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Florida's New Law to Protect Private Property Rights

by David L. Powell, Robert M. Rhodes, and Dan R. Stengle

On May 18 Governor Lawton Chiles signed into law landmark legislation¹ which creates a new cause of action to provide judicial relief for landowners who suffer a major restriction on the use of their land.

The law capped three years of contentious debate over proposed legislation and constitutional amendments to give landowners protection beyond the existing constitutional guarantee against private property being taken for public use without just compensation.² The new statute has stirred fears it will empty the public purse and roll back decades of work to protect the environment and manage growth, as well as concerns it will completely fail to protect landowners confronted by a steady accumulation of regulatory programs.

In reality, it will do neither. The new law grants important new rights and remedies to landowners while protecting existing environmental and

growth management programs. The law protects landowners against some regulatory actions which do not rise to the level of a taking, but it is more limited in scope than the property rights legislation considered in Florida in recent years. Perhaps most importantly, it signals a change in the way government will do business with landowners. It is a balanced, measured response to a pressing and emotional issue.

The public policy argument over private property rights has been simmering for years, but it was only in 1993 that lawmakers considered the matter ripe for action. The legislature passed a bill to set up a Study Commission on Inverse Condemnation to review landowner remedies when government action restricts the use of land but does not amount to a taking.³ Governor Chiles vetoed the bill because he said it was tilted too far toward private interests and instead set up the Governor's Property Rights

Study Commission II.⁴ It proposed new nonlitigation remedies for landowners,⁵ but its recommendations were not acted on by the legislature in 1994. Instead, a citizen's initiative campaign proposed a private property rights amendment to the Florida Constitution, but it was removed from the ballot by the Florida Supreme Court.⁶

Thus, at the start of the 1995 Regular Session, lawmakers had several property rights measures before them. Believing these measures did not strike a reasonable balance, Governor Chiles decided to prepare his own proposal. He directed Secretary Linda Loomis Shelley of the Department of Community Affairs to convene an ad hoc working group to draft a consensus property rights measure. The working group was composed of representatives from local government, landowners, citizens groups, and other constituencies. It met through most of the 1995 Regular Session. With only one significant change by lawmakers,⁷ the bill drafted

by this working group was enacted with only one dissenting vote.

New Judicial Remedy

The cause of action is created by the Bert J. Harris, Jr., Private Property Rights Protection Act,⁸ named after the Highlands County legislator who has championed property rights legislation for years. The Harris Act seeks to provide compensation to a landowner when the actions of a governmental entity impose an "inordinate burden" on his or her real property. It is intended to apply to governmental actions that do not rise to the level of a taking under the Florida or U.S. constitutions.⁹

The new judicial remedy is intended to protect either a landowner's "existing use" or "a vested right to a specific use" of land from an action by a state, regional, or local government agency that would amount to an inordinate burden.¹⁰ Therefore, in any potential claim it is critical to evaluate the landowner's property interest in light of the statutory requirements for relief.

Existing Use

An "existing use" means an actual, present use or activity on the land, notwithstanding periods of inactivity normally associated with or incidental to the activity.¹¹ A period of inactivity could include land lying fallow in association with the growing of crops.

An "existing use" also may mean:

[S]uch reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.¹²

So long as the requested use is not speculative, is suitable for the property, is compatible with adjacent land uses, and can be justified by an appraisal, and the landowner meets the other requirements, the landowner should be protected by the Harris Act.¹³ This alternative definition of "existing use" should benefit a landowner who applies for approval of a land use which is already enjoyed by his or her neighbors.

A "vested right to a specific use" must be determined by applying common law principles of equitable estoppel, constitutional principles of substantive due process, or state statu-

The Harris Act creates a new cause of action to provide compensation to a landowner when the actions of a governmental entity impose an "inordinate burden" on his or her real property

tory principles.¹⁴ These foundations for establishing vested rights are independent; for purposes of the Harris Act, rights may vest under any of the bases.

Equitable Estoppel. The estoppel doctrine is grounded in equity, and focuses on whether it would be inequitable to allow government to repudiate its prior conduct. Equitable estoppel will be applied to government regulation of a land use if a landowner, in good faith, on some act or omission of government, has made a substantial change in position or has incurred extensive obligations and expenses, so that it would be inequitable and unjust to destroy the acquired right.¹⁵ Each of these criteria has received valuable judicial interpretation and application,¹⁶ and the legislature relied solely on these cases in establishing an equitable estoppel basis for vesting.

Substantive Due Process. Rights also may vest for purposes of the Harris Act by applying constitutional principles of substantive due process. This standard enables the judiciary to craft a constitutionally based vesting test separate from takings theories or remedies, and distinct from equitable estoppel. This standard could focus on whether an owner has acquired a constitutionally protected property interest that should not be diminished or frustrated by governmental action.¹⁷ In some instances, the protected interest could be established by applying and satisfying estoppel principles, but the new test should go further.

Statutory Vesting. The Harris Act protects rights vested by state statu-

tes. A variety of statutes create such rights. Among them are provisions in the Local Government Comprehensive Planning and Land Development Regulation Act,¹⁸ the Florida Environmental Land and Water Management Act,¹⁹ the statute creating the surface water management regulatory program,²⁰ and the statute creating the coastal construction control line program.²¹ Local government vesting provisions are not covered by the Harris Act unless they implement a particular state statute. For example, local government comprehensive plan policies and land development regulations that define a "final local development order" or establish when development "is continuing in good faith" should be covered by the new cause of action.²² Plan policies or local regulations that codify equitable estoppel principles are not covered by the Harris Act's categorical protection of rights vested pursuant to state statute.

Harris Act Limitations

The seemingly broad sweep of the Harris Act is deceptive, because the new judicial remedy is subject to significant exceptions and limitations. The Harris Act does not apply to actions by the federal government, or by any governmental entity otherwise covered when exercising the powers of the United States or its agencies through a formal federal delegation.²³ The Harris Act does not apply to governmental actions which involve operating, maintaining, or expanding transportation facilities, and it does not affect existing law regarding eminent domain relating to transportation.²⁴ The Harris Act is not intended to affect the sovereign immunity of government.²⁵

Finally, and most significantly, the Harris Act is strictly a forward-looking measure. It applies only to specific actions of a governmental entity based on a statute enacted after the final adjournment of the legislature on May 11, 1995, or a rule, regulation, or ordinance adopted after that date. Actions based on a statute enacted before that date, or a rule, regulation, or ordinance adopted before that date, or one formally noticed for adoption before that date, are exempt from the Harris Act.²⁶ This provision provides perhaps the most significant and—among landowners—controversial limitation regarding the availability of this

new remedy.

Showing an Inordinate Burden. To demonstrate that a governmental action constitutes an inordinate burden on an existing use or vested right to a specific use, the landowner must meet one of two statutory tests.

Under the first test, the effect of the action must satisfy three criteria. First, the action must have directly restricted or limited the use of real property to the extent that the landowner is unable to realize 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. Second, the deprivation must be permanent. Third, the deprivation must be to the real property as a whole.²⁷

The alternative test for demonstrating an inordinate burden is for the landowner to show that, by virtue of the regulatory action, he or she has been left with existing uses or vested rights that are unreasonable such that, he or she bears permanently a disproportionate share of a burden imposed for the good of the public which, in fairness, should be borne by the public.²⁸ This test appears to allow the court to take remedial action when governmental action has been unreasonable, or has overreached in limiting the uses on a landowner's property.

An inordinate burden does not include impacts to real property which result from governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law, or to a noxious use of real property.²⁹ Temporary impacts to land do not constitute an inordinate burden,³⁰ so a valid, time-limited moratorium would not be actionable under the Harris Act. Finally, impacts to real property caused by governmental action that grant relief under the Harris Act would not be an inordinate burden;³¹ this exclusion should encourage governmental entities to grant relief to a landowner without concern that doing so will result in a Harris Act claim by another landowner.

Bringing a Claim

A Harris Act claim must be presented to the governmental entity within one year after the new statute, rule, ordinance, or regulation is applied to the landowner's property in order for a subsequent cause of action

to be brought in circuit court. If a landowner elects to invoke other administrative or judicial remedies prior to seeking relief under the Harris Act, the time for bringing the Harris Act claim is tolled until the conclusion of those other proceedings.³²

At least 180 days prior to filing suit, the landowner must present a written claim to the head of the governmental

entity which has taken the action at issue.³³ The claim must be accompanied by a bona fide appraisal that demonstrates the loss in fair market value to the property. If more than one governmental entity is involved in the governmental action—or if all relevant issues can only be resolved by involving more than one governmental entity, in the view of either the landowner or

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a governmental entity to which a claim is presented—the landowner must present the claim to each governmental entity involved.

During the 180-day notice period, the governmental entity must make a written settlement offer to resolve the claim. A settlement offer may include an adjustment or variance of the governmental action; increases or modifications in the density or intensity of use of development areas; transfer of development rights; land swaps or exchanges; mitigation; location on the least sensitive portion of the property; conditions on the development or use permitted; a requirement that issues be addressed comprehensively; purchase of the property interest; issuance of a development order; or no changes to the governmental action which occasioned the claim.³⁴ This broad authority creates an opportunity for innovation in resolving disputes.

Also during the notice period, unless the landowner has accepted the settlement offer, the governmental entity must provide a written “ripeness decision” which identifies the allowable uses of the property. The ripeness decision is intended to permit the landowner to go directly to circuit court, rather than having to pursue other administrative remedies, if dissatisfied with the response of the governmental entity.³⁵

The combined effect of the requirement that the governmental entity make a settlement offer and identify the uses to which a property may be put should be to change the way regulators deal with land use and environmental issues. The Harris Act is intended to shift the focus of government agencies and landowners alike from *whether* a proposed use is allowable to *what* uses are allowable. In this regard, regulators may seek options in a more cooperative way which both could accommodate a landowner’s wishes while still achieving the public policy objectives of underlying statutes, rules, ordinances, or regulations applied to the landowner’s real property.

When a governmental entity’s settlement offer would constitute a modification, variance, or special exception to application of an ordinance, rule, or regulation, the Harris Act directs that the relief protect the public interest served by the ordinance, rule, or regulation at issue, and be appropriate to

If the governmental entity does not prevail in the appeal, the court is directed to award the landowner attorneys’ fees and costs incurred in the appeal

prevent the inordinate burden on the real property.³⁶ If a proposed settlement would contravene the application of a statute, a “friendly suit” in circuit court must be brought by the governmental entity and the landowner. The court is directed to ensure that the relief protects the public interest served by the statute, and is appropriate to prevent the governmental effort from inordinately burdening the real property.³⁷

Prospect for Sanctions

The importance of the 180-day notice is enhanced by the prospect for sanctions to be imposed in a subsequent civil action. Attorneys’ fees are recoverable from the governmental entity if the landowner prevails and the court finds that the governmental entity did not make a bona fide offer which would have resolved the claim during the notice period.³⁸ On the other hand, the governmental entity may recover attorneys’ fees from the landowner if the court finds the landowner did not accept a bona fide offer which would have resolved the claim.³⁹ These provisions place even more importance than usual on a dispassionate analysis of claims for both landowning and governmental clients.

If the governmental entity does not make a bona fide offer to settle the issue, or if the landowner rejects the settlement offer and ripeness decision, the landowner may file a claim in circuit court. The landowner must serve the complaint on each governmental entity making a settlement offer and ripeness decision. Venue for this bifurcated proceeding is the county where the real property is located.⁴⁰ The court

will decide if the landowner is entitled to compensation,⁴¹ and, if so, a jury will decide the amount.⁴²

The court first must determine whether there has been an existing use or a vested right to a specific use of the real property. Thereafter, the court must determine whether an existing use or vested right has been inordinately burdened by the governmental action.⁴³

In determining an inordinate burden, the court must consider the standards set forth in the Harris Act as well as the governmental entity’s settlement offer and ripeness decision.⁴⁴ Thus, the determination by the court in effect is whether the last, best offer, if accepted, would constitute an inordinate burden. If the actions of more than one governmental entity are at issue, the court must apportion responsibility among them.⁴⁵

Interlocutory Appeal

Before the issue is submitted to the jury for an award of compensation, a governmental entity may take an interlocutory appeal of the court’s determination that there has been an inordinate burden. The court may stay the proceedings during the pendency of the appeal, but a stay is not automatic. If the governmental entity does not prevail in the appeal, the court is directed to award the landowner attorneys’ fees and costs incurred in the appeal.⁴⁶

If the court determines the governmental action has inordinately burdened the landowner’s property, the court must impanel a jury for the second phase of the proceeding. The jury must determine the difference in the fair market value of the unburdened land and the fair market value of the property as inordinately burdened. Because the Harris Act requires the award of compensation to take into account the settlement offer and ripeness decision,⁴⁷ the award is not calculated by an assessment of the governmental entity’s original action, but by its last, best offer. Consideration may not be given to business damages, but the Harris Act requires a reasonable award of prejudgment interest from the date the claim was presented.⁴⁸

By operation of law, the payment of compensation vests in the governmental entity the right, title, and interest in rights of use for which com-

compensation has been paid. The governmental entity may hold, sell, or otherwise dispose of these development rights. When the court has awarded compensation, it will determine the form and recipient of the rights and the terms of their acquisition.⁴⁹ The court also is given broad powers to make final determinations to effectuate the relief available under the Harris Act.⁵⁰

In light of the unique purposes and intent of the Harris Act, a court should not necessarily construe it under the case law regarding takings claims under the U.S. and Florida constitutions if the governmental action does not rise to the level of a taking.⁵¹

The Harris Act creates a new civil action remedy for landowners that will bear a striking resemblance to existing remedies under takings law. Each case will be an ad hoc, fact-intensive inquiry to determine whether a particular action of government intrudes too far into the landowner's domain.

Conclusion

The 1995 property rights legislation was intended to adjust the balance between the private sector and government in the continuing friction between regulators and landowners over the use of land in Florida. It reflects both the popular mood and a shift in legislative sentiment in recent years.

This remedy is not a radical departure from prior law. The Harris Act builds upon common law principles, constitutional decisions, and the tradition of finding an accommodation between public and private interests. It represents an attempt to provide new and measured relief for landowners without undermining Florida's landmark environmental protection and growth management laws. □

¹ Fla. Laws Ch. 95-181.

² U.S. CONST. amend V; FLA. CONST. art. X, §6.

³ Fla. SB 1000 (1993).

⁴ Fla. Exec. Order 93-150 (June 4, 1993).

⁵ Report of the Governor's Property Rights Study Commission II (Feb. 28, 1994).

⁶ *Advisory Opinion to the Attorney General re Property Rights*, 644 So. 2d 486 (Fla. 1994).

⁷ Fla. H.R. Jour. 1050 (Reg. Sess. May 5, 1995).

⁸ Fla. Laws Ch. 95-181, §1.

⁹ Fla. Laws Ch. 95-181, §1(9).

¹⁰ Fla. Laws Ch. 95-181, §1(3).

¹¹ Fla. Laws Ch. 95-181, §1(3)(b).

¹² *Id.*

¹³ This approach to defining an existing

land use is well grounded in the law of eminent domain relating to valuation. *E.g.*, *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955); *Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, *cert. denied*, 101 So. 2d 817 (Fla. 1958). See also Florida Eminent Domain Practice and Procedure §§9.32-.33 (4th ed. Fla. Bar CLE 1988). A landowner probably would have a cause of action anyway founded on reverse spot zoning, denial of equal protection, or perhaps substantive due process, based on the

argument that denying the requested use would be arbitrary and capricious.

¹⁴ Fla. Laws Ch. 95-181, §1(3)(a).

¹⁵ *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867 (Fla. 4th D.C.A. 1973), *rev'd in part*, 329 So. 2d 10 (Fla. 1976).

¹⁶ Rhodes & Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 STET. L. REV. 475, 476 (1991).

¹⁷ *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1544 (11th Cir.

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¹⁸ FLA. STAT. §163.3167(8).

¹⁹ FLA. STAT. §380.05(18) (areas of critical state concern); FLA. STAT. §380.06(20) (1994 Supp.) (developments of regional impact).

²⁰ FLA. STAT. §373.414(11)-(16) (1993).

²¹ FLA. STAT. §161.052 (1993).

²² See FLA. STAT. §163.3167(8) (1993).

²³ Fla. Laws Ch. 95-181, §1(13)(c).

²⁴ Fla. Laws Ch. 95-181, §1(10).

²⁵ Fla. Laws Ch. 95-181, §1(13).

²⁶ Fla. Laws Ch. 95-181, §1(12). An action based on a subsequent amendment may be a basis for a Harris Act claim "only to the extent that the application of the amendatory language imposes an inordinate burden apart from" the grandfathered statute, rule, ordinance, or regulation. *Id.*

²⁷ Fla. Laws Ch. 95-181, §1(3)(e).

²⁸ *Id.*

²⁹ *Id.*

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³⁰ *Id.*

³¹ *Id.*

³² Fla. Laws Ch. 95-181, §1(11).

³³ Fla. Laws Ch. 95-181, §1(4)(a).

³⁴ Fla. Laws Ch. 95-181, §1(4)(c).

³⁵ Fla. Laws Ch. 95-181, §1(5)(a).

³⁶ Fla. Laws Ch. 95-181, §1(4)(d)1.

³⁷ Fla. Laws Ch. 95-181, §1(4)(d)2.

³⁸ Fla. Laws Ch. 95-181, §1(6)(c)1.

³⁹ Any proposed settlement offer or proposed ripeness decision, and any negotiations or rejections with respect to the formulation of the settlement offer and ripeness decision, are admissible in the proceeding only for the purpose of determining costs and attorneys' fees. Fla. Laws Ch. 95-181, §1(6)(c)3. The determination of costs and attorneys' fees must be made by the court. Fla. Laws Ch. 95-181, §1(6)(c)1.

⁴⁰ Fla. Laws Ch. 95-181, §1(5)(b).

⁴¹ Fla. Laws Ch. 95-181, §1(6)(a).

⁴² Fla. Laws Ch. 95-181, §1(6)(b).

⁴³ Fla. Laws Ch. 95-181, §1(6)(a).

⁴⁴ Fla. Laws Ch. 95-181, §1(6)(a). In determining whether there has been an inordinate burden, the final settlement offer and ripeness decision are admissible; proposed settlement offers and ripeness decisions, and negotiations are inadmissible for these purposes. Fla. Laws Ch. 95-181, §1(6)(c)3.

⁴⁵ Fla. Laws Ch. 95-181, §1(6)(a).

⁴⁶ *Id.*

⁴⁷ Fla. Laws Ch. 95-181, §1(6)(b).

⁴⁸ Fla. Laws Ch. 95-181, §1(6)(b).

⁴⁹ Fla. Laws Ch. 95-181, §1(7)(b).

⁵⁰ Fla. Laws Ch. 95-181, §1(7)(a).

⁵¹ Fla. Laws Ch. 95-181, §1(9).

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