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# MEMORANDUM

**TO:** Sarasota County Commissioners

**SUBJECT:** Bert Harris Act liability from adopting CPA 2019-C

**DATE:** September 15, 2020

## SUMMARY

Property owners of the 6,000 acres subject to proposed comprehensive plan amendment CPA 2019-C contend that the county will be required to pay them compensation if the overlay is changed from Hamlet/Open Space to Rural Heritage/Estate. However, the Bert Harris Act allows claims for losses of reasonable nonspeculative future uses, which then can be the subject of reasonable investments that create expectations. The land at issue has no Hamlets on it and has never had a single proposal to rezone it for a Hamlet Development Master Plan. Indeed, a comprehensive plan amendment has been proposed to double permissible Hamlet Development density because such developments are not financially viable without higher density. Proposed amendment CPA 2019-C does not expose Sarasota County to risk of Bert Harris Act claims.

## INTRODUCTION

This memo addresses the question of whether adopting proposed comprehensive plan amendment CPA 2019-C would expose Sarasota County to Bert Harris Act compensation claims by current owners of land in the affected area. At issue is the proposal to amend the Future Land Use Map for approximately 6000 acres located northwest of Fruitville Road and Verna Road by changing its designation from Hamlet/Open Space Resource Management Area (RMA) to Rural Heritage/Estate

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RMA. The existing Hamlet overlay allows property owners to apply to rezone their property from the current zoning – which is a mix of one dwelling per five acres and one dwelling per ten acres – by submitting a Master Land Use plan for a Hamlet Planned Development and seeking approval by the county. These planned developments can have higher densities than allowed by the existing zoning but must comply with numerous requirements and conditions, including leaving at least 60% of the land as open space. No applications have ever been filed to rezone any of the land for any Hamlet Planned Development in these 6,000 acres. Indeed, proposed comprehensive plan amendment CPA 2018-C sought to increase Hamlet densities on the ground that Hamlet developments in this area were not financially feasible without doubling allowable density. Over 80% of the land at issue is currently used for cattle grazing, and the remainder is in ranchettes and agricultural uses, so that all existing uses remain permissible if the Rural Heritage/Estate overlay is adopted.

Despite the fact that no property owner has ever applied for a Hamlet Planned Development, the property owners of the 6,000 acres at issue assert that Sarasota County may not lawfully change the overlay because possible future rezoning applications could not be accepted. In essence, the opponents contend that any reduction in theoretical development options would trigger a right to compensation under section 70.01, Florida Statutes, known as the Bert Harris Act. This memo shows that the specific statutory requirements of that Act are far from being met in this instance.

## THE BERT HARRIS ACT

Section 70.01, Florida Statutes – the Bert Harris Act – provides a process and a remedy for property owners who assert that state and local government actions have inordinately burdened their property. In order to fall within the coverage of the act, the property owner must show that the act of the government directed at their property has "inordinately burdened" either an existing use or a vested right to a specific use of the property.

**Vested Rights**. Section 70.001(3)(a) defines "vested right" as a right to a specific land use, the existence of which is determined by applying the principles of "equitable estoppel," or "substantive due process," or state statutes. Equitable estoppel arises when the property owner has (1) relied in good faith (2) upon a specific act by the government (3) and has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly

inequitable for the government to be allowed to change its mind. That three-part test is set out in the appeals court's decision in *Town of Ponce Inlet v. Pacetta, LLC*, 120 So.3d 27, 29 (4th DCA 2015) and is a restatement of governing law. Established United States Supreme Court law states that the substantive due process requirement is violated only in instances of egregious abuses of government power shocking to the judicial conscience. *Sacramento County v. Lewis*, 523 U.S. 833, 847 (1998). The substantive due process theory is discussed at length in *Most Unlikely to Succeed: Substantive Due Process Claims Against Local Governments Applying Land Use Restrictions*, J. Richards and A. Ridge, Florida Bar Journal V.78, no. 4 (April 2004). No violation of state statutes has been alleged that could vest rights in this instance. There can be no serious suggestion that any of the property owners threatening lawsuits actually have vested rights to build Hamlets because none of them have applied for rezoning under the Hamlet overlay.

**Existing Uses.** Section 70.01(3)(b) defines an "existing use" as an actual present use of the property or a "reasonably foreseeable, non-speculative land use," suitable for the property, that has created a market value higher than the actual present use. Putting aside the contradiction in the definition of "existing use" that includes both actual present use and hypothetical future uses, the definition reaches reasonably foreseeable future uses if they are so foreseeable that that they have increased the value of the land. But a future use is neither reasonable nor nonspeculative if it is contingent on a future discretionary act by the government. The hope that the county will in the future amend the zoning ordinance to allow more density is always speculative, as is any future land use that depends on the discretion of the government. When a Bert Harris Act claimant argued that a contingent future use of land was reasonable and nonspeculative, the court rejected the claim on the ground that the future use was contingent on the city's exercise of discretion to deny a petition to abandon a right of way. *City of Jacksonville v. Coffield*, 18 So.3d 589, 696 (1st DCA 2009). Here, the actual present use is cattle grazing, agriculture, and ranchettes, and future rezoning would be needed to obtain an approved Hamlet Plan Development. Future rezoning to Hamlet developments is contingent on a discretionary act of the county that could approve as few as 50 dwellings per thousand acres. Moreover, the North Fruitville Hamlet Utility Group recently proposed comprehensive plan amendment CPA 2018-C that would double the density in the Hamlet overlay to two units per acre; the justification for the proposed amendment was that without the amendment, the development of Hamlets is not financially feasible. Thus, the future use for Hamlet developments is also speculative

because a comprehensive plan change would be needed to make them financially viable.

**Inordinate Burden.** Section 70.01(3)(e) defines inordinate burden as restrictions on the use of property that prevent the owner from attaining their "reasonable, investment-backed expectations" or from exercising a vested right, or which leave the owner with unreasonable uses so restrictive that they impose a disproportionate share of a burden imposed for the public good. As discussed above, there is no plausible claim of vested rights to Hamlet developments. The proposed amendment leaves the owners with reasonable uses, because the proposal to attach the Rural Heritage/Estate overlay merely extends the reach of the overly that now borders two sides of the 6,000 acres at issue. Assuming that the property owners actually had a reasonable nonspeculative future use of the land for Hamlet developments – and as shown above they do not – the owners would have to prove that they have reasonable investment-backed expectations that they could and would actually build Hamlet developments.

Given that the owners of land in the 6,000 acres at issue have not filed any applications for Hamlet Planned Development and that the Fruitville Hamlet Utility Group has sought to double the density of Hamlets to make them financially viable, any expectations that the property owners had of developing Hamlets were not reasonable. As explained above, the decision in *City of Jacksonville v. Coffield*, 18 So.3d 589, 599 (1st DCA 2009) is established law and it holds that expectations are not "reasonable" within the meaning of the Act if they are contingent on a favorable outcome of a future exercise of discretion by the local government.

## COURT INTERPRETATION OF THE BERT HARRIS ACT

Scores of cases have been decided by the appeals courts of Florida, and almost no cases have upheld claims for compensation under section 70.01. Indeed, the leading case finding Bert Harris Act liability is *Ocean Concrete, Inc. v. Indian River County,* 241 So.3d 181 (4th DCA 2018). There, a concrete maker bought land that was zoned for a concrete batch plant, confirmed in a meeting with county planners that his concrete plant was a permissible use, and then started building a railroad spur line, graded the site, and installed several wells on the site. When the county rezoned the land to prohibit the concrete plant, the land owner sought Harris Act compensation and received it from the court. That case stands in bright contrast with the situation here. The owners in this controversy do not assert that they have invested in Hamlet developments, but only that they invested by buying the land and had hopes that it

would someday be possible to get an approved Hamlet development if it became financially feasible to do so. But that Act does not provide compensation for hopes. It requires compensation for a loss of existing uses or vested rights to specific uses, and only when the property owner has expectations because they actually invested reasonably in seeking the specific use. The proposition advanced by the property owners is that no government can ever reduce development options without triggering a right to compensation for the owners of the lands affected. That is simply not the law. Indeed, court decisions make clear that the Act should not be applied in a way to hamstring local government from exercising its powers for the public good. *See, e.g. City of Jacksonville v. Smith*, 159 So. 3d 888, 893 (1st DCA 2015). The property owners are asking Sarasota County to do just that.

## RELEVANT TEXT OF SECTION 70.01, FLORIDA SATUTES

Reproduced below are the operative portions of section 70.01. Not included are provisions setting out exclusions that are not applicable here, and the provisions for settling claims and filing lawsuits.

70.001 Private property rights protection.—

(1) This act may be cited as the "Bert J. Harris, Jr., Private Property Rights Protection Act." The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) 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.

(3) For purposes of this section:

(a) The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state.

(b) The term "existing use" means:

1. An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or

2. Activity or such 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.

(c) The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms "inordinate burden" and "inordinately burdened":

1. Mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.