NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DEAN WISH, LLC, Appellant, v. LEE COUNTY, FLORIDA, Appellee.	)	Case No. 2D19-4843

Opinion filed April 7, 2021.

Appeal from the Circuit Court for Lee County; Leigh F. Hayes, Judge.

Chance Lyman and Hala A. Sandridge of Buchanan Ingersoll & Rooney PC, Tampa, for Appellant.

Jay J. Bartlett and Jeffrey L. Hinds of Smolker Bartlett Loeb Hinds & Thompson, P.A., Tampa; and Richard Wm. Wesch, Lee County Attorney, Fort Myers, for Appellee.

LaROSE, Judge.

"Many high-stakes cases turn on . . . narrow linguistic questions." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 141 (1st ed. 2012). This is such a case.

Dean Wish, LLC, challenges the final summary judgment rejecting its claim under the Bert J. Harris, Jr., Private Property Rights Protection Act, section

70.001, Florida Statutes (2016) (the "Act"). See Fla. R. App. P. 9.030(b)(1)(A) (providing this court's jurisdiction over appeals from final orders). The claimant must be the legal title holder to be entitled to relief under the Act. Because Dean Wish no longer holds legal title to the property at issue, we affirm.[1]

I. Background

Starting some forty years ago, Edward Dean and others began buying contiguous[2] parcels of land on Pine Island in Lee County, Florida, "for farming and eventual sale for residences." Much of the land was zoned for agricultural use and included a "Rural" future land use designation that allowed a residential density of one dwelling unit per acre (1 du/1 acre) under the Lee County Comprehensive Plan. The remaining land was designated as either "Outlying Suburban" or "Wetlands" future use.

In 2003, Lee County changed the "Rural" designation to "Coastal Rural," a designation that decreased density to one dwelling unit per every ten acres (1 du/10 acres). At the time, Mr. Dean, along with other individuals and entities, had accumulated about 55 parcels, comprised of about 640 acres. Mr. Dean and another entity sued Lee County in November 2006 under the Act, based upon the alleged inordinate burden the "Coastal Rural" designation imposed upon the land. See § 70.001. The trial court dismissed the lawsuit because the claim was not ripe; the density reduction had not yet been applied to the allegedly affected landowners.

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[1]Based on our disposition, we do not address Dean Wish's second issue on appeal regarding the validity of the appraisal it submitted to Lee County under the Act.

[2]Although the parties, at times, refer to the parcels as contiguous, the record indicates that there is a piece of property unattached to the other property.

The land changed hands many times over the years. Ultimately, in 2010, Mr. Dean and Gary Wishnatzki formed Dean Wish. The company bought the 55 parcels. Then on May 18, 2015, Dean Wish submitted a development application to Lee County. Dean Wish sought an administrative increase in the standard maximum density for the "Coastal Rural" lands and for a permit for 336 dwelling units over its 640 acres (about 1 du/1.9 acres). See Lee County, Fla., Land Dev. Code ch. 33, art. III, div. 5, §§ 33-1051, 33-1052 (2015). Dean Wish included all of its parcels in its application, although the requested density increase was for the "Coastal Rural" lands.

In November 2015, Lee County's Zoning Division responded that it was not authorized to administratively approve the application. It suggested that Dean Wish "submit an application for a planned development consistent with the Land Development Code or an appropriate amendment to the Lee Plan." Then, in 2016, Lee County amended the Plan, setting the density of the "Coastal Rural" lands to one dwelling unit per 2.7 acres (1 du/2.7 acres).

Dean Wish presented Lee County with its notice of claim under the Act in August 2016. It also submitted an appraisal asserting a monetary loss exceeding $9 million. Dean Wish rejected a settlement offer from Lee County. It sued Lee County the following January.

Lee County moved to dismiss the lawsuit. Dean Wish filed an amended complaint. Lee County, again, moved to dismiss. It argued that Dean Wish failed to provide a valid presuit appraisal because the appraisal included parcels not subject to the "Coastal Rural" density reduction and not directly impacted by government action. Lee County relied on Turkali v. City of Safety Harbor, 93 So. 3d 493 (Fla. 2d DCA 2012). Dean Wish responded that Lee County and the Act required it to include all 55

parcels because it owned all of the contiguous property and all the parcels were part of the single 336-unit development plan. See § 70.001(3)(g) ("The term 'real property' means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner has a relevant interest. The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity.").

The trial court rejected Lee County's position, finding Turkali inapposite because it "dealt with an owner 'bundling' his property with those of other owners in order to present a claim." See Turkali, 93 So. 3d at 495. The trial court found the appraisal valid because it included only property that Dean Wish owned, and Dean Wish only alleged damages stemming from "the loss in residential density of [its] Rural/Coastal Rural property." The trial court denied Lee County's motion without prejudice "to raise the issue upon presentation of additional countervailing evidence by subsequent motion for summary judgment, or at trial."

Lee County raised the appraisal issue in a subsequent summary judgment motion. Dean Wish—citing section 70.001(3)—countered that, as the trial court had previously ruled, it owns all the parcels and was not seeking damages for non-Coastal Rural parcels. Dean Wish maintained that the issue remained a fact question inappropriate for summary judgment.

Several months later, Dean Wish sold the property "as is" at auction. Seemingly, the auction was necessary due to lack of market interest, litigation costs, and Mr. Dean's retirement, increasing age, and medical expenses. The sales contract specified that Dean Wish retained all rights to monetary relief in the pending lawsuit. A corrective warranty deed provided that Dean Wish conveyed title subject to

> [a]ny award or payment of compensation made by Lee County in the Circuit Court action of Dean Wish, LLC v. Lee County, Case No. 17-CA-000061 and any orders of the Court in relation thereto, in accordance with Section 70.001(7), Fla. Stat. (2018); provided any such order or settlement is limited to monetary compensation and shall not result in the modification of any property rights or entitlements, including future land use designations, as such rights and entitlements to the landowner existed on the date of [the initial warranty deed].

(Emphasis added.)

Following the sale, Lee County filed another summary judgment motion, arguing that Dean Wish could not maintain the lawsuit because the Act required Dean Wish to maintain ownership of the property "until conclusion of the case." Dean Wish responded that the operative time for measuring ownership was when Lee County imposed the inordinate burden on its property.

The trial court granted Lee County's motion. The trial court agreed that Dean Wish was no longer the "property owner" as defined under section 70.001(3)(f) of the Act, as "the person who holds legal title to the real property."[3] The trial court observed:

> The [Act] utilizes the present indefinite tense ("holds legal title") in demarcating who is a proper [claimant]. It does not use the past tense ("held legal title") or the past perfect tense ("had held legal title"). As a result, the plain language of the [Act] requires a [claimant] to be the current legal title holder of the property that is the subject of a Bert Harris claim in order to avail itself of the remedies offered by the [Act].

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[3]The trial court mentioned the rule of statutory interpretation regarding the strict interpretation of the Act in its "Background, Legal Standards, Undisputed Facts" section. See Bair v. City of Clearwater, 196 So. 3d 577, 581 (Fla. 2d DCA 2016). But contrary to Dean Wish's assertions in its briefs, the final order reflects that the trial court did not utilize this rule in its analysis.

The trial court also relied on Turkali, finding that Dean Wish's inclusion of nonimpacted parcels in its appraisal invalidated its claim. The trial court subsequently entered its final judgment, from which Dean Wish appeals.

II. Discussion

We limit our discussion to the first issue framed by Dean Wish: "[M]ay a [claimant] maintain an action under [the Act] where the [claimant] owned the property when it commenced the action but was forced to sell the property prior to trial while reserving the right to collect compensation?" This is an issue of first impression. Dean Wish argues that the Act's plain language requires that a claimant "need only own the property when the government imposes the burden" and that, therefore, the trial court violated the plain language and improperly relied on the rules of statutory construction to frustrate legislative intent. Dean Wish asserts that the trial court's interpretation creates an unreasonable restraint on alienation and amounts to a judicial taking. Dean Wish further asserts that even if the trial court's interpretation were correct, there is still a disputed fact question whether it remains the "property owner" with legal title based on the corrected warranty deed.

Lee County contends that the trial court was correct: the Act's plain language "affords recovery only to the 'property owner' as defined in the Act, which requires the claimant to retain legal title to the subject property until the case is concluded." Lee County also argues that Dean Wish's post hoc retention of rights to money does not amount to an equitable or legal title for it to be a "property owner" under the Act.

We review the order granting summary judgment and issues involving statutory interpretation de novo. Bair v. City of Clearwater, 196 So. 3d 577, 581 (Fla. 2d

DCA 2016). "Summary judgment is properly entered only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). "[O]nce the moving party has submitted evidence entitling it to relief, '[i]t is not enough for the opposing party merely to assert that an issue [of fact] does exist.' " Cong. Park Office Condos II, LLC v. First-Citizens Bank & Tr. Co., 105 So. 3d 602, 610 (Fla. 4th DCA 2013) (second and third alterations in original) (quoting Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979)). "Rather, it is incumbent upon [the opposing party] to come forward with competent evidence revealing a genuine issue of fact[.]" Id. (alterations in original) (quoting Florida Bar v. Mogil, 763 So. 2d 303, 307 (Fla. 2000)).

To interpret a statute, we examine primarily the statute's plain language. Bair, 196 So. 3d at 581 (citing J.W. v. Dep't of Child. & Fam. Servs., 816 So. 2d 1261, 1263 (Fla. 2d DCA 2002)). "If the statute is clear and unambiguous, we need not resort to rules of statutory interpretation; rather, we give the statute 'its plain and obvious meaning.' " Id. (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). We "endeavor[] to give effect to every word of a statute so that no word is construed as 'mere surplusage.' " Hardee County v. FINR II, Inc., 221 So. 3d 1162, 1165 (Fla. 2017) (quoting Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 198 (Fla. 2007)). We review the tense used in the statute, see, e.g., Dep't of Revenue ex rel. Salyer v. Vobroucek, 259 So. 3d 228, 231 (Fla. 2d DCA 2018) (applying the statute's plain language, including the use of present tense, to conclude that the trial court had jurisdiction under the statute over the child support dispute), and definitions in the statute or dictionary, see License Acquisitions, LLC v. Debary Real Estate Holdings, LLC, 155 So. 3d 1137, 1144 (Fla. 2014) (explaining that when the legislature fails to define a term, "it is

appropriate to refer to dictionary definitions in order to ascertain the plain meaning of the statutory provisions at issue" (citing Greenfield v. Daniels, 51 So. 3d 421, 426 (Fla. 2010))).

Unremarkably, statutes "are presumed to be grammatical in their composition. They are not presumed to be unlettered. Judges rightly presume, for example, that legislators understand subject-verb agreement, noun-pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word-choice." Scalia & Garner, supra, at 140. Any statement suggesting "that grammatical usage is some category of indication separate from textual meaning . . . is quite wrong." Id. at 141.

Section 70.001(2) provides: "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 . . . as provided in this section." The "property owner" is "the person who holds legal title to the real property that is the subject of and directly impacted by the action of a governmental entity." § 70.001(3)(f). The Act also permits an award of attorney fees and compensation to the prevailing "property owner." See § 70.001(6) (providing that the trial court shall award a "prevailing property owner the costs and a reasonable attorney fee" and "impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property").

These provisions are clear and unambiguous. The Act requires one to be the "property owner" to be eligible for statutory relief. § 70.001(2). And the Act plainly defines the term "property owner" as "the person who holds legal title to the [impacted] real property." § 70.001(3)(f) (emphasis added).

The trial court properly recognized that the Act utilizes the present indefinite tense to determine the proper claimant. The present indefinite tense is the same as the simple present tense. See Tenses in Writing, Ask Betty, https://depts.washington.edu/engl/askbetty/tenses.php (last visited Mar. 12, 2021). The simple present tense of "holds" communicates that the person currently holds legal title to the impacted property. See Mary Barnard Ray, Finding the Perfect Tense, Wis. Law., Apr. 1999, at 28 (providing that the simple present tense communicates current actions and habitual actions that still occur); Robert C. Farrell, Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions, 40 Loy. U. Chi. L.J. 1, 19 (2008) (same); see also Koehn v. Delta Outsource Grp., Inc., 939 F.3d 863, 865 (7th Cir. 2019) ("After all, the simple present-tense verb 'is' also implies 'current,' doesn't it?"); Sherley v. Sebelius, 644 F.3d 388, 394 (D.C. Cir. 2011) ("The use of the present tense in a statute strongly suggests it does not extend to past actions.").

The Act does not use a tense or terms that allows a claimant, who held legal title in the past, when the lawsuit was filed or when the property was burdened, to obtain relief. Cf. Winston Labs v. Sebelius, No. 09 C 4572, 2009 WL 8631071, at *6 (N.D. Ill. Dec. 11, 2009) ("Congress specifically defined the term 'affiliate' in the text of the [Federal Food, Drug and Cosmetic Act (FDCA)] employing a present sense definition. If Congress intended the term 'affiliate' to include dissolved, defunct or previously existing corporate entities, Congress could have included such a definition of 'affiliate' in the text of the FDCA."). In fact, the Act continues to use the term "property owner" to outline the trial court's procedures to determine compensation and fees. See § 70.001(6)(a)-(c). Put simply, the Act's plain language requires a claimant to be the current legal title holder of the impacted property to obtain the available remedies. Cf.

Osborne v. Dumoulin, 55 So. 3d 577, 588 (Fla. 2011) ("We agree that use of the present tense of the verbs in section 222.25(4)[, Florida Statutes (2007),] narrows the relevant time that a debtor receives the benefits of the [constitutional] homestead exemption to the period when the debtor asserts the personal property exemption.").

Inserting the pertinent part of the definition into subsection 2, as Dean Wish desires, does not refute this conclusion: "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 person who holds legal title to the real property] is entitled to relief . . . as provided in this section." See §§ 70.001(2), (3)(f). We recognize that the Act requires the person who holds legal title to wait to seek Bert Harris relief until the governmental entity has burdened the property. However, the continued use of "property owner"—that is defined with the present tense—communicates that the property owner must continue to hold legal title to the property at all stages of the litigation. See § 70.001(6); cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987) ("One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505 [of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)]. . . . [T]he present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."); Osborne, 55 So. 3d at 588 (agreeing that the present tense of the verbs in the statute narrowed the time period that the debtor received the homestead exemption benefits).

It is noteworthy that the legislature used the present perfect tense for the requirement that the governmental entity's action "has inordinately burdened" the property. See generally Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health,

183 So. 3d 1138, 1145 (Fla. 1st DCA 2015) (explaining that the present perfect tense "can be used to indicate 'action that was started in the past and has been recently completed or [action that] is continuing up to the present time' " (alteration in original) (citing William A. Sabin, The Gregg Reference Manual, ¶ 1033, at 272 (10th ed. 2005))). The legislature's use of the different tenses reflects its knowledge of "the significance and meaning of the language it employed." See Barrett v. United States, 423 U.S. 212, 217 (1976) (reasoning that "Congress knew the significance and meaning of the language it employed" where it used different tenses in the same statute); Alena Farber, Venue, Then or Now?: Interpreting the Patent Venue Statute, 33 Harv. J.L. & Tech. 693, 706 (2020) ("The Supreme Court has held that Congress's use of the present and present perfect tenses in one statute 'is significant and demonstrates that Congress carefully distinguished between present status and a past event.' It is notable that Congress chose to refer to the place of business in the present tense because 'Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option.' " (footnotes omitted)).

We now turn to application of the Act's plain language to the facts before us. Dean Wish is not the legal title holder of the parcels. It divested itself of legal title while the lawsuit was pending. See generally McCoy v. Love, 382 So. 2d 647, 649 (Fla. 1979) ("Where all the essential legal requisites of a deed are present, it conveys legal title."). Dean Wish never disputed the validity of the corrective deed. Dean Wish's retention of its right to monetary damages did not equate to a retention of the legal title to the property. Cf. Anderson v. Aetna Cas. & Sur. Co., 443 So. 2d 404, 404-05 (Fla. 4th DCA 1984) ("[T]he policy defined 'owner' as one who holds legal title to the uninsured vehicle. Under the facts before us now, the insured had a beneficial interest

in the vehicle but he did not hold legal title to the vehicle at the time of the accident. . . . Thus, the trial court erred in applying the PIP exclusion because the insured did not have legal title to the vehicle." (footnote omitted)).

Dean Wish's attempt to claim that there is a disputed fact question over whether it still held legal title is not genuine. Cf. Vale v. Palm Beach County, 259 So. 3d 951, 953 (Fla. 4th DCA 2018) (rejecting plaintiffs' argument that the county impacted their properties by allowing the redevelopment of a golf course within the same planned unit development because plaintiffs were not "property owners" under the Act where "it [was] undisputed that plaintiffs [did] not hold legal title to the former golf course").

Although not critical to our decision, we note that the corrective deed may have given Dean Wish rights, if any, in the chose of action. Cf. Caulk v. Orange County, 661 So. 2d 932, 933-34 (Fla. 5th DCA 1995) (discussing the circumstances in which a seller conveyed a deed with the reservation of rights to condemnation proceeds). Its purported retention of entitlement to damages does not seem to us to limit the scope of the legal title conveyed to the purchaser. Dean Wish was no longer a "property owner" and not "entitled to relief." See § 70.001(3)(f); cf. Allstate Ins. Co. v. Morgan, 870 So. 2d 2, 4 (Fla. 2d DCA 2003) ("Morgan was entitled to PIP benefits only if she was an 'injured person' as defined in paragraph 3(a)(ii) of the PIP section definitions. She was not, because she was not riding in an 'insured motor vehicle' as that phrase was specifically defined in paragraph 4 of the PIP section definitions.").

The cases that Dean Wish relies upon do not convince us otherwise.[4] For example, the First District in City of Jacksonville v. Coffield, 18 So. 3d 589, 593-94 (Fla.

[4]Although an appellant in Ocean Concrete, Inc. v. Indian River Cnty., Bd. of Cnty. Comm'rs, 241 So. 3d 181, 185-88 (Fla. 4th DCA 2018), lost ownership over the

1st DCA 2009), assumed that the original property owner and the subsequent holder of the legal title were "entitled to an adjudication of their rights under the Act" where the original property owner and the subsequent title holder were alter egos and parties to the lawsuit. The court did not decide the question at issue here, which is whether the original property owner was ineligible for any relief under the Act where he no longer held legal title to the property. Id.

We do not dispute that "Florida public policy disfavors unreasonable restrictions on the free alienability of property." Webster v. Ocean Reef Cmty. Ass'n, 994 So. 2d 367, 370 (Fla. 3d DCA 2008). But again, because the Act is unambiguous, we may not depart from its plain and natural meaning by considering public policy.[5] See generally Bd. of Comm'rs of Leon Cnty. v. State, 118 So. 313, 317-18 (Fla. 1928) ("Where the language of a statute is ambiguous or doubtful in meaning, the courts may well look to the purpose and policy of the statute to elucidate and explain the meaning of the language used, but it is a well-settled principle of construction that, so long as the language used is unambiguous, a departure from its plain and natural meaning is not justified by any consideration of its consequences or of public policy. It is also well settled that, where a statute is incomplete or defective because the case in question was not foreseen or contemplated, it is beyond the province of the courts to supply the omission, even though, as a result, the statute appears unfair, impolitic, or a complete nullity."). It is not our place to add language or alter the Act to resolve any perceived

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property to foreclosure during litigation, the Fourth District did not address the issue before us, i.e., the definition of "property owner."

[5]This opinion does not determine whether the Act violates public policy and is an unreasonable restriction on the free alienability of property.

inconsistency with public policy concerning the free alienability of property. See Fitts v. Furst, 283 So. 3d 833, 841 (Fla. 2d DCA 2019) (explaining that the remedy for shortcomings in a statute "lies with the legislature, not the courts" (quoting Mitchell v. Higgs, 61 So. 3d 1152, 1156 (Fla. 3d DCA 2011))).

Because the trial court correctly interpreted the Act's plain language, Dean Wish's argument about a judicial taking also fails. Claims under the Act are for government actions that do not amount to constitutional takings. See § 70.001(1) ("The [l]egislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The [l]egislature determine[d] that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the [l]egislature that, as a separate and distinct cause of action from the law of takings, the [l]egislature herein provides 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(9) ("This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution."). In effect, the legislature created and defined a limited right that did not previously exist. See Brevard County v. Stack, 932 So. 2d 1258, 1261 (Fla. 5th DCA 2006) ("The [l]egislature determined that there was an important state interest in protecting private property owners from these burdens, and provided relief in the [Bert Harris Act] by establishing a new cause of action, where none previously existed."). Because the Act's plain language does not extend the statutorily-created right to a person who does

not hold legal title to the property, the trial court did not take an "established" right; the court's action is not a judicial taking. Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.").

III. Conclusion

Having sold the property during the lawsuit, Dean Wish was no longer a "property owner" entitled to relief under the Act. See § 70.001(2), (3)(f). We therefore affirm the final summary judgment.

However, we recognize that it is not uncommon for a party to lose property ownership during litigation. See, e.g., Ocean Concrete, Inc. v. Indian River Cnty., Bd. of Cnty. Comm'rs, 241 So. 3d 181, 185-88 (Fla. 4th DCA 2018) (addressing claim under the Act where appellant lost ownership of the disputed property to foreclosure during the pendency of litigation). And, apparently, no other case under the Act has framed an issue as Dean Wish has here. Therefore, we certify the following question to the Florida Supreme Court as one of great public importance:

> MAY A PLAINTIFF MAINTAIN AN ACTION UNDER THE BERT HARRIS ACT WHERE THE PLAINTIFF OWNED THE PROPERTY WHEN THE PLAINTIFF COMMENCED THE ACTION BUT HAD BEEN DIVESTED OF OWNERSHIP PRIOR TO TRIAL?

See Fla. R. App. P. 9.125(a).

Affirmed; question certified.

KHOUZAM, C.J., and BLACK, J., Concur.