

UPDATE ON THE BERT HARRIS ACT

By: **Ronald Weaver, Esq.**

STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
Tampa, Florida

Because Bert Harris-type causes of action are unique in the United States and still relatively new in their application in Florida, it is helpful to undertake a practical overview of how property owners and governmental entities have couched their claims and defenses. Only experience will demonstrate the full impact of the Act on the way governments choose to regulate real property in Florida in the public interest.

In the twelve years since the Bert Harris Act's inception, close to 200 claims have been filed, but only a small amount have been fully adjudicated by the courts. Judges have shown their willingness to rule in favor of landowners, and as a result, local governments are becoming more willing to settle with property owners. *See Aquaport, L.C. v. Collier County*, Case No. 03-1609 CA (20th Jud. Cir. 2004) and *West Side Partners, Ltd. v. City of Miami Beach*. The Act survived *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So.2d 320 (Fla. 3d DCA 2004), ruling that sovereign immunity was waived by the Florida Legislature in passing the Act. Then, in 2006, the constitutionality of the Act was upheld by *Brevard County v. Stack*, 932 So.2d 1258 (Fla. 5th DCA 2006), although this was not really revolutionary, since it had been previously stated by Judge Carlisle in *First Church of Christ Scientist v. West Palm Beach* (Cir. Ct. Case No. CL-97-4710-AE, 15th Jud. Cir. 1997). The following claims and responses are representative of the approaches taken in various jurisdictions in response to governmental regulatory efforts.

Background of Bert Harris Act

The Bert J. Harris, Jr. Private Property Rights Protection Act of 1995 created a new cause of action for an aggrieved property owner who demonstrates that governmental action "inordinately burdens" his property.¹ The statute's description of the requisite showing of injury is perhaps the most complex provision in the Act. The Act provides:

The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities 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 a disproportionate

¹ § 70.001, Fla. Stat. (2006).

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), Fla. Stat..

Broken out into parts, the injury element is best understood as an independent, alternative means of demonstrating "unfairness" in the governmental action at issue. One deals with specific uses that are presently existing or proposed for the property and for which the property owner can demonstrate some degree of reasonable expectation of present or future development. Under this provision, the owner must show that he or she has been deprived by the offending regulation of either a specific existing use of the property (defined to include both present and certain foreseeable uses) or a vested right to a specific use.

In a claim under the Act, a property owner could advance either or both theories, depending on the facts of the case at hand. The owner may demonstrate such an "inordinate burden" by showing either (1) that the property has been unfairly singled out to bear a "disproportionate" share of the regulatory burden imposed to meet a legitimate governmental end, or (2) that the owner is now permanently unable to attain reasonable, investment-backed expectations for use of the property. Those expectations may include expectations for the continued present use of the property, or for a vested right to a specific future use of the real property, or, within prescribed limitations, for reasonably anticipated future uses.

The second means of proving injury looks not at the regulation's impact on specific proposed uses, but instead at the uses remaining after the governmental regulation takes effect, and considers whether the remaining uses for the property represent a reasonable range. Under this option, a property owner must show that the property has such limited remaining uses that it is unfairly bearing the brunt of a regulatory burden that should not properly be imposed upon an individual property owner, but instead upon the public as a whole, which benefits from the regulation.

For relief under Part I of the Act, a landowner must show, with an appraisal in hand, a permanent inordinate burden. The inordinate burden claim must be presented to the governmental entity no later than one year after the regulation is first applied.

However, the one-year deadline is tolled while the property owner seeks other available administrative or judicial relief.² In *Russo Associates, Inc. v. City of Dania Beach Code Enforcement Board*,³ the court held that the time for bringing a claim under the Act was tolled during the period of administrative and judicial challenges to the government action, and that the general four-year statute of limitations in § 95.11(3), Fla. Stat., applied.

² § 70.001(11), Fla. Stat. (2006).

³ 920 So.2d 716 (Fla. 4th DCA 2006).

In addition, the claim must be presented to the governmental entity not less than 180 days prior to filing an action in circuit court under the Act.⁴ During the 180-day negotiation period, parties shall discuss settlement of the owner's claim. At the end of negotiations, the governmental entity is required to issue a written settlement offer to the claimant.

As in takings case law, a burden imposed on less than the whole property is not actionable. If the property as a whole retains the reasonable, investment-backed expectation for its existing use, or the ability to use the property for a vested right to a specific use, no claim accrues.

Florida Land Use and Environmental Dispute Resolution Act

Part II of the Act, known as the Florida Land Use and Environmental Dispute Resolution Act, provides another informal, non-judicial avenue of relief for a land owner, through a special master, to seek review of a development order which "is unreasonable" or "unfairly burdens" the use of his real property. The Act does not define what it means to be an "unreasonable" or "unfair burden" on real property. However, the Act states that it is not to be construed "in pari materia with the Private Property Rights Act," (§ 70.80, Fla. Stat. (2006)), so we can not take the definition from here. The Act instructs the special master to decide on a case-by-case basis what constitutes an unreasonable or unfair burden, applying certain factors. The statute directs the special master to take into account the full range of circumstances surrounding the property. The statute lists several nonexclusive factors to consider in an analysis of whether a property owner has been deprived of all or substantially all economically viable use of property. Those factors include: the ownership history of the property and its initial use; the development history of the property; the regulatory history of the property; the present characteristics of the property; the reasonable expectations of the owner about the prospective use of the property; the public purpose of regulations applicable to the property; uses allowed or restricted on similar parcels; and any other relevant consideration. § 70.51(18), Fla. Stat. (2006).

The request for mediation must be made within 30 days after such order issues.⁵ Initiation of a proceeding tolls the time for seeking judicial review of a local government development order or enforcement action until the local government acts upon the special magistrate's recommendation.⁶

The special magistrate must convene the hearing within 45 days of receipt of the request for relief, and convene it in the county where the subject property is located. The governmental entity that issued the development order at issue has 15 days to file a response setting forth the government's position regarding the landowner's allegations and the public purpose of the regulations on which the order is based.

⁴ § 70.001(4)(c), Fla. Stat. (2006).

⁵ § 70.51(3), Fla. Stat. (2006).

⁶ § 70.51(10)(a), Fla. Stat. (2006).

The hearing prescribed by this section must be informal, open to the public, and operated under the special magistrate's supervision. The primary goal of the hearing is to explore alternatives to the development order and facilitate a resolution of the dispute. If a resolution is not reached, the special master must determine whether the development order is "unreasonable" or "unfairly burdens" the subject real property. Factors to be considered are prior zoning uses, the history of the property, the history of environmental protection and land use there, and the nature and extent of the real property, etc.

Within 14 days of the conclusion of the hearing, the special magistrate must make a written recommendation which the governmental entity must accept, reject or modify within 45 days. The government's acceptance or modification of the recommendation is subject to the owner's rejection. If, however, the government rejects the recommendation, it has 30 days within which to issue a written decision stating the allowable use(s) of the property. At that juncture, the matter is deemed ripe for judicial action.

A Sample of Typical Bert Harris Cases

While there is no such thing as a "typical" Bert Harris case, below is a sampling of how the Bert Harris Act has been used during the past several years.

i. ***Associates, Inc. v. City of Dania Beach Code Enforcement Board, 920 So.2d 716 (Fla. 4th DCA 2006)***

Russo involved a dispute over a change in zoning. The Plaintiff's existing use of the property was prohibited under new zoning regulations, and was subsequently issued a citation on August 31, 2000. After a hearing by the city code enforcement board, Russo was found in violation of the ordinance, which finding was later confirmed by the Circuit Court. The Plaintiff presented a written claim on October 10, 2002 pursuant to section 70.001(11), Florida Statutes, and filed a complaint on February 6, 2004. The City of Dania asserted that the Plaintiff was in contravention of the Florida Statutes in filing its complaint, because the statute mandates a cause of action be filed less than one year after the subject ordinance was first applied by the city to the Plaintiff's property. The trial court dismissed Russo's complaint with prejudice as barred by the statute of limitation.

The Fourth District found that Legislature established an explicit procedure to follow under the statute. The statute does not expressly address a statute of limitations, and states that "[n]ot less than 180 days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the heard of the governmental entity." Further, a cause of action under section 70.001(11) may not be commenced 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.

The Court reasoned that section 95.11(3)(p) imposes a catch-all four-year statute of limitation which has been held to govern inverse condemnation actions. The intention of section 70.001 is to provide an additional remedy when governmental action does not

rise to the level of a taking; so it would be unreasonable to infer a more restrictive statute of limitations of six months, as proposed by the City. Accordingly, the Plaintiff had four years to file his complaint under the Harris Act, and did so after fulfilling all pre-suit conditions imparted under the statute. The final judgment of dismissal was reversed and remanded for further proceedings.

ii. ***Palm Beach Polo, Inc., v. The Village of Wellington, 918 So.2d 988 (Fla. 4th DCA 2006)***

This case involved an appeal of the trial court's denial of an inverse condemnation claim and a Bert Harris Act claim by a landowner. The subject property was originally approved as a PUD in 1971, with an area set aside as a preserve, open space reserve. The development rights for the preserve were transferred to other portions of the property, allowing for higher density on certain tracts. The original developer filed bankruptcy, and the land was sold to a sister company of Palm Beach Polo. Due Diligence was completed prior to purchase, specifically including a master plan which designated the Preserve, known as "Big Blue." Wellington subsequently incorporated, and designated Big Blue as conservation. Polo protested the conservation designation, making a claim under the Bert J. Harris Act. In addition to the conservation designation, Wellington filed suit for a declaratory judgment to enforce original requirements of the 1972 PUD. Polo then counterclaimed, asserting inverse condemnation.

The trial court found in favor of Wellington, and appeal followed, in which the Court upheld the trial court's holding. The appellate court found that it was fairly obvious from the "abundant history of Big Blue that there was no reasonable, investment backed expectation for an existing use of Big Blue at all." It had been designated as a natural reserve from 1972 forward and significant efforts had been made to preserve the forest. The restrictions on the use of the property had existed for many years prior to Polo's acquisition of the property; as part of the PUD, any development density available to the acreage in Big Blue was transferred to other property in the Wellington PUD, so those restrictions had been compensation for by the allocation of development rights. Polo failed to establish any reasonable investment backed expectations with respect to development of the Big Blue Property, so the inability to develop the parcel did not constitute an unconstitutional taking or inverse condemnation. The re-designation of it as a conservation area changed nothing regarding the property, and Polo failed to establish that at any time it was entitled to build on the property. Therefore, Polo's Bert Harris Act claim was frivolous.

iii. ***West Side Partners, Ltd. v. City of Miami Beach, Florida, Case No. 98-13274 (Circuit Court of the Eleventh Judicial Circuit, September 8, 2004)***

On July 8, 1995, the Circuit Court of the 11th Judicial Circuit entered an order approving a settlement between South Shore Developers and the City of Miami Beach. Pursuant to the order, the City entered into a series of agreements, including a development agreement, pertaining to the purchase, ownership and development rights of two South beach parcels. Sometime after the entry of the order, the City determined that

the cost to comply with the development agreement would be extremely expensive and not in the public's best interest. As a result, the City negotiated with the plaintiffs a new development agreement which specifically provided for a series of three closings on designated parcels of real property. Two of these closings were fully completed. Fundamental to the new development agreement was the condition that the Commission consider and approve in the future a series of zoning applications for certain parcels of land located in the City. Because the City could not lawfully contract to approve future zoning applications, it instead lawfully agreed that the zoning and development laws applicable to the affected properties would not change.

Thereafter, several of the plaintiffs filed development approval applications which were accepted for filing, underwent review, and were duly and properly noticed for public hearings before the Commission. At the June 9, 1997 public hearing, plaintiffs were prepared to conduct the public hearing and present all evidence on the merits of the development approval applications. Instead, the commission maintained that an amendment to the City of Miami Beach Charter required that the applications be first approved by the entire Miami beach electorate in a special election before the Commission could take any action on the applications. Ultimately, the Commission never heard or considered the development agreement applications, and the final third closing did not occur as required by the agreement. On June 20, 1997, pursuant to their rights under the agreement, two of the developers chose to terminate the development agreement.

As a result of the City's actions, the plaintiffs claimed they were damaged by the expenditures incurred in implementing the agreement and by denial of their rights contained in the agreement. In addition, plaintiffs claim that the City's adoption of Ordinance No. 98-3107 which reduced the maximum Floor Area Ratio for the plaintiffs' properties inordinately burdened an existing use and vested right to a specific use such that the plaintiffs were permanently unable to attain their reasonable investment-backed expectations for such uses. Plaintiffs subsequently presented to the City written claims for compensation pursuant to Section 70.001(4)(a) of the Harris Act. On December 18, 1998, the City rejected the claims and made settlement offers to each of the Plaintiffs' Harris Act claims pursuant to Section 70.001(4)(c). Each settlement offer was accompanied by a written ripeness decision identifying the allowable uses to which each of the properties may be put. Section 70.001(5)(b) allows the property owner who rejects the settlement offer and the ripeness decision of the City to file a claim for compensation. Thus, upon receipt of the settlement offer and ripeness decision, the plaintiffs filed for declaratory judgment on various matters, a claim for breach of the development agreement, and several Harris Act claims against the City.

In order to resolve the lawsuit, the parties engaged in extensive mediation, and on February 25, 2004, the City Commission adopted Resolution 2004-25509 which approved a term sheet contemplating a conditional settlement of all pending litigation. Thereafter, representatives of the City Attorney's Office and the City Administration met with Plaintiffs' representatives to finalize a formal Settlement Agreement. As a result of the numerous publicly noticed public meetings, a general citizen consensus was reached on all major issues affecting the settlement.

The formal Settlement Agreement was presented to the City Commission on July 7, 2004 and approved on July 28, 2004 through the adoption of Resolution Nos. 2004-25650 and 474-2004. The Settlement Agreement contemplated amendments to the City's land development regulations, Comprehensive Plan, zoning map, and the plan's Future Land Use Map to restore certain development rights to the Plaintiffs. In addition, the City also passed Resolution No. 2004-25649 which approved a "Compliance Agreement" between the Florida Department of Community Affairs and certain other parties. Pursuant to the Settlement Agreement, the City also agreed to the conveyance of certain city owned lands to several of the Plaintiffs in return for the conveyance of certain additional lands to the City to be used for Marine Recreational zoning purposes. On September 8, 2004, the Circuit Court of the Eleventh Circuit signed the order approving the Settlement Agreement between the parties and implementing the ordinances and resolutions contained therein.

iv. Thomas Kramer-South Beach/Miami Beach

On February 25, 2004, the Miami Beach City Commission approved a settlement agreement ending a 7-year-long legal battle between the City and developer Thomas Kramer and his Portofino Group. When the dust settled, Kramer and his group had sold a \$28 million property and settled their \$15 million Bert Harris Act damages claim. The original conflict centered around Kramer's efforts to build a high-rise on land purchased in 1994 at the southern tip of Miami Beach. In 1998, the city down-zoned the property, reducing by more than half the square footage the developer could build. Kramer's group sued to restore its development rights and additionally sought \$15 million in damages from the City under the Bert Harris Act for the resulting diminished value of its property. The final resolution came when much of the original land involved was sold to The Related Group of Florida which, in turn, negotiated a settlement with the City. The agreement allows the developer to build up to 619,748 square feet, an almost 40% increase over the currently allowed 446,404 square feet. Rather than the pre-1998 unrestricted height limit, the settlement allows for a high-rise up to 300 feet high (approximately 30 floors).

**v. *City of Miami Beach v. Chisholm Properties South Beach, Inc.*,
830 So. 2d 842 (Fla. 3d DCA 2002)**

The Ritz Carlton sought approval for a 15-story addition to the rear of its existing hotel. While the application for approval of the addition was pending, the City of Miami Beach enacted zoning regulations which had the effect of limiting the height of new additions to oceanfront buildings to five stories. Following the enactment of this legislation, the Ritz filed three claims against Miami Beach, one of which was a Harris Act claim. After the Ritz had filed its claims against the City, it entered into a settlement agreement with the City whereby it agreed to modify its plans if the City would agree to have its staff recommend granting the necessary zoning variances when the application came before the Board of Adjustment. Ultimately, the Board approved two variances allowing construction of a seven story addition to the hotel.

Chisholm Properties filed Petitions for Writ of Certiorari claiming that the Ritz Carlton had failed to show the hardship required to justify the granting of the variances. The Circuit Court granted the Petitions and found that the variances should not have been granted because no hardship was shown. The court found also that at the time of the settlement agreement, the City has already granted the Ritz Carlton the variances.

vi. ***Scott v. Polk County, 793 So. 2d 85 (Fla. 2d DCA 2001)***

In March 1999, the Polk County Commissioners denied a Planned Unit Development (PUD) application submitted by plaintiff Scott who acted as trustee for a certain piece of property. The proposed PUD sought to convert the waterfront portion of the property into a marina and resort.

After the application was denied, Scott, pursuant to section 70.51(4), filed a letter with the county board, seeking nonjudicial review of the board's order by a special master. A week later, Scott filed this lawsuit against Polk County, alleging that, with regard to his PUD application, his substantive due process rights were violated by unlawful, ex parte communications between the county and the South Florida Water Management District, which had a prospective interest in the property. Scott claimed that those communications were improperly considered in the county's denial of the subject PUD application.

In November 1999, the special master filed a report in Scott's civil lawsuit, indicating that a proper special master proceeding had been conducted but had resulted in an impasse. In February 2000, the county filed, in the civil lawsuit, an amended motion to dismiss, abate, or stay the special master proceedings. After a hearing, the trial court entered an order, dismissing the special master proceedings. The trial court found that the special master proceedings were intended only as an alternative to judicial proceedings and that, once judicial proceedings were instituted, the right to a special master proceeding was waived.

On appeal, Scott argued that the trial court did not have jurisdiction to dismiss the special master proceedings. The Second District Court of Appeal agreed. The court began by noting that the instant judicial action involved a due process claim, which is an action independent and distinct from the judicial review process relating to the approval or denial of a zoning request. The court noted, on the other hand, that the section 70.51 special master proceeding at issue is an alternative dispute resolution process used to resolve challenges to a zoning decision, in lieu of judicial review. The court stated that the plain language of section 70.51 indicates that the alternative proceedings contemplated by that section are informal and nonjudicial and are controlled strictly by the special master and the parties. Furthermore, no provision within section 70.51 confers jurisdiction on any court of law or authorizes judicial intervention in a special master proceeding. Judicial review of a zoning decision is an entirely separate formal process that may be initiated. Therefore, the Court of Appeals concluded that the trial court was without the authority to intervene in the special master proceeding or to otherwise dismiss it.

vii. ***Sosa v. City of West Palm Beach*, 762 So. 2d 981 (Fla. 4th DCA 2000)**

The City of West Palm Beach issued a notice and order of condemnation on a structure being remodeled by Fabian Sosa. Both the notice and order informed Sosa that an inspection of the structure had revealed severe deterioration in addition to multiple code violations and that the structure was deemed to be unsafe for human habitation. Sosa appeared before the City's Board of Adjustment and Appeals several times seeking extensions in order to obtain the proper certifications and permits. However, after more than 18 months after the issuance of the notice and order of condemnation, the Board found that Sosa continued to work on the property without the proper permits and certifications. As a result, the board ordered demolition of the structure.

Sosa subsequently sued the City pursuant to the Harris Act, alleging that it had placed an inordinate burden on his property by refusing to issue him the required permits that he needed to complete the remodeling of the structure. Finding that Sosa had failed to comply with the prerequisites for bringing a Harris Act claim, the trial court dismissed Sosa's third amended complaint with prejudice. This appeal resulted.

The Fourth District Court of Appeal recognized that the Harris Act does create a distinct and independent cause of action for an aggrieved property owner. However, the court also pointed out that in order to pursue a cause of action under the Harris Act, the property owner must present the claim in writing to the head of the governmental entity at least 180 days prior to filing an action under the Act. In addition, ' 70.001(4)(a) of the Act also requires the property owner to submit, along with the claim, a bona fide appraisal supporting the claim and demonstrating the loss in fair market value to the property. After reviewing the record, the Court found that Sosa not only failed to present the City with any appraisal supporting his claim but he also presented his claim less than 180 days before he filed it. Thus, the court affirmed dismissal of Sosa's third amended complaint.

Provisions of Act Regarding Interlocutory Appeals

In *Osceola County v. Best Diversified, Inc.*, 830 So.2d 139 (Fla. 5th DCA 2002), the Fifth District Court of Appeals held that the Supreme Court of Florida must incorporate statutory language into the appellate rules to give effect to provisions of the Harris Act, regarding interlocutory appeals.

In *Best Diversified*, the County denied Best Diversified's ("Best") zoning application that would allow it to use its property as a landfill. Likewise, DEP refused to issue Best a general permit that would allow a landfill on Best's property. The trial court agreed with Best that the denials by the County and DEP "inordinately burdened" Best's property and constituted an inverse condemnation of the property, and violated the Harris Act under § 70.001. The County and DEP appealed, and the Court *sua sponte* ordered the County and DEP to show cause why the appeal should not be dismissed for lack of jurisdiction. In response, the County and DEP asserted that the court had jurisdiction over the inverse condemnation claim under Fla. R. App. P. 9.130(a)(3)(C)(ii), which

allows for an interlocutory appeal of an order that determines the right to immediate possession of property. Further, the County and DEP argued that the Harris Act specifically confers jurisdiction on the appellate court to hear an interlocutory appeal from an inordinate burden determination.

While acknowledging that previous appellate court decisions have relied upon Fla. R. App. P. 9.130(a)(3)(C)(iv) for jurisdiction to review non-final orders finding liability in inverse condemnation actions, the Court found that Fla. R. App. P. 9.130(a)(3)(C)(iv) was repealed in 2000 by amendment, thus, no longer providing a basis for jurisdiction. No other subdivision of Fla. R. App. P. 9.130 provides a basis for jurisdiction over the inverse condemnation portion of the appeal.

Acknowledging that § 70.001(6)(a) states that a governmental entity may seek an interlocutory appeal of the court's determination that an action of a governmental entity has inordinately burdened private property, the Court dismissed the appeal for lack of jurisdiction because the Florida Constitution (Art. V, § 4(b)) does not authorize the Legislature to provide for interlocutory appeals. Thus, the Court found that an agency may not seek an interlocutory appeal of a court's determination that an action of a governmental entity has resulted in an inordinate burden unless the Florida Supreme Court amends Fla. R. App. P. 9.130 to provide for such review. Subsequently, a jury was impaneled to determine damages. It awarded the plaintiff \$1,415,000 on the inverse condemnation claim, and \$1,400,000 on the Harris Act claim. The plaintiff elected the remedy of inverse condemnation.

The Fifth District Court of Appeal subsequently found, in *Osceola County v. Best Diversified, Inc.*, 2005 WL 1787438 (Fla. 5th DCA 2005), that Best was not entitled to compensation from the DEP as a result of a denial of a request for continued conditional use of the property and a permit to operate as a landfill. The Court found that the County effected a compensable taking by denying the owner an opportunity to close the landfill. Because the owner was put into a "catch 22" situation by the requirements placed upon him by the County, he was denied all reasonable economic use of his land. He was, therefore, entitled to compensation from the County for a taking of his property under a theory of inverse condemnation. However, the Court did not find competent, substantial evidence to uphold the verdict against DEP. This opinion was withdrawn on grant of rehearing on August 11, 2006.

Upon rehearing, the Fifth District Court of Appeal reversed the inverse condemnation finding, saying there was simply no evidence that the County kept plaintiff from closing the landfill in accordance with law or engaged in any conduct amounting to a taking. Plaintiff was not entitled to compensation from the County and DEP when his request for a conditional use was denied based on their determination the facility was the cause of noxious odors and constituted a public nuisance. In light of the complete reversal of the inverse condemnation judgment, the court considered the trial court's alternative finding of liability under the Harris Act. They found that the plaintiff clearly failed to submit the bona fide, valid appraisal supporting his Harris Act Claim. The court said that failing to satisfy this requirement couldn't be cured by filing an appraisal in the litigation. Further, the Act does not apply to the impact on real property occasioned by

governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property. *Osceola County v. Best Diversified, Inc.*, 936 So.2d 55 (Fla. 5th DCA 2006). The Florida Supreme Court denied review of the case on December 4, 2006.

Sovereign Immunity Does Not Apply in Bert Harris Cases

In *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320 (Fla. 3d DCA 2004), *rehearing denied* 895 So. 2d 404 (Fla. 2005), the Plaintiffs brought an action for, *inter alia*, inverse condemnation against the City of Miami for enacting certain ordinances in violation of the Harris Act. They sought damages in excess of \$7,000,000. The Plaintiffs alleged that the City of Miami violated the Harris Act when the City enacted three city-wide zoning ordinances that established new height and density restrictions for development in the area where the Plaintiffs' were to construct their proposed project. The Plaintiffs claimed that the ordinances violated the Harris Act because they "inordinately burdened" the Plaintiffs' vested rights to construct the site as they had originally planned.

In its Order granting partial summary judgment for the City of Miami on the inverse condemnation count, the court held that the City of Miami was immune for legislative acts, but not quasi-judicial ones, based on the defense of sovereign immunity because the actions of enacting ordinances should be considered inherent acts of governing. The major premise for this holding is that "Commissions, boards, city councils . . . by their enactment of, or failure to enact laws or regulations, are acting pursuant to basic governmental functions performed by the legislative . . . branch." The defense of sovereign immunity has always existed as a shield against liability for the legislative or quasi-legislative acts of municipalities. Therefore, the Court found, "[e]ven though the Defendant City has enacted certain zoning ordinances which have the practical effect of over burdening the Plaintiffs' property to the point where its proposed development value becomes negligible, it remains immune from suit."

The Plaintiffs later appealed. In its oral argument, Appellant Royal World argued that sovereign immunity was intended to be waived under the Harris Act. Royal World admitted that Section 13 of the Act which states that "[t]his section does not affect the sovereign immunity of government" does conflict with Section 1 and is therefore problematic. However, Royal World asserted that a literal interpretation of Section 13, as advocated by the City, would nullify most of the Act. Thus, Royal World maintained that the problematic section should not be read literally, but instead be harmonized and read with the rest of the statute.

Claiming that Royal World read the Harris Act in a way that effectively invalidated Section 13, the City argued that the Court is required to read the plain language of the entire statute. Furthermore, the City argued that sovereign immunity should only be waived where it is clearly and expressly done so, and since Section 1 is not a clear and express waiver, the Court should err on the side of upholding the immunity.

The Court began its analysis by emphasizing the importance of legislative intent in the construction of a statute. The Court proclaimed that a statute should be construed and applied to give effect to the legislative intent, even if that construction varies from the statute's literal meaning. The Court quoted from *Plante v. Smathers*, 372 So. 2d 933 (Fla. 1979), "[i]ntent is traditionally discerned from historical precedent, from the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented." The Court concluded that the legislative intent of the Harris Act was clearly set forth in Section 1 of the Act which provides that the statute's intention was to protect private property owners against "inordinately burdensome" governmental regulation.

The Court also addressed the City's position that Section 13 of the Act should be read literally, stating that such a literal reading of Section 13 "is in direct contravention of the statute and its purpose [and] negates everything the legislature purports to achieve through the enactment of the Act." The court also said that "it would be absurd to interpret Section 13," as the City argues, because it would "undo everything the Act is designed to achieve." The court went on to say that because it is not possible to give Section 13 literal effect within the meaning of the statute, "its application must [be] construed consistent with the general purpose and intent of the Act." In its conclusion, the Court held that "Section 13 does not bar a private property rights claim pursuant to the Harris Act," but instead it merely preserves the sovereign immunity that governmental entities otherwise enjoy. The Order granting Final Summary Judgment was reversed and remanded for further proceedings consistent with the court's opinion.

After the Third District Court of Appeal reversed the trial court's Summary Judgment, the City of Miami Beach filed a petition for review by the Supreme Court of Florida. On February 8, 2005, the Supreme Court of Florida declined to accept jurisdiction of the case and ordered that the petition for review be denied.

Bert Harris Act and Settlement Agreements

In the twelve years since the Bert Harris Act's inception, governments are becoming more willing to settle with property owners. For example, in December 2000, Aquaport applied to Collier County for approval of a 10-story, 68-room hotel.⁷ The plan was approved and building permits were later issued. Neighboring condominium associations opposed to the project alleged that the intensity and density of the hotel was inconsistent with the County's Growth Management Plan, and they threatened to sue. In response, the Commission voted to revoke the approvals and permits on May 22, 2001. Then in June 2001, the Board of County Commissioners amended the Land Development Code limiting hotel density to 26 rooms per acre. As a result, Aquaport was forced to build a 15-unit condominium on the property. Aquaport first filed a claim in federal court against the County for violation of procedural and due process rights, but the

⁷ *Aquaport, L.C. v. Collier County*, Case No. 03-1609 CA (Circuit Court of the Twentieth Judicial Circuit of Florida), May 5, 2004.

federal court said Aquaport must first seek relief from the state court system. As a result, they filed the Bert Harris Claim in April 2003.⁸

In May 2004, the Twentieth Judicial Circuit Court stated that the County's revocation of the approval constituted an "action" of Collier County which created an inordinate burden on Aquaport's vested rights. They also found that the passage of the ordinance which imposed a limitation of 26 hotel rooms per acre constituted an action which created an inordinate burden. So, the actions of the County entitled the developers to compensation under the Harris Act. The case subsequently settled for \$2.75 million, thereby avoiding a jury trial on damages, and Aquaport also agreed to drop their federal court appeal.

Looking back, Aquaport should not have filed a civil rights case in federal court, since it was both expensive and time consuming. Aquaport simply could have noticed the civil rights claim along with its Bert Harris Claim. This case exemplifies the use of the Bert Harris Act to receive compensation from the government.

In *Charlotte County Park of Commerce, LLC v. Charlotte County*,⁹ a developer sued the county regarding a dispute over development rights. Before settling, the developer notified Charlotte County of a potential Bert Harris Claim, but never officially filed the claim. The settlement agreement contained language that referenced the Bert Harris claim. The county would not file the pleadings necessary to obtain court approval of the agreement, so the developer sought a writ of mandamus to compel the county to file the pleadings and to seek a declaration of its rights under the Harris Act. The Trial Court dismissed the action because the developer could not have had its Harris Act claim subject to the settlement because the claim had never been filed in court. On appeal, the Second District Court of Appeal determined it was not necessary for the developer to file suit in order to have the Bert Harris Act claim addressed in the settlement agreement.¹⁰

Bert Harris Act is Found Constitutional: *Brevard County v. Stack*

On July 14, 2006, the Fifth District Court of Appeal found the Bert J. Harris Act constitutional in *Brevard County v. Stack*.¹¹ Appellees purchased two adjoining parcels of land, consisting of over four acres, in 1984 and 1987 for investment purposes. The center of the property contained approximately one acre of wetlands. At the time of purchase, the parcels were zoned BU-1, a general retail commercial zoning category. As of 2001, the parcels were designated as Community Commercial on the Brevard County future land use map. In September of 2000, Brevard County adopted the "Brevard County Wetlands Protection Act," which provided, in part, that "commercial development

⁸ Larry Hannan, *Collier Settles Property Rights Claim With Developer for \$2.75M*, Naples News (Sept. 25, 2004).

⁹ *Charlotte County Park of Commerce, LLC v. Charlotte County*, 31 Fla. L. Weekly D1270 (Fla. 2d DCA May 5, 2006).

¹⁰ Florida Municipal Law Reporter, April-June 2006, Section 2: Recent Decisions of the Florida District Courts of Appeal.

¹¹ 932 So. 2d 1258 (Fla. 5th DCA 2006).

activities are prohibited in wetlands contained in properties designated on the future land use map as commercial after February 23, 1996."¹²

In March of 2003, the Appellee and a land development company executed a sale of the property for 1.1 million dollars, planning the development of the property as a 10,000 square foot shopping plaza, with a restaurant and 170 parking spaces. Thirty-five of the parking spaces were to be located within the wetlands, requiring destruction of part of the wetlands area.¹³

The proposed site plan was in conformity with all county zoning and development requirements, except for the wetlands ordinance. The developer received approval for offsite mitigation of the wetlands impact from the St. Johns Water Management District and subsequently sought approval from the County under an exemption in the wetland ordinance. The developer was advised by the County Resource Management Office that the wetlands area could not be impacted by the proposed development. Depending on the wetland types, the ordinance required a natural, native upland buffer with wetlands ranging from fifteen to fifty feet. As a result of the restrictions on development, the contract between the parties was cancelled by the developer.¹⁴

A notice of claim for reduction in property value in the amount of \$760,000 was submitted by the Appellees, which was later increased to \$1 million. The County responded with a ripeness decision in the form of an alternative layout plan. The plan reflected the same intensity as the plan submitted by the developer, but reduced the number of parking spaces by 68 and required construction of a bridge over the wetland area. Appellees' appraiser determined that prior to the enactment of the ordinance the value of the property was 1.7 million, and after enactment, the value of the land was \$700,000. The appraiser determined that the County's plan did not cure the problems created by the ordinance because it required that the property be bisected; made no provision for a traffic signal; and did not provide sufficient parking.¹⁵

After filing suit under the Bert Harris Act (the "Act"), Appellees filed a motion for summary judgment on the issue of liability, asserting they had pre-existing property rights and reasonable investment backed expectations at the time of purchase of the property. They asserted that they suffered a significant diminution in value because of the ordinance and that, as applied, the ordinance denied them the ability to develop their land and allow offsite mitigation for wetland impacts. The Circuit Court found for Appellees, from which finding the County appealed, claiming the act was unconstitutional for the following reasons:¹⁶

1. The Act authorizes local governments to contract away inherent sovereign police powers and requires the government to buy back the ability to exercise those powers, violating due process.

¹² *Id.* at 1260.

¹³ *Id.* at 1261.

¹⁴ *Id.* at 1260.

¹⁵ *Id.* at 1260-61.

¹⁶ *Id.* at 1261.

The Fifth District Court found that when a government inordinately burdens property through regulation, the Act provides relief.¹⁷ Local governments are required to waive, modify, transfer purchase or financially compensate a property owner.¹⁸ The Act does not affect the inherent power of a government, but requires that government fairly provide relief to a property owner. The Court found no violation of due process.¹⁹

The Court also found that the Florida Legislature, acting within its police power to protect the public health safety welfare or morals, enacted The Bert Harris Act for the benefit of its citizens. “ The due process clause does not override the power of a state or its political subdivision to establish laws that are reasonably necessary to secure health, safety, . . . or general welfare of the community.”²⁰ The Court held that the Act established a new cause of action, requiring the governmental entity grant relief in some form which cannot be characterized as a "buy back" of an entity's inherent power.²¹

2. The Act violates the separation of powers doctrine, as well as altering and enlarging the judicial interpretation of a taking under the Florida Constitution.

The Court rejected this claim, finding that the act clearly established a new cause of action separate from a taking.²²

3. The Act delegates legislative power to the courts because there are no standards, conditions or criteria to guide interpretation of the Act.

The Court determined that the Act contains definitions, time periods, and settlement options, as well as other requirements and guidelines for determinations by the judiciary, as required by statute.²³

Finally, the Court found the County's assertion that the circuit court failed to make the required findings under the Act had merit. The Circuit Court failed to make a finding as to the existence of an existing use of the real property or a vested right to a specific use, and if one or the other did exist, "when considering the settlement offer and ripeness of the decision, the governmental entity or entities have inordinately burdened the real property."²⁴

Procedural Provisions in Part II Found Constitutional

¹⁷ § 70.001(2), Fla. Stat. (2004).

¹⁸ § 70.001(4)(c), Fla. Stat. (2004).

¹⁹ *Id.* at 1261.

²⁰ *Atlantic Coastal Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 558-559 (1914).

²¹ *Id.* at 1262.

²² *Id.* Fla. Stat. §70.001(1), (9), (13) (2004).

²³ *Id.*

²⁴ *Id.*

On August 1, 2007, the Second DCA overruled a circuit court decision which found the procedural provisions in the Florida Land Use and Environmental Dispute Resolution Act (the “Act”) unconstitutional.

In September 2005, the City of Bradenton (the “City”) denied Peninsular Properties Braden River, LLC and Manatee Corporation’s (the “Petitioners”) application for Mira Isles, a planned development project along Braden River.²⁵ In October 2005, Petitioners served a Request for Relief under § 70.51, Fla. Stat. and initiated a special magistrate proceeding to review the city’s action.²⁶ Fifty-one days later, and while the special magistrate process was proceeding, Petitioners filed a petition for writ of certiorari in circuit court seeking review of the permit denial.²⁷ In February 2006, the City voted to reject the magistrate’s recommendation to settle with the Petitioners based on the terms reached during the mediation. The City filed a motion with the circuit court in June 2006 to dismiss the petition for lack of jurisdiction. The City argued that Florida Rules of Appellate Procedure 9.100(c) mandates a 30-day jurisdictional time limit on the filing of petitions for judicial review of administrative agency orders; § 70.51(10)(a) Fla. Stat. tries to amend that rule by allowing for the tolling of that 30-day limit if an owner chooses instead to pursue a special magistrate proceeding. Because Petitioners’ petition for writ of certiorari was not filed until after the 30-day limit, the City argued that the petition should be dismissed for lack of jurisdiction under Florida Rule of Appellate Procedure 9.300.²⁸

The circuit court said that if the procedural elements of a statute are found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures.²⁹ The circuit court referenced *Kalway v. State*,³⁰ stating that in that case, the procedural aspects were minimal, were intended to implement the substantive provisions of the law, and did not appear to conflict with any existing court rule or procedure. However, in the present case, the circuit court found that the tolling provision of the statute is not merely incidental, but rather intrusive, and it conflicts with the strict, 30-day provision established by the Florida Supreme Court. Therefore, the court found the procedural portion of § 70.51(10)(a) to be unconstitutional, and granted the City’s Motion to Dismiss the Petition for Writ of Certiorari for Lack of Jurisdiction, because the Petitioners’ petition was untimely under Florida Rule of Appellate Procedure 9.100.

However, on appeal, the circuit court’s decision was overruled.³¹ The District Court looked at the intent of the Act, which is to encourage mediation, and found that this

²⁵ *Peninsular Prop. Braden River, LLC v. City of Bradenton*, Case No. 2005-CA-006018 (Circuit Court of the Twelfth Judicial Circuit of Florida), Or. Granting Respt.’s Mot. To Dismiss Pet. For Writ of Certiorari (Oct. 11, 2006).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Kalway v. State*, 730 So.2d 861 (Fla. 1st DCA 1999).

³⁰ *Id.*

³¹ *Peninsular Prop. Braden River, LLC v. City of Bradenton*, 2007 WL 2188342 (Fla. 2d DCA Aug. 1, 2007).

intent is facilitated by the tolling of time required to file an action in court.³² According to the opinion, the Supreme Court has “consistently rejected constitutional challenges where the procedural provisions were intertwined with substantive rights.”³³ As such, the court found that because the procedural provision in question is intertwined with the remained of the statute, the circuit court erred in finding § 70.51(10)(a), Fla. Stat. unconstitutional.³⁴

Denial of Extension of Permit is not an Inordinate Burden under Bert Harris

In a recently decided case, the Fifth DCA held that the denial of a three-year extension of a special use permit for a landfill was not an “inordinate burden” under the Bert Harris Act, and is therefore not compensable.³⁵ In 1999, the Petitioners sought to extend their special land use permit, which allowed them to accept offsite clean fill, for three years.³⁶ At the public hearing regarding the matter, several citizens testified in opposition to the application, citing several issues with the landfill, including debris being left in the road, heavy dust in the air as a result of truck traffic and landfill operation, loud noise, and noxious fumes.³⁷ The Marion County Board of County Commissioners denied the application, since the Petitioners had not met their burden of demonstrating that the extension of the special use would be compatible with surrounding land uses and would not adversely affect the public interest.³⁸

The Petitioners then filed a Bert Harris Act claim against Marion County in 2000, claiming \$2.6 million in damages.³⁹ They argued that even though a time-limited special use permit did not create a “vested right” to continue using their property as a landfill beyond expiration of the permit, the landfill was an existing use when the Bert Harris Act became law, so the County had to automatically re-permit indefinitely to avoid liability under the Act.⁴⁰ The Court rejected this argument, stating that the issuance of a time-limited permit cannot create a reasonable expectation that the specially permitted use will be allowed to continue indefinitely.⁴¹ The only “reasonable, investment-backed expectation” that the Petitioners had was that they could operate their landfill until the expiration of their original permit.⁴² Since the denial did not “inordinately burden” the property, as defined under the Act, the District Court affirmed the trial court’s decision that the Petitioners did not have a valid claim under the Bert Harris Act.⁴³

³² *Id.*

³³ *Id.* (citing *Caple v. Tuttle’s Design-Build, Inc.*, 753 So.2d 49, 54 (Fla. 2000)).

³⁴ *Id.*

³⁵ *Holmes v. Marion County*, 2007 WL 1852123 (Fla. 5th DCA June 29, 2007).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Recent Legislation Regarding Bert Harris Act

Proponents of the Bert Harris Act have tried to amend the law to ease its use and clarify certain language. HB 1333 and SB 2852 were aimed at amending several sections of the Bert Harris legislation, § 70.001, Fla. Stat. HB 1333 died in the House Committee on Infrastructure on May 4, 2007 and SB 2852 died in the Senate Committee on Community Affairs on May 7, 2007. Similar bills can be expected during the 2008 legislative session.

The bills would have added to the definition of “inordinate burden” or “inordinately burdened” by including moratoria on development, which are in effect for longer than one year. Next, the bills attempted to amend the time that must be given to the head of the governmental entity before filing an action under the section. The bills would have changed the time from not less than 180 days to not less than 120 days. In the current Bert Harris Act, the governmental entity must report the claim in writing to the Department of Legal Affairs; but under the bills, the claim would have to be reported to the state land-planning agency.

In addition, the bills would have added to the options available to the governmental entity in the written settlement agreement. Payment of compensation to the property owner would have been added to the options. The confusing “ripeness decision” language would have been removed, and instead would be referred to as the final decision. The final decision of the governmental entity would have been either a written decision during the 120-day notice period, or the prior action, if the entity fails to submit a written decision during the notice period. The time to commence a cause of action would have increased from 1 year to 2 years after a law or regulation is first applied by the governmental entity to the property at issue. Finally, the bills would have expressly waived sovereign immunity for liability for actions subject to the section.

Conclusion

Landowners and government agencies have struggled over the compensation of property owners affected by land use, environmental or similar regulations. While governments have often prevailed, landowners have achieved some recent success outside of claims under the Act. While most commentators still fear the Act's chilling impact on regulatory activities in Florida, others maintain that the Act has had its intended effect, to make governments think twice before implementing regulations or ordinances which might unfairly burden private property.

**THE INFORMATION CONTAINED IN THIS DOCUMENT IS NOT
INTENDED AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE.**