LAST WORD ON RECENT DEVELOPMENTS

THE "AS APPLIED" REQUIREMENT OF THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT: JUDICIAL ABROGATION OF A LEGISLATIVE MANDATE?*

Frederick T. Reeves**
George T. Reeves***
George Zadorozny****

I. INTRODUCTION

In *Citrus County v. Halls River Development, Inc.*,[1] the Fifth District Court of Appeal ruled that the mere enactment of a statute, ordinance, or other governmental rule or regulation may satisfy the "as applied" requirement of the Bert J. Harris, Jr., Private Property Rights Protection Act[2] if the impact of the statute, ordinance, or other governmental rule or regulation is "readily ascertainable" upon enactment.[3] This ruling effectively negated the plaintiff landowner's cause of action under the Harris

** J.D., University of Florida College of Law, 1985; B.S., Florida State University, 1981. Mr. Reeves is a partner in the law firm of Frederick T. Reeves, P.A. and practices in the areas of business, real estate, and administrative litigation.

*** J.D., University of Florida College of Law, 1994; B.S., Florida State University, 1991. Mr. Reeves is a partner in the law firm of Davis, Schnitker, Reeves & Browning, P.A. and is Board Certified by the Florida Bar in the areas of City, County, and Local Government Law and Appellate Law.

**** J.D., Northwestern University School of Law, 1982; B.A., Yale College, 1978. Mr. Zadorozny limits his practice to legal research and writing for attorneys.

1. 8 So. 3d 413 (Fla. 5th Dist. App. 2009), *rev. denied*, 23 So. 3d 712 (Fla. 2009).
2. Fla. Stat. §§ 70.001–70.80 (2010).
3. *Halls River*, 8 So. 3d at 422–423.

Act by requiring a presuit claim to be asserted within one year from the time the Comprehensive Plan amendment was adopted in 1997, instead of allowing the landowner to assert a presuit claim within one year from the time the applicable Comprehensive Plan amendment was *applied* to the landowner's property in 2002.

The court's ruling contradicts the plain language and intent of the Harris Act, which is to create a separate and distinct cause of action to provide relief (in the form of payment of compensation) when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, inordinately burdens real property.[4]

II. FACTS AND PROCEDURAL HISTORY

In 1997, Citrus County amended its Comprehensive Plan[5] to change the classification of certain property near the Homosassa River from "Mixed Use" (MXU) to "Low Intensity Coastal and Lakes" (CL),[6] dramatically lowering future development density to one unit per twenty acres of property.[7] Crucially, even though the County made the same amendment to its Generalized Future Land Use Map (GFLUM), which showed future land uses under the Comprehensive Plan, it did *not* make this change to the property's designation in its Land Development Code (LDC) nor to the LDC zoning maps.[8] Accordingly, the LDC and the LDC maps continued to show that the property was zoned at the much higher MXU density.

The LDC and its maps were *not* changed to reflect the Comprehensive Plan's 1997 classification amendment from MXU to CL because the County believed—erroneously—that by doing so, it could continue to approve development at higher densities in

4. Fla. Stat. § 70.001(1).

5. The Local Government Comprehensive Planning and Land Development Regulation Act compels local governments to adopt comprehensive land use plans to guide and control future land development. Fla. Stat. §§ 163.3161(1), 163.3167(1), (2); *see also Halls River*, 8 So. 3d at 415 (citing *Home Builders & Contractors Assn. of Brevard, Inc. v. Dept. of Community Affairs*, 585 So. 2d 965, 966 (Fla. 1st Dist. App. 1991); *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 165 (Fla. 5th Dist. App. 2003)).

6. *Halls River*, 8 So. 3d at 416.

7. *Id.*

8. *Id.*

the areas reclassified from MXU to CL in the Comprehensive Plan.[9] The County's error was the factual linchpin of the case. The County repeatedly and unequivocally assured landowner Halls River Development, Inc. (Halls River) that the County's Comprehensive Plan and LDC authorized the multifamily condominium project that Halls River sought to build.[10] More specifically, the trial court's Order on Inordinate Burden Hearing stated the following:

> This is the state of affairs when [Halls River] came on the scene. Mr. [F. Blake] Longacre, the founder and principal owner of Hall's [sic] River Development, desired to build [an] interval ownership condominium in the Homosassa River area. He contacted a realtor in the area for available, suitable property. According to the zoning [LDC] map, this property was. Before going to contract, however, [Halls River] contacted the county staff to confirm that it could build its proposed project on the property. [Halls River] was assured that multifamily condominiums was a proper use . . . . [Halls River] was assured that if it could meet all code requirements—setbacks, environmental concerns, etc.—, obtain the necessary permits from the Army Corp[s] and the SWFWMD and obtain the approval of the County Commission after public hearing his project could be built.
>
> [In February 2000, Halls River] contracted to purchase the property for several hundred thousand dollars. The contract gave him 180 days to do [a] feasibility study. [Halls River] then hired a surveyor and an engineer to determine if a suitable project could actually be built on the property and still comply with all code and environmental concerns. . . . Although staff opposed the number suggested by [Halls River], it always took the position that multiple units could be built if properly configured and placed on the property in conformity with the code. Based on this assurance, [in January 2001 Halls River] closed on the property.
>
> Then the permitting process began. After additional amendments to his application and trips back and forth to the staff (where [Halls River] finally satisfied the staff on

9. *Id.*
10. *Id.* at 416, 418–419, 423.

> the number of units), the Planning Board and the County Commission and after obtaining approval from the Army Corp[s] and SWFWMD, the project was finally approved [in February 2002] by the Board of County Commissioners by a [three to two] vote at a highly political meeting; some [four hundred] people appeared before the Commission to protest development of the property. . . .
>
> Shortly after the Commission's action, some of the disappointed protesters took the matter to court. . . . [In November 2002], the Court ruled the County's approval of the project null and void because the Comprehensive Plan controlled over the [LDC]. In effect, the Court ruled that the County's reservation of the right to approve uses and exceed the density contrary to the [CL] zoning on that property originally zoned MXU, even though approved by the State, was unenforceable. . . .
>
> • • •
>
> *The County does not deny that its agents consistently and unequivocally assured [Halls River] that the County regulations would permit a development such as [Halls River] intended, in fact[,] the County staff involved in the application process so candidly admitted. And the staff knew [Halls River] was relying on their expertise. . . . It would be unreasonable for an owner not to rely on county staff.*[11]

Thereafter, the County informed Halls River that it would not consider Halls River's resubmitted application because it was inconsistent with the Comprehensive Plan's CL designation.[12]

In April 2003, within one year of the County's refusal to consider Halls River's application, Halls River filed a presuit claim with the County—as required by the Harris Act[13]—notifying the County of Halls River's claim for compensation under the Harris

11. Or. on Inordinate Burden Hrg., *Hall's River Dev., Inc. v. Citrus County* (Fla. 5th Cir. Feb. 8, 2008) (No. 2005-CA-4547) (emphasis added). The circuit court's order is quoted in part in the district court of appeal's opinion. *Halls River*, 8 So. 3d at 418.

12. *Halls River*, 8 So. 3d at 417.

13. Fla. Stat. § 70.001(4)(a). On pain of forfeiting the right to later bring a Harris Act suit in court, "the [presuit, administrative] claim [must be] presented [within one] year after a law or regulation is first applied by the governmental entity to the property at issue." *Id.* at § 70.001(11).

Act due to the inordinate burden on its development rights[14] by the application of the 1997 Comprehensive Plan amendment's low-density CL classification. This resulted in Halls River being unable to build the fifty-six-unit interval ownership condominium project under the old MXU zoning. In place of this, Halls River was left with the right under the CL Comprehensive Plan and LDC classifications to build a single unit or other low-density development on the property's eleven riverfront acres. Halls River asserted that such an impact to its property rights constituted a compensable inordinate burden under the Harris Act.[15] As required by the Act,[16] "[t]he County responded by issuing a 'ripeness decision,' identifying the allowable uses of the property[,] and informing Halls River that it would 'effectuate no change in its actions with respect to this matter and w[ould] not extend an offer of settlement.'"[17]

In October 2005, having obtained the required ripeness decision,[18] Halls River sued the County, again alleging, as in its presuit claim, that its property was inordinately burdened and seeking compensation under the Harris Act.[19] Post-trial, the cir-

14. *Halls River*, 8 So. 3d at 421. The Harris Act defines "inordinate burden" and "inordinately burdened" as follows:

> The terms "inordinate burden" or "inordinately burdened" 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. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

Fla. Stat. § 70.001(3)(e).

15. *Halls River*, 8 So. 3d at 421.

16. Fla. Stat. § 70.001(5)(a).

17. *Halls River*, 8 So. 3d at 417.

18. *See* Fla. Stat. § 70.001(5)(b) (prescribing that "[i]f the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court").

19. *Halls River*, 8 So. 3d at 418. Halls River also alleged other causes of action not discussed in this Article, being beyond its scope.

cuit court made the findings quoted above[20] and concluded as follows:

> The basic fact is that [Halls River] was found to have met the Comprehensive Plan requirements, the [LDC], received the approval of the Army Corp[s] and the SWFWMD, and obtained a ruling by the County Commission after a public hearing that it was entitled to build a [fifty-six] unit interval ownership project. This was taken away by the belated application of a zoning restriction of one unit per twenty acres passed for the public good. [Halls River] is now limited to a single unit on eleven acres of riverfront property. This is an inordinate burden under the Bert Harris Act and the public should share the burden.[21]

As authorized by the Harris Act, the County filed an interlocutory appeal of the non-final order.[22] The Fifth District reversed the finding of inordinate burden.[23] In support of its reversal, the court held that Halls River's presuit claim was not filed within one year after the offending regulation—the Comprehensive Plan's CL designation—was "first applied" to Halls River's property, as required by Section 70.001(11) of the Harris Act.[24] The court held that "the mere enactment of a statute, ordinance[,] or plan of general application" can "trigger the accrual of a Harris Act claim,"[25] starting the one-year deadline to file a presuit claim[26] if "the impact of a governmental regulation . . . on a given parcel of property can immediately be determined" upon enact-

20. To review the quoted findings, see the text accompanying *supra* note 11.

21. Or. on Inordinate Burden Hrg., *Hall's River,* No. 2005-CA-4547 at 9 (providing explanation for the finding of an inordinate burden, also quoted in part in *Halls River*, 8 So. 3d at 419).

22. *Halls River*, 8 So. 3d at 415; *see* Fla. Stat. § 70.001(6)(a) (permitting governmental entities to take an interlocutory appeal should the court determine that the governmental entity's action resulted in an inordinate burden); Fla. R. App. P. 9.130(a)(3)(C)(viii) (permitting appellate review by the district courts of appeal of non-final orders concerning actions by a governmental entity that resulted in an inordinate burden to real property).

23. *Halls River*, 8 So. 3d at 423.

24. *Id.*

25. *Id.* at 422.

26. *Id.*; Fla. Stat. § 70.001(11) (2005) (text of the cited section from the 2010 Florida Statutes, which is identical, is quoted at *supra* note 13). If the presuit, one-year deadline is missed, the landowner forfeits all rights to bring a Harris Act suit in court. Fla. Stat. § 70.001(11) (2010).

ment.[27] Halls River asserted that its presuit notice was timely filed within the one-year deadline because it was not until the County's refusal to consider Halls River's application that the Comprehensive Plan's CL designation was first applied to Halls River's property.[28]

Accordingly, Halls River was forever barred from filing any action under the Harris Act because it did not file a timely presuit claim. Pursuant to the court's ruling, Halls River's Harris Act suit was barred under Section 70.001(11) because the predecessor landowner failed to file the presuit claim in 1998, within the year after enactment of the Comprehensive Plan amendment that changed the MXU classification to the lower-density CL. The court then acknowledged the following:

> *We recognize that almost universally, the result in this case will be seen as unduly harsh.* There is no doubt that Halls River was misled to its detriment by the County's unintentional misadvice. However, by its express terms, the Harris Act requires the court to determine when the new law or regulation, *as first applied*, unfairly affected the property and requires a claim to be asserted within one year thereafter. On the facts presented in this case, it is clear that the adverse impact was caused in 1997 when the Plan changed the MXU designation to CL. *We are not at liberty to modify the statutory scheme the Legislature created to remediate an unfair regulatory burden*, though we recognize the equities clearly favor Halls River.[29]

As demonstrated and argued below, a close reading of the Harris Act reveals that in *Halls River* the Fifth District did indeed "modify the statutory scheme the Legislature created to remediate an unfair regulatory burden,"[30] primarily by failing to perceive the true effect of the Act's repeated use of the phrases "as applied" and "first applied" (as well as other dovetailing words and phrases in the Act). The First District later held that these statutory words and phrases, properly understood, compel the conclusion that a Bert Harris Act claim does not automatically

27. *Halls River*, 8 So. 3d at 422.
28. *Id.*
29. *Id.* at 423 (emphasis added).
30. *Id.*

arise simply because a general police-power ordinance or regulation was enacted,[31] "*especially in light of the express language of the Bert Harris Act indicating its applicability to as applied challenges only*."[32]

III. THE BERT J. HARRIS ACT: OVERVIEW[33]

On May 18, 1995, inspired partly by the regulatory gauntlet he himself had run trying to build a "cook shack" on his own land,[34] Governor Lawton Chiles signed into law the Bert J. Harris, Jr., Private Property Rights Protection Act.[35] The Harris Act created a new cause of action—separate and distinct from the law of takings—for compensation when a new law, rule, regulation, or ordinance of the state or political entity in the state, as applied, unfairly affects real property by imposing an "inordinate burden" on any landowner's real property.[36] More specifically, a landowner is entitled to relief 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.[37] That relief may include compensation for the actual loss to the fair market value of the real property caused by the government's action.[38]

---

31. *M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 77 (Fla. 1st Dist. App. 2009), *rev. denied*, 41 So. 3d 218 (Fla. 2010) (holding that the mere enactment of a municipal ordinance imposing new height and setback restrictions throughout an entire general commercial zoning district was not a specific action by a city as to a particular piece of property, and so did not violate the Harris Act). *M & H Profit* was published in December 2009, *id.* at 71, nine months after the Fifth District's *Halls River* opinion was published in March 2009, 8 So. 3d at 413.

32. *M & H Profit*, 28 So. 3d at 78.

33. Part III is modeled closely on Judge Moody's concise summation of the Harris Act in *Bloomingdale Development, LLC v. Hernando County* because it can hardly be improved upon. *Bloomingdale Dev., LLC v. Hernando Co.*, No. 8:07-cv-575-T-30MAP, at **5–6 (M.D. Fla. Feb. 11, 2009) (available at 2009 WL 347786).

34. Stephen T. Maher, *The Death of Rules: How Politics Is Suffocating Florida*, 8 St. Thomas L. Rev. 313, 316–317 (1996) (quoting Governor Chiles' 1995 inaugural address regarding how regulations increased the price of his desired "cook shack" from fifteen thousand dollars to sixty-five thousand dollars; criticizing the governor's call "to reduce the present rules and regulations by [fifty] percent within two years"); Stephen Van Drake, *Elevator Chat Helped Spark the Conception of Property Rights Act*, S. Fla. Bus. J. ¶ 11 (Sept. 23, 2002), http://www.bizjournals.com/southflorida/stories/2002/09/23/story5.html.

35. Fla. Stat. §§ 70.001(1)–(13) (2010). It went into effect on October 1, 1995. 1995, Fla. Laws ch. 95-181, § 6.

36. Fla. Stat. §§ 70.001(1), (2), (9), (12). Section 70.001(3)(e) defines "inordinate burden" and "inordinately burdened," and is quoted at *supra* note 14.

37. *Id.* at § 70.001(1).

38. *Id.* at § 70.001(2).

A landowner who seeks Harris Act compensation must present the claim in writing to the head of the appropriate governmental entity not less than 180 days prior to filing an action.[39] The landowner must also, prior to filing, submit a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property.[40]

Within 180 days of receiving the claim, the governmental entity must provide a written settlement offer comprising one or more of the eleven types of offers specified in the Act.[41] Within the same time, unless the landowner accepts the settlement offer, the governmental entity must issue a written ripeness decision identifying the allowable uses for the property.[42] If the governmental entity fails to issue a timely ripeness decision, that failure ripens the prior action of the governmental entity and automatically becomes a ripeness decision rejected by the landowner, thus making it eligible for judicial review.[43]

The circuit court must then determine if a claimed "existing use of the real property" or a claimed "vested right to a specific use of the real property" actually existed; if either did, the court must determine whether the governmental entity inordinately burdened the property, considering the settlement offer and ripeness decision.[44] If the court finds an inordinate burden, it must impanel a jury to determine the total amount of compensation owed to the property owner for the loss in value caused by the inordinate burden to the property.

> 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 inordi-

39. The appropriate governmental entity is the one that "first applied" a "new law, rule, regulation, or ordinance" to the property at issue. *Id.* at §§ 70.001(1), (11).

40. *Id.* at § 70.001(4)(a).

41. *Id.* at § 70.001(4)(c). The governmental entity may make a settlement offer of "[n]o changes to the action of the governmental entity." *Id.* at § 70.001(4)(c)(11).

42. *Id.* at § 70.001(5)(a).

43. *Id.*

44. *Id.* at § 70.001(6)(a).

> nately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities.[45]

IV. THE USE OF THE TERM "AS APPLIED" AND THE LIKE IN THE HARRIS ACT DEMONSTRATES THAT THE LEGISLATURE DID NOT INTEND TO CREATE LIABILITY FOR MERE ENACTMENT OF A REGULATION

The plain language of the Harris Act evidences the Legislature's intent to use the Act to address "as applied" issues only. For example, Section 70.001(1) of the Act provides the following:

> 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.[46]

Similarly, Section 70.001(11) of the Act provides as follows:

> A cause of action may not be commenced under this section if the claim is presented more than [one] year after a law or regulation is *first applied* by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under

45. *Id.* at § 70.001(6)(b).
46. Fla. Stat. § 70.001(1) (2010) (emphasis added).

> this section is tolled until the conclusion of such proceedings.[47]

Finally, Section 70.001(12) of the Act provides:

> No cause of action exists under this section as to the *application* of any law enacted on or before May 11, 1995, or as to the *application* of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the *application* of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.[48]

Importantly, the law in effect at the time of the enactment of the Harris Act required a governmental entity to take some action to *apply* a regulation to a particular parcel of property before an "as applied" challenge could be brought. This body of law is most clearly set out in *Eide v. Sarasota County*.[49] In *Eide*, the Eleventh Circuit Court of Appeals determined that an "as applied" challenge to a zoning regulation must fail because the local government had taken no action to apply the ordinances to the property:

> It is important first to note that Eide's challenge is an *as applied* challenge, not a *facial* challenge. In order to challenge the County's *application* of the sector plan to his property, Eide must first demonstrate that the sector plan has been *applied* to his property. If the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made.
>
> • • •
>
> *Eide has not met this burden. He has not submitted even a single plan for the commercial development of his properties.*

47. *Id.* at § 70.001(11) (emphasis added).
48. *Id.* at § 70.001(12) (emphasis added).
49. 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

> *He has not submitted a petition to rezone his properties from their present residential zoning to commercial zoning. Therefore, the County has not been given an opportunity to apply the sector plan to his property*.[50]

Of course, the Fifth District was required to assume that the Legislature was familiar with the above caselaw and its requirements for an "as applied" action at the time the Legislature chose to use the term "as applied" in the Harris Act.[51]

Other opinions confirm the *Eide* "as applied" analysis in the context of the Harris Act. In *M & H Profit, Inc. v. City of Panama City*,[52] a property owner brought a Harris Act claim against the City of Panama City, claiming that the enactment of an ordinance imposing height restrictions and additional setbacks on structures in a general commercial zone caused a significant loss in value to its property.[53] Affirming the trial court, the First District held that "the plain and unambiguous language of the Bert Harris Act establishes the Act is limited to 'as-applied' challenges, as opposed to facial challenges."[54] In supporting its decision, the court noted that "[l]egal commentators, including those involved in drafting the Bert Harris Act, have also recognized the Bert Harris Act is limited to 'as-applied' challenges and does *not* provide for facial challenges based on the mere enactment of a new ordinance or regulation."[55]

A 2009 trial court decision, *Brown v. Charlotte County*,[56] has held as much. In denying the plaintiff landowners' motion for summary judgment on their Harris Act claim, the trial court stated and ruled thusly:

50. *Id.* at 724–726 (citation omitted) (all emphases added except for "application" and "applied").

51. *See Ford v. Wainwright*, 451 So. 2d 471, 475 (Fla. 1984) (holding that the Legislature is presumed to be acquainted with judicial decisions on the subject matter underlying its subsequently enacted statutes).

52. 28 So. 3d 71.

53. *Id.* at 73–74.

54. *Id.* at 75.

55. *Id.* at 76 (emphasis in original).

56. 16 Fla. L. Weekly Supp. 546c (Fla. 20th Cir. April 1, 2009).

> [T]he [county] also alleges that [the landowners] did not apply for any kind of development approval specific to the real property issue in the action.[57]
>
> The court agrees with [the county's] argument that a proper interpretation of the language of the Bert Harris Act requires that a governmental entity must do something more than simply enact a law or ordinance in order to give rise to a claim under the act. . . . In summary, this Court holds that the Bert Harris Act allows for a private property rights claim where the trier of fact finds, under the totality of the circumstances, that a governmental entity has made a meaningful application of a law or regulation to a Plaintiff's property and that the Plaintiff could have reasonably relied on said specific governmental action. . . . This holding is consistent with the intent and remedial purpose of the Statute while requiring more than just mere legislative enactment as a basis for governmental liability.[58]

Notably, even though the *Halls River* opinion had been issued twelve days before *Brown*, *Brown* made no mention of it, and accordingly the landowners moved for reconsideration. The order denying the motion for reconsideration squarely faces *Halls River*, and distinguishes it:

> The intellectual underpinning for the [*Halls River v.*] *Citrus County* Court's [opinion] is that a comprehensive plan is similar to a constitution for all future development as compared to zoning laws [that] are the means by which a comprehensive plan is implemented. Once a comprehensive plan is adopted, all development and all actions taken by governmental agencies in regard to development orders pertaining to such land must be consistent with the plan. Zoning involves the exercise of discretionary powers within limits imposed by the comprehensive plan. This Court agrees with [the county's] comments in this regard that the mere enactment of a zoning ordinance cannot constitute specific action of a governmental entity under the Bert Harris Act because the impact of a zoning regulation is not readily ascertainable on its face. As pointed out by [the county], one example of

57. *Id.* at pt. I(A).
58. *Id.* at pt. III(A).

> Charlotte County's discretionary powers to relax the requirements of the zoning ordinance . . . is through the variance process. Based on the above analysis, the Court concludes that *Citrus County v. Halls River* . . . is distinguishable from this Court's decision to deny summary judgment in the instant case.[59]

V. THE "MERE ENACTMENT" CONSTRUCTION PLACED ON THE ACT BY THE HALLS RIVER COURT DEPRIVES THE PROPERTY OWNER OF ANY REMEDY AS TO STATUTES

The intent of the Harris Act is plainly to create a new cause of action and a corresponding remedy:

> 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.*[60]

The term "law" means an "act of the legislature."[61] Further, the term "law" cannot be interpreted to mean a rule, regulation, or ordinance because the Legislature separately listed all of these terms in the statute. Any construction that limited the term "law" to a "rule, regulation, or ordinance" would violate the rule of statutory construction that requires that "significance and effect must

59. *Brown v. Charlotte Co.*, 16 Fla. L. Weekly Supp. 656a (Fla. 20th Cir. April 28, 2009) (citations omitted).

60. Fla. Stat. § 70.001(1) (2010) (emphasis added).

61. *Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st Dist. App. 1992); *Browning v. Angelfish Swim Sch., Inc.*, 1 So. 3d 355, 359 (Fla. 3d Dist. App. 2009) (holding that the phrase "[a]s provided by law" means "as passed by an act of the Legislature"); *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (Fla. 4th Dist. App. 1982).

be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."[62]

In *Halls River*, the Fifth District interpreted Section 70.001(11) of the Harris Act to mean that the enactment of an ordinance may be sufficient to start the one-year filing period referenced therein.[63] This Section of the statute states, "A cause of action may not be commenced under this section if the claim is presented more than [one] year after a *law or regulation is first applied by the governmental entity* to the property at issue."[64] The court explained its reasoning as follows:

> Halls River argues that until an actual development plan is submitted, the impact of a governmental regulation cannot be determined. We agree that there may be some instances when the impact of a governmental regulation cannot be determined prior to the submission of an actual development plan. For example, if a comprehensive plan contains a clear height limit, the impact on a given parcel of property can immediately be determined. On the other hand, the impact of a generally applicable development standard discouraging urban sprawl may not be as readily apparent. But here, the impact of the CL designation of the property was readily ascertainable in 1997, *i.e.*, one housing unit per twenty acres of land. That the County and Halls River misperceived the legal effect of the [1997] amendment is of no legal significance in determining the timeliness of Halls River's claim.[65]

Inordinate burdens caused by the enactment of a *statute* do not fit within the framework set out by the *Halls River* court. This is because the Harris Act provides a remedy against "governmental entities" only, and the statutory definition of "governmental entity" does not include the entity that enacts statutes, namely, the Legislature. As the Harris Act states:

---

62. *Sch. Bd. of Palm Beach Co. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) (quoting *Gulfstream Park Racing Assn, Inc. v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006)).

63. *Halls River*, 8 So. 3d at 423.

64. Fla. Stat. § 70.001(11) (2010) (emphasis added).

65. *Halls River*, 8 So. 3d at 422–423.

> 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.[66]

The Harris Act further states that "[t]he 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."[67]

The Legislature of the State of Florida is conspicuously absent from the entities listed in the statutory definition of "governmental entity" and, therefore, is not liable under the Harris Act. The question becomes how to reconcile Section 70.001(1) of the Harris Act (which provides for protection from burdens imposed by statutes) with Section 70.001(2)(c) (which provides no remedy against the Legislature). As the Legislature cannot be sued pursuant to the Harris Act, the Fifth District's reasoning simply does not work.

The Fifth District's example in *Halls River* of a regulation that would start the clock ticking by enactment shows the fallacy of the court's reasoning. The court's example is as follows: "[I]f a comprehensive plan contains a clear height limit, the impact on a given parcel of property can immediately be determined."[68]

If the "clear height restriction" referenced above was not a part of a comprehensive plan but rather was part of a general law or special act of the Legislature, the property owner would be denied any remedy at all under the Harris Act. Under the Fifth District's reasoning, the statute would have been "first applied" upon enactment of the statute and the time limit to file a presuit claim would have started to run. But at the time of enactment, no "governmental entity" would have taken any specific action, and

66. Fla. Stat. § 70.001(2) (2010) (emphasis added); *see also id.* at § 70.001(6)(a)–(c) (providing for the circuit court to determine whether the "governmental entity" inordinately burdened the real property and, if yes, authorizing damages and attorney's fees awards against the "governmental entity").

67. *Id.* at § 70.001(3)(c).

68. *Halls River*, 8 So. 3d at 422.

the property owner would have had no one to sue because the Legislature is not subject to suit under the Harris Act.

The Fifth District's opinion makes the use of the Harris Act as to ordinances and administrative rules *virtually* impossible. In this regard, the practical effect of *Halls River* is to require a property owner to discover every applicable ordinance or administrative rule that may be applicable to his or her property and, within one year of the date of enactment, file a presuit claim if he or she ever wishes to obtain the protection of the Harris Act. Even worse, *Halls River* makes the application of the Act as to statutes *literally* impossible. The property owner is effectively locked out of the courthouse because it cannot sue the Legislature.

But if the Harris Act is construed as providing a remedy for burdens created by the *application* (rather than the mere *enactment*) of laws, rules, regulations, or ordinances, then the section that provides for protection from statutes will work with the section that prohibits remedies against the Legislature. Under such a construction, the enactment of a new law, rule, regulation, or ordinance triggers nothing under the Harris Act. Rather, it is not until one of these is applied by a governmental entity to the owner's property that the Harris Act is triggered, and the remedies under the Act become available against the appropriate governmental entity. As the Legislature does not "apply" laws, rules, regulations, or ordinances to property, the Legislature is not needed as a party.

Halls River is plainly wrong in equating the Act's "as applied" condition precedent with the mere enactment of a law, rule, regulation, or ordinance.

VI. THE FIFTH DISTRICT'S "MERE ENACTMENT" REGIME ENCOURAGES NEEDLESS LAWSUITS

The Fifth District's "mere enactment" regime encourages needless lawsuits to be brought against governmental entities. For example, every property owner within the ambit of a zoning change suddenly possesses a potential Harris Act claim from the moment of its enactment. Compare this to the statutory "specific action of a governmental entity" when "first applied . . . to the

property at issue" approach.[69] *Halls River* forces landowners to bring a Harris Act claim every time a governmental entity enacts "a new . . . rule, regulation, or ordinance [that] . . . affects real property,"[70] or risk that Section 70.001(11) will eliminate such claims one year later.

Indeed, nine months after the issuance of *Halls River*, the First District in *M & H Profit* recognized the risks related to allowing claims under the Harris Act based on mere enactment and rejected such an interpretation:

> [As to the] protection of the welfare of the local citizenry through the adoption of generally applicable land development regulations[,] . . . [a]pplying the sanctions of the Bert Harris Act to local governments for the mere passage of ordinances dealing with the general police power needs of its citizens will severely limit the willingness of local government to act. This clearly was not the intent of the people in adopting [A]rticle VIII, [S]ections 1 and 2 of the Florida Constitution. *We decline to tie local governments' hands in this matter, especially in light of the express language of the Bert Harris Act indicating its applicability to as applied challenges only*.[71]

Hence, it seems clear that the Legislature did not intend for the Harris Act to create a cause of action and corresponding remedy for inordinate burdens to property rights based only on the enactment of a law, ordinance, rule, or regulation, and such an interpretation makes the Harris Act unworkable.

---

69. Fla. Stat. §§ 70.001(2), (11).

70. *Id.* at § 70.001(1).

71. 28 So. 3d at 77–78 (emphasis added). The constitutional provisions cited by the court in the excerpt grant Florida's counties and municipalities wide-ranging home rule powers. Indeed, in rejecting the contention that "the mere enactment of a general police power ordinance or regulation . . . give[s] rise to a Bert Harris Act claim," the First District specifically invoked the broad, overarching purposes served by the constitutional home rule powers of municipalities:

> The decision not to broadly construe the Bert Harris Act in a manner [that] would expand its scope beyond its literal terms is also supported by basic principles of municipal home rule. In adopting [A]rticle VIII, [S]ection 2 of the Florida Constitution, the citizens of this state expressed a desire that municipalities have broad home rule powers to protect the general health, morals, safety, and welfare of the residents of the municipality.

Id. at 77 (citing *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983)).

VII. CONCLUSION

The Fifth District stated in *Halls River* that the court was "not at liberty to modify the statutory scheme the Legislature created to remediate an unfair regulatory burden,"[72] but this is precisely what the court did. Its ruling that the mere *enactment* of a law, ordinance, rule, or regulation may be equated to the *application* of a law, ordinance, rule, or regulation effectively deprives deserving property owners of a cause of action under the Harris Act. Further, *Halls River* will encourage property owners to file actions under the Harris Act immediately after the enactment of regulations rather than waiting to determine if the regulations will be applied in an objectionable manner. The Fifth District should recede from its "mere enactment" regime in *Halls River* and adopt the "as applied" standard mandated in the plain language of the Harris Act and recognized by the First District in *M & H Profit*.

72. 8 So. 3d at 423.