Memorandum of Law : Bert Harris Act

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Re: Bert Harris Act
To: Save Guana Now

Bert Harris Act

In 1995, the State of Florida enacted the Bert J. Harris, Jr., Private Property Rights Protection Act, as Chapter 70.001 of the Florida Statutes[i].

Typically, the B. Harris Act applies to downzoning of properties and not to regulations that existed on the effective date of May 11, 1995. See below.

The Harris Act provides a formal process (involving both a dispute resolution period and litigation period) to address and resolve differences between landowners and governments.

The Act provides statutory relief that is supplemental to, but separate from, private property protections under the Florida and U.S. Constitutions. Claims brought under the Harris Act must meet a less stringent standard than the formal finding of a "regulatory taking" of private property under the Florida and U.S. Constitutions (which requires a plaintiff show a loss of all economic use of the property). However, a mere dimunition in value is compensable under the Harris Act, if a Harris Act plaintiff can meet the specific requirements of the Act.

Post 1995 regulations only.

The Harris Act only applies to regulations that are adopted after May 11, 1995.

Inordinate Burden.

Aggrieved property owners must demonstrate that governmental action "inordinately burdens" property.

> "When a specific action of a governmental entity has inordinately burdened:
> an ***existing use*** of real property, or
> a ***vested right to a specific use*** of real property,
> the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section." F.S. 70.001(2).

"*Existing use"* includes uses already approved; and also include future uses if they are "reasonably foreseeable, ***nonspeculative 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."[ii]

"*Nonspeculative*" future uses. Existing uses include "*nonspeculative*" future uses. Whether an anticipated use could ever be proved to be "nonspeculative" is open to debate, but would depend on narrow, specific circumstances. See generally City Nat'l Bank v. Dade Cty., 715 So. 2d 350 (Fla. 3rd DCA) (holding that unapproved site plan was too speculative to be admitted as evidence of damages in eminent domain proceeding). The provision, if applied successfully, will likely benefit those property owners who can establish that similarly situated neighboring properties enjoy development approvals similar to that sought by the owner. R. Weaver, Florida Environmental and Land Use Law "Private Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation" (2001).

"*Vested Rights.*" To establish a vested right, a claimant must prove that:

(1) he or she has made a substantial change in position or incurred substantial obligations or expenses

(2) relying in good faith

(3) on some act or omission of government

(4) such that it would be highly inequitable and unjust to deprive the owner of the interest sought to be protected.

See Hollywood v. Hollywood Beach Hotel, 283 So. 2d 867 (Fla. 4th DCA 1973), rev'd in part, 329 So. 2d 10 (Fla. 1976).

Expressly Excluded Activities.

The Act has several notable exclusions/limitations of interest to local governments, including:

i. **the cause of action created by the Act does not apply to any laws, rules, regulations or ordinances adopted, or formally noticed for adoption, prior to May 11, 1995**, the adjournment date of the 1995 Regular Session of the Legislature.

ii. incremental additions to pre-May 11, 1995 laws are actionable only if the post-May 11, 1995 increment independently constitutes an inordinate burden in its own right;[iii]

iii. the Act only provides recovery for permanent losses or impacts and expressly excludes temporary losses or impacts to real property

iv. the governmental action in question must have been "applied" to the subject real property because the Act does not apply to facial attacks;[iv] An enactment is not actionable until there is "some adverse action by a government entity"

v. the Act only protects direct, not indirect, restrictions and limitations of use;

vi. contiguous neighbors must be given notice of the claim within 15 days of its filing and may be (but are not automatically) allowed to intervene in the settlement of the "claim" negotiations during the 180-day "cooling-off" or "counteroffer" period;

vii. affected governmental entities may take an interlocutory appeal of the court's determination that the challenged action resulted in an inordinate burden. That is, even if the government loses, it can call the process to a halt before damages are awarded by a jury, and

subject the landowner to a lengthy and perhaps expensive appeal process. Landowners, however, may not take an interlocutory appeal from the circuit court's adverse determination.

viii. the landowner must commence a cause of action under the Act within one (1) year after the relevant law or regulation is first applied to the property by the governmental entity. Much longer statutes of limitations govern other property rights causes of action;

ix. the Act expressly excludes relief for cases involving (1) "operation, maintenance or expansion of transportation facilities," or (2) traditional eminent domain laws relating to transportation.

Procedure.

The Act provides a formal process for addressing and resolving differences between landowners and governments, beginning with a dispute resolution period prior to actual litigation. The Act contemplates a dispute resolution negotiation period of 180 days. Only after this phase is concluded does the litigation phase with its attendant costs and fees arise. The judge will then determine liability in a trial, prior to empaneling a jury to determine the amount of damages (diminution in value, plus prejudgment interest). The governmental entity may take a statutory interlocutory appeal of the judge's determination that the government's action has inordinately burdened the property; prior to the jury damages phase of the trial. § 70.001(6)(a), Fla. Stat. However, if the government does not prevail in the interlocatory appeal, it must pay the plaintiff's attorney fees incurred in the interlocutory appeal.

Remedies.

Remedies in the dispute resolution phase include exploring the amount and type of development that is allowed on the property, including any project modifications or different uses upon which both the aggrieved party and the government can agree to such terms.

If the parties cannot agree during the dispute resolution period (180 days) the remedy available under the Harris Act litigation phase is monetary compensation, plus prejudgment interest from the date the claim was presented to the governmental entity. § 70.001(6)(b), Fla. Stat.

The Act's remedies do not reverse, strike or overturn an ordinance or regulation; (i.e., the Act merely provides compensation and does not award or mandate that the local government allow the existing or vested use). Equitable relief is not provided for, and recovery for business damages is expressly disallowed.

If the owner establishes in the circuit court litigation that such an inordinate burden has been caused by the government action at issue, the owner is entitled to the loss in fair market value of the property occasioned by the government action. This amount is determined by a jury.

Attorney's Fees –based on Reasonable Settlement Offer.

Attorney's fees and costs are recoverable by either the property owner or the governmental entity if the court finds that the nonprevailing party failed to accept a reasonable settlement offer. § 70.001(6)(c), Fla. Stat. The government may recover its attorney's fees and costs if it prevails in the action and the judge determines that the settlement offer was reasonable. The owner may recover attorney's fees and costs if the judge determines that the settlement offer did not constitute a bona fide offer that reasonably would have resolved the claim.

Dispute Resolution/Settlement Options

The Act expressly details a list of options for settlement of a claim. § 70.001(4)(c), Fla. Stat. The bases for settlement expressly listed in the Act are as follows:

> (1) An adjustment of land development or permit standards or other provisions controlling the development or use of land.
>
> (2) Increases or modifications in the density, intensity, or uses of areas of development.
>
> (3) The transfer of development rights.
>
> (4) Land swaps or exchanges.
>
> (5) Mitigation, including payments in lieu of onsite mitigation.
>
> (6) Location on the least sensitive portion of the property.
>
> (7) Conditioning the amount of development or use permitted.
>
> (8) A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
>
> (9) Issuance of the development order, a variance, special exception or other extraordinary relief.
>
> (10) Purchase of the real property, or an interest therein, by an appropriate governmental entity.
>
> (11) No changes to the action of the governmental entity.

NOTE: The District Court(s) have rejected settlement agreements that amounted to "sweet heart deals" that allowed applicants to violate the land development code or comprehensive plan. *See, Miami Beach v. Chisholm*, 830 So.2d 842 (Fla. 3rd DCA 2002)[v], upholding a circuit court reversal of a local government approval noting that:

> "the circuit court, in a comprehensive and insightful opinion by Judge Altonaga, **rejected an attempt by a hotel owner and the City of Miami Beach to grant totally unjustified and illegal height variances through the device of a sweetheart**

"settlement" [under Bert Harris Act] ...I of course totally agree with this opinion and thus with the panel's determination to deny review. See *Broward County v. G.B.V. Int'l, Ltd.*, 787 So.2d 838 (Fla. 2001); *Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995).

Endnotes.

[i]Fla. Stat. § 70.001 (1995).

[ii]Fla. Stat. § 70.001(3)(b) (2000).

[iii]Fla. Stat. § 70.001(12) (2000).

[iv]Fla. Stat. § 70.000(3)(d) (2000). The Florida Attorney General, on December 7, 1995, in AGO, 95-78 opined that the Act does not pertain to indirect burdens on a neighbor by government's approval of higher density next door. The Act, he concluded, only compensates for "direct" inordinate burdens and is an exception to sovereign immunity which must therefore be narrowly interpreted.

[v] See also, *Morgran Co. v. Orange County*, 818 So.2d 640, 642-43 (Fla. 5th DCA 2002), *rev. denied,*839 So.2d 699 (Fla.2003); *Chung v. Sarasota County*, 686 So.2d 1358 (Fla. 2d DCA 1996); *Hartnett v. Austin*, 93 So.2d 86, 89 (Fla.1956) (stating that "[t]he adoption of an ordinance is the exercise of municipal legislative power" and that the city exercising this power "cannot legislate by contract").