SUPREME COURT OF FLORIDA
No. SC15-1260

Lower Tribunal Case No. 2D14-788

HARDEE COUNTY, FLORIDA,
A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA
Petitioner,

v.

FINR II, INC., A FLORIDA CORPORATION
Respondent.

INITIAL BRIEF OF HARDEE COUNTY, FLORIDA

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INTRODUCTION

Local comprehensive plans, zoning ordinances, and the Florida Administrative Procedure Act entitle concerned neighbors to challenge government action that might place a fire station, jail, or mine next door.[1] Common law nuisance and trespass actions are also available to remedy any actual harm. But neighbors cannot use the Harris Act as another, separate means to challenge government action and then seek compensation from the government – like the $38 million that FINR now seeks from Hardee County. The Act's plain language limits claims to those by property owners whose property is *itself* the object of government regulation. The Harris Act's legislative history, the need to avoid absurd results, and a long tradition of narrowly construing waivers of sovereign immunity further support such a reading. Thus, consistent with the First District's *en banc* decision in *City of Jacksonville v. Smith,* 159 So. 3d 888 (Fla. 1st DCA 2015), this Court should reverse the Second District's decision in *FINR II, Inc. v. Hardee Cnty.,* 164 So. 3d 1260 (Fla. 2d DCA 2015).

[1] This brief abbreviates references to the Bert J. Harris, Jr. Private Property Rights Protection Act as "Act" or "Harris Act," the Petitioner here and Appellee below as "Hardee County," and the Respondent here and Appellant below as "FINR." Citations to the record begin with "R." followed by the appropriate page number. Citations to the Florida Statutes are to the 2012 version unless specified otherwise.

STATEMENT OF THE CASE & FACTS

The government action at issue is a development order entitled Hardee County Resolution 12-21. (R. 44-109). Among other things, this development order amends a generally applicable mining setback requirement for CF Industries "based upon a demonstration by CF that mining operations will not significantly interfere with current or planned uses in areas to be benefited by the setback." (R. at 49). The development order allows CF Industries to mine more of its own property by changing the applicable setback – the area on CF Industries' property where mining operations are prohibited – from a quarter-mile to an "effective setback distance of 510 feet from Rural Center[s]." (*Id.* at 109).[2]

The Hardee County Board of County Commissioners adopted the development order on September 20, 2012 after holding two *quasi*-judicial public hearings, (*id.* at 47); making eleven findings of fact, and four conclusions of law, (*id.* at 48-50); and imposing over one hundred conditions on CF industries (*id.* at 50-81). No petition for writ of *certiorari* was filed challenging the County's development order. Nor was an action for declaratory judgment filed pursuant to

[2] FINR alleges in its complaint that the development order at issue "allows CF to mine within 150 feet to the west and north of [FINR's property] and within 207 feet to the east of the property." (R. at 4). But FINR's mandatory appraisal alleges that the development order allows mining within "50 feet" of FINR's property. (*Id.* at 422). While the County recognizes the need to accept FINR's allegations as true given the procedural posture of this case, *FINR,* 164 So. 3d at 1266, here the County simply does not know which allegation to accept as true. The County thus notes the "effective setback distance" provided in the development order itself.

§ 163.3215(3) of the Florida Statutes. *See generally* Gary K. Hunter, Jr. & Douglas M. Smith, *ABCs of Local Land Use and Zoning Decisions,* 84 Fla. Bar. J. 20, 20-26 (2010) (discussing the bases to challenge development orders).

FINR, an adjoining property owner, instead filed a Harris Act complaint against Hardee County in federal bankruptcy court and circuit court. (R. at 1).[3] FINR alleged that the County's development order resulted in a $38 million diminution of its property value. (*Id.* at 1-6). More specifically, FINR alleged that its property is classified as a "Rural Center" on the County's "Future Land Use Map," allowing it to use the property for "a mixed use development consisting of 900 multi-family dwellings units, 60,000 square feet of general commercial development, a 200-room hotel, 175,000 square feet of office [sic], a 200-bed hospital and a 1,030 bed expansion of [FINR's existing neurological] rehabilitation center." (R. at 2). According to FINR, the County's development order would harm its property by permitting mining closer to its property line, "result[ing] in excessive noise, vibration, and dust," and so the order causes a diminution in

[3] As the Second District noted in its opinion, "FINR and its related entities filed for Chapter 11 bankruptcy protection." *FINR,* 164 So. 3d at 1262. FINR thereafter filed "identical" Harris Act complaints before the federal bankruptcy court and State circuit court with the intention of abating the circuit court proceedings and having the bankruptcy court resolve the Harris Act claim. *Id.* The circuit court denied FINR's motion to abate. *Id.* at 1263. The Second District affirmed the circuit court's denial of the motion to abate. *Id.* at 1261.

FINR's property value. (*Id.* at 4). To date, FINR has not filed a nuisance or trespass action alleging harm caused by noise, vibration, or dust.

Notably, FINR's alleged harm includes a diminution in value to "eight off-site" buildings. (*Id.* at 111). These "off-site" properties are approximately 6 miles from the eastern most edge of the FINR property that actually abuts CF Industries' property. (*Id.* at 158-59) (providing relevant map and addresses); (*Id.* at 144, 194) (providing legible maps with scales that allow one to calculate distances).

On January 27, 2014, the circuit court dismissed FINR's Harris Act complaint, reasoning that "the complaint fails to state a cause of action because [FINR]'s property is not the real property at issue, vis-à-vis, Hardee County Resolution 12-21 and the Bert Harris Act." (R. at 617).[4] The Second District reversed the circuit court's decision by a 2-1 margin. *FINR,* 164 So. 3d at 1261-

[4] Hardee County raised other issues in its motion to dismiss before the circuit court such as FINR's failure to provide a bona fide appraisal as required by Harris Act, and FINR's failure to allege any permanent harm as required by the Act. (R. at 574-75); *see also* §§ 70.001(3)(e), (4)(a). But, according to the circuit court, a favorable ruling for the County on the threshold issue now before this Court "obviate[d] the need" to address these other issues. (R. at 616). The Second District similarly limited its decision to whether the Harris Act applies only to a property owner whose property is itself the object of government action. If necessary, on remand, the trial court should be given a chance to address these other issues in the first instance. *Cf. Savona v. Prudential Ins. Co. of Am.,* 648 So. 2d 705, 707 (Fla. 1995) (recognizing that this Court has the authority to address issues other than those upon which jurisdiction is based but declining to exercise that authority where "neither the federal district court nor circuit court addressed [the] issue" raised by the Appellee) (citations omitted).

66. The Second District also certified a conflict with the First District's decision in *Smith*. *Id.* at 1266. This Court accepted jurisdiction on August 18, 2015.

STANDARD OF REVIEW

As Judge Wolf writes in the First District's *en banc* opinion, "[t]he dispositive issue in this case, which is strictly a legal one, is whether a property owner may maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property." *Smith*, 159 So. 3d at 888. This Court reviews pure questions of law *de novo*. *See Rippy v. Shepard,* 80 So. 3d 305, 306 (Fla. 2012).

SUMMARY OF THE ARGUMENT

Words matter. The words the Legislature chose in enacting the Harris Act limit the Act's reach to laws, regulations, and ordinances actually "applied" by the government to a specific piece of real property. §§ 70.001(1), (3)(e), (11), Fla. Stat. The Act further limits actions to those that "directly" burden one's property. *Id.* § 70.001(3)(e). Indeed, the clock begins to run on a claim only when "a law or regulation is first applied by the governmental entity to the property at issue." *Id.* § 70.001(11). Ensuring that these words and phrases are given meaning within the statute read as a whole requires that the Court prohibit property owners from filing claims where government action applies to someone else's property.

Consequences matter too. The Legislature could not have intended to place government in a situation where it would have to fear Harris Act claims from the property owner whose property is actually the object of government regulation and competing claims by dissatisfied neighbors – some miles away. Surely this absurd paradox should be avoided. This is especially true where the public purse must bear the costs and neighbors have other means to remedy any perceived or actual harm. By enacting the Harris Act, the Legislature decided on a specific balance of public and private interests in the regulation of private property. That balance should not be changed in the dramatic manner sought by FINR.

ARGUMENT

I. THE HARRIS ACT LIMITS CLAIMS TO THOSE BY A PROPERTY OWNER WHOSE PROPERTY IS *ITSELF* THE OBJECT OF GOVERNMENT REGULATION.

"This Court's purpose in construing a statutory provision is to give effect to the 'polestar' of legislative intent." *B.C. v. Fla. Dep't of Children & Families,* 887 So. 2d 1046, 1051 (Fla. 2004). Legislative intent is discerned first and foremost from "the words expressed in the statute." *Fla. Dep't of Rev. v. Fla. Mun. Power Agency,* 789 So. 2d 320, 323 (Fla. 2001). These words must be read within the framework of the statute as a "consistent whole," giving meaning to every word where possible, and ensuring that no word is rendered meaningless. *Knowles v. Beverly Enterprises-Fla., Inc.,* 898 So. 2d 1, 6 (Fla. 2004); *see also Gulfstream*

Park Racing Ass'n v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006). Constructions that lead to "absurd" results must be avoided. *Palm Beach Cnty. Canvassing Bd. v. Harris,* 772 So. 2d 1273, 1287 (Fla. 2000). And where, as here, the statute includes a waiver of sovereign immunity, the waiver should be narrowly construed in favor of the government. *See Manatee Cnty. v. Town of Longboat Key,* 365 So. 2d 143, 147 (Fla. 1978). "This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the [S]tate," and protects "the public against profligate encroachments on the public treasury." *Spangler v. Fla. St. Tpk. Auth.,* 106 So. 2d 421, 424 (Fla. 1958).

A. Historical context: the constellation within which the polestar of legislative intent resides.

The Harris Act is the product of "three years of contentious debate over the appropriate means to give landowners protection for the use of their property beyond the constitutional guarantee against the taking of private property for public use without just compensation." David L. Powell, Robert M. Rhodes, & Dan R. Stengle, *A Measured Step to Protect Private Property Rights,* 23 Fla. St. U. L. Rev. 255, 258 (1995). The Act "filled a void in then-existing Florida law because, prior to its enactment, there was no means by which an owner could receive compensation for the adverse financial effects of governmental regulation of his land without satisfying the constitutional standards for a taking, namely, physical invasion or the loss of all economically viable use." *Id.* at 265 n.52

(citing Dep't of Comm'y Aff., CS for H.B. 863 (1995) Staff Analysis 1 (May 15, 1995)). In enacting the Harris Act, the Legislature thus focused "on the level of damage a party had to demonstrate in order to maintain an action based on the regulatory action of government." *Smith,* 159 So. 3d at 892.

But in enacting the Harris Act the Legislature also struck a balance with other equally important interests by guarding against the "empty[ing] of the public purse" or the "roll back [of] decades of work in environmental protection and growth management." Powell *et al.*, *supra*, at 258. It never "intended to create a whole new class of takings claimants who do not have to demonstrate that a governmental law, rule, or regulation had been applied to their property." *Smith,* 159 So. 3d at 892. The Act's plain language supports such a reading. *Id.*

B. The Harris Act's plain language: giving effect to the words "applied" and "directly."

The Harris Act – as it existed when Hardee County issued the development order at issue – provides in pertinent part:

> (1) . . . 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:

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(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.

***

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***.

***

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first ***applied*** by the governmental entity ***to the property at issue***.

§ 70.001, Fla. Stat. (emphasis added). Read within the context of the statute as a whole, the words "applied" and "directly" make clear that "the Act simply does not apply where, as here, the [plaintiff's] property was not itself subject to any government regulatory action." *Smith,* 159 So. 3d at 889.

First, the word "applied." It is used twice in the Act's intent section. § 70.001(1), Fla. Stat. There, the word limits the types of objectionable "laws, regulations, and ordinances" to only those that actually apply to the plaintiff's "real property." *Id.* The definition of "inordinate burden" similarly speaks to "the factual circumstances . . . between enactment of the law or regulation and its first *application to the subject property*." *Id.* § 70.001(3)(e) (emphasis added). It presupposes that the objectionable government action is being applied to the property at issue. *Id.* And the Act's statute of limitations directs would-be plaintiffs to present their claims no "more than 1 year after a law or regulation is *first applied by the governmental entity to the property at issue*." *Id.* § 70.001(11) (emphasis added). This provision would be rendered meaningless – its 1-year trigger never pulled – were someone to sue in reference to another person's property. *Id.*; *see also Smith,* 159 So. 3d at 892 ("This section concerning the statute of limitations would make no sense if a cause of action could be triggered by a government action in reference to another person's property.").

Second, the word "directly." It too is intended to limit the universe of possible claims. As used in the definition of "inordinate burden," the word allows one to sue only where government action has "directly restricted or limited the use of real property." § 70.001(3)(e)1, Fla. Stat. A law, regulation, or ordinance that applies to another person's property fails to satisfy this requirement; it is only an indirect or incidental burden. *See id.*

The Attorney General agrees. In an opinion issued shortly after the Act's passage in 1995, the Attorney General opines that "[t]he plain language of the statute indicates that only real property that is directly affected by a governmental regulation is covered by the provisions of the act." Op. Att'y Gen. Fla. 95-78 (1995). Relying on this language, the Attorney General concludes that "it does not appear that the Legislature contemplated extending the compensation provisions of the act to real property that may be incidentally affected by a government action or regulation directed at a separate, specific parcel of real property." *Id.* While this Attorney General's opinion "is not binding" on the Court, "it is entitled to careful consideration and generally should be regarded as highly persuasive." *State v. Family Bank of Hallandale,* 623 So. 2d 474, 478 (Fla. 1993).

Commentators involved in the Harris Act's passage similarly explain that "[a] governmental action which indirectly burdened or inadvertently devalued an owner's land, because of regulatory decisions regarding another owner's property,

would be too attenuated for relief under the Harris Act." Powell, *et al.*, *supra* at 273. "[T]he governmental entity must specifically apply the statute, rule, regulation, or ordinance to the owner's property" for the owner to have a Harris Act claim. *Id.* at 289.

More recently, during the 2015 Regular Session, the Florida Legislature amended the Harris Act to make clear "that only those property owners whose real property is the subject of and directly impacted by the action of a governmental entity may bring suit under the [A]ct." H.R. Final Bill Analysis, *H.B. 383*, 117th Sess., at 5 (Fla. 2015);[5] *see also* Ch. 2015-142, Laws of Fla. (amending definition of "property owner" and "real property").[6] As the sponsors of this legislation explained to their colleagues, these amendments were intended to "clarify" or make "clarifications to" existing law. *See H.B. 383* Before the H.R. Civil Justice Subcomm., 2015 Leg., 117th Sess. (Feb. 10, 2015) (statement of Rep. Edwards);[7] *H.B. 383* Before the H.R. Local Gov't Affairs Subcomm., 2015 Leg., 117th Sess.

[5]This staff analysis is available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0383z2.CJS.DOCX&DocumentType=Analysis&BillNumber=0383&Session=2015 .

[6] This new legislation is available at http://laws.flrules.org/2015/142 .

[7] *H.R. Civil Justice Subcomm. Meeting*, available at http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015021200&committeeID=2828 (at approx. 24:50).

(Mar. 18, 2015) (statement of Rep. Edwards);[8] *H.B. 383* Before the H.R. Appropriations Comm., 2015 Leg., 117th Sess. (Mar. 31, 2015) (statement of Rep. Perry);[9] *H.B. 383* Before the H.R. Judiciary Comm., 2015 Leg., 117th Sess. (Apr. 8, 2015) (statement of Rep. Edwards);[10] *S.B. 284* Before the S. Envtl. Preservation & Conservation Comm., 2015 Leg., 117th Sess. (Mar. 24, 2015) (statement of Sen. Diaz de la Portilla);[11] *S.B. 284* Before the Appropriations Subcomm. On General Gov't., 2015 Leg., 117th Sess. (Apr. 14, 2015) (statement of Sen. Diaz de la Portilla);[12] *S.B. 284* Before the Appropriations Comm., 2015 Leg., 117th Sess. (Apr. 21, 2015) (statement of Sen. Diaz de la Portilla).[13]

A plain reading of the Harris Act thus limits claims to those by property owners whose property is itself the object of government action. Such a reading

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[8] *H.R. Local Gov't Affairs Subcomm. Meeting*, available at http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015031322&committeeID=2836 (at approx. 57:56).

[9] *H.R. Appropriations Comm. Meeting*, available at http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015031530&committeeID=2827 (at approx. 1:19:50).

[10] *H.R. Judiciary Comm. Meeting*, available at http://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2015041076&committeeID=2826 (at approx. 1:48:49).

[11] *S. Envtl. Preservation & Conservation Comm. Meeting*, available at https://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015031431 (at approx. 3:20).

[12] *S. Appropriations Subcomm. on General Gov't. Meeting*, available at https://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015041158 (at approx. 2:49).

[13] *S. Appropriations Comm. Meeting*, available at https://www.flsenate.gov/media/videoplayer?EventID=2443575804_2015041230 (at approx. 169:20).

ensures that the words "applied" and "directly" are not written out of the Act, or the Act's statute of limitations provision rendered superfluous. Such a reading comports with the rules of statutory construction, and dictates that the Second District's decision below be reversed. *See Gulfstream Park,* 948 So. 2d at 606; *Knowles,* 898 So. 2d at 6; *Fla. Mun. Power Agency,* 789 So. 2d at 323; *Palm Beach Cnty. Canvassing Bd.,* 772 So. 2d at 1287.

C. Avoiding absurd results: dueling Harris Act claims by property owners and their neighbors.

The Second District's decision below should also be reversed because it sanctions an absurd result. Suppose a property owner were to satisfy all applicable state and local requirements for a permit or entitlement. In such a situation, the government would issue the necessary state and local approvals. Failure to do so would expose the government to challenge under the Harris Act, assuming an appraisal would demonstrate that the property was inordinately burdened. Yet, under the Second District's reading of the Harris Act, granting the necessary permits or entitlements to the applicant would also expose the government to a Harris Act claim from the applicant's neighbor or another property owner further removed from the applicant's property. Caught between two competing Harris Act claims, there would be no prudent course of action for the government. Government would be damned were it to grant or deny the necessary permission.

See Smith, 159 So. 3d at 893 (labeling this a "cataclysmic change" that would subject "any governmental action" to litigation under the Harris Act).[14]

This concern is more than abstract here. Among other things, CF Industries satisfied the requirements for an alternative setback, and agreed to the conditions that Hardee County found necessary. (R. 44-109). An interpretation that now allows FINR to allege a Harris Act claim against the County – where the County's development order "directly" applies only to CF Industries' property – would place Hardee County in an absurd position: deny the application and be sued by the landowner, or grant the application and be sued by the neighbor.

Surely the Legislature could not have intended to turn government action into Schrödinger's cat.[15] Unlike the cat, which is both alive and dead at same time, government action can either burden the landowner or the neighbors – not both. For the same government action to burden both the landowners and the neighbors would create an absurd paradox. Limiting claims to those by a property owner whose property is itself the object of government regulation would avoid this

[14] While the Legislature's 2015 Harris Act amendments ameliorate these concerns, in considering the Legislature's intent when enacting the Harris Act in 1995, one must assume that the Legislature did not intend to expose state and local government to the absurd.

[15] Used in quantum physics, Schrödinger's thought experiment serves as a symbol of something existing in two contradictory states at the same time; however, this thought experiment seldom works when applied to the law. *See, e.g., TKO Equip. Co. v. C & G Coal Co., Inc.,* 863 F.2d 541, 545 (7th Cir. 1988) (noting that unlike Schrödinger's cat, an agreement cannot simultaneously be both a sale and a lease).

absurdity. *See Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008) ("We have long held that the Court should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences.").

D. Waiver of sovereign immunity: the need to narrowly construe any waiver for the public good.

Finally, reversing the Second District's decision would be consistent with the policy of narrowly construing waivers of sovereign immunity. The Harris Act's waiver of sovereign immunity provides: "In accordance with § 13, Art. X of the State Constitution, the state, for itself and for its agencies or political subdivisions, waives sovereign immunity for causes of action based upon the application of any law, regulation, or ordinance subject to this section, *but only to the extent specified in this section.*" § 70.001(13), Fla. Stat. (emphasis added).

As discussed above, the Harris Act's plain language, read as a whole, and in a manner intended to avoid absurd results, limits claims to those by property owners whose property is itself the object of government regulation. The waiver of sovereign immunity is limited accordingly. *Id.* This interpretation of the Act would mean that Hardee County faces no liability from FINR related to the County's development order at issue. It would protect "the public against profligate encroachments on the public treasury." *Spangler,* 106 So. 2d at 424.

Based on its broad interpretation of the Act, however, FINR alleges that Hardee County must compensate it $38 million. (R. at 4). This interpretation

would expose "the public" to "profligate encroachments on the public treasury." *Spangler,* 106 So. 2d at 424. Accordingly, consistent with the public policy of narrowly construing waivers of sovereign immunity, Hardee County asks this Court to reverse the Second District's broader – and incorrect – interpretation of the Harris Act. *Cf. Allstate Ins. Co. v. RJT Enters., Inc.,* 692 So. 2d 142, 143 (Fla. 1997) ("In the absence of a clear directive from the legislature, this Court should not impose such monumental costs on the citizens of Florida.").

E. Red herrings: the dissenting opinions in *Smith*.

The two dissenting opinions from *Smith*, on which the Second District relied, do not require a contrary result. Judge Swanson's dissent was animated by a concern that a narrow reading of the Harris Act would leave "governmental entities . . . free to disregard the legitimate interests and vested rights of adjacent landowners when deciding to locate jails, landfills, airports, waste incinerators, sewage treatment plants, power plants, and other facilities in residential areas not previously zoned for such uses." *Smith,* 159 So. 3d at 896. Not so.

Governmental entities must always abide by local comprehensive plans, zoning ordinances, and (in the case of state agencies) the Florida Administrative Procedure Act when deciding whether to approve a specific use of property. Neighboring property owners have ample opportunity to provide their input, and then seek judicial review of any government approval. For example, "the rulings

of a [local government] board acting in its *quasi*-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence." *Bd. of Ctny. Comm'rs v. Snyder,* 627 So. 2d 469, 474 (Fla. 1993). Any "aggrieved or adversely affected party" may also challenge a local government's "development order" by filing a circuit court complaint that alleges an inconsistency with that local government's comprehensive plan. § 163.3215(1), Fla. Stat. Actions by state agencies are similarly subject to administrative adjudication, and judicial review. *Id.* §§ 120.569, 120.57, 120.68.

Neighboring landowners may also seek redress through the common law. They could allege that the foul odors, noise, dust or bright lights from a neighboring property constitutes a nuisance, or trespass. *See generally North Dade Water Co. v. Adken Land Co.,* 130 So. 2d 894, 896 (Fla. 3d DCA 1961) (enjoining actions for neighboring property owner because they "constituted a private nuisance (odors and pollution of plaintiff's lakes) and a continuing trespass to the irreparable damage of the plaintiff"); Am. Jur. 2d, Nuisances § 105 (noting that such concerns, "if sufficiently extreme, may constitute a nuisance").

Here, while FINR has not yet filed any nuisance or trespass actions against CF Industries to enjoin the mining operations, FINR did file an administrative action against CF Industries and the Florida Department of Environmental Protection, the state agency responsible for issuing necessary state permits to CF

Industries. FINR lost. *See FINR II, Inc. v. CF Indus., Inc.*, FDEP OGC Case No. 11-1756, at *32-33 (Final Order, Jun. 8, 2012) *affirmed and rehearing denied* 118 So. 3d 809 (Fla. 1st DCA 2013) *writ of certiorari denied* 134 S. Ct. 1031 (2014) (rejecting claims that CF Industries' activities would have an adverse environmental or water resource impact on FINR's property).

The basis for Judge Swanson's dissent is thus flawed. A broad reading of the Harris Act is *not* necessary to protect the rights of neighboring property owners when the government decides to "locate jails, landfills, airports, waste incinerators, sewage treatment plants, power plants, and other facilities." *Smith,* 159 So. 3d at 896. Florida law provides ample alternative remedies. If another remedy was necessary for neighboring landowners, the Legislature would have clearly said so in the Harris Act. It did not.

Judge Makar's dissent likewise misses the mark. First, Judge Makar explains that the Legislature's use of the word "applied" is "most reasonably understood as creating a differentiation from mere facial applications of the Act." *Smith,* 159 So. 3d at 909. But when one reads the Act as a whole it becomes clear that this could not have been so. With or without the word "applied," the Legislature made clear in the Harris Act that claims are not facial; claims are fact-specific, based on government action directed at a specific piece of property, supported by appraisals specifically demonstrating a loss in the fair market value

of the property, and remedied by relief specifically targeted at the property to which the burdensome regulation was "directly" applied. *See* §§ 70.001(2), (3)(e) , (4)(a)-(c). Therefore, Judge Makar's interpretation of the word "applied" makes the word at best redundant, and at worst meaningless. The rules of statutory interpretation sanction neither interpretation. *See Gulfstream Park,* 948 So. 2d at 605 (noting the need to avoid an interpretation that would render any word "totally redundant and without meaning"); *see also Atwater v. Kortum,* 95 So. 3d 85, 90 (Fla. 2012) (requiring courts to "give effect to each word in the statute").

Second, Judge Makar suggests that the Harris Act should be liberally construed to allow claims by neighboring property owners because it is a remedial statute. *Smith,* 159 So. 3d at 911-12. While Judge Makar is correct in noting that the Act is a remedial statute, *id.* at 911, the threshold question before this Court is whether neighboring property owners were ever intended to fall within its ambit. This threshold question turns on the language used by the Legislature. It is simply circular logic to suggest that the Court should liberally construe the Harris Act to protect neighboring property owners because the Legislature intended to protect neighboring property owners. Only when (or if) it is clear that the Legislature intended to protect the rights of neighboring property owners would this convention of statutory construction apply. It does not apply here.

CONCLUSION

Hardee County asks that this Court reverse the Second District's decision below. The Second District's interpretation of the Harris Act is inconsistent with the language the Legislature chose to use, the canons of statutory construction, and the prudent policy of limiting the sovereign's exposure to liability. The Act was designed to balance the rights and obligations of both public and private interests without creating a tidal wave of change in the regulation of private property. Neighboring property owners like FINR never fell within the Act's scope. The contrary construction sought by FINR and approved by the Second District would upset the balance achieved by the Legislature. Any such re-calibration of that balance should be left to the Legislature. The trial court was thus correct in dismissing FINR's complaint, in concluding that there is simply no basis in the Harris Act to address FINR's grievance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 15th day of October, 2015, the foregoing was filed with this Court via the Court's e-filing portal and served by e-mail on the below listed individuals:

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I HEREBY CERTIFY that the foregoing has been generated with Times New Roman 14 point font and thus complies with Rule 9.100, Florida Rules of Appellate Procedure.

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