IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Case No. 2D16-4713

P.I.E., LLC,

Appellant,

v.

DeSoto County,

Appellee.

On Appeal from the Circuit Court, Twelfth Judicial Circuit,
in and for DeSoto County, Florida
(Case No. 2011CA106)

APPELLANT'S REPLY BRIEF

JOSEPH M. HANRATTY
Fla. Bar No. 0949760
CHARLES R. FORMAN
Fla. Bar No. 229253
Forman, Hanratty,
Thomas & Montgomery
723 E. Ft. King Street
Ocala, Florida 34471
Telephone: (954) 522-9441
Facsimile: (954) 522-2076
E-mail: hanrattypleadings@gmail.com
crforman@hotmail.com

MARK MILLER
Fla. Bar No. 0094961
CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pacific Legal Foundation
8645 North Military Trail, Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org
cmm@pacificlegal.org

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

REPLY STATEMENT OF THE FACTS AND CASE. 1

REPLY ARGUMENT. 5

I. P.I.E. MAINTAINED THE RIGHT TO ENFORCE ITS HARRIS ACT CLAIMS AFTER FORECLOSURE. 5

II. SUMMARY JUDGMENT FOR THE COUNTY WAS IMPROPER BECAUSE FACT QUESTION EXISTS AS TO WHETHER THE COUNTY RELIED UPON POST-HARRIS ACT ACTIONS TO DENY PERMIT. 8

III. P.I.E. DID NOT HAVE TO SUBMIT ANOTHER PERMIT APPLICATION AFTER THE COUNTY AMENDED THE EXCAVATION ORDINANCE. 10

IV. UNDER THE HARRIS ACT, P.I.E. HAD A PROTECTED RIGHT TO EXCAVATE THE PROPERTY. 13

CONCLUSION. 15

CERTIFICATE OF COMPLIANCE. 17

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Canney v. City of St. Petersburg,
466 So. 2d 1193 (Fla. Dist. Ct. App. 1985). 7

FINR II, Inc. v. Hardee County, 164 So. 3d 1260 (Fla. 2d DCA 2015),
rev'd, *Hardee County v. FINR II, Inc.*, __ So. 3d __,
42 Fla. L. Weekly S613 (Fla. May 25, 2017). 6-8, 12-13

Hussey v. Collier County, 158 So. 3d 661 (Fla. 2d DCA 2014).. 12

King v. Shoar, No. 3:06-cv-61-J-33TEM,
2007 WL 2066173*1 (M.D. Fla. 2007). 4

Pasco County v. Tampa Development Corp.,
364 So.2d 850 (Fla. 2d DCA 1978). 14

State v. C.M., 154 So. 3d 1177 (Fla. 4th DCA 2015). 7

Florida Statutes

Fla. Stat. § 70.001(3)(a) (2007).. 12

§ 70.001(3)(e). 13

§ 70.001(4)(c) (2007). 12

REPLY STATEMENT OF THE FACTS AND CASE

In its answer brief, Appellee DeSoto County (the County) misstates a number of material facts and attempts to obfuscate the genuine issues of material fact that exist in the case. Appellant P.I.E., LLC (PIE) bring to the Court's attention only the most important misstatements and obfuscations in order to help the Court evaluate the case on the merits:

- *At Page 7 of the County's Answer Brief, the County suggests that P.I.E. principal Thomas Finney did not meet with County Engineer Jason Green in 2005, since Green says he began working for it in 2006.*

When Green began his employment with the County is both irrelevant for purposes of this appeal and obscures what matters about the meeting between the County's Planning Department and Finney. What matters is, before buying the property at issue, Finney met with and relied upon the County Planning Department when he decided to buy the land at issue for excavation and mining (R. 939-40). P.I.E. introduced record facts to show Finney looked to the Planning Department for direction before buying the property, *and the County does not deny that he did so*.

Instead, the County tries to confuse the matter by arguing about when Green began working for the Planning Department. That is neither here nor there. What matters is that Finney, as principal for P.I.E., sought County advice as to what property he could purchase for excavation and mining. The County's Planning

Department assured Finney that the land at issue could be used for mining as he intended to use it (R. 939-40). Therefore, Finney bought the property (R. 939-40).

- *At page 4 of its Answer Brief, the County asserts it denied P.I.E.'s permit because of Ordinance 1990-10, and then relies on a number of record citations—to pages 548, at ¶12, and pages 1427, 1433, 1438, 1439, and 1446—ostensibly to support that assertion.*

In fact, none of the record citations support the assertion that the County denied the permit *based on Ordinance 1990-10*. For example, the first citation is to the current County Director of Development's affidavit, Earl Hahn. But Hahn was only hired by the County in July 2015 (R. 547-50). He cannot speak firsthand to why the commissioners denied the permit since he was not there in 2007 (R. 547-50).

The other pages are all citations to the deposition testimony of Jason Green, the County's planning engineer at the time the County's commissioners denied P.I.E.'s permit. First, Green is not the right person to testify as to why the county commissioners denied the permit. Further, Green only testified as to the fact that he reviewed the permit application in the context of Ordinance 1990-10, a fact that P.I.E. does not dispute. Indeed, Green determined that P.I.E.'s application satisfied that ordinance (Supp. R. 1455-56).

- *At page 6 of its Answer Brief, the County asserts that the property was not worth $3.3 million dollars with an approved permit.*

Contrary to the County's assertion, at page 22 of the record, as identified in P.I.E.'s initial brief, the Court will find appraiser John Gillott's letter appraising the property

as worth $3.3 million dollars with the permit. Gillott's deposition and the letter as an exhibit to the deposition were relied upon to oppose the County's motion for summary judgment (R. 946).

- *At page 7 of its Answer Brief, the County asserts—without citation to the record—that the County Administrator, County Attorney, and Engineer never recommended approval of P.I.E.'s permit application.*

The record belies the County on this point. County Engineer Jason Green explicitly stated that the County Administrator, County Attorney, Planning Director, and County Engineer (Green himself) recommended the commissioners approve the permit with certain conditions that P.I.E. agreed to meet (Supp. R. 1455-56). The relevant portion of the deposition states:

> **Q.** Okay. And just to sum up, you, as the head planner, the County Attorney, the County Engineer, the County Manager, I guess, who also acted as Planning Director, reviewed the [permit] application with regard to the land use plan, the zoning, the health, safety and welfare of the residents of DeSoto County, *and the end result was that you recommended that the Commission approve it with conditions that you attached, correct*?
>
> **A.** *That's a lot. Yes.*
>
> **Mr. Forman** [counsel for P.I.E.]: *Okay. I have no further questions.*
>
> **Mr. Conn** [counsel for the County]: *No further questions.*

(Supp. R. 1455-56) (emphasis added). In other words, the County's key witness Jason Green said that *all* the significant County officials recommended that the Commission

approve P.I.E.'s permit application.[1] They would not have made that recommendation if the permit application did not satisfy County Ordinance 1990-10. It was not the County Ordinance 1990-10 that provided the rationale for the commissioners' vote; it was politics that led them to vote against approval, in contravention of the law.

Remarkably, the County's Answer Brief relies upon a declaration Jason Green created *after* he gave this sworn testimony. In that subsequent declaration, Green disavows his above-quoted sworn testimony and claims that he meant to say that these County officials approved only the permit application "being transmitted to the Board of County Commissioners for final action." (R. 1015 at ¶ 13f). This affidavit creates a genuine question of material fact that should have precluded summary judgment for the County, since the deposition testimony goes to show that all key County officials believed the permit application met the requirements of Ordinance 1990-10. *See, e.g.*, *King v. Shoar*, No. 3:06-cv-61-J-33TEM, 2007 WL 2066173*1, *3 (M.D. Fla. 2007) (explaining that where key witness gives conflicting testimony on the same material fact in two sworn statements considered at summary judgment stage, court accepts that genuine issue of material fact exists on that material fact).

- *Finally, at page 35 of its Answer Brief, the County submits "the Record" does not support P.I.E.'s contention at page 31 of its initial*

[1] The proposed approval was subject to conditions lifted from the then-being-drafted 2007 revised mining ordinance. (Supp. R. 1416-17).

> *brief that the County encouraged P.I.E. to purchase the property. In fact, the County says "P.I.E. does not even attempt to cite to any portion of the Record to support its opposition on this point."*

Indeed, P.I.E. did not cite to the Record for this point at page 31of its Initial Brief because P.I.E. had already set out that same contention with a cite to P.I.E. principal Tom Finney's affidavit (R. 939-40) at the outset of its initial brief at pages three and four. There, P.I.E. explained how Finney approached County staff in 2005 for direction as to where to find property to mine, and the staff informed Finney that it would approve the property at issue here as long as it did not have wetlands issues—which it did not (R. 939-40).

Having addressed the most significant misstatements of fact contained in the County's Answer Brief, P.I.E. now addresses the most significant misstatements of law contained in the County's Answer Brief.

REPLY ARGUMENT

I

P.I.E. MAINTAINED THE RIGHT TO ENFORCE ITS HARRIS ACT CLAIMS AFTER FORECLOSURE

The trial court concluded P.I.E. lost its right to sue for its Harris Act injuries when it lost the property in foreclosure. That result is incorrect as a matter of law.

As P.I.E. explained in its Initial Brief, P.I.E. owned the property when the County inordinately burdened it and then P.I.E. pursued Harris Act relief as per the

statute. The County concedes that P.I.E. followed the statute to the letter. But the County claims that PIE lost the ability to enforce Harris Act rights, because P.I.E. lost the property before P.I.E. finished the Harris Act proceeding and filed suit. The Act itself never says a property owner can lose their right to sue in this manner. Nevertheless, in its Answer Brief, the County submitted that *FINR II, Inc. v. Hardee County*, 164 So. 3d 1260, 1264 (Fla. 2d DCA 2015), rev'd, *Hardee County v. FINR II, Inc.*, __ So. 3d __, 42 Fla. L. Weekly S613 (Fla. May 25, 2017), supported its position. Now that the Florida Supreme Court has reversed *FINR II*, it is clear *FINR II* offers the County no support.

From the outset of the *FINR II* opinion, the Florida Supreme Court makes clear the landowner at the time the government burdens the property has the cause of action:

> The Act was intended "as a separate and distinct cause of action from the law of takings . . . 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*." § 70.001(1), Fla. Stat. (2012).
>
> ***
>
> [The government action must directly act upon the owner's parcel].

FINR II, 42 Fla. L. Weekly at S613. Here, the County's action directly acted upon P.I.E.'s parcel, thus P.I.E. has the claim. The High Court's opinion then makes it even clearer that P.I.E. retained its claim even after losing its property to foreclosure:

> The legislative history of the Act indicates that *the Legislature intended to create new procedures to give inordinately burdened property owners a day in court* before exhausting all administrative remedies and to give them the ability to arbitrate a dispute with a governmental entity without first having to obtain its consent. Fla. H.R. Comm. on Judiciary, CS for HB 863 (1995), Bill Analysis & Economic Impact Statement 2-3 (final May 23, 1995) (on file with Fla. State Archives).

Id. at S614 (emphasis added). The Legislature intended to give property owners whose property is inordinately burdened their "day in court," yet the County would have it otherwise. The County submits that the Harris Act allows the County to inordinately burden P.I.E.'s property and get away with it because P.I.E. could not afford the property after the County burdened it in this way. That conclusion flies in the face of the recently-decided *FINR II* case at the Florida Supreme Court, the purpose of the Harris Act, and the legislative history for the Harris Act as described above by the state Supreme Court.

The County's argument also writes into the law a provision not there; courts "are not at liberty to add words to statutes that were not placed there by the Legislature. To do so, would be an abrogation of legislative power." *State v. C.M.*, 154 So. 3d 1177, 1180 (Fla. 4th DCA 2015)(quotation and citations omitted). Moreover, such a requirement would put Harris Act plaintiffs at a disadvantage not felt by takings plaintiffs, which again would conflict with the intent that the Harris Act provide greater relief to property owners. *See, e.g.*, *Canney v. City of St. Petersburg*, 466 So. 2d 1193, 1195 (Fla. Dist. Ct. App. 1985) ("Damages to

compensate for the taking of land . . . belong to the one who owns the land *at the time of the taking or injury*. Furthermore, the damages for the taking or injury do not pass to a subsequent grantee of land, except by provision in the deed or by assignment" (citation omitted); *FINR II*, 42 Fla. L. Weekly at S613 ("Legislature was focused on . . . giv[ing] landowners protection . . . against some regulatory actions which do not rise to the level of a taking.") (internal quote omitted). Simply put, the lower court read into the Harris Act a requirement not included within the Act. That was erroneous as a matter of law.

II

SUMMARY JUDGMENT FOR THE COUNTY WAS IMPROPER BECAUSE FACT QUESTION EXISTS AS TO WHETHER THE COUNTY RELIED UPON POST-HARRIS ACT ACTIONS TO DENY PERMIT

The County asserts that it denied P.I.E.'s excavation permit because P.I.E. did not comply with the terms of its 1990 mining ordinance, and therefore P.I.E. cannot bring a Harris Act claim. But, because P.I.E. offered evidence that the commissioners denied the permit for reasons other than the ordinance, this Court must reverse and allow P.I.E. to present its Harris Act claim to the factfinder.

First, as explained earlier, the County Administrator, County Planner, County Attorney, and County Engineer all recommended to the Commission that it approve the permit with conditions that did not flow from the 1990 ordinance. The conditions

mirrored aspects of what became the later-approved 2007 excavation ordinance, an ordinance already being drafted at the time the commissioners denied P.I.E.'s permit application. That these officials listed conditions for approval that did not flow from the 1990 ordinance at a minimum creates a fact question as to whether the commissioners denied the permit application based on the 2007 draft ordinance—and thus rendered a decision subject to the protections of the Harris Act.

Second, there is additional evidence that creates a genuine issue of material fact as to whether the commissioners denied the permit application for reasons outside of the 1990 ordinance. The NIMBYs[2] at the commission hearing on the application pressured the commissioners to deny the application, despite the fact that the zoning code recognized that P.I.E. had a right to mine the property. The Commissioners caved because of political pressure, (R. 1023-1176), not because of the 1990 ordinance. Attorneys for the NIMBY neighbors relied on the Land Development Regulations and a claim about "compatible use" when they argued for the commissioners to deny the permit application; a factfinder should decide whether those were the actual grounds for denial, thus allowing for a finding of liability on the Harris Act claim. The opponents presented a number of experts who then spoke to compatibility, along with road capacity (R. 1121-26), and sound impacts

[2] "Not in my backyard" (i.e., people who resist development near their property).

(R. 1126-34), and how it would impact nearby property values (R. 1137-42), but not to the excavation ordinance that the County now says was the reason it denied the permit. These reasons for denial create a genuine issue of material fact—whether the commissioners denied the permit application based on the 1990 ordinance, or based on other reasons that would allow for Harris Act recovery.

Certainly, the excavation ordinance pre-dated the Harris Act. But the county commissioners had other reasons presented to them as to why they should deny the permit application, and those reasons did not include the 1990 ordinance. A factfinder should examine these facts and decide whether the commissioners relied on the 1990 ordinance—despite the fact that all county officials who examined the permit felt it should be approved under the permit—or relied upon other reasons that would allow a Harris Act claim to proceed.

III

P.I.E. DID NOT HAVE TO SUBMIT ANOTHER PERMIT APPLICATION AFTER THE COUNTY AMENDED THE EXCAVATION ORDINANCE

P.I.E.'s second Harris Act theory of recovery flows from the County's decision to amend its excavation ordinance two months after it denied the original permit application. (R. 6). The amendment foreclosed any possibility of P.I.E. using the property for excavation as it had the right to do, resulting in a two-million-dollar loss in value of the property. The County argues that P.I.E. should have first applied for

a permit under the new ordinance before pursuing Harris Act relief, because theoretically the County could have offered a rezoning, variance, or special exception, but that argument ignores reality and the law.

It ignores reality, because the County already inordinately burdened P.I.E.'s property. Prior to the County adopting the new ordinance, the County specifically permitted mining operation in the A-5 zone that included P.I.E.'s property. (R. 548; Supp. R. 1485-86). Excavation on parcels larger than 20 acres (P.I.E.'s property planned to mine just over 20 acres) was a permitted principal use. (Supp. R. 1485-87). But after the amendment, that planned use was no longer allowed. Only small-scale, very limited mining rights survived the amendment to the excavation ordinance. That reduction erased P.I.E.'s vested (or existing) right under the old ordinance, and drastically cut the value of the land. The County suggests it is "speculation" to say P.I.E. would not receive a permit to use the property as it contemplated, Answer Brief at 25, but P.I.E. did not need to speculate: the commissioners had just denied its permit to use the property for excavation a few months earlier, under an ordinance that allowed for the use P.I.E. intended.

The County's claim also ignores the law, because the Harris Act provided that P.I.E.'s claim accrued without any additional applications. *Citrus Cty. v. Halls River Dev., Inc.*, 8 So. 3d 413, 422 (Fla. Dist. Ct. App. 2009) (claim accrued when "the impact on a given parcel of property can immediately be determined" from

ordinance). Here, the impact of the revised ordinance was clear and unequivocal—just a few months earlier, the county commissioners had unanimously denied P.I.E. the use it sought under an ordinance that explicitly allowed the use it sought. The revised ordinance did not allow for this use, and the Harris Act claim thus accrued when the ordinance was passed, and became ripe upon completion of pre-suit notice. *Id*. at 420, 422; § 70.011, Fla. Stat. (2007). P.I.E did not have to apply for a permit or seek a variance or exception, because the Harris Act did not require it to do so before pursuing its claim. *Id*.; *see also Hussey v. Collier County*, 158 So. 3d 661 (Fla. 2d DCA 2014) (reversing dismissal of Harris Act suit where trial court incorrectly held that failure to apply for permit under a new ordinance rendered suit an improper facial claim versus what it actually was, an allowed "as applied" claim).

It would have been futile for P.I.E. to make another application, and it was not required to do so. Indeed, the Act shifted the burden to the County to proactively offer a variance or other option for P.I.E. in order to avoid a Harris claim. *See* Fla. Stat. § 70.001(4)(c) (2007); *FINR II, Inc.*, 42 Fla. L. Weekly S613 ("Legislature intended to . . . give inordinately burdened property owners a day in court before exhausting all administrative remedies").

IV

UNDER THE HARRIS ACT, P.I.E. HAD A PROTECTED RIGHT TO EXCAVATE THE PROPERTY

Contrary to the County's arguments, the Harris Act expanded the property rights protected by Florida law by expanding what constitutes a "vested right" or "existing use." Under the Act, the "existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state." Fla. Stat. § 70.001(3)(a) (2007); *see also FINR II*, 42 Fla. L. Weekly at S613 ("vested right is determined under the principles of equitable estoppel or substantive due process.").

The County sets out the elements for a claim under the statute, section 70.001(3)(e), at page 30 of its Answer Brief; but contrary to the County's argument, the facts here when taken in the light favorable to P.I.E. demonstrate P.I.E. has a valid Harris Act claim. First, does the property owner have a vested right? Yes, P.I.E. had a vested right because its property met the requirements for an excavation permit under the 1990 ordinance, as all the County officials admitted when they recommended to the Commission that it approve the permit. Next, did the County's actions directly restrict or limit its property rights? Yes, they did both because the commissioners refused to approve the permit application, and amended the ordinance to ensure P.I.E. could never mine it as planned. And finally, was P.I.E. permanently

unable to use the property pursuant to its expectations? Yes, in light of the vote and subsequent amendment to the ordinance, P.I.E. was left permanently unable to use the property as the zoning law at the time of purchase allowed, and the County's actions induced P.I.E. to reasonably expect it could.

The County also cites to *Pasco County v. Tampa Development Corp.*, 364 So. 2d 850 (Fla. 2d DCA 1978), but that case supports reversing summary judgment. As this Court said in that case:

> one party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds . . . .

Id. at 852-53. Here, the County put the welcome mat out to P.I.E. by way of the Planning Department telling Finney he had found the right property for excavation, and by the County itself by making clear in its excavation ordinance that P.I.E. could use the property as it planned. Then the County pulled the mat out from under P.I.E. Those facts allow for recovery under *Tampa Development Corp.*

Here, the land was zoned for its intended use and its application was complete and satisfactory, and approved by county staff. This case satisfies every requirement of equitable estoppel and "existing use" under the Harris Act. Moreover, fairness itself recognizes that P.I.E.'s permit should have been granted.

CONCLUSION

The trial court's errors of law included:

1) holding that P.I.E. lost its claims against the County when it lost the underlying property to foreclosure, even though the Harris Act allows the claim;

2) holding that the Harris Act did not apply because the County relied on the 1990 excavation ordinance, even though P.I.E.'s application satisfied that ordinance;

3) holding that P.I.E.'s failure to apply for a permit under the new ordinance prohibited that claim, even though the new ordinance clearly barred P.I.E.'s use; and

4) holding that P.I.E. did not have a vested or existing right to its planned use of the property, even though the law had allowed P.I.E.'s use.

The trial court's errors require reversal and remand. The Court may reverse and remand with instructions to enter a liability finding for P.I.E., to be followed with a trial on the damages P.I.E. suffered, or at a minimum reverse and remand for a trial on liability and damages, should the Court conclude liability is a question of fact and not one for entry of judgment in favor of P.I.E. at this time.

If Thomas Finney and P.I.E. cannot recover on these facts, then one must question whether a landowner can ever recover under the Act. That would frustrate the property rights of P.I.E. and its principals, and violate the very purpose and language of the Harris Act itself.

It would also be a grave injustice.

DATED: July 12, 2017.

Respectfully submitted,

By: /s/ Mark Miller

JOSEPH M. HANRATTY
Fla. Bar No. 0949760
CHARLES R. FORMAN
Fla. Bar No. 229253
Forman, Hanratty,
Thomas & Montgomery
723 E. Ft. King Street
Ocala, Florida 34471
Telephone: (954) 522-9441
Facsimile: (954) 522-2076
E-mail: hanrattypleadings@gmail.com
crforman@hotmail.com

MARK MILLER
Fla. Bar No. 0094961
CHRISTINA M. MARTIN
Fla. Bar No. 0100760
Pacific Legal Foundation
8645 N. Military Trail, Suite 511
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org
cmm@pacificlegal.org

Co-Counsel for Appellant

CERTIFICATE OF COMPLIANCE

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

DATED: July 12, 2017.

/s/ Mark Miller
MARK MILLER
Florida Bar No. 0094961

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Reply Brief has been electronically filed with the Clerk of Court using the e-DCA electronic filing system on this 12th day of July, 2017, which will send a notice of electronic filing to the following:

Robert C. Shearman, Esq.
Carlos A. Kelly, Esq.
Henderson, Franklin, Starnes & Holt, P.A.
P.O. Box 280
Ft. Myers, FL 33902-0280
(*Attorneys for Defendant DeSoto County*)
carlos.kelly@henlaw.com
jeanne.culek@henlaw.com
services@henlaw.com

Donald D. Conn, Esq.
Conn & Buenaventura, P.A.
4830 West Kennedy Blvd., Ste. 600
Tampa, FL 33609
(*Attorney for Defendant DeSoto County*)
don@cbflalaw.com
dconnlaw@gmail.com

/s/ Mark Miller
MARK MILLER
Florida Bar No. 0094961