

Dean Wish, LLC v. Lee County, No. 2D19-4843, 2021 WL 1277973 (Fla. 2d DCA Apr. 7, 2021)

Second DCA Holds That the Bert J. Harris Act Requires Property Owners to Remain the Legal Holder of Title Until the Conclusion of the Lawsuit in Order to Obtain Damages

In 2010, Dean Wish, LLC (“Dean Wish”) purchased 55 parcels of land covering over 640 acres in Lee County (the “County”). These parcels were zoned as “Coastal Rural,” which only allowed for one unit per every ten acres, as compared to “Rural” zoning which allows for one unit per every one acre. In 2015, Dean Wish sought to obtain an increase in density for the Coastal Rural zoned land that would allow for one unit per every 1.9 acres. The County denied Dean Wish’s request to increase density, stating that the application was inconsistent with the County’s Land Development Code (“LDC”). The County noted that Dean Wish needed to either submit a new application or request an amendment to the County’s LDC. However, in 2016—only about a year later—the County amended the Coastal Rural density to one unit per every 2.7 acres.

In response to the County’s change in Coastal Rural density, Dean Wish brought suit under the Bert J. Harris Jr., Private Property Rights Protection Act (the “Act”), claiming a monetary loss of over \$9 million due to the inordinate burden that the “Coastal Rural” zoning placed on the property by limiting the allowable density. Due to several factors—“lack of market interest, litigation costs, and [Dean Wish owner’s] retirement, increasing age, and medical expenses”—Dean Wish decided to sell the property prior to the trial. As part of the sale of the property, Dean Wish included in the sales contract a provision retaining all rights to any award received from the outcome of the ongoing lawsuit.

Following the sale of the property, the County submitted a motion for summary judgment arguing that, because Dean Wish had sold the property, it could no longer maintain its claim under the Act. Dean Wish countered, arguing that the court was not required to look at current ownership, but instead look at ownership at the time the inordinate burden was placed on its property. The trial court agreed with the County, noting that the Act defined “property owner” in the present tense—“the person who holds legal title to the real property”—rather than using a past tense form of hold, such as “held” or “had held.” The trial court granted summary judgment in favor of the County.

On appeal, the Second DCA affirmed the trial court’s ruling. The appellate court first reviewed the Act’s language, concluding that the language in the Act was clear and unambiguous. Specifically, the court stated that “the Act requires one to be the ‘property owner’ to be eligible for statutory relief.” Second, the court applied the Act’s language to the facts of the case and determined that because Dean Wish was no longer the legal title holder, Dean Wish’s arguments under the Act fail. Lastly, the appellate court recognized that “it is not uncommon for a party to lose property ownership during litigation” and certified the following question to the Florida Supreme Court:

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?