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IN THE SUPREME COURT
STATE OF FLORIDA

R. LEE SMITH and CHRISTY SMITH,

Petitioners,

Case No.: SC15-534
LT Case No.: 2012-CA-007994

vs.

CITY OF JACKSONVILLE,

Respondent.
______________________________________/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

A. Introduction

Is a property owner entitled to compensation under the Bert Harris Act for incidental damages caused by a governmental action on an adjacent property, where no governmental action has been directly applied to or interferes with that owner's real property and its available uses? As demonstrated below, the answer is no, and therefore the certified question from the *en banc* First District Court of Appeal should be answered in the negative.

This matter was brought by Petitioners R. Lee Smith and Christy Smith (the "Smiths") because of alleged action by the City of Jacksonville ("the City") against the Smiths' property interests in unimproved real property purchased in May 2005 and located on Heckscher Drive in Jacksonville, Florida (the "Vacant Property"). [A 2][1] The basis for the relief requested by the Smiths is a claim under the Bert Harris Property Rights Protection Act, Section 70.001, Florida Statutes ("the Act"). The claim arises from the issuance of a building permit on December 23, 2010, and the subsequent construction of a fire station with a boat dock on the City's property adjacent to the Vacant Property. [A 3] The Smiths purchased the Vacant Property

[1] Citations to the Appendix will be "[A #], where "#" is the page number(s) of the Appendix. The pages in the Appendix, filed concurrently with the City's initial brief in the First District Court of Appeal, are Bates numbered consecutively, pages 1-1133.

as an investment and claim that their investment lost value for which the City should reimburse them. [A 4]

As explained below, the undisputed facts show that the City has taken no action on or against the Smiths' Vacant Property. Therefore, the Bert Harris Act does not apply to the Smiths' claims. Furthermore, at the time of the City's fire station permit, the Smiths still retained the right to construct a single family dwelling on the Vacant Property or to sell the property for single family development.[2] Therefore, the First District Court of Appeal in its *en banc* majority opinion correctly concluded that the circuit court erred in finding that the Act applied in this case.

The sole substance of the Smiths' claim was the alleged reduction in value of their Vacant Property as a result of the City's actions in placing a fire station on the adjacent, City-owned property to the northwest (the "Fire Station Property"). There can be no Bert Harris cause of action under these undisputed facts because there was no direct action applied to the Smiths' property by the City. The Court should therefore answer the certified question in the negative.

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[2] The Smiths sold the Vacant Property on April 8, 2015 to a third-party purchaser. A publicly-available copy of the Special Warranty Deed is located on the Duval County Clerk of Court's website, oncore.duvalclerk.com.

B. Background

The Smiths purchased the Vacant Property with no plans to develop it themselves, testifying that they intended it as an investment to re-sell to potential residential buyers. [A 629-30] The zoning is for "Residential Low Density" and the Vacant Property is undeveloped. [A 255] The Vacant Property was originally part of a double lot, which was subdivided by the original owner. [A 619] One half of the original lot was sold to the Smiths and the other half was sold to the homeowner adjacent to the southwest to operate as a buffer between their existing single family residence and whatever development would be occurring on the Smiths' Vacant Property. [A 619-20] The Smiths could also have chosen to purchase an interest in or title to adjoining parcels of property, thus ensuring control over whatever development might occur next door to protect their investment.

The City's Fire Station 40 was already in existence, being located nearly across the street from its new location. [A 451] However, it was determined that the City needed to place a marine fire boat in the northeast portion of the county. [A 824] The City was deeded the Fire Station Property in 1954, which at the time was limited in its use to the recreation of City employees. [A 247-48] The then-owner of the Vacant Property was not named as a beneficiary or otherwise legally entitled to rely on a continuation of this limitation.

Once the need for an additional fire boat was determined, the City identified the already-owned City property across the street as the new location of Fire Station 40. [A 451] The Fire Station Property was rezoned in 2005, and in 2007, a quit claim deed was issued to the City from the original transferor, removing the recreation use limitation for the City to build the new Fire Station 40. [A 247, 255]

The City posted notice of the proposed change and mailed notice to 20 neighboring properties and others [A 252-54], held a community meeting [A 829], and posted notice signs on the property, including a 3-by-5 foot sign reading "future site of fire station" placed in the center of the City's property for close to two years before construction began [A 829-30]. Notice of the zoning change was not mailed to the Smiths; instead, notice went to the former owner of the property.[3] The Smiths allege they did not become aware of the fire station until after construction began. [A 634][4]

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[3] The Smiths bought the Vacant Property from three successor trustees of the Donald W. Tredinick Trust (9250 Baymeadows Road, Ste. 400, Jacksonville, FL 32256). [A 243] The zoning notice was sent to that address, rather than to the Smiths. [A 252-54]

[4] Such a mistake by the City does not invalidate the legislative action. Section 656.124(a), Jacksonville Code of Ordinances ("JCO"), states in part:

> The intent of these increased notice requirements is to provide adjacent owners and registered neighborhood organizations with the basic necessary information to make an informed decision concerning their position on the application and, if additional information is required, to provide guidance on how to obtain that information. Recognizing that mistakes may occur in the process of copying these notices or the additional information to be included

Fire Station 40 primarily serves the immediate neighborhood around it by responding to general emergencies and marine distress calls, averaging less than one response call per day. [A 597-98] However, the fire station also utilizes a dock for marine calls, which may extend beyond the immediate neighborhood and serve the City's broader public safety needs. [A 601]

C. The Smiths' Harris Act Claim

The Smiths sought damages against the City through the Bert Harris Act, section 70.001(2), Florida Statutes. The Act creates a cause of action "[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." Pursuant to section 70.001(3)(e), the terms "inordinate burden" and "inordinately burdened" mean, in relevant part:

> 1. 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

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in the notice package, it is the specific intent of this Section that the failure of an owner or registered neighborhood organization required by this Section to be notified by mail, to receive the notice, or the failure to receive a complete and accurate notice, shall not invalidate or otherwise have any effect upon a public meeting, hearing or action taken by the Planning Commission, committee or the Council on the application for rezoning. [A 923-26]

> 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.

(emphasis added).

Section 70.001(3)(b), Florida Statutes defines the term "existing use" to mean:

> 1. **An actual, present use or activity on the real property**, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or
>
> 2. Activity or such **reasonably foreseeable, non-speculative land uses** which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

(emphasis added). Government action must *directly* restrict or limit the rights of real property use such that the owner is unable to obtain his reasonable, investment-backed expectation for the property's actual, present use, or its reasonably foreseeable non-speculative use. The Smiths claimed that the Fire Station Property inordinately burdened the existing use of their Vacant Property.

D. The Circuit Court's Order.

Prior to trial, the City filed a motion to dismiss and a motion for summary judgment, arguing that the Act does not apply when no governmental action has been directly applied to a plaintiff's property, that the Act does not authorize an

award of incidental damages from a governmental action, and that the Smiths retain all existing uses and reasonably foreseeable, non-speculative land uses of the Vacant Property. [A 15-25, 151-55] The circuit court denied both motions. [A 145-46, 241-42]

The circuit court then held a bench trial on the issue of whether an inordinate burden occurred under the Act ("phase one" of the litigation) on April 9 and 10, 2014. In a six-page order entered on April 15, 2014, the court concluded that the Act applies to the Smiths' claims in that it applies to any governmental actions which "inordinately burden, restrict, or limit property rights *without amounting to a taking*. . ." [A 515 (*quoting* §70.001(1), Fla. Stat., emphasis in order)] The circuit court reasoned that the Act was meant to cover situations which would not amount to inverse condemnation or a taking, and therefore the Act should not be limited to actions only directly applied against property. [A 516]

The circuit court concluded that "the Act provides legislative relief to owners of property when their property has been incidentally diminished in value due to governmental action taken against an adjacent property." *Id*. In the final paragraph of its order, the court then summarily concluded that the City's adjacent

fire station inordinately burdened the value of the Smiths' adjacent property. The City filed an interlocutory appeal to the First District Court of Appeal.[5]

E. The First District Court of Appeal's *En Banc* Order

On February 26, 2015, an *en banc* majority of the First District Court of Appeal ruled in favor of the City and reversed the circuit court.[6] The First District concluded that "the Act simply does not apply where, as here, the Smiths' property was not itself subject to any governmental regulatory action." *City of Jacksonville v. Smith*, 159 So. 3d 888, 889 (Fla. 1st DCA 2015). The court concluded that the "Act contains no language to indicate that it intends to create a whole new class of takings claimants who do not have to demonstrate that a governmental law, rule or regulation had been applied to their property, nor is there language which would allow for claims based on non-regulatory governmental actions." *Id.* Highlighting the specific language of the Act, the court held that it indicates that in order to have a cause of action, a government action must be directly "applied" to the subject property. *See id.* at 890.

Citing the specific language of the Act, the context of the statute when read as a whole, and case law concerning regulatory takings, the First District

[5] The right to an interlocutory appeal after the initial phase of trial is provided in section 70.001(6)(a), Florida Statutes.

[6] The First District convened the *en banc* review *sua sponte*, without the request of either party.

concluded that the City's interpretation of the Act was consistent with its language and overall purpose. Moreover, to construe the Act broadly would "create a cataclysmic change in the law of regulatory takings which common sense dictates the Legislature would not have intended without directly and specifically providing for it." *Id.* at 891. By isolating one section of the statute, the definition of "action of a governmental entity," the First District reasoned that the circuit court created a new class of plaintiffs who could then bring lawsuits whenever the government exercises its police powers. *See id.* This, the First District stated, does not comport with legislative intent and other sections of the Act, as highlighted by the City. *See id.* at 891-92.

Moreover, the First District reasoned that the City's interpretation of the Act is consistent with its history and purpose. The Act was meant to create a cause of action for direct governmental actions that do not rise to the level of taking, which requires a total deprivation of all beneficial uses of property. *See id.* at 892-93. The Act therefore created a new cause of action for direct regulatory applications that "inordinately burden" a person's property. *See id.* It did not, however, expand the class of potential plaintiffs to those who have not had their property affected directly, or have not been the subject of a regulatory action. *See id.* In other words, the Act requires direct action, not claims based on the alleged "ripple effect" of governmental action.

Lastly, the First District discussed the "cataclysmic" effects of the circuit court's overly broad interpretation of the Act, where "any governmental action related to the use of property may engender litigation." *Id.* at 893. This would put governments between a rock and a hard place, exposing them to liability for so-called "ripple effects" related to any government uses or actions, as well as actions for rezoning and permitting decisions that are not limited to government property. *See id.* These unlimited claims based on all levels of government decision-making would "thus severely affect the functioning of a number of levels of government." *Id.* at 893-94. The circuit court's interpretation of the Act "imposes additional costs on the taxpayer through dramatically increased liability for government action." *Id.* at 894.

Without a clear legislative intent, the First District refused to read the Act as broadly as urged by the Appellants, the dissenters and the circuit court. Furthermore, to interpret the Act so broadly conflicts with the well-settled proposition that any waiver of sovereign immunity must be strictly construed with any doubt resolved in favor of the government. *See id.* The First District refused to "open the floodgates" for claims under the Act anytime governmental actions adversely impact some other properties. *Id.* The court therefore reversed the trial court's reading of the Act as to "phase one" of the Smiths' claim.

F. The Certified Question to this Court

The First District then certified the following question in accordance with Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure, as being one of great public importance: May a property owner maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance directly applied to the owner's property which restricts or limits the use of the property? Petitioners invoked this Court's discretionary jurisdiction on March 23, 2015. This Court accepted jurisdiction on May 22, 2015, to answer this purely legal question of statutory interpretation regarding the application and reach of the Act going forward.[7]

During its 2015 Legislative Session, the Florida Legislature amended the Act to make clear that the act only applies to direct governmental action. Due to these statutory revisions, the City subsequently filed a Suggestion of Mootness in this Court, arguing that the forward-looking certified question has now been answered in the negative and this Court's review is moot. The suggestion was denied on March 18, 2016.

[7] The First District Court of Appeal explicitly stated that the issue in this case "involves pure statutory interpretation" and is thus "strictly a legal one." *Smith*, 159 So. 3d at 888-89.

SUMMARY OF THE ARGUMENT

The *en banc* majority of the First District Court of Appeal correctly held that the Smiths' action should have been dismissed for a multitude of reasons, and its certified question should be answered in the negative.

First and foremost, the City took no action as applied *directly* to the Smiths' Vacant Property, and that is the only way to support a claim under the Act. The Smiths complained that their property suffered incidental damages as a result of the City's lawful construction of its fire station on its adjacent property, but such incidental damages, even if real, are not compensable under the Bert Harris Act. The Act cannot be used to award incidental damages for so-called "ripple effects" when no governmental action has been meaningfully applied directly to the Smiths' property. The 2015 Legislature made this crystal clear.

Second, the Act only applies when government action directly restricts or limits the "existing use" or vested right to a specific use of real property. Here, the Smiths' property remained undeveloped, vacant, low-density residentially-zoned land. The Smiths retained all ability to maintain their property in its "actual, present use or activity." They also retained all "reasonably foreseeable, non-speculative land uses which are suitable for the subject property."

In short, the City's fire station created no legal restrictions on the use of their property in any way. The property is zoned for a single family house, and nothing

prevented the property owner from building a single family home on the property. The Act was not meant to apply under these circumstances.

The Smiths' argument is that the construction of the fire station "inordinately burdened" their right to sell their adjacent property as a luxury home site, which, by its very nature, is speculative. There is no basis for this argument within the Act's plain terms when read as a whole, or in its legislative history. From its enactment, the Act has never been construed this broadly because this is not what the Act was enacted to protect. To interpret the Act this broadly also flies in the face of its limited waiver of sovereign immunity. The First District's question should be answered in the negative.

The Smiths, along with the dissenters in the First District, seek to expand the application of the Act to require compensation not only when a governmental action has been *directly* applied to a specific property, but also to properties *indirectly* affected by a particular governmental action that are inordinately or unfairly burdened.[8] They argue the Act should cover these so-called "ripple

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[8] Not only has the Florida Legislature now directly answered the First District's question in the negative, as will be more fully discussed below, the Florida Attorney General, in response to a question directly on point with the issues raised in this proceeding, long ago opined that the Act was not intended to apply to governmental actions that are not directly applied to a plaintiff's property or award compensation for incidental impacts from actions on adjacent properties. *See* Op. Att'y Gen. Fla. 95-78 (1995). Before this case, the Act was never applied as expansively as the Smiths and First District dissenters argue is should be applied, and it will certainly not be applied that way in the future.

effects" of government action and be an "all-risk insurance policy." Such a proposition impermissibly expands the scope of recovery far beyond the plain meaning of the statute and will subject the City (and all affected governments) to unlimited lawsuits any time it takes any action affecting any real property. This extremely broad application of the Act would simply be unworkable.

The Bert Harris Act is inapplicable to cases like the Smiths', where the City's action was not directly applied to their property. The *en banc* majority correctly concluded that the Act should not be construed so expansively in contradiction of its express terms.

ARGUMENT

I. The District Court Correctly Held That the Bert Harris Act Does Not Provide Relief When Governmental Action Incidentally Diminishes the Value of an Adjacent Property.

A. Standard of Review.

This Court reviews the certified legal question at issue under a *de novo* standard of review. *See City of Jacksonville v. Coffield,* 18 So. 3d 589, 594 (Fla. 1st DCA 2009) (reviewing court's legal determination that city inordinately burdened plaintiffs' property under Bert Harris Property Rights Protection Act and that a jury should be impaneled to assess damages under a *de novo* standard of review); *Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27, 29 (Fla. 5th DCA 2013) (in "phase one" Bert Harris Act interlocutory appeal, stating that "[a] trial

court's legal conclusions, reached following a non-jury trial, are reviewed *de novo*).

B. The Act Does Not Apply Because the City's Action Was Not Applied Directly to the Smiths' Property.

1. The plain meaning of the Act supports the First District's decision.

The First District correctly concluded that the Smiths' claim failed because the governmental action complained of was not directly applied to their Vacant Property, but to an adjacent property. The Bert Harris Act provides relief to property owners when, under certain circumstances, a specific action of a governmental entity *directly* restricts or limits the use of the property. The Act provides no remedy for indirect or incidental burden to property that is not the subject of direct governmental action.

Under the Act, relief is only available 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 such property §70.001(2), Fla. Stat. The terms "inordinate burden" and "inordinately burdened" are defined to mean:

> 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), Fla. Stat. (emphasis added).

The Act authorizes compensation only when a governmental action, *as applied*, unfairly affects real property. §§70.001(1), (3)(e), (11), (12), (13), Fla. Stat. The Legislature's requirement that the governmental action must be applied to the subject property is critical to its understanding. The word "apply" connotes an intent to specifically "put to use, especially for a particular purpose."[9] A governmental action must therefore be intentionally "applied" to a subject property in order for that action to be reviewable under the Act. Adjacent properties such as the Smiths', which may suffer an incidental impact as a result of a governmental action "applied" to an adjacent property, are not covered under the Act because such incidental properties were not themselves "put to use for a particular purpose" by the governmental act at issue.

A plain reading of the Act thus makes clear that its purpose is to compensate certain "inordinate burdens" to real property – burdens that result from government action that *directly* restricts or limits the use of real property. The direct restriction or limitation on the property must rise to such a level that either: (1) the property

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[9] *See Merriam-Webster.com*, http://www.merriam-webster.com/dictionary/apply (June 13, 2016).

owner is permanently unable to attain the reasonable, investment-backed expectation of an existing use or a vested right to a specific use; or (2) the property owner is left with unreasonable existing or vested uses which cause the owner to unfairly bear a burden imposed for the good of the public. Either way, the Act only contemplates relief of a direct action by the government that has been applied against a plaintiff's property. To hold otherwise would improperly require the Court to rewrite the law, creating a provision providing relief for incidental "ripple effect" damages to adjacent properties.

In this case, for example, it is undisputed that the specific action at issue was the City's issuance of a building permit for the construction of a fire station on the City's own property, located adjacent to the Smiths' property.[10] The City took no direct action with regard to the Smiths' property. It re-zoned only City property, and the building permit in question applied to a building to be built on the City's property, not on the Smiths' adjacent Vacant Property. [A 255-58, 264, 649, 690-91] The Smiths retained the legal right to build a residence on their property, and to use their property in all ways consistent with its zoning. [A 649, 690-91] The

[10] The Smiths argue that, along with the issuance of the building permit, another specific government action was the re-zoning of the City's own property from Residential Low Density to Public Buildings and Facilities to allow for the building of the fire station. Even if that were the case, the specific government action of re-zoning property was done with regard to the City's own property, and not the adjacent Vacant Property.

use of the Smiths' adjacent property was not directly restricted or limited, and therefore they could not recover under the Act.

This Court has held that "[w]hen construing a statutory provision, legislative intent is the polestar that guides the Court's inquiry," and such intent is to be determined primarily from the language of the statute. *Maggio v. Florida Dept. of Labor and Employment Security,* 899 So. 2d 1074, 1076-77 (Fla. 2005); *Borden v. East-European Ins. Co.,* 921 So. 2d 587, 595 (Fla. 2006); *Diamond Aircraft Indus., Inc. v. Horowitch,* 107 So. 3d 362, 367 (Fla. 2013). However, the Court cannot read a subsection in isolation, but must read it within the context of the entire section to determine the legislative intent. *See Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1265 (Fla. 2008); *see also D.S. v. J.L.,*18 So. 3d 1103, 1110 (Fla. 1st DCA 2009) (where possible, related statutory provisions must be read together to achieve a harmonized whole). This Court explained in *ContractPoint* that "[i]f a part of the statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in *pari materia*, the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent." *ContractPoint Fla. Parks, LLC,* 986 So. 2d at 1264 (Fla. 2008), *quoting Fla. State Racing Comm'n v. McLaughlin,* 102 So. 2d 574, 575-76 (Fla. 1958).

Here, the plain language of the Bert Harris Act provides relief when governmental action inordinately burdens an existing use of real property, or a vested right to a specific use of real property. §70.001(2), Fla. Stat. The Act then plainly defines an inordinate burden as an "action of one or more governmental entities [that has] *directly* restricted or limited the use of real property. . . ." §70.001(3)(e), Fla. Stat. (emphasis added).

The word "directly," contained in the definition of "inordinate burden," must be given meaning and cannot be ignored. This Court has stated that "[c]ourts are required to give effect to 'every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage.'" *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198-99 (Fla. 2007), *citing American Home Assur. Co. v. Plaza Materials Corp.,* 908 So. 2d 360, 366 (Fla. 2005). Applying that requirement leads to the necessary conclusion that the Legislature did not define "inordinate burden" to mean an action of government that, in general or indirectly**,** restricts or limits the use of real property. Instead, the Legislature specified that an inordinate burden is an action of government that directly restricts or limits the use of real property. The *en banc* majority of the First District construed the statute in accordance with these axiomatic principles.

The Act plainly and unambiguously qualifies that restrictions or limits on the use of property must be the direct result of the governmental action. By choosing

to use the word "directly," the Legislature demonstrated its intent to exclude restrictions or limits that are indirectly caused by government action. As the First District correctly stated in *M&H Profit, Inc. v. Panama City*, 28 So. 3d 71, 76-79 (Fla. 1st DCA 2009):

> the Harris Act may not be used to bring a facial challenge to a statute, rule, regulation, or ordinance; the **governmental entity must specifically apply the statute, rule, regulation, or ordinance to the owners [sic] property in order for the owner to have a Harris Act claim**. David L. Powell, et al., *A Measured Step to Protect Private Property Rights,* 23 Fla. St. U. L. Rev. 255, 289 (Fall 1995) (emphasis added); *see also* Ronald L. Weaver, *1997 Update on the Bert Harris Private Property Protection Act,* 71 Fla. Bar J. 70, 72 (Oct. 1997) ("The governmental action in question must have been 'applied' to the subject real property because the act does not apply to facial attacks.").

(emphasis added). In other words, the Act was intended to apply only in situations when governmental action, specifically directed to a particular property, causes a direct economic effect on that property.

The principle that the governmental action must be applied to the subject property was also considered nearly 20 years ago by the Florida Attorney General, shortly after the Act's enactment. *See* Op. Att'y Gen. Fla. 95-78 (1995). In that opinion, the Attorney General considered an inquiry from St. Johns County as to whether the Bert Harris Act provides a means for compensation to a property

owner suffering an incidental diminution in property value caused by governmental action on an adjacent property.

The Attorney General reasoned that the plain language of the statute indicates that only real property that is directly affected by a governmental regulation is covered by the provisions of the Act. *See Id.* Thus, he opined that the Act:

> operates to provide a cause of action only for owners of real property that is directly affected by a governmental regulation and does not provide for recovery of damages to property that is not the subject of governmental action or regulation, but which may have incidentally suffered a diminution in value or other loss as a result of the regulation of the subject property.

Id. The First District correctly agreed with this plain reading of the Act.

The Attorney General's position was referenced by the circuit court in *Brown, et. al v. Charlotte County, Florida*, 16 Fla. L. Weekly Supp. 546c (20th Jud. Cir. 2009). There, the court made specific favorable reference to Attorney General Opinion 95-78, finding that under the opinion, "only real property that is 'directly affected' by governmental regulation is covered by the provisions of the Act." *Id*. The court stated that "[t]he governmental entity must specifically apply the statute, rule, regulation or ordinance to the owner's property in order for the owner to have a Bert Harris Act claim." *Id.*, *quoting* David L. Powell, Robert M. Rhodes and Dan R. Stengle, *A Measured Step to Protect Private Property Rights,*

23 Fla. St. U. L. Rev. 255, 289 (Fall 1995).[11] The *Brown* court thus concluded that in order to justify compensation under the Act, "a governmental entity [must have] made a meaningful application of a law or regulation to a Plaintiff's property. . . " *Brown,* 16 Fla. L. Weekly Supp. at 546c.

This Court should not ignore the plain meaning of the Act's definition of "inordinate burden," which contains the exact restriction contemplated by the First District. This Court long ago held that:

> [t]he Legislature must be understood to mean what it has plainly expressed and this excludes construction. 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. Cases cannot be included or excluded merely because there is intrinsically no reason against it. 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), *citing Van Pelt v. Hilliard*, 75 Fla. 792, 798–99, 78 So. 693, 694-95 (1918). Because the Bert Harris Act unambiguously limits its application to harm caused as a result of direct governmental action against the owner's property, and the

[11] This 1995 Florida State University Law Review article was written shortly after the Act's passage by three of the principle drafters of the Bert Harris Act, one of whom is the undersigned, Robert M. Rhodes.

Smiths' property was not directly affected by the City's action of issuing a building permit, this Court should answer the certified question in the negative and affirm the First District Court of Appeal.

2. The Act, when read as a whole, supports the First District's decision.

In addition to the plain meaning of the definition of "inordinate burden," as the First District pointed out, a reading of the Act as a whole further demonstrates the legislative intent that the Act only apply to property that is the direct subject of the government action. This Court held that "[i]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992); *M.W. v. Davis*, 756 So. 2d 90, 101 (Fla. 2000).

Whenever possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. *See Forsythe*, 604 So. 2d at 455; *citing Fleischman v. Department of Professional Regulation,* 441 So. 2d 1121, 1123 (Fla. 3d DCA 1983), *rev. denied,* 451 So. 2d 847 (Fla. 1984) (stating that "[e]very statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.") Applying this fundamental principle here, even if the Bert Harris Act were ambiguous in its application, a review of other provisions of the Act supports the City's position that the Act does not apply to the

factual circumstances of this case. This is evidenced by the following subsections of Section 70.001, Florida Statutes:

- **Section 70.001(1) (1995)**

In the second sentence of Section 70.001(1), the Legislature recognized that some governmental laws, regulations and ordinances, **as applied**, may inordinately burden private property rights without amounting to a taking. In this subsection, the legislative intent is made clear that relief under the Act is only available to owners against whose property a governmental action was applied. The government must intentionally and directly apply its laws, regulations or ordinances to the subject property to inordinately burden those private property rights. Incidental impacts of government actions are not part of this intent.

- **Section 70.001(3)(e) (2011)**

The last sentence of Section 70.001(3)(e) states that "[i]n 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**" (emphasis added). It is clear that this provision contemplates property that is the subject of the law or regulation, not an adjacent property. The Smiths' interpretation of the Act completely ignores this provision.

- **<u>Section 70.001(3)(f) (1995)</u>**

The Act provides relief to "property owners," but limits the meaning of that term in Section 70.001(3)(f). A "property owner" is defined as "the person who holds legal title to the **real property at issue**" (emphasis added).[12] "Real property at issue" is clearly a reference to the specific property that is the subject of the government action, and not property that is incidentally affected. Thus, the Act only provides relief to owners of property that is the subject of the government action.

The Smiths' and the First District dissenters' reading of the Act is inconsistent with this paragraph. Under their reading, the definition of "property owner" would be impermissibly expanded to include "people who hold title to real property adjacent to the real property at issue," and perhaps "people who hold title to any real property."

- **<u>Section 70.001(4)(d)(1) and (2) (1995)</u>**

The last sentence of Section 70.001(4)(c) conditions the implementation of any settlement agreements between a property owner and a governmental entity to the provisions of Section 70.001(4)(d). In turn, Section (4)(d) contemplates only two types of settlement agreements under the Act: 1) agreements that have the

[12] Consistent with the First District's holding, the Legislature recently clarified that a property owner is "the person who holds legal title to the real property that is the subject of and directly impacted by the action of the governmental entity." §70.001(3)(f), Fla. Stat. (2015).

"effect of a modification, variance, or special exception to the application of a rule, regulation, or ordinance as it would otherwise **apply to the subject real property**;" and 2) agreements that have the "effect of contravening the application of a statute as it would otherwise **apply to the subject real property**." §§70.001(4)(d)(1) & (2), Fla. Stat. (emphasis added). In other words, the Act only contemplates specific settlement agreements (addressing the application of a law to the subject property), further demonstrating that the Legislature did not intend that such agreements under the Act would involve adjacent property.

- **<u>Section 70.001(5)(a) (1995)</u>**

Section 70.001(5)(a) requires that during the prescribed pre-suit notice period, a governmental entity must "issue a written ripeness decision identifying the allowable uses to which the subject property may be put." If the Act was intended to apply to property other than the property subject to the governmental action, this provision would be meaningless. This is because if a rule, regulation, or ordinance at issue is not applied directly to a property (such as the Smiths' Vacant Property adjacent to the City's property), there will be no change in that property's allowable uses (as there was no change in the Smiths' allowable uses).

- **<u>Section 70.001(7)(b) (1995)</u>**

Section 70.001(7)(b) provides that an award or payment of compensation pursuant to the Act "shall operate to grant to and vest in any government entity by

whom compensation is paid the right, title, and interest in rights of use for which the compensation has been paid, which rights may become transferable development rights to be held, sold, or otherwise disposed of by the governmental entity." It is inconceivable that such a provision, which vests right, title, and interest to the government, would apply in a situation like the Smiths' case, where property value is incidentally diminished. The result would mean that any time government action to one property affected the value of an adjacent property, upon paying compensation for the reduction, the government would *own* a portion of that adjacent property.

This makes neither logical nor legal sense. This provision further frustrates the Smiths' argument because they no longer own the Vacant Property.[13]

- **<u>Section 70.001(11) (1995)</u>**

Section 70.001(11) states that "[a] cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation **is first applied by the governmental entity to the property at issue**" (emphasis added). This provision demonstrates that only owners of property to which the government's law or regulation is applied may commence an action under the Bert Harris Act. The broad interpretation of the Act furthered by the

[13] *See* note 2, *supra.*

Smith and the First District dissenters renders the Act's statute of limitations provision meaningless.

As a whole and in overall context, these seven sections of the Act, each referencing the application of a law, regulation or ordinance (the government action) to the subject property, are consistent with the limitation that an "inordinate burden" only results from the direct action of the government to a targeted property. When these statutory provisions are read together in harmony with the Act as a whole, and when each provision is given full effect, it is clear that the Act was intended to only apply in cases when government action affects a property as a direct result of the application of a law or regulation to that property. *See Forsythe*, 604 So. 2d at 455.

The Smiths (and the dissenters in the First District) improperly isolate the Act's definitions of inordinate burden and government action when they argue that the Act applies to property that is not the subject of the government action. In doing so, the Smiths simply ignore the following language from the seven provisions discussed above: 1) "laws, regulations, and ordinances, as applied, may inordinately burden;" 2) "enactment of the law or regulation and its first application to the subject property;" 3) "the person who holds legal title to the real property at issue;" 4) "the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property;" 5) "written ripeness decision

identifying the allowable uses to which the subject property may be put;" 6) "right, title, and interest in rights of use for which the compensation has been paid;" and 7) "first applied by the governmental entity to the property at issue."

Under the Smiths' misguided interpretation of the Act, these collective provisions cannot be read together as a consistent whole, and full effect cannot be given to all provisions of Act. *See Knowles v. Beverly Enterprises-Florida, Inc*., 898 So. 2d 1, 6 (Fla. 2004). Thus, in order to grant the Smiths relief under the Act, the Court would need to disregard the well settled principles of statutory interpretation and ignore or rewrite the seven provisions cited above. The Court should decline this invitation and answer the certified question in the negative.

3. Legislative intent supports the First District's interpretation of the Act.

In addition to its plain terms and established principles of construction to give all of its current terms their full meaning, subsequent amendments to the Bert Harris Act, up to the clear and explicit amendments just last year, further support the Legislature's intent that the Act only applies to property that is directly affected by governmental action. The Legislature is presumed to know the existing law when a statute is enacted, including "judicial decisions on the subject concerning which it subsequently enacts a statute." *Collins Inv. Co. v. Metropolitan Dade County.,* 164 So. 2d 806, 809 (Fla. 1964); *Sarasota Cnty. Sch. Bd. v. Roberson*, 135 So. 3d 587, 589-90 (Fla. 1st DCA 2014), *citing City of Hollywood v.*

Lombardi, 770 So. 2d 1196, 1202 (Fla. 2000) (noting that "the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law" and "[f]urthemore, the legislature is presumed to have adopted prior judicial construction of a law unless a contrary intention is expressed in the new version"). Legislative intent shows that the First District *en banc* majority's construction of the Act is the correct one since the Act's enactment, and it is certainly correct going forward.

The Bert Harris Property Rights Protection Act was first introduced as law in 1995. *See* Ch. 95-181, Laws of Fla. As discussed above, from its inception the Act defined "inordinate burden" as an action of a governmental entity that directly restricts or limits the use of real property in certain ways. *See* Ch. 95-181, §(3)(e), Laws of Fla. Additionally, other parts of the current Act, relating the application of the governmental action to the subject property (Sections 70.001(3)(f), (4)(d), (5)(a), (7)(b), and (11)), were present in the original statute.

A review of the history of the Act and how it has been evaluated over time reveals that the certified question at issue has been presented and addressed. In 1995, shortly after the original passage of the Act, a question was posed to the Attorney General from St. Johns County, which read:

> Does the Act: "provide a means for the recovery of damages to property other than the property that is the subject of governmental action or regulation, but that may have suffered a diminution in value

> or other loss as a result of its proximity to the property that is subject to the regulation?"

Op. Att'y Gen. Fla. 95-78 (1995). The Attorney General's reply was consistent with the majority opinion below in this case. Properties that are not the subject of the governmental action, which may have suffered an incidental diminution in value or other loss as a result of the action on the subject property, are not entitled to relief under the Act. *Id*. In arriving at this conclusion, the Attorney General examined the Act within the framework of the plain meaning of the words used, and he applied the strict construction requirement in favor of the State when the Legislature creates a waiver of sovereign immunity.

Additionally, an article written by three of the principal drafters of the Act was published in 1995 and described the background of and intent behind the Act. *See generally* David L. Powell, *et al.*, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995). The article serves as primer for the Act, written by its drafters, discussing and explaining each section and definition.

In the article, the authors describe the Act as creating "a new cause of action to provide compensation to a landowner when the actions of a governmental entity impose an 'inordinate burden' on the owner's real property." *Id.* at 265. Then, in describing the Act's requirement for an "action of a governmental entity," the authors indicate that the government's action must have "'directly restricted or limited the use' of the owner's land . . . A governmental action which indirectly

burdened or inadvertently devalued an owner's land, because of regulatory decisions regarding another owner's property, would be too attenuated for relief" under the Act. *Id*. at 272-73. Furthermore, the authors explain the limitation of the Act to "as-applied" challenges only, as described in Section 70.001(1), Florida Statutes, stating that "the Harris Act may not be used to bring a facial challenge to a statute, rule, regulation, or ordinance; the governmental entity must specifically apply the statute, rule regulation, or ordinance to the owner's property in order for the owner to have a Harris Act claim." *Id*. at 289. Both the Attorney General and the Act's original drafters therefore explicitly addressed the original intent and meaning behind the Act.

Amendments were then made to the Act in 2006 and 2011. *See* Ch. 2006-255, Laws of Fla.; Ch. 2011-191, Laws of Fla. Prior to the 2011 amendment, district courts of appeal issued spilt decisions about when the application of the governmental action triggered the Act's one-year notice period. Section (11) of the Act provided that "[a] cause of action may not be commenced under this section if the claim is presented more than 1 year after the law or regulation is first *applied* by the governmental entity to the property at issue" (emphasis added). In *Citrus County v. Halls River Development,* 8 So. 3d 413 (Fla. 5th DCA 2009), the Fifth District held that enactment of a law, which clearly impacted the claimant's

property, started the clock on the Act's one-year period of time in which to file a claim.

In contrast, the First District in *M&H Profit, Inc.,* 28 So. 3d at 76-79, held that the mere enactment of the law was not appropriate to begin the calculation of time. Nonetheless, while the courts had differing opinions as to when the time limitation began to run, they both agreed that under the Act, the law or regulation (governmental action) must be applied directly to the subject property. *See id*. at 76; *Citrus County,* 8 So. 3d at 420, 422. This has never changed.

With knowledge of this split of authority, the Legislature amended the Act to resolve the conflict. *See* Ch. 2011-191, Laws of Fla. The original provision of Section (11) was left untouched, but sections (11)(a) and (b) were added to clarify when the one-year time limit begins. *Id.* Significantly, the Legislature left the following language in Section (11): "after a law or regulation is first applied by the governmental entity to the property at issue." *Id.* Further, Section (3)(e)'s definition of "inordinate burden" continued to use the words "directly restricted or limited," and an additional sentence was added to that section, stating that:

> [i]n 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.

Id. (emphasis added).

In light of *Citrus County*, *M&H Profit, Inc.*, *Brown*[14] and the 1995 Florida Attorney General opinion directly on point, it is significant that when the Legislature amended the Act in 2011, it left the words “directly restricted or limited” in the Act’s definition of “inordinate burden.” Additionally, not only did the other references that the application of governmental action must be made to the subject property (Sections 70.001(3)(f), (4)(d), (5)(a), (7)(b), and (11)) remain untouched by the amendments, but the Legislature added an additional reference at the end of Section (3)(e). *See Collins Inv. Co.,* 164 So. 2d at 809; *Roberson*, 135 So. 3d at 589-90. In short, with the “presumed knowledge” that Florida courts and the Florida Attorney General were in agreement that under the Act the law or regulation (governmental action) must be applied directly to the subject property, the Legislature amended the Act leaving all earlier references to that proposition intact, and even added another.

[14] In *Brown*, the trial court addressed “the narrow question [as to] whether the mere passage of a law or ordinance is sufficient to create liability under the Bert Harris Act or must there be a specific application of the law or ordinance to a particular property?” The court determined that the Act requires more than a facial attack and that a governmental entity must specifically apply the statute, rule, regulation or ordinance to the owner’s property in order for the owner to have a Bert Harris Act claim. *See Brown,* 16 Fla. L. Weekly Supp. 546c (Fla. 20th Cir. Ct. Apr. 1, 2009).

4. The 2015 Legislature agreed with the First District, answering the prospective certified question in the negative.

Last year, in the wake of the First District's dissent, the Florida Legislature removed all doubt as to the application of the Act. Accordingly, claims like the Smiths' cannot be made in the future. The 2015 Florida Legislature explicitly agreed with the analysis of the First District *en banc* majority and answered the prospective certified question before this Court in the negative. The certified question is one of pure statutory construction, and because the Legislature has now answered that question, there is no longer an issue of statewide importance before this Court.[15]

The 2015 Legislation clarifies the application of the Act by stating, in Section 70.001(3)(f), that "[t]he 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*" (emphasis added). Then, at 70.001(3)(g), the Legislature now defines "real property" to include "only parcels that *are the*

[15] The Enrolled 2015 Legislation, CS/CS/CS/HB 383, is available at www.myfloridahouse.gov. For the Court's convenience, the City attached the legislation to its Suggestion of Mootness as "Exhibit 1." Chapter 2015-142 was signed by the Governor on June 11, 2015 and went into effect on October 1, 2015. In the House of Representatives' Final Bill Analysis, after discussing the amendments, the First District *en banc* majority in this case, along with the Attorney General's 1995 opinion construing the Act, are cited with approval in a footnote on page five. The Staff Analysis is also available at www.myfloridahouse.gov.

subject of and directly impacted by the action of a governmental entity" (emphasis added). In short, the Act has now been amended to construe its language and address what claims are proper going forward. This answers the only jurisdictional question before the Court.

This Court has limited jurisdiction to decide the certified question from the First District Court of Appeal under Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure. The First District explicitly stated that the issue in this case "involves pure statutory interpretation" and is thus "strictly a legal one." *Smith*, 159 So. 3d at 888-89. This Court need not answer the question of great public importance, as application of the Act going forward has already been clarified by the Legislature, and thus there is no *recurring* question having statewide importance. *See State v. Matthews*, 891 So. 2d 479, 483-84 (Fla. 2004); *see also Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984) (holding that settlement of underlying litigation did not destroy jurisdiction because certified question *will occur again* and *will only cause more problems in the future* if not answered).

Nonetheless, the dissenters in the First District, in interpreting the Act, essentially agree with the Smiths' argument that when the Legislature chose the words "directly applied" in qualifying restrictions or limitations caused by governmental action, it was merely a reference to immediate causation. They argue that the Act applies when government action causes damages to property,

regardless of whether the action was directed to the damaged property or not. Accepting this argument renders many other provisions of the Act inconsistent and even meaningless, as laid out above.

The trial court and the dissenters failed to give full effect to all of the Act's provisions and failed to construe related statutory provisions in harmony with one another and with Legislative intent. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). By expanding the application of the Act to include damage to incidental property not the subject of "directly applied" governmental action, they ignore the provisions discussed above when laid out with conjunction with one another. Such a reading of the Act is entirely inconsistent with this Court's well settled principles of statutory interpretation.

C. The Act Contains a Limited Waiver of Sovereign Immunity Which Should be Construed in Favor of the City.

The First District correctly reasoned that the Act's limited waiver of sovereign immunity should be construed in favor of the government. Florida law has set forth three policy considerations that underpin the importance of doctrine of sovereign immunity: (1) the preservation of the constitutional principle of separation of powers; (2) the protection of the public treasury; and (3) the maintenance of the orderly administration of government. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). Accordingly, the Florida Constitution provides that only the Legislature can waive the State's

sovereign immunity, and any such waiver must be clear and unequivocal. *See, e.g., Manatee County v. Town of Longboat Key,* 365 So. 2d 143, 147 (Fla. 1978)*;* *Rabideau v. State,* 409 So. 2d 1045, 1046 (Fla. 1982).

A statutory waiver of sovereign immunity requires specific, clear, and unambiguous language, and here the Act should not be interpreted as an expansive waiver of immunity. *See id.* In interpreting legislative waivers of sovereign immunity, a court must strictly construe the waiver in favor of the State. *See Longboat Key,* 365 So. 2d at 147; *City of Gainesville v. State Dep't of Transp.*, 920 So. 2d 53, 54 (Fla. 1st DCA 2005). Waiver cannot be "a product of inference or implication." *Am. Home Assur. Co.,* 908 So. 2d at 472.

Here, paragraph (13) of the Bert Harris Act waives sovereign immunity for "causes of action based upon the application of any law, regulation, or ordinance subject to this section, but only to the extent specified in this section." As discussed above, a large number of the Act's provisions discuss the "application of a law, regulation, or ordinance" in reference "to the subject property," or "to the property at issue." A narrow interpretation of the Act is exactly what is called for because the Act is a waiver of sovereign immunity and should be construed in favor of the government. *See City of Gainesville,* 920 So. 2d at 54. This leads to only one conclusion: the Act cannot apply to incidental impacts to adjacent property.

There is no question that sovereign immunity has been expressly waived for claims of property owners whose property is the subject of the direct government action. However, as the First District stated, this is a limited waiver which should not be expanded beyond the Act's terms. *See Am. Home Assur. Co.,* 908 So. 2d at 472; *Longboat Key,* 365 So. 2d at 147. The Act should also be strictly construed because it is an act of the Legislature that creates an obligation against the State (City) in favor of a grantee, and opens up the treasury to new claims. Any ambiguity in the provisions of the Act should therefore be construed against an award of damages, and such damages should be awarded only when an award appears consistent with the Legislature's intent. *See* Op. Att'y Gen. Fla. 95-78 (1995), *citing Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.*, 444 So. 2d 926, 928 (Fla. 1983) (legislative grants of property or franchise rights must be strictly construed in favor of the state and against the grantee).

Even if the restriction in question is unclear under the Act, then at best the Act is ambiguous as to whether the Legislature intended it to apply in cases of incidental damage to adjacent property. Such an ambiguity should not be resolved in favor of the Smiths because a waiver of sovereign immunity cannot be the product of inference or implication. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 472 (Fla. 2005). Rather than expanding the

reach of the waiver of sovereign immunity in the absence of an express restriction, the Act's waiver should apply only to what is expressly authorized in the statute. *See Longboat Key,* 365 So. 2d at 147; *Am. Home Assur. Co.,* 908 So. 2d at 472. In other words, if a situation is ambiguous or questionable, the statute should be construed in favor of the government and no waiver should be found. *See id*.

The Smiths and First District dissenters nevertheless urge this Court to ignore its well settled precedent requiring strict construction of the waiver of sovereign immunity, and instead broadly construe the Act in their favor because the Act is "remedial." It is true that when a statute is remedial in nature, it should be construed so as to afford the remedy "clearly intended." *Irven v. Dep't of Health & Rehab. Services*, 790 So. 2d 403, 406 (Fla. 2001) (internal citation omitted*)*. However, "[o]n the other hand, it should not be extended to create rights of action not within the intent of the lawmakers as reflected by the language employed when aided, if necessary, by any applicable rules of statutory construction." *Id.* The Court should therefore not extend the Bert Harris Act to include the Smiths or any other incidentally affected property owners, as this would go beyond even a liberal application of the Act as a whole.

The Act does not expressly waive sovereign immunity in situations where property is incidentally diminished in value due to governmental action taken against an adjacent property, and in fact much of the Act qualifies the government

action as being applied directly to the subject property. There can be no inference of a waiver.[16] Sovereign immunity thus further supports answering the certified question in the negative and affirming the First District Court of Appeal.

D. Claims Under The Act Differ from Takings Claims.

It is simply incorrect to conclude, as the circuit court did, that "confining the Bert Harris Act to circumstances where a governmental entity took a direct action against property, substantially diminishing its value, would be to limit the Act to situations in which the property owner would already have a remedy for inverse condemnation," and "[t]hat would mean the Act would have no real purpose." [A 516] To see the fallacy of this position, one need only review the plain language of intent in Section 70.001(1), Florida Statutes: "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 . . . when a new law, rule, regulation, or ordinance of the state or political entity in the state, as applied, unfairly affects real property" (emphasis added). Harris Act claims differ from existing takings claims.

[16] The Smiths argued, and the dissenting judges in the First District agreed, that the City raised the issue of sovereign immunity for the first time in its initial brief. However, this argument is without consequence because "[s]overeign immunity relates to the jurisdiction of the court and may be raised at any time." *Charity v. Board of Regents of the Div. of Universities of the Florida Dept. of Education*, 698 So. 2d 907, 908 fn. 1 (Fla. 1st DCA 1997). Furthermore, to the contrary, the City's argument that the Act does not apply and was not intended to grant relief under the facts of this case has been raised at every possible stage of the litigation.

Moreover, contrary to the circuit court's finding, to recover under a claim of inverse condemnation,[17] property owners must demonstrate that they have been denied *all or a substantial portion* of the beneficial uses of their property. *See Glisson v. Alachua County.,* 558 So. 2d 1030, 1035 (Fla. 1st DCA 1990); *see also Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (holding that "[n]ot every land use regulation which restricts development of property will entitle a landowner to compensation by government for inverse condemnation, but only regulations which in the words of Justice Holmes, go 'too far.'"). In contrast, a claim under the Bert Harris Act requires a plaintiff only to show that the government action has prevented a *single* use (either the existing use, or a vested right to a specific use of the property), rather than all or substantially all of the property's uses (thus failing to rise to the level of a taking).

[17] Governmental regulatory actions can rise to the level of a taking in one of two ways: "facial" takings or "as-applied" takings. A facial taking occurs when there is a physical invasion of the property, or when the governmental action results in the taking of 100 percent of all of the property's economically beneficial use. *Shands v. City of Marathon*, 999 So. 2d 718, 723 (2008). The standard for an as-applied taking is "whether there has been a *substantial* deprivation of economic use or reasonable investment-backed expectations. This requires a 'fact intensive inquiry of impact of the regulation on economic viability of the landowner's property by analyzing permissible uses before and after the enactment of the regulation.'" *Id.*, *citing Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1170, 1174 (Fla. 4th DCA 1995). A court must therefore consider: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with the distinct investment-backed expectations; and (3) the character of the government invasion. *See City of Venice v. Gwynn*, 76 So. 3d 401, 404-05 (Fla. 2d DCA 2011), *citing Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

In *City of Venice*, for example, the property owner bought a residential property for the purpose of renting it to seasonal visitors. *See City of Venice*, 76 So. 3d at 402-403. Five years after the plaintiff purchased the property, the city passed an ordinance that restricted the frequency of such property rentals to only three times per year. *Id.* The Second District explained that an as-applied taking only occurs when there has been a substantial deprivation of the economic uses or reasonable investment-backed expectations. *Id.* Because the plaintiff's property still had value as a short-term rental for three periods a year, and also as an investment property which could be sold, there was no as-applied taking. *See id.*

In short, the "as-applied" taking standard is clearly different and much more stringent than the standard required for a claim under the Bert Harris Act. Had the plaintiff in *City of Venice* pursued a claim under the Act, she may have been successful because the government action (restricting the number of times she was able to rent her property) inordinately burdened her property by *directly* limiting her existing use of the property (*i.e.*, renting it more than three times per year). *See id.* Thus, *City of Venice* is a perfect example of a situation in which government action that does not necessarily rise to the level of a taking may still be compensable under the Act when property is directly affected. The application of the Act to the facts of *City of Venice* is thus consistent with the obvious Legislative intent and the First District's construction of the Act.

The First District *en banc* majority correctly reasoned that the Act does not grant relief for incidental damage to property that is not itself the subject of the government action. Such an interpretation would expand the Act well beyond the plain meaning of its words and is inconsistent with other provisions of the Act. This Court should answer the certified question in the negative and affirm the First District Court of Appeal.[18]

E. Public Policy Favors a Limited Application of the Act.

The *en banc* First District majority also accurately laid out the statewide ramifications if the Court agrees with the Smiths' interpretation of the Act. The

[18] Even if the Act did apply to incidental burdens, the City's "action" here did not inordinately burden the Smiths' use of their investment property. *See, e.g., City of Jacksonville v. Coffield*, 18 So. 3d 589 (Fla. 1st DCA 2009). Like *Coffield,* the alleged contemplated use here was speculative. The Smiths had no development plans for the Vacant Property and no plans to live there. [A 629-30] They were simply attempting to use the Bert Harris Act as a way to guarantee a specific return on their investment, and that is not its purpose. The plan to sell the Vacant Property for use by *someone else* as a "luxury home site" is not an actual, present use or activity on the real property and amounts to nothing more than a speculative investment. *See also Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988, 995 (Fla. 4th DCA 2006); *Monroe County v. Ambrose,* 866 So. 2d 707, 711 (Fla. 3d DCA 2003) (holding that a "subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property") (citations omitted). The Smiths alleged that the governmental act upon which they relied in good faith to their detriment was the fact that when they purchased the Vacant Property, the City's adjacent property was being used as a park and included a deed restriction requiring it to remain so. [A 496] Reliance on that fact was unreasonable, as the Smiths had no right or ability to control how the City chooses to use its property, so long as that use is authorized and not a nuisance.

Smiths asked the circuit court to authorize compensation for a governmental action taken on a property other than their own, and the court did so. Notwithstanding its inconsistency with the legislative amendments of 2015, if such a position is affirmed by this Court, it will subject the City and all other affected governmental entities to constant litigation every time any action is taken that affects real property, regardless of what decision is made by the local government.

Additionally, the triggering action for the Smiths' Bert Harris Act claim was the issuance of a building permit to construct a building in an entirely legal manner, but which is aesthetically displeasing to the adjacent property owner. This type of claim is contrary to the intent of the Act and contrary to sound public policy.

Moreover, if a covered government action triggers compensation based on its "ripple" effect on surrounding properties, it begs the question: how far out from the source property would such compensation be required? Presumably compensation would not be limited to the government's use of its own property. For example, such a broad application of the Act would apply to the issuance of a building permit to a private developer for construction of a building that is otherwise completely legal to construct but which someone might not want to live or operate a business next to or near.

Certainly, the Act was never meant to reach that far to stifle the development and use of property in an otherwise legal manner. On the other hand, if the City were to deny such permits due to these "not in my back yard" impacts, it would be subject to a Bert Harris Act claim filed by the permit applicants. Cities across the State would be in a no win situation.

The Smiths' position, and the one advocated by the dissenters in the First District, is that under the Bert Harris Act, local governments must act as an "all-risk insurance policy" to protect speculative real estate investments against completely authorized actions of unrelated third parties. Initial Brief, pg. 18. Certainly, it is not the role of government to insure a return on speculative investments. Nonetheless, according to the Smiths, a government entity is strictly liable any time its actions inordinately burden another property, regardless of such property's geographic proximity to the property upon which the action took place.

The Smiths misconstrue the definition of "direct" to mean "without another intervening cause," *i.e.*, a simple cause and effect analysis. This interpretation would mean that a local government would never be able to properly ascertain the impact of its actions due to the speculative nature of identifying a radius of impact around the actual property that was the subject of its action. This expansive application of the "inordinate burden" analysis would simply be unworkable.

The building permit in this case was issued on December 23, 2010 [A 3], and under the Smiths' limitless interpretation of the Act, each time the City issues a building permit, whether to itself or to a private individual, it would have to consider whether the construction could be deemed unacceptable to adjacent and surrounding (to some indeterminate distance) property owners. This would expose the government to increased levels of litigation beyond that which was contemplated by the Legislature. The extreme difficulty this would cause local governments is therefore self-evident.

This approach also puts cities between a rock and a hard place. If a city were to deny an application for a building permit because it feared the design and use of the project would inordinately burden adjacent and surrounding properties, it would then be subject to a Bert Harris claim by the *denied* permit applicant pursuant to section 70.001(3)(d), Florida Statutes. It simply makes no sense that the Legislature would make governments strictly liable any time there is an impact to another property, regardless of its proximity to the directly affected property, putting them in this impossible position.

The Smiths' position, and the construction of the Act urged by the First District dissenters, inappropriately restricts the government's right to use its own property. They are attempting to use the Bert Harris Act as an equitable measure to prevent what they have determined is an "ugly" use on the City's adjacent

property, but which benefits the public pursuant to the City's police powers. The Smiths are trying to assert an advantage over a property owner that would not exist if the adjacent property was privately held. Applications of the Act to such far-reaching circumstances were not intended, and therefore the Court should answer the certified question in the negative.

II. There is No Conflict With the Second District Court of Appeal.

This Court also accepted jurisdiction and briefing has been completed in *Hardee County v. FINR II, Inc.*, No. SC15-1260, based on a conflict between the Second District Court of Appeal and the First District's *en banc* opinion in this case. As the First District correctly concluded and the Legislature has now made clear, the Act only applies to direct action on the subject property, and thus the 2-1 opinion of Second District should be reversed to the extent that court held that the Act can be applied to government action directed at adjacent property.

In any event, *FINR* is factually distinguishable from this case. In *FINR,* the respondent applied for and received a land use change under Hardee County law. The change to a "rural center" legally entitled FINR to expand its neurological rehabilitation facility and to a one-quarter-mile setback on the adjacent phosphate mining property, within which mining activities were prohibited. *See FINR II, Inc. v. Hardee Co.*, 164 So. 3d 1260, 1261-62 (Fla. 2d DCA 2015). The approval of the change to rural center was direct governmental action applied to FINR's property

which, by operation of law, created a *vested right* to the specific rural center use and its associated setbacks. Thus, when the county later changed the setback boundary to allow mining closer to FINR, it arguably inordinately burdened FINR's vested right to a specific use – rural center.

Furthermore, to receive the major special exception, the mining company also had to demonstrate that a reduction of the setback would not significantly interfere with FINR's use of its property. *See id.* The Second District held that "Hardee County's reduction of the mining setback on CF Industries' 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." *Id.* at 1266 (emphasis added).

Because Hardee County enacted a law creating the one-quarter-mile setback from rural center land uses and authorized the land use change to rural center on FINR's property, it created a vested right upon which FINR could rely. *See id.* at 1262. As the First District long ago reasoned:

> "One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances or commitments of a zoning authority and if he does, the zoning authority is bound by its representations . . . ."

Equity Res. Inc. v. County of Leon, 643 So. 2d 1112, 1120 (Fla. 1st DCA 1994), *quoting Franklin County v. Leisure Props., Ltd.,* 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

In this case, the Smiths claim reliance on the fact that the City's adjacent property was zoned and had a deed restriction for park use. However, the adjacent zoning and deed restriction were not conditions upon which the Smiths could rely, creating no vested interest in a continuation of the status quo. The Smiths retained no appurtenant easement over the City's property to guarantee the continuation of the recreation use, nor were the City's and the Smiths' property part of the same parent tract that created, upon subdivision, a dominant or superior right to a perpetual continuance for the benefit of the Smiths' property.

There is thus no conflict between the First District's opinion in this case and the Second District's opinion in *FINR*. Factually they are simply different cases, and deciding each case need not disturb the holding of the First District *en banc* majority.

CONCLUSION

For the foregoing reasons, the City requests that this Court answer the First District Court of Appeal's certified question of great public importance in the negative and affirm the majority *en banc* decision of the First District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a duplicate of the foregoing was furnished via electronic mail on June 15, 2016, to the following: Major B. Harding, Esq. and Anthony L. Bajoczky, Esq., Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302, mharding@ausley.com and tbajoczky@ausley.com; John F. Fannin, Esq., Fisher, Tousey, Leas & Ball, 501 Riverside Ave., Suite 600, Jacksonville, FL 32202, jff@fishertousey.com; and D.R. Repass, Esq., D.R. Repass, P.A., 501 Riverside Ave., Suite 600, Jacksonville, FL 32202, Dr@repasspa.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and that the brief is in Times New Roman 14-point font.

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