

ORDINANCES & REGULATIONS

Ordinances & Regulations: Challenges

M & H Profit, Inc. v. City of Panama City,
28 So. 3d 71 (Fla. 1st Dist. App. 2009)

A property owner cannot state a cause of action under the Bert Harris Act (Act) when a municipality has adopted an ordinance of general applicability but has not yet applied the ordinance to a particular piece of property. The Bert Harris Act does not allow facial challenges to municipal ordinances.

FACTS AND PROCEDURAL HISTORY

M & H Profit (M & H), the appellant, purchased property in Panama City in February 2005. At the time of purchase, the property was zoned General Commercial (GC-1) and had no height or setback restrictions. M & H intended to construct a twenty-story residential condominium on the property but had not filed a developmental application with the City of Panama City (City).

Six weeks after M & H purchased the property, the City passed a new ordinance (Ordinance), which placed new height restrictions and setback requirements for all structures in the GC-1 zoning district. The Ordinance created 120-foot height restriction, additional setbacks, and an absolute 150-foot limit on all structures within the zoning district.

In October 2005, M & H attended an informal pre-application conference with the City Planning Manager, who later sent a letter to M & H stating that the twenty-story residential condominium would not meet the height and setback requirements established by the Ordinance. M & H asked the City Attorney whether it could take any action to overrule the City's letter, and the City responded that the Board of Architects and the City Commission must approve any variance.

In March 2007, M & H submitted a Notice of Intention to File a Claim under Florida Statutes Section 70.001 (2006), known as the Bert Harris Act, and also supplied appraisals confirming its alleged loss in the property's fair market value. In response, the

City sent M & H a Ripeness Determination, asserting M & H's Notice of Claim did not fall within the scope of the Act.

In its subsequent complaint, filed in Bay County Circuit Court and pursuant to the Bert Harris Act, M & H asserted a significant loss of value in its property caused by the City's enactment of the Ordinance. M & H claimed the City applied the Ordinance to M & H's property, and took the position that the provisions of the Ordinance applied to the property. Additionally, M & H claimed its intent to build the twenty-story condominium in compliance with the then-existing zoning regulations created an "existing use" and that M & H had an investment-backed expectation to build the twenty-story condominium.

In its Motion to Dismiss, the City pointed out that M & H never applied for a development order or a building permit, and as the Bert Harris Act covers only as-applied challenges, M & H therefore failed to state an appropriate cause of action under the Act. The City also claimed M & H had no investment-backed expectation to build a twenty-story residential condominium project, and that such a structure did not qualify as an existing use because the City's Comprehensive Plan did not allow residential use of property in GC-1 zones.

The trial court granted the City's Motion to Dismiss. On appeal, the First District Court of Appeal affirmed the trial court's ruling.

ANALYSIS

The First District Court of Appeal affirmed the trial court's ruling, granting the City's Motion to Dismiss. The court held that the Bert Harris Act was restricted to "as-applied" challenges and did not allow facial challenges resulting from a City's mere enactment of a new ordinance. The court also held that M & H's informal meeting with the City Planning Manager did not qualify as a specific application of the Ordinance and therefore did not afford M & H a cause of action under the Act.

First, the court analyzed the language of the Bert Harris Act to determine whether its application was limited to as-applied challenges. It considered various provisions of the Act that explicitly use phrases such as "as-applied" and "present use or activity" when addressing the Legislature's intent and the causes of actions arising under the Act. The court thus found the language of

the Act plainly and unambiguously limits it to as-applied challenges and does not permit facial challenges. The court consequently determined there was no need to utilize rules of statutory interpretation to resolve the issue of intent, as it is not permitted to add words to the Act that were not originally intended by the legislature. Since the City had enacted the Ordinance but had not yet applied it to M & H's property, the court found M & H's claim would not qualify as an as-applied challenge and therefore could not be brought under the Bert Harris Act.

Second, the court discussed the importance of allowing municipalities to exercise their Home Rule powers to enact ordinances for purposes not expressly prohibited by the constitution or by general or special law or county charters. Local governments adopt land development regulations for the protection and welfare of local citizens, and local governments act within their power when enacting such regulations. "Applying the sanctions of the Bert Harris Act to local governments for the mere passage of ordinances dealing with the general police power needs of its citizens will severely limit the willingness of local government to act." *M & H Profit, Inc.*, 28 So. 3d at 77–78.

Finally, the court held that the meeting between M & H and the City Planning Manager and the letter from the City Planning Manager did not constitute specific application of the Ordinance to M & H's property because the meeting was informal, and the letter contained only general statements that the zoning ordinance applied to M & H's property just as it applied to all properties within the zoning category. The court therefore affirmed the trial court's ruling in granting the City's Motion to Dismiss.

In his dissent, Judge Thomas states that M & H should be able to bring a cause of action under the Bert Harris Act based on the informal denial of the business plan. Although he did not address whether M & H could establish an existing use as required by the Act, he argued that private property owners may be compensated if unfairly burdened by local ordinances.

In finding that M & H could bring a claim after being adversely affected by the Ordinance, the dissent reasoned that the plain language of the Act does not limit its application to specific action by the government, but includes the informal denial of M & H's business plan, which was an action on M & H's application. He also distinguished the law of takings by pointing out that

the Act allows compensation for losses that may not otherwise meet the threshold of regulatory takings. As such, takings cases are not relevant when considering claims under the Bert Harris Act.

Although he recognized the speculative nature of M & H's intended property use, the dissent asserted that it is not the role of the court to evaluate the merits and purpose of the governmental ordinance. Therefore, the court should apply the plain language of the Act, and M & H should be permitted to pursue its claim under the Bert Harris Act.

SIGNIFICANCE

M & H Profit, Inc. emphasizes the requirement, under the Bert Harris Act, that there be a specific application of an ordinance to specific property before a property owner can bring a cause of action for a violation of his rights under provisions of the Act. Mere enactment of an ordinance, without application of the ordinance to property, does not justify a cause of action under the Bert Harris Act.

RESEARCH REFERENCE

- 83 Am. Jur. 2d *Zoning and Planning* § 128 (2009).

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