IN THE FLORIDA SUPREME COURT

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

Petitioner,

vs.

FINR II, INC., a Florida
corporation,

Respondent.
_____/

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

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

L.T. Case No. 130000614CAAXMX

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Edward P. de la Parte, Jr.
Patrick J. McNamara
David M. Caldevilla
de la Parte & Gilbert, P.A.
Post Office Box 2350
Tampa, FL 33601-2350
(813)229-2775

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

A. Introduction

The Petitioner, Hardee County, Florida (the "**County**") has invoked this Court's discretionary jurisdiction to review the decision in *FINR, Inc. v. Hardee County, Florida*, 164 So.3d 1260 (Fla. 2d DCA 2015), where the Florida Second District Court of Appeal ("**Second District**") certified conflict with *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015).[1]

B. The Bert Harris Act

On October 1, 1995, Section 70.001, Florida Statutes (the "**Bert Harris Act**") took effect. The Bert Harris Act created a new cause of action to provide compensation to a landowner whenever the actions of a governmental entity impose 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. (2012).[2] The Bert Harris Act is intended to apply to governmental actions that do not rise to the level of a regulatory taking. §70.001(1), Fla. Stat. (2012).

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[1] *Smith* was decided *en banc* in a 9-to-5 decision. Judge Wolfe wrote for the majority, with eight judges concurring. Five judges dissented, and one judge was recused. There were two dissenting opinions, one by Judge Swanson and one by Judge Makar, and all five dissenting judges concurred in both dissenting opinions.

[2] In 2015, the Legislature amended the Bert Harris Act effective as of October 1, 2015. *See*, Ch. 2015-142, §4, Laws of Fla. (2015). However, this case involves the 2012 version of the Bert Harris Act. Unless stated otherwise, all citations herein to Section 70.001 and its subsections refer to the 2012 version of the statute.

C. FINR's property and the County's action

The Respondent, FINR II, INC., ("**FINR**") owns approximately 872 acres in Hardee County, Florida[3] (R 1).[4] FINR leases the property to its affiliated companies, FINR III, LLC and to the Florida Institute for Neurologic Rehabilitation, Inc., which provide health care, rehabilitation, education and vocational services to injured veterans and other survivors of brain injuries (R 2).

When FINR purchased it in 1996, the property had a future land use designation of "Agriculture" and "Public Institutional" in the County's Comprehensive Plan (R 2). At that time, the adjacent properties to the north, east, and west of the FINR property were zoned "A-1" (Agricultural) and were being used for citrus and agricultural activities (R 2).

In February 2007, *at the County's request*, FINR filed an application with the County to amend the Hardee County Comprehensive Plan and change the future land use designation for FINR's property from "Agriculture" and "Public Institutional" to "Rural Center" (R 2). On December 13, 2007, the Board of County Commissioners approved FINR's application for the "Rural Center" designation,

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[3] Many of the facts described herein are derived from the allegations of FINR's complaint, which must be deemed true at this juncture of the case. *See, e.g., W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So.2d 297, 300 (Fla. 1st DCA 1999); *Lutz Lake Fern Rd. Neighborhood Groups, Inc. v. Hillsborough County*, 779 So.2d 380, 384 (Fla. 2d DCA 2000).

[4] Citations to **"R"** refer to the record on appeal. Citations to **"A"** refer to FINR's appendix.

by adoption of Ordinance 2007-14 (R 2, 8-27). Ordinance 2007-14 determined that the Rural Center designation "would be in the best interest of the health, safety and welfare of the general public of Hardee County..." (R 8, 9). Ordinance 2007-14 amended the County's Comprehensive Plan and Future Land Use Map, to allow a mixed use development of 900 multi-family dwelling units, 60,000 square feet of commercial development, a 200-room hotel, 175,000 square feet of office, a 200-bed hospital, and a 1,030 bed expansion of the rehabilitation center (R 2, 11).

Ordinance 2007-14 includes many findings explaining why it was important for FINR's property to be designated as a Rural Center:

> ... Hardee County is a rural county with primarily an agricultural and phosphate mining economic base. ....
> . . . . .
> The site of the proposed amendment is located in Agricultural and Public/Institutional Future Land Use designations and is developed-partially-with the Florida Institute of Neurological Rehabilitation [FINR] facilities. Surrounding land uses include: to the south pasture land with Mining Overlay; to the east pasture land, citrus groves and a storage facility; to the north-pasture land with Mining Overlay; to the west – pasture land.
>
> **... [P]hosphate mining ownership represents a significant portion of land that is unavailable for other uses in the County. The mining companies have historically acquired very large tracts of land for their use that, over the life of the mining process results in acquisition/reservation, mining, reclamation, and release. Historically, there has been little released land since mining entered Hardee County in the 1970s. Assuming that the companies past actions portends their future behavior; land held by the mining companies will remain unavailable for residential/intensive use through 2030.**

Mining owns approximately 106,173 acres, with Mosaic Fertilizer, LLC, owning 81,773 acres and CF Industries Inc. owning 24,400 acres. ...

. . . . .

The Rural Center category is established in the Hardee County Comprehensive Plan to recognize the existence of, and need for small-scale rural clusters of mixed-use development. This request by the Florida Institute of Neurological Research (FINR), a medical rehabilitation center specializing in brain trauma, is consistent with the Rural Center category in that the amendment will permit the expansion of the rehabilitation element as well as establishing a mixed use development to take advantage of the Vandolah Estates mixed housing type residential site as well as introducing 900 additional residential units (multi-family), 60,000 square feet of retail, a 200-room hotel, 175,000 square feet of office, a 200-bed hospital and a 1,030-bed expansion of the rehabilitation facility. When combined with the adjacent development proposed in the Vandolah Rural Center, a compact community based on an employment center (light industrial, medical, retail, and office), along with a variety of residential housing types will become established. Further, such a Rural Center may provide impetus for downtown development and revitalization within the City of Wauchula, given the City's proximity to Vandolah. Wauchula maintains the charm of an early 20th century Florida city, and such charm has been highly marketable in other areas of the state and region.

. . . . .

This request is appropriate because it will further introduce urban uses within Vandolah Rural Center such as medical (rehabilitation and hospital for specialized brain trauma treatment) retail, office, and hotel. Over the next 20 years FINR is expected to create 5,000 jobs, establish workforce scale housing, create demand for the Vandolah Estates housing and further initiate Rural Center development within the Vandolah area.

. . . . .

... Hardee County is deficient with respect to recreation facilities. **The proposed land use amendment will be required to include recreation facilities to meet concurrency requirements**.

. . . . .

It should not be neglected that primary construction jobs, in the form of residential construction, create and sustain jobs. Economic development and activity, devoid of managed population growth to support a balanced

> and sustainable local and regional economy, does not occur. Applying the Rural Center Land Use designation can create appropriate development/economic activity while supporting efficient public investment in infrastructure.
>
> . . . . .
>
> Hardee County is beginning to experience population growth beyond historic growth rate trends. As identified earlier, much of Hardee County has a future land use designation of Agriculture, limiting development to one unit per five acres. While it is important to protect Hardee County's agricultural resources, and encourage the continuation of agriculture where desired, **this density limitation on 95% of the county is a grossly inefficient use of land, consuming large tracts in very low density development. Hardee County will not be able to accommodate projected and likely future growth given the current land use designations and locations**.
>
> Additionally, **Hardee County... has been designated as a Rural Area of Critical Economic Concern (RACEC) community** pursuant to section 288.0656(7), F.S. **This designation establishes that Hardee County is in need of economic development activity and growth. Expanding the population base to provide an employment base, as well as a base for commercial activity, is clearly demonstrated by the designation. Providing new-and expanding existing-Rural Center areas can accommodate future growth in logically compact areas, maintaining agriculture and open space, while providing the density to make fiscally sound investments in infrastructure.**

(R 12-13, 16, 17, 20; emph. added). Another reason given by Ordinance 2007-14 for approving FINR's Rural Center designation is that it "[p]romotes a clear separation between urban and rural uses" as required by Florida Administrative Code Chapter 9J-5 (R 21). Ordinance 2007-14 also explains that FINR was "required to donate land" and provide "developer funding" to the County, that there is a "Developer's Agreement" which addressed the expansion of utility services for the project, and that all roadway improvements necessary as a result of the

development "will be the responsibility of the developers" (R 18, 19, 23).

Thus, designating FINR's property as a Rural Center was "part of an overall attempt by Hardee County to establish the Vandolah Rural Center" whose central focus would be the FINR rehabilitation and skilled nursing facilities (R 3, 15, 32). In reliance upon the Ordinance, FINR constructed facilities on its property (R 3). FINR's campus consists of 25 buildings located on the property (R 2).

Importantly, the County's designation of FINR's property as a "Rural Center" automatically entitled FINR to a quarter-mile setback from its property boundary within which all phosphate mining operations were prohibited under the Comprehensive Plan and the Land Development Code (R 3, 572). *See*, Hardee County Unified Land Development Code §3.14.02.06 (A)(01)a (adopted June 21, 2007) (A 65).[5] The County's Land Development Code explains that this quarter-mile setback is intended to establish the "minimum" requirement "to protect adjoining property uses" and to ensure that "mining operations will not significantly interfere with current or planned uses within or adjacent to such land use classification[.]" *See*, Hardee County Unified Land Development Code §3.14.02.06(A)(01)a and (04)a (adopted June 21, 2007) (A 65-66).

[5] Excerpts from the 2007 version of the Hardee County Unified Land Development Code are provided in FINR's appendix (A 63-84). The current version of the County's Land Development Code can be accessed on the internet at *https://www.municode.com/library/fl/hardee_county/codes/land_development_code?nodeId=SUHITA_ART3DEDEIMST_3.14.00PEST*.

Directly adjacent to FINR's property, and surrounding FINR on the north, east, and west is a 7,513-acre parcel of property (the **"Adjacent Parcel**"), which was owned by a phosphate company known as CF Industries Inc. (the "**Phosphate Company**"), but only authorized for citrus and other agricultural uses (R 3). [6] On August 17, 2010, the Phosphate Company applied to the County to develop a new phosphate mine on the Adjacent Parcel through a major special exception and alternate setback (R 3, 46). In its request for an alternate setback, the Phosphate Company sought to remove the pre-existing quarter mile no-mining setback required between mining operations on the Adjacent Parcel and FINR's property (R 3, 46). Absent a modification of the pre-existing quarter-mile setback, phosphate mining operations could not take place on the Adjacent Parcel within the quarter-mile setback (R 3). *See also*, Hardee County Unified Land Development Code §3.14.02.06 (A)(01)a (A 65).

[6] According to Policy L1.17 of the County's Comprehensive Plan, a "Mining Overlay District" identifies areas in Hardee County where mining has, is or is planned to occur. *See*, Hardee County Comp. Plan at p. 16 (*available at http://www.hardeecounty.net/site/content/plan/files/2030%20Hardee%20County%20Comp%20Plan-%20NO%20MAPS.pdf*). In 2007, the Adjacent Parcel was located within the Mining Overlay District, but the Phosphate Company was not authorized to mine the property at that time because it had not been added to the 1977 development of regional impact known as the South Pasture Mine, and the Phosphate Company had not received a Major Special Exception Use Permit under Section 2.29.02(B) and Part 7.12.00 of the Land Development Code (R 44-46). Therefore, the only authorized uses of the property at the time were agricultural related activities. *See*, Table 2.29.02(B), Land Development Code (R 3; A 75-84).

On or about September 21, 2012, the Board of County Commissioners granted the Phosphate Company's request, by adoption of Resolution 12-21, which was effective as of September 25, 2012 (R 3, 44-109). With certain exceptions, Resolution 12-21 generally allows phosphate mining operations within 150 feet to the west and north, and within 207 feet to the east, of FINR's property (R 4, 109), as opposed to being prohibited from mining within the quarter-mile (i.e., 1,320 feet) distance established by virtue of FINR's Rural Center land use designation approved in 2007 by Ordinance 2007-14 (R 2, 97, 103). Notably, Resolution 12-21 expressly and repeatedly identified, referenced, and depicted FINR and its property in relation to the reduced setback, including:

- **Page 3 (R 46):** One of the County's "whereas" clauses euphemistically states that the Phosphate Company's request for the reduced setback, includes "certain mitigation measures designed to avoid significantly interfering with current and planned land uses in the Vandolah Rural Center" (i.e., FINR's Rural Center).

- **Page 6 (R 49)**: Paragraph 10 acknowledges that the Phosphate Company's setback reduction request "was disputed by adjacent property owners," and that the request was being "granted for those areas depicted in Exhibit G". The adjacent property owner is FINR, and FINR's Rural Center is within the area depicted in Exhibit G (R 109).

- **Page 8 (R 51)**: "FINR" is one of the defined terms in the Resolution.

- **Pages 34-35 (R 77-78):** The Vandolah Rural Center (i.e., FINR's Rural Center) is specifically mentioned in paragraphs 109 and 110. Paragraph 110 specifically acknowledges that the "landowners within the rural center have not signed a waiver of the ¼ mile setback" (R 78).

- **Exhibit F (R 107)**: "FINR" and the "FINR Property" is specifically identified and depicted on the map at Exhibit F (R 107).

- **Exhibit G (R 109)**: FINR's "Rural Center" is identified and depicted on the map at Exhibit G.

(R 46, 49, 51, 77-78, 107, 109). Thus, FINR and its property are not only repeatedly referenced within Resolution 12-21, but the effect of that resolution was to modify FINR's Rural Center designation, which FINR previously applied for and which the County previously approved in Ordinance 2007-14 (8-27).

At page 2 of the initial brief on the merits, the County states no petition for certiorari or declaratory judgment action was filed to challenge Resolution 12-21. While that statement is true, such proceedings are not a prerequisite to bringing a Bert Harris action. Much like a citizen whose interest in a parcel of property is lawfully condemned by a county through eminent domain, FINR does not now challenge the County's legal authority and power to grant the Phosphate Company's application to reduce FINR's quarter-mile setback. Rather, FINR contends that the County's approval of that application has "inordinately burdened" FINR's "existing use of real property or a vested right to a specific use of real property," and as a result, FINR, as "the property owner of that real property[,] is entitled to relief" under the Bert Harris Act pursuant to Section 70.001(2), Florida Statutes (2012). Moreover, if the lack of a petition for certiorari or declaratory relief action is deemed relevant, then it should also be noted that no such

proceeding was initiated by the Phosphate Company challenging the County's approval of FINR's application for a Rural Center designation in 2007, even though the Phosphate Company had the right to do so.

D. FINR's bankruptcy proceeding and Bert Harris Act claims

On January 4, 2013, FINR and its related entities filed for Chapter 11[7] bankruptcy protection and reorganization (the "**Bankruptcy Case**") in the U.S. Bankruptcy Court for the Middle District of Florida, Tampa Division (the "**Bankruptcy Court**") (R 556; A 1-2).

On or about April 26, 2013, FINR presented the County with a notice of claim concerning the effects of Resolution 12-21 on FINR's property, and a bona fide, valid appraisal report of the FINR property pursuant to section (4)(a) of the Bert Harris Act (R 5, 322-538). §70.001(4)(a), Fla. Stat. (2012). However, the County rejected FINR's claim and declined to rescind or modify its reduction of the prior quarter-mile setback (R 5, 539).

On September 24, 2013, after the expiration of the statutory 150-day notice period set forth in Section 70.001(4)(a), FINR filed a complaint in the Bankruptcy Court against the County pursuant to the Bert Harris Act (the "**Adversary**

[7] Chapter 11 refers to Title 11 of the U.S. Bankruptcy Code, which permits reorganization under the bankruptcy laws. Chapter 11 reorganization is available to every business, whether organized as a corporation or sole proprietorship, as well as to individuals. *See*, 11 U.S.C. § 1101 et. seq.

Proceeding")[8] (R 556; A 56).

A claim under the Bert Harris Act must be brought within one year from the date "a law or regulation is first applied by the governmental entity to the property at issue." *See*, §70.001(11), Fla. Stat. (2012). Because of the impending limitation period under the Bert Harris Act, on September 25, 2013, FINR also filed in Hardee County Circuit Court essentially the same complaint as it had previously filed in the Adversary Proceeding (R 1-555). FINR did this in an abundance of caution, due to uncertainty as to whether the Bankruptcy Court would ultimately hear the Adversary Proceeding.[9] On September 27, 2014, FINR moved the Hardee County Circuit Court to hold that case in abeyance, pending the outcome of the earlier-filed Adversary Proceeding (R 556-561).

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[8][8] An adversary proceeding is a lawsuit filed within the bankruptcy case. 9 *Collier on Bankruptcy* ¶ 7001.01 (16th ed. 2011). An adversary proceeding "incorporates [many] of the Federal Rules of Civil Procedure ... and [it] equate[s] to [a] full-blown lawsuit[]." *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 762 (5th Cir. 1995). An adversary proceeding is typically brought in bankruptcy court instead of state court because it involves parties or issues central to a bankruptcy proceeding. *See, e.g.*, R. 7001, Fed. R. Bankr. P.

[9] According to Section 1334(c)(1) of the Bankruptcy Code (28 U.S.C. §1334(c)(1)), a bankruptcy court has the exclusive authority to determine whether an adversary proceeding is within its core jurisdiction. If an adversary proceeding is not within a bankruptcy court's core jurisdiction, the bankruptcy court may still exercise jurisdiction pursuant to Section 157(c) of the Bankruptcy Code. *See*, 28 U.S.C. §157(c). Because it was impossible for FINR to be certain whether the Bankruptcy Court would issue a ruling on jurisdiction before the expiration of the statute of limitations on FINR's Bert Harris Act claims, FINR elected to file an identical claim in Hardee County Circuit Court as a contingency plan (R 1-555).

FINR alleged that, without the prior setback in place, Resolution 12-21 now allows expanded phosphate mining operations within 150 feet to the west and north and within 207 feet to the east of FINR's property, instead of beyond the pre-existing quarter-mile setback (R 4). FINR further alleged that the mining activity results in excessive noise, vibration, and dust, to such an extent as to preclude the present use of FINR's property as a skilled nursing and neurologic rehabilitation facility for the care and treatment of patients with traumatic brain injuries (R 4). FINR also alleged that with the expanded mining operations in such close proximity, the highest and best use of its property will be merely as agricultural or recreational land (R 4).

The same appraisal was attached to FINR's complaints in both cases (R 115-327). The appraisal indicates the fair market value of FINR's property prior to the September 25, 2012 effective date of Resolution 12-21 was $41,930,000 (R 4, 112, 214). As a result of the adoption of Resolution 12-21, the highest and best use of FINR's property is now merely agricultural and recreational uses (R 4, 204). Consequently, the appraisal shows the value has been reduced to $3,600,000 (R 4, 112, 214). This represents $38.33 million in damages to FINR resulting from the County's decision to remove the pre-existing quarter-mile no-mining setback and to authorize phosphate mining operations in much closer proximity to FINR's existing neurological injury facilities and operations.

On October 21, 2013, the County moved to dismiss FINR's complaint in the state court action (R 571-576). On December 27, 2013, FINR responded to the County's motion (R 585-592). On January 8, 2014, the trial court conducted a single hearing on FINR's motion to hold the case in abeyance and the County's motion to dismiss (R 640-706).

On January 27, 2014, the trial court rendered its decision on the motions (R 614-617). The trial court denied FINR's motion to hold the case in abeyance (R 614), and granted the County's motion to dismiss *with prejudice*, even though the County never requested dismissal with prejudice and even though FINR had never been given any opportunity to file an amended complaint (R 617).

Instead of suggesting that FINR's complaint failed to plead any essential elements of a Bert Harris Act claim, the trial court's ruling was based on the lack of a statutory definition for the term "real property at issue"[10] (R 615-616). According to the trial court's order, FINR's property was not "real property *at issue*" as contemplated by the Bert Harris Act, because FINR's property is supposedly not the property identified as being regulated in Resolution 12-21 (R 614-616).

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[10] Although the Bert Harris Act does not define the term "real property *at issue*," it does broadly define the term "real property" as follows: "The term 'real property' means land and includes any appurtenances and improvements to the land, **including any other relevant real property** in which the property owner had a relevant interest." *See*, §70.001(3)(g), Fla. Stat. (2012) (emph. added). The trial court's final judgment does not mention or allude to this definition of "real property" (R 629-632).

FINR timely appealed to the Florida Second District Court of Appeal (R 618-623, 629-638), and the Bankruptcy Court abated the Adversary Proceeding pending the outcome of the appeal (A 53-54, 60-61).

In its appeal to the Second District, FINR argued: (1) the trial court abused its discretion by denying FINR's motion to hold the case in abeyance pending the outcome of the Adversary Proceeding; (2) the trial court abused its discretion by depriving FINR of the right to amend its complaint; and (3) that the trial court erroneously concluded that the Bert Harris Act does not apply to FINR's claim. *See,* FINR's Initial Brief, Fla. 2d DCA Case No. 2D14-788. The Second District affirmed the abatement issue "without further comment." *FINR*, 164 So.3d at 1261. In a two-to-one decision, the Second District reversed on the Bert Harris Act issue, held that FINR, as the owner of the property adjacent to the property that was subject to Hardee County's governmental action, can maintain a cause of action under the Bert Harris Act, and certified conflict with *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015). *See*, *FINR*, 164 So.3d at 1263.

In reversing the trial court's decision and certifying conflict with *Smith*, the Second District's decision notes that "the new setback distances set forth in [the County's] Resolution 12-21 were less than the 500-foot setback for mining operations near cemeteries required by Hardee County Unified Land Development

Code Section 3.14.02.06(A)(01)(b)."[11] *See, FINR*, 164 So.3d at 1262, n. 1. (*See also*, A 65). The Second District's decision included the following analysis:

> ... "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. In determining that intent, we have explained that we look first to the statute's plain meaning." *Mathews v. Branch Banking & Trust Co.*, 139 So.3d 498, 500 (Fla. 2d DCA 2014) .... "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984) ....
>
> The purpose and intent of the Act is 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.*
>
> (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

[11] Ironically, the County's land development code affords more setback protection from phosphate mining to dead bodies in cemeteries than Resolution 12-21 provides to the injured veterans and other brain-injured patients at FINR's property.

> caused by the action of government, as provided in this section.

§ 70.001 (emphasis added). The Act defines "inordinate burden" to

> [m]ean 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.

§ 70.001(3)(e)(1) (emphasis added). **Pursuant to the plain language of the statute [i.e., §70.001], in order to allege a claim under the Act the plaintiff must own the property alleged to be burdened by the specific governmental action.** And subsection (3)(f) of the Act defines a property owner as "the person who holds legal title to the real property at issue." However, the statute does not define the term "real property at issue." **As such, there is no clear expression of any intent to limit relief to property owners whose property was the subject of the governmental regulatory action and deny relief to adjacent property owners.**

Although the Act does not define the term "real property at issue," **a plain reading of the Act demonstrates that the term refers back to the real property previously mentioned in subsections (1) and (2), which was "unfairly affected" and "inordinately burdened." To limit the Act to afford a cause of action only to a property owner whose property was subject to the direct action of a governmental entity would be to rewrite the statute to insert an additional requirement not placed there by the legislature and would defeat the legislature's stated intent.** *See Hayes v. State*, 750 So.2d 1, 4 (Fla.1999) (explaining that courts "are not at liberty to add words to statutes that were not placed there by the [l]egislature"). The cause of action created by section 70.001(2) contains no requirement that the regulation giving rise to the inordinate burden directly affect the burdened property. The Act establishes broad protection for property owners who suffer

economic loss from governmental property regulations and actions. It was enacted to provide relief to those property owners who do not have an action for inverse condemnation or regulatory taking. *See, e.g., Smith*, 159 So.3d at 892 (citing *Brevard Cnty. v. Stack*, 932 So.2d 1258, 1261, 1261 n. 5 (Fla. 5th DCA 2006)). Accordingly, the trial court erred when it determined that FINR's property was not the real property at issue because it was not the property directly affected by and named in resolution 12–21.

In coming to this conclusion, we recognize that the First District recently addressed this issue in [*Smith*]. ... [I]n an en banc opinion with a nine-judge majority, the First District reversed the trial court and held that the Act does not provide a cause of action to a property owner whose property was not itself subject to any governmental regulatory action.

We decline to follow *Smith*. By holding that governmental action under the Act is limited to "those types of actions which would support a regulatory taking," the *Smith* majority construed the Act too narrowly. *Id.* at 891. Furthermore by reading into the statute the requirement that the property inordinately burdened be the subject of the governmental regulatory action, the *Smith* majority ignores the legislature's intent—specifically set forth in the Act—to create "a separate and distinct cause of action from the law of takings" and to thereby provide "relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state ... as applied, unfairly affects real property" but does not "amount[ ] to a taking under the State Constitution or the United States Constitution." *See* § 70.001(1). It is clear from the plain language of the Act that property owners do not have to show that a taking has occurred. Thus "government action," which is defined in the Act as "a specific action of a governmental entity which affects real property," is not properly limited to actions which amount to a regulatory taking. *See* § 70.001(3)(d). We agree with Judge Makar's dissent that "if the Florida legislature had intended to enact a more narrow meaning of governmental action, one consistent with the City's position, they could have easily done so." *See Smith*, 159 So.3d at 906 (Makar, J., dissenting).

The question before the trial court in considering a claim made

under the Act is not whether the governmental action is directly applied to the claimant's property but rather "whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and statement of allowable uses, the governmental entity or entities have inordinately burdened the real property." §70.001(6)(a); *see also City of Jacksonville v. Coffield*, 18 So.3d 589, 594 (Fla. 1st DCA 2009). As Judge Swanson stated in his dissent in *Smith*, "the statutory phrase 'directly restricted or limited the use of real property' is properly construed to refer to the issue of causation and simply requires the action of a governmental entity to immediately and detrimentally affect the value of real property without the intervention of other factors." *Smith*, 159 So.3d at 896 (Swanson, J., dissenting). If the alleged impact is indirect and incidental, the Act provides no relief.

Furthermore, contrary to the *Smith* majority's view, allowing adjacent property owners to make claims under the Act does not open a floodgate of litigation, nor does it create a "cataclysmic change in the law of regulatory takings." *See id.* at 891. Factual allegations remain crucial to a determination as to whether the claimant can state a cause of action under the Act, and the courts remain the gatekeepers evaluating the legal sufficiency of each claim. There is no language in the Act that would allow for its application to property that was only incidentally or remotely affected as a result of government action, and we do not read it to provide relief to those property owners who are so far removed from the action that the government could not reasonably anticipate their harm. *See id*. at 908 n. 26 (Makar, J., dissenting).

If we were to agree with the *Smith* majority and conclude that adjacent property owners can never state a cause of action under the Act, governmental entities would be "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 granting exceptions to allow for excavation, blasting, and mining in areas previously protected from such intrusions. *See id*. at 896 (Swanson, J., dissenting). Such a conclusion would be contrary to the expressly stated purpose of the Act. *See Royal World Metro., Inc. v. City of Miami Beach*, 863 So.2d 320,

> 321 (Fla. 3d DCA 2003) ("[I]f a statute is fairly susceptible of two constructions, one of which will give effect to it, and the other which will defeat it, the former construction is preferred.").
>
> Hardee County's reduction of the mining setback on [the Phosphate Company's] property directly affected FINR's alleged vested right and reasonable investment-backed expectation to expand its neurological rehabilitation facility and to develop its land consistent with its designation as a rural center. As such, FINR's complaint was sufficient to state a cause of action. ...
>
> Accordingly**, we hold that the Bert Harris Act provides a cause of action to owners of real property that has been inordinately burdened and diminished in value due to governmental action directly taken against an adjacent property.** Therefore, we certify conflict with *Smith*, 159 So.3d 888, reverse the order on appeal dismissing FINR's complaint with prejudice, and remand for further proceedings.

FINR, 164 So.3d at 1263-66 (bold added; italics in original). Judge LaRose offered a one-sentence dissent, which expressed agreement with Judge Wolfe's opinion in *Smith*. The Second District also entered a separate order provisionally granting FINR's motion for appellate attorneys' fees (A 62).

The County timely sought discretionary review in this Court. By order dated August 18, 2015, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Second District's decision is correct and applies the plain language of the 2012 version of the Bert Harris Act, which governs this case. The 2015 amendments confirm the correctness of the Second District's decision. In any event, the 2015 amendments are not retroactive and do not otherwise apply.

Moreover, even under the First District's narrow interpretation of the Bert Harris Act in *Smith*, FINR still has a viable cause of action because FINR and its property are repeatedly referenced within Resolution 12-21, and because Resolution 12-21 modified FINR's Rural Center designation, which was previously approved in 2007 by Ordinance 2007-14. As such, FINR's property is "itself" subject to the County's regulatory action, as contemplated by *Smith*. And, although the 2015 amendments to the Bert Harris Act cannot be retroactively applied, FINR would easily comply with those amendments because FINR's real property is the subject of and directly impacted by the County's regulatory action.

ARGUMENTS

I. THE BERT HARRIS ACT DOES NOT LIMIT CLAIMS TO ONLY THOSE PROPERTY OWNERS WHOSE REAL PROPERTY IS "ITSELF" DIRECTLY THE SUBJECT OF GOVERNMENTAL REGULATORY ACTION

(a) Introduction

In its initial brief, the County boldly proclaims that "words matter." However, the County's argument belies the plain words of the Bert Harris Act and invites this Court to rewrite the statute (under the guise of statutory interpretation) by inserting language that the Florida Legislature did not include in the statute, when it was originally enacted in 1995. This Court must reject that invitation. Courts are not at liberty to add words to a statute that were not placed there by the Legislature. *See, e.g., Florida Dep't of Revenue v. Florida Mun. Power Agency*,

789 So.2d 320, 324 (Fla. 2001) (under fundamental separation of powers principles, courts cannot judicially alter the wording of statutes; instead a court's function is to interpret statutes as they are written and give effect to each word in the statute); *Hawkins v. Ford Motor Co*., 748 So.2d 993, 1000 (Fla. 1999) ("this Court may not rewrite statutes contrary to their plain language"); *Ervin v. Collins*, 85 So.2d 852, 855 (Fla.1956) (court is not permitted to revise an unambiguous statute by "engrafting … [its] views as to how it should have been written").

(b) <u>The plain language of the Bert Harris Act provides a claim for anyone whose real property is inordinately burdened</u>

Although the County purports to embrace the plain language of the Bert Harris Act, its initial brief tellingly omits some of that plain language. Accordingly, a review of all pertinent provisions of the statute is appropriate.

When the Bert Harris Act took effect on October 1, 1995, it created a new cause of action that accrues when a governmental entity imposes 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 provide relief to any property owner when a governmental entity creates an "inordinate burden" which "unfairly affects real property," without rising to the level of an unconstitutional taking.

The applicable requirements for bringing a Bert Harris Act claim 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).

Despite the County's desire to impose a constricted construction, the 1995-2014 versions of the Bert Harris Act did not narrowly define any particular 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. And, instead of narrow definitions, the Bert Harris Act broadly defined the terms "property owner" and "real property" as follows:

> (f) The term "property owner" means **the person who holds legal title to <u>the</u> <u>real</u> <u>property</u>** at issue. The term does not include a governmental entity.
>
> (g) The term "real property" **<u>means</u> <u>land</u> <u>and</u> <u>includes</u>** any appurtenances and improvements to the land, including **<u>any</u> <u>other relevant</u> <u>real</u> <u>property</u>** in which the property owner had a relevant interest.

§70.001 (3)(f) and (g), Fla. Stat. (1995-2014) (emph. added). Although the term "real property *at issue*" is not defined, the term "real property" is broadly defined in subsection (3)(g) to include "land"[12] and "any other relevant real property," and the use of the term "real property *at issue*" in Section 70.001(3)(f) obviously refers to that same defined term (i.e., "real property") as well as the "real property" previously mentioned in subsections (1) and (2), which was "unfairly affect[ed]"

[12] Notably, the definition of "real property" just broadly refers to "land," without any qualifier such as "*the*" land or "*such*" land or "land *for which a development application is filed*," etc.

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).

In addition to the definitions for "property owner" and "real property," 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 relief "[w]hen 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[.]" §70.001 (2), Fla. Stat. (1995-2014). Before the Legislature amended the Act in 2015, this meant ***any*** real property (i.e., "land and ... any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest") the government had inordinately burdened, and the cause of action was granted to "the property owner of that real property[.]" This was clearly 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" was "inordinately burdened" by government action, including any time "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."

As explained by the Second DCA below, the key issue is whether the governmental entity has imposed an “inordinate burden” on the plaintiff's real property, not where that real property is located. The interpretation advocated by the County and the First District in *Smith* would authorize governmental entities to inordinately burden any real property with impunity, as long as it is not the applicant’s property. However, nothing in the Bert Harris Act states or implies that

governmental entities are immune from claims when the ripple effects of their regulatory actions truly cause an inordinate burden on a parcel of real property. To the contrary, the legislative intent section of the Bert Harris Act expressly states "**there is an important state interest in protecting the interests of private property owners from such inordinate burdens**." §70.001(1) (emph. added)..

Because FINR's complaint alleged all essential elements of a Bert Harris Act claim, and because these elements are heavily imbued with factual issues that cannot be decided on a motion to dismiss the complaint for failure to state a cause of action, the Second District correctly reversed the trial court's decision. *See The Fla. Bar v. Greene,* 926 So.2d 1195, 1199 (Fla.2006) ("A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues"); *Nevitt v. Bonomo*, 53 So.3d 1078, 1081 (Fla. 1st DCA 2010) (when ruling on motion to dismiss, trial court may look no further than four corners of complaint, and all allegations in complaint must be accepted as true).

(c) Legislative history is inapplicable and does not support the County's arguments

Instead of focusing on the plain language of the 2012 version of the Bert Harris Act, the County prefers to ignore or blur that plain language, and to suggest an alternative interpretation based on so-called legislative history.

When a statute is plain and unambiguous, resorting to legislative history is inappropriate. *See, e.g., Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000)

("when the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute"); *Brown v. City of Vero Beach*, 64 So.3d 172, 176 (Fla. 4th DCA 2011) (when the statutory language "is clear and unambiguous, its plain and ordinary meaning controls; we cannot resort to legislative history or other rules of statutory construction to discern its meaning").

It should also be noted that legislative history is often not a reliable indicator of legislative intent. *See, e.g., American Home Assur. Co. v. Plaza Materials Corp.,* 908 So.2d 360, 375-376 (Fla. 2005) (Cantero, J., concurring in part, dissenting in part). Indeed, case law explains that even the testimony of one or more legislators does not shed meaningful light on the intent of the entire legislature. *See, e.g., Security Feed & Seed Co. v. Lee*, 189 So. 869, 870 (Fla. 1939); *State v. Patterson*, 694 So.2d 55, 58 at n.3 (Fla. 5th DCA 1997).

The only text a legislator must vote on is the text of the bill itself, and no one can say for certain what the majority of legislators who voted for the bill actually intended that text to mean. Accordingly, the best place to determine the Legislature's intent is from the plain language of the statute. *See, e.g., Overstreet v. State*, 629 So.2d 125, 126 (Fla.1993) ("Legislative intent must be determined primarily from the language of the statute."). As this Court has explained:

> The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.... **Even where a**

> **court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity**.

Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 454 (Fla.1992) (emph. added). Thus, "[i]f the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended." *Tropical Coach Line, Inc. v. Carter*, 121 So.2d 779, 782 (Fla.1960).

In this case, the County concedes that the Bert Harris Act is plain and unambiguous, but nonetheless points to a law review article written by non-legislators as evidence of so-called legislative history. *See*, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995).While FINR believes that legislative history is inapplicable in light of the plain language of the Bert Harris Act, if this Court desires to analyze any legislative history, FINR suggests that analysis must begin with the session law that created the Bert Harris Act in 1995. That session law is Chapter 95-181, Laws of Florida (1995).

Chapter 95-181 enacted the Bert Harris Act (i.e., Section 70.001), but also enacted three other statutes as well (i.e., Sections 70.20, 70.51, and 70.80, Florida Statutes). Section 70.001 is known as the "Bert Harris Act," and Section 70.51 is known as the "Florida Land Use and Environmental Dispute Resolution Act." *See*,

§70.51(1), Fla. Stat. According to Section 70.80, the Bert Harris Act and the Florida Land Use and Environmental Dispute Resolution Act "have separate and distinct bases, objectives, applications, and processes" and "are not to be construed in pari materia." Because these two acts (enacted in the same session law) have such different bases, objectives, applications, and processes, it should not come as any surprise that the two acts define the term "owner" very differently. A side-by-side comparison of those definitions comparison is enlightening:

Bert Harris Act (1995-2014)	**Florida Land Use and Environmental Dispute Resolution Act (1995-present)**
70.001(3)(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."	70.51(2)(d): "'Owner' means a person with a legal or equitable interest in real property **who filed an application for a development permit** for the property at the state, regional, or local level **and who received a development order, or who holds legal title to real property that is subject to an enforcement action of a governmental entity**."

(Emph. added).

The distinctions between the foregoing two definitions set forth in the same 1995 session law confirm that if the Legislature had intended to limit Bert Harris Act claims exclusively to property owners whose real property is "itself" subject to governmental regulatory action, the Legislature certainly knew how to express that intent in plain language. Under the Florida Land Use and Environmental Dispute

Resolution Act, the owner must not only have a legal or equitable interest in the property, but must also be: (a): the person who actually filed an application for a development permit, and received a development order for that property, or (b) the person whose property is subject to a governmental entity's enforcement action. Neither of these two limitations is included within the much broader definition provided in the Bert Harris Act. As explained by this Court:

> The law clearly requires that the legislative intent be determined primarily from the language of the statute because a statute is to be taken, construed and applied in the form enacted. ... The reason for this rule is that **the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute**.
>
> It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. **Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned**.

Thayer v. State, 335 So.2d 815, 817 (Fla. 1976) (emph. added). Based on the doctrine of expressio unius est exclusio alterius, we know that for purposes of the 1995-2014 versions of the Bert Harris Act, the Legislature did not intend that a "property owner" must be strictly limited to someone who applied for the governmental regulatory action that caused his property to be inordinately burdened, or whose property is "itself" subject to governmental regulatory action. Otherwise, the Legislature could have and would have made sure that the Bert

Harris Act defined that term in the same narrow manner it is defined in the Florida Land Use and Environmental Dispute Resolution Act.

The County misplaces its reliance on the Op. Atty. Gen. Fla. 95-78, 1995 WL 750474 (Dec. 7, 1995), which opines that the Bert Harris Act applies to the owner of the property directly affected by the governmental action. The Attorney General opinion does not stand for the proposition that the Bert Harris Act only applies to the applicant property owner. Even if it did, FINR was the applicant property owner for the "Rural Center" land use designation that created the quarter-mile no-mining setback for FINR's benefit in the first place (R 2, 8-27). In other words, the entire point of the setback was, by way of government action, to directly affect FINR's property in a positive manner. Logically, the County's governmental action to modify or undo the original governmental action also directly affects FINR's property, this time in a negative manner. The Attorney General opinion also does not stand for the proposition that a property owner protected by a setback is deemed not affected when that setback is reduced or abolished.[13] Even if the opinion was on point, which it is not, Attorney General opinions are not binding on Florida courts. *Browning v. Florida Prosecuting Attorneys Ass'n, Inc.*, 56 So.3d 873, 876 (Fla. 1st DCA 2011).

[13] For example, if a setback is established to separate churches and schools from "adult entertainment" establishments or landfills, those churches and schools would be directly affected (or inordinately burdened) if the government drastically reduced or eliminated that setback.

(d) The 2015 amendment cannot be retroactively applied to FINR

In 2015 (i.e., 20 years after the Bert Harris Act was originally enacted), the Florida Legislature amended the Bert Harris Act to significantly narrow the definitions for "property owner" and "real property" as follows:

> (f) 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 ~~at issue~~. The term does not include a governmental entity.
>
> (g) The term “real property” means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner has ~~had~~ a relevant interest. The term includes only parcels that are the subject of and directly impacted by the action of a governmental entity.

Ch. 2015-142, §1, Laws of Fla. (2015) (strike-through and underlines in original). Importantly, the 2015 session law has no language suggesting any intent to retroactively apply these narrowing definitions, but instead, clearly states, "This act shall take effect October 1, 2015." Ch. 2015-142, §4.

The 2015 amendments confirm that under the plain and unambiguous provisions of the prior 1995-2014 versions 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). *See also, 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); *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364-65 (Fla. 1977) ("In making material changes in the language of a statute, the Legislature is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all the enactments on the subject. The Courts should give appropriate effect to the amendment."); *Arnold v. Shumpert*, 217 So.2d 116, 119 (Fla.1968) (when statute is amended, it is presumed that legislature intended statute to have meaning different from that accorded before amendment).

Because the Legislature clearly determined that the new amendments to the Bert Harris Act shall not become effective until October 1, 2015, 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). Moreover, FINR's Bert Harris Act claim accrued long before the 2015 amendment took effect. An accrued cause of action constitutes a vested property right, and a statute cannot be applied retroactively in a

way that eliminates a party's vested property right. *See, Am. Optical Corp. v. Spiewak*, 73 So.3d 120, 125–26 (Fla.2011).[14]

The County misplaces its reliance on various ad hoc oral statements by the sponsors of the 2015 amendments to suggest that their recent amendments were merely intended to "clarify" the meaning of a statute that was adopted in 1995. Because the Bert Harris Act was originally adopted 20 years ago, any suggestion that the recent narrowing amendments are actually a "clarification" of what a completely different group of legislators intended 20 years ago would be absurd 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). In *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (Fla. 1995), this Court stated:

> It would be absurd, however, to consider legislation enacted more than ten years after the original act as a clarification of original intent; the membership of the 1992 Legislature substantially differed from that of the 1982 Legislature.

In *McKenzie Check Advance of Florida v. Betts*, 928 So.2d 1204, 1210 (Fla. 2006),

[14] In *Am. Optical*, this Court held that the Asbestos and Silica Compensation Fairness Act imposed an essential new element to an asbestos-related cause of action, and could not be retroactively applied to the plaintiffs' previously vested asbestos-related claims, because the retroactive application would have unconstitutionally destroyed plaintiffs' vested property interest to pursue an action. *Id.*, 73 So.3d 130-131.

this Court again reiterated that legislative amendments of a statute enacted long after the original cannot be considered a clarification. Likewise, oral statements by the sponsors of 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*, 189 So. at 870; *Patterson*, 694 So.2d at 58, n. 3. In this case, the 2015 session law does not state or even suggest that it is intended to be a mere clarification of what the 1995 Legislature intended to say 20 years ago.

The preamble and language of a session law "readily reveal the legislature's intent and its policy reasons." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984). Surely, if the Legislature had intended for the 2015 amendments to apply retroactively or to serve as mere clarifications of what the 1995 legislators originally intended, the preamble to the session law would have expressed that intent. *See, e.g., Durring v. Reynolds, Smith & Hills*, 471 So.2d 603, 608 (Fla. 1st DCA 1985)(where nothing in the preamble to session law or the statutory language amounts to an express, clear or manifest intent to make the new statute retroactive to causes of action in existence on the effective date of the statute, the new statute does not apply to bar the plaintiffs' cause of action).

The County misplaces its reliance on the House of Representatives Final Bill Analysis, H.B. 383, 117th Sess., (Fla. 2015) for the proposition that the intent of the 2015 amend is "to make clear" that the Bert Harris Act is only available to

property owners whose property "is the subject of and directly impacted by the action of a governmental entity[.]" The Bill Analysis does not say that, does not include any language expressing an intent to merely clarify the prior version, and at best, merely reflects the views of a staff attorney working for the House of Representatives (i.e., one-half of the Florida Legislature)

In summary, the Second District's decision below is based on a plain reading of the 1995-2014 versions of the Bert Harris Act. If anything, the Legislature's recent 2015 amendments confirm the correctness of the Second District's decision, and demonstrate an intent to narrow the scope of the Bert Harris Act for claims accruing on or after the October 1, 2015 effective date of the amendments.

(e) FINR's complaint clearly stated a cause of action

The trial court's holding in the instant case, like the First District's decision in *Smith*, 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 immediately adjacent to FINR's property, where FINR operates a brain treatment and vocational service facility for veterans and survivors of brain injuries. 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).

FINR's complaint alleged all essential elements of a claim under the 2012 version of the Bert Harris Act. FINR's complaint alleged compliance with the notice of claim and appraisal requirements (R 5). FINR's complaint also alleged that the County considered the notice of claim, and rejected the possibility of settlement (R 5). FINR's complaint also alleged a specific action on the part of the County, Resolution 12-21, which has inordinately burdened FINR's existing use of its property (R 4-5). The complaint alleged the County's action renders FINR's property fit only for agricultural and recreational uses, such that FINR is permanently unable to attain its reasonable, investment-backed expectations for the existing use of the property (R 4-5). The complaint further alleged that FINR is left with existing uses that are unreasonable such that it bears permanently a disproportionate share of the burden imposed for the good of the public, which in fairness should be borne by the public at large (R 4-5).

Because FINR pled all elements of a cause of action under the 2012 version of the Bert Harris Act, the trial court's refusal to accept as true FINR's allegations that it is a property owner whose property has been inordinately burdened by a specific government action was erroneous, and properly reversed by the Second District.[15] *See, Lutz Lake*, 779 So.2d at 384.

[15] Even if this Court concludes that FINR's complaint did not include sufficient allegations to state a cause of action under the Bert Harris Act, there has been no demonstration that the complaint was not amendable. Florida Rule of Civil

(f) In any event, FINR's claim satisfies the narrower interpretation adopted by the First District in *Smith*

As explained herein, the Second District properly enforced the plain meaning of the 2012 version of the Bert Harris Act, and certified conflict with the First District's narrower interpretation in *Smith*. In this case, however, FINR's claim easily satisfies the *Smith* decision's narrower interpretation as well as the narrower definitions adopted in the 2015 legislation.

For example, Resolution 12-21 specifically identifies and refers to FINR's property in reference to the truncated setback (R 46, 49, 51, 78-79, 107, 109).[16]

Procedure 1.190 provides that "[a] party may amend a pleading once as a matter of course at any time before a responsive pleading is served…." Courts have no discretion to deny amendment as a matter of course under that portion of Rule 1.190. *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 568 (Fla. 2005). *See also, Fowler v. Paradise Lakes Condo. Ass'n, Inc*., 133 So.3d 576 (Fla. 2d DCA 2014); *Reed v. Long*, 111 So.3d 237, 240 (Fla. 4th DCA 2013). Thus, assuming arguendo that FINR's complaint failed to state a cause of action, reversal is still required and on remand, FINR should be given an opportunity to amend its complaint.

[16] At page 3, one of the County's "whereas" clauses euphemistically states that the Phosphate Company's request for the reduced setback, includes "certain mitigation measures designed to avoid significantly interfering with current and planned land uses in the Vandolah Rural Center" (i.e., FINR's Rural Center) (R 46). At page 6, paragraph 10 acknowledges that the Phosphate Company's setback reduction request "was disputed by adjacent property owners," and that the setback reduction "is hereby granted for those areas depicted in Exhibit G" (R 49). The adjacent property owner is FINR, and FINR's Rural Center is depicted in Exhibit G (R 108-109). At page 8, "FINR" is one of the defined terms (R 51). Pages 34-35 specifically mention the Vandolah Rural Center (i.e., FINR's Rural Center) and specifically acknowledge that the "landowners within the rural center [i.e., FINR] have not signed a waiver of the ¼ mile setback" (R 78-79). Exhibit F of the resolution specifically mentions "FINR" and FINR's property is depicted on the

Besides being identified throughout Resolution 12-21, FINR's property was directly impacted by that resolution, because FINR had previously applied for and received a Rural Center designation that expressly provided for a quarter-mile no-mining setback intended to protect that Rural Center from the highly destructive and invasive activities associated with phosphate mining operations. Now, as a result of the County's actions, that FINR's Rural Center designation has been unilaterally modified to eliminate the protection which that setback provided.

Phosphate mining "is accomplished through utter destruction of the local natural environment from ground surface down to a depth of approximately 50 feet." *Charlotte County v. IMC-Phosphates Co. and Fla. Dep't. of Env. Prot.*, 2003 WL 21801924, 5 (DOAH 2003). Further, phosphate mining pollutes the area surrounding the mining activity in a number of ways. *See, e.g. Estech Gen. Chem. Corp. v. Manatee County, etc.*, 1980 WL 142856, 13 (DOAH 1980) (discussing air pollution and radioactive particles uncovered during mining operations); *Manatee County v. State, Dept. of Envtl. Regulation*, 429 So.2d 360, 363 (Fla. 1st DCA 1983) (discussing water pollution by phosphate mining operations); *In re Application for Power Plant Certification of Florida Power Corporation Polk County Site PA 92-33*, 1993 WL 943551, 20 (DOAH 1993) (noise pollution from phosphate mining operations); *United States Steel Corp. v. Seaboard Coast Line*

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map (R 107). Exhibit G depicts FINR's Rural Center on the map (R 109).

Railroad Co., 356 I.C.C. 481, 483 (1977) (dust pollution from phosphate mining operations). In sum, phosphate mining has "a devastating impact on the local natural environment." *Charlotte County*, at 6. There can be no mistake that the quarter-mile no-mining setback was crucial to FINR's health care operations, and that the County's abrogation of that setback "has inordinately burdened an existing use of [FINR's] real property or a vested right to a specific use of [FINR's] real property," as "the property owner of that real property," FINR "is entitled to relief," as stated in Section 70.001(2).

Even under the trial court's rewritten standard, FINR is the owner of "real property *at issue*," because FINR's property rights under its previously approved Rural Center designation have been "unfairly affected" and "inordinately burdened" by the County's decision to alter the setback. The purpose of a setback is to protect the public health, safety, welfare, and the adjacent property of **<u>others</u>**. *See, e.g., City of Miami v. Romer*, 73 So.2d 285, 286-287 (Fla. 1954) (if setback ordinance had been enacted without regard to public health, safety and general welfare, it would have been an unreasonable exercise of the police power); *Old Taunton Colony Club v. Medford Tp. Zoning Bd. of Adjustment*, 2013 WL 2420354 (N.J. Super. Ct. App. Div. 2013) (purpose of setbacks is to protect adjoining properties from intrusions of sound, light, glare, and other objectionable factors); *Anthony v. Mason County*, 2010 WL 4967933, 2 (Wash. App. Div. 2 2010) (goal

of setbacks is primarily to protect adjoining uses and the community as a whole); *Bird v. Delaware Muncie Metropolitan Plan Commission*, 416 N.E.2d 482, 488 (Ind. App. 1981) (purpose for including setback provisions in comprehensive zoning plan is to protect the public safety, health or general welfare). The quarter-mile no-mining setback established in 2007, when the County approved FINR's application for Rural Center designation, was created pursuant to Hardee County Unified Land Development Code §3.14.02.06 (A) for the purpose of protecting FINR's property and the health care activities conducted on that property, not to protect the Phosphate Company's Adjacent Parcel. Indeed, at that time, the Adjacent Parcel could only be used citrus and other agricultural purposes. This intent is demonstrated by §3.14.02.06(A)(01)a and (04)a, which state:

> 3.14.02.06. Standards.
>
> All mining and reclamation activities within Hardee County **shall at a minimum**, conform to these standards.
>
> (A) Mining Standards:
>
> (01) **No mining operations**, except temporary storage of excavated materials, **shall be performed within**:
>
> a. **One-quarter mile** from the following future land use classifications specified and shown on the Future Land Use Map: incorporated towns and cities; Town Center; Highway Mixed Use; Residential Mixed Use; and **Rural Center**. The Board of County Commissioners may allow mining operations within one-quarter mile **upon demonstration by the Applicant/Owner that such mining operations will not significantly interfere with current or planned uses**

> **within or adjacent to such land use classification**[.]
>
> . . . . .
>
> (04) Effect on Adjoining Owners:
>
> a. **The above setback requirements are the minimum**, and the Board expressly reserves the right to require whatever setbacks may be necessary, on a case by case evaluation, **to protect adjoining property uses** ....

(A 65-66; emph. added).

Thus, the quarter-mile no-mining setback created by §3.14.02.06 (A)(01)a applies in order to separate and provide an adequate protective buffer between: (1) phosphate mining operations, and (2) towns, cities, Town Centers, Highway Mixed Uses, Residential Mixed Uses, and Rural Centers (like FINR's brain injury facilities).[17] The self-evident reason for the setback is to prevent phosphate mining operations from significantly interfering with the safety and other amenities of such adjacent land uses. According to the County's code, the only reason that the setback can be altered, is if the phosphate mining applicant demonstrates that its proposed new phosphate mining operations "will not significantly interfere with

[17] Section 3.14.02.06(A) establishes numerous other extended setbacks from phosphate mining activities. For example, Section 3.14.02.06(A)(01)b establishes a 500-foot no-mining setback from public parks, cemeteries, historical sites, or permanent buildings (including mobile homes or manufactured housing) used for residential, commercial, church or public purposes. In this case, the County has reduced FINR's no-mining setback to less than the 500-foot no-mining setback afforded to a public park, cemetery, historical site, or all other permanent buildings located anywhere in the County. The County's decision to do that has caused significant damage to FINR and its ability to continue operating a brain injury rehabilitation center next door to a highly destructive phosphate mining operation. The two uses are simply incompatible with each other.

current or planned uses within or adjacent to such land use classification." In this case, FINR contends and has alleged that the County's reduction of the quarter-mile no-mining setback will indeed significantly interfere with FINR's adjacent Rural Center land uses, and the Bert Harris Act provides FINR with a cause of action to remedy that interference.

With a stroke of a pen, the quarter-mile no-mining setback which was originally created by the County to "protect adjoining property uses" from the devastation and disruption associated with phosphate mining, has now been removed by the County, and as a result, the prior innocuous agricultural land uses that were permitted adjacent to FINR's brain injury facilities, will be replaced with highly disruptive and destructive phosphate mining activities, which are totally incompatible with FINR's pre-existing use of its property as a neurological injury rehabilitation complex. In effect, the market value associated with FINR's pre-existing use of its property and the protections afforded by its Rural Center designation, was liquidated and transferred to the Phosphate Company. If, for whatever reason, the County wishes to accommodate the Phosphate Company's desire to engage in mining activities in a manner that inordinately burdens FINR's pre-existing use of its property, the County is required to compensate FINR for that decision. As explained in subsection (3)(e)1 of the Bert Harris Act, the County cannot make FINR bear a "disproportionate share of a burden imposed for the good

of the public, which in fairness should be borne by the public at large." FINR's claim simply requires the County to honor that legal commitment.

Even though FINR contends that the foregoing information and analysis is not required by the plain language of the Bert Harris Act, FINR is placed squarely within the ambit of the narrower definition of "real property at issue" advocated by the County and the trial court, the First District's decision in *Smith*, and the 2015 amendments to the Bert Harris Act. Consequently, even if this Court disapproves of the Second District's decision below and approves the First District's decision in *Smith*, this Court must nonetheless allow FINR to proceed with its claim against the County in this case.

(g) Avoiding absurd results

The County's suggestion that the Second District's decision promotes an absurd result is quite ironic. Contrary to the County's suggestion, the only truly absurd result would be to affirm the trial court's decision.

In this case, the County actually requested FINR to apply for a Rural Center designation in order to provide a better life for the County's residents, rather than a future plagued by the proliferation of phosphate mining and its associated environmental devastation. After requesting FINR to apply, the County approved FINR's application to allow mixed use development consisting of 900 multi-family dwelling units, 60,000 square feet of general commercial development, a 200-room

hotel, 175,000 square feet of office, a 200-bed hospital, and a 1,030 bed expansion of the rehabilitation center (R 2, 11). Ordinance 2007-14 includes many findings explaining why it was important to the County for FINR's property to be developed as a Rural Center (R 12-13, 16, 17, 20), one of which was to promote "a clear separation between urban and rural uses" (R 21). Ordinance 2007-14 also acknowledged that FINR was "required to donate land" and provide "developer funding" to the County, that there is a "Developer's Agreement" which addressed the expansion of utility services for the project, and that all roadway improvements "will be the responsibility of the developers" (R 18, 19, 23).

Ironically, five years after encouraging FINR to take on this massive undertaking and watching FINR incur significant expenses in going forward, the County pulled the rug out from under FINR's feet. Instead of abiding by the commitments stated in Ordinance 2007-14, the County decided to acquiesce to the politically powerful will of the Phosphate Company, who was no longer content to keep its distance from FINR's health care facilities.[18] Much like the wildlife and environmental resources which lie in the path of the Phosphate Company's mighty draglines, FINR’s pre-existing ability to maintain and expand its health care

[18] The Phosphate Company could have challenged the 2007 Ordinance, if it believed that the Rural Center designation would adversely impact its future plans. Instead, it waited until after FINR made substantial investments in its property under the assumption that the quarter-mile setback would remain inviolate.

operations has been decimated by the County's regulatory action.

The County incorrectly argues that it is placed in a "Catch-22" situation under the Second District's decision, by suggesting that it could be held liable to the Phosphate Company for denying its request to reduce the no-mining setback. If the County had simply maintained the quarter-mile setback previously approved in Ordinance 2007-14, the Phosphate Company could not have brought a Bert Harris Act claim in 2012. The Phosphate Company's time for bringing a Bert Harris Act claim concerning the setback was 8 years prior, when Ordinance 2007-14 was enacted,[19] and thus, any claim would be barred by the one-year statute of limitations for a Bert Harris Act. §70.001(11), Fla. Stat. (2012). Denying the Phosphate Company's request and preserving the status quo established by Ordinance 2007-14 could not give rise to a new Bert Harris Act claim because the quarter mile no-mining setback was "first applied"[20] in 2007. Otherwise, the one-year statute of limitations would be rendered meaningless.

Somehow, the County believes it is "absurd" that the Bert Harris Act should require the County to compensate FINR for the inordinate burden it has inflicted

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[19] In additional bringing its own Bert Harris action, the Phosphate Company also could have legally challenged the adoption of Ordinance 2007-14, which amended the County's Comprehensive Plan to designate FINR's property as a Rural Center. See, §163.3184(9), Fla. Stat. (2007). The Phosphate Company did not do so.

[20] A Bert Harris Act claim must be brought within one year from the date "a law or regulation is **first applied** by the governmental entity to the property at issue." *See*, §70.001(11) (emph. added).

on FINR's property. Maybe the County's position would have merit if Hardee County was located in the former Soviet Union or the Peoples Republic of China, but that is not the case. Hardee County and the FINR property are located in the United States of America and the State of Florida, where respect for private property rights is a cornerstone of our democratic freedoms. This respect for private property rights has been confirmed by several appellate judges at the First and Second Districts, who believe that it would be absurd to allow governmental entities (like the County) to shirk responsibility to respect the rights of private property owners (like FINR) by imposing upon them a "disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large." §70.001(e)1.

(h) <u>The Bert Harris Act's waiver of sovereign immunity does not require a narrower construction than intended by the plain language of the statute</u>

Section 70.001(13) of the Bert Harris Act provides the waiver of sovereign immunity creating a cause of action is "only to the extent specified in this section." Although waivers of sovereign immunity should be strictly construed, in this case, the trial court unreasonably contracted the scope of the Bert Harris Act. "Strict construction does not mean… that clear words may be tortured into uncertainty so that new meanings can be added." *State Farm Fire & Cas. Ins. Co. v. Deni Associates of Florida, Inc.*, 678 So.2d 397, 401 (Fla. 4th DCA 1996), *approved*,

711 So.2d 1135 (Fla. 1998). Nor does it mean that a statutory provision should "be subjected to such a strained and unnatural construction as to defeat the plain and evident intendments of the provision." *Lummus v. Cushman*, 41 So.2d 895, 897 (Fla. 1949). The general principle that waivers of sovereign immunity should be strictly construed does not justify an interpretation of a statute that is at odds with the plain language of the Bert Harris Act.

(i) The Second District's decision and the dissenting opinions in Smith are correct

The trial court's holding in the instant case, like the First District's decision in *Smith*, 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 immediately adjacent to FINR's property, where FINR operates a brain treatment and vocational service facility for veterans and survivors of brain injuries. 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).

The Second District's decision is 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. *See, e.g., Holly*, 450 So.2d at 219 (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). The Second District's decision below and the dissenting opinions authored by Judges Swanson and Makar in *Smith* are very well-reasoned, consistent with the plain meaning of the Bert Harris Act, and demonstrate that the majority decision in *Smith* is simply incorrect. *Id.*, 159 So.3d at 895-915. Alternatively, even under the *Smith* decision's narrow interpretation, FINR still has a bona fide Bert Harris Act Claim.

CONCLUSION

WHEREFORE, FINR respectfully requests this Honorable Court to affirm the Second District's decision below. Alternatively, this Honorable Court should rule that, even under the *Smith* decision's narrower interpretation, FINR's complaint adequately pled a cause of action under the Bert Harris Act, or that FINR should be given the opportunity to amend its complaint.

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:

- Kenneth B. Evers, Esquire (Email - office@hardeelaw.com and kevers@hardeelaw.com), P.O. Box 1308, Wauchula, FL 33873-1308; and
- Frank E. Matthews, Esquire (Email - frankm@hgslaw.com), D. Kent Safriet, Esquire (Email - kents@hgslaw.com), Timothy M. Riley, Esquire (Email - TimothyR@hgslaw.com), and Mohammad O. Jazil, Esquire (Email -

mjazil@hgslaw.com), Hopping Green & Sams, P.A., 119 S. Monroe Street, Suite 300, Tallahassee, FL 32301;

on this 9th day of December, 2015.

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,

/s/ David M. Caldevilla
Edward P. de la Parte, Jr., FBN 236950
David M. Caldevilla, FBN 654248
Patrick J. McNamara, FBN 699837
Primary Email: edelaparte@dgfirm.com
Primary Email: dcaldevilla@dgfirm.com
Primary Email: pmcnamara@dgfirm.com
Secondary Email: serviceclerk@dgfirm.com
de la PARTE & GILBERT, P.A.
Post Office Box 2350
Tampa, Florida 33601-2350
Telephone: (813) 229-2775
COUNSEL FOR RESPONDENT