

# Hopping Green & Sams

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

### **Florida's Landmark Property Rights Legislation**

#### ***A Primer for Private Landowners***

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After three years of debate, the Florida Legislature enacted landmark legislation in 1995 that affords property owners new remedies against government entities that reduce the value of privately owned real property through regulatory decisions. The law – enacted as Chapter 95-181, Laws of Florida, and codified at Chapter 70, Florida Statutes – provides relief for a landowner when State or local government seeks to restrict certain existing or future uses of land, and by doing so diminishes the fair market value of that land. The new law became effective on October 1, 1995. On July 1, 2011, several substantive amendments to the law designed to make the law more user friendly, took effect.

Below, is a general explanation of the Harris Act (as amended in 2011) from the perspective of a private landowner confronted by a governmental action affecting the landowner's real property.

**Q. *What does the property rights law do for me?***

**A.** The measure contains two main parts. Part I, the “Bert J. Harris, Jr., Private Property Rights Protection Act,” creates a new legal remedy in circuit court for regulatory actions by government entities that may not be as extreme as a constitutional "taking" of property when the government takes all or substantially all economically viable use of the property.

Part II, the Florida Land Use and Environmental Dispute Resolution Act, creates a new nonjudicial settlement procedure that a landowner can use, without having to file a lawsuit, in the hope of getting relief from a governmental decision which reduces property value by unfairly or unreasonably restricting the landowner's use of that property.

**Q. *Tell me about the new remedy in circuit court. What interests does it protect?***

**A.** The Harris Act protects a landowner's actual, present use or activity on his property as well as any vested right to a specific use of his property. Importantly, it also protects any reasonably foreseeable future uses for his property. Those future uses are protected if they are not speculative in nature, are suitable for the property, are compatible with adjacent land uses, and have created an existing fair market value in the property which is greater than the fair market value of the actual, present use or activity. For example, a city or county may have to compensate a landowner if it denies him the right to change the use of property from agricultural to residential if it was reasonably foreseeable that the land could be developed in this manner.

**Q. *What governmental actions does this new law protect me against?***

**A.** It protects you against governmental actions which "inordinately burden" your property. The law defines this to mean an action by a State, regional or local government entity which directly restricts or limits the use of your property as a whole so that you are permanently unable to continue or attain one of the protected existing or future uses. It also can mean that you are left with existing or vested uses that are unreasonable in the sense that you permanently bear a disproportionate share of a burden imposed for the public good, which in fairness should be borne by the public at large. For instance, if a portion of a private landowner's property is placed in a permanent conservation easement to ensure that the land is kept in its natural state for the public use or public good, the landowner may be able to receive compensation under the property rights law for the value of the land preserved. "Inordinately burden" is undefined in statute and is left for initial assessment by a Judge and ultimately a jury.

**Q. *Can I use the Bert Harris Act if my land is devalued by a government decision that does not specifically name my property as the subject of that decision?***

**A.** Yes. The Bert Harris act applies to "direct actions of government" that inordinately burden property. The Harris Act requires a landowner to file a claim with the governmental entity within one year of the new rule or regulation being first applied to your property. Following early confusion on what the term "first applied" meant the 2011 amendments to the Harris Act clarified the issue. The 2011 amendments recognize that the impacts to properties from some regulations can be easily determined and known immediately upon enactment while others cannot be known until development (*e.g.*, the impact of a regulation changing building heights from 300' to 50' are known upon enactment while a regulation enacting a setback from wetlands is not known upon enactment and will be known only when the governmental entity views the property and determines the precise location of the wetland.)

Thus, the 2011 amendments clarify that the one-year period to file a claim can begin upon enactment of the regulation if: 1) the impact of the regulation is clear and unequivocal in its terms and 2) specific mailed notice is provided to the landowner by the governmental entity. If notice is not provided, then the regulation is not "first applied" to the property until the landowner's written request for development or variance is denied (which could be many years following the enactment of the regulation). The landowner would then have one year from the denial to file a claim with the governmental entity.

**Q.     *So does that mean any action that diminishes my property values?***

**A.**     The law applies to "a specific action" by a government agency which affects real property. That includes a variety of actions like decisions on permit applications and land use approvals. It does not include a governmental decision that abates or prohibits a public nuisance at common law or any "noxious uses" of private property. This allows government entities to continue to prohibit unreasonable actions and uses of property that injure the public.

**Q.     *What other governmental actions are not covered by this new law?***

**A.**     It does not cover a governmental action based on a statute enacted before the end of the 1995 Regular Session of the Legislature on May 11, 1995, or based on a regulation or ordinance adopted or noticed for adoption prior to that date. It does not alter the existing law of eminent domain as it relates to the operation, maintenance, or expansion of transportation facilities.

**Q.     *What government agencies does it apply to?***

**A.**     It applies to State agencies such as the Department of Environmental Protection (DEP) or the Fish and Wildlife Conservation Commission, regional agencies such as water management districts, and local governments. It does not apply to agencies of the Federal government, and it does not apply to any Federal programs administered by State, regional or local governments in Florida. An example of a Federal program that is administered by the State is the National Pollutant Discharge Elimination System (NPDES) program administered by DEP.

**Q.     *Is this new remedy available if the government entity has its own appeal processes?***

**A.**     Yes. Under Part I, you are not required to exhaust all available administrative remedies before filing a written complaint under the Harris Act.

**Q.     *What do I have to do to bring a lawsuit under this new law, and is there is particular deadline?***

**A.**     The new law requires that you present a formal written claim to the government agency in question within one year of the government decision affecting your property. You have to support your claim with an appraisal that shows you have lost fair market value in the property because of the government's action. The government entity then has 150 days (or 90 days if the property is classified as agricultural pursuant to section 193.461, *Florida Statutes*) to review the matter, and it must make a written offer to respond to your claim. Silence over the requisite time period operates as a denial.

**Q.     *What can the governmental entity offer to do?***

**A.**     The governmental entity may offer to change permit requirements, swap or buy your land, re-arrange development on the site, grant a variance or special exception or take other steps. Alternatively, the entity can choose to stand by its earlier decision. As the landowner, you can accept the government entity's offer and jointly implement it, or you can reject it and bring your lawsuit.

**Q. *What if more than one government entity is causing the problem?***

**A.** The law allows you to commence proceedings against several government entities. All of them have to respond and, if their written offers are not satisfactory, you can sue all of them.

**Q. *What happens if I don't like the government entity's written offer?***

**A.** You can file suit in circuit court. The case then goes to a judge, who decides whether you have a protected existing use or vested right to a specific use and whether your use of your property has been "inordinately burdened." If he decides that it has, a jury will decide how much compensation you are due. The law says you are entitled to receive the difference between the fair market value of your property before and after the governmental action. Those amounts will be determined after testimony by each side's appraisers.

**Q. *Does anyone else have an opportunity to participate in the lawsuit?***

**A.** Yes. After receiving the formal written claim, the government entity must notify everyone who was involved in any administrative proceeding which led up to the government's action and the owners of real property that is contiguous to your property. It also must notify the Attorney General. Those persons and others may intervene in the lawsuit if they meet the legal tests for doing so and persuade the judge to let them participate.

**Q. *Will the government pay my attorneys' fees?***

**A.** If you reject a settlement offer from the government entity and then prevail in court, the judge will award you your costs and attorneys' fees if the judge decides that the settlement offer from the government entity was not a bona fide offer which reasonably would have resolved your claim. On the other hand, if you reject a settlement offer and then the judge rules against you in your lawsuit, the government agency is entitled to have you pay its attorneys' fees and costs if the judge decides the agency's offer was a bona fide offer which reasonably would have resolved your claim. The threat of having to pay the other side's attorneys' fees and cost is intended to be an inducement for the parties to settle.

**Q. *What happens if I win and receive money from the government?***

**A.** Then the government owns whatever rights were in dispute. That's what the government gets in exchange for the money it pays you. It's a forced governmental purchase of those rights which the government agency wouldn't let you use.

**Q. *This new remedy doesn't cover all governmental actions. Why is it good for me?***

**A.** There are two major benefits. First, you no longer have to meet the stringent constitutional requirements to prove that a governmental action has "taken" your property before you can receive compensation. To prove a "taking" you generally have to prove that you have lost all or substantially all profitable use of your property. Under this new remedy, you can receive compensation for

regulatory actions which lessen your property values even if you retain some profitable uses. This is a big benefit for many landowners.

Second, this is the first real response by the Legislature to the steady erosion of property rights that landowners have suffered in recent years due to the increasing burdens created by Florida's environmental protection and growth management programs. Because landowners have this new remedy, government regulators are being much more cautious about expanding or enacting new regulatory requirements. There is ample evidence that local governments are proceeding more cautiously. In some instances, they decided not to adopt new regulations related to historic districts, preservation of open space, and restrictions on commercial projects because their attorneys have advised them they would be vulnerable to suit under the Harris Act.

## **Summaries of Recent Harris Act Cases**

### ***I. Appellate Cases***

#### ***Collier Cnty. v. Hussey, No. 2D13-5078, 2014 Fla. App. LEXIS 9722, 2014 WL 2900934 (Fla. 2d DCA 2014)***

This case stems from an amendment to the Collier County Growth Management Plan referred to as the "Rural Fringe Amendment." Lands were either designated "sending lands" or "receiving lands", and "sending lands" were given greater development and use restrictions based on the heightened environmental value and sensitivity. This amendment resulted in approximately 1000 acres of the Property Owners' land being designated as "sending lands" with new restrictions on development and use. The Property Owners brought suit for damages under the Bert Harris Act, and claimed inverse condemnation due to the "sending lands" designation. During subsequent appeals, the parties entered into a settlement agreement. Section 70.001(4)(d)(2), *Florida Statutes*, requires court approval of a Harris Act pre-suit settlement agreement when it would contravene the application of a statute or regulation. The circuit court denied approval of the settlement agreement because it would result in contravening laws and regulations. The County appealed to the Florida Second DCA.

The Second DCA determined that Bert Harris Act pre-suit settlement procedures in section 70.001(4) were not available to the parties at the time they entered into the settlement agreement in question and affirmed the circuit court's order. The Second DCA found that it was unnecessary to reach the merits of the settlement agreement in this case because the settlement agreement was not entered into in a timely fashion as required by the clear and unambiguous language of the Harris Act. Section 70.001(4), *Florida Statutes*, allows parties to enter in settlement agreements that would otherwise contravene a statute with court approval. The Court held, however, the statute only provides for a limited time period (*i.e.*, that the 180 day pre-suit notice period) in which parties can enter into a settlement agreement that would contravene another statute or regulation. Thereafter, the parties can only enter into settlement agreements that do not contravene a statute or regulation.

***P.I.E., LLC v. DeSoto Cnty.*, 133 So. 3d 577 (Fla. 2d DCA 2014)**

P.I.E., LLC acquired fifty acres of undeveloped land in DeSoto County for sand and shell excavation and future development. The County denied P.I.E.'s permit application for excavation at a hearing on February 27, 2007 by verbal vote. The decision was not reduced to writing until March 28, 2007 when the County adopted Resolution 2007-12. P.I.E. filed its pre-suit claim with the County on March 26, 2008. The circuit court dismissed P.I.E.'s complaint as untimely, deciding that the law was "first applied" on the date of the denial hearing (February 27), not the date of the resolution (March 28). This case centered on the interpretation of section 70.001(11), *Florida Statutes*, which requires a claim be presented within "1 year after a law or regulation is first applied by the government entity to the property at issue."

In reversing the circuit court, the Second DCA determined that, based on the limited record available, the lower court erred in dismissing P.I.E.'s complaint as untimely under the Harris Act. The Second DCA noted that P.I.E. filed its pre-suit claim with the County on March 26, 2008. The circuit court concluded the law was "first applied" on the date of the denial hearing (Feb. 27), not the effective date of the resolution (March 28). DeSoto County maintained that the ordinance was effective as of the date of the vote, whereas P.I.E. asserted that the ordinance was not effective until the date of the adopted resolution. Accordingly, the date in which the decision became effective would determine when the ordinance was "first applied" as prescribed by section 70.001(11), *Florida Statutes*. The court found that the disagreement as to the date the ordinance was "first applied" was a factual dispute, and that dismissal was improper. In remanding, the court noted that the DeSoto County may be able to establish that its ordinances take effect immediately upon voting, and that in such case P.I.E.'s claim would be considered untimely.

***Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27 (Fla. 5th DCA 2013) *reh'g denied* 2013 Fla. App. LEXIS 15009 (Fla. 5th DCA Aug. 15, 2013) (en banc) *review denied* 2014 Fla. LEXIS 1023 (Fla. Mar. 25, 2014)**

Pacetta, a developer, acquired 16 acres of property along the Halifax River in Ponce Inlet to build a mixed use waterfront development. The proposed development required a comprehensive land use plan amendment. Pacetta sued the Town of Ponce Inlet for damages under the Harris Act after the proposed amendment was defeated. Pacetta claimed they had a vested right to build on the property because they formed a beneficial relationship with the Town which led to a belief that the amendment would be approved. In order for Pacetta to prevail under the Harris Act, the property owner must show that the governmental action constituted an inordinate burden to a vested right regarding the use of the property.

The circuit court ruled in favor of Pacetta holding that they had established by equitable estoppel a vested right to have the town include the amendment within its Comprehensive Land-Use Plan. The Fifth DCA reversed the decision determining, as a matter of law, that the circuit court erred in granting Pacetta relief under the Harris Act on the basis of equitable estoppel.

In reversing the circuit court's decision, the Fifth DCA held that Pacetta could not invoke the principle of equitable estoppel because Pacetta could not establish good faith reliance on government action. At the time Pacetta purchased its properties, Ponce Inlet's Comprehensive Land-Use Plan

expressly prohibited the type of development Pacetta proposed. Because town officials lacked the authority to unilaterally amend the Comprehensive Land-Use Plan, Pacetta could not rely in good faith on town officials' assurances that the Comprehensive Land-Use Plan would be amended to allow for Pacetta's development. The Fifth DCA cited section 163.3184(4),(15), *Florida Statutes* (2009), noting the requirement that any proposed changes to Comprehensive Plans are subject to approval by various government agencies. Because of the requirement for public hearings and other government approvals for amendments to Comprehensive Plans, the Fifth DCA further reasoned that recognition of a vested right based solely on assurances from town officials to amend the Comprehensive Land-Use Plan would violate public policy.

***Wendler v. City of St. Augustine*, 108 So 3d. 1141 (Fla. 5th DCA 2013) review denied 122 So. 3d 867 (Fla. 2013)**

The Wendler's purchased several properties in St. Augustine between 1996 and 2008 containing seven residential structures built between 1910 and 1930. A 2005 amendment to a City of St. Augustine ordinance authorized the City's Historic Architectural Review Board (HARB) to deny demolition or relocation of certain historic structures considered "contributing property to a National Register of Historic Places District." The Wendler's filed an application to demolish the existing structures that was denied under the historic structures ordinance on December 5, 2007. The Wendler's filed a Harris Act claim with the City, who made a settlement offer and entered a ripeness decision. The Wendler's rejected the settlement offer and filed a Harris Act claim in circuit court on July 14, 2011. The court found the complaint untimely and dismissed the case with prejudice.

The Fifth DCA, reversed the circuit court and remanded the case for further proceedings. The Fifth DCA held that the clock began to run on the plaintiffs' ability to file a Harris Act claim with the City of St. Augustine and the court when the impact of the government action was readily ascertainable to the owners. The Fifth DCA determined that impact of the amendment was not readily ascertainable to the plaintiffs in 2005 when the ordinance was enacted, but only when the City denied the plaintiff's demolition applications on December 5, 2007.

Section 70.001(11), *Florida Statutes*, requires that a Harris Act claim must be presented within one year from the time the law or regulation is *first applied* by the government entity to the subject property. The question the Fifth DCA sought to answer in its *Wendler* opinion is when the clock on the one-year statute of limitations under section 70.001(11) begins to run. The Fifth DCA looked to its opinion in *Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413 (Fla. 5th DCA 2009). In *Halls River* the Fifth DCA noted that there are instances when the impact of a governmental regulation cannot be determined prior to submission of an actual development plan. In the instant case, the Fifth DCA held that the ordinance in question was not readily ascertainable to the plaintiffs because the ordinance granted the City significant discretion to grant or deny demolition or relocation requests. Because of the City's discretion in granting or denying these requests, the impact of the ordinance was not readily ascertainable to property owners at the time it was granted.<sup>1</sup>

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<sup>1</sup> Note that statutory amendments were adopted in 2011 to address this timing issue. The *Wendler* case interpreted the Harris Act as it existed before these amendments.

Section 70.001(11), *Florida Statutes*, states that if “an owners seeks relief from governmental action through lawfully available or judicial proceedings, the time for bringing an action under [the Harris Act] is tolled until the conclusion of such proceedings.” Given the tolling provision, the Fifth DCA held that the plaintiffs filed their Harris Act claim within the one-year statute of limitation under section 70.001(11), given that only six months had elapsed since the City’s denial of the demolition permit.

***Turkali v. City of Safety Harbor, 93 So. 3d 493 (Fla. 2d DCA 2012)***

Mr. Turkali, a waterfront property owner filed a notice of intent to file an action against the City of Safety Harbor under the Harris Act after the City approved a plan changing the designation of the owner’s property from a retail/office/service designation to single-family residential. The owner alleged that the change in designation significantly diminished the value of his property. The owner attached the required appraisal to the notice of intent to file. When there was no resolution of his claim, the owner filed his complaint, seeking damages for the loss in the value of his property due to the amending of the land use designation. The circuit court dismissed the complaint on two grounds. First, the court determined that as a matter of law the owner could not state a cause of action under the Act without first seeking use of his property for purposes other than single-family residence. Second, the court determined that the appraisal attached to the notice of claim was not a “valid, bona fide” appraisal for purposes of the Act.

The Second DCA held that the circuit court properly dismissed the owner's suit with prejudice. Because the procedures of the Act were negated by a deficient appraisal, which did not provide opinions as to the value of the owner's parcel before and after the enactment of the new restrictions, as required by section 70.001(4)(a), *Florida Statutes*, the owner's presuit notice was invalid, and he could not state a cause of action under the Act. Accordingly, the circuit court properly dismissed the owner’s complaint. Since this was the owner’s third amended complaint and was essentially the same as his second amended complaint, the court was within its discretion to dismiss with prejudice.

Having determined that the circuit court properly dismissed the complaint, the Second DCA did not rule on the issue of whether a variance must be sought and denied as a condition precedent to filing an “as applied” challenge to the ordinance.

***II. Circuit Court Cases***

***Cammilot Partners, LLC v. Lee Cnty., No. 09-CA-005630 (Fla. 20th Cir. Ct. 2014 July 8, 2014)***

Cammilot Partners, LLC purchases a 9.71 acre property on Pine Island agricultural use of residential use with a density of one dwelling unit per acre. Cammilot intended an interim agricultural use for the property with future residential development plans. Subsequently, Lee County adopted several ordinances limiting the development density on Cammilot’s property to one unit per 10 acres. Under the regulations, a “recapture” of the higher density was possible if the landowner placed up to 70% of the property into conservation easements.

Following denial of its application to split the property into two lots, Cammilot file a Harris Act claim against the County. The circuit court found the County liable under the Harris Act. The court first determined Cammilot had an “existing use” of the property for residential development for up to the 8 units as the property was previously allowed to be developed to that density. The Court next found that existing use was “inordinately burdened” by the County’s reduction of density. The landowner’s appraiser testified the fair market value of the property was reduced 36% as a result of the downzoning, and the County’s appraiser testified the loss in value was only 10%. The court credited the landowner’s appraiser and concluded the property was inordinately burdened and ordered a jury trial be scheduled to determine the amount of damages to the landowner.

***Smith v. City of Jacksonville*, No. 2012-CA-007994 (Fla. 4th Cir. Ct. April 15, 2014).**

The Smiths owned undeveloped riverfront property in the City of Jacksonville adjacent to a property owned by the City. Both properties were designated “Residential Low Density.” There was a deed restriction on the City’s property limiting its use to leisure and recreation of Duval County employees. The City removed the deed restriction and rezoned the parcel for the development of a fire station without providing the required notice to the Smiths. The City developed the fire station which had a negative impact on the Smith’s property value.

The Smiths filed a Harris Act claim against the City claiming its actions in rezoning and building a fire station next door inordinately burdened their property. In a question of first impression, the circuit court determined that the Harris Act “provides legislative relief to owners of property when their property has been incidentally diminished in value due to governmental action taken against an adjacent property.” In doing so the court rejected the idea that the Harris Act only applied to circumstances where a governmental entity took direct action against a property reasoning “if the Act did not apply to the facts at bar, it would be hard to imagine facts under which it did apply.” This case is being appealed to the Florida First DCA.

***FINR II, Inc. v. Hardee Cnty.*, No. 252013CA000614 (Fla. 10th Cir. Ct. Jan. 8, 2014).**

At the request of a mining landowner, Hardee County enacted a resolution that reduced the setback corridor for mining activities from property lines from ¼ mile to 150 to 207 feet from the adjacent property. Under the Harris Act, section 70.001(3)(f), *Florida Statutes*, a “property owner” that may bring a claim is defined as “the person who holds legal title to the real property at issue.” The dispute before the court was the definition of “real property at issue” under the Bert Harris Act. The plaintiff claimed the meaning “real property at issue” includes all property inordinately burdened by government action, whether or not the real property was the property being directly regulated by the governmental entity. The County argued the “real property at issue” is the property actually being regulated by the government action.

The circuit court held that a Harris Act claim may only be brought by the property owner of the property subject to or regulated by the governmental action. Because the Harris Act does not define “real property at issue,” the court reasoned that a limited application of the Harris Act should be applied. The court concluded that “real property at issue” only includes the property directly subject to government action and is not defined by an inordinate burden of government actions. This case is being appealed before the Florida Second DCA.