DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JAMES J. JAMIESON,

Appellant,

v.

THE TOWN OF FORT MYERS BEACH, FLORIDA,

Appellee.

No. 2D21-2723

December 2, 2022

Appeal from the Circuit Court for Lee County; Alane Laboda, Judge.

Ryan C. Reese of Moore Bowman & Reese, P.A., Tampa, for Appellant.

Jeffrey L. Hochman and Hudson C. Gill of Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, PA, Ft. Lauderdale, for Appellee.

VILLANTI, Judge.

James J. Jamieson, the plaintiff below, appeals from a final summary judgment entered in favor of the defendant, the Town of Fort Myers Beach (the Town). This is Jamieson's second appeal from a final summary judgment entered in the same case. *See*

Jamieson v. Town of Fort Myers Beach (*Jamieson I*), 292 So. 3d 880 (Fla. 2d DCA 2020). For the reasons explained below, we again reverse, and we remand for further proceedings.

This case arises from Jamieson's attempt to develop a property consisting of two contiguous parcels of land comprising about seven acres in Fort Myers Beach. The property was originally platted with forty lots zoned for single-family homes. However, in direct contradiction to the plat map, the property was also designated wetlands, upon which construction of residential units was limited to one unit per twenty acres, effectively frustrating any possibility for residential development of the property.

During a period of approximately ten years prior to filing suit, Jamieson attempted to change and/or correct the wetlands designation by several means, including an application for boundary clarification regarding the extent of the wetlands, a request to transfer the residential density from the affected lots to another parcel, a request for an administrative determination that the wetlands designation was inaccurate as demonstrated by a South Florida Water Management District (SFWMD) survey that

determined that the property was only sixty-one percent wetland, a request for a minimum use determination (MUD) to establish that the platted lots were entitled to residential development despite being "nonconforming,"[1] and a request for a variance from the Town's Land Development Code to allow development in accordance with state guidelines, which allowed development on wetlands with mitigation. All of his efforts failed.

In 2016, Jamieson filed a notice of claim pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act, § 70.001, Fla. Stat. (2016) (the Bert Harris Act). The Town Attorney responded by letter, dated October 25, 2016. The letter offered to settle

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[1] Section 34.3274(a) of the Town's Land Development Code provides, "A single-family residence may also be constructed on a nonconforming lot which does not comply with the density requirements of the Fort Myers Beach Comprehensive Plan provided the owner receives a favorable administrative interpretation of the single-family residence provision (also known as a minimum use determination) . . . ." Although Jamieson's MUD application was approved, Jamieson was still prevented from developing the property by section 34-3274(c), which provides: "Lots qualifying for a minimum use determination may not place the home, accessory structures, or driveways on any land in the 'Wetlands' or 'Recreation' category on the future land use map of the comprehensive plan." Section 34-3274(c) was added to the Land Development Code after Jamieson purchased the property.

Jamieson's claim by "administratively" removing the wetlands designation from three lots, provided that Jamieson give up his development rights to the remaining thirty-seven lots. The offer was contingent on approval by the Town Council. Jamieson rejected the offer and filed suit.

Jamieson's complaint alleged categorical inverse condemnation by regulatory taking[2] (count one); partial inverse condemnation by regulatory taking[3] (count two); and violation of the Bert Harris Act (count three). Both parties moved for summary judgment, and the trial court entered a final summary judgment in favor of the Town on January 8, 2019. The trial court's rationale for granting summary judgment was twofold: (1) count 1 of Jamieson's complaint was barred as a matter of law because the property he sought to develop had been designated wetlands long before he purchased it, and (2) Jamieson's complaint was not ripe as to all three counts because he had not exhausted all available administrative remedies. Jamieson appealed.

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[2] Sometimes referred to as a "total" or "*per se*" taking.

[3] Sometimes referred to as an "as applied" taking.

This court reversed the first final summary judgment, finding reversible error in both of the trial court's reasons for granting it. *See Jamieson I*, 292 So. 3d at 886-88 (holding (1) that Jamieson "acquired the full property rights when he bought the property, including the right to challenge the [preexisting] wetlands designation," and (2) that at the time Jamieson filed his complaint, "the permissible uses of the property were clear to a reasonable degree of certainty" and additional attempts to obtain relief via the administrative avenues left open to him would be futile). On April 22, 2020, the trial court vacated the first final summary judgment.

A few weeks later, instead of scheduling the matter for trial, Jamieson renewed his motion for summary judgment as to count I only. Over the course of the next fifteen months, the trial court denied Jamieson's motion for summary judgment as to count I and granted the Town's cross-motion for summary judgment as to count I, denied Jamieson's motion for summary judgment as to count III and granted the Town's cross-motion for summary judgment as to

count III,[4] granted the Town's motion for summary judgment as to count II, and, on August 13, 2021, rendered a final judgment.[5]

In this appeal, Jamieson challenges the trial court's orders denying his motions for summary judgment and granting the Town's motions for summary judgment.

Analysis

Our review of the trial court's 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). Summary judgment is proper only if there is no genuine issue of material fact and the

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[4] We question the wisdom of moving for summary judgment on the Bert Harris Act claim before the taking claims had been resolved. The Act, by its own terms, applies when government action has inordinately "burden[ed], restrict[ed], or limit[ed] private property rights without amounting to a taking." § 70.001(1), Fla. Stat. (2016)) (emphasis added). Thus, the Act provides an additional avenue for relief in cases where a taking claim failed or would have failed. If there was a strategic reason for presenting the claims to the trial court in this order, it eludes us.

[5] Jamieson filed a response to the Town's Motion for Summary Judgment as to count II but did not file a countermotion or oppose the Town's motion for entry of final summary judgment because he recognized that the order granting summary judgment for the Town on count III foreclosed any possibility that he could prevail on count II. However, Jamieson preserved his right to challenge the trial court's rulings as to all three counts on appeal.

moving party is entitled to judgment as a matter of law. *Id.*

Count I: Inverse Condemnation/Total Regulatory Taking

Because Jamieson alleged both a total and, alternatively, a partial regulatory taking in counts I and II, the following general principles apply to those counts:

> [A]n inverse condemnation . . . is defined as "a cause of action by a property owner to recover the value of property that has been *de facto* taken by an agency having the power of eminent domain where no formal exercise of that power has been undertaken." *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 471 (Fla. 5th DCA 2014) (quoting *Osceola Cty. v. Best Diversified, Inc.*, 936 So. 2d 55, 59–60 (Fla. 5th DCA 2006)). A regulatory taking can be either total or partial. In a "total" or "per se" taking, the government's regulations effectively deny *all* economically beneficial or productive use of the property. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992)). In a "partial" or "as-applied" taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978), the court must 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 governmental action." [*Ocean Palm*, 139 So. 3d at 471] (quoting *Leon Cnty. v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004)).
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> The first step for a court in analyzing whether there has been a taking under *Lucas* or *Penn Central* is to "define what constitutes the relevant parcel before [it] can evaluate the regulation's effect on that parcel." *Dist.*

> *Intown Props. Ltd. P'ship v.* [*District*] *of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999). Stated differently, the subject of the alleged taking must first be determined. *Ocean Palm*, 139 So. 3d at 468 n.7.

Town of Ponce Inlet v. Pacetta, LLC, 226 So. 3d 303, 312 (Fla. 5th DCA 2017) (second, third, and fifth alterations in original) (footnotes omitted).

In his renewed motion for summary judgment on count I, Jamieson argued that the Town's categorization of his property as wetlands—which he asserted was incorrect—precluded him from using his property "in any economic manner." Therefore, he argued, as he does on appeal, that he was deprived of all economic use of his property and is entitled to compensation for the loss. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-19 (1992) (reaffirming the principle that where government regulations deny a property owner all economically viable use of his land, the owner has suffered a compensable taking).

The trial court found that Jamieson's claim that he was deprived of all economic use of the property was refuted by the Town's settlement offer, which would have allowed Jamieson to build single-family homes on three of his forty lots. In reaching this

conclusion, the trial court held that footnote two of *Jamieson I* constituted "the law of the case on that issue." Explaining further, the trial court said:

> [Jamieson] argued that the settlement offer was contingent, but the District Court found the Town's position, pursuant to the settlement offer, was known to a reasonable degree of certainty. Had [Jamieson] not rejected the settlement offer, there is a reasonable degree of certainty that the Town Council would have approved the settlement offer it allowed counsel to make on its behalf. Court approval could then have been requested.

The trial court also found that even with the wetlands designation, the Town's comprehensive plan allowed for "passive recreation" (such as fishing, boating, and hiking) and walking access to tidal waters (via boardwalks and docks) on the property. The court also observed, "Neither party offered any argument or evidence as to whether [Jamieson] could charge consumers for access to the Property for those purposes, nor the value to [Jamieson] if he did so."

Discussion

The trial court misinterpreted *Jamieson I*. Our discussion leading up to and including footnote two was directed solely to the trial court's holding that Jamieson's claim was not ripe:

> Here, the permissible uses of the property were clear to a reasonable degree of certainty when Jamieson filed his complaint. In 2011, Jamieson challenged the wetlands designation and was told that the wetlands designation was not erroneous. In 2013, he submitted an application for a comprehensive plan amendment, seeking to transfer the historical density attached to his forty lots to other property in the Town, and the application was denied. In 2014, the Town granted Jamieson a MUD [Minimum Use Determination] that allowed for construction of one single-family home per lot, but section 34-3274(c) of the land development code still prevented him from placing homes on the property based on the property's wetlands designation. In 2015, the Town declined to process his request for a variance, suggesting that he seek a small-scale comprehensive plan amendment to change the wetlands designation. Finally, when he filed notice of a Bert Harris Act claim in 2016, the Town offered to settle his claim by removing the wetlands designation for three lots only, provided that he give up his development rights to the remaining thirty-seven lots. Thus, it is reasonably certain that the Town will not permit Jamieson to develop ninety-three percent of his property based on its wetlands designation.[2] The Town never asserts that the wetlands designation would allow any development or other economically beneficial or productive use of the property; it argues only that Jamieson should have sought to amend the wetlands designation. But based on the history of his applications and the Town's responses, it is clear that the permissible uses of the land were known and that any further application to the Town to change the wetlands designation would be futile.

292 So. 3d at 888. In footnote two, we added, "The Town's offer to allow development of three lots is relevant to whether the Town's

position was known to a reasonable degree of certainty. However, we make no comment on whether a taking occurred where the Town offered Jamieson the opportunity to develop three of the forty lots." *Id.* at 888 n.2.

We fail to see how anything in the above-quoted discussion invokes the law of the case doctrine as to any issue other than the ripeness of Jamieson's claim. The inference that this court's conclusion that the Town's position was known "to a reasonable degree of certainty" supports the premise that had Jamieson accepted the settlement offer, there was a reasonable degree of certainty that the Town Council would have approved it, is a non sequitur. The footnote implies nothing of the sort. To the contrary, the first sentence simply reinforces what was already stated: The Town Attorney's October 2016 letter made it clear that attempting to pursue any other available administrative avenues for relief would have been futile; thus, Jamieson's claim was ripe. As to the second sentence of the footnote, "we make no comment on whether a taking occurred" as a result of the Town Attorney's offer, this means what it says and nothing more; that is, the issue of whether

the Town Attorney's contingent offer supports a finding that a total taking did or did not occur remained—and remains—unsettled.

In addition, the question of whether the offer was enforceable or not—a question which must be resolved before the takings issue can be addressed—was not before this court in *Jamieson I*. Now that the issue is before us, we find merit in Jamieson's position:

> Interpretation of settlement agreements is governed by contract law . . . . *See Gunderson v. Sch. Dist. of Hillsborough County*, 937 So. 2d 777, 779 (Fla. 1st DCA 2006). Conditioning a contract upon approval by one of the parties shows that a binding contract has not yet been formed. *See Meekins–Bamman Prestress, Inc. v. Better Constr., Inc.*, 408 So. 2d 1071, 1073 (Fla. 3d DCA 1982) ("It is universally held that a document . . . which specifically conditions the contractual effectiveness of a proposal by a projected seller upon its own subsequent approval, constitutes no more than a solicitation to the prospective purchaser to make an offer itself."); *Rudolph v. Lewis*, 418 So. 2d 296, 297 (Fla. 2d DCA 1982) ("An acceptance clause specifically limits the authority of an agent and reduces an agreement to the status of an unaccepted offer. . . . Only when the agent's principal accepts the offer does a contract arise.").

Munroe v. U.S. Food Serv., 985 So. 2d 654, 655 (Fla. 1st DCA 2008); *see also* 1 Williston on Contracts § 4.34 (4th ed. 2022) ("[A] condition of subsequent approval by the promisor in the promisor's

sole discretion gives rise to no obligation."); *Foster & Klieser v. Baltimore County*, 470 A.2d 1322, 1325 (Md. App. 1984) (holding that an offer that was subject to approval by the city council was not a binding contract but instead was "merely a step in a course of preliminary negotiations").[6]

In its order granting the Town's motion for summary judgment on count I, the trial court stated, "Had [Jamieson] not rejected the settlement offer, there is a reasonable degree of certainty that the Town Council would have approved the settlement offer it allowed counsel to make on its behalf." This finding is unsupported by the record. In fact, the record indicates the opposite might be more likely. The Town Attorney testified in deposition that the Town Council could reject the offer, and the Town Council's actions in this matter since the beginning suggest that it probably would have done exactly that. For example, in 2002, shortly after Jamieson

[6] Whether a valid offer was or was not made was not relevant to our determination in *Jamieson I* that Jamieson's claim was ripe because it was clear at the time the offer was made that the Town would block all further attempts by Jamieson to develop the remaining ninety-three percent of his property.

purchased the property, the Town Council passed the following resolution:

> **NOW THEREFORE BE IT RESOLVED**, that the Fort Myers Beach Town Council is opposed to any activity on the [subject property] which is inconsistent with Objective 6-D of the Comprehensive Plan, which in part seeks to preserve all remaining wetlands; such activities include all commercial or residential construction, filling or excavation; and furthermore requests that the permitting agency, which may include the Department of Environmental Protection and South Florida Water Management, deny all requests to impact the wetland habitat on the [subject property].

Then, in 2003, the Town added section 34-3274(c) to the Land Development Code, which provided, "Lots qualifying for a minimum use determination may not place the home, accessory structures, or driveways on any land in the 'Wetlands' or 'Recreation' category on the future land use map of the comprehensive plan." At about the same time, the Town also amended its Land Development Code, changing the subject property's zoning classification from RM-2 (residential multiple-family)[7] to "Environmentally Critical." Later, when Jamieson applied for an amendment to the Comprehensive Plan to transfer the property's residential density to another parcel,

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[7] Albeit also designated "wetlands."

the Town Council denied the application despite a favorable recommendation from its own staff.

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (first citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and then quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

Jamieson also argues, as he did below, that because the subject property is platted into forty residential lots, each platted lot is "presumed to be separate and independent in inverse condemnation cases" and that "the presumption [in the instant case] is unrebuttable." "Thus," Jamieson concludes, "in the event the Town Attorney's 'offer' is deemed relevant to [Jamieson's *Lucas*

claim] a per se taking of the other [thirty-seven] lots has still occurred."

Jamieson cites *Department of Transportation v. Jirik*, 498 So. 2d 1253 (Fla. 1986), in support of this argument. *Jirik* does not support this argument:

> When property is, in fact, unoccupied, the question of whether separate lots are one unit is more difficult. Given the complexity and formalities of modern-day city planning, we believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence. . . . We therefore hold that vacant city property constitutes presumptively separate units if platted into lots. The presumption of separateness is, of course, rebuttable. Other factors relevant to unity of use, or the lack of it, have been adequately enumerated by the district court below, and do not warrant further consideration here.

Id. at 1257 (emphasis added); *see also Pacetta*, 226 So. 3d at 312-13 ("When a 'developer treats several legally distinct parcels as a single economic unit, together they may constitute the relevant parcel.' " *Pacetta*, 226 So. 3d at 312-13 (quoting *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013)). Because Pacetta had previously treated the property as a single parcel in its development plans, in the litigation below, and in a prior related

appeal, the Fifth District held that Pacetta "is estopped from taking the diametrically opposite position here." *Id.* at 312.

In the instant case, the trial court ruled, "The Court declines to consider a *Jirik* claim as to the individual lots, as that claim was not raised in the Complaint or the [first] appeal." The trial court did not err in reaching this conclusion.

In summary, in *Jamieson I*, we held that Jamieson's efforts to obtain relief, culminating in the Town Attorney's contingent offer, demonstrated to a reasonable degree of certainty that the Town would not allow Jamieson to develop ninety-three percent of his property; thus, any further attempts to obtain relief via administrative means would be futile, and therefore his claim for inverse condemnation was ripe. The question of whether a *Lucas*-style taking had or had not occurred and to what extent the Town Attorney's offer is relevant to this determination remains unsettled, as does the preliminary question of the enforceability of the offer itself. These questions are not amenable to summary judgment and must be resolved at a bench trial. *See FCCI Ins. Co. v. Cayce's*

Excavation, Inc., 901 So. 2d 248, 251 (Fla. 2d DCA 2005) ("A summary judgment proceeding is not a substitute for a trial.").

Count III: Bert Harris Act Claim

The trial court rendered its order denying Jamieson's motion for summary judgment as to count I and granting the Town's opposing motion for summary judgment on the same count on October 19, 2020. Jamieson skipped count II and moved for summary judgment on count III—the Bert Harris Act claim—on May 5, 2021. Jamieson's motion alleged that the Town's actions had the effect of preventing Jamieson from developing ninety-three percent of his property, and he argued that this "unequivocally qualifies as an 'inordinate burden' " as defined in the Act.

In its response and countermotion, the Town argued that Jamieson's claim was time-barred because it was initiated more than one year "after any decision allegedly applying the regulations at issue," that Jamieson could not establish an existing or vested right to residential use of the property because the property was always designated as "wetlands" under the Town's Comprehensive Plan, and that "[t]he town's October 2016 offer to confer

development rights, allowing residential construction on three lots did not inordinately burden the property."[8]

In the order denying Jamieson's motion and granting the Town's countermotion, the trial court found that the subject property was designated "wetlands" in the Lee County Comprehensive Plan long before Jamieson purchased it and that therefore it was "not eligible for development as single-family residences or other types of dwelling units at the time of purchase." The trial court further found that the Town's adoption of an Official Zoning Map in 2004, which "confirmed the Property's zoning classification as Environmentally Critical," resolved the conflict between the wetlands designation and its RM-2 (residential) zoning.

The trial court then concluded that because the wetlands designation was in place when Jamieson purchased the property

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[8] Section 70.001(2) provides that "when a specific action of a governmental entity has inordinately burdened an [existing use or vested right to a specific use] of real property," the property owner is entitled to relief. The 2016 letter from the Town Attorney does not appear to be a "specific action of a governmental entity" in this context. Whether a qualifying "specific action of a governmental entity" occurred within one year of Jamieson's Burt Harris Act notice is a question for the finder of fact at trial.

and the SWFMD had determined that the subject property was wetlands, the Town had "met its burden of demonstrating that residential development was not an existing use" of the property and that Jamieson did not have a vested right to develop the land or an objectively reasonable, investment-backed expectation that he could develop it.

Finally, the trial court ruled:

> [Jamieson's] claim is not objectively reasonable or investment backed when there was no reasonable expectation that the Property could be developed, since that was not a permitted use. *Ocean Concrete [v. Bd. of Cnty Comm'rs*, 241 So. 3d 181, 189 (Fla. 4th DCA 2018)] ("there could be no reasonable expectation that the preserve would be used for anything other than conservation").

The order is silent as to the Town's argument that Jamieson's claim was time-barred.

Discussion

As an initial observation, we note that the Fourth District did not hold in *Ocean Concrete* that "there could be no reasonable expectation that the preserve would be used for anything other than conservation." That quote comes from *Palm Beach Polo, Inc., v. Village of Wellington*, 918 So. 2d 988 (Fla. 4th DCA 2006), which the

Ocean Creek panel quoted for the purpose of distinguishing it. The Fourth District reached the opposite conclusion in *Ocean Creek*, holding that the appellant's planned use of the property "was a permitted use under the zoning code" and that "nothing about the physical or regulatory aspects of the property at the time of the government regulation made Appellants' expectations for [development] unreasonable." *Id.* at 190 (emphasis added). That said, we reach no conclusion as to whether *Ocean Concrete* is applicable to the instant case; we only observe that the trial court relied on it for a proposition that *Ocean Concrete* does not state.

Section 70.001(11) provides: "A cause of action may not be commenced under this section if the claim is presented more than [one] year after a law or regulation is first applied by the governmental entity to the property at issue." In this case, the addition of section 34-3274(c) to the Land Development Code in 2003 and the adoption of an "Official Zoning Map" in 2004—both occurring after Jamieson purchased the land—seemingly imposed

more stringent restrictions on Jamieson's property[9] and had no effect on any other property in Fort Myers Beach. However, Jamieson did not submit the Notice of Claim to the Town (as required by section 70.001(4)(a)) until 2016. Accordingly, it appears that Jamieson may not have been entitled to assert a Bert Harris Act claim to begin with. Because this dispositive issue was raised by the Town in its motion for summary judgment but was not addressed by the trial court in its order granting the Town's motion, we must remand the issue for further consideration. *See Pignataro v. Rutledge*, 841 So. 2d 636, 638 (Fla. 2d DCA 2003) ("When issues raised by the pleadings are properly before the trial court, it is error for the trial court to fail to rule on them."); *Sierra ex rel. Sierra v. Pub. Health Tr. of Dade Cnty.*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) ("Appellate courts may not decide issues that were not ruled on by a trial court in the first instance.").

[9] Whether the Town's actions in the period from 2002 to 2004 following Jamieson's purchase of the property placed an inordinate burden on the subject property is a question of fact that can only properly be addressed at trial.

Should the trial court find that Jamieson's Bert Harris Act claim is not time-barred, we will address the merits of this issue insofar as they may provide some guidance on remand.

The Bert Harris Act created "a separate and distinct cause of action from the law of takings," which provides for relief or monetary compensation "when a new law, rule, regulation, or ordinance . . . unfairly affects real property." § 70.001(1) (emphasis added). "Because the Act alters the common law and waives sovereign immunity, it must be narrowly construed." *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017). In order to prove entitlement to compensation under the act, the property owner must prove that "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." § 70.001(2). "Existing use" is defined as:

> [A]n actual, present use or activity on the real property, . . . or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

§ 70.001(3)(b). As to vested right, the Act provides, "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." § 70.001(3)(a).

"Inordinate burden" or "inordinately burdened" means:

> [A]n action of one or more governmental entities [that] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

§ 70.001(3)(e).

Here, the facts upon which the trial court based its ruling were specifically disapproved as a basis for granting summary judgment in *Jamieson I*. Although the preexisting wetlands designation may be a factor in deciding whether Jamieson has been inordinately burdened by the Town's actions, it must be weighed against other factors, such as 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 fact that the property is surrounded on three sides by residential development and was zoned RM-2 when Jamieson purchased it created a "reasonable, investment-backed expectation" that the land could be developed, such that if the Town determines that it cannot be developed–a determination which it clearly has the right to make–results in Jamieson bearing a "disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."

Again, these are issues of fact that must be brought to light in a trial and are inappropriate for consideration on summary judgment.

Count II: Inverse Condemnation/Partial Regulatory Taking

In count II, Jamieson alleged a partial regulatory taking pursuant to *Penn Central*. Specifically, although allowing that the Town's actions were "largely designed to achieve public benefits stemming from environmental preservation" (a laudable goal), it did so at Jamieson's expense by depriving him of the use and value of his property for the benefit of the public. This, he argued, entitled

him to compensation for the deprivation of the use of his private property.

In its order granting the Town's motion for summary judgment as to count II of Jamieson's complaint, the trial court stated:

> Based on the finding[s] of fact and conclusions of law entered in the June 3, 2021, Order granting summary judgment to the Town on Count III of the Complaint, which the Court incorporates herein by reference thereto, the Court finds that the Plaintiff lacked any reasonable, investment-backed expectations to develop the property and there cannot succeed on the taking claim under *Penn Central* . . . .

We first observe that, with the exception of the oft-repeated reference to "reasonable, investment-backed expectations," a Bert Harris Act claim involves a wholly different set of considerations than a takings claim. Thus, although some of the concepts may overlap, the trial court's order in this case falls short of adequately considering whether Jamieson had established a partial taking under *Penn Central*. Opinions such as *Ocean Concrete*, which was solely about a Bert Harris Act claim, do not help us get there.

In *Penn Central*, the Supreme Court first observed that the development of takings law has evaded any " 'set formula' for determining when 'justice and fairness' require that the economic

injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124. However, the Court identified several factors that had "particular significance" in determining whether a taking has occurred:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. Once again, these are factors to be weighed by a finder of fact, not issues that can be ruled upon as a matter of law. As the Supreme Court put it, the process of determining whether " 'justice and fairness' require that economic injuries caused by public action be compensated" is "essentially [an] ad hoc, factual inquir[y]." *Id.*; see also *Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 139 So. 3d 463, 473-74 (Fla. 5th DCA 2014) (applying the *Penn Central*

factors to the facts of that case).[10]

Conclusion

Based on the above, we reverse the trial court's orders of summary judgment as to all counts. However, we affirm the trial court's denial of Jamieson's motions for summary judgment. On remand, the trial court shall hold a bench trial on counts I and II, during which it shall first determine whether the Town Attorney's settlement letter constituted a binding offer on the part of the Town and then whether a total regulatory taking has occurred.

If the trial court again finds that there has not been a total *Lucas*-style taking, it shall determine whether a partial taking as to any portion of the subject property occurred. In either scenario, if liability is found, a jury trial shall be held to determine the amount of compensation Jamieson is due. *See Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 40 (Fla. 1990) ("[T]he trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just

[10] *Ocean Palm* is also relevant because it was a direct appeal following a bench trial in a takings action.

compensation." (quoting *Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988))).

If the trial court finds that there has been no total or partial taking, it shall hold a bench trial to determine (1) whether Jamieson's Bert Harris Act claim was timely, (2) if so, whether there existed a reasonably foreseeable, nonspeculative land use for the subject property as defined in section 70.001(2), or whether a vested right as defined in section 70.001(3)(a) had attached to the land prior to the 2003 and 2004 regulatory changes, and (3) if so, whether those regulatory changes inordinately burdened the property. *See* § 70.001(6)(a) ("The circuit court shall determine whether [an existing use or a vested right] to a specific use of the real property existed, and, if so, whether, considering the settlement offer and statement of allowable uses, determine whether the governmental entity or entities have inordinately burdened the real property."). If liability is found,[11] "the court shall impanel a jury to

[11] Section 70.001(6)(a) also provides that the governmental entity may take an interlocutory appeal after a finding that its action has resulted in an inordinate burden and before the jury trial on damages.

determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property." § 70.001(6)(b).

Reversed and remanded with instructions.

SMITH, J., Concurs.
ATKINSON, J., Concurs in result only.