

**IN THE FLORIDA SUPREME COURT**

**HARDEE COUNTY, FLORIDA,**  
a political subdivision of the State  
of Florida,

Petitioner,

**Fla. S. Ct. Case No. SC15-1260**

vs.

Fla. 2d DCA Case No. 2D14-788

**FINR II, INC.,** a Florida  
corporation,

L.T. Case No. 130000614CAAXMX

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION  
OF THE FLORIDA SECOND DISTRICT COURT OF APPEAL**

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**RESPONDENT'S ANSWER BRIEF ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

The Petitioner, Hardee County, Florida (the "**County**") seeks to invoke this Court's discretionary jurisdiction to review the decision in *FINR, Inc. v. Hardee County, Florida*, 164 So.3d 1260 (Fla. 2d DCA June 10, 2015), where the Second District Court of Appeal ("**Second District**") certified conflict with *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015). In *Jacksonville*, the First District Court of Appeal ("**First District**") certified the following question:

MAY A PROPERTY OWNER MAINTAIN AN ACTION PURSUANT TO THE HARRIS ACT IF THAT OWNER HAS NOT HAD A LAW, REGULATION, OR ORDINANCE DIRECTLY APPLIED TO THE OWNER'S PROPERTY WHICH RESTRICTS OR LIMITS THE USE OF THE PROPERTY?

*Jacksonville*, at 894-895.

The Respondent, FINR, II, Inc. ("**FINR**"), generally agrees with the facts presented in the County's jurisdictional brief and in the Second District's decision below (A 1-4).<sup>1</sup> However, if this Court accepts jurisdiction, FINR reserves the right to raise additional facts and issues reflected in the record on appeal.

## SUMMARY OF THE ARGUMENT

Although this Court has discretionary jurisdiction to review the Second District's decision, which certified conflict with the First District's decision in the *Jacksonville* case, this Court should not exercise that discretion. The Second

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<sup>1</sup> Citations herein to "A" refer to the Second District's slip opinion provided in the appendix to the County's jurisdictional brief, followed by the page number.

District's decision is clearly correct and applies the plain language of the Bert Harris Act. The Florida Legislature's recent amendment to the Bert Harris Act confirms the correctness of the Second District's decision, and that the amendment is not retroactive. Moreover, even under the First District's narrow interpretation of the Bert Harris Act in *Jacksonville*, FINR still has a viable cause of action.

### ARGUMENTS

#### **I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THE SECOND DISTRICT'S DECISION**

FINR acknowledges that Article V, Section 3(b)(4) of the Florida Constitution provides this Court with discretion to review a decision certified by a district court as being in conflict with a decision of another district court. In this case, the Second District has certified that its decision conflicts with the First District's decision in *Jacksonville*. However, for the reasons provided below, this Court should not exercise its discretion to review the Second District's decision.

When Section 70.001, Florida Statutes (the "**Bert Harris Act**") took effect on October 1, 1995, it created a new cause of action in response to actions of a governmental entity imposing an "inordinate burden" on "an existing use of real property or a vested right to a specific use of real property." *See*, §70.001(2), Fla. Stat. (1995-2014). The purpose and intent of the Bert Harris Act was described by the Legislature in 1995 as follows:

- (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**.

§70.001(1), Fla. Stat. (1995-2014) (emph. added). Thus, the intent was to compensate any private owner for "inordinate burdens" which "unfairly affect real property," even if they do not rise to the level of an unconstitutional taking.

The applicable requirements for bringing a claim under the Bert Harris Act are set forth in subsections (2), (4)(a), and (5)(b), as follows:

(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.

...

(4)(a) Not less than 150 days prior to filing an action ..., a **property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity.... The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property...**

...

(5)(b) **If the property owner rejects the settlement offer and the statement of allowable uses of the governmental entity or entities, the property owner may file a claim for compensation in**

**the circuit court ...**

§ 70.001(2), (4)(a), and (5)(b), Fla. Stat. (1995-2014) (emph. added).

The 1995-2014 versions of the Bert Harris Act did not contain definitions or parameters for identifying the particular parcels of real property that must suffer from the inordinate burden giving rise to the cause of action. Instead, subsection (2) provides broad protection to "an existing use of real property or a vested right to a specific use of real property," without limitation. However, the Bert Harris Act did define "property owner" as follows:

(f) The term "property owner" means **the person who holds legal title to the real property at issue**. The term does not include a governmental entity.

§70.001(3)(f), Fla. Stat. (1995-2014) (emph. added). Although the term "real property at issue" is not defined, the use of the term in Section 70.001(3)(f) obviously refers back to the real property previously mentioned in subsections (1) and (2), which was "unfairly affect[ed]" and "inordinately burdened." Courts must read statutes and regulations relating to the same subject matter together or *in pari materia* and in harmony with each other. *See, e.g., Fla. Dep't of State v. Martin*, 916 So.2d 763, 768 (Fla.2005).

The Bert Harris Act further defines "inordinately burdened" as follows:

(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.**

2. 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. However, a temporary impact on development, as defined in s. 380.04, that is in effect for longer than 1 year may, depending upon the circumstances, constitute an "inordinate burden" as provided in this paragraph.

In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property.

§70.001(3)(e)1 and 2, Fla. Stat. (1995-2014) (emph. added).

Thus, the plain language of the Bert Harris Act provides a cause of action "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[.]" This means *any* real property that the government has inordinately burdened. The cause of action is granted to "the property owner of that real property[.]" This clearly is a cause of action available to *any* property owner whose "existing use of property or a vested right to a specific use of real property" is "inordinately

burdened" by government action. The trial court's holding in the instant case, like the First District's decision in *Jacksonville*, erroneously rewrote the Bert Harris Act to exclude valid claims of owners like FINR, whose property is inordinately burdened by the County's decision to allow new highly disruptive phosphate mining operations<sup>2</sup> immediately adjacent to FINR's property, where FINR operates "a brain treatment and vocational service facility for veterans and survivors of brain injuries" (A 2). FINR's claim clearly falls within the cause of action described by the plain language of Section 70.001(2), as well as the statutory definition of an affected "property owner" in Section 70.001(3)(f).

This Court should not exercise jurisdiction to review the Second District's decision for a number of reasons. First, the Second District's decision is clearly correct on its face, because it follows well-settled principles of statutory construction and correctly applies the plain and unambiguous language of the Bert Harris Act to conclude that FINR stated a cause of action against the County. *See, e.g., Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984) (when language of statute is clear and unambiguous, there is no occasion for resorting to rules of statutory construction, and statute must be given its plain and obvious meaning). In contrast,

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<sup>2</sup> Phosphate mining "is accomplished through utter destruction of the local natural environment from ground surface down to a depth of approximately 50 feet" and has "a devastating impact on the local natural environment." *Charlotte County v. IMC-Phosphates Co. and Fla. Dep't. of Env. Prot.*, 2003 WL 21801924, 5-6 (Fla. DOAH 2003).

the *Jacksonville* case was decided *en banc* by the First District, with eight judges in the majority and five judges dissenting, and one judge recused. The dissenting opinions in *Jacksonville* are very well-reasoned, and demonstrate that the majority decision is simply incorrect, and contrary to well-settled statutory construction principles, and contrary to the clearly stated legislative intent of the Bert Harris Act. *Jacksonville*, 159 So.3d at 895-915.

Second, the correctness of the Second District's interpretation of the Bert Harris Act below is also confirmed by the Florida Legislature's recent amendment of the Bert Harris Act. The Second District held that an "owner of the property adjacent to the property that was subject to ... governmental action, can maintain a cause of action under the Bert Harris Act." In 2015, the Florida Legislature amended the Bert Harris Act to eliminate that cause of action effective as of October 1, 2015. *See*, Ch. 2015-142, §4, Laws of Fla. (2015). Under the 2015 amendments, Section 70.001(3)(f) has been narrowed and now states that the term "property owner" means "the person who holds legal title to the real property *that is the subject of and directly impacted by the action of a governmental entity*," and Section 70.001(3)(g) now states that the term "real property" "*includes only parcels that are the subject of and directly impacted by the action of a governmental entity*." (Emph. added). These amendments confirm that under the plain and unambiguous provisions of the prior version of the Bert Harris Act,

adjacent property owners do indeed have a cause of action, as correctly concluded by the Second District below. Otherwise, there would not have been any reason for these narrowing amendments. Indeed, "there is a strong presumption that, when the legislature amends a statute, it intends to alter the meaning of the statute." *Mikos v. Ringling Bros. Barnum & Bailey Combined Shows, Inc.*, 497 So.2d 630, 633 (Fla.1986); *Capella v. City of Gainesville*, 377 So.2d 658, 660 (Fla.1979) (when legislature amends statute, we presume it intends statute to have different meaning than before).

The Bert Harris Act was originally adopted 20 years ago. Ch. 95-181, §1, Laws of Fla. (1995) (effective Oct. 1, 1995). Thus, any suggestion that the recent narrowing amendments are actually a "clarification" of what the Florida Legislature intended 20 years ago would be disingenuous and must be flatly rejected. *See, e.g., U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001, 1012 (1968) (the views of one legislature as to the construction of a statute adopted many years before by another legislature have very little, if any, significance).<sup>3</sup> Indeed, the plain language of the new amendments reveal a clear intent to narrow and limit the broad cause of action

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<sup>3</sup> Likewise, oral statements by the sponsors of the amendments which are not stated in the written legislation itself have no bearing and do not shed light on the intent of the entire Florida Legislature. *Security Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla.1939); *McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So.2d 811, 813 (Fla.4th DCA 1979); *State v. Patterson*, 694 So.2d 55, 58, n. 3 (Fla.5th DCA 1997).

described in Section 70.001(1) as the Legislature's intent in 1995 to "provide[] 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**" and that obviously means *any* real property.

Moreover, because the new amendments to the Bert Harris Act are not effective until October 1, 2015, *see*, Ch. 2015-142, §4, those amendments cannot be retroactively applied to FINR's cause of action, which accrued in 2013 under the prior version of the statute. *See, e.g., Foley v. Morris*, 339 So. 2d 215, 216 (Fla. 1976) (there is a presumption against retroactive application of statute where legislature has not clearly and explicitly expressed its intention that statute be so applied); *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 424 (Fla.1994) (statute will not be determined to be retroactive unless its terms clearly show that legislature intended such). Because the Second District's decision below is based on a plain reading of the statute and because the Legislature's recent amendment confirms the correctness of the Second District's decision, there is no reason for this Court to exercise its discretion to review it.

Finally, even though the Second District has "certified" that its decision conflicts with the First District's decision in *Jacksonville*, we respectfully submit there actually is no material conflict which will require a different outcome concerning FINR's situation. As explained in the Second District's decision below,

the County's resolution actually decreased the pre-existing quarter-mile rural center setbacks protecting FINR's *brain injury center* from highly disruptive phosphate mining activities to merely 150 feet to the west and north, and 207 feet to the east of FINR's property--which is far less protection than a *cemetery* gets from phosphate mining activities (A 3). In other words, FINR's property is actually the subject of and is directly impacted by the County's action, and as such, FINR's Bert Harris Act claim would satisfy even the narrower test espoused by the First District in *Jacksonville* as well as the Legislature's recent narrowing amendments to the Bert Harris Act. Because of the Legislature's recent amendments, any conflicting legal holdings expressed in the Second District's decision below and the First District's *Jacksonville* decision are unlikely to be repeated, and under the amended version of the Bert Harris Act, the Second District's decision will have no precedential value in resolving future Bert Harris Act disputes.

### **CONCLUSION**

**WHEREFORE,** this Honorable Court should decline to exercise its discretionary jurisdiction to review the Second District's decision below.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy hereof was E-Filed with the Clerk of the Court and electronically served using the Florida Courts E-Filing Portal on

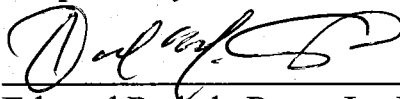
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on this 31<sup>st</sup> day of July, 20 15.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, and that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.120 and 9.210.

Respectfully submitted,



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