

**Second DCA Holds Wetland Designation for 93% of Property May Constitute a Total Regulatory Taking and a Claim under the Bert Harris Act**

A property owner purchased and attempted to develop approximately seven acres of property in the Town of Fort Myers Beach, Florida (the “Town”) for residential uses. The property was platted to allow 40 single-family lots, but the entire property was also designated as wetlands, frustrating any residential development opportunity. For ten years, the property owner tried to change the wetland designation through multiple avenues but to no avail. In 2016, the property owner then filed a notice of claim under the Bert J. Harris Jr., Private Property Rights Protection Act (the “Bert Harris Act”).

In response, the Town attorney offered settlement terms contingent on approval by the Town Council to “administratively” remove the wetlands designation from three lots. The property owner declined and filed suit, alleging: (1) categorical inverse condemnation by regulatory taking; (2) partial inverse condemnation by regulatory taking; and (3) violation of the Bert Harris Act.

In January of 2019, the trial court agreed with the Town, holding the complaint was barred because the wetlands designation existed prior to the property owner’s purchase of the property and because there was additional attempts to obtain relief through other administrative avenues. This judgement was partially reversed on appeal after the Second DCA held additional administrative avenues to challenge the wetland designation would be futile and the property owner purchased the property with the right to challenge the wetlands designation. Shortly thereafter, Jamieson renewed his motion for summary judgment as to the alleged categorical inverse condemnation by regulatory taking (count 1). The trial court denied that motion and subsequent motions for summary judgement on the second and third allegations raised by Jamieson—instead granting summary judgment for the Town and rendering a final judgment.

On appeal, the Second DCA described the law on regulatory takings. A regulatory taking can be partial or total. Total regulatory takings result in virtually all beneficial or productive use of the property being denied. (*Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). Partial regulatory takings require the court to evaluate: “(1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.” (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)).

The Second DCA held that there were unsettled questions related to whether there was a total or partial taking because the Town Attorney’s contingent offer demonstrated that the property owner would not be able to develop 93% of his property, so any other administrative challenges would be futile and his regulatory takings claim was ripe.

Under the Bert Harris Act claim (count 3), the Second DCA held that whether the property was entitled to assert a Bert Harris Act claim was a dispositive issue that was not addressed by the trial court in its order granting the town’s motion for summary judgment and, therefore, warranted remand for further consideration.

Regarding the merits of the Bert Harris Act claim, the Second DCA provided—for guidance purposes—that success on a Bert Harris Act claim requires the property owner to prove that “a specific action of a government 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(1). Factors that must be considered when making this determination include whether “adjacent land uses... have created an existing fair market value greater than the fair market value of the actual, present use or activity on the real property” and whether the property being “surrounded on three sides by residential development,” and having been zoned for residential multi-family use when the property owner purchased it created a “reasonable, investment backed-expectation” that the land could be developed. And, if so, whether the Town determining to the contrary—which it reserves the authority to do—places a “disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large” on the property owner.

The Court concluded that a bench trial was necessary for the inverse condemnation/total regulatory taking and inverse condemnation/partial regulatory taking claims. The Court provided the trial court with instructions and considerations to guide the bench trial.