

BOARD OF COUNTY COMMISSIONERS

INTER-OFFICE MEMORANDUM

TO: Honorable Chairman and Members of the Board of County Commissioners

FROM: Herbert W.A. Thiele, Esq.
County Attorney

DATE: May 20, 2011

SUBJECT: Overview of the Bert J. Harris, Jr., Private Property Rights Protection Act and HB 701 amendments adopted during 2011 legislative session

The question of whether the County could be subject to claims under the Bert Harris Act as a result of the adoption of Amendment PCT110110 "Urban Fringe and Conservation Subdivisions" proposed for adoption in Comprehensive Plan Amendment Cycle 2011-1 has been raised several times during the public debate over the adoption of this amendment. During the 2011 legislative session, HB 701 was adopted. This bill, once signed by the Governor, will change several of the key provisions in the Bert Harris Act, which has been amended several times previously. In light of the questions raised during the review of the proposed comprehensive plan amendment, and the amendments proposed to the Bert Harris Act, we would like to take this opportunity to provide an overview of the Bert Harris Act, as amended.

The Fifth Amendment of the U.S. Constitution prohibits government from taking private property without due process of law. The Florida Constitution also encourages the protection of private property rights. Historically, a government's action can be determined to be a "regulatory taking" where a governmental regulation deprives an owner of "all economically productive or beneficial uses" of the property (Emphasis Added). If this is the case, then the property owner must be fully compensated for the loss of his or her property.

Section 70.001, Florida Statutes, commonly cited as the "Bert Harris Act," was originally adopted in 1995 to provide a remedy to a property owner when an action of a government entity "inordinately burdens" the existing use of the property, but does not rise to the level of a constitutionally defined taking (an inverse condemnation).

An inordinate burden is defined at Section 70.001(3)(e), Fla. Stats., as government action that 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 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.

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In addition, HB 701 also provides that in some circumstances "temporary impacts" lasting less than one year may amount to an inordinate burden giving rise to a Bert Harris claim. During the debate of the legislation, the most commonly cited examples of "temporary impacts" were moratoria on construction.

Bert Harris Act claims are limited to as-applied challenges; an ordinance cannot be facially challenged based on its enactment, it may only be challenged once it has been applied to a particular property owner. A claim must be made within one year after the application of the law or regulation to the property. Under HB 701, the regulation will be determined to be applied to the property and the one year time period will begin accruing either: (1) when it is enacted and notice is provided to the property owner or his agent by mail, or (2) when there is a formal denial of a written request for development or a variance.

The property owner must present his claim to the government a minimum of 150 days (or 90 days, for property classified as agricultural) prior to filing an action for compensation in the circuit court. During this 150 day period, the government must make a written settlement offer to the property owner proposing one of the following actions:

- (1) adjusting land development or permit standards;
- (2) modifying the density, intensity, or use;
- (3) transferring development rights;
- (4) performing a land swap or exchange;
- (5) mitigation or an in-lieu payment;
- (6) locating development on the least sensitive portion of the property;
- (7) conditioning the amount of development;
- (8) requiring issues to be addressed on a comprehensive basis;
- (9) issuing a development order, variance, or special exception;
- (10) purchasing the real property or paying compensation; or
- (11) making no changes.

Also during the notice period, the government entity must issue a statement of allowable uses to the property owner, which identifies the permissible uses of the property. If the property owner rejects the settlement offer, he may file a claim in circuit court. Sovereign immunity is waived for the causes of action arising under the Harris Act.

For a property owner to succeed in a Harris Act claim, the circuit court must determine (1) that an existing use of the property or a vested right to a use of the property existed, and (2) that the actions of the government entity inordinately burdened the property. The first prong of this test is determined to be met if there is an actual, present use to which the property is being put, or if there are reasonably foreseeable, non-speculative land uses which are suitable for the property. The second prong, whether the property is inordinately burdened, is met where the actions of a government entity have limited the use of the property such that the property owner is permanently unable to attain the reasonable, investment-backed expectations for the existing use

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of the property. In determining whether the property is inordinately burdened, the court may consider factual circumstances leading to the time elapsed between the enactment of the law and its application to the property. Property is not inordinately burdened where government actions were designed to abate a public nuisance or grant relief to a property owner.

If the property owner prevails, the matter will go before a jury to decide the amount of compensation to which the property owner is entitled. Compensation is determined by considering the fair market value of the property as it existed as the time of the government action, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, and the fair market value of the property as it exists inordinately burdened.

Generally, any regulation that changes the allowable development on a piece of property may give rise to a Bert Harris Act claim; however, the success of such a claim is heavily dependant on the specific facts of the case. A case-by-case determination must be made as to whether the property has been "inordinately burdened" to the extent that the owner cannot achieve reasonable, investment-backed expectations. Then, if a regulation is found to have inordinately burdened the property, the value of the claim is based upon the value of the property at the time that the regulation was imposed, less the value after the imposition of the regulation.

Should you have further questions regarding this issue, please do not hesitate to contact our office.

HWAT/LMY/LW

cc: Parvez Alam, County Administrator
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