DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

LAKE LINCOLN, LLC,

Appellant,

v.

MANATEE COUNTY, FLORIDA,

Appellee.

No. 2D21-2826

January 13, 2023

Appeal from the Circuit Court for Manatee County; Charles Sniffen, Judge.

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

William E. Clague, County Attorney, Christopher M. De Carlo, Assistant County Attorney, and Whittni Hodges, Assistant County Attorney, Bradenton, for Appellee.

JACOBUS, Bruce W., Associate Senior Judge.

Plaintiff Lake Lincoln, LLC, appeals a final summary judgment in favor of Defendant Manatee County (the County) in Lake Lincoln's action which asserted two claims: (1) a claim under the Bert J. Harris, Jr., Private Property Rights Protection Act and (2) a claim for inverse

condemnation for a categorical temporary regulatory taking.[1] The only question presented on appeal is what is the "relevant parcel" upon which Lake Lincoln's takings claim in count two should be measured. Because the trial court erred as a matter of law in determining that the relevant parcel was an entire 1,124-acre development of regional impact (DRI), rather than a 10.32-acre parcel within the DRI, we reverse the final summary judgment entered in favor of the County on count two and remand for entry of a partial summary judgment regarding liability on count two in favor of Lake Lincoln. We affirm the final summary judgment as to count one.

This action arose from the County's restrictions on the use of a 10.32-acre parcel that Lake Lincoln owns. The 10.32-acre parcel is located within the 1,124-acre Tara DRI, which was created in 1980. Tara-Manatee, Inc., the original developer of the Tara DRI, transferred the 10.32-acre parcel to Lake Lincoln by warranty deed in 2008. Tara-Manatee was later dissolved. The same person was the principal of both Tara-Manatee and Lake Lincoln. The 10.32-acre parcel is vacant and undeveloped, save for some landscaping and a community sign. In 2009, it was zoned Planned Development Residential (PDR). The County Comprehensive Plan future land use element designated the 10.32-acre parcel as Retail/Office/Residential. Other areas of the Tara DRI have different future land use designations. The Tara DRI development order and zoning ordinance are the governing documents for the allocation of development entitlements for the various phases of the Tara DRI.

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[1] Lake Lincoln consented to the entry of judgment in favor of the County on count one based on the trial court's rulings on count two. The judgment for the County on count one is not at issue on appeal.

In 2009, Lake Lincoln applied to the County to amend the Tara DRI development order and zoning ordinance. It sought to create a 3.32-acre subparcel, "Subphase III-BB," within its 10.32-acre parcel, rezone the newly-created subparcel from PDR to Planned Development Commercial (PDC), transfer existing commercial and/or residential entitlements from other DRI subphases to Subphase III-BB to grant the parcel development rights, and add an adult assisted living facility use to Subphase III-BB. To mitigate against a one-acre wetland impact within the newly-created 3.32-acre subphase, the residual land within the 10.32 acres was proposed to be environmentally enhanced and placed into conservation. The application also sought other unrelated changes to the DRI, such as the addition of adult assisted living facility uses to other designated subphases and clarification on permissible locations for a storage warehouse.

The County denied all of Lake Lincoln's requested amendments related to the 10.32-acre parcel, including the creation of Subphase III-BB. In doing so, it declined to follow the planning staff's recommendation with respect to suggested residential uses, determining instead that the transfer of any entitlements to the 10.32-acre parcel would be inconsistent with the County's Comprehensive Plan and Land Development Code. The County approved the remainder of the application and subsequently issued a decision that identified "open spaces" and "wetlands" as the allowable uses of the 10.32-acre parcel.

At the time the County denied the amendments in 2010, Lake Lincoln owned only 12.73 acres of land in the 1,124-acre DRI in addition to the 10.32-acre parcel. That 12.73 acres is not contiguous to the 10.32-acre parcel. The over 11,000 remaining acres had been sold to others over the years since 1980 and had been developed to a variety of

uses, including single-family residential, multifamily residential, commercial, public, and recreational.

As a result of the denials related to the 3.32-acre subparcel, Lake Lincoln filed its lawsuit against the County in 2012 and alleged a permanent regulatory taking arising under article X, section (6)(a), of the Florida Constitution. Settlement negotiations ensued. In 2019, the County ultimately approved the rezoning of subparcel III-BB to authorize limited residential/residential support uses. Thus, between October 2010 and September 2019, the 10.32-acre parcel's use was restricted to open spaces and wetlands.

Lake Lincoln subsequently amended its complaint in count two to allege a categorical regulatory taking for the almost nine-year period based on the County's denial of the development application seeking amendment of the DRI development order to assign entitlements to and rezone the 3.32-acre parcel. As to count two, the County filed a motion for summary judgment and Lake Lincoln filed a motion for partial summary judgment as to liability.

After a hearing on the motions, the trial court granted summary judgment in favor of the County on June 11, 2021. In its order the trial court concluded, "Considering the relevant factors and the undisputed facts and giving particular weight to the unique interdependence created by the DRI regulatory scheme, the Court finds the appropriate 'relevant parcel' in this case is the entire Tara DRI property." After the trial court entered a final summary judgment, Lake Lincoln appealed.

Lake Lincoln contends that the trial court erred in concluding that the 1,124-acre Tara DRI was the "relevant parcel" upon which Lake Lincoln's takings claim should be measured. Lake Lincoln argues that a proper application of the undisputed facts to the relevant law

demonstrates that the 10.32-acre property is the appropriate relevant parcel. We agree with Lake Lincoln that although the trial court identified the appropriate test established by the Florida Supreme Court in *Department of Transportation, Division of Administration v. Jirik* (*Jirik II*), 498 So. 2d 1253 (Fla. 1986), to determine the relevant parcel, the trial court failed to properly apply the facts to that test. In doing so, the trial court reached the wrong legal conclusion.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a).[2] We conduct a de novo review of the trial court's order granting summary judgment. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *see also Murphy Auto Grp. v. Fla. Dep't of Transp.*, 310 So. 3d 1066, 1068 (Fla. 2d DCA 2020) (stating that appellate review is de novo of an order that grants summary judgment based on a matter of law).

The Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner." Art. X, § 6(a), Fla. Const; *see also Murphy Auto*, 310 So. 3d at 1068 ("[G]overnmental entities may not take private land for a public purpose without paying just compensation." (first citing Amend. V, U.S. Const.; and then citing Art. X, § 6, Fla. Const.)) "Inverse condemnation is a cause of action by a property owner to recover the

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[2] *See In re Amends. to Fla. Rule Civ. Proc. 1.510*, 317 So. 3d 72, 75, 77 (Fla. 2021) ("New rule 1.510[, which adopts the federal standard,] takes effect on May 1, 2021. This means that the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases.").

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." *Jamieson v. Town of Fort Myers Beach*, 292 So. 3d 880, 885 (Fla. 2d DCA 2020) (quoting *Sarasota Welfare Home, Inc. v. City of Sarasota*, 666 So. 2d 171, 173 (Fla. 2d DCA 1995)).

At issue here is an alleged regulatory taking, one "where regulation denies all economically beneficial or productive use of land." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). "In the 'relatively rare situations where the government has deprived a landowner of all economically beneficial uses,' the regulatory action is recognized as a 'categorical taking' that must be compensated." *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (quoting *Lucas*, 505 U.S. at 1018).

Before performing a takings analysis, the court must determine the subject of the alleged taking. *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 468 n.7 (Fla. 5th DCA 2014); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) ("This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action?"). "The relevant parcel determination is a question of law based on underlying facts." *Lost Tree*, 707 F.3d at 1292. Here, the parties agree that the underlying facts are undisputed and that a question of law remains.

In determining whether a landowner's "parcels are separate and independent or a single tract" for purposes of determining a compensable taking, the Florida Supreme Court has set forth three factors to consider: "physical contiguity, unity of ownership, and unity of use." *Jirik II*, 498

So. 2d at 1255. In evaluating unity of use, courts look to the following criteria:

> (1) intent of the owner, (2) the adaptability of the property, (3) the dependence between parcels, (4) the highest and best use of the property, (5) zoning, (6) the appearance of the land, (7) the actual use of the land, and (8) the possibility of tracts being combined in use in the reasonably near future.

Ocean Palm, 139 So. 3d at 472 (quoting *Town of Jupiter v. Alexander*, 747 So. 2d 395, 400 (Fla. 4th DCA 1998)); *see also Div. of Admin., State Dep't of Transp. v. Jirik* (*Jirik I*), 471 So. 2d 549, 554-55 (Fla. 3d DCA 1985) (stating factors), *approved*, *Jirik II*, 498 So. 2d 1253.

As to physical contiguity, the trial court found that because the 10.32-acre parcel is located within the DRI, they are physically contiguous. The trial court relied upon the "ownership history" of the Tara DRI as a whole and the 10.32-acre parcel, concluding that the original Tara developer made an "internal transfer" of the 10.32-acre parcel to Lake Lincoln because the companies possessed a common principal. But this does not account for the reality that Lake Lincoln owns *no* property adjacent to the 10.32-acre parcel. Lake Lincoln does not own any contiguous land that could be considered part of the "relevant parcel."

As to unity of ownership, although the entire Tara DRI was developed by Tara Manatee and Lake Lincoln is the successor developer, Lake Lincoln actually owned only a very small percentage of the Tara DRI property at the relevant time in 2010. Of the 1,124-acre DRI, Lake Lincoln neither owned nor controlled approximately 1,100 acres. The Supreme Court has recognized that a court looks to the property "held by the owner." *Murr*, 137 S. Ct. at 1944 ("In some, though not all, cases the effect of the challenged regulation must be assessed and understood by

the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value.").

As to unity of use, the trial court stated the subfactors to consider but did not apply them. In its order, the trial court recognized that "DRIs are designed to allow flexibility over the course of development of large tracts, with common entitlements being assigned to particular lots over time under a common development scheme. *Howard v. Murray*, 184 So. 3d 1155, 1164 (Fla. 1st DCA 2015)." Like the County, the trial court focused on the fact that the 10.32-acre parcel and the Tara DRI share common development entitlements. The trial court appeared to make a determination on unity of use based in large part on the one subfactor that there was dependence between the parcels due to the development entitlements.

Regarding the subfactors of the intent of the owner and the dependence between parcels, Lake Lincoln intended the 3.32-acre subparcel to be a standalone commercial property. The 10.32-acre parcel is not dependent upon any adjacent DRI properties to appreciate the commercial use Lake Lincoln sought. Although Lake Lincoln sought the 3.32-acre subphase through a larger DRI amendment process and the application lists the entire DRI as the property, Lake Lincoln was seeking amendments for other parcels in the DRI in addition to the 10.32-acre parcel and seeking transfers of entitlements. The application shows that Lake Lincoln's proposed use and intent was to develop a 3.32-acre commercial subphase independently from other properties within the DRI.

As to zoning, adaptability, and appearance, this standalone commercial property would be consistent with its future land-use

classification and the neighboring uses. Commercial use for the 3.32-acre subparcel with the remainder of the 10.32 acres for use as wetland mitigation/conservation is the property's highest and best use. Further, there is no realistic possibility of the parcel being combined with other tracts in the reasonably near future, given the DRI build-out.

We agree with Lake Lincoln that *Lost Tree*, 707 F.3d 1286, provides analogous support for the determination that the relevant parcel is the 10.32-acre parcel. Under an option agreement to purchase 2,750 acres on Florida's mid-Atlantic coast, Lost Tree, the developer, purchased substantially all of that land from 1969-1974. *Id.* at 1288. By the mid-1990s, Lost Tree had developed around 1,300 acres in the John's Island community. *Id.* In 2002, Lost Tree learned it would receive "mitigation credits" as part of a neighboring project and identified "Plat 57," a 4.99-acre tract, as property that could be developed "to exploit the mitigation credits." *Id.* at 1290. Lost Tree sought to develop one residential home and applied for a wetland fill permit with the Army Corp of Engineers to develop Plat 57, but the permit was denied. *Id.* at 1291.

Lost Tree filed suit for a regulatory taking. *See id.* at 1288. The federal circuit determined that Lost Tree did not treat Plat 57 as part of the same economic unit as the other land it had developed in the John's Island community. *Id.* at 1293. The court concluded that Plat 57 alone was the relevant parcel for takings purposes. *Id.* at 1294.

In *Lost Tree*, similar to the County's argument here, the government had argued for a larger relevant parcel in the takings analysis—"the entire John's Island community." *Id.* at 1291. Although Lost Tree did not "strictly follow[] any master development plan," *Lost Tree* involved, similar to the present case, a major, large-acre development, constructed over many decades in a "piecemeal" fashion.

Id. at 1289. And, just as Lake Lincoln's request to develop its 10.32-acre parcel was "physically and temporally remote" from other existing developments in the Tara DRI, so too was the proposal in *Lost Tree* as to the entire John's Island community. *Id.* at 1291. A determination that the 10.32-acre parcel is the proper relevant parcel under *Jirik II* is in accord with *Lost Tree*.

The fact that the 10.32-acre parcel is in a DRI that requires a transfer of entitlements for development appears to have driven in large part the trial court's decision that the relevant parcel is the entire 1,124-acre DRI. This ruling would result in a large DRI being deemed the "relevant parcel" for most cases where a small parcel affected by government regulation is located within a DRI. Considering the undisputed facts, we conclude that the relevant parcel for takings purposes is the 10.32-acre parcel. When considering the proper relevant parcel, the undisputed facts demonstrated that Lake Lincoln could achieve no economic use on its 10.32-acre parcel as a result of the County's restriction to uses for only open spaces and wetlands during the nearly nine-year period.

We conclude that the trial court erred as a matter of law in determining that the entire 1,124 Tara DRI was the relevant parcel for takings purposes. We reverse the final summary judgment and the ruling that the County was entitled to summary judgment on count two for inverse condemnation and that Lake Lincoln was not entitled to partial summary judgment on count two. We remand for further proceedings and direct the trial court to enter partial summary judgment as to liability on count two in favor of Lake Lincoln. To the extent that the trial court granted summary judgment on count one, we affirm.

Affirmed in part, reversed in part, and remanded.

NORTHCUTT and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.