IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

P.I.E., LLC,

Appellant,

v. **Case No.: 2D16-4713**
L.T. No.: 2011CA106

DeSoto County,

Appellee.

_____/

MOTION FOR ISSUANCE OF A WRITTEN OPINION, REHEARING, AND FOR REHEARING *EN BANC*

Appellant, P.I.E., LLC (P.I.E.), by and through its undersigned counsel and pursuant to Rule 9.330(a) and Rule 9.331 of the Florida Rules of Appellate Procedure, moves this Court for issuance of a written opinion and, separately, for rehearing and rehearing *en banc*.

Motion for Issuance of a Written Opinion

Fla. R. App. P. 9.330 provides that "[w]hen a decision is entered without opinion, and party believes that a written opinion would provide a legitimate basis for supreme court review, the party may request that the court issue a written opinion." Such is the case here.

1. First, if the Court affirmed the trial court's decision because the panel concluded P.I.E. did not have a vested right to excavate sand, then that decision conflicts with *City of Margate v. Amoco Oil Co.*, 546 So. 2d 1091 (Fla. 4th DCA

1989), and that conflict gives P.I.E. an avenue to seek further appellate review at the Florida Supreme Court. But P.I.E. can only do so if the Court explains its reasoning for the affirmance.

2. In *City of Margate*, a property owner applied for a permit to open a service station. The City denied the permit despite the fact that the application satisfied the existing land regulations. *Id*. at 1093. Shortly thereafter, the City changed the land development regulations to provide that service stations would not be allowed on properties like that owned by Amoco Oil. *Id*. The Fourth District recognized a vested right on those facts, because the City had exhibited "bad faith and an avoidance of duty" by refusing to approve the permit even though it satisfied the requirements of the zoning law. *Id*. at 1094.

3. If this Court does not think P.I.E. had a vested right to its permit, despite the similarity of the facts to *City of Margate*, then P.I.E. would ask the Florida Supreme Court to resolve this split of authority via Article V, § 3(b)(3), of the Florida Constitution, and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the state supreme court has jurisdiction when an opinion "expressly and directly conflict[s] with a decision of another district court of appeal or of the supreme court on the same question of law."

4. When a property owner has a vested right to develop is a question that has vexed the trial and intermediate appellate courts of Florida for years. *Compare*

Town of Ponce Inlet v. Pacetta, LLC, 120 So. 3d 27 (Fla. 5th DCA 2013) (no vested right where developer received preliminary approval for plan and Town moved to change comprehensive plan to accommodate development) *with Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (1963) (vested right where City approved preliminary plan for construction of 12-story apartment building). An answer from the Florida Supreme Court on this question would benefit all landowners and local governments in Florida. But without an opinion here that acknowledges the split, P.I.E. cannot seek further review at the state supreme court.

5. Alternatively, if the Court affirmed the lower court's holding that P.I.E.'s claim was barred because the County claimed to deny the permit based on the "health, safety, and welfare" of the community, as in the 1990 ordinance, then that raises a matter of great public importance, which if this Court certified the question would give P.I.E. a second path to Florida Supreme Court review. *See* Fla. Const. art. V, § 3(b)(4); Fla. R. App. P. 9.030(a)(2)(A)(v) (allowing for Florida Supreme Court discretionary jurisdiction when a district court certifies a question of great public importance).

6. The case presents a question of great public importance because affirmance on this ground jeopardizes the legislative intent of the Harris Act; it allows for local governments to escape Harris Act liability for inordinate burdens

on private property by merely citing to its general police power to protect the health, safety, and welfare of the public.

7. Local government can virtually always find a statute or ordinance that predates the Harris Act that charges local government with acting in that interest. *See, e.g.*, the Community Planning Act (Fla. Stat. Ann. § 163.3161, *et seq*.), which requires that local governments plan in the interest of the "health, safety . . . and general welfare" of the public, and has been the law since 1975 (formerly the Local Government Comprehensive Planning and Land Development Regulation Act).

8. This Court's apparent approval of "health, safety, and welfare" as "magic words" that allow a local government (in this case, DeSoto County) to escape any Harris Act claim would become an exception that swallows the Harris Act rule. If all a government has to do to avoid Harris Act liability is say it is protecting the health, safety, and welfare of the community, then the Harris Act has been all but judicially voided.

9. If that is the Court's position, then it should say so and certify the case as one that includes a question of great public importance, since it implicates the statutory rights of all property owners in Florida. Certifying the question—that question being whether a local government can avoid Harris Act liability by simply relying upon its police power, as protected by any number of statutes and local ordinances that pre-date the Harris Act, when it inordinately burdens property.

Certifying that question as one of great public importance would allow for P.I.E. to seek review at the Florida Supreme Court. *See* Fla. Const. art. V, § 3(b)(4), and Fla. R. App. P. 9.030(a)(2)(A)(v).

Motion for Rehearing and Rehearing En Banc

10. Alternatively, if the Court affirmed the circuit court's opinion that P.I.E. lost the right to press its Harris Act claim when it lost his property to foreclosure, then that conflicts with this Court's own decision in *Canney v. City of St. Petersburg*, 466 So. 2d 1193 (Fla. 2d DCA 1985).

11. The common law at issue here is that of eminent domain and inverse condemnation, as the Florida Supreme Court recently recognized in *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1166 (Fla. 2017). The common law of eminent domain and inverse condemnation (of which the Harris Act is a form) in Florida has long recognized that a claim seeking compensation for lost value caused by a regulation is not cut off merely because that property owner loses ownership of the property, just as this Court has previously recognized. *See Canney*. Thus, if the court affirmed the lower court's opinion that P.I.E. lost its Harris Act claim when the property was foreclosed, that conflicts with *Canney* and this Court should grant rehearing and vacate the original decision, or grant rehearing *en banc*, vacate the original panel decision, and in either event (panel or *en banc*) hold that a property owner does not lose an inverse condemnation claim,

or Harris Act claim, merely because the owner loses the property before the suit concludes.

12. If the panel was receding from the *Canney* rule, then it is establishing a precedent at odds with takings jurisprudence not just locally, but nationally. As the Federal Circuit Court of Appeals in *Reoforce, Inc. v. United States*, 853 F.3d 1249 (Fed. Cir. 2017) explains:

> It is axiomatic that only persons with a valid property interest *at the time of the taking* are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (emphasis added); *see also Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003). While precedent requires that the property owner prove its ownership at the time of the alleged taking, *we are aware of no case that requires the property owner to possess those same rights during litigation*. We thus decline to adopt the Claims Court's rule that a property owner must not relinquish its property rights before filing suit.

Reoforce, Inc., 853 F.3d at 1263 (first emphasis in original; second added). If the Court is going to diverge from its own prior case law—let alone the well-understood law of virtually all other jurisdictions, as described in *Reoforce*—then the Court should do so in an *en banc* opinion and explain why a Harris Act claim is less protective of property rights then the common law of regulatory takings, as well as this Court's own precedent. This seems particularly necessary when one considers that the Florida Legislature passed the Harris Act to be *more*

protective—not *less* protective—of the property rights of Floridians. The per curiam affirmance here, on the other hand, appears to ignore that legislative direction in favor of a judicial revision of the statute that lessens property rights of all Floridians.

13. Alternatively, if the panel affirmed the circuit court's opinion that P.I.E. never ripened its claim challenging the 2007 excavation ordinance—because P.I.E. did not apply for a permit under the 2007 ordinance—then that conflicts with *Hussey v. Collier County*, 158 So. 3d 661 (Fla. 2d DCA 2014), where this Court reversed the trial court dismissal of a Harris Act suit because the lower court incorrectly held that failure to apply for a permit under a new ordinance rendered the suit an improper facial claim versus what it actually was, an allowed "as applied" claim. *See also Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413, 422 (Fla. 5th DCA 2009) (Harris Act claim accrues when "the impact on a given parcel of property can immediately be determined" from the ordinance). Here, the affirmance suggests that the panel disagrees with the result of *Hussey*, because otherwise P.I.E.'s claim should have survived DeSoto County's motion for summary judgment as a matter of law. Therefore, the Court should address the case *en banc* and either recede from *Hussey* or re-affirm that *Hussey* is the law of this district and vacate the panel decision. Alternatively, the panel could withdraw

the PCA and explain how it could affirm the dismissal of the Harris Act claim based on the 2007 ordinance despite this Court's controlling *Hussey* precedent.

WHEREFORE, Appellant P.I.E. prays that this Court would withdraw the PCA and issue an opinion that addresses the conflicts raised above so as to allow the Appellant to pursue certiorari review in the Florida Supreme Court or, alternatively, rehear the case as a panel or *en banc* in order to address the intra-district splits P.I.E. has identified that the per curiam affirmance implicitly creates but avoids identifying by way of the lack of a written opinion.

> I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Florida Supreme Court review because a written opinion in this case will reveal express and direct conflict with the decision in *City of Margate*, 546 So. 2d 1091, on the same question of law, or would allow the Court to certify the question described above as one of great public importance, either of which alternatives would provide the Supreme Court of Florida with discretionary jurisdiction to review this case pursuant to Fla. Const. art. V, § 3(b)(3) and (4), and Fla. R. App. P. 9.030(a)(2)(A)(iv) and (v).

DATED: November 17, 2017.

Respectfully submitted,

By: /s/Mark Miller

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font used in this motion is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: November 17, 2017.

/s/ Mark Miller
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion has been electronically filed with the Clerk of Court using the e-DCA electronic filing system on this 17th day of November, 2017, and served via electronic mail upon the following:

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