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 INITIAL BRIEF

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INTRODUCTION

When the Florida Legislature enacted the Bert J. Harris Act in 1996, it explained that the law provided a remedy to landowners unfairly affected by government regulation on their property. *See* § 70.001(1), Fla. Stat. The law says:

> When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property, caused by the action of government[.]

§ 70.001(2), Fla. Stat.

This case represents a perfect example of why the Legislature created the law. An experienced contractor, Tom Finney decided to mine his own property for sand and fill in order to increase his profits on septic work where he needed fill dirt. He asked the Defendant/Appellee DeSoto County government's Planning Department for instruction on where to purchase property in the county for that purpose, and the County told him to find A-5 zoned property, at least 20 acres in size, with good road access. Finney found a 50-acre site with good road access and zoned A-5. The County Planning Manager approved the site.

Finney then formed a partnership with a competitor, and they created P.I.E., LLC (Partners In Excavating). P.I.E. purchased the property for $1.25 million (the property). In its condition at the time of the purchase, the property was worth $1.1 million. But as an excavation site, it was worth $3.3 million. P.I.E. then invested over

$250,000 to survey the property, retain an engineer, secure a water management district permit, and ultimately to submit a complete excavation permit application to DeSoto County.

County staff accepted the excavation permit application, deemed it complete, and advised P.I.E. that its application complied with the County's Comprehensive Plan and A-5 zoning. The County Planner, County Attorney, County Engineer, and County Manager all recommended to the County Commission that it approve the permit with conditions. Meanwhile, the County staff neglected to mention to P.I.E. that they were re-writing the excavation ordinance to eliminate the possibility of a mine this size in the A-5 zone.

The County Commission reviewed the application and, against the staff recommendation, rejected the permit application with a generalized complaint about the "health, safety, and welfare" of DeSoto County. Two months later, the County passed the revised excavation ordinance that rendered P.I.E.'s plans for the property a dead letter.

As noted above, the property was worth $3.3 million as an excavation site, and $1.1 million without the approval that the County led P.I.E. to believe it would and should receive. P.I.E. lost over two million dollars in value when the County Commission rejected the staff recommendation and denied the permit.

The Legislature wrote the Harris Act to remedy this very situation. The trial court erred when it entered judgment against P.I.E., and this Court must right that wrong.

FACTS AND STATEMENT OF THE CASE

I

THE FACTS

A. County Denies "Proper Application" for Excavation Permit

In 2005, Thomas Finney of DeSoto County decided to purchase property within the County suitable for mining sand that he needed for his family septic tank business, Finney & Sons Excavating. (Supp. R. 1727-28). Purchasing the sand cost $8.50-$12.00 per yard depending on the quality. (R. 933). If Finney could find the right mine, he anticipated reducing the cost to $2.00 per yard, a substantial savings. (R. 939).

Finney asked the DeSoto County Planning Department for guidance on the property he sought in order to ensure he could fulfill his plans with County approval. (R. 939-40). DeSoto County's staff informed Finney the ideal property for sand mining would be larger than 20 acres in size, have A-5 zoning and good road frontage. (R. 940). Such a property would fit DeSoto County Land Development Regulations Section 2305 (LDR), which set out the requirements for such mining. (Supp. R. 1377, 1485-88).

Finney asked a friendly competitor, Dwight Daugherty of Dwight Daugherty Construction, to partner with him in the plan. (R. 940). Together they created P.I.E. ("Partners in Excavating") to pursue the venture. (R. 940).

Finney found the right property, which previous owners had used for citrus; an appraiser valued the property at $1.1 million for agricultural use. (R. 22; 946). As a properly permitted mine, on the other hand, appraisers estimated its worth at $3.3 million. (R. 22; 946).

Jason Green, DeSoto County's Planning Manager, then reviewed the property and informed Finney that, barring wetlands issues, the County would approve the property for excavation and sand mining. (R. 939-40). Upon receiving that DeSoto County assurance and confirming the lack of any wetlands issues, P.I.E. purchased the property— approximately fifty acres of undeveloped property in DeSoto County—for $1,250,000 in September 2005. (R. 940). P.I.E. planned to use the property for excavating sand, and later a portion of it for development. (R. 14).

P.I.E. then set about obtaining the proper permit from the County. (Supp. R. 1752). P.I.E. hired Johnson Engineering, the largest engineering firm in the area with extensive background in borrow pits similar to the one plaintiff proposed, to draft the application for permits P.I.E. needed to use the property as it intended. (Supp. R. 1753).

After spending over $250,000 to properly present and support the permit application, P.I.E. submitted a complete excavation permit application to DeSoto County in October 2006—one year after completing the purchase of the property. (R. 940).

Staff reviewed P.I.E.'s application from its submittal through the County Commission hearing on the permit application scheduled for February 27, 2007. (Supp. R. 1533-34). Prior to that hearing, the DeSoto County Development Department produced a staff report that approved the application as consistent with the County's Comprehensive Plan and Land Development Regulations but required that P.I.E. agree to certain conditions not required by the applicable excavation ordinance. (R. 2; Supp. R. 1538-49).[1] The County staff that reviewed the application included Green, the County Administrator, the County Engineer, and the County Attorney. (Supp. R. 1455-56).

Despite the staff's approval and the permit conditions that would benefit the community, the County Commission denied the permit. At the February 27 hearing to approve the permit, the County summarily reversed the position of staff and

[1] Those conditions included a demand that P.I.E. post an insurance bond, dedicate 75 feet for right-of way along the county highway frontage, and concede that 20 percent of the future storm-water retention pond on the property would allow for future public use from any expansion of that county highway. Green admitted that the runoff requirement had nothing to do with the proposed land use but rather was designed simply to benefit the public's use of the county road. (Supp. R. 1416-17).

rejected the application. (R. 1175-76). The County Commission determined P.I.E. had made a "proper application" pursuant to the existing development regulations but, nevertheless, denied the permit "due to lack of compatibility" premised on a generalized concern about the health, safety and welfare of DeSoto County residents. (R. 13; 1175-76). The County committed the denial to writing on March 28, 2007. (R. 13). The County made no reference to the applicable excavation ordinance, in place since 1990;[2] as noted earlier, the application met its strictures, along with all other LDR and Comp Plan requirements.

B. The County Rewrites Excavation Ordinance To Prevent Another P.I.E. Application

In May 2007—two months after rejecting P.I.E.'s excavation permit—the County enacted a new excavation ordinance. (Supp. R. 1502). Staff had begun working on this new ordinance during the summer of 2006. (Supp. R. 1369). The new ordinance precluded the type and scope of mining proposed by P.I.E., for its property. (Supp. R. 1507). The ordinance that applied to P.I.E.'s application, adopted in 1990, allowed for the issuance of P.I.E.'s requested permit. (R. 561-73). The new ordinance, on the other hand, rendered the property unuseable to P.I.E. for excavation. (Supp. R. 1502).

[2] There were amendments to the 1990 excavation ordinance, but they are not pertinent to this case.

II

STATEMENT OF THE CASE

A. P.I.E. Seeks Administrative Relief

In response to the Commission's denial of P.I.E.'s "proper application," P.I.E. sought relief in local circuit court from the decision via Florida's Land Use and Environmental Dispute Resolution Act. *See* § 70.51, Fla. Stat. (2007). (R. 4). After two years, in May 2009, the circuit court granted P.I.E.'s petition for mandamus and ordered DeSoto County to participate in the mandatory administrative proceeding P.I.E. demanded two years earlier. (R. 949). Unfortunately, P.I.E. lost the property to foreclosure on November 25, 2008, and the statutorily-required administrative dispute resolution hearing never took place through no fault of P.I.E. (R. 5).

B. P.I.E. Brings Bert Harris Act Claims Against County

Meanwhile, while waiting for the administrative hearing that never took place, P.I.E. initiated a Harris Act claim against the County for the substantial loss in property value it sustained when the County unlawfully rejected its permit application. *See* § 70.001, Fla. Stat. (2007); (R. 949-50). Pursuant to the Act, P.I.E. filed this claim with the County; in turn, the County made a non-monetary settlement "ripeness" offer. (R. 950). That offer was essentially a promise to not oppose as untimely an untimely petition for writ of certiorari challenging the County's decision to deny P.I.E. the permit. (R. 950). P.I.E. rejected the offer. (R. 950).

P.I.E. then filed its two-count complaint alleging the Harris Act claims and alleging a *Penn Central* taking. (R. 1-22). In regards to the Harris Act claims, P.I.E. alleged that the permit denial and the ordinance amendment amounted to Harris Act injuries, in that the County's acts directly impacted and diminished its property value. (R. 6). The second count, for a *Penn Central* taking (R. 6), was later dismissed.

C. Procedural History Leading to the Current Appeal

After suit was filed, DeSoto County convinced the trial court to dismiss the case on statute of limitations grounds; this Court reversed that decision. *See P.I.E., LLC v. DeSoto County*, 133 So. 3d 577 (Fla. 2d DCA 2014). The case then proceeded on the two Harris Act theories and the trial court entered the judgment against P.I.E., from which this appeal follows.

The trial court granted summary judgment for four reasons. (R. 1313-25). First, the trial court held that once P.I.E. lost the property, it lost any claims flowing from the County's actions. (R. 1316-19). Second, the trial court held that the Harris Act, which prohibits suits based on laws already in place at the time the Act took effect, precluded P.I.E.'s claims because the excavation ordinance pre-dated the Act. (R. 1315-16). Third, the trial court held that P.I.E.'s failure to apply for a permit under the new 2007 excavation ordinance was fatal to the Harris Act theory of recovery. Lastly, the Court held that P.I.E. did not have a vested right to the mine. (R. 1319-21).

P.I.E. timely appealed the judgment. (R. 1328-44).

SUMMARY OF ARGUMENT

The Florida Legislature created the Harris Act in order to ensure that property owners could recover for their losses caused by government actions that inordinately burden their property. The Legislature could not have envisioned a better case to demonstrate the need for the law than what happened to P.I.E. and its principals here.

Relying upon existing law and the County's assurance that the property could be used for excavation and sand mining, P.I.E. purchased the property to support its businesses. After completing the extensive and expensive permit application, the County Commission pulled the rug out from under P.I.E. Without the ability to use the property as it intended, P.I.E. lost the property because it could not keep up with the payments. Tragically, Finney and Sons—the excavation business owned by one of the principals that developed the land purchase strategy to enhance his family-owned business—lost the property and his family business in the maelstrom that the County created.

The trial court erred when it held that P.I.E. lost its claims against the County when it lost the underlying property to foreclosure; the Harris Act creates a cause of action for the loss in value P.I.E. incurred when the County refused to follow its staff's recommendation and approve the permit.

Likewise, the trial court erred when it held that the 1990 excavation ordinance in place when the County denied the permit prevented a Harris Act claim. The County

did not rely upon the excavation ordinance when it denied the permit. Rather, the County relied upon its duty to protect the "health, safety, and welfare" of the County's residents. That duty does not preclude the Harris Act claim that P.I.E. brought based on the permit denial. The Harris Act prohibits suits that arise out of permit denials based on laws in place at the time the Harris Act became law, but the County did not rely on the 1990 excavation ordinance when it denied the permit. To the contrary, if it had relied upon it, the County would have approved the permit since the County conceded that the permit met the 1990 ordinance's strictures.

The trial court also erred when it held that P.I.E.'s failure to apply for a permit under the new ordinance prohibited that claim. Florida law did not require P.I.E. to apply for another permit because the ordinance was written and passed to stop P.I.E. from mining the property. Once the County denied P.I.E.'s permit and then amended its ordinance to ban excavation, it was clear that P.I.E. would never get the permit. Any additional application would have been futile.

And finally, the trial court erred when it concluded P.I.E. did not have a vested right to the use it lost. P.I.E. relied upon the representations made by the County and invested money and time, blood, sweat, and tears, into its excavation plan. That all went for naught when the County pulled the rug out from under P.I.E.

The County's actions here, at a minimum, present a fact question on whether P.I.E. suffered Harris Act injuries and, if so, the value of its losses. This Court should

reverse and remand the trial court's judgment and instruct the court to either enter judgment for P.I.E. and hold a hearing on damages, or at a minimum order the parties to take the case to trial.

This Court must reverse the lower court decision to allow P.I.E. and Thomas Finney to recover for the inordinate burden DeSoto County imposed on them. The Legislature designed the Harris Act to protect landowners and their rights. 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, as the Legislature intended.

ARGUMENT

The Florida Legislature passed the Harris Act to better protect property rights from government regulation. Fla. Stat. § 70.001. The Act passed unanimously in Florida's House and with only one dissenting vote in the Florida Senate. Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 Fla. L. Rev. 709, 715-716 (1996). Declaring "an important state interest in protecting the interests of private property owners," it created a new cause of action when a government mandate "unfairly affects real property." Fla. Stat. § 70.001(1).

The Harris Act provides that property owners should be reimbursed for the loss of value to their property when a government regulation "inordinately burden[s]" an existing use or a vested right. Fla. Stat. § 70.001(2). That is what happened here.

DeSoto County inordinately burdened P.I.E.'s property when it refused to approve what its law allowed for and its staff promised—a permit to excavate the property P.I.E. purchased. DeSoto County should bear the burden of that loss.

The standard of review for an order granting final summary judgment is de novo. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The court "must consider the evidence in the light most favorable to the nonmoving party, and if the record raises the slightest doubt that an issue might exist, [the court] must reverse the summary judgment." *Buck-Leiter Palm Avenue Development, LLC v. City of Sarasota*, __So. 3d__, 2017 WL 835326, *3 (2nd DCA March 3, 2017). Decisions concerning statutory interpretation are also reviewed de novo. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).

I

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

The trial court concluded that P.I.E. lost its right to sue for its Harris Act injuries when it lost the property in foreclosure. Under the court's ruling, government may inordinately burden property, and if the owner loses it as a result of the government action, then the government escapes all liability. That result the trial court approved is not only perverse—it is incorrect as a matter of law.

A. The Plain Language of the Harris Act Supports P.I.E.'s Claim

Section 70.001(2) states that "the property owner of . . . real property is entitled to relief under the Act '[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property . . . .' " Fla. Stat. § 70.001(2) (2007). The Act defines "property owner" as "the person who holds legal title to the real property at issue." Fla. Stat. § 70.001(3)(f) (2007). A plain reading of the statute shows that P.I.E.'s cause of action accrued when DeSoto County refused to issue the permit and then changed its excavation ordinance. That P.I.E.'s claim survives the foreclosure likewise follows from the plain language of the statute.

1. P.I.E. Satisfies All Standing Requirements Under the Act

By the terms of the statute, a Harris Act claim must be presented within one year from the time the law or regulation is first applied by the governmental entity to the subject property. § 70.001(11), Fla. Stat. (2010). In this case, P.I.E. presented its claim within one year of the permit denial and one year of the County's amendment to the excavation ordinance.[3] Next, at least 180 days prior to filing a lawsuit, the owner must submit a presuit notice to the appropriate governmental entity. § 70.001(4)(a), Fla. Stat. (2010). DeSoto County concedes that P.I.E. did so.

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[3] This issue was resolved in the prior appeal; *see P.I.E., LLC*, 133 So. 3d at 579.

Following receipt of the presuit notice, the government has 180 days to consider its options, which include retracting or modifying its action, taking no action, or granting relief in a variety of ways and making an offer to settle. § 70.001(4)(c), Fla. Stat. (2010). DeSoto County made an unsatisfactory settlement offer—again, in compliance with the Harris Act. (R. 950). Before this 180–day period expires, unless a settlement offer is accepted by the property owner, the governmental entity must issue a written "ripeness" decision, identifying the allowable uses for the property. § 70.001(4)(a), (5)(a), Fla. Stat. (2010) . "The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies." § 70.001(5)(a), Fla. Stat. (2010); *Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413, 420 (Fla. 5th DCA 2009). The County did so here.

After receiving the ripeness decision, the property owner may file an action for damages. § 70.001(5)(b), Fla. Stat. (2010). That's what P.I.E. did. (R. 1-22).

Provided that the procedural requirements of the Harris Act are satisfied, the court then determines whether an existing or vested use exists and whether the regulation has "inordinately burdened" the real property. If the court finds this to be true, then a jury determines the amount of damages suffered by the property owner. § 70.001(6), Fla. Stat. (2010).

2. Lower Court's Interpretation of the Harris Act Violates the Rules of Statutory Construction

Nowhere in the statute does the Legislature write that the property owner who owned the property at the time the government burdened it, and who incurred damages from that burden, must continue to hold title. DeSoto County, and the lower court, add to the Harris Act a requirement that does not appear in the text. For DeSoto County and the lower court to do so contradicts the "Omitted-Case Canon," which holds that "nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) (citation omitted). The 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) (quoting *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005) (citations omitted)); *see also Kortum v. Sink*, 54 So. 3d 1012, 1018 (Fla. 1st DCA 2010) ("It is fundamental that judges do not have the power to edit statutes so as to add requirements that the legislature did not include.") (citation omitted); *Fla. Dep't of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 323 (Fla. 2001) ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself

authorized to depart from the plain meaning of the language which is free from ambiguity.") (citation omitted). Simply put, the lower court read into the Harris Act a requirement not included within the statute. That was erroneous as a matter of law.

To be sure, a statute, such as the Harris Act, that creates a separate and distinct cause of action in derogation of the common law, must be strictly construed and its terms must be given their plain meaning. *See* §§ 70.001(1) and (9), Fla. Stat.; *Ady v. American Honda Finance Corp.*, 675 So. 2d 577 (Fla. 1996). But here, the plain meaning of the statute gives a property owner with property burdened and diminished in value by government action, a cause of action against that local government. Such a conclusion makes sense because it was P.I.E. that suffered the injury. This Court has held that the right to monetary compensation belongs to the owner of the property at the time it was damaged. *Canney v City of St. Petersburg*, 466 So. 2d 1193 (Fla. 2nd DCA 1985). The party who assumed the property after P.I.E. lost it, took the property knowing that it could not be used for excavation in the way P.I.E. planned, and as such it is not that property owner who now is bearing the loss. Moreover, even if the subsequent owner wanted to bring a Harris Act claim, he could not. The claim ripened and statute of limitations ran during P.I.E.'s ownership. *P.I.E.*, 133 So. 3d at 579.

P.I.E. suffered the loss and the Legislature intended for P.I.E. to have a cause of action to recover from the government for causing the loss. P.I.E. was the owner at the time of the government actions that burdened its property and as such it has

viable Harris Act claims against the County, even if it lost the underlying property before bringing suit.

B. Lower Court's Reliance on *FINR* Is Misplaced

DeSoto County and the trial court misinterpreted this Court's precedent when they relied upon *FINR II, Inc. v. Hardee County*, 164 So. 3d 1260, 1264 (Fla. 2d DCA 2015), *rev. granted*, 182 So. 3d 632 (Fla. 2015), to hold that P.I.E. lost its Harris Act claim when it lost the property. In *FINR II*, the Second District Court of Appeal addressed whether the Act provides a cause of action for owners of real property *adjacent* to property affected by governmental action. 164 So. 3d at 1261. The Court applied the plain meaning of the term "property owner" as used in the Act to determine whether a neighbor could bring a Harris Act claim when the government reduced a mining setback on a neighboring property:

> Pursuant to the plain language of the statute, in order to allege a claim under the Act the plaintiff must own the property alleged to be burdened by the specific governmental action . . . . the Act defines a property owner as "the person who holds legal title to the real property at issue."

FINR II, 164 So. 3d at 1264.

The Court held that the property owner who owns property diminished in value by government action burdening an adjacent property has a Harris Act claim, because it concluded that "the real property at issue" was not defined in the statute. In reaching that conclusion, this Court conflicted with the First District, which had concluded that

the Harris Act was intended to provide a cause of action for the property owner who suffers a taking that does not rise to the level of a constitutional taking yet deserves compensation for the diminution in property value effected by the government action. *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). The Florida Supreme Court has now accepted both cases for review to address the conflict. That is an interesting issue, but has nothing to do with this case.

FINR II did not address when a property owner must hold title to inordinately burdened property. It only addressed how far removed (physically) a property may be from property directly burdened by government action. P.I.E. owned the property burdened by DeSoto County's decision to deny the permit and change the ordinance at the time it was burdened. *FINR II* has no bearing on whether P.I.E. may continue the Harris Act claim. The property foreclosure did not foreclose P.I.E.'s Harris Act claim. P.I.E. is the underlying property owner whose property was burdened and who was injured. Accordingly, under the Harris Act, P.I.E. is the correct party for raising and maintaining the Harris Act claim.

II

P.I.E.'S HARRIS ACT CLAIMS ARE PERMISSIBLE BECAUSE THEY ARE POST-HARRIS ACT GOVERNMENT ACTIONS

P.I.E. brought its Harris Act claim based on the County's lawless permit denial and the County's subsequent resolution, not the pre-existing excavation ordinance.

But the County asserted below that it denied plaintiff's excavation permit application because P.I.E. did not comply with the terms of its 1990 mining ordinance. Since the Harris Act precludes claims based on the application of laws that pre-date the Harris Act's passage in 1995, *see* Fla. Stat. § 70.001(12), and P.I.E. asked for a permit to excavate land under a excavation ordinance passed in 1990, the County argues no land owner could bring a Harris Act claim in regards to the County's actions that burdened real property to be used for excavation between 1995—when the Legislature passed the Harris Act—and 2007, when DeSoto County amended the excavation ordinance. The County's position and the trial court's ruling ignore the fact that the County did not deny the permit based on the excavation ordinance; it denied the permit because of the commissioners' purported concerns about the "health, safety, and welfare" of the people of the County. That concern did not flow from the excavation ordinance in place at the time the County denied the permit.

A. The Permit Denial at the Hearing Relied Only on Concern for the Community's Health, Safety, and Welfare

The excavation ordinance in place when P.I.E. applied for its permit, which had not changed since 1990, provided certain limitations and requirements on a landowner in order to excavate. (R. 561-73). The day before the County Commissioners illegally vetoed the application, County staff recommended that the Commission approve the application. (Supp. R. 1538-49). They set out conditions for approval; staff members

who recommended approval included the County Attorney, who reviewed the application to ensure it complied with both the 1990 excavation ordinance and the LDRs. (Supp. R. 1455-56).

But when it came time for the Commissioners to do their legal duty and apply the law—which allowed for the use P.I.E. contemplated—the Commissioners blinked because of political pressure from neighbors opposed to P.I.E.'s use. (R. 1023-1176).

The neighbors' attorney claimed that the permit application violated "Policy L-3.4" of the LDRs (R. 1107), and then suggested the mine in the area was not a "compatible use" for the area as developed. (R. 1111). Another attorney for the "not in my backyard" neighbors agreed. (R. 1144). Neither attorney mentioned the 1990 excavation ordinance. The excavation ordinance had no "compatible use" condition (R. 562-73). Even the opponents to the mine knew that it was not whether the mine was proper under the excavation ordinance that was at issue. The opponents presented a number of experts who then spoke to compatibility, along with road capacity (R. 1121-26), and sound impacts (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.

After the neighbors torpedoed the project with their NIMBY (not in my backyard) complaints, one commissioner, Commissioner Neads, summed up why the County denied the application. He stated for the record:

> I'd like to make a motion of denial due to lack of compatibility. Also it is our responsibility to oversee the health, safety, and welfare that's in all of our comprehensive plan and our LDRs of the citizens of DeSoto County, and this directly impacts those local residents under the health, the dust, and the noise. Under the safety it's going to increase traffic, already demonstrates narrow roads and accidents in that area. And also the welfare, a lot of people buy property out there, own a little acreage for the peace and tranquility . . . which will be directly disrupted by a mining operation.

(R. 1175-76).

The Commissioners rejected the permit because of their generalized concern about the health, safety, and welfare of the community. (R. 1175-76). They rejected it to benefit the neighbors despite the fact that the use fit the 1990 excavation ordinance and Jason Green confirmed the property was fit for excavation. (R. 1175-76). Yet the County now wants P.I.E. to bear the cost of carrying this burden for the community. That's not the law. The law is that the community should bear community costs. That, in part, is the very purpose of the Harris Act.

B. The County Resolution Did Not Apply the Excavation Ordinance When It Rejected P.I.E.'s Approved Use for Property

After the hearing the Commission set out in a resolution why it denied the permit, and again the resolution—like the comments during the hearing—did not point to any failure to meet the excavation ordinance as the reason for the denial.

The resolution memorializing the denial provided:

> WHEREAS, the Board of County Commissioners finds that the proposed Excavation Permit is denied due to lack of compatibility, it is the

> Commissioners responsibility to oversee the health, safety, and welfare of the citizens of DeSoto County as required by the Comprehensive Plan and the Land Development Regulations, and this directly impacts those local residents of DeSoto County,
>
> NOW THEREFORE BE IT RESOLVED by the Board of County Commissioners of DeSoto County, Florida, that [P.I.E. application] is denied.

(R. 13).

Just as the Commission at the hearing on the permit did not rely on the excavation ordinance as a reason to deny the permit, the Commission again did not even rely on a cite to the excavation ordinance as a reason to deny the permit in its formal resolution. (R. 13). The resolution provided no reasons—other than government's general duty to the health, safety, and welfare of the community.

The failure of the County to set out the reasons for the permit denial reflects that the Commission did not meets its legal duties. In *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986), the Florida Supreme Court explained:

> [O]nce the petitioner [meets] the initial burden of showing that his application met the statutory criteria for granting such [applications], the burden [is] upon the Planning Commission to demonstrate, by competent substantial evidence presented at the hearing and made a part of the record, that the [application] requested by petitioner [does] not meet such standards and was, in fact, adverse to the public interest.

Irvine, 495 So. 2d at 167 (emphasis added); *see also* Section 125.022, Fla. Stat. ("When a county denies an application for a development permit, the county shall give written notice to the applicant. The notice must include a citation to the applicable

portions of an ordinance, rule, statute, or other legal authority for the denial of the permit."). Here, the County decided P.I.E.'s use for the property was adverse to the public interest, but the County failed to first establish the predicate for that decision—that the application failed to meet the statutory criteria: the excavation ordinance as well as the Comprehensive Plan and other land development regulations. It failed to carry its statutory duty to do so, and in any event even if it had, it could not have pointed to any failure to meet the excavation ordinance. The Commission chose to ignore the law and instead made its decision to deny the application on reasons other than the excavation ordinance.

To be sure, the excavation ordinance pre-dated the Harris Act and has a generalized "health, safety, and welfare" clause. But the excavation ordinance had nothing to do with why the County denied the permit. It is the permit denial itself that gives rise to this Harris Act claim. The excavation ordinance was not a reason for the denial, and thus that the ordinance pre-existed the Harris Act does not immunize the illegal conduct of the County.

III

P.I.E. DID NOT HAVE TO SUBMIT ANOTHER PERMIT APPLICATION BECAUSE IT WOULD HAVE BEEN FUTILE

P.I.E.'s second Harris Act theory of recovery relies on the County decision to amend its excavation ordinance two months after it denied the original permit

application. (R. 6). The amendment foreclosed any ability for P.I.E. to use the property for excavation. The trial court granted summary judgment on this claim because P.I.E. did not apply for a permit after the new ordinance was enacted. But Florida law did not require P.I.E. to do so. Therefore, this Harris Act claim—like the other claim based on the permit denial—should have survived summary judgment.

This Court has held that a landowner does not have to apply for a permit to make a Harris Act claim when the application of a new regulation to the burdened land would definitively lead to a permit denial, because the regulation applied by its very terms to the property at issue. *See 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 the suit an improper facial claim versus what it actually was, an allowed "as applied" claim). *Hussey* controls this case and the trial court erred when it rejected its application and granted judgment on this claim to the County.

In *Hussey*, the amendments to the land use plan that served as the predicate for the landowner's Harris Act claim applied to the owners' property by their very terms. *Hussey*, 158 So. 3d at 666. Properties within the areas covered by the amended land use plan were specifically identified and designated. *Id*. The amendments designated the landowners' property in a manner that restricted use of the property in ways its use was not restricted before the amendments. *Id*. That circumstance allowed for an as

applied Harris Act claim even without the submission of a permit application after the amendments became law. *Id*. *See also Citrus County*, 8 So. 3d 413 (Harris Act claim without a permit application allowed where the claim was based on "an amendment to a comprehensive plan which reclassified the land use category on" the piece of property at issue and thus burdened it by its very terms).

The instant case presents another *Hussey* circumstance allowing for Harris Act as applied claims without the requirement that the landowner actually apply for a permit. The new excavation ordinance, passed two months after the County denied P.I.E. its permit, specifically prohibited large mining operations on P.I.E.'s property and other properties zoned in the same way (within the A-5 zone), whereas prior to the new ordinance the law allowed for large mining operations on P.I.E.'s property and other A-5 zoned properties. (R. 492-97). After passage of the 2007 excavation ordinance, by its very terms the law only allowed an A-5 zoned property like P.I.E.'s property to be mined for 8,000 yards or less of sand in six months' time, whereas under the prior ordinance a land owner could mine 1,500,000 yards of sand over a five-year period. That is a 99.5% reduction in use as to what was P.I.E.'s property. This is classic *Hussey*.

The County and trial court's reliance on *M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71 (Fla. 1st DCA 2009) was misplaced. In that case, Panama City enacted a new height and setback ordinance pertaining to a zoning classification that

included M & H's property. *Id*. at 72. The land owner had informal discussions with Panama City about obtaining a construction permit; the city explained "after a cursory review" that the proposed construction would not meet the new rules. *Id*. M & H never formally submitted a permit request, and instead submitted a notice of its intention to file a claim under the Harris Act. *Id*. at 73. Although the First DCA affirmed a dismissal of the Harris Act claim because of the failure to apply for a permit, the court distinguished *Citrus County*, 8 So. 3d 413, because that case "involved an amendment to a comprehensive plan which reclassified the land use category on a particular piece of property." *M & H Profit*, 28 So. 3d at 78.

This case differs from *M & H Profit* in the same way. The amendments to DeSoto County's excavation ordinance were designed to prevent the use the County knew that P.I.E. contemplated for its property because P.I.E. had just applied for a permit. The new ordinance was drafted while P.I.E.'s application was pending. The landowner had not claimed that the height and set back ordinance was drafted so as to apply specifically to its property. Here, the circuit court erred by dismissing this case under the theory that the amendment had not been designed specifically to apply to P.I.E.'s property.

Prior to DeSoto County adopting the new excavation 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 was

a permitted principal use whereas excavations on parcels less than 20 acres was only allowed as a special exception. (Supp. R. 1485-87). The excavation and mining regulations contained no absolute volume or water restrictions for mines in the A-5 zone. (Supp. R. 1485-87). Plaintiff proposed to mine approximately 1,500,000 million cubic yards from 22.3 acres of a 47.8 acre site at a rate of 300,000 cubic yards per year. (R. 2; Supp. R. 1538-49). DeSoto County staff found the permit application to be in compliance with the comprehensive plan, zoning, excavation regulation requirements and, with the addition of certain conditions, not injurious to the citizens' health, safety and welfare. (R. 2; Supp. R. 1538-49). With an apparent eye on the future excavation and mining ordinance, the County Commission denied what clearly was an entitled permit under the existing regulations.

Ultimately, the County argued, and the trial court agreed, that P.I.E.'s claim was not ripe because P.I.E. had not applied for a permit under the new, more onerous ordinance. (R. 1320). This argument ignores the fact that the County Commission denied P.I.E.'s application only two months earlier under the old ordinance that allowed for the use that the County denied, anyway. It would have been futile to spend the time and money to make another application under these circumstances.

IV

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

The Harris Act significantly expanded the kinds of property rights protected by Florida law by expanding what constitutes a "vested right" or "existing use." Under the Act, "existing uses" includes not only present and actual uses, but also reasonable foreseeable uses that are non-speculative, compatible with neighboring land uses, and suitable for the land, such that it affects the property's fair-market value. Fla. Stat. § 70.001(3)(b). Moreover, under the Harris Act, an intended use also becomes a vested right under either equitable estoppel or substantive due process: "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). Here, PIE's right to develop its property for mining vested under the Harris Act's definitions of vested rights and existing use.

A. P.I.E.'s Had a Vested Right Under Equitable Estoppel

The Harris Act provides that a right vests under the Act if it would vest under equitable estoppel. *See* Fla. Stat. § 70.001(2). In common law, a "vested right" has been almost synonymous with "equitable estoppel" in Florida. Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 Stetson L. Rev. 475, 475-76 (1990-91) ("Florida courts have employed

these concepts [of vested rights and equitable estoppel] interchangeably."). Under equitable estoppel, a vested interest arises when a property owner in good faith, relying on an act or omission of the government, has made a substantial change in position or incurred such extensive obligations that it would be unjust to destroy the acquired right. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15 (Fla. 1976); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004).

Vested rights are about fairness. This Court explained this in *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571 (Fla. 2d DCA 1975):

> [T]he theory of estoppel amounts to nothing more than an application of the rules of fair play. 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. . . .

Town of Largo, 309 So. 2d at 573.

In *Town of Largo*, Imperial Homes made a contract to buy property contingent upon obtaining zoning that would expressly allow a multiple family development on the land. *Id*. at 572. Imperial asked the Town of Largo to rezone the land accordingly, and the Town did so. *Id*. As a result, Imperial Homes purchased the land. *Id*. But then when Imperial applied for a building permit for a multiple family development, the Town denied the building permit because neighbors protested the development. *Id*.

Even though Imperial Homes did not have a building permit, the court held that it had a vested right under equitable estoppel.

Like Imperial Homes, P.I.E. first sought approval from DeSoto County prior to purchasing the land. Only after being advised that the County would approve the land for P.I.E.'s intended development, did P.I.E. buy the land. (R. 939-40). Again, at the advice of the County, P.I.E. spent a quarter of a million dollars on a permit application. *Id*. The purchase and application were a substantial change in position that were made in reliance on the County's actions. *Cf. Town of Largo*, 309 So. 2d at 572–73. Given the facts, it would be unjust to deny P.I.E. this right. *Cf. id*.

Florida courts also recognize that a vested right arises under equitable estoppel even without detrimental reliance by the plaintiff, when the government fails to issue a permit authorized by the law and then passes an ordinance after the fact, denying a permit or license. In *City of Margate v. Amoco Oil Co.*, "the City illegally denied a permit that should have been issued and then tried to pass ordinances that would authorize a denial." 546 So. 2d 1091, 1094 (Fla. 4th DCA 1989). The court found that the City exhibited "bad faith and an avoidance of duty, such that estoppel should apply." *Id*. Here, the County did the same thing. (R. 2, 13, 1175-76). Although obviously P.I.E. did indeed detrimentally rely upon the actions of the County, Florida law holds that P.I.E. should recover on these facts even if P.I.E. had not so relied.

As if that were not enough, the Harris Act actually expands the definition of vested rights to protect more than those rights protected under common law equitable estoppel. It provides that this Court should determine whether a vested right exists by applying "principles of equitable estoppel or substantive due process." Fla. Stat. § 70.001(3)(a). The Bert Harris Act's substantive due process provision was intended to extend protection well beyond equitable estoppel, "enabl[ing] the judiciary to craft a constitutionally based vesting test separate from takings theories or remedies, and distinct from equitable estoppel." David L. Powell, Robert M. Rhodes, & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255, 270-71 (1995); *see also* David L. Powell, et al., *Florida's New Law to Protect Private Property Rights*, 69 Fla. B. J. 12, 14 (Oct. 1995). Substantive due process does not traditionally provide a vesting test, but it does bar the government from acting arbitrarily or capriciously, which adds another fairness component to the statute's vesting test. Because the government here denied P.I.E.'s properly completed permit after encouraging the plaintiff to purchase the land and spend a quarter of a million dollars on the permit application, this fairness-based factor should weigh in favor of P.I.E.

The lower court erred by summarily holding that P.I.E. could not have had a vested right. (R. 1321). To support its decision, the lower court quoted *Boynton Beach v. Carroll*, 272 So. 2d 171 (Fla. 4th DCA 1973), for the proposition that "if the

possession of a building permit does not create a vested right, then a mere application for a building permit cannot create a vested right." But the plaintiffs in *Carroll* did not claim equitable estoppel and thus the case does not apply here. *Id.* ("In the instant case, no claim of equitable estoppel has been presented by the appellees. Therefore, no vested right was created by the appellees' application . . . .").

Similarly, the lower court cited *City of Jacksonville v. Coffield*, 18 So. 3d 589, 596 (Fla. 1st DCA 2009), to support its decision. (R. 1321). But in that case, the property owner knew of the government's plans to shut a road that would thwart his development *prior to purchasing the land*. *Coffield*, 18 So. 3d at 595. The government carefully told Coffield that his development could only succeed if the road remained open. *Id.* at 598. Thus he did not rely on any action from the government when he purchased the land. Rather he relied merely on a hope that the government would not close the road after all. *See id*. In contrast, P.I.E. had every reason to believe the government would approve its permit. It relied on the government to approve the appropriateness of the land for excavation prior to its purchase of the land. It relied on the government's advice when it decided to spend $250,000 on the permit application. 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. Moreover, fairness itself recognizes that P.I.E.'s permit should have been granted and thus its right to the use vested.

B. P.I.E.'s Plan Was an "Existing Use" Under the Harris Act Because It Was Reasonably Foreseeable, Non-Speculative, and Suitable

Besides having a vested right to use the property as it intended, the plan P.I.E. had for the property amounted to "an existing use" protected by the Harris Act. The Harris Act protects landowners who lose an existing use of their property due to government action. § 70.001(2), Fla. Stat. To be protected, an "existing use" under the act that is not a present and actual use must be reasonably foreseeable, non-speculative, compatible with neighboring land uses, and suitable for the land, such that the use affects the land's value. § 70.001(3)(b), Fla. Stat. That was the case here.

The property at issue in the case consisted of nearly 50 acres of land zoned A-5. (R. 548). At the time P.I.E. purchased it, the County Comprehensive Plan provided that excavation on lots greater than 20 acres was a permitted use. (R. 548). When a County Comprehensive Plan permits a use, it is presumed to be a valid use of the property "and therefore valid." *Brooks v. Planning Comm'n of Jacksonville*, 579 So. 2d 270, 273 (Fla. 1st DCA 1991). If the Comp Plan allowed use for excavation, then P.I.E.'s use of the property for excavation carried a presumption of reasonableness. *See Rural New Town, Inc. v. Palm Beach County*, 316 So. 2d 478 (Fla. 4th DCA 1975) ("the very adoption of [a regulation allowing a proposed use] creates a presumption of reasonableness" for that proposed use.). Moreover, the finding of compatibility and recommended approval by the County's lawyer, engineer, planning

manager, and administrator shows that P.I.E.'s intended use was reasonably foreseeable, non-speculative, compatible with neighboring land uses, and suitable for the land. (R. 2; Supp. R. 1455-56, 1538-49).

The trial court simply misinterpreted the law on this point. For example, the court asserted that P.I.E.'s plan for the property was not based on reasonable expectations because "a use that requires a time-limited permit does not create a reasonable expectation that the specially-permitted use can continue indefinitely". (R. 1322). The court cited *Holmes v. Marion County*, 960 So. 2d 828, 830 (Fla. 5th DCA 2007), for that proposition. To be sure, if P.I.E. had asked the lower court to extend a time-limited permit indefinitely, then *Holmes* would be on point. But P.I.E. did not ask for that. P.I.E. asked for a five-year excavation permit that DeSoto County's laws explicitly allowed for. P.I.E.'s plan, unlike the plan of the property owner in *Holmes*, was based on reasonable expectations created by DeSoto County's own rules.

Similarly, the trial court's reliance on *Coffield*, 18 So. 3d 589, was misplaced, too. In *Coffield*, a property owner sought to develop residential property at a density not supported without a road that the owner knew the government would close. *Id*. at 596. The First District explained that because Coffield knew of the planned road closure prior to buying the land, he knew that developing the residential property at the density he preferred was by no means a "reasonably foreseeable, non-speculative"

use of the property. *Id*. The Court has no such facts in this case. No road closed rendered the excavation plan unreasonable. DeSoto County's Plan and regulations allowed for the use, and P.I.E. reasonably expected to rely on those rules. It was error for the trial court to hold otherwise.

Through its own published rules for land development, DeSoto County put the world on notice that this land was suitable and compatible with the excavation plan P.I.E. had for it. Indeed, even the County's own Planning Manager, Jason Green, knew as much. The County's refusal to honor its own rules and thus approve the permit violated the Harris Act.

CONCLUSION

Tom Finney planned to mine fill and septic sand for his family business. He wished to reduce his costs by digging the materials himself, rather than paying for it on the market. He asked the County Planning Manager what property he should buy for these purposes, and the Planning Manager told him what he needed. The Planning Manager assured Finney that the property Finney found would serve Finney's needs and the County's requirements. Finney found a partner, they created P.I.E., and paid $1.25 million for the property. They then spent another quarter-of-a-million dollars to make sure the property would meet the County's rules. It did. County staff approved the plan—as P.I.E. had every reason to expect since its Planning Manager had guided P.I.E. every step of the way—but the County then pulled the rug out from

under P.I.E. It rejected the permit application, and then it re-wrote its law to ensure P.I.E. never could excavate the property as it intended.

When a County acts in this manner, the Harris Act provides a way for the property owner to recover for its losses. The trial court erred when it refused to grant summary judgment on liability in favor of P.I.E. both for the permit denial and for the ordinance re-write designed to cut off any opportunity for P.I.E. to use the property as it intended and the law allowed. This Court must reverse with instructions that the lower court enter summary judgment on liability in favor of P.I.E. and conduct a trial to determine P.I.E.'s damages.

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Respectfully submitted,

By: /s/ Mark Miller

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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: March 20, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Initial Brief has been electronically filed with the Clerk of Court using the e-DCA electronic filing system on this 20th day of March, 2017, which will send a notice of electronic filing to the following:

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