

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC14-1321

OCEAN PALM GOLF CLUB  
PARTNERSHIP,

Petitioner,

vs.

THE CITY OF FLAGLER BEACH, a  
Florida municipal corporation,

Respondent.

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**BRIEF OF PETITIONER ON JURISDICTION**

On review from the Fifth District Court of Appeal of the State of Florida

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## **STATEMENT OF THE CASE AND FACTS**

This petition arises from an inverse-condemnation action brought by Ocean Palm Golf Club Partnership (Ocean Palm Golf) and Caribbean Condominium Limited Partnership (Caribbean Condo) against the City of Flagler Beach (the City). The trial court rendered a judgment in favor of the City. Ocean Palm Golf appealed to the Fifth District, which affirmed. Ocean Palm Golf Club P'ship v. City of Flagler Beach, No. 5D12-4274 (Fla. 5th DCA May 30, 2014).

This case involves a 34-acre, now-defunct nine-hole golf course (golf-course parcel) and a vacant 2.94-acre parcel (condo parcel) located within the golf-course parcel (A2). The golf-course parcel was sold to Ocean Palm Golf in 1999; at the same time, the condo parcel was sold to Ocean Palm Condominium Ventures, Inc. (Ocean Palm Condo) (A3). Ocean Palm Condo tried to develop the condo parcel twice before selling it to Caribbean Condo (A3-4). "Caribbean Condo was a separate company from Ocean Palm Golf"; not all of Ocean Palm Golf's partners were partners in Caribbean Condo (A4). Caribbean Condo made two further, attempts to develop the condo parcel, in 2002 and 2004, thwarted by the City (A4).

In 2008, Ocean Palm Golf and Caribbean Condo tried to develop both parcels together (A5). But "ownership of the two parcels was not . . . merged for purposes of this proposal" (A5). The application would have required the City to amend its Comprehensive Plan to allow residential development of the golf-course property, whereas before it had been designated recreational (A2, 6). This attempt

was not successful (A5-6). As the Fifth District noted, there was strong opposition from commissioners and the public (A5-6 & n.5, 18 n.18).

Eventually, Ocean Palm Golf was forced to shut the golf course down. The Fifth District noted the testimony of Ocean Palm Golf's principal that "the golf course was never profitable," from 1999 until its closure in 2008, due to market forces (A7). It also noted Ocean Palm Golf's evidence that a golf course on the property would never be profitable or economically feasible (A7-9).

Ocean Palm Golf and Caribbean Condo filed this lawsuit against the City alleging that the City's refusal to change the Comprehensive Plan's designation of their respective properties deprived them of all or substantially all economically beneficial use of their respective properties (A6).

After the bench trial, the trial court found the golf-course parcel and the condo parcel were a single tract, allowing them to be considered together to determine economic viability; the court found they were viable, relying on the testimony of the City's expert (A12-13). The trial court also considered the golf-course parcel separately (A13). But, in finding it was economically viable, the trial court relied on the City's expert, whose only opinion was based on the two parcels being treated as a single parcel (A10-13). In fact, as the Fifth District noted in its opinion, this expert "admitted that[,] if the assumption that the two owners would work together was incorrect, then a different analysis would result" (A12)

On appeal to the Fifth District, Ocean Palm Golf argued that, per this

Court's decision in Dep't of Transp. Div. of Admin. v. Jirik (Jirik II), 498 So.2d 1253 (Fla. 1986), the trial court incorrectly found the parcels should be treated as one tract (A13). In Jirik II, this Court held that vacant urban property is presumptively separate if platted into lots. Ocean Palm Golf thus argued the court's alternative ruling on the golf-course parcel alone was not supported by the evidence, because the expert did not offer an opinion on the economic viability of just the golf-course parcel (A13). Citing this Court's cases, Ocean Palm Golf also argued the City's failure to act in light of the changed economic circumstances resulted in a taking of the golf-course property (see A16).

The Fifth District rejected Ocean Palm Golf's arguments. It held the City rebutted the presumption of separateness arising from the golf-course and condo parcels being legally distinct lots (A15). Accordingly, it held the trial court's finding that the two parcels were economically viable was supported by competent, substantial evidence, namely the testimony of the City's expert (A16). Although it agreed "that the government's refusal to act can constitute a total taking under some circumstances," it concluded this Court's decisions were distinguishable, and that "the purpose of eminent domain law" is not to make the government the "guarantor for the landowner's investment after it becomes unprofitable due to, not the zoning regulations, but outside market forces" (A16-17).

### **SUMMARY OF ARGUMENT**

This Court should grant discretionary review of the Fifth District's opinion



in Ocean Palm Golf Club Partnership. First, it expressly and directly conflicts with this Court’s decisions that a government can take property when it fails to relax zoning restrictions in light of changed circumstances. Second, it expressly and directly conflicts with the decision of this Court in Jirik II, in that the City presented no legally sufficient evidence to overcome the presumption of separateness that arose in this case.

### **POINT I**

THE FIFTH DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT’S DECISIONS THAT CHANGED ECONOMIC CIRCUMSTANCES CAN LEAD TO A TAKING.

The Fifth District’s decision in the instant case misapplies this Court’s decisions that a government’s failure to relax zoning restrictions in light of changed circumstances—irrespective of changes to the surrounding properties—can amount to a taking of an owner’s property.<sup>1</sup>

“[W]here a government agency, by its conduct or activities, has effectively taken private property without a formal exercise of the power of eminent domain, a cause of action for inverse condemnation will lie.” Rubano v. Dep’t of Transp., 656 So.2d 1264, 1266 (Fla. 1995) (citation omitted). The prohibition against takings is meant “to prevent government from forcing some people alone to bear

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<sup>1</sup> This Court has discretionary jurisdiction over any decision of a district court that misapplies a decision of this Court. See art. V, § 3(b)(3), Fla. Const.; Wallace v. Dean, 3 So.3d 1035, 1040 (Fla. 2009)

public burdens which, in all fairness and justice, should be borne by the public as a whole.” Joint Ventures, Inc. v. Dep’t of Transp., 563 So.2d 622, 624 (Fla. 1990) (citation and quotation marks omitted).

A material change in circumstances can transform a previously valid regulation into a taking. See State v. City of Jacksonville, 133 So. 114, 116 (1931). This Court has held that a government must relax its zoning restrictions in light of changed circumstances, if the failure to do so would amount to a taking of the property. Id. Numerous other cases from this Court support that proposition.<sup>2</sup>

The Fifth District distinguished those cases from this one because, according to it, those cases involved changes to the character of the surrounding properties, citing to this Court’s opinion in Tollius (A16-17). The Fifth District dismissed Ocean Palm Golf’s argument because it did not involve “change to the surrounding properties, but . . . change in market and demographic factors” (A17).

In so holding, the Fifth District completely ignored the contrary case law from this Court. Changed circumstances can be “physical, economic[,] or social change.” City of Miami Beach v. First Trust Co., 45 So.2d 681, 688 (Fla. 1949) (on rehearing). In Forde, 1 So.2d at 684, this Court found a taking based on “changes [to the] physical character [of a property] from natural causes”—without

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<sup>2</sup> See Zabel v. Pinellas Cnty. Water & Nav. Control Auth., 171 So.2d 376, 381 (Fla. 1965); Burritt v. Harris, 172 So.2d 820, 822-23 (Fla. 1965); Tollius v. City of Miami, 96 So.2d 122 (Fla. 1957); Forde v. City of Miami Beach, 1 So.2d 642 (Fla. 1941).

reference to the surrounding properties. The fallacy in the Fifth District’s reading of the law can be easily seen in this Court’s decision in Burritt, 172 So.2d at 822-23, where it quoted from Forde and then stated “[t]he same rule applies where changes in character of the community have occurred,” citing Tollius.

This misapplication of the Court’s precedent undermines the constitutionally-rooted fairness of eminent-domain law and therefore requires the Court’s review.<sup>3</sup>

## **POINT II**

### **THE FIFTH DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH JIRIK II.**

The Fifth District’s decision in the instant case misapplies this Court’s decision in Jirik II. Although the court recognized that the presumption of separateness arose in this case, it held the City overcame it even though the City presented no legally sufficient evidence of the nonexistence of the presumed fact. The Fifth District has effectively eviscerated Jirik II’s holding.

Like this case, Jirik II was an inverse-condemnation action, 498 So.2d at 1254. The Court held that three factors should be considered to determine whether parcels are separate or a single tract: contiguity, unity of ownership, and unity of use. Id. at 1255. The Court noted a split of authority on whether, for the purposes

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<sup>3</sup> The Pacific Legal Foundation has filed a notice of intent to seek leave to file an amicus brief in Ocean Palm Golf’s support should the Court accept jurisdiction.

of the use factor, a presumption of separateness should arise for vacant lots that “are part of an established subdivision layout.” Id. at 1256. “After a careful review of the relevant case law,” the Court adopted the presumption. Id. The Court noted the strong reasons for adopting such a presumption, e.g., “the complexity and formalities of modern-day city planning.” Id. at 1257 (citations omitted).

Thus, “vacant city property constitutes presumptively separate units if platted into lots.” Id. at 1257. The presumption is rebuttable and affects the burden of producing evidence. See id. at 1256-57 & n.5. To overcome it, a party must produce “credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact.” § 90.302(1), Fla. Stat. (2008). Whether parcels are separate generally is a question of fact. Jirik II, 498 So.2d at 1257. That finding should be upheld unless unsupported by competent evidence, or clearly erroneous. Id.

The Fifth District recognized the presumption arose, but stated: “We believe that the City did, in fact, rebut that presumption. In our view, the unity of use factor weighs in favor of finding that the presumption was rebutted.” (A15.)

Thus, the Fifth District first held there was unity of use (A15):

Historically, the two parcels were a single tract of land, until 1989, at which point the Development Agreement treated them as two distinct tracts. While the two parcels were sold to different owners in 1999, the purchasers worked together to obtain approval of symbiotic developments on the parcels. And, significantly, Ocean Palm Golf and Caribbean treated the two parcels as one in their application for the Comprehensive Plan Amendment.

The fact the two parcels were one tract of land until 1989 does not support

the trial court's finding that the two parcels were historically treated as one, or the Fifth District's upholding of that finding. If one goes far enough back in time, any two or more adjacent parcels were a single tract of land.

Further, the Fifth District concluded the parcels were a single tract because the parties "worked together to obtain approval of symbiotic developments on the parcels" (A15). But the parcels were treated as one only because, before 1999, they were owned by the same entity, Ocean Palm Estates (A3). As the Fifth District noted, the 1989 Development Agreement treated them separately (A2, 15). And, following the 1999 sale, the owners continued to treat them separately. For example, Ocean Palm Condo's and later Caribbean Condo's attempts to develop in 1999-2000, 2002, and 2004<sup>4</sup> involved only the condo parcel (A3-5). The two instances the Fifth District relied on—the 2004 and 2008 attempts (A4-5)—were the exceptions that proved the rule. Those attempts, especially the 2008 one, represented the owners' attempts to find any way to develop their parcels, especially after the City ran out the clock on the Development Agreement. Essentially, the Fifth District has allowed the City to benefit from the futile development choices it forced Ocean Palm Golf to make.

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<sup>4</sup> The Fifth District stated the 2004 attempt would have "required Caribbean Condo [to] purchase one acre of the golf course parcel from Ocean Palm Golf," and noted "Cejner later explained[] the investors decided that 'we'll buy an acre from ourselves'" (A5 & n.3). This actually shows the opposite of what the Fifth District implied—the two entities respected the corporate form. If they did not, Ocean Palm Golf would have gifted the acre to Caribbean Condo.

The owners' history of treating the parcels together was barely existent. The facts the Fifth District relied on did not credibly, fairly, and reasonably show the two parcels were a single tract.

Second, the Fifth District held “[t]he unity of ownership factor also weighs in favor of finding that the City rebutted the presumption of separateness” (A15). The Fifth District held there was unity of ownership—even though it recognized that “the parcels are now owned by different companies”—because “there is substantial overlap in principals and shareholders of those companies” (A15).

In Jirik II, the Court agreed with the Third District that one of the factors to be considered was “unity of ownership.” 498 So.2d at 1255 (citing Mulkey v. Div. of Admin., State Dep’t of Transp., 448 So.2d 1062, 1065 (Fla. 2d DCA 1984); Cnty. of Volusia v. Niles, 445 So.2d 1043, 1047 (Fla. 5th DCA 1984)). The Court said “it is undisputed that the three parcels are physically contiguous and are all owned by Jirik.” Id. (emphasis added).

There was unity of ownership in Jirik II because the three parcels were owned by the same person. Thus, Jirik II requires the properties be owned by the same person or entity before there can be unity of ownership. By contrast, in this case, the Fifth District found unity of ownership even though the two parcels were owned by the different business entities. This was a misapplication of Jirik II.

In interpreting Jirik II, it is noteworthy that each Florida case finding the ownership factor satisfied involved strictly identical ownership. Not only has the

Fifth District misapplied Jirik II, but its decision marks a radical departure from Florida law. For example, in Jirik II, the Court cited two cases, Mulkey and Niles, where the parcels were owned by the same people. Mulkey, 448 So.2d at 1064; Niles, 445 So.2d at 1047. Other Florida cases also have required strict unity of ownership.<sup>5</sup> Shedding further light on Jirik II, the rule of strict ownership is supported by the greater weight of authority.<sup>6</sup> The contrary rule has been adopted by only a minority of jurisdictions to have considered the issue.<sup>7</sup>

The Fifth District's holding that the presumption of separateness was overcome renders this Court's holding in Jirik II dead letter. Review by this Court is necessary to remedy the Fifth District's misapplication.

### **CONCLUSION**

This Court should grant discretionary review to resolve the conflict created by the Fifth District's decision in this case.

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<sup>5</sup> See Town of Jupiter v. Alexander, 747 So.2d 395, 401 (Fla. 4th DCA 1998); City of Riviera Beach v. Shillingburg, 659 So.2d 1174, 1883 (Fla. 4th DCA 1995); Brevard Cnty. v. Canaveral Props., 658 So.2d 590, 591 (Fla. 5th DCA 1995); Dade Cnty. v. Midic Realty, 551 So.2d 499, 500 (Fla. 3d DCA 1989); Di Virgilio v. State Road Dep't, 205 So.2d 317 (Fla. 4th DCA 1967), disapproved on other ground by Jirik II, 498 So.2d at 1257.

<sup>6</sup> See, e.g., Board of Transp. v. Martin, 249 S.E.2d 390, 394-96 (N.C. 1978); City of Salem v. H.S.B., 733 P.2d 890, 893-94 (Or. 1987); Arnold v. S.C. Pub. Serv. Auth., 356 S.E.2d 837, 837 (S.C. 1987); Bogese, Inc. v. State Highway & Transp. Comm'r of Va., 462 S.E.2d 345 (Va. 1995).

<sup>7</sup> See, e.g., Housing Auth. of City of Newark v. Norfolk Realty Co., 364 A.2d 1052, 1057-58 (N.J. 1976); Johnson v. State, 781 N.Y.S.2d 764, 766 (N.Y. App. Div. 2004); State of Illinois Med. Ctr. Comm'n v. United Church of the Med. Ctr., 491 N.E.2d 1327, 1332 (Ill. App. Ct. 1986).

## **CERTIFICATE OF SERVICE**

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