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.

REPLY BRIEF OF HARDEE COUNTY, FLORIDA

Frank E. Matthews
Florida Bar No. 328812
D. Kent Safriet
Florida Bar No. 174939
Timothy M. Riley
Florida Bar No. 56909
Mohammad O. Jazil
Florida Bar No. 72556
HOPPING GREEN & SAMS, P.A.
119 S. Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500 – Phone
(850) 224-8551 – Facsimile
FrankM@hgslaw.com
KentS@hgslaw.com
TimothyR@hgslaw.com
MohammadJ@hgslaw.com

Kenneth B. Evers
Florida Bar No. 54852
KENNETH B. EVERS, P.A.
424 West Main Street
Post Office Drawer 1308
(863) 773-5600 – Phone
(866) 547-4362 – Facsimile
kevers@hardeelaw.com
office@hardeelaw.com

Counsel for Petitioner
Hardee County, Florida

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ARGUMENT

FINR's[1] 50-page response to County's 22-page initial brief devotes space to the obvious (like the fact that Hardee County is not located in "the former Soviet Union or the Peoples Republic of China"),[2] the irrelevant (like the intricacies of federal bankruptcy law),[3] and the plainly incorrect (like the assertion that Hardee County altered a setback requirement simply "[w]ith a stroke of a pen").[4] The County only addresses FINR's more substantive arguments.

I. First principles: giving effect to every word in a statute.

First, FINR fails to reconcile its plain reading of the Harris Act with the Act's plain text: the words "applied" and "directly." §§ 70.001(1), (3)(e), (11), Fla. Stat. As this Court explained in *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.,* 948 So. 2d 599, 606 (Fla. 2006), "[i]t is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute." FINR does not dispute this. Still,

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[1] This brief abbreviates references to the Bert J. Harris, Jr. Private Property Rights Protection Act as "Harris Act" or "Act," the Petitioner as "Hardee County" or "County," and the Respondent as "FINR." Citations to the record begin with "R.," the County's Initial Brief with "Cnty Int. Br.," and FINR's Response Brief with "FINR Br." All citations are followed by the appropriate page number. Citations to the Florida Statutes are to the 2012 version unless specified otherwise.

[2] FINR Br. at 47.

[3] FINR Br. at 10-11 n. 7-9.

[4] FINR Br. at 43.

FINR's plain reading of the Harris Act actually ignores the Act's plain text, namely the words "applied" and "directly." §§ 70.001(1), (3)(e), (11), Fla. Stat.

FINR instead rails against the "ripple effects" created and left unchecked by the First District's *en banc* decision in *City of Jacksonville v. Smith,* 159 So. 3d 888 (Fla. 1st DCA 2015). FINR Br. at 26. But the Harris Act is not concerned with "ripple effects." *Id.* The Act is concerned with "laws, regulations, and ordinances" that actually apply to the plaintiff's "real property." § 70.001(1), Fla. Stat. The Act's statute of limitations provision thus directs would-be plaintiffs to present their claims no "more than 1 year after a law or regulation is *first applied* by the government entity to the property at issue." *Id.* § 70.001(11)(emphasis added). The Act also allows would-be plaintiffs to sue only where government action has "*directly* restricted or limited the use of real property." *Id.* § 70.001(3)(e) (emphasis added). As such, the Harris Act was only intended to remedy harm that flows "directly" from government action "applied" to one's property. *Id*. It was never intended to remedy "ripple effects" that indirectly affect a neighboring property owner. FINR Br. at 26.

Contrary to FINR's assertion, this does not mean that "[t]he 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." FINR Br. at 25. Broader public concerns – likes effects on neighboring property owners – are addressed through public debate at county commission hearings, judicial review of local government actions through petitions for *writ of certiorari* or declaratory judgment claims under § 163.3215(3) of the Florida Statutes, and (where state agencies are involved) administrative proceedings under §§ 120 *et seq*. of the Florida Statutes.

FINR itself filed an administrative challenge to take issue with the "ripple effects" of CF Industries' proposed mining activities. FINR Br. at 26. FINR lost before the Division of Administrative Hearings, the Florida Department of Environmental Protection, the First District, and the U.S. Supreme Court (which declined to hear the case). *FINR II, Inc. v. CF Indus., Inc.,* FDEP OCG Case No. 11-1756, at *32-33 (Final Order, Jun. 6, 2012) *affirmed and rehearing denied* 118 So. 3d 809 (Fla. 1st DCA 2013) *writ of certiorari denied* 134 S. Ct. 1031 (2014).

In addition, "FINR objected to approval of the request for alternate setback at a public hearing" held by Hardee County. R. at 3. There, the County considered the broader implications of granting CF Industries' request, making several findings of fact and conclusions of law including the following:

> 5. [CF Industries' proposal] . . . is *consistent with the State Comprehensive Plan*.

> 6. [CF Industries' proposal] . . . is *consistent with the Hardee County Comprehensive Plan and the Hardee County Unified Land Development Code*.
>
> ***
>
> 10. The *Setback Request*, which was supported by written setback waivers from adjacent property owners [i.e., property owners other than FINR], is hereby granted pursuant to [Hardee County Unified Land Development Code] Section 3.14.02.06.A.04.b for those areas depicted in Exhibit G. The Alternate Setback Request, which was disputed by the adjacent property owners [i.e., FINR], is hereby granted pursuant to [Hardee County Unified Land Development Code] Section 3.14.02.06.A.01.a for those areas depicted in Exhibit G based upon a demonstration by CF [Industries] that mining operations *will not significantly interfere* with current or planned uses in areas to be benefited by the setback.
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> ***
>
> 12. The development of [CF Industries' property], as specifically conditioned herein, is consistent with the Hardee County Comprehensive Plan, the Hardee County Unified Land Development Code, including the mining standards set forth therein, the State Comprehensive Plan and the Strategic Regional Policy Plan.

R. at 48-49 (emphasis added). The County even imposed on CF Industries the following conditions intended to protect neighboring property owners:

> 108. CF [Industries] shall comply with applicable parts of the [Hardee County Unified Land Development Code] regarding control of noise and control of fugitive dust emissions.
>
> 109. Within 180 days of issuance of this Development Order, CF [Industries] shall complete the *planting of southern magnolia or red cedar trees on 10 foot centers and within 10 feet of the property boundary adjacent to the Vandolah Rural Center [i.e., FINR's property]*. This condition is only required within portions of the [CF Industries' project] where land owners within the rural center have not signed a waiver of the 1/4 mile setback [i.e., FINR].

> 110. CF [Industries] *shall install a noise, light and dust barrier berm* along the boundary of [its property] adjacent to portions of the Vandolah Rural Center where land owners within the rural center have not signed a waiver of the 1/4 mile setback. The berm shall be constructed one year prior to initiating mining activities or operations within the 1/4 mile setback. In order to maximize the effectiveness, the berm will be constructed as depicted on Exhibits "E" and "F."

R. at 77-78 (emphasis added).

FINR chose not to challenge the development order. Specifically, FINR chose not to file a petition for *writ of certiorari* or declaratory action under § 163.3215(3) to take issue with the County's findings of fact or conclusions of law, or challenge the sufficiency of conditions imposed on CF Industries to mitigate any "ripple effects." FINR Br. at 26; *see also* Gary K. Hunter, Jr. & Doug M. Smith, *ABCs of Local Land Use and Zoning Decisions,* 84 Fla. Bar J. 20, 20-26 (2010) (noting need to file within 30-days from rendition of *quasi*-judicial development order a petition for *writ of certiorari* or declaratory judgment action).

Fidelity to the Harris Act's plain language should now preclude FINR from having yet another opportunity to challenge alleged "ripple effects." FINR Br. at 26. The Act only creates a cause of action for property owners whose property is itself the object of government regulation. Put another way, the Act only remedies harm that flows "directly" from government action actually "applied" to the would-be plaintiff's property. §§ 70.001(1), (3)(e), (11), Fla. Stat. FINR's plain

text reading of the Harris Act would have this Court read out the words "applied" and "directly" from the Act. *Id.*; *see also Smith,* 159 So. 3d at 888-94. The Court should reject such a reading. *See, e.g., Gulfstream Park,* 948 So. 2d at 606 (collecting citations for proposition that each word should be given meaning).

II. Legislative history: a useful tool that one should not misuse.

Second, FINR's myopic view of legislative history ignores the policy debate at the heart of the Harris Act: balancing property rights with the need to protect the public purse and prevent an erosion of police powers. A contemporaneous law review article details this debate from the perspective of all those involved. *See* David L. Powell, Robert M. Rhodes, & Dan R. Stengle, *A Measured Step to Protect Private Property Rights,* 23 Fla. St. U. L. Rev. 255 (1995). Its authors conclude that the Act was never intended to create a cause of action for those whose property is not itself subject to government regulation. *Id.* at 289.

After the First District issued its opinion in *Smith*, the 2015 Legislature again weighed-in to reaffirm the balance it originally chose. Cnty Int. Br. at 12-13. This made sense. *Smith* was the first case that addressed the issue now before the Court, drawing *en banc* review, two sharp dissents, and a certified question to this Court. The Legislature thus had a compelling reason to "clarify" or make "clarification

to" existing law, protecting the public treasury in the process. *Id.*;[5] *see also* H.R. Final Bill Analysis, *H.B. 383,* 117th Sess., at 5 n.25.[6] "When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, [the] [C]ourt may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." *Lowry v. Parole & Prob. Com.,* 473 So. 2d 1248, 1250 (Fla. 1985).

FINR, however, takes issue with the County's reliance on this legislative history. While FINR does not actually respond to what was said by those who crafted and then amended the Act, it erects roadblocks intended to keep this Court from considering what was said. FINR's attempts are unavailing.

As an initial matter, FINR wrongly argues that the County cannot even mention the relevant legislative history. *See* FINR Br. at 26-27. But this Court has previously recognized and used legislative history as a tool to discern legislative

[5] The County cites in its initial brief seven different hearings where sponsors of the 2015 amendments explained to their colleagues that their bill would clarify – not change – existing law. After listening to this explanation, members of each committee voted on the bill to allow it to come to the floor. *Compare* Rule 3.2, Florida House of Representative Rules (2014-16) (requiring members to vote in session, and on committees or subcommittees to which members are appointed) and Rule 2.2, 2.15-.16, Florida Senate (2014-16) (discussing powers and voting requirements) *with* FINR Br. at 27 ("no one can say for certain what the majority of legislators . . . actually intended" because "[t]he only text a legislator must vote on is the text of the bill itself").

[6] The Legislature's final bill analysis specifically references the First District's decision, making clear that the Legislature was aware of the decision.

intent. *See, e.g., Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez,* 74 So. 3d 1070, 1075 (Fla. 2011) (explaining that where "statutory intent is unclear from the plain language of the statue," this Court has "explor[ed] legislative history to determine legislative intent") (collecting citations).

FINR is similarly incorrect in suggesting that the Court should ignore "a law review article written by non-legislators as evidence of so-called legislative history." FINR Br. at 28. FINR fails to mention that the article's authors include a member of the "working group that recommended the property rights legislation," and Governor Chiles's General Counsel who "served as the principal drafter for the working group that prepared the property rights legislation" now known as the Harris Act. Powell *et al.*, *supra*, at 255. Discounting the views of these "known commentators," *Smith,* 159 So. 3d at 893, whose work has been positively cited by the courts, *e.g., M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 76 (Fla. 1st DCA 2009), would needlessly hamstring this Court as it seeks to discern and "give effect to the 'polestar' of legislative intent." *B.C. Fla. Dep't of Children & Families,* 887 So. 2d 1046, 1051 (Fla. 2004). This is especially true because an Attorney General's opinion issued shortly after the Act's enactment corroborates the article's conclusion. *Compare* Powell *et al., supra* at 289 ("governmental entity must specifically apply the statute, rule, regulation, or ordinance to the

owner's property" for there to be a claim) *with* Op. Att'y Gen. Fla. 95-78 (1995) (concluding that Act "does not provide for recovery of damages to property that is not the subject of governmental action or regulation" – where "governmental action or regulation [is] directed at a separate, specific parcel of real property").

Notably, FINR itself misuses legislative history. FINR compares the definition of "property owner" in section 1 of Chapter 95-181 Law of Florida – which became the Harris Act – with the definition of "owner" in section 2 of Chapter 95-181 Laws of Florida – which became the Florida Land Use and Environmental Dispute Resolution Act. FINR Br. at 29. Relying only on the two definitions, FINR observes that the definition in section 2 is more restrictive. *Id.* From this, FINR infers that the Harris Act definition must be construed to allow neighboring property owners to file claims. *Id.* The problem with FINR's use of one definition to illuminate the meaning of the other – of its *in pari materia* reading – is section 3 of Chapter 95-181 Laws of Florida. Section 3 states that "[i]t is the express declaration of the Legislature that section 1 and section 2 of this act have separate and distinct bases, objectives, applications, and processes." Chapter 95-181 Laws of Fla., 1664 (1995). Section 3 further states that "[i]t is therefore the intent of the Legislature that section 1 and section 2 of this act are not to be construed *in pari materia.*" *Id.* Simply put, the legislative history on which FINR

relies specifically prohibits the argument FINR now makes. *Cf.* 48A Fla. Jur., Statutes, § 166 (2nd ed. 2015) ("The doctrine of '*in pari materia*' requires courts to construe related statutes together so that they will illuminate each other").

III. Fundamental misunderstanding: setbacks and police powers.

Third, FINR's remaining substantive arguments belie a fundamental misunderstanding: an expectation that generally applicable setbacks must always remain unchanged. FINR Br. at 38-44. But generally applicable setbacks do change. Enacted through the exercise of local government police powers, setbacks reflect local government policy.[7] Policies change, and so setbacks change. They are altered through *quasi*-legislative or *quasi*-judicial actions – through amendments to a local zoning ordinance or waivers and variances from an ordinance. Either way, local governments exercise their police powers to make changes to existing policy as reflected in their setbacks. *See generally* § 125.01(1), Fla. Stat. (delineating powers of county governments like Hardee County).

[7] FINR also seems to suggest that setbacks create property rights of an unexplained kind in the owner of adjacent land. FINR Br. at 38-44. FINR provides no support for this. To be sure, however, setbacks are not easements. Setbacks – unlike easements – do not add to an adjacent property owner's bundle of property rights. *See generally Miami v. Romer,* 58 So. 2d 849, 851-52 (Fla. 1952) (distinguishing setbacks from easements by noting that setbacks, unlike easements, are only a "restriction of use" that is "based upon the exercise of the police power for the general welfare") (citations omitted).

Yet FINR now argues that the County erred by altering a generally applicable setback – at least by altering it without giving FINR $38 million. R. at 4.[8] Stated differently, FINR advocates an interpretation of the Harris Act that would hold the County's treasury hostage if the County chooses to exercise its police powers and alter a setback. Interpretations of statutes that impede the ability of local governments to exercise their police powers "should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action." *M&H Profit,* 28 So. 3d at 77 (citing cases and affirming dismissal of Harris Act claim based on change to applicable height and setback requirements).

CONCLUSION

For the foregoing reasons, and those in Hardee County's initial brief, the Second District's decision below should be reversed.

[8] In its statement of the case and facts, FINR seems to acknowledge that the County may change the applicable setback – as it existed in 2007 – to allow a property owner to mine more of its own property where, as here, the property is included in the County's Mining Overlay District. FINR Br. at 7 n.6. This is because the Mining Overlay District, according to FINR, "identifies areas in Hardee County where mining has, is or *is planned to occur*." *Id.* (emphasis added). But, under FINR's reading of the Harris Act, the County would first have to pay either the property owner (who satisfies the requirements for an alternate setback but still has its request denied) or neighboring property owners (who feel aggrieved by any approved change). FINR's reading of the Harris Act thus places the County in an untenable position. The Legislature could not have intended this.

Respectfully submitted,

/s/ Mohammad O. Jazil

Frank E. Matthews, Florida Bar No. 328812
D. Kent Safriet, Florida Bar No. 174939
Timothy M. Riley, Florida Bar No. 56909
Mohammad O. Jazil, Florida Bar No. 72556
HOPPING GREEN & SAMS, P.A.
119 S. Monroe Street, Suite 300
Tallahassee, FL 32301
Email: FrankM@hgslaw.com
Email: KentS@hgslaw.com
Email: TimothyR@hgslaw.com
Email: MohammadJ@hgslaw.com

Kenneth B. Evers, Florida Bar No. 54852
KENNETH B. EVERS, P.A.
424 West Main Street
Post Office Drawer 1308
Wauchula, FL 33873-1308
(863) 773-5600 – Phone
(866) 547-4362 – Facsimile
Email: office@hardeelaw.com

Counsel for Petitioner
Hardee County, Florida

Dated: December 29, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 29th day of December, 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:

Edward P. de la Parte, Jr., Esquire
Patrick J. McNamara
David M. Caldevilla
Vivian Arenas-Battles
DE LA PARTE & GILBERT, P.A.
Post Office Box 2350
Tampa, FL 33601-2350
edelaparte@dgfirm.com
dcaldevilla@dgfirm.com
pmcnamara@dgfirm.com
varenas@dgfirm.com
serviceclerk@dgfirm.com

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been generated with Times New Roman 14 point font and thus complies with Rule 9.210 of the Florida Rules of Appellate Procedure.

/s/ Mohammad O. Jazil
Attorney