FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4344

LARRY and ELLEN VICKERY,

Appellants,

v.

CITY OF PENSACOLA, a Municipal Corporation,

Appellee.

On appeal from the Circuit Court for Escambia County.
Jeffrey Burns, Judge.

June 22, 2022

ON MOTION FOR REHEARING, CLARIFICATION, REHEARING EN BANC, AND CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE

WINOKUR, J.

We deny Appellee's motions for rehearing, clarification, rehearing en banc, and certification of questions of great public importance.

After the opinion in this case was issued and after Appellee filed its post-opinion motions, the Legislature amended section 163.045. *See* Ch. 2022-121, Laws of Fla. Of course, this means that Appellee's post-opinion motions make no mention of the 2022 version of the statute. Nonetheless, the dissent to this order spends

paragraphs arguing that the Vickerys could not have prevailed under the current statute. We do not address this suggestion. Because it did not exist at the time, the 2022 version of the statute is not the one that either party used to determine the legal requirements for the tree removal, nor was it considered by the trial court in imposing the order under review. Nor, for that matter, was the 2022 version of the statute at issue when we decided this appeal. As such, the requirements it imposes are irrelevant to the propriety of the order below.

Even if the 2022 version of the statute were relevant, its existence demonstrates why this case presents no issues of great public importance deserving of certification. Since the statute it interprets has been substantially amended, the case applies primarily only to the parties, which militates against certification. *See State Atty's Office of Seventeenth Jud. Circuit v. Cable News Network, Inc.*, 251 So. 3d 205, 217 (Fla. 4th DCA 2018) (Conner, J., concurring in part and dissenting in part) (noting that "[a]n issue is not 'of great public importance' where the issue is important only to the parties involved"); *see also Grimes v. State*, 208 So. 3d 323, 325 (Fla. 1st DCA 2017) (finding an issue to be one of great public importance because of its "recurring nature"); *Walker v. State*, 853 So. 2d 498, 500 (Fla. 1st DCA 2003) (finding an issue to be of great public importance because the issue was "continually recurring"). If great public importance is determined by the issue's "recurring nature," this case cannot meet that standard as it analyzes a statute that, in effect, no longer exists.

We add that the supreme court has warned district courts about using certification merely for the purpose of seeking its approval of a decision. In *Owens-Corning Fiberglass Corp. v. Ballard*, the court surmised that a certified question "appears to be more of a request for our approval of the conclusion reached by the court below than an issue involving great public importance." 749 So. 2d 483, 485 n.3 (Fla. 1999). "[W]e would discourage district courts from asking for this kind of check on its decision as a question of great public importance." *Id.* Given that the statutory requirements we analyze here no longer exist, supreme court review by certification under the circumstances here would be little more than a "check" on our decision.

The dissent further notes that this case is not yet final below, and implies that when this case does return to the lower court, it will be analyzed pursuant to the 2022 version of the statute. It would not be appropriate for us to opine on the retroactivity of the 2022 version and its application to this case. What is clear is that the temporary injunction in this case was imposed nearly three years ago, and that briefing was completed in this appeal over one and one-half years ago. It is long past time to return this case to the trial court to conclude this litigation.

B.L. THOMAS, J., concurs; MAKAR, J., dissents with opinion.

MAKAR, J., dissenting from denial of certification.

At issue is a temporary injunction that halted the removal of the "Old Tree" pending a trial on the merits. The panel majority reversed the temporary injunction, ordering that it be dissolved. In the interim, the Florida Legislature has substantially revised the statute in question, section 163.045, Florida Statutes, to impose professional standards of the kind that the trial court concluded were necessarily implied in the statute's prior version; it also clarifies that "documentation" is far more than an insupportable off-the-cuff opinion, pressured by a property owner, as occurred in this case.

Effective July 1, 2022, the so-called removal statute defines "documentation" to mean "an onsite assessment performed in accordance with the tree risk assessment procedures outlined in Best Management Practices—Tree Risk Assessment, Second Edition (2017) by an arborist certified by the International Society of Arboriculture (ISA) or a Florida licensed landscape architect and signed by the certified arborist or licensed landscape architect." Ch. 2022-121, § 1(a), Laws of Fla. (to be codified at § 163.045(1)(a), Fla. Stat.). An owner of "residential property," a new and restrictively defined phrase, *see* Ch. 2022-121, § 1(b), Laws of Fla. (to be codified at § 163.045(1)(b), Fla. Stat.),[*] must now *possess*

[*] "Residential property" means "a single-family, detached building located on a lot that is actively used for single-family residential purposes and that is either a conforming use or a legally recognized nonconforming use in accordance with the local

(rather than merely "obtain") documentation "from an arborist certified by the ISA." Gone is vague and open-ended language that the tree sought to be removed "presents a danger" to persons or property; instead, the "documentation" must show that a tree "poses an unacceptable risk to persons or property," which means its "removal is the only means of practically mitigating its risk below moderate, as determined by the tree risk assessment procedures outlined in Best Management Practices—Tree Risk Assessment, Second Edition (2017)." Ch. 2022-121, § 2, Laws of Fla. (to be codified at § 163.045(2), Fla. Stat.).

The evidence Vickery presented in this case does not appear to meet the definition of "documentation," which requires an onsite assessment in accordance with tree risk assessment procedures and signed by the professional performing the assessment. Nor does it appear to meet the statutory test that requires an "unacceptable risk" such that "removal [of a tree] is the only means of practically mitigating" the risk below the risk assessment standard that is now statutorily set. Instead, the Legislature clarified the statute's language by "revising" the "conditions under which a local government may not require notice, application, approval, permit, fee, or mitigation" when "pruning, trimming or removal of a tree on residential property." Chapter 2022-121, § 2, Laws of Fla. (proviso).

The new legislation undermines Vickery's factual and legal claims and casts doubt on the validity of the panel majority's view that a residential property owner's reliance on section 163.045 to remove a locally protected tree is beyond any judicial review whatsoever. By fortifying the requirement that documentation actually exists and meets professional standards—and by significantly restricting the limited circumstances in which exemptions from local codes and ordinances may apply—the Legislature has strengthened the City's argument that some form of limited judicial review exists; that's not to say my colleagues' view is entirely without merit, but it is not conclusive until after a

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jurisdiction's applicable land development regulations." Ch. 2022-121, § 1(b), Laws of Fla. (to be codified at § 163.045(1)(b), Fla. Stat.).

full and final hearing and judgment on the merits, which is yet to come.

Thus, it is highly questionable, and is an issue to be decided on remand, whether Vickery ultimately prevails under the clarified statute. My colleagues' opinion does not—indeed cannot—decide the matter with finality because the order on appeal is merely the denial of a motion to vacate a temporary injunction. The parties did not stipulate to the temporary injunction order being the final order on the merits and no full and final hearing on the merits has been held.

Under these circumstances, the majority opinion disposes of only the preliminary injunction aspect of the case, but it does not necessarily bind the trial court on the ultimate merits. That's

> [b]ecause a decision based on a less-than-full hearing—such as the issuance or denial of a preliminary injunction—is by its very nature provisional, it would be nonsensical to give it binding effect on the subsequent proceedings in the same case. *This is true, of course, even where the tentative determination of a trial court has been the subject of interlocutory appellate review*.

Klak v. Eagles' Rsrv. Homeowners' Ass'n, Inc., 862 So. 2d 947, 952 (Fla. 2d DCA 2004) (emphasis added); *see also Ladner v. Plaza Del Prado Condo. Ass'n, Inc.*, 423 So. 2d 927, 929 (Fla. 3d DCA 1982) ("It follows necessarily that any expression on the merits of the case by an appellate court reviewing an order granting or denying a preliminary injunction, where review is based on a record made at a less-than-full hearing, will not be binding at trial on the merits."); *Belair v. City of Treasure Island*, 611 So. 2d 1285, 1289 (Fla. 2d DCA 1992) ("The fact that this court affirmed the trial court's previous order granting a temporary injunction does not prohibit an appeal on the order granting a permanent injunction involving the same facts."); *see generally Smith v. Hous. Auth. of City of Daytona Beach*, 3 So. 2d 880, 881 (Fla. 1941) ("The obvious purpose of a temporary injunction is the maintenance of the subject matter in status quo pending the determination of the cause and, as the name implies, such an order is not conclusive and

the provisions of it may be merged in, or dissolved by, the final decree.").

Finally, although a remand and full trial on the merits may ultimately lead to an appeal and an adjudication with binding effect as to the statute's meaning, certification of a question of great public importance is advisable to give our supreme court the option to accept jurisdiction if it wishes to do so at this time. The City has suggested the following three:

> 1. Whether Section 163.045 must be construed as having a conflict preemption effect only, such that local government regulations regarding tree trimming, pruning, and removal that [are] not directly in conflict with the statute continue to be applicable to residential lots;
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> 2. Whether a court, to avoid overinclusive results that would cause destruction of healthy trees inconsistent with the legislative purpose of Section 163.045, should construe the terms "documentation" and "danger" consistent with the professional standards of certified arborists and landscape architects based on the legislature's choice to appoint those professionals to render opinions on trees on residential properties; and
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> 3. Whether a private or governmental party is permitted to present evidence that a tree is healthy to contradict the opinion of the property owner's arborist or landscape architect in circumstances where the reliability of the specialist's opinion is fairly debatable.

The Legislature has already answered the second question, favorably to the City, by revising section 163.045. In doing so, the Legislature had the opportunity to go further and state an intention to preclude any judicial review, but it made no such statement; nor did it say it intended to grant residential property owners the unreviewable power to remove trees claimed to be dangerous. Ordinarily, Florida courts have the authority to review acts of the legislative branch, subject to jurisdictional standards, which is a core judicial power inherent in principles underlying the

state constitution's separation of powers. *See Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992); *see also Closet Maid v. Sykes*, 763 So. 2d 377, 382 (Fla. 1st DCA 2000). Due to uncertainty about the availability of judicial review in this case, therefore, I would certify a question of great public importance that queries whether the Legislature intended to entirely preclude judicial review of any local government's action in requiring a residential property owner to show compliance with section 163.045 (i.e., possess documentation the statute requires) to avoid tree local regulations.

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Heather F. Lindsay, Assistant City Attorney, Pensacola, for Appellee.