

## A MEASURED STEP TO PROTECT PRIVATE PROPERTY RIGHTS

DAVID L. POWELL,\* ROBERT M. RHODES,\*\* AND DAN R. STENGLE\*\*\*

### I. INTRODUCTION

On May 18, 1995, Governor Lawton Chiles signed into law landmark private property rights legislation enacted during the 1995 Regular Session of the Florida Legislature.<sup>1</sup> The measure includes a new cause of action providing judicial relief to landowners who suffer inordinate burdens on the use of their land and a new nonjudicial settlement and expedited hearing procedure promoting compromise solutions for disputes between landowners and regulators.<sup>2</sup>

The legislation concluded three years of contentious debate over the appropriate means to give landowners protection for the use of their property beyond the constitutional guarantee against the taking of private property for public use without just compensation.<sup>3</sup> The new statute has stirred fears that it will empty the public purse and roll back decades of work in environmental protection and growth management, as well as countervailing concerns among landowners that it will not protect them from the proliferation of regulations that impede their efforts to put their land to productive use.<sup>4</sup>

If properly implemented and applied, the measure will have none of the above effects. The legislation grants important new rights and reme-

---

\* Shareholder, Hopping Green Sams & Smith, P.A., Tallahassee, Florida. B.J., 1974, University of Texas at Austin; M.S., 1975, Columbia University; J.D., 1986, Florida State University. In conjunction with the Florida Conflict Resolution Consortium at Florida State University, under contract with the Florida Department of Community Affairs, Mr. Powell prepared the Model Procedural Guidelines for the Special Master Law contained in the legislation that is the subject of this Article.

\*\* Partner, Steel Hector & Davis, Tallahassee, Florida. B.A., 1964, University of California; J.D., 1968, University of California at Berkeley; M.P.A., 1973, Harvard University. Mr. Rhodes served on the working group that recommended the property rights legislation which is the subject of this Article.

\*\*\* Deputy Chief of Staff, Office of the Governor, Tallahassee, Florida, 1995-Present; General Counsel, Florida Department of Community Affairs, Tallahassee, Florida, 1993-1995; B.A., 1978, University of South Dakota; J.D., 1982, Florida State University. Mr. Stengle served as the principal drafter for the working group that prepared the property rights legislation which is the subject of this Article.

The authors gratefully acknowledge the research assistance of Connie C. Durrence of Hopping Green Sams & Smith, P.A.

1. FLA. STAT. § 70 (1995).
2. *Id.*
3. U.S. CONST. amend. V; FLA. CONST. art. X, § 6.
4. Larry Kaplow, Panel Compromise on Property Rights Bill, *PALM BEACH POST*, Apr. 20, 1995, at A9.

dies to landowners while maintaining existing environmental protection and growth management programs. It protects landowners against some regulatory actions which do not rise to the level of a taking, but it is more limited in scope than property rights legislation considered in Florida in recent years.<sup>5</sup> Perhaps most importantly, the measure is intended to reform the way government does business with landowners.<sup>6</sup> The legislation provides a measured response to a pressing and emotional issue and strikes a balance between conflicting, but equally valid, public and private interests.

## II. BACKGROUND

The subject of private property rights is not new in Florida. From the beginning of the period of environmental activism by the Florida Legislature in the early 1970s, the issue of legal protections for private property rights has generated much legislative activity. These efforts have increased in recent years due to the controversies which have attended the implementation of Florida's growth management programs. The trend in Florida to extend greater protection to private property rights reflects national developments, both in statehouses and in the Congress.<sup>7</sup>

### A. The 1993 Regular Session of the Legislature

Although the public policy argument regarding increased protection of private property rights has been simmering for several years, it was only in 1993 that the Legislature considered the matter ripe for legislative attention. A bill was introduced into the Florida House of Representatives which would have created a cause of action by which a landowner could obtain a judicial order requiring condemnation of his property. The order would apply to any governmental entity that imposed a restriction which

---

5. Larry Kaplow, Property Rights Bill Readied, Palm Beach Post, Apr. 20, 1995, at A1.

6. Kaplow, *supra* note 4, at A9.

7. Since 1991, at least 19 states have enacted property rights legislation. See ARIZ. REV. STAT. ANN. §§ 9-462.02, 9-500.12, 9-500.13, 11-810, 11-811, 11-830(F), 41-1311 to 41-1313 (1995); DEL. CODE ANN. tit. 29, § 605 (1995); FLA. STAT. § 70 (1995); IDAHO CODE § 67-8001 to 67-8004 (1995); IND. CODE § 4-22-2-32 (1995); KAN. STAT. ANN. § 26 (1995); LA. REV. STAT. ANN. § 19 (West 1995); MISS. CODE ANN. § 49-33-1 to 49-33-17 (1995); MO. ANN. STAT. §§ 536.017, .018 (1995); MONT. CODE ANN. §§ 75-1-102, 75-1-103, 75-1-201 (1995); N.M. STAT. ANN. § 73 (Michie 1995); N.C. GEN. STAT. §§113-206(e) (1995); OR. REV. STAT. § 105 (1994); TENN. CODE ANN. §§ 12-1-201 to 12-1-204 (1995); TEX. GOVT. CODE ANN. § 2007 (1995); UTAH CODE ANN. §§ 63-90-1 to 63-90-4, 63-90a-1 to 63-90a-4 (1995); WASH. REV. CODE § 36.70A.370 (1995); W. VA. CODE § 22-1A-1 to 22-1A-6 (1995); WYO. STAT. § 9-5-301 to 9-5-305 (1995).

For an overview of state property rights measures from a public-sector perspective, see Larry Morandi, Takings for Granted, STATE LEGISLATURES, June 1995, at 22. For an overview of the nationwide property rights movement from a private-sector perspective, see Peter Samuel, The Property Rights Movement: Enviro, Regulators Meet Their Match, MINING VOICE, May/June 1995, at 22.

"severely limited the practical use of the property," unless the restriction was an exercise of the police power to prohibit a use that was "noxious in fact" or to prevent "a demonstrable harm to public health and safety."<sup>8</sup> The court could have awarded compensation to a prevailing landowner.

Significantly, the bill would have established a presumption that a "severe limitation" on the practical use of an owner's land occurs when its fair market value is reduced by forty percent from the uses permitted at the time the owner acquired title or on July 1, 1985, whichever was later.<sup>9</sup> The bill was approved by the House Judiciary Committee but died on the House calendar.<sup>10</sup>

Instead, the Legislature enacted a measure which would have created the Study Commission on Inverse Condemnation to explore and recommend new remedies to protect landowners against the effects of regulation.<sup>11</sup> Governor Chiles vetoed the measure; he objected to both the composition of the commission and its charge.<sup>12</sup> He concluded that the measure did not strike a balance between the legitimate interests of private landowners and the public interest in protecting the environment and managing Florida's growth.<sup>13</sup>

#### B. The Governor's Property Rights Study Commission II

As an alternative to the vetoed 1993 legislation, Governor Chiles created the Governor's Property Rights Study Commission II.<sup>14</sup> It was patterned after the Governor's Property Rights Study Commission established in 1975 by former Governor Reubin Askew, whose recommendations led to the 1978 enactment of a statutory remedy for landowners aggrieved by governmental restrictions.<sup>15</sup> Governor Chiles directed the new commission to consider, among other things, "[t]he current and potential

8. Fla. HB 1437 (1993).

9. *Id.*

10. FLA. LEGIS., HISTORY OF LEGISLATION, 1993 REGULAR SESSION, HISTORY OF HOUSE BILLS at 268, HB 1437.

11. Fla. SB 1000 (1993).

12. Veto of Fla. SB 1000 (1993) (letter from Gov. Chiles to Sec'y of State Jim Smith, June 4, 1993) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.).

13. *Id.*

14. Fla. Exec. Order No. 93-150 (June 4, 1993). The commission consisted of 17 members, including: four landowners; one economist familiar with property valuation; two local government officials; the secretaries of the Department of Community Affairs and the Department of Environmental Protection; a water management district representative; four representatives of conservation organizations; two persons, respectively, recommended by the Speaker of the House and the President of the Senate; and one member of The Florida Bar serving as chair of the commission.

15. E.g., 1978, Fla. Laws ch. 78-85. See also Robert M. Rhodes, *Compensating Police Power Takings: Chapter 78-85, Laws of Florida*, 52 FLA. B.J. 741 (Nov. 1978). For an account of recent legislative activity in this field leading up to the 1995 Regular Session, see Kent Wetherell, *Private Property Rights Legislation: The "Midnight Version" and Beyond*, 22 FLA. ST. U. L. REV. 525 (1994).

effectiveness of Florida law in providing substantially affected persons with appropriate remedies of law to protect their private property rights and any changes necessary to assure meaningful and effective remedy to affected property amounts."<sup>16</sup>

Led by former Florida Supreme Court Justice Alan C. Sundberg of Tallahassee, the commission held hearings throughout the state.<sup>17</sup> Its chief proposal was the creation of an informal, nonjudicial settlement process to resolve property rights disputes between a landowner and a governmental entity through payment of compensation or adjustment of the regulation prior to litigation.<sup>18</sup> The commission advised against creating a new cause of action for landowners based on awarding compensation for a percentage-diminution of the land's market value.<sup>19</sup>

### C. The 1994 Regular Session of the Legislature

The commission's proposal for a new settlement procedure was considered during the 1994 Regular Session of the Legislature.<sup>20</sup> Other bills would have allowed a landowner to seek compensation through a judicial award when a regulation prohibited or severely limited the use of the owner's real property.<sup>21</sup> Under these bills, if the governmental entity imposing the regulation could not afford to pay the compensation, it would have been prohibited from imposing the restriction on the landowner's property.<sup>22</sup> Neither approach, the settlement procedure nor the court-ordered compensation bill, came to a floor vote.<sup>23</sup>

### D. The Constitutional Initiative on Property Rights

At the same time the Legislature was considering these measures, a citizens' group mounted a well-funded petition drive for four constitutional amendments bundled into one package for petition gathering purposes.<sup>24</sup> One of the four proposed amendments would have created a constitutional right to full compensation for a landowner when any exer-

---

16. Fla. Exec. Order No. 93-354, § 3(b) (Dec. 28, 1993).

17. REPORT OF THE GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION II (1994) [hereinafter GOVERNOR'S STUDY COMMISSION II].

18. *Id.* at 1.

19. *Id.* at 75-76.

20. Fla. HB 1967 (1994).

21. Fla. SB 630 (1994); Fla. HB 485 (1994).

22. Fla. SB 630 (1994); Fla. HB 485 (1994).

23. FLA. LEGIS., HISTORY OF LEGISLATION, 1994 REGULAR SESSION, HISTORY OF HOUSE BILLS at 345-46, HB 1967; *id.* at 74, SB 630; *id.* at 247-48, CS for HB 485.

24. Advisory Opinion to the Att'y Gen. Re: Tax Limitation; Advisory Opinion to the Att'y Gen. Re: Voter Approval of New Taxes; Advisory Opinion to the Att'y Gen. Re: Property Rights; Advisory Opinion to the Att'y Gen. Re: Revenue Limits, 644 So. 2d 486, 489 (Fla. 1994).

cise of the police power diminished the value of a vested property right.<sup>25</sup> The package received enough signatures for a ballot position in the 1994 general election.<sup>26</sup>

In a validation proceeding to determine whether the four amendments satisfied the constitutional and statutory requirements for submission to the electorate, the Florida Supreme Court struck the property rights measure and two others from the ballot.<sup>27</sup> The court held that the property rights amendment violated the single subject requirement for constitutional initiatives<sup>28</sup> and that its ballot title and summary were not accurate or informative.<sup>29</sup> This decision set the stage for further legislative consideration of the property rights controversy during the 1995 Regular Session.

#### E. The 1995 Regular Session of the Legislature

The supreme court's 1994 decision on the constitutional initiative increased political pressure on lawmakers to legislate a solution to the controversy. In addition, the perceived political climate underwent dramatic changes in the 1994 general election. Nationally and in Florida, the tide of public opinion was illustrated by the change in partisan control of the Congress and the Florida Senate. When lawmakers convened in Tallahassee, the Congress was considering property rights legislation, and legislatures around the nation were continuing a trend in enacting property rights laws.<sup>30</sup>

Both constitutional and statutory proposals were introduced into the 1995 Regular Session.<sup>31</sup> One proposed constitutional amendment would have provided that no owner could be deprived of a use of private prop-

---

25. *Id.*

26. *Id.*

27. *Id.* at 494.

28. FLA. CONST. art. XI, § 3.

29. Advisory Opinion, 644 So. 2d at 494.

30. During the 1995 Regular Session, in Washington State, lawmakers gave legislative a p-proval to a property rights initiative.

The Washington legislation, Initiative No. 164, the Private Property Regulatory Fairness Act, required full compensation for any reduction in value caused by regulation to any parcel or portion of private property. Any regulation of private property was prohibited unless a statement analyzing the expected economic impact on regulated property was prepared by the regulator and made available to the public prior to adoption. The initiative forbid governmental entities from requiring any property owner to provide or pay for any studies, maps, plans, or reports to be used in decisions that would restrict the use of private property for public use. See Wash. C.A. 164 (1995) (subject to referendum).

On November 9, 1995, Referendum 48, previously Initiative No. 164, became the third such referendum in the nation to be voted down. While the measure was defeated by a margin of 3-to-2, proponents hope to enact a similar law in next year's legislative session. Doug Conner, Property-Right Vote Losers To Keep Fighting, L.A. TIMES, Nov. 9, 1995, at A1.

31. Fla. SJR 968 (1995); Fla. HJR 1847 (1995) (proposed amendment to art. X, § 6, Fla. Const.); Fla. CS for SB 1326 (1995); Fla. HB 1381 (1995).

erty, or any part of his property, by governmental regulation or action resulting in a "nonnegligible" reduction in the fair market value of that property without full compensation as determined by a jury.<sup>32</sup> A prevailing owner would have been entitled to costs and attorney's fees.<sup>33</sup>

Statutory measures considered would have declared that any lawful use of private property could not be deprived or devalued, even temporarily, by an action of government without full compensation.<sup>34</sup> The cause of action for such a deprivation or devaluation, entitling the landowner to a jury determination of compensation, would have arisen if the governmental action resulted in a temporary or permanent diminution in fair market value of the affected portion of the owner's land in excess of twenty-five percent or \$10,000, whichever was greater. The recovery of full compensation would not have been limited by any percentage or dollar amount.<sup>35</sup> An exception to the right of compensation would have been carved out for public nuisances, but the governmental entity would have borne the burden of proving that a proscribed land use constituted a public nuisance.<sup>36</sup> A prevailing owner would have been entitled to attorney's fees and costs.<sup>37</sup>

Against this backdrop, Governor Chiles sought to develop a more restrained proposal to provide statutory protection for private property rights without undermining Florida's environmental protection and growth management programs.<sup>38</sup>

The Governor directed Secretary Linda Loomis Shelley of the Florida Department of Community Affairs to convene an Ad Hoc working group to draft a consensus proposal which would win the support of lawmakers and affected constituencies.<sup>39</sup>

As the 1995 Regular Session unfolded, the working group toiled for weeks with important support and involvement from legislative sponsors

---

32. Fla. SJR 968 (1995); Fla. HJR 1847 (1995).

33. Fla. SJR 968 (1995); Fla. HJR 1847 (1995).

34. Fla. CS for SB 1326 (1995); Fla. HB 1381 (1995).

35. The House bill did not specify that recovery would be available only if the diminution of value exceeded the greater of \$10,000 or 25 percent. Fla. HB 1381 (1995).

36. Fla. CS for SB 1326 (1995); Fla. HB 1381 (1995).

37. Fla. CS for SB 1326 (1995); Fla. HB 1381 (1995).

38. Lucy Morgan, Chiles Seeks Law To Repay Small Landowners, ST. PETE. TIMES, Mar. 30, 1995, at B5.

39. The working group included representatives from state agencies, including the Department of Community Affairs, the Department of Environmental Protection, and the Eminent Domain Section of the Department of Transportation; regional entities, including regional planning councils and water management districts; local governments, including the Florida Association of Counties and the Florida League of Cities; environmental organizations, including the Florida Audubon Society, 1000 Friends of Florida, the Florida Wildlife Federation, and the Florida Chapter of the American Planning Association; development interests, including the Florida Home Builders Association and the Association of Florida Community Developers; and landowning interests, such as the Florida Farm Bureau, the Florida Land Council, and the Property Rights Coalition (an alliance of agricultural and landowner interests).

of various property rights measures. A constitutional remedy was rejected as an option in order to allow any necessary adjustments in the new remedy without the cumbersome and time-consuming procedures involved in amending the Florida Constitution.<sup>40</sup>

The working group produced a draft bill which included a statutory remedy to provide compensation for landowners in situations which do not rise to the level of a taking, but it rejected an automatic numerical formula for determining when relief is warranted.<sup>41</sup> The bill also included a new nonjudicial settlement and expedited hearing procedure for land use and environmental permitting disputes, a procedure patterned after the recommendations of the Governor's Property Rights Study Commission II.<sup>42</sup> With only one significant change by the Legislature,<sup>43</sup> the working group's bill was enacted by lawmakers with just one dissenting vote.<sup>44</sup>

Aside from the scrutiny the bill received when being hammered out in the working group, the legislation received ample hearing and formal consideration by lawmakers. Section 1, which created the judicial cause of action for landowner relief, was fully debated in both the Senate Committee on the Judiciary and the Senate Committee on Community Affairs, as Senate Bill 2912.<sup>45</sup> Sections 2 through 5 were added to Senate Bill 2912, which was reported favorably by the Senate Committee on the Judiciary as a committee substitute.<sup>46</sup> Section 2, which created the nonjudicial settlement and expedited hearing procedure, also received a hearing in the Real Property and Family Law Subcommittee of the House Committee on the Judiciary, as House Bill 1335.<sup>47</sup>

On the House floor, the provisions of Committee Substitute for Senate Bill 2912 and House Bill 1335 were incorporated into one amendment which was adopted as a substitute for the language in another bill, Committee Substitute for House Bill 863. That bill as amended was then thoroughly debated and passed by the House.<sup>48</sup> Committee Substitute for

---

40. Morgan, *supra* note, 37.

41. For a discussion on the drawbacks of the formulaic approach, see GOVERNOR'S STUDY COMMISSION II, *supra* note 16, at 71-75.

42. For a discussion of the settlement procedure, see *infra* part IV.

43. FLA. H.R. JOUR. 1050 (Reg. Sess. 1995); See Elizabeth Willson, Lobbyist Takes a Big Leap--and Lands on Some Toes, ST. PETE. TIMES, July 5, 1995, at B5. For the text of the amendment, see *infra* text accompanying note 7.

44. FLA. H.R. JOUR. 1050 (Reg. Sess. 1995).

45. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 266, SB 2912.

46. FLA. S. JOUR. 551 (Reg. Sess. 1995).

47. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 141, HB 1335. This bill was placed on the agenda for the House Judiciary Committee, but the committee meeting was canceled for unrelated reasons, and the House Judiciary Committee did not meet again during the 1995 Regular Session.

48. *Id.* at 101, HB 863; FLA. H.R. JOUR. 1050 (Reg. Sess. 1995).

House Bill 863 was sent to the Senate for floor debate and final legislative approval.<sup>49</sup>

### III. THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT

Section 1 of the legislation is the Bert J. Harris, Jr., Private Property Rights Protection Act<sup>50</sup> (Harris Act), named after the Highlands County legislator who has championed property rights legislation for years. 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 the owner's real property.<sup>51</sup> It is intended to apply to governmental actions that do not rise to the level of a regulatory taking.<sup>52</sup>

In general, the new judicial remedy is intended to protect either a landowner's existing use of the land or a vested right to a specific use of the land from an inordinate burden which a state, regional, or local governmental agency imposes.<sup>53</sup> This remedy is subject to many important limitations and exclusions.<sup>54</sup> Therefore, in any potential claim it is critical to evaluate the landowner's property interest in light of all the statutory requirements for relief.

When compared to the textual basis for relief from a regulatory taking, namely, the sparse language in the Fifth Amendment and the Florida Constitution, the Harris Act is richly detailed in the substantive legal standards and procedural mechanisms for obtaining relief. However, pre-

---

49. FLA. H.R. JOUR. 1050 (Reg. Sess. 1995).

50. FLA. STAT. § 70.001 (1995).

51. *Id.*

52. *Id.* § 70.001(9). The Harris Act filled a void in then-existing Florida law because, prior to its enactment, there was no means by which an owner could receive compensation for the adverse financial effects of governmental regulation of his land without satisfying the constitutional standards for a taking, namely, physical invasion or the loss of all economically viable use. See Dep't of Comm'y Aff., CS for HB 863 (1995) Staff Analysis 1 (May 15, 1995) (on file with Dept.).

53. FLA. STAT. § 70.001(3) (1995). The Legislature did not appropriate funds for implementation of the Harris Act. See 1995, Fla. Laws ch. 95-181. To avoid running afoul of the constitutional prohibition against unfunded mandates, article VII, section 18, of the Florida Constitution, the Legislature expressly determined in the Harris Act that there was an important state interest in protecting private property owners from inordinate burdens on their property. Fla. Stat. § 70.001(1) (1995).

The Legislature also met two of the listed alternatives which remove an enactment from this constitutional bar: 1) that any expenditure necessary under the Act would apply to all persons similarly situated, including state and local governments, section 70.001(3), Florida Statutes; and 2) the Act was approved by a two-thirds vote of the membership in each chamber of the Legislature. The vote was 111-0 in the House of Representatives, and 38-1 in the Senate. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 101, HB 863; See also Dep't of Comm'y Aff., CS for HB 863 (1995) Staff Analysis 6 (May 15, 1995) (on file with Dept.).

54. For a discussion of the limitations and exclusions, see part III.C.

cisely because Harris Act claims were expected to be "ad hoc, factual inquiries,"<sup>55</sup> as those in takings cases, the working group which prepared the legislation favored an approach under which the full import of the Harris Act ultimately would be determined by judicial construction and application. In other words, judicial interpretation on a case-by-case basis was considered inevitable, necessary, and desirable.

#### A. Definitions

In any legislative enactment, the definitions imposed on particular terms are crucial for understanding the scope of the measure. That is certainly true with the Harris Act; it includes a number of definitions which are intended to set boundaries on the scope of the statute.

##### 1. Existing Use

The Legislature adopted two alternative definitions for an "existing use" of land which is protected by the Harris Act. Both reflect established legal principles.

##### a. Actual, Present Use or Activity

An existing use of land means "an actual, present use or activity on the real property," notwithstanding periods of inactivity normally associated with or incidental to the activity.<sup>56</sup> This portion of the definition of existing use is intended to encompass land uses engaged in by the landowner even though there might be some intermittent quality to the use or activity. For example, a period of inactivity could include land's lying fallow in association with the growing of crops or timber.

##### b. Reasonably Foreseeable Future Use

An existing use also may mean

such 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.<sup>57</sup>

So long as the requested use is suitable for the property, compatible with adjacent land uses, justifiable by an appraisal, and is not speculative, it would qualify as an existing use protected by the Harris Act from certain governmental actions.<sup>58</sup>

---

55. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

56. FLA. STAT. § 70.001(3)(b) (1995).

57. Id.

58. Id.

This alternative definition of existing use was and is very controversial, primarily among those who did not favor the enactment of property rights legislation.<sup>59</sup> In fact the definition stitches together longstanding concepts which are not usually linked together and recasts them in a new legal context.<sup>60</sup> Aside from its merit on legal and policy grounds, this provision was central to building a broad base of political support for passage of the legislation.

The first drafts of the Harris Act were considered by some legislators and participants in the working group to offer little or nothing to the landowners whose disputes with regulatory agencies had propelled the property rights movement.<sup>61</sup> Because government is already equitably estopped from impairing vested rights to existing uses, these legislators and landowners viewed the early drafts of the Harris Act, which protected "vested rights" and an existing use defined only as "an actual, present use or activity" on the land, as offering only an additional item on the menu of remedies already available to landowners.<sup>62</sup> Further, these legislators and landowners recognized that government only rarely deprives a landowner of the actual, present use of land, halts an activity being conducted on an owner's land, or seeks to infringe on a vested right.<sup>63</sup> Accordingly, for the Harris Act to be meaningful to landowners, it had to offer a remedy in some circumstances in which regulatory permission was denied for the conversion of land to a future use in which the owner's rights were not otherwise protected.

As a legal concept for an existing land use, the alternative definition is well-grounded in the law of eminent domain.<sup>64</sup> In a condemnation proceeding, valuation of the property is based upon the highest and best use.<sup>65</sup> The highest and best use is not limited to those uses authorized under the existing land development regulations.<sup>66</sup> If on the date of taking there is a reasonable probability of a land use change, that probability may be taken into account in determining valuation.<sup>67</sup> An important factor

---

59. Elizabeth Willson, *Property Act Fences Out the Government*, ST. PETE. TIMES, July 5, 1995, at B1.

60. See, e.g., *Bass v. General Dev. Corp.*, 374 So. 2d 479 (Fla. 1979); *Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. 1st DCA 1958), cert. denied, 101 So. 2d 817 (Fla. 1958).

61. Fla. S. Comm. on Judiciary, tape recording of proceedings (Apr. 19, 1995) (on file with comm.) (discussion of SB 2912); Fla. S. Comm. on Comm'y Aff., tape recording of proceedings (Apr. 24, 1995) (on file with comm.) (discussion of SB 2912).

62. *Id.*

63. *Id.*

64. FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE § 9.32 (4th ed., Fla. Bar C.L.E. 1988)[herinafter *Florida Eminent Domain*].

65. *State Road Dep't Co. v. Chicone*, 158 So. 2d 753 (Fla. 1963); *Cameron Dev. Co. v. United States*, 145 F.2d 209 (5th Cir. 1994).

66. *Florida Eminent Domain* supra note 63 at, § 9.33.

67. See, e.g., *Board of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67 (Fla. 1st DCA 1958), cert. denied, 101 So. 2d 817 (Fla. 1958).

in determining the highest and best use of property is whether the property is suitable for that proposed future use.<sup>68</sup> However, such a future use may not be wholly speculative.<sup>69</sup>

Seen in the context of the law of eminent domain, there are circumstances in which a prospective future use may be considered an existing land use, and therefore compensable. That is at the heart of the Harris Act's alternative definition of an existing land use, which reaches some future uses. Altogether, it is a remarkably conventional idea in a legal system which has embraced the doctrine of future interests in land since medieval England.<sup>70</sup>

The proof necessary to establish that a future land use is reasonably foreseeable could come from such authorities as an adopted local comprehensive plan, local land development regulations, or a credible appraisal which relies at least in part on nonexisting but reasonably expected future uses.<sup>71</sup> Particularly relevant would be evidence of the owner's ability or inability to secure financing based on these documents.<sup>72</sup> The comprehensive plan and land development regulations adopted by the relevant local government also would have a bearing on the suitability and compatibility issues.

This alternative definition is intended to reach future land uses such as "next-in-line" acreage adjacent to developed or developing lands. This is particularly applicable when a landowner applies for approval of a use already enjoyed by neighboring landowners. But even in these cases the application of the alternative definition is not revolutionary. A landowner who could meet the test of this alternative definition probably would have a cause of action founded on reverse spot zoning, denial of equal protection, or perhaps deprivation of substantive due process, based on the argument that denying the requested land use would be arbitrary and capricious. Nevertheless, as with situations in which the doctrine of equitable estoppel might apply, the Harris Act represents a new opportunity for compensation where only an equitable remedy previously was available.

## 2. Vested Rights

A "vested right to a specific use" under the Harris Act must be determined by applying common law principles of equitable estoppel, constitu-

---

68. Florida Eminent Domain, *supra* note 4, § 9.32.

69. *Yoder v. Sarasota County*, 81 So. 2d 219 (Fla. 1955).

70. See generally WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 34-73, 171-85 (5th ed. 1942).

71. Florida Eminent Domain, *supra* note 4, § 9.32. It would go too far, however, for a local government to utilize its comprehensive plan to purport to define the term "reasonably foreseeable, nonspeculative land uses" for Harris Act purposes in a way other than it has been defined by the Legislature--any more than a local government could adopt its own definitions for the terms "equitable estoppel" or "substantive due process" as utilized in the Harris Act.

72. *Id.*

tional principles of substantive due process, or state statutory principles.<sup>73</sup> These foundations for establishing vested rights are separate and independent; accordingly, rights may vest for purposes of the Harris Act under any one of these three alternative theories.

a. Equitable Estoppel

The estoppel doctrine is grounded in equity and focuses on whether it would be inequitable to allow a governmental entity to repudiate its prior conduct.<sup>74</sup> In one of the leading cases, the Second District Court of Appeal followed the trial court in explaining that

. . . the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite a n- other 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.<sup>75</sup>

Equitable estoppel will be applied to government regulation of land use if a property owner in good faith, while relying upon 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.<sup>76</sup> Each of these vesting criteria has received valuable judicial interpretation and application,<sup>77</sup> and the Legislature relied on these cases in establishing an equitable estoppel basis for vesting.<sup>78</sup>

The remedy provided by the doctrine of equitable estoppel is to bar the governmental entity from interfering with the owner's rights acquired by virtue of his reliance on the prior governmental action.<sup>79</sup> In other words, the owner gets to complete the authorized activity. Compensation is not a remedy.<sup>80</sup> Therefore, by providing equitable estoppel as one basis for acquiring rights which may be a basis for a Harris Act claim, the Legislature in effect has added compensation as a remedy for the landowner in a certain category of equitable estoppel cases.

---

73. FLA. STAT. § 70.001(3)(a) (1995).

74. E.g., *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963) (estoppel applied against city to forbid rescission of a building permit); see also Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 STETSON L. REV. 475, 476 (1991).

75. *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. 2d DCA 1975) (quoting trial court).

76. *Id.*; see also *City of Hollywood v. Hollywood Beach Hotel Co.*, 283 So. 2d 867 (Fla. 4th DCA 1973), *rev'd in part*, 329 So. 2d 10 (Fla. 1976).

77. Rhodes & Sellers, *supra* note 73, at 478-89.

78. FLA. STAT. § 70.80(a) (1995).

79. Rhodes & Sellers, *supra* note 73, at 475; see also *City of Lauderdale Lakes v. Corn*, 427 So. 2d 939 (Fla. 4th DCA 1983).

80. Rhodes & Sellers, *supra* note 74, at 475.

## b. Substantive Due Process

Rights also may vest for purposes of the Harris Act by applying principles of substantive due process.<sup>81</sup> This provision enables the judiciary to craft a constitutionally based vesting test that is separate from takings theories or remedies and distinct from equitable estoppel.<sup>82</sup>

True to its substantive due process roots, this vesting standard could focus on whether an owner has acquired a constitutionally protected property interest that should not be diminished or frustrated by government action.<sup>83</sup> In some instances, the protected interest could be established by applying and satisfying estoppel principles, but the new test should go further.<sup>84</sup>

The linchpin for establishing substantive due process vesting could be the existence of reasonable, investment-backed expectations in a particular use.<sup>85</sup> This approach draws from a judicially crafted concept which courts have used to analyze both takings and Fourteenth Amendment vested rights claims.<sup>86</sup> In addition, it parallels the statutory test for determining whether property is inordinately burdened.<sup>87</sup>

This test would mean an inordinate burden need not be found if vested rights exist based on investment-backed expectations. A determination of whether vested rights exist is only the first step in evaluating a Harris Act claim; determining whether the governmental action inordinately burdens those rights is the next. An inordinate burden may be found only if a restrictive government action results in an owner's permanent inability to attain reasonable, investment-backed expectations in a vested right.<sup>88</sup> Thus, relying upon the concept of reasonable, investment-backed expectations both to establish a vested right and to determine whether the governmental action constitutes an inordinate burden is not a tautology.

Vested rights founded on substantive due process could extend protection to situations which might not be covered by estoppel. Consider, for example, multiple-phase or multiple-use projects for which only a conceptual or master plan and a first phase or initial use have been approved

---

81. FLA. STAT. § 70.001(3) (1995); see also *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

82. Regarding the recognized but muddled distinction between equitable estoppel and constitutionally-based vested rights, see David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63-65; see also *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641, 643 (Fla. 3d DCA 1989).

83. *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

84. *Perry*, 408 U.S. at 601; *Roth*, 408 U.S. at 577.

85. For a comprehensive discussion of investment-backed expectations, see Daniel Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215 (1995).

86. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

87. FLA. STAT. § 70.001(3)(e) (1995).

88. *Id.*

when government imposes new regulatory restraints. If an owner can establish a property interest founded on reasonable, investment-backed expectations in completing the entire project and all uses, the interest may vest for purposes of the Harris Act under this substantive due process theory.<sup>89</sup> By contrast, if applying the doctrine of equitable estoppel, which focuses on an owner's reliance and change of position on a specific governmental action, in certain circumstances, only the approved first phase or initial use may be vested for Harris Act purposes.<sup>90</sup>

### c. Statutory Vesting

The Harris Act protects rights vested by virtue of legislative enactments. A variety of statutes create such rights. Among them are vested rights provisions in the Local Government Comprehensive Planning and Land Development Regulation Act,<sup>91</sup> the Florida Environmental Land and Water Management Act,<sup>92</sup> the statute creating the surface water management regulatory program,<sup>93</sup> and the statute creating the coastal construction control line program.<sup>94</sup>

Local government vesting provisions, on the other hand, are not addressed under this provision and therefore are not a basis for a Harris Act claim. However, a local government vesting ordinance should be a basis for a Harris Act claim if it fairly implements a particular state statute. For example, local government comprehensive plan policies and land development regulations which implement section 163.3167(8), Florida Statutes, by defining "a final local development order" or by establishing when development "is continuing in good faith" should be covered by this theory.<sup>95</sup>

Local government plan policies or development regulations which codify equitable estoppel common law principles are not covered by the Harris Act's categorical protection of rights vested pursuant to state statute. However, as noted, owners who can satisfy common law equitable estoppel criteria will be vested under the previously discussed part of the Act's vested rights definition.

## 3. Governmental Entity

---

89. *Id.*

90. For an example of partial vesting by application of statutory criteria, see *Compass Lake Hills Dev. Corp. v. Department of Comm'y Aff., Div. of State Planning*, 379 So. 2d 376 (Fla. 1st DCA 1979) (partial vesting under section 380.06(12), now codified at section 380.06(20), Florida Statutes (1995)).

91. FLA. STAT. § 163.3167(8) (1995).

92. *Id.* § 380.05(18) (areas of critical state concern); *id.* § 380.06(20) (developments of regional impact).

93. *Id.* § 373.414(11)-(16).

94. *Id.* § 161.052.

95. See *id.* § 163.3167(8).

A "governmental entity" includes any agency of the state, any regional agency, any local government entity, or any other entity that independently exercises governmental authority.<sup>96</sup> It does not matter whether the governmental entity was created by the Florida Constitution<sup>97</sup> or by general or special law. The United States and its various agencies do not fall within this definition; thus their actions are not subject to relief under the Harris Act.

#### 4. Action of a Governmental Entity

The term "action of a governmental entity" means a specific action which affects real property.<sup>98</sup> It expressly includes action by the governmental entity on an application for development approval or other permit,<sup>99</sup> but it is intended to go beyond that to other actions which adversely affect the ability of a landowner to use the land.<sup>100</sup>

The governmental action must have "directly restricted or limited the use" of the owner's land.<sup>101</sup> This requirement should be interpreted to mean that an action's effect is "[i]n a direct way without anything intervening; not by secondary, but by direct, means."<sup>102</sup> A governmental action which indirectly burdened or inadvertently devalued an owner's land, because of regulatory decisions regarding another owner's property, would be too attenuated for relief under the Harris Act.<sup>103</sup>

On the other hand, the directness requirement should not be converted into a straitjacket. It should not, for example, be construed to mean that a statute, rule, ordinance, or regulation must specifically set forth in detail the precise restriction on a particular owner's property. Such a construction would be at odds with the legislative intent that the Harris Act address grievances arising from statutes, rules, regulations, or ordinances "as applied" to private land.<sup>104</sup>

Governmental inaction, that is, the decision by a governmental entity not to act, is not within the ambit of the Harris Act.

96. *Id.* § 70.001(3)(c).

97. This provision encompasses the Florida Game and Fresh Water Fish Commission. FLA. CONST. art. IV, § 9. It also precludes any argument that certain local governmental entities addressed in the Florida Constitution are not within the ambit of the Harris Act. *E.g.*, *id.* art. VIII, § 6(e), (f) (Metropolitan Dade County).

98. FLA. STAT. §70.001(3)(d) (1995).

99. *Id.*

100. *Id.*

101. *Id.* § 70.001(3)(e). Although technically part of the definition of an inordinate burden, this phrase is important primarily for delineating the type of governmental action which is subject to a Harris Act claim.

102. BLACK'S LAW DICTIONARY 414 (6th ed. 1990).

103. *Op. Att'y Gen. Fla.* 95-78 (1995). A cause of action must be commenced no more than one year "after a law or regulation is first applied by the governmental entity to the property at issue." FLA. STAT. §70.001(11) (1995) (emphasis added).

104. *Id.* § 70.001(1).

## 5. Inordinate Burden

After demonstrating the existing use or a vested right to a specific use, a landowner must then demonstrate that the governmental action is an "inordinate burden," which entitles him to relief.<sup>105</sup> In order to demonstrate an inordinate burden, the landowner must meet either one of two statutory tests.

### a. Expectations Not Realized

Under the first test, the effect of the governmental action must satisfy three criteria.<sup>106</sup> First, the governmental 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 of the existing use of the real property or a vested right to a specific use of the real property.<sup>107</sup> Second, the deprivation of the reasonable, investment-backed expectation must be permanent.<sup>108</sup> Third, the deprivation must expressly be to the real property as a whole.<sup>109</sup>

### b. Unreasonable Use and Unfair Burden

The alternative test for demonstrating an inordinate burden is to show that, by virtue of the regulatory action, the landowner has been left with existing uses or vested rights which are so unreasonable that the landowner permanently bears a disproportionate share of a burden imposed for the good of the public and which, in fairness, should be borne by the public at large.<sup>110</sup> This test allows the court to take remedial action when governmental action has been unreasonable or has excessively limited the uses on a landowner's property.

There are limitations and exceptions with respect to when a governmental entity has inordinately burdened an owner's land. These limitations and exceptions, discussed below with similar provisions,<sup>111</sup> will limit the circumstances in which relief will be available under the Harris Act. For overriding policy reasons, some governmental actions will continue to be subject only to the other constitutional and statutory remedies which are otherwise available to a landowner.<sup>112</sup>

## 6. Property Owner

---

105. Id. § 70.001(3)(e).

106. Id.

107. Id.

108. Id.

109. Id.

110. Id.

111. See *infra* part III.C.

112. FLA. STAT. § 70.001(3)(e) (1995).

The term "property owner" means the "person who holds legal title to the real property" which is the subject of the Harris Act claim.<sup>113</sup> Under existing Florida law, a person may include a natural person, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, or other group or combination.<sup>114</sup> Any one of those then may initiate a Harris Act claim. Governmental entities expressly not included in this definition are thus not considered persons under the Harris Act and therefore may not bring a Harris Act claim.<sup>115</sup>

The Harris Act does not expressly address the nature of the estate in land that a person must hold in order to bring a Harris Act claim, but a broad reading of the statute would reach any legal interest in land, such as an easement serving a legal interest. A person with only an equitable or other beneficial interest appears not to be authorized to bring a Harris Act claim.

## 7. Real Property

The term "real property" means "land, and includes any appurtenances and improvements to the land" as well as any other relevant land in which the owner has a relevant interest.<sup>116</sup> There are at least two significant aspects to this definition.

First, this definition expressly includes "any other relevant real property in which the property owner had a relevant interest" it thus encompasses the entire parcel in which the owner has a legal interest.<sup>117</sup> This construction is supported by reading it in conjunction with the definition of "inordinate burden," which expressly requires that the existence of an inordinate burden be determined by reference "to the real property as a whole."<sup>118</sup> Thus, the court will be required to determine--by examining other relevant parcels of real property in which the owner has a relevant interest--whether the property "as a whole" has been inordinately burdened.<sup>119</sup> This whole-parcel requirement reflects precedent in the context of constitutional takings.<sup>120</sup>

---

113. Id. § 70.001(3)(f).

114. Id. § 1.01.

115. See *id.*

116. Id. § 70.001(3)(g).

117. Id. The use of the term "relevant interest" in the definition of real property is unfortunate. It should be read as meaning a legal interest in land; to read the statute otherwise would be inconsistent with the use of the term "legal title" in the definition of property owner.

118. Id. § 70.001(3)(e).

119. Id.

120. *Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA 1994); *Department of Env'tl. Reg. v. Schindler*, 604 So. 2d 565 (Fla. 2d DCA 1992); *Department of Transp. v. Jirik*, 471 So. 2d 549 (Fla. 3d DCA 1985), approved, 498 So. 2d 1253 (Fla. 1986); *Fox v. Treasure Coast Regional Planning Council*, 442 So. 2d 221 (Fla. 1st DCA 1983).

Second, the term "real property" includes "any appurtenances and improvements to the land."<sup>121</sup> This phrase is patterned after the definition of "land" in the Florida Environmental Land and Water Management Act,<sup>122</sup> but it goes further by not including customary notions of land as a limitation on the improvements and appurtenances which will be regarded as real property for purposes of the Harris Act.<sup>123</sup>

## B. Procedure for Bringing a Civil Action

The Harris Act sets forth, in detail, the procedure which a landowner must follow in bringing a claim under the statute. It is intended both to strike a balance between public and private interests and also to promote settlement short of a judicially imposed resolution of the dispute.

### 1. Actions Prior to Filing a Civil Action

Before bringing a civil action under the Harris Act, the landowner must notify the governmental entity of the claim and wait a limited period of time for a response.<sup>124</sup> This notification process is one of the procedural devices built into the Harris Act to promote settlements without resort to litigation.

#### a. Conditions Precedent

At least 180 days prior to filing a civil action, the landowner must present a written claim to the head of the governmental entity which has taken the action at issue.<sup>125</sup> The claim must be accompanied by a bona fide appraisal which demonstrates the loss in fair market value to the property.<sup>126</sup> This requirement is based on similar requirements in other statutes

---

In determining whether portions of an owner's property should be considered as a whole or treated separately, courts have considered such factors as parcel contiguity, unity of use, unity of ownership, intent of the owner, and particular factual circumstances. *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174 (Fla. 4th DCA 1995).

121. FLA. STAT. § 70.001(3)(g) (1995).

122. *Id.* § 380.031(7) (" 'land' includes any improvements or structures customarily regarded as land").

123. For example, billboards would fall within the ambit of this definition even though they might not be considered a customary appurtenance or improvement to the land.

124. FLA. STAT. § 70.001(4)(a) (1995).

125. *Id.*

126. *Id.* The Harris Act does not require that the appraiser preparing the appraisal be certified, licensed, or registered. *Id.* Section 475.612, Florida Statutes, prohibits persons from using the titles "certified real estate appraiser," "licensed real estate appraiser," "registered real estate appraiser," or other words to that effect, without being certified, registered, or licensed in accordance with chapter 475, Florida Statutes. Generally, such certification, registration, or licensure by the Florida Real Estate Appraisal Board is required for persons who hold themselves out as certified, registered, or licensed, or who issue appraisal reports in connection with federally related transactions. See *id.* §§ 475.610, .612, .613. The requirements that the appraisal be "bona fide" and "valid" allow the governmental entity to whom the appraisal is

which authorize legal actions against governmental entities.<sup>127</sup> It is intended to put the governmental entity on notice of its potential liability and to create an opportunity for settlement, but--as will be seen--the requirement also gives the governmental entity a chance to improve its position in any subsequent litigation.

If more than one governmental entity is involved in the governmental action or, if in the view of either the landowner or a governmental entity to whom a claim is presented, all relevant issues can be resolved only by involving more than one governmental entity, the landowner must present the claim to each governmental entity involved.<sup>128</sup> Because the owner may subsequently commence a civil action only against a governmental entity which has received the claim and had a 180-day notice period,<sup>129</sup> the Harris Act creates an incentive for an owner to bring in all governmental entities which may be liable.

#### b. Written Offer to the Landowner

During the 180-day notice period, the governmental entity must make a written settlement offer to resolve the claim. A settlement offer may include 1) an adjustment of development or permit standards which control the use of the land; 2) increases or modifications in the density, intensity, or use of development areas; 3) transfer of development rights; 4) land swaps or exchanges; 5) mitigation, including payments instead of on-site mitigation; 6) location on the least sensitive portion of the property; 7) conditions on the amount of development or use of the land; 8) a requirement that issues be addressed more comprehensively than the use or uses immediately proposed; 9) issuance of a development order, variance, special exception, or other form of extraordinary relief; 10) public purchase of the owner's property, or acquisition of a less-than-fee-simple interest in it; or 11) no change to the governmental action which occasioned the claim.<sup>130</sup>

This broad authority and menu of options creates an opportunity for innovation in resolving disputes with landowners, even if some of these

---

submitted to exercise some judgment as to the quality of the appraisal. *Id.* § 70.001(4)(a). Since the appraisal requirement is intended to support the claim of the owner, the greater the validity of the appraisal, the greater the likelihood that the governmental entity would rely on the appraisal in evaluating the owner's claim.

127. *E.g.*, *id.* § 403.412.

128. *Id.* § 70.001(4)(a). The Harris Act thus gives the governmental entity the opportunity, in effect, to implead another governmental entity prior to a complaint being filed in circuit court. Unfortunately, the statute does not prescribe the procedural mechanisms for accomplishing this intention. Apparently, the governmental entity receiving the initial claim may require the landowner to serve a copy of the claim on another governmental entity. *Id.*

129. *Id.*

130. *Id.* § 70.001(4)(c). This list of potential remedies is almost identical to the remedies proposed for consideration in the nonjudicial settlement procedure established in section 2 of the legislation. *Id.* § 70.50(19)(b); see *infra* text accompanying note 360.

remedial steps are not otherwise addressed by the governmental entity's underlying regulatory code.

c. Acceptance and Resolution

When a settlement 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 prevent the inordinate burden on the real property.<sup>131</sup>

The Harris Act also delegates to each state, regional, and local governmental entity the authority to enter into a settlement which contravenes statutory requirements so long as it "protects the public interest served by the statute, . . . and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."<sup>132</sup> In addition, the court must approve the settlement in a consent decree.<sup>133</sup>

The public policy issues which may come into conflict through implementation of this pre-suit settlement provision were addressed recently by the Florida Supreme Court. In *Abramson v. Florida Psychological Association*,<sup>134</sup> the supreme court upheld a settlement agreement by which the Florida Department of Business and Professional Regulation agreed to the licensure of two psychologists, subject to certain conditions, even though the applicants did not meet all statutory requirements.<sup>135</sup> The supreme court succinctly explained the conflicting legal and policy issues in this way: "Administrative agencies have the authority to interpret the laws which they administer, but such interpretation cannot be contrary to clear legislative intent. At the same time, the power of a public body to settle litigation is incidental to and implied from its power to sue and be sued."<sup>136</sup>

In its decision, the court declined to answer a certified question regarding the circumstances under which an agency may settle a lawsuit on terms inconsistent with its delegated legislative authority "because [the court does] not believe that a general rule can be formulated which would

---

131. FLA. STAT. § 70.001(4)(d)1 (1995).

132. *Id.* § 70.001(4)(d)2.

133. *Id.* § 70.001(4)(d)2. For a thorough discussion of issues related to utilizing consent decrees as settlement vehicles, see David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 *STETSON L. REV.* 871 (1992).

134. 634 So. 2d 610 (Fla. 1994), reversing, 610 So. 2d 447 (Fla. 1st DCA 1992).

135. *Id.* It was not clear whether the settlement was the subject of a consent decree entered by the court, but the original litigation continued with other plaintiffs after the two psychologists settled and withdrew from the original litigation. *Id.* It was a subsequent challenge to implementation of the settlement which led to the decision by the Florida Supreme Court.

136. *Id.* at 612 (citations omitted).

be applicable under all circumstances."<sup>137</sup> Further, the supreme court confined its ruling to the facts of the case and reiterated the litany of reasons offered by the agency as justification for the settlement.<sup>138</sup> Plainly, the court was uneasy about the case.

While the Abramson decision does not provide firm footing for the pre-suit settlement provision of the Harris Act,<sup>139</sup> it does provide a frame of reference for evaluating the issues raised by this provision. First, the supreme court acknowledged that the settlement of litigation is incidental to the authority to sue and be sued.<sup>140</sup> Second, in the best manner of case-by-case adjudication, the court focused on the justifications for this particular settlement, noting that the deviation from the statute was "minimal."<sup>141</sup> Third, and most importantly, the court observed that agencies may not act "contrary to clear legislative intent." This third observation presents the crux of the matter here.<sup>142</sup>

The Harris Act provides clear legislative authority for a governmental entity to make a minimal departure from a statutory requirement in a particular case where a Harris Act claim has been filed by a landowner. This express legislative direction, coupled with the implied authority to enter into settlements by virtue of a governmental entity's authority to sue or be sued<sup>143</sup> and the public policy in favor of settling disputes,<sup>144</sup> provides the necessary legal basis for pre-suit settlements which include discrete deviations from statutory requirements.

---

137. *Id.*

138. *Id.*

139. The decision has been criticized for containing "no real discussion of the critical issue regarding the source of legal authority for an agency to enter into a settlement agreement which contravenes the agency's enabling act." Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 *ST. THOMAS L. REV.* 287, 298 (1995).

In another recent case, a divided court affirmed without discussion a consent decree which was tantamount to an exception to statutory dredge-and-fill permitting requirements. *Eastpointe Condominium Ass'n I, Inc. v. Palm Beach Isles Assocs.*, 636 So. 2d 721 (Fla. 4th DCA 1993) (per curiam affirmance). In his dissenting opinion, Chief Judge Glickstein objected to the court's affirmance of the consent decree partially because existing law did not authorize the permit exception. *Id.* at 723. In a companion case that may presage issues arising from implementation of the pre-suit settlement provision of the Harris Act, the same court affirmed the agency's denial of a petition by a third party requesting a formal administrative hearing on the agency's decision to enter into the settlement agreement which resulted in the consent decree. The court grounded the latter decision solely on its affirmance of the consent decree. *Singer Island Civic Ass'n, Inc. v. State Dept. of Env't'l Reg.*, 636 So. 2d 723 (Fla. 4th DCA 1993), rev. granted, 649 So. 2d 234 (Fla. 1994), rev. denied sub nom., 652 So. 2d 817 (Fla. 1995).

140. *Abramson v. Florida Psychological Association*, 634 So. 2d 610, 612 (Fla. 1994), reversing, 610 So. 2d 447 (Fla. 1st DCA 1992).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

This grant of authority satisfies the separation of powers provision of the Florida Constitution.<sup>145</sup> In a Harris Act settlement, any departure from existing statutory requirements must "protect the public interest served by" the underlying statute, and it must provide no more than "the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."<sup>146</sup> These criteria constitute the "minimal standards and guidelines"<sup>147</sup> necessary to prevent governmental entities from "acting through whim, favoritism, or unbridled discretion."<sup>148</sup>

Though general in nature, these standards are valid and adequate. The supreme court has held that the specificity of standards provided by the Legislature "may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards."<sup>149</sup> Given the complexity and technical nature of the situations which may arise under Harris Act claims and the number and diversity of the state, regional, and local governmental entities charged with implementing the measure, the Harris Act presents a situation which is "not conducive to specific, detailed instructions from the Legislature."<sup>150</sup> While general, these standards nevertheless "are susceptible of legal interpretation based upon the facts of a given case."<sup>151</sup> Accordingly, they satisfy the requirements of the non-delegation doctrine.

Even if the statutory standards are deemed inadequate for separation of powers purposes, the courts have recognized an exception to the nondelegation doctrine which would apply. This exception applies when the statutory delegation involves exercise of the police power to regulate a business operated as a privilege rather than a right.<sup>152</sup> In such situations, it is not essential that the statute include a specific standard for the exercise of discretion. Instead, the governmental action is limited by a standard of reasonableness.<sup>153</sup>

---

145. FLA. CONST. art. II, § 3. Like its predecessors, this provision incorporates the no n-delegation doctrine into the state's organic law. See, e.g., *State v. Atlantic Coast Line Ry. Co.*, 47 So. 969, 976 (Fla. 1908) (The Legislature "may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law.") (emphasis added).

146. FLA. STAT. § 70.001(4)(d)1-2 (1995).

147. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

148. *In re Advisory Opinion to the Gov.*, 509 So. 2d 292, 311 (Fla. 1987).

149. *Id.*

150. *Bigler v. Department of Banking & Fin.*, 368 So. 2d 449, 450-51 (Fla. 1st DCA 1979), *aff'd*, 394 So. 2d 989 (Fla. 1981).

151. *Safer v. City of Jacksonville*, 237 So. 2d 8, 12 (Fla. 1st DCA 1970).

152. *Apalachee Regional Planning Council v. Brown*, 546 So. 2d 451, 452 (Fla. 1st DCA 1989), *aff'd*, 560 So. 2d 782 (Fla. 1990).

153. *Department of Bus. Reg. v. Jones*, 474 So. 2d 359, 362 (Fla. 1st DCA 1985), *rev. denied*, 484 So. 2d 8 (Fla. 1986).

The regulated activities being addressed under the Harris Act fall within that exception. In *Apalachee Regional Planning Council v. Brown*,<sup>154</sup> the First District Court of Appeal applied this exception to fee-setting for review of developments of regional impact (DRIs) because the DRI law "serves as a control of the privileges of land development which is potentially dangerous to the citizens of more than one county."<sup>155</sup> The court characterized the DRI process as a dynamic one, requiring "a large degree of flexibility and expertise due to a myriad of variables,"<sup>156</sup> which make precise statutory standards unrealistic.<sup>157</sup>

Similarly, the regulated activities addressed by the Harris Act involve land development. Governmental entities, in their adherence to the Harris Act, will be faced with a wide range of issues regarding the application of many statutory measures to many owners. The "complexity and needed flexibility inherent in the [regulation of land development] as it applies to individual applicants is too pronounced to be practicably placed within the scope of legislative responsibility."<sup>158</sup> Therefore, in implementing the pre-suit settlement provisions of the Harris Act, governmental entities would be subject to a rule of reasonableness in the absence of valid minimal standards and guidelines.

Of course, there are legal obstacles to be negotiated along the path of pre-suit settlement. For example, any settlement must be structured to avoid claims of contract zoning.<sup>159</sup> It also must accord all interested parties a modicum of procedural due process, especially in situations which do not require judicial review.<sup>160</sup> While this provision is an important remedy under the Harris Act, it is distinct from the judicial remedy provided elsewhere in the statute and constitutes a separate means for achieving resolution of land use disputes.<sup>161</sup>

As a practical matter, the situations in which these aspects of the pre-suit settlement provision will be implicated will be rare precisely because one of the standards is that the settlement "protect the public interest served by" the statute, rule, regulation, or ordinance at issue in the Harris Act claim.<sup>162</sup> While this provision is intended to open new options for creative problem solving, this standard will constrain governmental entities in settling Harris Act claims.

---

154. 546 So. 2d 451, 452 (Fla. 1st DCA 1989), *aff'd*, 560 So. 2d 782 (Fla. 1990).

155. *Id.* at 453.

156. *Id.*

157. *Id.*

158. *Id.*

159. See Robert M. Rhodes, Terry E. Lewis & James C. Hauser, *Contract and Conditional Zoning: The Not So Dubious Distinction*, 56 FLA. B.J. 263 (Mar. 1982).

160. See Callies, *supra* note 132, at 879-95.

161. See *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 214 (Fla. 1968).

162. FLA. STAT. § 70.001(4)(d)1 (1995).

#### d. Ripeness Decision

Also during the 180-day notice period, unless the landowner accepts the settlement offer, the governmental entity must provide the landowner with a written "ripeness decision."<sup>163</sup> The Harris Act does not prescribe the form or specific contents of the ripeness decision, but it sets forth the general requirement that the ripeness decision "identif[y] the allowable uses to which the subject property may be put" under the applicable regulations of the issuing governmental entity.<sup>164</sup>

The ripeness decision is intended to permit the landowner to go directly to circuit court after the expiration of the 180-day notice period, rather than having to pursue other administrative remedies.<sup>165</sup> This procedural device was deemed an essential feature of the Harris Act because the issue of ripeness goes to whether the court has subject matter jurisdiction to hear a claim and, in the takings context, has become a major source of frustration for landowners.<sup>166</sup>

Under the prudential doctrine of ripeness in the land use setting, compensation claims are not within the court's subject matter jurisdiction until the governmental "authority has determined the nature and extent of the development that will be permitted" on the subject property.<sup>167</sup> The drafters of the Harris Act concluded that, for an owner to have a meaningful judicial remedy under the Act if a settlement were not reached during the 180-day notice period, the issue of ripeness should not be allowed to impede the owner's subsequent request for judicial relief.<sup>168</sup> Thus, the drafters came up with the requirement for a ripeness decision.<sup>169</sup>

---

163. *Id.* § 70.001(5)(a).

164. *Id.*

165. *Id.* Significantly, the Harris Act provides that "the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section." *Id.* (emphasis added). Thus, a ripeness decision in response to a Harris Act claim will not necessarily satisfy the ripeness requirements for other types of actions, specifically for a civil action alleging a taking without just compensation.

166. *E.g., Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir. 1989).

167. *Eide v. Sarasota County*, 908 F.2d 716, 721 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991); see also *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

Florida courts have adopted federal doctrine on ripeness. *E.g., Glisson v. Alachua County*, 558 So. 2d 1030, 1034 (Fla. 1st DCA), rev. denied, 570 So. 2d 1304 (Fla. 1990). For a comprehensive review of federal and state ripeness cases in a regulatory taking context, see Taylor v. Village of North Palm Beach, 20 Fla. L. Weekly D1831 (Fla. 4th DCA Aug. 16, 1995).

168. FLA. STAT. § 70.001(5)(a) (1995).

169. This provision is intended to preclude Kafkaesque situations such as the ping-pong judicial proceedings involving Richard and Anne Reahard of Lee County, Florida. Reahard v. Lee County, United States District Court for the Middle District of Florida, No. 89-227-CIV-FTM-10C. In the period leading up to enactment of the Harris Act, the Reahard case had a profound effect on Florida landowners' perceptions about the efficacy of existing judicial remedies for their grievances. *Id.*

In 1989, the Reahards sued Lee County for taking their property by designating it a Resource Protection Area under the Lee County Comprehensive Plan. *Id.* The lawsuit was filed

The requirements that the governmental entity make a settlement offer and identify the uses to which property may be put is intended to change the way regulators deal with land use issues. The Act is intended to shift the focus 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 could accommodate an owner's wishes while achieving the public policy objectives of underlying statutes, rules, ordinances, or regulations applied to the owner's real property.<sup>170</sup>

## 2. Commencement and Conduct of a Civil Action

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 180 days after filing the written claim.<sup>171</sup> The court will decide whether the landowner is entitled to compensation,<sup>172</sup> and, if so, a jury will decide the amount.<sup>173</sup>

### a. Jurisdiction and Venue

The Harris Act specifies that the claim must be brought in circuit court, and there is no minimum jurisdictional amount.<sup>174</sup> Venue for this proceeding is the county where the real property is located.<sup>175</sup>

in state circuit court. *Id.* It was removed to United States District Court on the motion of Lee County. *Id.* A federal magistrate determined that the Reahards had exhausted their state administrative remedies and concluded that the claim was ripe for federal court disposition. *Id.* A jury awarded the Reahards \$700,000 plus accrued interest. *Id.*

Lee County appealed. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). Reversing the trial court, the United States Court of Appeals for the Eleventh Circuit held that the magistrate had misapplied the test for regulatory takings. *Id.* at 1134. The Eleventh Circuit then issued an addendum opinion, instructing the magistrate to address the issue of ripeness. *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir. 1992).

On remand, the magistrate again held that all state remedies had been exhausted and reinstated the jury verdict. *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994). Again, Lee County appealed. *Id.* Again, the Eleventh Circuit reversed the trial court, holding that state administrative remedies had not been exhausted. *Id.* at 1418. Again, the Eleventh Circuit remanded the case, this time with directions to remand the case to the state circuit court from which it had been originally removed. *Id.*

The Reahards' petition for writ of certiorari to the United States Supreme Court was denied. *Reahard v. Lee County*, 115 S. Ct. 1693 (1995).

170. The Harris Act ripeness process fulfills at least one of the functions of the judicial ripeness policy by recognizing that regulatory decisions are subject to change based on input from various and competing interests, and thus provides for administrative or political resolution of disputes. See *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 525 (Fla. 4th DCA 1994).

171. FLA. STAT. § 70.001(5)(a), (b) (1995).

172. *Id.* § 70.001(6)(a).

173. *Id.* § 70.001(6)(b).

174. *Id.* § 70.001(5)(b).

175. *Id.*

b. Joinder

The landowner must serve the complaint on the head of each governmental entity making a settlement offer and ripeness decision.<sup>176</sup> This provision contemplates that each governmental entity whose actions contributed to the alleged inordinate burden had received a copy of the claim during the notice period, either by election of the landowner or at the instigation of a governmental entity.<sup>177</sup>

c. Determination of Inordinate Burden

In the action, the court first must determine whether there has been an existing use or a vested right to a specific use of the real property. Second, the court must determine whether an existing use or vested right has been "inordinately burdened" by the governmental action.<sup>178</sup>

In determining whether the governmental action constitutes an inordinate burden, the court must consider and apply the standards set forth in the Harris Act as well as the governmental entity's settlement offer and ripeness decision.<sup>179</sup>

A governmental entity may avail itself of the opportunity to put its last, best offer forward in the settlement offer and ripeness decision. This is intended to allow the governmental entity to relieve an inordinate burden and perhaps avoid litigation. If litigation ensues, it affords the governmental entity an opportunity to present the court with an offer perhaps more reasonable than the initial governmental action. Accordingly, the determination to be made by the court, in effect, is whether the last, best offer by the governmental entity, if accepted, would constitute an inordinate burden.

If the actions of more than one governmental entity are at issue, and the entities are parties to the proceeding, the court must apportion responsibility among them.<sup>180</sup> Significantly, the apportionment must occur before the valuation issue is addressed.<sup>181</sup> The Harris Act expressly provides that the apportionment must not be on a Pro Rata basis, but rather on the basis of "the percentage of responsibility each such governmental entity bears with respect to the inordinate burden."<sup>182</sup>

---

176. *Id.*

177. See *supra* text accompanying notes 5-29.

178. FLA. STAT. § 70.001(6)(a) (1995).

179. *Id.* In determining whether there has been an inordinate burden, only the final settlement offer and ripeness decision are admissible; proposed settlement offers, ripeness decisions, and negotiations are inadmissible for these purposes. *Id.* § 70.001(6)(c)3.

180. *Id.* § 70.001(6)(a).

181. *Id.*

182. *Id.*

#### d. 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.<sup>183</sup> The circuit court may stay the proceedings during the pendency of the interlocutory appeal, but the statute expressly provides that a stay is not automatic upon the filing of an interlocutory appeal.<sup>184</sup>

If the governmental entity prevails in the interlocutory appeal, then the action is at an end, and the landowner must pay the governmental entity's attorney's fees and costs under conditions specified by the statute.<sup>185</sup> If the governmental entity does not prevail in the interlocutory appeal, the circuit court is directed to award the landowner his attorney's fees and costs incurred in the interlocutory appeal.<sup>186</sup> In addition, the landowner will receive prejudgment interest on his compensation for the period of delay occasioned by the interlocutory appeal.<sup>187</sup>

#### e. Attorney's Fees and Costs

Attorney's fees and costs are recoverable from the governmental entity if the landowner prevails on the liability issue, whether in the first phase of the proceeding or on appeal, if the circuit court finds the governmental entity did not make a Bona Fide offer which would have resolved the landowner's claim during the 180-day notice period.<sup>188</sup>

Among other things, this standard requires the circuit court to determine whether the governmental entity acted in good faith in making its settlement offer.<sup>189</sup> However, the court is not required to evaluate the terms of the settlement offer from the perspective of the landowner or otherwise.<sup>190</sup> If more than one governmental entity is responsible for the inordinate burden, the award of attorney's fees and costs shall be appor-

---

183. *Id.*

184. But see Fla. R. App. P. 9.310(b)(2) (providing for automatic stay upon appeal by a government agency).

The Harris Act contains language that arguably contradicts the authority of the court to proceed with the compensation phase of the proceeding notwithstanding an interlocutory appeal. It states that the court is to impanel a jury to determine compensation "following the resolution of any interlocutory appeal." FLA. STAT. § 70.001(6)(b) (1995). This phrase should be read as meaning the circuit court must proceed with the compensation phase following an interlocutory appeal in favor of the landowner, unless that phase has otherwise been commenced during the pendency of the appeal.

185. FLA. STAT. § 70.001(6)(c)2 (1995).

186. *Id.* § 70.001(6)(c)1.

187. *Id.* § 70.001(6)(b) (providing that the landowner will receive "prejudgment interest from the date the claim was presented to the governmental entity or entities") (emphasis added).

188. *Id.* § 70.001(6)(c)1.

189. *Id.*

190. *Id.*

tioned among them on the basis of their percentage of responsibility for the inordinate burden.<sup>191</sup>

This provision does not address the prospect that the landowner would prevail after rejecting a Bona Fide settlement offer; in that situation, the landowner would have to pay his own attorney's fees and costs, unless there was another basis for an award by the court.<sup>192</sup>

If the governmental entity prevails on the liability issue in the first phase of the proceeding or through an appeal, it may recover attorney's fees and costs from the landowner.<sup>193</sup> In that situation, the Harris Act specifies that the governmental entity or entities shall receive attorney's fees and costs if

the property owner did not accept a bona fide settlement offer, including the ripeness decision, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.<sup>194</sup>

In this circumstance, the court must determine whether the governmental entity acted in good faith in making its settlement offer.<sup>195</sup> However, unlike the situation when the landowner prevails, when determining an award of attorney's fees and costs after the governmental entity has prevailed, the circuit court also must determine whether the settlement offer "reasonably would have resolved the claim fairly to the property owner."<sup>196</sup> In other words, it must evaluate the terms of the settlement offer. In doing so, it may utilize only information available to both parties during the 180-day notice period;<sup>197</sup> thus, new information developed by the governmental entity or landowner for purposes of the litigation may not be utilized by the court to evaluate the terms of the settlement offer for purposes of determining an award of attorney's fees and costs.

The Harris Act does not authorize an award of attorney's fees and costs to a prevailing governmental entity if it did not make its settlement

---

191. The Harris Act does not address an award of attorney's fees and costs to a prevailing landowner where one of two or more governmental entities responsible for the inordinate burden made a settlement offer in good faith but another did not. In that circumstance, one solution would be to award the landowner the proportion of her attorney's fees and costs attributable to the governmental entity which did not act in good faith, based on the percentage of its responsibility for the burden. See *id.* § 70.001(6)(a), (b).

192. See *id.* § 70.001(6)(c).

193. *Id.* § 70.001(6)(c)2.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* 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 attorney's fees and costs. *Id.* § 70.001(6)(c)3.

offer in good faith or if it offered, on the basis of information then available, settlement terms which would not have fairly resolved the matter.<sup>198</sup> In those circumstances, the governmental entity will absorb its own attorney's fees and costs.

These provisions increase the importance of the decisions made by the parties during the 180-day notice period; they create powerful incentives for the governmental entity to make a fair settlement offer and for the landowner to take it. Because of the high cost of litigation, both landowning and governmental clients will be more likely to engage in a dispassionate analysis of a Harris Act claim.

#### f. Determination of Compensation

If the court determines that the governmental action has inordinately burdened the landowner's property, it must impanel a jury for the second phase of this bifurcated proceeding.<sup>199</sup> The jury must determine the compensation to be awarded to the landowner.<sup>200</sup>

The Harris Act prescribes the measure of the landowner's damages as follows:

The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities.<sup>201</sup>

In fixing compensation, the jury may not consider any business damages suffered by the landowner; however, the Harris Act requires a reasonable award of prejudgment interest from the date the claim was presented for purposes of initiating the 180-day notice period.<sup>202</sup>

Because the Harris Act requires the award of compensation to take into account the settlement offer and ripeness decision,<sup>203</sup> compensation is not necessarily calculated on the basis of the governmental entity's original action, but rather with respect to the last, best offer of the governmental entity.<sup>204</sup> Thus, the landowner's appraisal utilized at the outset of the 180-

---

198. *Id.* § 70.001(6)(c)2.

199. *Id.* § 70.001(6)(b).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

day notice period will not necessarily address all the issues which the jury will weigh in determining compensation.

### 3. Final Judgment

The Harris Act contemplates that any determination and valuation issues will be concluded in a final judgment entered by the court.<sup>205</sup> The court is given specific responsibilities to ensure that both the governmental entity and the landowner receive their intended benefits.<sup>206</sup>

#### a. Court's Authority To Grant Relief

The court may enter "any orders necessary to effectuate the purposes of" the Harris Act and has broad authority to make final determinations to effectuate the relief available under the Harris Act.<sup>207</sup> This authority is important for the resolution of litigated claims, implementation of pre-suit settlements, and upholding any pre-suit settlements against collateral attacks.

#### b. Rights Acquired by the Governmental Entity

By operation of law, the government entity which pays the compensation receives the right, title, and interest in rights of use for which compensation is paid.<sup>208</sup> The governmental entity may hold, sell, or otherwise dispose of these development rights.<sup>209</sup> When the court has awarded compensation, it will determine the form and recipient of the rights and the terms of their acquisition.<sup>210</sup>

### C. Limitations and Exceptions

The seemingly broad sweep of the Harris Act is deceptive because the new judicial remedy is subject to limitations and exceptions which will curtail its use in practice.

#### 1. As-Applied Challenges Only

The Harris Act authorizes compensation only for as-applied challenges to governmental actions. This limitation can be seen in several provisions.<sup>211</sup> For example, the statement of legislative intent makes clear that the Harris Act provides compensation "when a new law, rule, regulation,

---

205. *Id.* § 70.001(6)(c)3.

206. *Id.* § 70.001(7)(a).

207. *Id.*

208. *Id.* § 70.001(7)(b).

209. *Id.*

210. *Id.*

211. *Id.* 70.001(1), (9), (11), (12).

or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."<sup>212</sup>

Accordingly, the Harris Act may not be used to bring a facial challenge to a statute, rule, regulation, or ordinance; the governmental entity must specifically apply the statute, rule, regulation, or ordinance to the owner's property in order for the owner to have a Harris Act claim.

As discussed in the working group which drafted the legislation, there are many examples of governmental action which may restrict or limit existing uses or a vested right to a specific use and therefore provide a basis for Harris Act relief. These include downzoning, application of a new coastal construction control line to restrict development, imposition of upland preservation requirements to protect wildlife habitats, and land use restrictions to protect wellfields.

## 2. Federal Programs

The Harris Act does not apply to actions by any governmental entity otherwise covered when it is exercising the powers of the United States or its agencies through a formal federal delegation.<sup>213</sup> Accordingly, actions by the Florida Department of Environmental Protection based on implementation of portions of the federally delegated National Pollutant Discharge Elimination System (NPDES) program are not subject to relief under the Harris Act.<sup>214</sup> If the federal government delegates the authority to administer the section 404 wetlands permitting program to the states,<sup>215</sup> state action under this permitting program arguably would be exempt from Harris Act claims.

## 3. Temporary Impacts

Under the Act, temporary impacts to land do not constitute an inordinate burden for which the governmental entity must provide compensation to the owner.<sup>216</sup> Therefore, the adverse effects of a valid, time-limited moratorium would not be actionable under the Harris Act.

This exception also creates an opportunity for a governmental entity to avoid paying the owner compensation for an action which constitutes an inordinate burden, so long as the burden is promptly removed from the owner's property. Of course, if the burden amounted to a taking under

---

212. *Id.* § 70.001(1) (emphasis added).

213. *Id.* § 70.001(3)(c).

214. *Id.* § 403.0885; *id.* § 403.08851.

215. 33 U.S.C. § 1251 (1988); see also Martin R. Dix & Scott Denson, Florida's Assumption of Federal Dredge and Fill Jurisdiction: Clearing the Permitting Stream Bed or Muddying Administrative Waters, 67 FLA. B.J. 56 (Apr. 1993).

216. But see *First English Evangelical Lutheran Church v. of Los Angeles*, 482 U.S. 304 (1987) (holding compensable under the Fifth Amendment temporary regulatory takings which deny a landowner all use of his property).

constitutional standards, the governmental entity would still be required to compensate the owner.<sup>217</sup>

#### 4. Public Nuisances at Common Law and Noxious Uses

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 a noxious use of private property."<sup>218</sup> This exception is one of the principal provisions intended to ensure that the Harris Act does not bring an end to Florida's efforts to protect its environment and manage its growth. Because the exception is couched in elastic terms, its scope will be the subject of continuing discussion and litigation.

The portion of the exception grounded on public nuisance is dynamic because the common law is "not a fixed body of well-defined rules embodied in the written records of this or the mother country, but is rather a method of juristic thought or manner of treating legal questions worked out from time to time by the wisdom of mankind."<sup>219</sup> As the Florida Supreme Court has opined with respect to the common law, "its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands."<sup>220</sup> Thus, this is not a static exception embracing only those public nuisances at common law as of the effective date of the Harris Act, but rather an exception for those activities which are now or will come to be understood in the future as public nuisances.<sup>221</sup>

A public nuisance is an unreasonable interference with a right common to the general public.<sup>222</sup> A public nuisance "violates public rights, subverts public order, decency, or morals, or causes inconvenience or damage to the public generally."<sup>223</sup> By contrast, private nuisances are torts that involve the invasion of an interest in the private use or enjoyment of land, whether intentional or not.<sup>224</sup> Thus, this exception to the Harris Act may be invoked if the activity which is the subject of the governmental action violates a right or interest of the general public.<sup>225</sup>

---

217. *Id.*

218. FLA. STAT. § 70.001(3)(e) (1995).

219. *Orr v. State*, 176 So. 510, 513 (Fla. 1937).

220. *State v. Egan*, 287 So. 2d 1, 7 (Fla. 1973).

221. The Legislature has statutorily declared numerous uses or activities to be a public nuisance.

222. BLACK'S LAW DICTIONARY 1230 (6th ed. 1990).

223. *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972).

224. *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So. 2d 382, 384 (Fla. 1953).

225. The Legislature has supplemented judicial determinations of public nuisances with statutory declarations of public nuisances. FLA. STAT. § 125.563(2) (1995) (altering lake shores and levels by dumping and similar activities); *id.* § 161.052 (coastal construction without permit); *id.* § 316.077(4) (signage in certain locations); *id.* § 327.53(7) (discharging raw sewage from vessels); *id.* § 335.092(3)(a) (signage within 500 feet of Everglades Parkway); *id.*

A "noxious use of private property" is one which does not necessarily rise to the level of a public nuisance, although it has the potential to inflict injury upon the community. It has commonly been used to describe odiferous activities which may constitute a public nuisance,<sup>226</sup> as well as activities akin to private nuisances.<sup>227</sup> And, of course, it was used in early takings cases to describe land uses whose proscription was not compensable under some circumstances.<sup>228</sup>

Taken together, these terms and the case law which has given them meaning do not establish a clearly defined exception. Instead, they provide commonly accepted guideposts for determining land uses and activities which may be subjected to an inordinate burden without compensation under the Harris Act.

### 5. Relief Under the Harris Act

---

§ 339.241(3) (maintaining junkyards within 1,000 feet of federal-aid highway); *id.* § 370.15(5)(e) (unattended shrimp traps in public areas); *id.* § 372.98(4) (possessing or selling nutria without license); *id.* § 373.433 (stormwater management system in violation of rules); *id.* § 386.041(1) (listed conditions injurious to health); *id.* §§ 388.011(9), .291(3) (conditions which breed mosquitoes and flies in annoying numbers); *id.* § 479.105(1) (unpermitted signs adjacent to state or federal highway); *id.* § 514.06 (operation of swimming pool in violation of law); *id.* § 550.255 (horse and dog racing for prizes without pari-mutuel license); *id.* § 585.15 (pest or disease of animals under state rules); *id.* § 593.116(3) (cotton plants not destroyed a fter notice of assessment); *id.* § 823 (bonfires, diseased animals, houses of ill repute, improperly discarded white goods, smoke in elevators, derelict vessels, sale of controlled substances or obscene materials, releasing unsterilized cats and dogs from shelters).

Thus, one issue in construing this Harris Act exception is whether it includes statutory public nuisances. At least one state court has opined that a legislature by statute may "change the common law as to nuisances, and may move the line either way, as to make things nuisances which were not so, or to make things lawful that were nuisances." *Commonwealth v. Parks*, 30 N.E. 174, 175 (1892) (emphasis added). Under this theory, statutorily declared public nuisances become part of the common law of nuisance. Conversely, an argument can be made that the reference to a "public nuisance at common law" excludes statutorily defined nuisances under principles of statutory construction. Ultimately, the issue may be academic because this exception also reaches "noxious uses of private property."

226. E.g., *Farrugia v. Frederick*, 344 So. 2d 921, 922-23 (Fla. 1st DCA 1977) (upholding denial of permit to construct canal because waters would become stagnant and noxious); *Lee v. Florida Pub. Utils. Co.*, 145 So. 2d 299, 300 (Fla. 1st DCA 1962) (calling fumes expelled by diesel-powered electrical generating units noxious).

227. E.g., *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954) (cemeteries and funeral homes located in residential areas); *Mercer v. Brown*, 190 So. 2d 610 (Fla. 1st DCA 1966) (maintaining animal reduction plants); *Bunyak v. Clyde J. Yancey & Sons Dairy, Inc.*, 438 So. 2d 891 (Fla. 2d DCA 1983) (maintaining cesspools); *Town of Surfside v. County Line Land Co.*, 340 So. 2d 1287 (Fla. 3d DCA 1977), cert. denied, 352 So. 2d 175 (Fla. 1977) (failing to control garbage dump).

228. In early takings cases, the terms nuisance and noxious use were often used interchangeably. E.g., *Reinman v. Little Rock*, 237 U.S. 171, 172 (1915) (livery stable); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (brewery). However, takings cases should not necessarily be relied upon to determine the scope of this exception to the Harris Act, section 70.001(9), Florida Statutes, so this authority is of limited value in determining the scope of this exception.

Impacts to real property caused by governmental action to grant relief under the Harris Act do not constitute an inordinate burden on another landowner's property.<sup>229</sup> This exception is intended to encourage governmental entities to grant relief to a landowner without concern that doing so will result in a Harris Act claim by another landowner who contends the relief granted to the first landowner amounts to an inordinate burden on the second landowner's property.

## 6. Mediation and Alternative Dispute Resolution

The Harris Act expressly provides that it is not intended to supplant or preclude any form of alternative dispute resolution (ADR) that may be agreed to by the parties and is lawfully available for resolution of a claim.<sup>230</sup> For example, arbitration, mediation, and other alternatives to litigation are still available, and "governmental entities are encouraged to utilize such methods to augment or facilitate" the availability of relief under the Harris Act.<sup>231</sup> The most logical opportunities for doing so would be during the 180-day notice period.

## 7. Transportation

The Harris Act does not apply to governmental actions which involve operating, maintaining, or expanding transportation facilities.<sup>232</sup> Furthermore, the Act does not affect existing law regarding eminent domain relating to transportation.<sup>233</sup>

The Florida Statutes define "transportation facility" as "any means for the transportation of people and property from place to place which is constructed, operated, or maintained in whole or in part from public funds."<sup>234</sup> The statutes have also defined it as "the property or property rights, both real and personal, of a type used for the establishment of public transportation systems which have heretofore been, or may hereafter be, established by public bodies for the transportation of people and property from place to place."<sup>235</sup>

Accordingly, aside from not disturbing the law of eminent domain as it relates to public acquisition of right-of-way for a highway, the Harris Act would not apply to such governmental actions as the grant or denial of access permits to state roads under the State Highway System Access Man-

---

229. FLA. STAT. § 70.001(9) (1995).

230. *Id.* § 70.001(8).

231. *Id.*

232. *Id.* § 70.001(10).

233. *Id.*

234. *Id.* § 334.03(31). This definition is applicable to the Florida Transportation Code. *Id.* § 334.03.

235. *Id.* § 163.566(11). The accompanying definition of "public transportation" refers to common carriers such as trains and buses. *Id.* § 163.566(8).

agement Act.<sup>236</sup> Depending upon the circumstances, similar regulatory actions by local governments could be exempt from Harris Act claims.

#### 8. Statute of Limitations

In order for a subsequent cause of action to be brought in circuit court, a 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.<sup>237</sup> If a landowner elects to take advantage of lawfully available 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.<sup>238</sup>

#### 9. Sovereign Immunity

Under the doctrine of sovereign immunity, the state, its agencies, and its political subdivisions may not be sued absent a waiver of the doctrine by statute or constitutional amendment.<sup>239</sup> A waiver must be clear, specific, and unambiguous.<sup>240</sup> The Harris Act expressly authorizes lawsuits against governmental entities<sup>241</sup> and thus constitutes a limited waiver of sovereign immunity.

The Harris Act provides that it is not intended to affect the sovereign immunity of government.<sup>242</sup> This provision should be construed as meaning only that, by enactment of the Harris Act, the Legislature has not waived or otherwise affected the doctrine of sovereign immunity except to the extent that the Harris Act authorizes claims to be brought against the state, its agencies, and its political subdivisions. This provision should not be construed to impose additional statutory requirements beyond those in the Harris Act.

#### 10. Grandfathering

Finally, and most significantly, the Harris Act is strictly a forward-looking measure,<sup>243</sup> with an effective date of October 1, 1995.<sup>244</sup> It applies

---

236. *Id.* §§ 335.18-.188.

237. *Id.* § 70.001(11).

238. *Id.*

239. *Arundel Corp. v. Griffin*, 103 So. 422, 424 (Fla. 1925); *McWhorter v. Pensacola & A.R. Co.*, 5 So. 129 (Fla. 1888).

240. *Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1978).

241. See FLA. CONST. art. X, § 13. Although the Harris Act does not use the phrase "waives its sovereign immunity" or similar language, it expressly authorizes an owner who has met certain conditions precedent to "fil[e] an action under this section against a governmental entity." FLA. STAT. § 70.001(4)(a) (1995).

242. *Id.* § 70.001(13).

243. The statement of legislative intent expressly provides that it addresses only situations involving "a new law, rule, regulation, or ordinance." *Id.* § 70.001(1) (emphasis added).

only to specific actions of a governmental entity based on a statute enacted after the final adjournment of the Legislature on May 11, 1995,<sup>245</sup> or a rule, regulation, or ordinance adopted after that date. Governmental 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 not subject to claims under the Harris Act.<sup>246</sup>

An action based on a subsequent amendment to a grandfathered statute, rule, regulation, or ordinance may be a basis for a Harris Act claim, but "only to the extent that the application of the amendatory language imposes an inordinate burden apart from" the grandfathered statute, rule, ordinance, or regulation.<sup>247</sup>

This provision provides perhaps the most significant and, for landowners, the most controversial limitation regarding the availability of this new remedy. It is intended to prevent application of the Harris Act to governmental actions based on environmental protection and growth management programs which predate May 11, 1995, on the ground that they were put into place by government agencies in the expectation that landowners would be owed compensation for adverse regulatory decisions only if those decisions rose to the level of a constitutional taking.<sup>248</sup>

The more problematic aspect of this exception is the limitation which authorizes compensation awards on the basis of post-May 11, 1995 amendments to pre-May 11, 1995 statutes, rules, regulations, or ordinances.<sup>249</sup> Applying this provision in practice is likely to prove difficult.

244. *Id.* § 6. Even before it became legally effective, the Harris Act was the subject of great interest in the legal community, including the courts. *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1173 n.4 (Fla. 4th DCA 1995); *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1182 n.2 (Fla. 4th DCA 1995).

245. The term "enact" as employed in the Harris Act means final passage by both houses of the Legislature in the identical form. Thus, the final act in a bill becoming a law—signature by the Governor or the expiration of the requisite time period without veto—is not necessary in order for an enactment to be excluded from the purview of the Harris Act under this exception. In the legislative process, when a bill is ordered enrolled following final passage by both houses, the first line of the title, "A bill to be entitled," is removed, leaving the measure to read, "An act relating to . . ." See FLA. STAT. § 11.07 (1995). The measure is then transmitted to the Governor, whose role is to determine whether the act should become a law.

Several references in the Florida Constitution to the process of enactment support this conclusion. See, e.g., FLA. CONST. art. III, § 9 (laws shall take effect 60 days after final adjournment "of the session of the legislature in which enacted"); id. art. V, § 2(a) (court rules "may be repealed by general law enacted by two-thirds vote" of both chambers).

References in the Florida Statutes also support this conclusion. See, e.g., FLA. STAT. § 1.04 (1995) ("[a]mendments enacted during the same session"); id. § 11.075 ("[p]rior to the enactment of any general or special law"); id. § 11.076(1) ("[a]ny general law, enacted by the Legislature"); id. § 11.242(5)(c) (general laws "enacted by any current session of the Legislature"); id. § 11.242(5)(i) (expired, obsolete, invalid and other laws omitted by reviser's bills "enacted by the Legislature").

246. FLA. STAT. § 70.001(12) (1995).

247. *Id.*

248. *Id.*

249. *Id.*

#### D. Intent and Construction

In light of the unique purposes and intent of the Harris Act, a court should not necessarily construe it using the case law regarding takings claims under the United States and Florida constitutions if the governmental action does not rise to the level of a taking.<sup>250</sup> In addition, the Harris Act is distinct from section 2 of the legislation, which establishes a non-judicial settlement and expedited hearing procedure.<sup>251</sup> The two are not necessarily to be construed in *pari materia*.<sup>252</sup>

#### E. Summary

The Harris Act creates a new judicial remedy for landowners that, in some respects, bears a striking resemblance to existing remedies under the law of takings. Each case will be an *ad hoc*, fact-intensive inquiry to determine whether a particular governmental action intrudes too far into the landowner's domain. When it does, compensation will be due.

In all likelihood, however, the chief effect of the Harris Act will not be an explosion of litigation or a rash of damage awards. Rather, it will produce a sense of caution on the part of the regulators who are entrusted with the responsibility of protecting Florida's environment and managing its growth. That was the intention of the new law's legislative sponsors.<sup>253</sup> Already there is evidence that the Harris Act has had that effect, both among state agencies<sup>254</sup> and local governments.<sup>255</sup> The Harris Act was not intended to chill all new regulation, but careful consideration should be given to whether the Harris Act is implicated in proposed governmental actions. In a period of public skepticism about government action, such consideration ought to help restore confidence in Florida's regulatory system.

---

250. *Id.* § 70.001(9).

251. For a discussion on the non-judicial settlement and expedited hearing procedure, see *infra* part IV.

252. FLA. STAT. § 70.80 (1995).

253. James Martinez, *New Law Will Let Property Owners Sue State Over Regulatory Losses*, TALL. DEM., May 19, 1995, at B1, B2 (quoting Rep. Dean Saunders, D., Lakeland, as saying: "I think folks are ready for government to think twice before they just adopt a regulation. That's part of the intention here--to think about the impact you could potentially have on a property owner.").

254. The Department of Environmental Protection delayed plans, at least temporarily, to declare certain waters in Collier County as Outstanding Florida Waters (OFW) with a heightened degree of regulatory protection. Emma Ross, *State Stills Wiggins Water Protections*, NAPLES DAILY NEWS, Aug. 7, 1995, at D1. It cited a need to consider the implications of the Harris Act on the OFW designation, even though the new law was not in effect. *Id.*

255. In Palm Beach County, for example, local officials scaled down an ambitious plan to utilize regulatory measures to prevent development of certain farmlands in western Palm Beach County. George Bennett, *Ag Reserve Buyout Plan Cut in Half*, PALM BEACH POST, June 14, 1995, at B1. They blamed the Harris Act in part for forcing their retreat, even though the new law was not yet in effect. *Id.*

#### IV. FLORIDA LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION ACT

Section 2 of the 1995 property rights legislation is the Florida Land Use and Environmental Dispute Resolution Act (Special Master Law).<sup>256</sup> The Special Master Law attempts to resolve growth management and environmental permitting disputes at the state, regional, and local levels by establishing an informal, nonjudicial settlement and expedited hearing procedure overseen by a neutral third party.<sup>257</sup> The Special Master Law provides a landowner with an opportunity for negotiated relief and an impartial advisory hearing in disputes involving adverse consequences from a decision on a "development order" or an "enforcement action" by a "governmental entity."<sup>258</sup> This new procedure integrates aspects of other ADR processes together into a new form of proceeding.<sup>259</sup>

The Special Master Law is based on the 1993 recommendations of the Governor's Property Rights Study Commission II<sup>260</sup> and typifies the increasing reliance on ADR techniques to address controversies involving land use and environmental regulation.<sup>261</sup> Unlike the Harris Act, the Special Master Law may be invoked in disputes arising from decisions based on statutes, rules, ordinances, or regulations predating May 11, 1995.<sup>262</sup>

##### A. Definitions

As with the Harris Act, the Special Master Law's definitions for particular terms are crucial for understanding the scope of this measure. Again, however, the two measures are intended to be interpreted and applied by their own terms and are not necessarily to be construed in *pari materia*.<sup>263</sup>

##### 1. Development Order

---

256. FLA. STAT. § 70.51 (1995).

257. *Id.* For a critique of the "colonization" of ADR by the legal profession, see Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR," 19 FLA. ST. U. L. REV. 1 (1991). For an alternative view, see James J. Alfani, Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?, 19 FLA. ST. U. L. REV. 47 (1991).

258. FLA. STAT. § 70.51(3) (1995).

259. For a discussion of some of the practice issues raised by this hybrid process, see Michael K. Lewis, The Special Master as Mediator, 12 SETON HALL LEGIS. J. 75 (1988); Lawrence E. Susskind, Court-Appointed Masters as Mediators, 1 NEGOTIATION J. 295 (1985).

260. Fla. Exec. Order No. 93-150 (June 4, 1993).

261. For a discussion of the ADR procedures adopted for the local comprehensive planning program, see *infra* text accompanying notes 2-96.

262. See FLA. STAT. § 70.51 (1995).

263. *Id.* § 70.80. This statement of legislative intent may prove problematic when it comes to a term which receives an identical definition in both statutes. Compare *id.* § 70.001(3)(g) with *id.* § 70.51(2)(g) (definition of "land").

A "development order" means any order or notice of proposed agency action which grants, grants with conditions, or denies an application for a "development permit."<sup>264</sup> Rezoning of a specific parcel of land is expressly included; however, actions by state agencies and local governments relating to comprehensive plan amendments are excluded.<sup>265</sup>

## 2. Development Permit

A "development permit" means any "building permit, zoning permit, subdivision approval, certification, special exception, variance," or other action of local government, as well as any permit under state law which authorizes the development of real property.<sup>266</sup> This definition is based upon the definition of the same term in section 163.3164(8), Florida Statutes, but is expanded to include permits issued by state and regional agencies.<sup>267</sup>

## 3. Development

The Special Master Law does not define the term "development." Therefore, the definition of development set forth in section 380.04, Florida Statutes, should be applied in this context.<sup>268</sup> However, for two reasons the exclusions from that definition should not be applied in the context of the Special Master Law.<sup>269</sup> First, the exceptions are expressly intended to apply "for [the] purpose of this chapter," meaning Chapter 380, Florida Statutes.<sup>270</sup> Second, the Legislature intended the Special Master Law to serve a remedial purpose and be liberally construed to that end.<sup>271</sup>

## 4. Owner

An "owner" means a person with a legal or equitable interest in real property who filed an application for a development permit and received a development order.<sup>272</sup> It also means one who holds legal or equitable title to real property which is the subject of an enforcement action.<sup>273</sup> A person may include a natural person, firm, association, joint venture, partner-

---

264. Id. § 70.51(2)(a).

265. Id.

266. Id. § 70.51(2)(b).

267. See id. § 163.3164(8) (defining development as "the carrying out of any building a cavity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels").

268. See id. § 380.04.

269. Id. § 380.04(3).

270. Id.

271. Id. § 70.51(29).

272. Id. § 70.51(2)(d).

273. Id.

ship, estate, trust, business trust, syndicate, fiduciary, corporation, or other group or combination.<sup>274</sup>

Unlike the Harris Act, the definition of "owner" in the Special Master Law expressly includes a person with an equitable, as opposed to a legal, interest in land.<sup>275</sup> Furthermore, governmental entities are not expressly excluded. Accordingly, a school board could request a special master proceeding on a land use decision by a local government with regulatory authority over land.

### 5. Governmental Entity

The Special Master Law does not include the United States or any federal agency as a "governmental entity."<sup>276</sup> Therefore, a landowner cannot request a special master proceeding from a federal agency such as the U.S. Environmental Protection Agency. On the other hand, unlike the Harris Act, the Special Master Law does not expressly carve out an exception for actions by state, regional, or local governmental entities when acting under a formal delegation of federal powers.<sup>277</sup>

### 6. Land or Real Property

The term "land" or "real property" means land and "includes any appurtenances and improvements to the land, including any other relevant real property in which the owner had a relevant interest."<sup>278</sup> This definition is identical to the Harris Act's definition;<sup>279</sup> however, it is broader in scope because the definition of owner in the Special Master Law reaches both legal and equitable interests in land.<sup>280</sup> Therefore, the definition of land in the Special Master Law should be interpreted to encompass the owner's entire property, meaning relevant land in which the owner has either a legal or equitable interest, and any structure or improvement on the land, regardless of whether it customarily would be regarded as part of the real property.

### 7. Enforcement Action

The Special Master Law does not define the term "enforcement action," but the definition should encompass actions by state, regional, and local government agencies to enforce environmental protection and growth management laws as well as the terms of individual development

---

274. *Id.* § 1.01.

275. Compare *id.* § 70.51(2)(d) with *id.* § 70.001(3)(f).

276. *Id.* § 70.51(2)(f).

277. See *id.* § 70.001(3)(c).

278. *Id.* § 70.51(2)(g).

279. See *supra* text accompanying notes 6-3.

280. FLA. STAT. § 70.51(2)(d) (1995).

orders. Because, as a matter of law, the definition of "governmental entity" does not exclude state, regional, or local governmental entities exercising federally delegated authority,<sup>281</sup> an action by a state, regional, or local agency enforcing a federally delegated program could be the basis for a special master proceeding.

#### 8. Unreasonable or Unfairly Burdens

Unlike the Harris Act, which provides an ample, if flexible, definition for the operative legal standard,<sup>282</sup> the Special Master Law does not define the term "unreasonable or unfairly burdens" which must be applied by the special master to determine a landowner's rights.<sup>283</sup> Deliberately opting to omit a definition of the term, the drafters chose to rely on the common sense judgment of the special master selected by the parties themselves.

The Special Master Law does identify factors the special master may use to determine whether a development order or an enforcement action is unreasonable or unfairly burdens an owner's property.<sup>284</sup> These factors are 1) the history of the property; 2) the history of development and use of the property; 3) the history of land use and environmental controls on the property; 4) the present nature and extent of the property; 5) the reasonable expectations of the owner; 6) the public purpose to be achieved by the development order or enforcement action at issue; 7) the uses authorized for and restrictions imposed on similar property; and 8) any additional relevant information.<sup>285</sup>

In the event a settlement is not voluntarily reached by the parties, the special master may consider the above factors when determining whether a development order or enforcement action is unreasonable or unfairly burdensome.<sup>286</sup> Such a determination will necessarily require a balancing process.

### B. Initiation of Proceeding

A landowner who believes a development order or enforcement action is unreasonable or unfairly burdensome may apply for relief under the Special Master Law.<sup>287</sup>

#### 1. Conditions Precedent

---

281. *Id.* § 70.51(2)(f).

282. *Id.* § 70.001(3)(e).

283. *Id.* § 70.51(2).

284. *Id.* § 70.51(18).

285. *Id.* § 70.51(18)(a)-(g). This list is not inclusive.

286. *Id.* § 70.51(17)(b).

287. *Id.* § 70.51(3).

Prior to requesting relief from a local government development order, the landowner must exhaust all local administrative appeals so long as they do not take longer than four months.<sup>288</sup> If the local administrative appeal takes longer than four months, the landowner may apply for relief four months after commencement whether or not the local administrative appeal has been concluded.<sup>289</sup>

## 2. Request for Relief

In order to commence a special master proceeding, the statute requires that the landowner file a request for relief with the appropriate governmental entity.<sup>290</sup> The filing is intended to be a simple action without the trappings of most legal proceedings.

### a. Filing the Request

The owner must file a written request for relief with the appointed or elected head of the governmental entity.<sup>291</sup> The request must be filed within thirty days after receipt of the development order or notice of the governmental action at issue.<sup>292</sup> No filing fee may be charged, and the governmental entity is required to participate in the proceeding if one is requested.<sup>293</sup>

### b. Contents of Request

The Special Master Law specifies the bare-bones information which must be included in the request.<sup>294</sup> This information includes 1) a brief statement of the owner's proposed use of his land; 2) a summary of the development order or description of the enforcement action, including a copy of the development order or documentation of the enforcement action, such as a notice of violation; 3) a brief statement of the impact of the development order or enforcement action "on the ability of the owner to achieve the proposed use of the property"; and 4) a certification showing on whom copies of the request have been served.<sup>295</sup>

Although the statute does not require it, sound practice would include submitting a copy of the development permit application, if one exists, with the request for relief. Furthermore, an owner would be well-served by submitting carefully selected information showing how the governmental action is unreasonable or unfairly burdens the property.

---

288. *Id.* § 70.51(10)(a).

289. *Id.*

290. *Id.* § 70.51(4).

291. *Id.*

292. *Id.* § 70.51(3).

293. *Id.* § 70.51(4), (11).

294. *Id.* § 70.51(6)(a)-(d).

295. *Id.*

### c. Effect of Request for Relief

Initiation of a special master proceeding tolls the time to seek judicial review of local development orders and enforcement actions.<sup>296</sup> This filing also tolls the time to seek an administrative hearing under section 120.57, Florida Statutes, for those agency actions subject to the Administrative Procedure Act.<sup>297</sup> As a consequence, entities should amend their ordinances and rules regarding the availability of such judicial and administrative relief to indicate the effect of a request for relief under the Special Master Law.

### 3. Waiver of Rights

In any proceeding involving a development order or enforcement action, initiation of judicial review by a landowner will waive all rights under the Special Master Law.<sup>298</sup> A landowner's petition for an administrative proceeding pursuant to section 120.57, Florida Statutes, whether formal or informal, also waives the landowner's rights under the Special Master Law.<sup>299</sup>

In either circumstance, however, another party to the development order or enforcement action proceeding could request judicial review or a section 120.57 proceeding without foreclosing the opportunity for the landowner to request relief under the Special Master Law.<sup>300</sup> Although perhaps counter-intuitive and certainly unusual, such a situation would be within the legislative intent to provide this form of relief for landowners.

### 4. Parties and Participants

The Special Master Law sets up two categories of those who may present their interests for consideration in a special master proceeding. They are "parties" and "participants."<sup>301</sup>

#### a. Parties

The parties to the proceeding include the landowner and the governmental entity.<sup>302</sup> The landowner may name more than one governmental entity in the request for relief if the burden is the result of multiple development orders.<sup>303</sup>

---

296. Id. § 70.51(10)(a).

297. Id. § 70.51(10)(b); id. § 120.57.

298. Id. § 70.51(10)(a).

299. Id. § 70.51(10)(b).

300. Id.

301. Id. § 70.51.

302. Id. § 70.51(11).

303. Id. § 70.51(3).

The special master may join additional governmental entities as parties to the proceeding at the request of the landowner or the governmental entity, if the action at issue is the culmination of a process involving more than one governmental entity or if it is necessary for a complete understanding of the issues.<sup>304</sup> A governmental entity joined to the proceeding by the special master must participate in both the mediation and the hearing, if one is held.<sup>305</sup> A governmental entity joined to the proceeding by the special master must also file a response to the landowner's request for relief.<sup>306</sup>

#### b. Participants

Others may participate in the proceeding within limited bounds.<sup>307</sup> The governmental entity must forward a copy of the landowner's request to the owners of contiguous real property and certain persons who participated in proceedings leading up to the development order or the enforcement action.<sup>308</sup> These persons may request status as participants at the hearing, if one is held, within twenty-one days of receiving a copy of the request.<sup>309</sup> In order to be accepted as a participant, such a person must demonstrate that he is "substantially affected" by the subject matter of the proceeding.<sup>310</sup> The special master ultimately must determine whether a prospective participant satisfies this statutory requirement.<sup>311</sup>

Such persons will not be classified as parties or intervenors if accepted into the proceeding.<sup>312</sup> As a result, they may address only issues regarding alternatives to the development order or enforcement action as the alternatives might affect the persons' substantial interests.<sup>313</sup>

### 5. Selection of Special Master

The first and most important step after submission of the request for relief is the selection of the special master. The statute sets forth several

---

304. *Id.* § 70.51(11).

305. *Id.* ("requiring that those governmental entities so joined shall actively participate in the procedure").

306. *Id.* § 70.51(16)(b).

307. *Id.* § 70.51(12).

308. *Id.* § 70.51(5).

309. *Id.* § 70.51(12).

310. *Id.*

311. A body of case law has developed around this standard as it is utilized in Chapter 120, Florida Statutes, for determining access to rule challenge proceedings under the Administrative Procedure Act. See *id.* §§ 120.54(4), .56. For an in-depth discussion on access to rule challenge proceedings, see Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 *FLA. ST. U. L. REV.* 967 (1986).

312. *FLA. STAT.* § 70.51(12) (1995).

313. *Id.*

requirements which must be met but leaves important questions undressed.<sup>314</sup>

a. Jointly Selected

Within ten days of receiving a request for a special master proceeding, the governmental entity must agree with the landowner on the special master who will conduct the proceeding.<sup>315</sup> The Special Master Law does not provide guidance on how the parties are to select a special master or from what pool of candidates. The working group which prepared the legislation concluded that it was better to leave these decisions to each governmental entity and landowner. In addition, the Special Master Law does not contain a default procedure for selection of a special master if the parties cannot agree. Fortunately, the Special Master Law is flexible enough to allow the parties to agree on a default procedure.<sup>316</sup>

b. Qualifications

The statute sets forth only minimal qualifications for service as a special master.<sup>317</sup> Qualifications include being a Florida resident and possessing both experience and expertise in mediation.<sup>318</sup> In addition, one must possess both experience and expertise in at least one of the following disciplines: "land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same."<sup>319</sup>

## 6. Response to Written Claim

The governmental entity is required to file a response to the request setting forth the public purpose of the regulations on which the development order or enforcement action is based.<sup>320</sup> A response may include a request to be dropped from the proceeding.<sup>321</sup> The special master has authority to decide such a request.<sup>322</sup> In addition, the special master may dismiss a request for relief for failing to set forth the required informa-

---

314. *Id.* § 70.51(2)(c).

315. *Id.* § 70.51(4).

316. After failure to agree, one alternative to be considered is agreement on criteria for selection of a special master, with the selection performed by a neutral organization, such as the Florida Conflict Resolution Consortium at Florida State University, using those criteria.

317. FLA. STAT. § 70.51(2)(c) (1995).

318. *Id.*

319. *Id.* Under a grant from the Florida Department of Community Affairs, the Florida Conflict Resolution Consortium has initiated a training program for persons seeking to serve as special masters. The Consortium will maintain a directory of persons who have completed its training program.

320. *Id.* § 70.51(16)(a).

321. *Id.* § 70.51(16)(c).

322. *Id.*

tion.<sup>323</sup> However, in that circumstance, the special master must allow the party to file an amended request.<sup>324</sup>

### C. Conduct of the Proceeding

A special master proceeding has two phases;<sup>325</sup> as a result, the special master has dual roles. The first phase consists of mediation, during which the special master is required to serve as a mediator and facilitator to assist the parties in attempting to settle the dispute voluntarily and without resort to civil or administrative litigation.<sup>326</sup>

In the second phase, which arises if the parties do not reach a settlement, the special master serves as a neutral information-gatherer.<sup>327</sup> After receiving information from the parties and other participants at a public hearing, he must make a nonbinding advisory determination as to whether the development order or enforcement action at issue is unreasonable or unfairly burdens the landowner's property and, if so, may recommend remedies.<sup>328</sup>

In keeping with the settlement-oriented nature of the proceeding, the actions or statements of all persons in both phases of the proceeding are evidence of an offer to compromise.<sup>329</sup> Therefore, such actions are inadmissible in any subsequent judicial or administrative proceeding regarding the subject matter of the dispute.<sup>330</sup> The governmental entity may adopt procedural guidelines for the conduct of special master proceedings;<sup>331</sup> however, those guidelines should not compromise the fundamental fairness of the proceeding.

#### 1. Facilitation and Mediation

Because the Special Master Law expressly refers to the first phase of the proceeding as "mediation,"<sup>332</sup> the permissible techniques and procedures in this phase may be determined by reference to mediation practice.<sup>333</sup>

---

323. *Id.* § 70.51(8).

324. *Id.*

325. *Id.* § 70.51(17)(a), (b).

326. *Id.* § 70.51(17)(a).

327. *Id.* § 70.51(17)(b).

328. *Id.*

329. *Id.* § 70.51(20).

330. *Id.*; see also *id.* § 90.408.

331. *Id.* § 70.51(28). The Florida Conflict Resolution Consortium, under its contract with the Department of Community Affairs, has produced Model Procedural Guidelines for use by governmental entities in implementing the Special Master Law.

332. *Id.* § 70.51(17)(a). For the statutory definition of "mediation," see *id.* § 44.1011(2).

333. In authorizing mediation in various judicial proceedings, the Legislature set forth important statutory policies regarding the conduct of court-ordered mediation. See *id.* § 44.102. The law expressly confers judicial immunity on mediators. *Id.* § 44.107. The Florida Supreme

The Special Master Law contains virtually no procedural requirements for the mediation phase. Each party must be represented at the mediation by someone with authority to bind the principal or to recommend a settlement directly to those with authority to make a binding decision.<sup>334</sup> The statute gives the special master broad latitude to structure the mediation as the exigencies require.<sup>335</sup> The statute does not even prescribe when the mediation must occur in relation to the hearing, so it is conceivable that a special master could conduct a mediation and, if a settlement does not result, conduct a hearing at a later date, or the special master could conduct the hearing prior to the mediation in order to resolve factual issues as the basis for a mediated settlement.

## 2. Hearing

The special master must conduct a hearing on the dispute no more than forty-five days after receiving the request for relief, unless the parties have settled or agreed to a different date.<sup>336</sup> The special master must provide notice of the place, date, and time of the hearing.<sup>337</sup> The hearing must be held in the county where the property is located.<sup>338</sup> Because of its information-gathering function, there are additional statutory requirements which the special master must follow while controlling and directing the hearing.<sup>339</sup>

In all respects, the hearing is to be informal and should not require the services of an attorney.<sup>340</sup> The parties are expected to bring to the hearing "those persons qualified by training or experience necessary to address issues raised by the request or by the special master and further qualified to address alternatives, variances, and other types of modifications to the development order or enforcement action."<sup>341</sup> The hearing must be open to the public.<sup>342</sup>

The special master has specific powers intended to assure that all relevant information is brought to the hearing.<sup>343</sup> At any time he may require a party or participant to provide additional information.<sup>344</sup> The special

---

Court has also established important procedural requirements. See FLA. R. CIV. P. 1.700-.750.

334. FLA. STAT. § 70.51(17)(a) (1995). The authority of the governmental entity's representative is an important factor in determining procedural constraints in the mediation phase. See *News-Press Pub. Co. v. Lee County*, 570 So. 2d 1325, 1326 (Fla. 2d DCA 1990).

335. FLA. STAT. § 70.51(17) (1995).

336. *Id.* § 70.51(15)(a).

337. *Id.* § 70.51(15)(b).

338. *Id.* § 70.51(15)(a).

339. *Id.* § 70.51(17).

340. *Id.* § 70.51(17).

341. *Id.* § 70.51(13).

342. *Id.* § 70.51(17).

343. *Id.*

344. *Id.* § 70.51(7).

master may subpoena "any nonparty witnesses in the state whom the special master believes will aid in the disposition of the matter."<sup>345</sup> By requesting relief under the Special Master Law, the owner consents to inspection of his property by the special master and the parties.<sup>346</sup>

#### D. Special Master's Recommendation

No later than fourteen days after the hearing, the special master is required to submit a written recommendation to the parties.<sup>347</sup> The special master's recommendation is a public record.<sup>348</sup>

##### 1. Settlement

If the parties agree to settle during the mediation or afterward, the special master must incorporate the settlement in his written recommendation.<sup>349</sup> In that circumstance, no additional findings, determinations, or recommendations by the special master are required by the statute, although the hearing may suggest additional proposals the special master may wish to submit to the parties.

##### 2. Without Settlement

If the parties do not agree to settle, the special master must make a written determination as to whether the development order or enforcement action is unreasonable or unfairly burdens the owner's property.<sup>350</sup> If the circumstances warrant, the special master is expressly required to make the determination on the basis of the development order or enforcement action at issue "in combination with the actions or regulations of other

---

345. *Id.* § 70.51(14). The provision granting subpoena power to a special master is vague compared to the grant to hearing officers of the Division of Administrative Hearings. Compare *id.* § 120.58(1) with *id.* § 70.51(14). That provision sets forth prerequisites for issuance of a subpoena and provides for payment of fees to certain subpoenaed experts. *Id.* § 120.58(1)(a), (c). The Special Master Law would be improved by the addition of such provisions.

346. *Id.* § 70.51(9).

347. *Id.* § 70.51(19). The statute does not expressly require that a copy of the written recommendation be provided to participants, but sound practice and fundamental fairness strongly suggest that they also receive a copy.

The statute does require that the special master provide a copy of his recommendation to the Florida Department of Legal Affairs. *Id.* § 70.51(27).

348. *Id.* § 70.51(20); see *id.* § 119.07.

349. *Id.* § 70.51(19)(c). In a circuit court mediation in Florida, by contrast, the settlement agreement is not necessarily submitted to the court and made public. FLA. R. CIV. P. 1.730(b). In a family mediation in Florida, a settlement must be filed with the court. FLA. R. CIV. P. 1.740(f).

350. FLA. STAT. § 70.51(19)(a) (1995). This provision is an important difference from that concerning court-ordered mediation in Florida. See FLA. R. CIV. P. 1.730(a) ("The mediator shall report the lack of agreement to the court without comment or recommendation.").

governmental entities."<sup>351</sup> This provision reflects the reality that the full consequences of one governmental entity's regulatory actions sometimes are fully felt by a landowner only in concert with those of another governmental entity.

### 3. Evaluation of Information Produced at Hearing

The Special Master Law contains seemingly conflicting provisions regarding the standard to be applied in evaluating the information produced at the hearing. One passage of the Special Master Law requires the special master to consider "any ... information produced at the hearing."<sup>352</sup> Another passage requires the special master to limit his consideration to "information determined relevant by the special master."<sup>353</sup>

This apparent inconsistency is resolved by the requirement that the special master "weigh all information offered at the hearing."<sup>354</sup> This last provision indicates that the special master should accept all information submitted during the proceeding regardless of relevancy concerns and use it in attempting to facilitate a settlement; but, in formulating a written recommendation in the absence of a settlement, the special master may give weight only to relevant information.<sup>355</sup> Among other things, this construction negates the need for the application of rules of evidence, which in any event are not authorized by the Special Master Law and are inconsistent with the notion of an informal proceeding not requiring counsel.<sup>356</sup>

### 4. Recommendation

If the special master determines after the hearing that the development order or enforcement action is not unreasonable or does not unfairly burden the property, the recommendation must be that it remain undisturbed.<sup>357</sup> Although no further action or recommendation by the special master is required by the statute, the special master may wish to submit

---

351. FLA. STAT. § 70.51(19)(a) (1995). This provision does not confine the special master to considering only formal development orders or enforcement actions of other governmental entities when assessing the combined effect of multiple governmental actions. It is consistent with the liberal standard for joinder of additional governmental entities. *Id.* § 70.51(11) ("when a complete resolution of all relevant issues would require the active participation of more than one governmental entity").

However, the other governmental actions or regulations must be those of governmental entities that are parties to the special master proceeding. *Id.* § 70.51(18) (special master is to consider the development order or enforcement action "in conjunction with regulatory efforts of other governmental parties.") (emphasis added).

352. *Id.* § 70.51(17)(b).

353. *Id.* § 70.51(18)(h).

354. *Id.* § 70.51(17)(c).

355. *Id.* § 70.51(18)(h).

356. *Id.* § 70.51(17).

357. *Id.* § 70.51(19)(a).

proposals to the parties on the basis of information produced at the hearing.

On the other hand, if the special master determines that the development order or enforcement action is unreasonable or unfairly burdens the property, the special master may recommend "one or more alternatives that protect the public interest served by the development order or enforcement action" but reduce the burden on the property.<sup>358</sup> Such a recommendation may be made only with the consent of the landowner.<sup>359</sup>

The Special Master Law suggests ten options which are to be considered in proposing relief for the landowner.<sup>360</sup> They include 1) an adjustment of land development or permit standards controlling the use of the land; 2) increases or modifications in the density, intensity, or use of development areas; 3) transfer of development rights; 4) land swaps or exchanges; 5) mitigation, including payments instead of on-site mitigation; 6) location on the least sensitive portion of the property; 7) conditions on the amount of development or use permitted; 8) a requirement that issues be addressed more comprehensively than the use or uses immediately proposed; 9) issuance of a development order, variance, special exception, or other form of extraordinary relief, including withdrawal of an enforcement action; or 10) public purchase of the owner's property or acquisition of a less-than-fee-simple interest in it.<sup>361</sup> The special master is not limited to proposing only those remedial steps on the statutory menu.

##### 5. Effect of Recommendation

A determination that the development order or enforcement action is unreasonable or an unfair burden on the owner's property may serve as an "indication of sufficient hardship" for purposes of a variance, special exception, or other relief.<sup>362</sup> This effect of the recommendation is not dependent upon the governmental entity's response.

A special master's recommendation also may serve as data and analysis to support a comprehensive plan amendment, but it alone will not necessarily determine whether the amendment is in compliance as defined in

---

358. *Id.* § 70.51(19)(b).

359. *Id.* § 70.51(19)(b). In light of the short time periods allowed by the statute, the special master should ask the landowner to make this election at hearing in the event that a settlement is not reached.

360. *Id.*

361. *Id.* § 70.001(4)(c). This list of potential remedies is almost identical to the remedies proposed for consideration by the governmental entity and the landowner under the Harris Act during the 180-day notice period. *Id.* § 70.001(4)(c). See *supra* note 0 and accompanying text. The special master's recommendation must be consistent with existing statutes, rules, regulations, and ordinances. See Dep't of Comm'y Aff., CS for HB 863 (1995) Staff Analysis 4 (May 15, 1995) (on file with Dept.).

362. FLA. STAT. § 70.51(25) (1995).

section 163.3184(1)(b), Florida Statutes.<sup>363</sup> If an amendment to the local comprehensive plan is necessary to implement the recommendation of a special master, the amendment will not be subject to the twice yearly limitation when a local government may adopt plan amendments.<sup>364</sup> Further, the amendment may be adopted pursuant to the streamlined adoption process set forth in section 163.3184(16), Florida Statutes, to implement a comprehensive plan compliance agreement.<sup>365</sup>

### E. Disposition of Recommendation

Upon receipt of a special master's recommendation, the governmental entity has several duties which are intended to bring the proceeding to a close, either by implementation of a settlement or official actions which are intended to ripen the controversy for judicial review.<sup>366</sup>

#### 1. Consistency with Existing Law

Unlike the Harris Act, which authorizes a departure from the specific terms of existing laws so long as the departure is consistent with the underlying statutory purpose, the resolution of a dispute through the Special Master Law must be consistent with applicable growth management and environmental protection laws.<sup>367</sup> The statute specifies that implementation of a settlement, whether as originally recommended by the special master or as subsequently modified by the governmental entity, must be "in the ordinary course and consistent with the rules and procedures of that governmental entity."<sup>368</sup> This limitation applies whether the disposition would involve implementation of a settlement or a recommendation by the special master in the absence of a settlement.<sup>369</sup>

---

363. Id. § 70.51(26); see id. § 163.3184(1)(b).

364. Id. § 70.51(26).

365. See id. § 163.3184(16).

366. Id. § 70.51(21).

367. Compare id. § 70.001(4)(d) with id. § 70.51(21).

368. Id. § 70.51(21)(a)-(b). Thus, the governmental entity's ordinary procedural requirements would apply to implementation of a settlement. For example, if the dispute involved a rezoning by a local government and the settlement called for an alteration of the rezoning a condition by addition or deletion of a condition, a new development order would have to be adopted to implement the settlement. That new development order would be subject to normal procedural requirements. See, e.g., *Board of County Comm'rs v. Snyder*, 627 So. 2d 469 (Fla. 1993).

This aspect of the Special Master Law ensures that, prior to implementation of a settlement, the general public as well as affected persons will have access to governmental decisionmakers, and that the matter will receive appropriate scrutiny. Specifically, it assures the same amount of due process that neighboring landowners or citizens' groups otherwise would receive and cures any concerns regarding the flexibility or informality of either the mediation or information-gathering phases of the proceeding.

369. However, an owner need not "duplicate previous processes in which the owner has participated in order to effectuate" a decision by the local government to grant a modification,

## 2. Responsibility of Governmental Entity

Within forty-five days of receipt of a special master's recommendation, the governmental entity must confer with any other involved government entities and either accept, modify, or reject the special master's recommendation.<sup>370</sup> An acceptance or modification may be implemented by development agreement or other action.<sup>371</sup> A failure to act on the recommendation within forty-five days constitutes a rejection of the recommendation unless the landowner agrees to an extension.<sup>372</sup>

If the governmental entity accepts the recommendation or modification but the landowner rejects that action or if the governmental entity rejects the recommendation, within thirty days after such a decision the governmental entity is required to issue a written decision describing all uses available on the property.<sup>373</sup> This action is intended to ripen the owner's claim for purposes of judicial review.<sup>374</sup> Whether or not the local government issues the written decision on uses, the landowner may file a civil action as soon as the governmental entity acts on the special master's recommendations.<sup>375</sup>

### F. Limitations

There are important limitations on the availability of a special master proceeding. First, it is available only in as-applied challenges.<sup>376</sup> Second, it is not available to an owner who contests an action of either state or local governmental entities regarding an amendment to a local comprehensive plan.<sup>377</sup> Third, it is available as of right only for development orders or enforcement actions on or after October 1, 1995.<sup>378</sup> Fourth, it is not intended to replace or supplant other lawfully available ADR methods.<sup>379</sup>

---

variance, or special exception as recommended by a special master. FLA. STAT. § 70.51(21)(a) (1995).

370. Id. § 70.51(21). Within 15 days of its decision of its disposition of the recommendation, the governmental entity must notify the Florida Department of Legal Affairs in writing. Id. § 70.51(27).

371. See Florida Local Government Development Agreement Act, id. §§ 163.3220-.3243.

372. Id. § 70.51(21)(c).

373. Id. § 70.51(22).

374. Id. § 70.51(23). It is described as "the last prerequisite to judicial action" unless the owner initiates a proceeding under section 120.57, Florida Statutes, for agencies subject to the Administrative Procedure Act. Id.

375. Id. § 70.51(24).

376. Id. § 70.51(3).

377. Id. § 70.51(2)(a); See *infra* notes 2-96 and accompanying text.

378. FLA. STAT. § 70.51(3) (1995). However, subject to approval of all parties and the court, the statute allows parties to pending judicial proceedings to utilize the special master procedure to address their dispute, although it does not provide a procedure for doing so. Id. § 70.51(30).

379. Id. § 70.51(29).

The special master proceeding may not last more than 165 days without the consent of all parties.<sup>380</sup> Requesting a special master proceeding is voluntary for the landowner and is not a condition precedent to any other legal proceeding.<sup>381</sup>

### G. Summary

The Special Master Law is a hybrid which combines in a single expedited proceeding some of the attributes of other ADR methods, such as mediation, arbitration, and mini-trials. While the Special Master Law is untested and may require legislative adjustments in the future, it is beyond question that this is a new body in the ADR firmament.

## V. ALTERNATIVE DISPUTE RESOLUTION IN THE CHAPTER 163 PROGRAM

Because the Special Master Law expressly does not cover actions by governmental entities relating to local comprehensive plans,<sup>382</sup> the 1995 property rights legislation creates separate ADR remedies for the comprehensive planning process at both the local and state levels.<sup>383</sup>

The Local Government Comprehensive Planning and Land Development Regulation Act<sup>384</sup> specifies the procedure for public participation in the comprehensive planning process on the local governmental level.<sup>385</sup> Prior to enactment of the new property rights law, there was no state-specified administrative process for a landowner to take issue with a local government's decision not to grant a plan amendment. Section 4 of the legislation requires a local government to provide an opportunity for mediation or other form of ADR when it denies an owner's request for an amendment to the local comprehensive plan.<sup>386</sup> The costs of the ADR will be shared equally by the local government and the owner.<sup>387</sup> If the owner requests mediation, the time for bringing a judicial action will be tolled for 120 days or until completion of the mediation, whichever is earlier.<sup>388</sup>

The property rights law also creates a new ADR process available in a compliance dispute between a landowner and the state land planning agency, the Department of Community Affairs (DCA).<sup>389</sup> Under existing law, the DCA is required to forward to the Division of Administrative Hearings (DOAH) the agency's notice of intent to find a local govern-

---

380. *Id.* § 70.51(23).

381. *Id.* § 70.51(24).

382. *Id.* § 70.51(2)(a).

383. *Id.* § 163.3181(4), .3184(10)(c).

384. *Id.* Ch. 163, pt. II.

385. *Id.* § 163.3181.

386. *Id.* § 163.3181(4).

387. *Id.*

388. *Id.*

389. *Id.* § 5.

ment's comprehensive plan amendment not in compliance with state law.<sup>390</sup> The DOAH then is required to conduct a formal fact-finding hearing in accordance with section 120.57(1), Florida Statutes, with the parties specified to be the DCA, the local government, and any affected person (such as the owner) who intervenes.<sup>391</sup>

Section 5 requires the DCA to afford a prehearing opportunity to mediate or otherwise resolve a dispute involving a notice of intent to find a plan amendment not in compliance.<sup>392</sup> If mediation is requested by any party, the DCA must agree to mediation; the DOAH may not conduct a hearing until the DCA has notified the hearing officer of the results of the mediation.<sup>393</sup> The hearing may not be delayed longer than ninety days under this provision without the consent of the parties.<sup>394</sup> Mediation costs will be borne equally by all parties to the proceeding.<sup>395</sup>

The ADR provisions integrated into Chapter 163 by the property rights law are general.<sup>396</sup> Thus, local governments and the DCA have broad latitude to choose, in conjunction with landowners and other parties, the particular dispute resolution methods to be employed in each case. This freedom should give parties to local planning disputes the opportunity to develop case-specific dispute resolution processes.

## VI. CONCLUSION

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

These new remedies are not radical departures from existing legal doctrine. The Harris Act builds upon common law principles, constitutional decisions, and the tradition of finding an accommodation between public and private interests. The Special Master Law and related mediation provisions for the local planning program draw on the field of ADR to seek remedies short of the expensive and frustrating process of litigation. Together, these efforts represent an attempt to provide new and measured relief for landowners without undermining Florida's landmark environmental protection and growth management laws.

---

390. *Id.* § 163.3184(10)(a).

391. *Id.*

392. *Id.* § 163.3184(10)(c).

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.* § 70.001, 70.51, 70.80, 163.3181(4), 163.3184(10)(c).