NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES J. JAMIESON,

Appellant,

v.

TOWN OF FORT MYERS BEACH, FLORIDA,

Appellee.

Case No. 2D19-238

Opinion filed March 25, 2020.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Ryan C. Reese of Moore Bowman & Reese, P.A., Tampa, for Appellant.

Hudson C. Gill and Jeffrey L. Hockman of Johnson, Anselmo, Murdoch, Burke, Piper & Hockman, P.A., Fort Lauderdale, for Appellee.

MORRIS, Judge.

James J. Jamieson appeals a final summary judgment entered in favor of the Town of Fort Myers Beach (the Town) on his complaint alleging counts for inverse condemnation, partial inverse condemnation, and a violation of the Bert J. Harris, Jr., Private Property Rights Protection Act (the Bert Harris Act). In granting summary judgment, the trial court concluded that Jamieson's counts were barred because he

bought the property with notice of a wetlands restriction and his claims were not ripe as he had not made meaningful application to the Town to develop the property. In this appeal, we find merit in Jamieson's arguments that the trial court erred in ruling that the wetlands designation that existed at the time of his purchase barred his takings claims and that the trial court erred in ruling that his claims were not yet ripe even though he had made several attempts to obtain approval from the Town to develop the land. Accordingly, we reverse the final summary judgment on all three counts of Jamieson's complaint.

In 2002, Jamieson and a partner purchased two parcels consisting of seven acres of vacant land in the Town of Fort Myers Beach. The two parcels are divided into forty platted lots, each 50 feet by 110 feet; the property was platted in 1919 as part of the Seagrape Subdivision. An aerial view of the property shows that the land surrounding the property on three sides is fully developed; the fourth side of the property is waterfront.

Prior to 1995, the property was under the jurisdiction of Lee County. In 1995, the Town was incorporated, and in 1998, the Town adopted a comprehensive plan that included a future land use map designating the entire subject property as wetlands, with a permitted maximum density of one dwelling unit per twenty acres. This designation was not supported by any environmental study or analysis but was carried over from the Lee County Comprehensive Plan. Under the Town's comprehensive plan, the property was subject to the "minimum use determination" (MUD) process, which allowed a property owner to apply for a determination of whether each plotted lot qualifies for residential use. In March 2003, a year after Jamieson purchased the

property, the Town adopted its own development code which includes section 34-3274, providing that "[l]ots qualifying for a [MUD] may not place the home, accessory structures, or driveways on any land in the 'wetlands' or 'recreation' category on the future land use map of the comprehensive plan." Thus, this provision restricted the MUD process as it applied to property designated as wetlands on the future land use map of the comprehensive plan.

In 2010, Jamieson petitioned the South Florida Water Management District for a formal determination as to the extent of the wetlands existing on the property, and the District determined that 61% of the property was wetlands, 12% was surface waters, and 27% was upland. In 2011, Jamieson presented this determination to the Town in an application for administrative interpretation, asserting that the Town's wetlands designation was incorrect. The Town issued its determination that "no clear factual error" existed in designating the property as wetlands.

In 2012, Jamieson applied for a MUD for all forty lots, requesting a determination that all the lots qualified for residential use. The application was referred to the local planning agency, which denied the application on the basis that section 34-3274(c) of the land development code prevented a home, structure, or driveway from being placed on wetlands. Jamieson appealed the agency's decision to the Town Council, but the parties agreed to hold the appeal in abeyance pending Jamieson's application for a comprehensive plan amendment.

In 2013, Jamieson applied for a small-scale comprehensive plan amendment, seeking to transfer the historical density attached to his lots to other property that he owned in the Town so that he could develop the other property.

Despite a favorable recommendation by the Town's staff, the Town denied the application in November 2014.

In December 2014, the Town Council heard Jamieson's appeal of the agency's decision. In Resolution 14-29, the Town Council reversed the agency's decision and granted Jamieson a MUD that allowed for construction of one single-family home per lot. However, the comprehensive plan still required Jamieson to comply with section 34-3274(c) of the land development code, which prevents a home from being placed on wetlands.

In 2015, Jamieson applied for a variance from section 34-3274(c). The Town did not process the application, stating the following:

> The subject lots are in the Wetlands category on the future land use map of the comprehensive plan, therefore the requests are for variance from the uses permitted on the subject lots. Sec. 34-203 [of the land development code] states that use variances are not legally permissible and the town cannot process applications for use variances.
>
> If the future land use category for the subject lots was not Wetlands or Recreation, the construction of one single-family dwelling on each of the subject lots may be permitted. A small scale comprehensive plan amendment to change the future land use designation of the subject lots is recommended; the application form is enclosed.

In 2016, Jamieson filed a formal "notice of claim" pursuant to section 70.001, Florida Statutes (2015), the Bert J. Harris, Jr., Private Property Rights Protection Act (the Bert Harris Act). The Town responded with an offer to administratively remove three lots from the wetlands category to allow Jamieson to develop those lots with residential units. However, the offer required Jamieson to agree

that the development of these three lots "represents the full amount of development rights to which the property owner is entitled under Resolution 14-29."

Jamieson rejected the Town's Bert Harris offer by filing suit against the Town in January 2017. He asserted a count for inverse condemnation (count I), a count for partial inverse condemnation (count II), and a count for a violation of the Bert Harris Act (count III). In November 2017, Jamieson filed a motion for summary judgment on count I. The Town responded and filed a cross-motion for summary judgment.

After a hearing, the trial court granted summary judgment in favor of the Town on count I. The court ruled that Jamieson's claim is without merit because when he purchased the property in 2002, the property was not eligible for development as a single-family residence and had not been since at least as early as 1995. The court also ruled that the claim is not ripe because Jamieson did not make a meaningful application to the Town to develop the property by applying to amend the wetlands designation or maximum density.

The Town then moved for summary judgment on counts II and III, arguing that the reasoning for summary judgment on count I also supported summary judgment on counts II and III. Jamieson moved for rehearing of the trial court's order on count I, which the trial court denied. Jamieson then moved for summary judgment on counts II and III, and the Town responded. After a hearing, the trial court granted summary judgment in favor of the Town on counts II and III, finding that Jamieson's claims are not ripe, based on the same reasoning applied to count I. The trial court entered final judgment in favor of the Town, which Jamieson now appeals.

"We review de novo the trial court's determination that [the Town] was entitled to—and that [Jamieson] was not entitled to—a judgment as a matter of law." Highlands-In-The-Woods, L.L.C. v. Polk County, 217 So. 3d 1175, 1178 (Fla. 2d DCA 2017). In count I, Jamieson alleged a categorical taking under the inverse condemnation theory. "Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." Sarasota Welfare Home, Inc. v. City of Sarasota, 666 So. 2d 171, 173 (Fla. 2d DCA 1995) (citing City of Pompano Beach v. Yardarm Rest., Inc., 641 So. 2d 1377 (Fla. 4th DCA 1994)). Relevant to this case, the Supreme Court has recognized a category of takings "where regulation denies all economically beneficial or productive use of land." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Id. at 1019 (emphasis omitted). Jamieson alleged that the Town's regulations caused him to suffer a permanent and total deprivation of all use and enjoyment of his property.

In ruling that Jamieson is not entitled to relief as a matter of law on count I, the trial court found that it was undisputed that the property was not eligible for development with single-family residences when Jamieson took title in 2002. The trial court referenced the comprehensive plan adopted in 1998 that restricted development to one dwelling unit per twenty acres.

In Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001), the Supreme Court considered whether "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction [such that he] is barred from claiming that it effects a taking."

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Id. at 626-27 (citations omitted). The Court recognized language in Lucas holding that "a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which 'inhere in the title itself.' " Id. at 629 (quoting Lucas, 505 U.S. at

1029). The Court rejected the government's argument that "Lucas stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment," holding that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." Id. at 629-30.

> This relative standard would be incompatible with our description of the concept in Lucas, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see id., at 1029-1030, 112 S.Ct. 2886. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See id., at 1030, 112 S.Ct. 2886 ("The 'total taking' inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself.

Id. at 630.

The trial court recognized Palazzolo in its order but distinguished the facts of Palazzolo, noting that "the claim [in Palazzolo] had not yet ripened by the time the property was transferred to a 'new owner' who has been the sole shareholder in the corporation that had owned the property for decades." The trial court went on to say that Palazzolo "holds that an owner who acquires title to property while awaiting a final decision from the government on the property's development rights is not subject to a 'blanket rule' that always strips that owner of a potential taking claim." We do not read Palazzolo so narrowly. The language in Palazzolo makes it clear that notice of a

preexisting regulation does not operate as an absolute bar to a takings claim. See also Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 733 (Fla. 1st DCA 2002) ("[W]e find no legal support for the contention that the [property owners] are somehow precluded from asserting their constitutional rights . . . because they bought the property subject to the previous determination of blight." (relying on Palazzolo, 533 U.S. at 627)). Indeed, in Palazzolo, 533 U.S. at 629-30, the Court reaffirmed its pre-Lucas holding in Nollan v. California Coastal Commission, 483 U.S. 825, 834 n.2 (1987), which rejected the argument that the plaintiffs in that case were on notice of a preexisting regulation when they purchased the property. In Nollan, 483 U.S. at 833 n.2, the Court held that the plaintiffs' rights were not

> altered because they acquired the land well after the [government] had begun to implement its policy. So long as the [government] could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Here, Jamieson acquired the full property rights when he bought the property, including the right to challenge the existing wetlands designation. Therefore, the trial court erred in determining that count I was barred as a matter of law because the wetlands designation existed before he acquired the property.

We now turn to the issue of ripeness, which was an alternative basis for granting summary judgment on count I and the sole basis for granting summary judgment on counts II and III.[1] The trial court ruled that Jamieson still has potential

[1]The trial court ruled, and Jamieson agreed, that the doctrine of ripeness applies to partial takings claims, see Town of Ponce Inlet v. Pacetta, LLC, 226 So. 3d 303, 314 (Fla. 5th DCA 2017), and Bert Harris Act claims, see § 70.001(3)(e)(1), Fla. Stat. (2017).

opportunities to secure development rights for the property. The trial court ruled that Jamieson could apply to amend the future land use map to change the wetlands designation or could apply to amend the comprehensive plan to change the maximum density or intensity allowed on the future land use map.

"While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." Palazzolo, 533 U.S. at 620.

> [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Id. at 620-21.

> Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies.

Id. at 625-26 (citation omitted). "Florida courts have adopted the federal ripeness policy of requiring a 'final determination from the government as to the permissible uses of the

property.' " Golfrock v. Lee County, 247 So. 3d 37, 39 (Fla. 2d DCA 2018) (quoting Taylor v. Vill. of N. Palm Beach, 659 So. 2d 1167, 1173 (Fla. 4th DCA 1995)).

"[T]he Supreme Court has carved out what has been characterized as a limited exception in cases where further attempts to obtain approval of an application would be futile." Id. (citing Palazzolo, 533 U.S. at 619-22). "[W]here the governmental agency effectively concedes that any other development would be impermissible, this can negate the requirement of pursuing further administrative remedies and the governmental action is effectively treated as a final decision." Taylor v. City of Riviera Beach, 801 So. 2d 259, 263 (Fla. 4th DCA 2001) (quoting City of Rivera Beach v. Shillinburg, 659 So. 2d 1174, 1181 (Fla. 4th DCA 1995)); see Alachua Land Inv'rs, LLC v. City of Gainesville, 107 So. 3d 1154, 1158 (Fla. 1st DCA 2013) ("The corollary is that the ripeness doctrine does not require a landowner who alleges a regulatory partial taking to file a meaningless, futile application to the governmental agency."). "No bright-line test exists for determining how far the landowner must go in challenging the limits of allowable development under the regulations." Alachua Land Inv'rs, LLC, 107 So. 3d at 1159.

Here, the permissible uses of the property were clear to a reasonable degree of certainty when Jamieson filed his complaint. In 2011, Jamieson challenged the wetlands designation and was told that the wetlands designation was not erroneous. In 2013, he submitted an application for a comprehensive plan amendment, seeking to transfer the historical density attached to his forty lots to other property in the Town, and the application was denied. In 2014, the Town granted Jamieson a MUD that allowed for construction of one single-family home per lot, but section 34-3274(c) of the land

development code still prevented him from placing homes on the property based on the property's wetland designation. In 2015, the Town declined to process his request for a variance, suggesting that he seek a small-scale comprehensive plan amendment to change the wetlands designation. Finally, when he filed notice of a Bert Harris Act claim in 2016, the Town offered to settle his claim by removing the wetlands designation for three lots only, provided that he give up his development rights to the remaining thirty-seven lots. Thus, it is reasonably certain that the Town will not permit Jamieson to develop ninety-three percent of his property based on its wetlands designation.[2] The Town never asserts that the wetlands designation would allow any development or other economically beneficial or productive use of the property; it argues only that Jamieson should have sought to amend the wetlands designation. But based on the history of his applications and the Town's responses, it is clear that the permissible uses of the land were known and that any further application to the Town to change the wetlands designation would be futile. See Taylor, 801 So. 2d at 263 (holding that land owner's takings claim was ripe where she applied for a building permit and it was denied; she was not required to apply for amendment to the comprehensive plan, and such application would be futile where town had previously rejected a proposed amendment to the plan that would allow the type of construction that land owner sought in her application for a building permit).

[2]The Town's offer to allow development of three lots is relevant to whether the Town's position was known to a reasonable degree of certainty. However, we make no comment on whether a taking occurred where the Town offered Jamieson the opportunity to develop three of the forty lots.

For the reasons explained above, the trial court erred in granting summary judgment as a matter of law on all three counts and we reverse the final summary judgment entered in favor of the Town.

Reversed and remanded.

KHOUZAM, C.J., and BADALAMENTI, J., Concur.