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Analysis and 2011
Update on the Bert J.
Harris, Jr.,
Private Property Rights
Protection Act

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I. The Bert J. Harris, Jr. Private Property Rights Protection Act¹

The Bert J. Harris, Jr. Private Property Rights Protection Act (the Act or Bert Harris Act) intends to protect private property rights by giving relief from “inordinate burdens” that result from new regulations. This document examines the Bert Harris Act and includes analysis of new case law relating to the Act as well as 2011 legislative changes to the Act. The analysis here is informed by an additional review of reported and unreported cases of claims filed under the Bert Harris Act as well as conversations with local government attorneys. The purpose of this review is to understand how the Act impacts the ability of local governments to utilize their comprehensive plans, land development codes, zoning plans, and coastal management plans as tools for adaptation to rising sea levels along Florida’s coasts.

The Bert Harris Act was passed into law in 1995 amid a wave of property rights protections throughout the United States.² The Act has been amended numerous times since and has often been a lightning rod for criticism or praise, depending on the viewpoint of the speaker. Critics assert that the Act has had a chilling effect on regulators and prevented protection of resources because of regulators’ fears about liability under the Act. Supporters agree with the conclusion that fewer regulations have been a result of the law, and they see this as evidence that the Act is working as intended.

In either case, when the Act was passed in 1995, most policymakers in the United States and Florida had never heard the phrase “sea-level rise” even though sea levels had been rising for decades. Over fifteen years after passage of the Act, we now realize that sea-level rise (SLR) affects many communities already, and the impacts will become more severe as the rate of SLR is projected to increase significantly.

Possible strategies for SLR adaptation typically include land use regulations. Such regulations may impact perceived property rights and lead to claims against the state or local government enacting the regulations. Thus, local governments seeking to proactively plan for adaptation to SLR may view the Bert Harris Act as an impediment to implementation of potential policies.

This article provides background information on the workings of the Act and incorporate research on recent case law and changes to the Act resulting from the 2011 Amendment. In some sections, potential legal arguments that local governments might use in defense of SLR adaptation policies will be noted.

Discussion of the Act is broken into two sections: first, an overview of the Act’s procedural requirements and second, an overview of the Act’s substantive elements.

¹ FLA. STAT. § 70.001 (2010) *et. seq.*, amended by 2011 Laws of Florida, Chapter 191.

² JOHN D. ECHEVERRIA & THEKLA HANSEN-YOUNG, THE TRACK RECORD ON TAKINGS LEGISLATION 1-2, 5 (2008).

II. Procedural Aspects of the Bert J. Harris Act:

The Act's procedural aspects revolve around three milestones - notice, ripeness determination, and settlement - each with its own guidelines, rules, and legal issues. These procedural requirements remain constant regardless of the claim, the claimant, or the governmental entity receiving the claim. This section also addresses some changes to the Bert Harris Act's procedural requirements in response to court cases under the Act. Thus, when enacting regulations to combat SLR, one must anticipate these requirements and plan accordingly.

A. Notice

The Bert Harris Act includes four types of notice; one is notice by the claimant and the other three pertain to notice provided by government entities.

First, the Act requires a claimant give notice a certain number of days in advance of filing a claim under the Act.³ This notice must be supplied to any governmental entity against whom the claimant intends to file.

Second, the Bert Harris Act requires a governmental entity, when presented with notice of a claim under the Act, to notify the State Department of Legal Affairs in Tallahassee no later than the fifteenth day after receipt of the notice.⁴ Although the Department of Legal Affairs receives a significant number of claims filed under this requirement, the Department of Legal Affairs believes that many claims are not reported according to this procedure.⁵ Although, the Act contains no penalty for failing to notify the Department of Legal Affairs, the failure to report every claim filed under the Act further hampers the already difficult process of understanding the role the Bert Harris Act plays in Florida's regulatory arena.

Third, the Act requires a government entity to provide notice to all contiguous properties of a claim filed against it under the Act.⁶ Such notice ensures that adjacent owners are made aware of the availability of a potentially similar claim. If neighboring landowners do indeed have and wish to assert a similar claim, this notice promotes efficiency by allowing bulk filing of cases or combining cases.⁷

³ FLA. STAT. § 70.001(4)(a) (2010).

⁴ FLA. STAT. § 70.001(4)(b) (2010).

⁵ Statement of Ms. Shelia Hall Public Records Coordinator, Office of Attorney General, Opinions Division, Florida State Department of Legal Affairs, April 10, 2011. Conversations of the author with local government attorneys supports the view that reporting is not uniform across either local governments or time.

⁶ FLA. STAT. § 70.001(4)(b)(2010).

⁷ See, e.g., *Lee County v. 48 Miscellaneous Claims* [no citation provided]; Nicole S. Sayfie and Ronald L. Weaver, *1999 UPDATE on the Bert J. Harris Private Property Rights Protection*, 73 *FLA. B. J.* 49 (1999) available at

<http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/E42A89C79174B90F85256ADB005D6249> (discussing the claims regarding Miami Beach's floor area ratio requirements [hereinafter "FAR"], which numbered in the hundreds.

Fourth, amendments to the Act in 2011⁸ effectively, if not formally, encourage a governmental entity to give notice to all property owners when a specific governmental action may affect their property.⁹ The statute indicates that after enacting a regulation that clearly and unequivocally affects real property, if the enacting authority gives notice to the owner of the affected property that the new law or regulation may impact existing property rights and that the property owner has only one year from receipt of the notice to pursue an action under the Act,¹⁰ this begins the clock ticking on the one-year statute of limitations in the Act. This raises some issues that receive greater attention below in Section III.A, “Specific Action, First Application, and the Statute of Limitations.”

Ultimately, governmental entities should carefully comply with the Act’s notice requirements because such efforts may pay dividends by setting-up substantive defenses in the long run while preventing due process and Florida Administrative Procedure Act problems in the short term.

B. Ripeness Determination.

According to the common law, “ripeness” constitutes the final prerequisite to filing a takings claim. Ripeness essentially means that a claimant has exhausted all the administrative avenues to address their grievances and has established a sufficient factual basis for determining whether a taking has occurred. Similarly, the Act incorporates ripeness. Ripeness determination refers to the Act’s precondition that a government entity essentially give a property owner permission to file a suit against the government entity.¹¹ The 2011 Amendments to the Act altered this

⁸ 2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001 (2010)).

⁹ *Id.* (amending FLA. STAT. § 70.001(11)(a)(1) (although not affirmatively mandating notice, the recent amendment requires that a law or regulation will not be considered “applied” until the impact is “clear and unequivocal *and* notice is provided by to the affected property owner... address referenced in the jurisdiction's most current ad valorem tax records.”) (emphasis added)).

¹⁰ *Id.*

¹¹ Florida has adopted the Federal ripeness doctrine, which requires a claimant exhaust administrative remedies prior to seeking judicial relief. Florida House of Representatives Staff Analysis, Judiciary Committee, 4/1/2011 at 7 (citing *Glisson v. Alachua County*, 558 So.2d 1030, 1034 (Fla. 1st DCA 1990)), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=45659&BillText=bert+j.+harris&HouseChamber=H&SessionId=66&>. See also, e.g., *M & H Profit, Inc. v. Panama City*, 28 So.3d 71, 76 (Fla. 1st DCA 2010) *cert. denied* 41 So.3d 218 (Fla. 2010) (“Simply put, until an actual development plan is submitted, a court cannot determine whether the government action has ‘inordinately burdened’ property.”) See also *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561, 570-71 (Fla. 4th DCA 2002) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full

terminology to “Statement of Allowable Uses” but left the substance of the requirement essentially unchanged.¹² As amended, the Act requires governmental entities involved in a claim, unless the claim is settled,¹³ to provide a written “statement of allowable uses” that identifies the uses to which the subject property may be put.¹⁴

Changes to the statute in 2011 make clear that failure of a governmental entity to issue a required “statement of allowable uses” ripens the claim and allows a claimant to file suit.

C. Settlements

Settlements have given rise to difficult issues related to the Bert Harris Act. As discussed above, a governmental entity must provide a settlement offer within a specified period of receiving a claim.¹⁵ However, any settlement agreed to by the parties must protect the public’s interest and represent necessary and appropriate relief.¹⁶ “Appropriate” means legitimate under the circumstances, not a sweet-heart deal.¹⁷ “Necessary” means the settlement does not stymie the interests promoted by the burdening regulation.¹⁸ Furthermore, if a settlement requires a variance, the government must prove compliance with the necessary and appropriate standard for a variance, together with supporting substantial competent evidence on the record.¹⁹ Ultimately

discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

¹² “Statement of Allowable Uses” replaced the “Ripeness Determination.” 2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(5)(a)(2010)).

¹³ See *Charlotte County Park*, 927 So.2d at 239 (owner and regulator may settle a claim without resorting to filing a complaint.)

¹⁴ 2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(5)(a)(2010)).

¹⁵ Prior to the 2011 amendments, this was 180 days. FLA. STAT. § 70.001(4)(c)(2010). The 2011 amendments decreased the time for local governments to respond to notice of claims to 150 for most claims. Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(4)(a)). The notice period is shorter for agricultural land at only 90 days. *Id.*

¹⁶ FLA. STAT. § 70.001(4)(d)(1)(2010); *Chisholm Props. South Beach, Inc v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689 [hereinafter *Chisholm I*] *rehearing denied*, *City of Miami Beach v. Chisholm Props. South Beach, Inc.*, 830 So. 2d 842 (Fla. 3d DCA 2002) [hereinafter *Chisholm II*].

¹⁷ *Chisholm II*, 830 So. 2d at 843. In denying review, one judge in the Third District Court suggested imposing sanctions against the hotel owner for bringing a frivolous appeal.

¹⁸ *Chisholm I*, 8 Fla. L. Weekly Supp. 689 (finding that that granting the variance to build additional stories ran contrary to the intent of the FAR).

¹⁹ *Id.* *Chisholm I*, one of the Miami FAR cases, the Ritz Carlton of Miami Beach filed suit alleging, amongst other things, that the city’s regulation prevented Ritz from building a desired number of units and thus required compensation under the Bert Harris Act. In response the city settled by promising to “recommend granting variance application when proposed” to the city’s Zoning Board of Adjustment (“BOA”). Although the BOA found that the Ritz could build the desired number of units without a variance, when the Ritz threatened that BOA denial could void the settlement, resulting in revival of a \$3.7 million suit, the BOA conceded. That concession precipitated the claim filed by the third party. In

courts reviewing settlements involving land use regulations will examine the intent behind a governmental entity's change of heart, which cannot rest solely on efforts to avoid the Bert Harris Act claim.²⁰

When examining settlements, it is important to recognize the distinction in judicial review between variances to land use regulations and amendments to comprehensive plans. Legislative actions, such as comprehensive plan enactments and amendments, are typically subject to a low level of judicial review (i.e.—the standard is easier for the government to meet).²¹ In contrast, issuance of permits or variances—classified as “quasi-judicial actions” rather than legislative—receive more careful scrutiny under a standard requiring that they be “appropriate and necessary.” This more searching standard means the government action is more easily overturned.²²

D. Procedural Requirements: A Double-Edged Sword

Just as procedural rules may serve the interests of claimants, governmental entities may also use them as affirmative defenses. In *Sosa v. City of West Palm Beach*²³ the court dismissed a claim as unripe because the plaintiff failed to follow the Act's procedural requirements for submitting a claim. Specifically, the court held that failure of the claimant to comply with the Bert Harris Act's requirement to submit an appraisal and failure to give notice at least 180 days' notice prior to filing the suit in court were fatal errors in the plaintiff's claim.²⁴ Similarly, in *Best Diversified, Inc.*, the court noted that plaintiff's failure to follow statutory procedures, such as submission of a bona-fide appraisal in support of its claim, could not subsequently be cured by submitting such appraisal during litigation.²⁵ Consequently, a plaintiff's claim is unlikely to move forward in court unless it is properly submitted, not less than 150 days²⁶ before filing an action in the court,

voiding the settlement, the court found that the BOA's decision did not flow from substantial evidence, when the desired number of building units could be constructed without a variance. As this was the case, nothing in the record supported the hardship finding that is necessary to justify a variance.

²⁰ *Id.*

²¹ *See Martin County v. Yusem*, 690 So.2d 1288, 1293-94 (Fla. 1997).

²² The distinction in standard of review between comprehensive plan amendments and permit or variance issuance arises because courts typically give greater deference to legislative than judicial decisions under the concept of separation of the three powers in our government represented by the legislative, executive, and judicial branches.

²³ 762 So.2d 981 (Fla. 4th DCA 2000).

²⁴ *Sosa v. City of W. Palm Beach*, 762 So.2d 981 at 982 (4th DCA 2000).

²⁵ *Best Diversified, Inc.*, 936 So.2d at 59-60 n. 5.

²⁶ 150 days for claims related to any property other than agricultural property, which is 90 days. 2011 Laws of Florida, ch. 191, s. 1 (amending FLA. STAT. § 70.001(4)(a)).

to the head of the governmental entity²⁷ with a valid appraisal²⁸ that demonstrates that the regulation in question resulted in a reduction in the fair market value of the property.²⁹

Thus, although the Bert Harris Act's automatic ripening provision answers the question of whether a governmental entity rendered its final decision for ripeness, a governmental entity could still rely on procedural mistakes, like absence of a bona-fide appraisal, as affirmative defenses against an otherwise valid claim.

III. Substantive Elements of Bert J. Harris Act.

To bring a claim under the Act, the a claimant must show a specific action of a governmental entity created an inordinate burden on an existing use or a vested right to a specific use of the claimant's real property.³⁰

A. Specific Action, First Application, and the Effect on the Statute of Limitation

Undefined in the Act itself, "specific action" has been defined through litigation relating to the Act's requirement that an action be brought within one year of the offending regulation's "first application" to the property.³¹ This begged the question of what "first application" meant. In response, Florida courts developed the meaningful application test.³² As articulated in *Brown v.*

²⁷ If multiple governmental authorities burden the property, the claimant must submit its claim to all involved. *Id.*

²⁸ *Florida Water Serv. v. City of New Smyrna Beach*, 790 So.2d 501 (Fla. 5th DCA 2001) (finding the validity of an appraisal turns on whether the appraiser was qualified to give an expert opinion, even without an MAI licenses.)

²⁹ *See Best Diversified*, 936 So.2d at 60 (noting that because plaintiff failed to submit the "bona-fide, valid appraisal supporting the claim" required by the Act, such cannot be cured by filing an appraisal in the litigation).

³⁰ FLA. STAT. § 70.001(2) (2010) as amended by 2011 Laws of Florida, Chapter 191, Sec. 1.

³¹ *Id.* at § 70.001(11) (2010).

³² *Brown v. Charlotte County*, 16 Fla. L. Weekly Supp. 546c (Fla. Cir. Ct., Apr. 1, 2009) (a law, rule, regulation or ordinance established by state or political entity only provides a basis for a claim under the Act if the law, rule, regulation, or ordinance has been applied to the claimants property; mere enactment does not constitute application); *Russo Assoc. v. Dania Beach Code Enforcement Bd.*, 920 So.2d 716, 718 (Fla. 4th DCA 2006). *See also*, Nancy E. Stroud and Thomas G. Wright, Symposium Article: *Florida's Private Property Rights Act - What Will It Mean For Florida's Future*, 20 NOVA L. REV. 683, 695 (1996) ("The Act does not create a cause of action as to the mere adoption of a law, regulation, rule, or ordinance, but only as to specific action that is applied to real property."). David L. Powell *et al.*, *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. L. REV. 255, 272 (1995) (must have a specific affect, but goes beyond mere approval/denial to other action that adversely affect the property - *i.e.* down-zoning); *but see* 2011 Laws of Florida, Chapter 191, Sec. 1. (amending FLA. STAT. § 70.001(11)(2010) (the notice requirement when impacts are clear and unequivocal, acknowledges that some enactments facially impact certain property)).

Charlotte County, mere enactment of a regulation fails to constitute a specific action absent a meaningful application of the law to the property.³³

Split over the definition of meaningful application, Florida's district courts issued two contrary opinions.³⁴ In *Citrus County v. Halls River Development*,³⁵ the court held that enactment of a law, which clearly impacted the claimant's property, started the clock on the Act's one-year time to file a claim because the impact was readily determinable.³⁶ Meanwhile, Florida's Fourth District Court of Appeal held in *M & H Profit, Inc. v. Panama City*³⁷ that mere enactment was not appropriate to begin this calculation.³⁸

³³ Brown, 16 Fla. L. Weekly Supp. 546c (Fla. Cir. Ct. Apr. 1, 2009)

[T]he trier of fact finds, under the totality of the circumstances, that (i) a governmental entity meaningfully applied a law or regulation to a plaintiff's property and (ii) that the plaintiff reasonably relied on a specific governmental action. "Said actions(s) may or may not involve a formal development permit application by Plaintiff and final review and determination of said application by the governmental entity. This holding is consistent with the intent and remedial purpose of the [Act] while requiring more than just mere legislative enactment as a basis for governmental liability."

Id.

³⁴ Compare *Citrus County, Florida v. Halls River Dev.*, 8 So. 3d 413, 423 (Fla. 5th DCA 2009) with *M & H Profit, Inc. v. Panama City*, 28 So. 3d at 79 (Fla. 1st DCA 2009).

³⁵ 8 So.3d 413 (Fla. 5th DCA 2009).

³⁶ *Id.* at 423, n. 5. The plaintiff in *Halls* purchased the property with the intent to develop a multifamily condominium project only after the county assured the plaintiff that such development was possible. *Id.* at 416-17. However, the county did not realize that changes to its comprehensive plan in 1996 from mixed use to low intensity coastal and lake, which did not permit the condominium project, made it illegal for the county to permit the project envisioned by the plaintiff. In 2002, the property owner applied for and the county approved him to build the project with assurance that the development was permissible for the property. *Id.* at 416-417. Subsequently, a resident of the county challenged the project as inconsistent with the county's comprehensive plan. *Id.* at 417. Comprehensive plans act like constitution for development and use within a jurisdiction and are implemented by land development regulations (zoning). *Id.* at 421(citing *Machado v. Musgrove*, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987)). Thus, the 2001 land development code and the county's approval of the development plan was void as inconsistent with the comprehensive plan, and the plaintiff could not build its condominiums despite issuance of the permit. *Id.* at 422. The plaintiff sued the county under the Bert Harris Act for the \$1.5 million spent to ready the property for development as a result of its reliance on the local government's assurances. *Id.* at 419. However, the county argued that the property owner failed to timely bring its action as the county amended the comprehensive plan over one year before the action. *Halls*, 8 So. 3d at 420. The plaintiff argued that "the mere enactment should not trigger the accrual of the period." *Id.* The court held in favor of the county, reasoning that the court "cannot construe the statute to create rights of action not within the intent of the lawmakers, as reflected by the language employed in the statute." *Id.* at 423, n. 5.

³⁷ 28 So. 3d 71 (Fla. 1st DCA 2009).

³⁸ *Id.* In *M & H*, the plaintiff brought a Bert Harris action against the city, alleging that an ordinance enacted six weeks after its purchase of the property inordinately burden the value of the property by imposing set back and height restrictions. *Id.* at 73-74. The court found, when the property owner only engaged in informal discussions with the city, neither statements made by the city about the general

To address this issue, the 2011 amendments added a definition of “first applied.” A law is “first applied” upon passage of a law or regulation that creates a clear and unequivocal impact on the property *and* the governmental entity enacting the regulation provides notice of such impact by mail to the affected property owners.³⁹ In addition, a regulation is “first applied” upon the formal denial of a plaintiff’s written permit request or variance petition.⁴⁰ Consequently, in the former, the claimant loses its right to file a claim one year after receipt of such notice; in the latter case, the right to file a claim is lost one year after a governmental entity issues a formal denial.⁴¹

A small amount of uncertainty related to the statute of limitations issue may remain due to the case of *Russo Associates v. Code Enforcement Board*.⁴² In *Russo*, the court subjected a claim under the Act to Florida’s four-year catchall statute of limitations.⁴³ The court in *Russo* expressed frustration that the Act’s terms would provide for a shorter statute of limitations than that applicable to general inverse condemnation claims. This frustration led the court to read the Act’s one-year limitation to be nothing more than “a pre-suit condition [] rather than a statute of limitations.”⁴⁴ Although never appealed, this opinion seems suspect as the court asserted that the Act’s one-year limitation on the filing of claims would be “inconsistent” with the “clear intent” of the Act.⁴⁵ However, according to rules of statutory interpretation, an unambiguous statute does not allow for any interpretation by a court “which would extend, modify, or limit its express terms or its reasonable and obvious implications” as doing so would violate the separation of the judicial and legislative powers.⁴⁶ In fact, rules of statutory intent should not even be looked to as the language of the statute controls when it is clear and unambiguous.⁴⁷

restrictions imposed by the regulation nor the enactment of the regulation itself constituted an application to specific piece of property. *Id.* at 79.

³⁸ 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § (11)(a)1 (2010) (further, “[t]he fact that the law or regulation could be modified, varied, or altered under any other process or procedure does not preclude the impact of the law or regulation on a property from being clear or unequivocal”).

⁴⁰ *Id.* (amending FLA. STAT. § 70.001(11)(a)(2)).

⁴¹ However this statute of limitation tolls during the pendency of administrative or judicial proceedings under the Act. 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § 70.001(11)(b)(2010)). This terminology raises an interesting issue. That last part of subsection (11)(a)(1) specifies that a property owner only has one year “from receipt” of the notice to pursue any rights under the Act. However, in the same the paragraph the language merely indicates that notice must be “provided by mail.” This might make it possible for a claimant to assert that they never received the notice regardless of whether it was mailed.

⁴² 920 So. 2d 716 (Fla. 4th DCA 2006).

⁴³ *Id.* at 717.

⁴⁴ *Id.*

⁴⁵ *Id.* at 717-18.

⁴⁶ *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001).

⁴⁷ *See, e.g. M&H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 75 (1st DCA 2009) (“When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc., v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).

B. Governmental Action

To bring a successful claim under the Act, a claimant must show that the specific action originated from a governmental entity.⁴⁸ The Act defines governmental entity broadly to include any exercise of state authority.⁴⁹ However, the Act provides a federal authority exemption.⁵⁰ This exemption excludes actions by the United States, its agencies, or any state, regional, or local government, or its agencies, when “exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.”⁵¹ An example of such delegation is the delegation from United States Environmental Protection Agency to the Florida Department of Environmental Protection to issue National Pollutant Discharge Elimination System permits under Clean Water Act its behalf.⁵²

This policy in the Act may prove important for local government in the context of laws such as the Endangered Species Act (ESA). Strict application of the “formal delegation” requirement could create a Hobson’s choice for state and local governments when attempting to comply with the ESA.⁵³ If a state or local governmental entity permits an action that would result in a prohibited take of a protected species, it may be liable under Section 9 of the ESA, which prohibits the “take” of endangered species.⁵⁴ At the same time, if a state or local governmental entity passes a new law or regulation which *does not* allow development because of potential “take” of endangered species, the property owner might try to sue the state or local government entity under the Bert Harris Act.

One potential way to avoid this conundrum might be for a state or local governmental entity to enter into a Habitat Conservation Plan, as authorized by the ESA. If the state or local governmental entity develops a habitat conservation plan and then works with the federal government to establish a memorandum of understanding (MOU) that makes local government implementation of the Habitat Conservation Plan part of the MOU, implementation of the habitat conservation plan measures might constitute an exercise of federal authority in assuring compliance with the federal ESA, thus exempting the state or local government from potential liability under the Bert Harris Act.⁵⁵

⁴⁸ 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § 70.001(2)(2010)).

⁴⁹ FLA. STAT. § 70.001(3)(c) (2010) (defining governmental entity as “an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. . .”).

⁵⁰ 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § 70.001(2)(2010)).

⁵¹ *Id.*

⁵² The Clean Water Act, 33 U.S.C. § 1342(b) (2010); see Ronald L. Weaver, *1997 Update on the Bert Harris Private Property Protection Act*, 9 FLA. BAR. J 70, n. 3 (1997).

⁵³ 16 U.S.C. §1531 *et seq.* (1973).

⁵⁴ Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1) (internal citation § 9)

⁵⁵ This approach was considered by Collier County. See, David C. Weigel, Collier County Attorney, memorandum RE: Red Cockaded Woodpecker Compliance Plan—Board Queries (Dec. 7, 2006) (on file with author). Ultimately Collier County did not test this approach as the county stopped development of the red-cockaded woodpecker protection plan that might have given rise to this issue.

C. Inordinate Burden

The substantive standard of “inordinate burden” in the Act remains difficult to interpret as little reported case law addresses the term.⁵⁶ The Act’s definition of inordinate burden includes two distinct parts: (1) a direct restriction on a vested or existing right such that the owner of real property is permanently unable to attain the reasonable, investment-backed expectations for the property or (2) an imposition of a disproportionate share of the burden imposed for a public benefit.⁵⁷ However, the Legislature intended the statute to supplement a claim under the Fifth Amendment, and thus one could presume that the level of burden or regulation necessary to constitute an inordinate burden falls below that required to demonstrate a taking under the U.S. Constitution’s Fifth Amendment.⁵⁸ Nonetheless, use of terminology from federal takings law further confuses the substantive issues with the Bert Harris Act.⁵⁹ The following portions explore some of the key terminology related to “inordinate burden” in the Act.

1. Two Types of Inordinate Burden

Reasonable Investment-Backed Expectation

The first type of inordinate burden under the Bert Harris Act could be termed a claim for inability of the claimant to attain the owner’s reasonable, investment-backed expectations for the property or a vested right to a use of the real property.⁶⁰ Use of the phrase “reasonable investment-backed expectations” (RIBE) demonstrates the difficulty of trying to interpret the Bert Harris Act separate from federal takings law.

In federal takings law, RIBE comprises one of the most important determinants of a taking in many cases.⁶¹ While some might argue that RIBE possesses a different meaning in the Bert Harris Act,⁶² existing federal case law⁶³ and extensive scholarly writings on the topic of RIBE in

⁵⁶ *City of Jacksonville v. Coffield*, 18 So. 3d 589, 594-95 (Fla. 1st DCA 2009).

⁵⁷ FLA. STAT. § 70.001(3)(e)(1)(2010).

⁵⁸ FLA. STAT. § 70.001(1). *See also* 31 OP. FLA. ATT’Y GEN 2006. (“The legislative intent of the Bert J. Harris, Jr., Private Property Rights Protection Act is evident from the first section of the act, which clearly provides that the statute was intended to protect private property interests against ‘inordinately burdensome’ governmental regulations that do not necessarily amount to a constitutional taking”).

⁵⁹ *See, e.g.* *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that takings law is designed “to bar Government from forcing some people to bear public burdens which, in all fairness and justice should be borne by the public as a whole”). *See also*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (U.S. 2001) (discussing the role of reasonable investment-backed expectations in federal takings jurisprudence).

⁶⁰ FLA. STAT. § 70.001(3)(e)1 (2011).

⁶¹ *See, e.g.* Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENV’T L. 239, 246 (2011).

⁶² FLA. STAT. § 70.001(9) (2010) states:

This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the

federal takings law⁶⁴ make it difficult to ignore previous interpretations of RIBE when interpreting RIBE for the Bert Harris Act. Before discussing federal interpretations of RIBE, we look to Bert Harris Act cases discussing RIBE.

Case law on the Act in Florida often repeats the Act's requirement that a regulation interfere with RIBE. However, research revealed only one reported case in Florida that discusses what this really means.⁶⁵ In *Holmes v. Marion County*,⁶⁶ the court held that the issuance of a time-limited permit precluded any reasonable investment-backed expectation that the specially permitted use would be allowed to continue indefinitely.⁶⁷ In *Holmes*, a landfill owner sued the county for denial of a special use permit extension to enable the owner to continue its clay and sand mining operation.⁶⁸ In opposition, the neighboring property owners objected to the use and complained about the debris, trucks, and other noises, resulting in the county denying the permit renewal.⁶⁹ The court ruled that the owner's expectation were unreasonable because the county was not required to issue a renewed permit.⁷⁰ Thus, the *Holmes* case indicates that the court may be reluctant to find RIBE for extension of conditional use permits.

Beyond the conclusions of *Holmes*, state case law fails to illuminate the concept of RIBE. But at the federal level, takings law provides significant guidance on RIBE and the following factors to consider:⁷¹

- whether the plaintiff's expectations were reasonable at the time the property interest was created – *e.g.*, purchased or transferred;
- whether the plaintiff's economic goal was rationally achievable;
- whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and
- the overall riskiness of the investment.⁷²

governmental action does not rise to the level of a taking.

⁶³ *Abraham-Youri v. United States*, 36 Fed. Cl. 482, 486 (1996) (“In assessing the reasonableness of investment-backed expectations, the question we ask is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind; hence, the call for just compensation on grounds of fairness and justice is considerably diminished.”).

⁶⁴ For a sampling of some of the issues inherent in RIBE, including U.S. Supreme Court cases discussing RIBE, see Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENV'T'L L. 239, 246-259 (2011).

⁶⁵ 960 So.2d 828 (Fla. 5th DCA 2007).

⁶⁶ *Holmes v. Marion County*, 960 So.2d 828 (Fla. 5th DCA 2007).

⁶⁷ *Id.* at 830.

⁶⁸ *Id.* at 829.

⁶⁹ *Id.*

⁷⁰ *Id.* at 830.

⁷¹ See generally, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁷² *Id.*

Although determined under federal case law, these factors should hold weight under a Bert Harris Act analysis because they are rationally aimed at determining the expectation of an objective person in the plaintiff's shoes.

The 2011 Amendment leaves RIBE undefined, but provides the following language:

In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property.⁷³

In doing so, however, none of the three committees reviewing the 2011 Amendment (the Judiciary Committee, the Economic Affairs Committee & Military Affairs Subcommittee) discusses the intent or the effect of this addition.⁷⁴ Nonetheless, a cogent argument could be made that this addition to the Bert Harris Act reflects another aspect of federal jurisprudence defining RIBE: the *Palazzolo* case, which indicated that acquiring a property *after* a regulation already took effect is not an absolute bar to a takings claim but may be considered as part of the overall RIBE analysis.

Even were a Florida court not to directly adopt all federal case law addressing RIBE, the foreseeability element should come into play when considering any Bert Harris claims related to regulations for adapting to SLR. Scientific evidence clearly demonstrates past SLR over both geologic time scales as well as smaller amounts of SLR in just the past 100 years. In addition, climate change scientists agree that future rates of SLR will be faster than today's rate, although just how much is still not very clear.⁷⁵ In light of these, a local government defending regulations adapting to SLR should be able to make cogent arguments that, in light of such recently gained knowledge of SLR, reasonable expectations of development on low-lying coastal land should also change.

Disproportionate Share

Disproportionate share language in the Act enables a property owner to bring a claim when it "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."⁷⁶ Unfortunately, little case law discusses this issue, but the idea that "in fairness" society should carry the burden of a regulation sounds very much like federal takings jurisprudence.

Over half a century ago the United States Supreme Court recognized that the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just

⁷³ 2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. § 70.001(3)(e)(2010)).

⁷⁴ Available at <http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=45659&SessionId=66>

⁷⁵ See, e.g. Gary Mitchum, *Sea Level Changes in the Southeastern United States: Past, Present, and Future*, (2011).

⁷⁶ FLA. STAT. § 70.001(3)(e)1(2011).

compensation was designed to bar 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.”⁷⁷ Similarly, in *Agins v. City of Tiburon*,⁷⁸ the Court found that judicial decisions under the Fifth Amendment center on the determination “that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”⁷⁹ Furthermore, in *First English Evangelical Lutheran Church v. Los Angeles*,⁸⁰ the Court determined that the framers designed the Fifth Amendment “to bar Government from forcing some people alone to bear the public burdens which, in fairness and justice, should be borne by the public...”⁸¹ The similarities between the “burden” language of these federal cases and the Bert Harris Act’s language are unmistakable.

Furthermore, discussion of “disproportionate burden” brings up the contemporary legal literature on “givings.”⁸² Givings, the mirror image of takings, seeks to balance the discussion of takings by noting the many instances in which government action enhances property values.⁸³

Givings may occur in three ways, each as a mirror for the three prototypical takings claims—physical, regulatory, and derivative.⁸⁴ Physical takings occur when a governmental entity physically enters the subject real property.⁸⁵ Conversely, physical givings occurs when the governmental entity grants title, easement, or use over the taken property to a third party.⁸⁶ Regulatory takings may occur either when a governmental entity regulates the subject property in such a manner as to deprive the property owner of *all economically beneficial use* of the subject property⁸⁷ or when a regulation goes “too far.”⁸⁸ Conversely, a regulatory givings occurs when the governmental entity regulates the subject property in a manner that increases the value of the property, such as granting of a variance to a land use regulation.⁸⁹ Finally, derivative

⁷⁷ *Armstrong et al. v. United States*, 364 U.S. 40, 49 (1960).

⁷⁸ *Agins v. City of Tiburon*, 447 U.S. 225 (1980).

⁷⁹ *Id.* at 260.

⁸⁰ 482 U.S. 304 (1987).

⁸¹ *Id.* at 318-19.

⁸² ABRAHAM BELL AND G. PARCHOMOVSKY, GIVINGS (2001). Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. Paper 320 available at http://lsr.nellco.org/harvard_olin/320 [hereinafter GIVINGS].

⁸³ GIVINGS, *supra* note 82 (categorizing the issues of givings into four clusters—reverse takings, singled out vs. majoritarian, refusible and non-refusable, and givings that are directly linked to takings.) For the purpose of this paper, however, we only explore givings in relation to regulatory takings. Interestingly, the author commented that the recipient of a giving should pay for its new rights, as an opposite of the compensation required under the Fifth Amendment.

⁸⁴ *Id.*

⁸⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁸⁶ GIVINGS, *Supra* note 82.

⁸⁷ *Lucas*, 505 U.S. at 1011

⁸⁸ *Pennsylvania Coal Co. v. Mahon* 260 US 393, 415 (1922). The U.S. Supreme Court applies several factors delineated in the case of *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

⁸⁹ GIVINGS, *supra* note 82. The two above representations of takings (physical and regulatory) represent the categorical—extreme—approach to takings. There exists a third claim, which may create a regulatory takings claim when the facts fail to rise to the level of categorical, by applying a factored approach. These

takings occur when a governmental entity gives a neighboring property a right that reduced the value of the subject property - *e.g.*, granting a variance from a (FAR) regulation despite the neighboring property owner's interest in an art deco designs.⁹⁰ Conversely, derivative givings indirectly increase the subject property value by taking the property rights of adjacent owner - *e.g.*, closing of a competing business within close proximity its competitor.⁹¹

One could argue that since no one person causes SLR, it would be unfair for coastal property owners to pay the price for SLR and instead argue that the public generally should bear the cost. This argument holds some weight for those that have owned their property for a long time already, including before we began to understand and document past and current SLR as well as predict increased future SLR. In light of such changes in knowledge, making the public bear the expense of changes in the use of property for recent property purchasers creates a likelihood of moral hazard: purchasers will purchase coastal property with less concern about the risk of SLR and changing regulations on land use to adapt to SLR because, if the property's use is changed to a less valuable use or otherwise limited, the public effectively insures the property owner's right by paying for the risk taken by the property owner.

2. Restricted or Limited Use

Both types of inordinate burden require that there be a direct restriction or limitation of land use imposed.⁹² An attorney general opinion stated that the Act covers only those properties that regulations directly affect, but beyond that, the Act leaves the determination of a direct affect to the court under the particular facts and circumstances of each case.⁹³ However, attenuated and indirect impacts fall outside the scope of the Act. Thus, regulations that indirectly affect use of property—such as financial regulations affecting insurance on buildings along Florida's coast,⁹⁴ developing special benefit areas for hazardous or erosion-prone coastal areas, or developing mandatory bond requirements for coastal construction. Such actions could indirectly prevent development by inhibiting financing—should not themselves be subject to a Bert Harris claim for their secondary impacts on property value.

Developers typically base their investments on benchmarks of returns to determine their investment decisions. If the return from a potential investment fails to meet the benchmark cost

factors include (1) the economic impact of regulation, (2) the interference with distinct investment-back expectation, and (3) characterization of the government action. *Penn Central*, 438 U.S. at 124.

⁹⁰ See, *e.g.*, *Chisholm II*, 8 Fla. L. Weekly Supp. 689 (Fla. Cir. Ct., Aug. 9, 2001), where the plaintiffs, the surrounding property owners, complained that a settlement in which the city of Miami granted the Ritz Carlton a variance from its FAR requirements. Although discussed on other ground, these facts lend themselves to the derivative takings and givings discussion because prior to the suit, the Ritz received a regulatory givings, at the expense of the neighboring owners.

⁹¹ GIVINGS, *supra* note 82.

⁹² There is no case law evidencing a difference between restricted or limited.

⁹³ 31 OP. FLA. ATT'Y GEN. 2006.

⁹⁴ For example, the non-profit advocacy group Florida Coastal and Ocean Coalition recently released a report advocating limitations in coastal areas on the policies of Citizens Property Insurance. FLORIDA OCEAN AND COASTAL COALITION, *FLORIDA'S COASTAL AND OCEAN FUTURE: AN UPDATED BLUEPRINT FOR ECONOMIC AND ENVIRONMENTAL LEADERSHIP* (2012), available at <http://flcoastalandocean.org/>.

of capital, the developer will not invest.⁹⁵ Simplistically, returns function on the difference between the marginal incomes and the marginal costs of an investment. Construction cost typically include factors such as materials, labor, and other direct expenses, but some of the largest costs for developers are soft costs, such as insurance, oversight requirements, mitigation requirements, and fees. Here, nothing prevents local governments or other governmental entities from requiring substantial bonding or insurance requirements for all coastal projects, or enacting other regulations such as additional fees for permits or oversight requirements appropriate for adaptation to SLR or improved coastal resilience. Such costs may cut into the developer's bottom line. When a project's return turns unfavorable, developers avoid investing. Similarly, where inland alternatives show higher return because they are not subject to the financial requirements of coastal property, this creates incentive to build on inland parcels. Since these enactments only provide negative incentive and do not directly prevent, restrict, or limit the use of a subject property, they could present an appropriate tool for some aspects of a local government's efforts to adapt to SLR and improve the resilience of an area without incurring liability under the Act.

3. Existing or Vested Use

To result in liability under the Act, a governmental entity must regulate in a manner that affects an existing use or a vested right.⁹⁶

The Act defines two "existing rights:" current and future.⁹⁷ Current means the present use or activity, including normally associated inactivity.⁹⁸ Future means the reasonably foreseeable, non-speculative land uses, which are suitable for the subject property and compatible with adjacent land uses.⁹⁹

A current use claim typically results from regulation prohibiting a claimant's contemporary use of its property.¹⁰⁰ For example, a claimant operates a hotel, and a government entity forbids the use of the property as a hotel (perhaps through zoning or law enforcement activities).¹⁰¹ In such cases, the only defense rests on whether the owner ever possessed the right to conduct the lost use.¹⁰²

⁹⁵ Such benchmarks include internal rate of returns or average cost of capital, which are typically used when projects are financed with debt or private equity. Some company in the stead of rates of return will make investment decision based on whether the investment will likely increase or decrease its stock price. However, this decision typically is rendered based on the same ratio of projected cost to projected income.

⁹⁶ FLA. STAT. § 70.001(2) (2010).

⁹⁷ 2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. §§70.001(3)(b)(1-2)(2010)).

⁹⁸ *Id.* (amending FLA. STAT. § 70.001(3)(b)(1)(2010)).

⁹⁹ 2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. § 70.001(3)(b)(2)(2010)).

¹⁰⁰ *See, e.g., Best Diversified*, 936 So. 2d at 59 (citing *Keshbro, Inc. v. City of Miami*, 801 So.2d 864, 865 (Fla. 2001)).

¹⁰¹ *Id.*

¹⁰² *Id.* at 876 (finding that the plaintiff never possessed a property right to use of a hotel as a prostitution and drug house).

Future uses, on the other hand, place the burden on the plaintiff to show the use or activity lost met five criteria: (1) reasonably foreseeable, (2) non-speculative, (3) suitable for the subject property, (4) compatible with the surrounding land uses, *and* (5) that the value of the property pre-regulation exceeds that of its post-regulation value.¹⁰³

Courts have long struggled to determine reasonable foreseeability.¹⁰⁴ In regards to the Act, reasonable foreseeability appears to mean objective foreseeability - the use that an ordinary person would find appropriate given the physical possibility of the subject land and the current legal climate – as opposed to subjective foreseeability - the owner’s actual intended use.¹⁰⁵

In *Citrus County, Florida v. Halls River Development, Inc.*, the plaintiff purchased a property after city officials mistakenly informed him that he could build single-family residences on the property.¹⁰⁶ Later, after it became apparent that the property the plaintiff purchased was not eligible for the development the city had said could be built, the city denied the plaintiff the permit necessary to build the homes.¹⁰⁷ The plaintiff filed a Bert Harris claim against the city. The court denied compensation, holding that the lost use was not reasonably foreseeable in light of the existing land density and coastal lake zoning designations which forbid such development.¹⁰⁸ The court reasoned that the determination of reasonable foreseeability disregards the developer’s internal beliefs and instead considers reasonableness in light of the current land use designation.¹⁰⁹ In this case, the property owner’s belief—and subsequent purchase of the land—was based on erroneous information from the city assuring him that the proposed development was acceptable. However, the court determined that foreseeability should be determined by the actual current land use designation as written rather than as asserted by the county or believed by the plaintiff.

Speculative uses have been determined as applying a similar standard as foreseeability. In *Jacksonville v. Coffield*,¹¹⁰ the developer plaintiff entered into a contract to purchase a property with the intention to subdivide it into eight single-family homes.¹¹¹ Prior to the execution of the contract, the neighboring homeowners filed an application with city to abandon and make private the only road to the subject property.¹¹² After learning of the application, the plaintiff purchased

¹⁰³2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. § 70.001(3)(b)(2)(2010)).

¹⁰⁴ See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

¹⁰⁵ The understanding of “reasonably foreseeable” as an objective standard can be understood by relating it to the “reasonable” in “reasonable investment-backed expectations.” See, e.g. Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envt’l L. 239, notes 44-46 and accompanying text (2011) (discussing addition of “reasonable” to investment-backed expectations language in federal takings law).

¹⁰⁶*Halls*, 8 So. 3d. at 416.

¹⁰⁷*Id.* at 416-18.

¹⁰⁸*Id.* at 421.

¹⁰⁹*Id.*

¹¹⁰18 So. 3d 589.

¹¹¹*Id.* at 591-592.

¹¹²*Id.* at 591.

the property anyway, incorrectly assuming either that the city would deny the permit,¹¹³ or, even if approved, he would retain half of the title to the abandoned roadway.¹¹⁴ Subsequently, the city closed the road.¹¹⁵ The plaintiff sued under the theory that awarding the closure inordinately burdened his private property rights, entitling him to compensation under the Act.¹¹⁶ The court disagreed, holding that the developer's rights were at best speculative because at the time of the neighbors' application to close the road, plaintiff only possessed an option to purchase the property, and after learning of application, plaintiff executed the option with full notice that development was at best a mere possibility.¹¹⁷

In addition to the foreseeability prerequisite of future use claims, a plaintiff must show that its lost use must be both "suitable for the subject property *and* compatible with the adjacent land uses."¹¹⁸ However, the Act remains silent as to the definition of either term. Recently, the Florida Legislature added definitions of suitability and compatibility to Florida's comprehensive planning statutes.¹¹⁹ One could argue that these definitions could be applied to the Act under the canon of construction *in pari materia*, which provides that where ambiguous, a court may derive the meaning of a term in light of statutes with similar subject matter. Both Florida's statutory planning law and the Act directly revolve around the appropriate use of property. Thus, the similarity of topics and use of these two indicates that courts could construe the Act's definitions of suitable and compatible as applying to the Bert Harris Act. The 2011 changes to Florida's planning statutes added the following definitions for compatibility and suitability:

"Compatibility" means a condition in which land uses or conditions can coexist in relative proximity to each other *in a stable fashion over time* such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.¹²⁰

"Suitability" means the degree to which the existing characteristics and limitations of land and water are *compatible* with a proposed use or development.¹²¹

Consequently, the application of these new definitions could enable governmental entity to posit affirmative defenses to liability under the Act. Under the definition of compatibility, a governmental entity could regulate property uses to prevent harms to adjacent properties. This argument would support, for example, prohibitions on sea wall construction in many instances as the construction of a sea wall at one location causes increased erosion on neighboring properties.

¹¹³ The court noted that according to the city official, "he could not remember any application to close a public road-of which the city received 45 to 70 per year-that the city denied during his tenure." *Id.* at 591.

¹¹⁴ *Id.* (the plaintiff mistakenly believed he maintained an easement by necessity).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 594.

¹¹⁷ *Id.* at 596.

¹¹⁸ 2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. § 70.001(3)(b)(2010) (emphasis added).

¹¹⁹ 2011 Laws of Florida, Ch. 163, sec.1 (amending FLA. STAT. § 163.3164(2010)).

¹²⁰ *Id.* (amending FLA. STAT. § 163.3164 (9)(2010)) (emphasis added).

¹²¹ *Id.* at (amending FLA. STAT. § 163.3164 (45)(2010) (emphasis added).

Furthermore, note that compatibility requires that a proposed use must be “stable . . . over time” such that it is not “negatively impacted” by other conditions, such as SLR.

Superficially, suitability may present a greater challenge because the definition in statute specifies “*existing* characteristics and limitations.” However, the word “existing” in the Bert Harris Act also includes that which is “reasonably foreseeable.” This point is strengthened by considering that the definition of “suitability” includes that the “limitations of land and water are *compatible* with a proposed use.” As noted above, compatibility itself requires consideration of the stability of a use over time. With this in mind, a local government confronted with a challenge to a land use regulation directed at adaptation to SLR might argue that the land involved is not “suitable” for the use because of “reasonably foreseeable” SLR that would render the land unsuitable for the proposed use.

Thus, determination of , existing rights and vested uses depends on an objective perspective of the financial feasibility, physical possibility, and current legal permissibility, not any subjectively held beliefs of a claimant.¹²² In addition, a claim cannot be made under the Act unless the burdened use is compatible with adjacent uses and suitable for the subject property. Both of these standards allow for good-faith arguments that legal changes to account for SLR do not infringe on existing rights if the claimed right was not “compatible” or “suitable” in light of known issues with erosion, flooding, or SLR problems.

Vested Rights Recognized

“Vested rights,” represents the idea that a governmental entity cannot change its mind and pull the rug out from under a claimant.¹²³ Through the use of common law principles of equitable estoppel and due process, the Act limits a government entity’s authority when the owner of real property relied in good faith upon some act or omission of the governmental entity and made a substantial change in position or incurred significant obligations or expenses, such that it would be highly inequitable and unjust to destroy the rights acquired.¹²⁴

In *Town of Largo*, the town re-zoned the property at the plaintiff’s request to allow for development of high-rise condominiums.¹²⁵ Unlike the plaintiff in *Coffield*, the plaintiff here

¹²² This terminology is derived from the Uniform Standards of Professional Appraisal Practice, 2010-2011 ed. available at <http://www.uspap.org/toc.html>, which seem appropriate given that the valuation of any claim would follow these guidelines.

¹²³ *Coffield*, 18 So. 3d at 597.

One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds.

Id. (quoting *Town of Largo*, 309 So. 2d at 573).

¹²⁴ *Coffield*, 18 So. 3d at 597 (citing *Equity Res. Inc. v. County of Leon*, 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994)).

¹²⁵ *Town of Largo*, 309 So. 2d at 572.

awaited the rezoning before purchasing the property.¹²⁶ Subsequently, the plaintiff purchased the neighboring lot and agreed to limit the use of the second lot in consideration of the town rezoning the combined property to allow 39 units per square acre.¹²⁷ However, the town later voted to rezone the property and allow no more than 2.5 units per acre.¹²⁸ The court held that although the mere purchase of land failed to create a vested right to rely on existing zoning, when the town approved a developer's request to rezone real property knowing that the purchase depended on the approval of the plan, the town led the plaintiff onto the welcome mat and thus could not now pull it out from under its feet by rezoning the land to deny the development.¹²⁹ However *Coffield* expressly qualified this holding, by stating it should only apply in rare and exceptional circumstances where the government goes beyond mere negligence.¹³⁰

Analysis of possible amendments to the Act recognized *Coffield's* holding and noted that "the theory of estoppel amounts to nothing more than an application of the rules of fair play."¹³¹ The subcommittee noted that equitable estoppel applies against a governmental entity "only in rare instances and exceptional circumstances;" the government's act must "go beyond mere negligence."¹³²

An example of negligence might be improper issuance of a permit. In *Lauderdale by the Sea v. Meretsky*,¹³³ the town mistakenly issued a building permit which violated the law and thus exceeded the town's authority.¹³⁴ The court held that it could not estop actions in violation of the town's ordinance, regardless of how much the plaintiff relied on the permit to his detriment,

¹²⁶ *Id.* In the following years, the developer purchase additional tracts of land with the assurance from the town that the second tract was suitable for multiple-family development.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 574.

¹³⁰ *Coffield*, 18 So. 3d at 598. Arguably negligence is part of what distinguishes this case from the *Halls River Development* case that was held not to be a taking.

¹³¹ Bill Analysis and Fiscal Impact Statement, Bill CS/SB 998, at 4 (April 8, 2011) (citing *Equity Resources*, 643 So. 2d at 1119-1120).

¹³² *Id.* (internal citations omitted).

¹³³ 773 So.2d 1245 (Fla. 4th DCA 2000).

¹³⁴ *Id.* at 1249.

A zoning authority may be equitably estopped to enforce a change in zoning regulations against one who has substantially altered his or her position in reliance on the original regulation and a building permit issued there under; however, when there is no authority to grant the building permit, the governmental entity cannot be estopped from revoking the permit ...Town was not equitably estopped from requiring that property owners remove wall that infringed on town's public right-of-way, even though town had originally approved placement of wall; property owners were on constructive notice of contents of ordinance prohibiting construction of wall and were presumed to have constructive knowledge of nature and extent of powers of governmental agents who issue permits.

because issuance of the permit itself was *ultra vires*—beyond the power of the town.¹³⁵ The plaintiff could not estop the town from enforcing its ordinances and revoking the permit.¹³⁶

An affirmative defense to a vested right, as with an “existing right,” arises for the governmental entity if the plaintiff never possessed the right supposedly lost. As discussed previously, in *Palm Beach Polo*, the village attempted to enforce a preservation and restoration plan on an estate purchased at a bankruptcy sale.¹³⁷ The previous owner of the property negotiated with the village to flood the land in exchange for further off-site development rights.¹³⁸ The court found the plaintiff had purchased the land subject to this bargained-for limitation. Thus, even though flooding rendered the property unusable for development purposes, the court determined that the plaintiff failed to establish its entitlement to build on the property because the flooded property represented precisely the condition that the plaintiff’s predecessors in interest bargained for in exchange for developing another property with higher densities.¹³⁹

4. The Time Aspect of an Impact on a Property Right

The 2011 Amendment touched on the issue of permanence by noting that temporary impacts lasting more than one year may, depending on circumstances, constitute an inordinate burden.¹⁴⁰ Prior to the 2011 Amendment, the only case addressing the issue of “permanently unable to attain the reasonable, investment-backed expectation for the property” tended to indicate a lapse of three years’s time before finding that the Act’s permanence requirement was satisfied.¹⁴¹ Further, the Amendment defines development broadly by reference to Florida Statute, section 380.04, to include almost any construction activity.¹⁴² Thus, any enactment that prevents construction for more than one year may support a claim under the Act.

¹³⁵ *See Id.* at 1248.

¹³⁶ *Id.*

¹³⁷ *Palm Beach Polo*, 918 So.2d at 990.

¹³⁸ *Id.* at 993.

¹³⁹ *Id.* at 995.

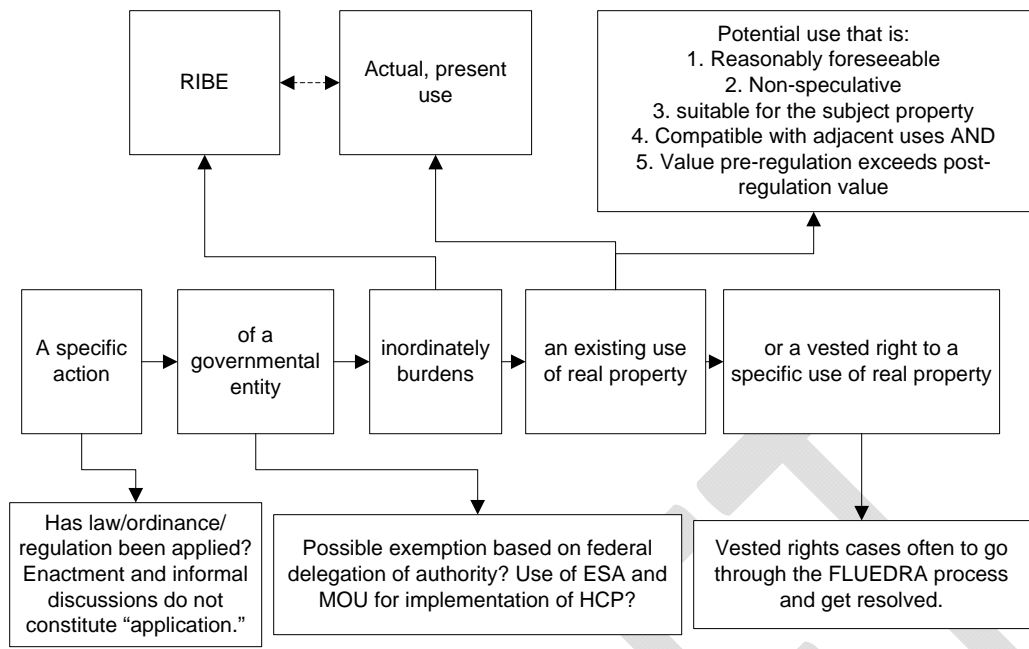
Whether there is a taking of Big Blue property requires a consideration of what occurred when the PUD was originally developed on the 7400 acres of Wellington in 1972. It was at that time that the owners bargained for development of vast sections at higher densities in return for preservation of Big Blue. This was an agreed restriction, compensated by the transfer of development rights to other property. No taking has occurred.

Id.

¹⁴⁰ 2011 Laws of Florida, Ch. 191, sec. 1.

¹⁴¹ Nicole S. Sayfie & Ronald L. Weaver, 1999 Update on the Bert J. Harris, Jr., Private Property Rights Protection Act, 73 Fla. Bar J. 49 (1999) (referencing *Wollard v. Monroe County*, BH-97-44-0 (Fla. ____ 1997)).

¹⁴² 2011 Laws of Florida, Ch. 191, sec. 1



Graphic representation of the major substantive elements of the Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. §70.001) and select associated issues.

IV. Conclusion

The Bert Harris Act continues to evolve and play a role in the decisions of state and local government actors. The Act remains a challenge to courts, attorneys, property owners, and other concerned parties because it purports to create a cause of action independent of federal or state constitutional takings law even as the Act utilizes key terminology from state and federal constitutional takings law. In 2011 the Florida Legislature made changes to the Bert Harris Act. Some of these changes were clearly the result of certain cases while the origin of other changes were less clear.

One important case—*Halls River Development*—as discussed above, opened a significant loophole that could have allowed a very broad defense for a local government when a plaintiff submits a claim under the Act more than one year after enactment of a regulation, rule, or comprehensive plan policy that was clear and unequivocal in its application to the affected property. The Legislature’s 2011 changes effectively eliminated the surprise to property owners that this could have engendered by stating that enactment only constitutes the “first application” to property required by the Act when the law is clear and unequivocal in its application *and* the property owner is provided notice.

The 2011 amendments to the Act also altered “ripeness” language. The Act now refers to a “statement of allowable uses” rather than ripeness. Neither the law nor analysis of the law provided to the Florida Legislature indicates the reason for this change. It may be that the change seeks to separate the Act’s workings from the common law jurisprudence surrounding the “ripeness” requirement for filing a claim. If this is the purpose of the change, it is suspect as the need for ripeness ensures that a claimant has exhausted all reasonably-available remedies and has

established an adequate factual basis to assess what the real harm to property is from the offending rule or regulation. To some degree other requirements of the Act may assist in fulfilling these important roles (i.e.—“statement of allowable uses” should indicate the uses permitted, thus allowing better calculation of the value of the property).

The Act’s central terminology of “inordinate burden” remains difficult to assess as the term has not been elucidated by case law. Legislative changes in 2011 modified the definition of “inordinate burden” and “inordinately burdened” to clarify that they mean the same thing. The changes also addressed temporal aspects by stating that temporary impacts of more than one year may arise to the level of an inordinate burden, depending on the circumstances.

Local governments with good information on erosion, flooding, storm surge, and SLR impacts have options for addressing these through tools such as land use planning and regulation. When such laws and regulations are well drafted, the Bert Harris Act should not be considered fatal to such efforts. Careful analysis of “inordinate burden” and related terms from the Act, such as “reasonable, investment-backed expectations,” “vested right,” “existing use,” “suitable,” and “compatible” indicate that good arguments exist for not finding a local government liable for a taking in some situations if land may be subject to erosion, flooding, surge, or SLR.

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