied directly to the claimant's real property. Any further meaning requires implying additional terms not included by the legislature. Moreover, this provision, which discusses an inordinate burden in the context of a real property owner's investment-backed expectations, only applies to the first definition of an inordinate burden. If anything, this indicates that the Act contemplates circumstances under the second definition when the circumstances of a government action's application to real property would not be a consideration. Most notably, this would be the case when a government action imposed an inordinate burden on a parcel of real property without being applied directly to the property.

The City also looks to subsection 4 of the Act providing that whenever a settlement agreement would have the effect of changing the application of a rule,

regulation, ordinance, or statute to the "subject real property," a joint motion must be filed to obtain court approval of the agreement. Fla. Stat. § 70.001(4)(d) (2012). By requiring court approval of settlement agreements with these particular terms, as opposed to all agreements, the Act contemplates other settlement agreements which will not involve altering the application of a rule, regulation, ordinance, or statute to real property and thus will not require court approval. By way of example only, subsection 4 expressly provides that a government entity may settle a claim by offering to purchase the real property or by payment of consideration. Fla. Stat. § 70.001(4)(c)(10) (2012). This and other remedies are equally applicable to any real property affected by a government action whether or not the effect derives from a direct application of the government action to the owner's real property.

With regard to subsection 5, the City contends that the pre-suit notice requirement that a government entity must give written notice of "the allowable uses to which the subject property may be put" would be meaningless if the Act applied to real property other than real property actually subjected to a government action. Fla. Stat. § 70.001(5)(a) (2012). However, subsection 5 is part of the Act's pre-suit settlement process in an attempt to resolve disputes without legal action. Putting the parties on notice of the allowable (i.e. lawful) uses of a parcel of real property, whether or not those uses are practical under the circumstances, is

necessary for the parties to evaluate pre-suit whether an inordinate burden has occurred. But subsection 5 at no time states that a legal restriction or limitation on the allowable uses of property is a prerequisite to a claim under the Act. If the Act intended to screen owners of real property without certain legal restrictions or limitations on allowable uses, the Act could have easily specified as much.

Subsection 7 provides that a government entity obtains a right, title, and interest in rights of use in real property for which compensation has been paid under the Act. Fla. Stat. § 70.001(7)(b) (2012). It makes sense that a government entity compensating an owner of real property for inordinately burdening that property may obtain a transferable right to continue burdening that real property in the same manner. For example, the Smiths, or their successors, would be precluded from suing the City, or its successors, for the same harm. Subsection 7 makes clear that the real property owner sells a right to inordinately burden his or her real property by obtaining relief under the Act.

Also, in arguing subsection 7, the City directs the Court to the Duval County public records for the proposition that the Smiths' no longer own the real property adjacent to the marine fire station. [A.B. 2, 27]. This information was not presented to the trial court. The City's reference to non-record evidence, albeit by footnote, is highly improper and should be disregarded. *See Altchiler v. State, Dep't of Professional Regulation*, 442 So. 2d 349, 351 (Fla. 1st DCA 1983) ("That

an appellate court may not consider matters outside the record is so elemental that there is no excuse for an attorney to attempt to bring such matters before the court." (internal citations omitted)). Nevertheless, this fact was not relevant to the First District's decision and is not relevant to the Court's resolution of the certified question.

III. THE LEGAL AUTHORITY CITED BY THE CITY IS FACTUALLY DISTINGUISHABLE AND NOT PERSUASIVE.

First and foremost, the City relies on a 1995 Attorney General opinion, Op. Att'y Gen. Fla. 95-78, for the proposition that the Act does not apply to real property that was not actually subjected to government action. [A.B. 20-21, 30-31]. While such opinions can be persuasive, they are not statements of law; they are not precedent; and they are not binding on the state's highest court. The opinion in question was issued without any factual or legal analysis. And the opinion is contrary to the Act's plain language. *See Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 473-74 (Fla. 2005) (disregarding Attorney General opinions which ignore the statute's plain language). For these reasons, the opinion is not persuasive.

Moreover, the opinion does not fully answer the question posed. The opinion initially tracks the Act's plain language to opine that the Act provides relief for the owners of real property affected directly by a government action.

From there, however, the opinion concludes that owners of real property not subjected to, but incidentally affected by, government action are not entitled to relief under the Act. The opinion assumes, as does the City, that real property cannot be affected directly (at least more than incidentally affected) unless it is the subject of government action. This is a critical oversight. The Smiths are case-in-point.

In *M&H Profit, Inc. v. City of Panama City*, a city ordinance mandated height and setback requirement for the development of certain real property. The property owner sought to develop the real property and sued the city under the Act. The City cites to dicta in *M&H Profit* that the government action must be specifically applied to the owner's real property. [A.B. 20]. But the court ruled on other grounds that facial claims are not actionable under the Act and that the property owner had yet to realize an inordinate burden. Namely, the court held that:

> The ordinance at issue in the present case sets general standards applicable throughout an entire zoning category . . . . The ordinance does not change the land use classification or zoning category on any particular piece of property . . . . [T]he plain and unambiguous language of the Bert Harris Act establishes the Act is limited to "as-applied" challenges, as opposed to facial challenges . . . . Simply put, until an actual development plan is submitted, a court cannot determine whether the government action has "inordinately burdened" property . . . . [T]he mere enactment of a general police power ordinance or regulation does not give rise to a Bert Harris Act claim.

Id. at 74-77. This is not inconsistent with the Smiths' position.

Here, the Smiths' claim is not based on a facial challenge to a general ordinance. Unlike in *M&H Profit*, the City rezoned property, obtained a building permit, and constructed the marine fire station. [A. 237, 264]. The City's action was applied to a particular parcel of real property, and the inordinate burden was realized on a parcel of real property as a direct result of the government action. The question certified to the Court is whether these parcels of real property must be the same. *M&H Profit* did not decide this issue.[3]

IV. THE ACT WAS A BOLD MOVE IN FAVOR OF PRIVATE PROPERTY RIGHTS BUT NOT THE CATACLYSMIC CHANGE THAT THE CITY SUGGESTS WILL RENDER LOCAL GOVERNMENTS INOPERABLE.

To start, the Act imposes an initial evidentiary burden on real property owners to obtain an appraisal supporting the claim and demonstrating a loss in fair market value. Fla. Stat. § 70.001(4)(a) (2012). This must be done within a year of the actionable government action. Fla. Stat. § 70.001(11) (2012). The parties are thereafter required to go through what amounts to a statutory mediation process before filing suit. Fla. Stat. § 70.001(4-5) (2012). Even then, a real property owner risks incurring prevailing party attorney fees and costs if he or she rejects a

[3] *M&H Profit* was postured differently than this case. In order to analogize the cases, assume that the claimant in *M&H Profit* owned real property adjacent to the developers' real property; that the developer had obtained a variance from the general ordinance, was granted a building permit, and had constructed an otherwise non-confirming structure; and that the claimant is left with unreasonable uses as a direct result. The court did not face these facts or address this issue.

written settlement offer and is ultimately unsuccessful. Fla. Stat. § 70.001(6) (2012). These measures discourage excessive and frivolous claims under the Act. In this case, however, the record does not reflect that the City made a written settlement offer which is a prerequisite under subsection 4(c) of the Act to a government entity's entitlement to attorney fees. [A. 58, 148, 636-38]. Furthermore, actions under the Act are bifurcated for separate trials of liability and damages. The trial court sits as a gatekeeper to evaluate the facts of a given claim before incurring the expense of a full trial. *See Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312, 313-17 (Fla. 5th DCA 2016) (discussing the circuit judge's broad statutory powers to effectuate the purpose of the Act and obligation to weigh the interests of private property owners with the public).

Next, the argument is unpersuasive that affording relief under the Act to an owner of real property that was not subjected to a government action creates a new class of plaintiffs. [A.C.B. 3-6]. The Act unequivocally states that it is a new cause of action separate and distinct from the existing law of takings. Fla. Stat. § 70.001(1) (2012). Therefore, there is no reason to assume that the Act's class of plaintiffs is limited to the same class of plaintiffs under the law of takings.

However, this argument also misstates the class of plaintiffs under the law of takings. For example, Florida courts have repeatedly found that noise, vibrations,

and other disruptive factors emanating from a neighboring airport may amount to a taking even though no government action was purposefully directed at a claimant's real property. *See Foster v. City of Gainesville*, 579 So. 2d 774, 776-77 (Fla. 1st DCA 1991) ("[T]he property owner must establish a diminution in value to the property caused by the noise and vibrations of low-flying aircraft to establish an entitlement to inverse condemnation."); *Fields v. Sarasota-Manatee Airport Auth.*, 512 So. 2d 961, 963 (Fla. 2d DCA 1987); *Young v. Palm Beach County*, 443 So. 2d 450, 451-52 (Fla. 4th DCA 1984). The Smiths are similarly situated plaintiffs.

V. THE ACT'S WAIVER OF SOVEREIGN IMMUNITY GOES HAND IN HAND WITH THE CAUSES OF ACTION AVAILABLE UNDER THE ACT.

The Act clearly and unequivocally "waives sovereign immunity for causes of action based upon the application of any law, regulation, or ordinance subject to this section [70.001], but only to the extent specified by this section [70.001]." Fla. Stat. 70.001(13) (2012). The City again argues that references to a "subject property" or "property at issue" creates ambiguity. [A.B. 37-41; A.C.B. 7-15]. However, this merely reargues the scope of actions available under the Act. Sovereign immunity is waived to the full extent that a cause of action exists under the Act. It is unnecessary and would be improper for the Court to analyze policy considerations to reach a result contrary to the waiver's plain language.

VI. THE 2015 AMENDMENTS TO THE ACT DO NOT AFFECT THE ACT'S APPLICATION TO THE SMITH'S

CLAIM.

The 2015 Florida legislature amended the Act, specifically amending the definition of "property owner" to narrowly include owners of "real property that is the subject of and directly impacted by the action of a governmental entity." Fla. Stat. § 70.001(3)(f) (2016). The amendment took effect in October 2015 and applied prospectively only. The fact that an amendment precludes future claims under the Act has no bearing on the application of the pre-amendment version of the Act at issue before the Court.

The City contends that the 2015 legislature agreed with it and the First District's interpretation of the Act. The City also cites to the 2015 amendment's staff analysis. [A.B. 35-36]. Respectfully, the 2015 legislature's opinion regarding the pre-amendment version of the Act is meaningless. The judiciary, not the legislature, is accountable for interpreting the law. And if the Court deems it necessary to look to legislative intent to construe an ambiguous law, it is the intent of the enacting legislature that is of interest.

The Court has previously recognized that amendments made soon after a law's enactment may be viewed as a "clarification" of the law and legislative intent, as opposed to a "change" in the law. *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1210 (Fla. 2006). But here, more than 20 years passed between the Act's enactment and the amendment; more than 20 years

passed between the controversy being brought to light by an Attorney General opinion and the amendment; and more than 6 years passed between the controversy arising in *M&H Profit* and the amendment. This gap is too long to view the amendment as a mere clarification. *See id.* (finding gaps of 7 and 10 years "too long to view the amendment[s] as merely [] clarification[s] of legislative intent"). Rather, the 2015 amendment substantively changed to Act.

CONCLUSION

The First District certified a narrow question of great public importance. That is, may real property owners maintain an action under the Act if no law, regulation, or ordinance has been applied directly to the owner's real property? The briefs unnecessarily stray from that question.

On this point, the Act broadly creates a cause of action for any owner of real property when a specific action of a governmental entity (i.e. an action affecting real property) inordinately burdens an existing use or vested right to a use of the real property. This requires a factual inquiry as to whether the alleged burden was directly caused by the government action. The language is broad but not ambiguous. The Act's plain language does not require the direct application of a government action to a claimant's real property, and such a restriction should not be judicially imposed.

Therefore, the First District's opinion should be reversed.

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is typed using Times New Roman 14 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished by electronic service on July 11, 2016, to the following: Jason R. Teal, Esq. at JTeal@coj.net; Sean B. Granat, Esq. at SGranat@coj.net; and Craig D. Feiser, Esq., at CFeiser@coj.net.

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