Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act

by

Thomas Ruppert, Esq.¹

Carly Grimm²

and Michael Candiotti³

2012

Contents

I. The Bert J. Harris, Jr. Private Property Rights Protection Act ................................................................. 2

II. Procedural Aspects of the Bert J. Harris Act: ......................................................................................... 3

   A. Notice ..................................................................................................................................................... 3
   B. Ripeness Determination ..................................................................................................................... 4
   C. Settlements ........................................................................................................................................ 5
   D. Procedural Requirements: A Double-Edged Sword ....................................................................... 6

III. Substantive Elements of Bert J. Harris Act ......................................................................................... 7

   A. Specific Action, First Application, and the Effect on the Statute of Limitation ............................. 8
   B. Governmental Action ....................................................................................................................... 10
   C. Inordinate Burden ........................................................................................................................... 11
      1. Two Types of Inordinate Burden .................................................................................................. 12
      2. Restricted or Limited Use ......................................................................................................... 15
      3. Existing Use or Vested Right ..................................................................................................... 16
      4. The Time Aspect of an Impact on a Property Right ................................................................... 22

IV. Conclusion ........................................................................................................................................... 24

V. Appendix of Defenses .......................................................................................................................... 25

¹ Coastal Planning Specialist, Florida Sea Grant College Program.

² University of Florida Levin College of Law J.D. Candidate, 2014.

³ J.D., University of Florida Levin College of Law.
I. The Bert J. Harris, Jr. Private Property Rights Protection Act

The Bert J. Harris, Jr. Private Property Rights Protection Act (the Act or Bert Harris Act) intends to protect private property rights by giving relief from “inordinate burdens” that result from new regulations. This document examines the Bert Harris Act and includes analysis of new case law relating to the Act as well as recent legislative changes to the Act. The analysis here is informed by an additional review of reported and unreported cases of claims filed under the Bert Harris Act as well as conversations with local government attorneys. The purpose of this review is to understand how the Act impacts the ability of local governments to utilize their comprehensive plans, land development codes, zoning plans, and coastal management plans as tools for adaptation to rising sea levels along Florida’s coasts. Possible procedural and substantive defenses are incorporated throughout the paper and summarized in the Appendix.

The Bert Harris Act was passed into Florida law in 1995 amid a wave of property rights protections throughout the United States. The Act has been amended numerous times since and has been a lightning rod for both criticism and praise. Critics assert the Act has engendered fear among regulators regarding liability and as a result has had a chilling effect on the creation of important land use and natural resource regulations. Supporters agree with the conclusion that the law has curbed the number of regulations affecting real property, but they see this as evidence the Act is working as intended.

When the Act was passed in 1995, most policymakers in the United States and Florida had never heard the phrase “sea-level rise” even though sea levels had been rising for decades. Over fifteen years after passage of the Act, we now realize that sea-level rise (SLR) has already affected many communities, and the impacts will only become more severe as the rate of SLR is projected to increase significantly.

Many possible strategies for SLR adaptation include some form of land use regulation. Such regulations may impact perceived property rights and lead to claims against the state or local government enacting the regulations. Thus, local governments seeking to proactively plan for adaptation to SLR may view the Bert Harris Act as an impediment to implementation of potential policies.

This article provides background information on the workings of the Act and incorporates research on recent case law and changes to the Act resulting from the 2011 Amendment. In some sections, potential legal arguments that local governments might use in defense of SLR adaptation policies will be noted.

Discussion of the Act is broken into two sections: first, an overview of the Act’s procedural requirements and second, an overview of the Act’s substantive elements.

---

4 FLA. STAT. § 70.001 (2012)
II. Procedural Aspects of the Bert J. Harris Act:

The Act’s procedural aspects revolve around three milestones - notice, ripeness determination, and settlement - each with its own guidelines, rules, and legal issues. These procedural requirements remain constant regardless of the claim, the claimant, or the governmental entity receiving the claim. This section also addresses changes to the Bert Harris Act’s procedural requirements in response to court cases under the Act. Thus, when enacting regulations to combat SLR, one must anticipate these requirements and plan accordingly.

A. Notice

The Bert Harris Act includes four types of notice; one is notice by the claimant and the other three pertain to notice provided by government entities.

First, the Act requires a claimant give notice a certain number of days in advance of filing a claim under the Act. This notice must be supplied to any governmental entity against whom the claimant intends to file.

Second, the Bert Harris Act requires a governmental entity, when presented with notice of a claim under the Act, to notify the State Department of Legal Affairs in Tallahassee no later than the fifteenth day after receipt of the notice. Although the Department of Legal Affairs receives a significant number of claims filed under this requirement, the Department believes that many claims are not reported according to this procedure. Although the Act contains no penalty for failing to notify the Department of Legal Affairs, inconsistent reporting of claims under the Act further complicates the already difficult process of understanding the role the Bert Harris Act plays in Florida’s regulatory arena.

Third, the Act requires a government entity to provide notice to all contiguous properties of a claim filed against it under the Act. Such notice ensures that adjacent owners are made aware of the availability of a potentially similar claim. If neighboring landowners do indeed have and wish to assert a similar claim, this notice promotes efficiency by allowing bulk filing of cases or combining cases.

---

7 Id. § 70.001(4)(b) (2012).
8 Statement of Ms. Shelia Hall Public Records Coordinator, Office of Attorney General, Opinions Division, Florida State Department of Legal Affairs, April 10, 2011. Conversations of author Ruppert with local government attorneys supports the view that reporting is not uniform across either local governments or time.
10 See, e.g., Lee County v. 48 Miscellaneous Claims [no citation provided]; Nicole S. Sayfie & Ronald L. Weaver, 1999 UPDATE on the Bert J. Harris Private Property Rights Protection, 73 Fla. B.J. 49 (1999) available at http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/E42A89C79174B90F85256ADB005D6249
Fourth, amendments to the Act in 2011\textsuperscript{11} effectively encourage a governmental entity to give notice to affected property owners when a specific governmental action may affect their property.\textsuperscript{12} The statute indicates that after enacting a regulation that clearly and unequivocally affects real property, if the enacting authority gives notice to the owner of the affected property that the new law or regulation may impact existing property rights and that the property owner has only one year from receipt of the notice to pursue an action under the Act,\textsuperscript{13} this begins the clock ticking on the one-year statute of limitations in the Act. This raises some issues that receive greater attention below in Section III, A, “Specific Action, First Application, and the Statute of Limitations.”

Ultimately, governmental entities should carefully comply with the Act’s notice requirements because such efforts may pay dividends by setting-up substantives defenses in the long run while preventing due process and Florida Administrative Procedure Act problems in the short term.

B. Ripeness Determination.

According to the common law, “ripeness” constitutes the final prerequisite to filing a takings claim. Ripeness essentially means that a claimant has exhausted all the administrative avenues to address their grievances and has established a sufficient factual basis for determining whether a taking has occurred. The Act incorporates this requirement of ripeness. As amended in 2011, the Act mandates that within 150 days of receiving notice of a claim under the Act (or 90 days for property classified as agricultural), the relevant governmental entity must either settle with the claimant\textsuperscript{14} or issue a written “statement of allowable uses” that identifies the uses to which the subject property may be put.\textsuperscript{15}

The 2011 Amendments make clear that the failure of a governmental entity to issue a required “statement of allowable uses” automatically ripens the claim at the culmination of the 90 or 150-day period and allows a claimant to file suit.\textsuperscript{16} Under the Act, therefore, a governmental entity essentially gives a property owner permission to file a lawsuit by refusing to settle the claim and

\textsuperscript{11}2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001 (2010)).

\textsuperscript{12}\textit{Id.} (amending FLA. STAT. § 70.001(11)(a)(1) (2010) (although not affirmatively mandating notice, the recent amendment requires that a law or regulation will not be considered “applied” until the impact is “clear and unequivocal and notice is provided by mail to the affected property owner … at the address referenced in the jurisdiction's most current ad valorem tax records.”) (emphasis added)).

\textsuperscript{13}\textit{Id.}

\textsuperscript{14}\textit{See} Charlotte County Park of Commerce, LLC v. Charlotte County, 927 So. 2d 236, 239 (Fla. 2d Dist. Ct. App. 2006) (owner and regulator may settle a claim without resorting to filing a complaint).

\textsuperscript{15}2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(5)(a) (2010)).

\textsuperscript{16}“Statement of Allowable Uses” replaced the “Ripeness Determination.” 2011 Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(5)(a) (2010)).
instead issuing a statement of allowable uses or by failing to issue this statement at all within the
specified time period.\textsuperscript{17}

C. Settlements

Settlements have given rise to difficult issues related to the Bert Harris Act. As discussed above, a
governmental entity must provide a settlement offer within a specified period of receiving a
claim.\textsuperscript{18} However, any settlement agreed to by the parties must protect the public’s interest and
represent necessary and appropriate relief.\textsuperscript{19} “Appropriate” means legitimate under the
circumstances, not a sweet-heart deal.\textsuperscript{20} “Necessary” means the settlement does not stymie the
interests promoted by the burdening regulation.\textsuperscript{21} Furthermore, if a settlement requires a

\textsuperscript{17} Florida has adopted the Federal ripeness doctrine, which requires a claimant exhaust
administrative remedies prior to seeking judicial relief. Florida House of Representatives Staff Analysis,
Judiciary Committee, 4/1/2011 at 7 (citing Glisson v. Alachua County, 558 So. 2d 1030, 1034 (Fla. 1st
Dist. Ct. App. 1990)), available at
ouseChamber=H&SessionId=66&. See also, e.g., M & H Profit, Inc. v. Panama City, 28 So. 3d 71, 76
(Fla. 1st Dist. Ct. App. 2009) cert. denied 41 So. 3d 218 (Fla. 2010) (“Simply put, until an actual
development plan is submitted, a court cannot determine whether the government action has ‘inordinately
burdened’ property”); Palazzolo v. Rhode Island, 533 U.S. 606 (2001), in which the court asserted:

[A] landowner may not establish a taking before a land-use authority has the
opportunity, using its own reasonable procedures, to decide and explain the reach of a
challenged regulation. Under our ripeness rules a takings claim based on a law or
regulation which is alleged to go too far in burdening property depends upon the
landowner's first having followed reasonable and necessary steps to allow regulatory
agencies to exercise their full discretion in considering development plans for the
property, including the opportunity to grant any variances or waivers allowed by law. As
a general rule, until these ordinary processes have been followed the extent of the
restriction on property is not known and a regulatory taking has not yet been established.

\textit{Id.} at 620–621 (cited by Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561
(Fla. 4th Dist. Ct. App. 2002)).

\textsuperscript{18} Prior to the 2011 amendments, this was 180 days. FLA. STAT. § 70.001(4)(c) (2010). The 2011
amendments decreased the time for local governments to respond to notice of claims to 150 days for most
claims. Laws of Florida, Chapter 191, sec. 1 (amending FLA. STAT. § 70.001(4)(a) (2010)). The notice
period is shorter for agricultural land at only 90 days. \textit{Id.}

\textsuperscript{19} FLA. STAT. § 70.001(4)(d)(1) (2012); Chisholm Props. South Beach, Inc v. City of Miami
Beach, 8 Fla. L. Weekly Supp. 689 [hereinafter Chisholm I] \textit{rehearing denied}, City of Miami Beach v.
Chisholm Props. South Beach, Inc., 830 So. 2d 842 (Fla. 3d Dist. Ct. App. 2002) [hereinafter Chisholm
II].

\textsuperscript{20} Chisholm II, 830 So. 2d at 843. In denying review, one judge in the Third District Court
suggested imposing sanctions against the hotel owner for bringing a frivolous appeal.

\textsuperscript{21} Chisholm I, 8 Fla. L. Weekly Supp. 689 (finding that that granting the variance to build
additional stories ran contrary to the intent of the FAR).
variance, the government must prove compliance with the necessary and appropriate standard for a variance, together with supporting substantial competent evidence on the record. Ultimately courts reviewing settlements involving land use regulations will examine the intent behind a governmental entity’s change of heart, which cannot rest solely on efforts to avoid the Bert Harris Act claim.

When examining settlements, it is important to recognize the distinction in judicial review between variances to land use regulations and amendments to comprehensive plans. Legislative actions, such as comprehensive plan enactments and amendments, are typically subject to a low level of judicial review (i.e.—the standard is easier for the government to meet). In contrast, issuance of permits or variances—classified as “quasi-judicial actions” rather than legislative—receive more careful scrutiny under a standard requiring that they be “appropriate and necessary.” This more searching standard means the government action is more easily overturned. While this would seem to indicate that it would be “better” for the local government to effectuate a settlement that utilized a comprehensive plan change rather than a variance, this would affect many more properties, thus, potentially violating the requirement that any relief “shall protect the public interest” and be “appropriate relief necessary.” Overall, local governments should view the settlement process as an opportunity to assess whether a potential claimant truly merits a variance or other relief, not simply as a way to avoid a Bert Harris claim.

D. Procedural Requirements: A Double-Edged Sword

Just as procedural rules may serve the interests of claimants, governmental entities may also use them as affirmative defenses. In *Sosa v. City of West Palm Beach* the court dismissed a claim as unripe because the plaintiff failed to follow the Act’s procedural requirements for submitting a claim. Specifically, the court held that failure of the claimant to comply with the Bert Harris Act’s requirement to submit an appraisal and failure to give notice at least 180 days prior to submitting the claim.
filing the suit in court were fatal errors in the plaintiff’s claim.27 Similarly, in Osceola County v. Best Diversified, Inc.,28 the court noted that the plaintiff’s failure to follow statutory procedures, such as submission of a bona fide appraisal in support of its claim, could not subsequently be cured by submitting such appraisal during litigation.29 Consequently, a plaintiff’s claim is unlikely to move forward in court unless it is properly submitted, not less than 150 days30 before filing an action in the court, to the head of the governmental entity31 with a valid appraisal32 that demonstrates that the regulation in question resulted in a reduction in the fair market value of the property.33 In 2012 the case of Turkali v. City of Safety Harbor34 hinged on the need to submit a bona fide appraisal. In Turkali, the claimant’s case was dismissed with prejudice because the submitted appraisal was not considered valid by the trial court or the reviewing court.35 Local governments have also refused to consider Bert Harris claims due to lack of a bona fide appraisal.36

Thus, although the Bert Harris Act’s automatic ripening provision does not allow local governments to avoid a lawsuit beyond the 90 or 150-day period on the ground that the claim is not yet ripe, a governmental entity could still rely on procedural mistakes, such as the absence of a bona-fide appraisal, as affirmative defenses against a claim that otherwise complies with statutory requirements.

III. Substantive Elements of Bert J. Harris Act.

27 Id. at 982.
29 Id. at 59-60 n.5.
30 150 days for claims related to any property other than agricultural property, which is 90 days. FLA. STAT. § 70.001(4)(a) (2012).
31 If multiple governmental authorities burden the property, the claimant must submit its claim to all involved. Id.
32 Florida Water Serv. Corp v. Utilities Comm’n, 790 So. 2d 501 (Fla. 5th Dist. Ct. App. 2001) (finding the validity of an appraisal turns on whether the appraiser was qualified to give an expert opinion, even without an MAI licenses.)
33 See Osceola County v. Best Diversified, 936 So. 2d 55, 60 (Fla. 5th Dist. Ct. App. 2006) (noting that because plaintiff failed to submit the “bona-fide, valid appraisal supporting the claim” required by the Act, such cannot be cured by filing an appraisal in the litigation).
34 93 So. 3d 493 (Fla. 2d Dist. Ct. App. 2012).
35 Id.
To bring a claim under the Act, a claimant must show a specific action of a governmental entity created an inordinate burden on an existing use or a vested right to a specific use of the claimant’s real property.37

A. Specific Action, First Application, and the Effect on the Statute of Limitation

The Act requires a “specific action” of a governmental entity and that all claims be brought within one year of a regulation’s first application to the property at issue.38 The Act does not define “specific action,” but it appears likely that it is the same as “first application.” Prior to 2011, first application was not defined in the act. This led Florida courts to develop two different views of “first application.” Some courts developed the meaningful application test.39 As articulated in Brown v. Charlotte County, this interpretation indicated that mere enactment of a regulation fails to constitute a specific action absent a meaningful application of the law to the property.40 Similarly, Florida’s Fourth District Court of Appeal held in M & H Profit, Inc. v. Panama City41 that mere enactment was not sufficient to trigger the Act’s time limitation.42

37 Fla. Stat. § 70.001(2) (2012).

38 Id. at § 70.001(11) (2012).

39 Brown v. Charlotte County, 16 Fla. L. Weekly Supp. 546c (Fla. Cir. Ct., Apr. 1, 2009) (a law, rule, regulation or ordinance established by state or political entity only provides a basis for a claim under the Act if the law, rule, regulation, or ordinance has been applied to the claimant’s property; mere enactment does not constitute application); Russo Assocs., Inc. v. City of Dania Beach Code Enforcement Bd., 920 So. 2d 716, 718 (Fla. 4th Dist. Ct. App. 2006). See also, Nancy E. Stroud & Thomas G. Wright, Private Property Rights Act - What Will It Mean For Florida's Future, 20 Nova L. Rev. 683, 695 (1996) (“The Act does not create a cause of action as to the mere adoption of a law, regulation, rule, or ordinance, but only as to specific action that is applied to real property”); David L. Powell et al., A Measured Step to Protect Private Property Rights, 23 Fla. St. U.L. Rev. 255, 272 (1995) (must have a specific affect, but goes beyond mere approval/denial to other action that adversely affect the property - i.e., down-zoning). But see 2011 Laws of Florida, Chapter 191, Sec. 1. (amending Fla. Stat. § 70.001(11) (2010) (the notice requirement when impacts are clear and unequivocal, acknowledges that some enactments facially impact certain property)).

As with many other elements of the Act, this resembles the test for ripeness in federal takings. See Collins v. Monroe County, 999 So.2d 709 (Fla. 3rd DCA 2008) (finding Monroe County landowners’ as-applied regulatory takings claims were not ripe until they obtain BUDs, and stating “[o]rdinarily, before a takings claim becomes ripe, a property owner is required to follow reasonable and necessary steps to permit the land use authority to exercise its discretion in considering development plans, including the opportunity to grant any variances or waivers allowed by law[ ] . . .The requirement is usually met when the property owner files an application for a development permit with the local land use authority and receives a grant or denial of the permit.”); Glisson v. Alachua County, 558 So.2d 1030 (Fla. 1st DCA 1990) (“Although the final decision prerequisite also may be satisfied by proof that attempts to comply would be futile, futility is not established until at least one meaningful application has been filed.”).

40 Brown, 16 Fla. L. Weekly Supp. 546c (Fla. Cir. Ct. Apr. 1, 2009)
On the other hand, in Citrus County v. Halls River Development, the court held that enactment of a law started the clock on the Act’s one-year window to file a claim because the impact of the County’s action on the plaintiff’s property was readily determinable.

To address this conflict, the Florida Legislature amended the Act in 2011 to include a definition of “first applied.” A law is “first applied” upon passage of a law or regulation that creates a clear and unequivocal impact on the property and the governmental entity enacting the regulation.

His Court holds that the Bert Harris Act allows for a private property rights claim where the trier of fact finds, under the totality of the circumstances, that a governmental entity has made a meaningful application a law or regulation to a Plaintiff’s property and that the plaintiff could have reasonably relied on said specific governmental action. Said actions may or may not involve a formal development permit application by Plaintiff and final review and determination of said application by the governmental entity. This holding is consistent with the intent and remedial purpose of the Act while requiring more than just mere legislative enactment as a basis for governmental liability.

Id.

In M & H Profit, Inc. v. Panama City, 28 So. 3d 71 (Fla. 1st Dist. Ct. App. 2009).

In M & H, the plaintiff brought a Bert Harris action against the city, alleging that an ordinance enacted six weeks after its purchase of the property inordinately burden the value of the property by imposing set back and height restrictions. Id. at 73-74. The court found, when the property owner only engaged in informal discussions with the city, neither statements made by the city about the general restrictions imposed by the regulation nor the enactment of the regulation itself constituted an application to a specific piece of property. Id. at 79.

The plaintiff in Halls purchased the property with the intent to develop a multifamily condominium project only after the county assured the plaintiff that such development was possible. Id. at 416-17. However, the county did not realize that changes to its comprehensive plan in 1996 from mixed use to low intensity coastal and lake, which did not permit the condominium project, made it illegal for the county to permit the project envisioned by the plaintiff. In 2002, the property owner applied for and the county approved him to build the project with assurance that the development was permissible for the property. Id. at 416-417. Subsequently, a resident of the county challenged the project as inconsistent with the county’s comprehensive plan. Id. at 417. Comprehensive plans act like a constitution for development and use within a jurisdiction and are implemented by land development regulations (zoning). Id. at 421(citing Machado v. Musgrove, 519 So. 2d 629, 631-32 (Fla. 3d Dist. Ct. App. 1987)). Thus, the 2001 land development code and the county’s approval of the development plan was void as inconsistent with the comprehensive plan, and the plaintiff could not build its condominiums despite issuance of the permit. Id. at 422. The plaintiff sued the county under the Bert Harris Act for the $1.5 million spent to ready the property for development as a result of its reliance on the local government’s assurances. Id. at 419. However, the county argued that the property owner failed to timely bring its action as the county amended the comprehensive plan over one year before the action. Halls, 8 So. 3d at 420. The plaintiff argued that “the mere enactment should not trigger the accrual of the period.” Id. The court held in favor of the county, reasoning that the court “cannot construe the statute to create rights of action not within the intent of the lawmakers, as reflected by the language employed in the statute.” Id. at 423, n. 5.
provides notice of such impact by mail to the affected property owners. Alternatively, a regulation is “first applied” upon the formal denial of a plaintiff’s written permit request or variance petition. Consequently, in the former, the claimant loses its right to file a claim one year after receipt of such notice; in the latter case, the right to file a claim is lost one year after a governmental entity issues a formal denial.

B. Governmental Action

To bring a successful claim under the Act, a claimant must show that the specific action originated from a governmental entity. The Act defines governmental entity broadly to include any exercise of state authority. However, the Act provides a federal authority exemption. This exemption excludes from liability actions by the United States, its agencies, or any state, regional, or local government, or its agencies, when “exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.” An example of such delegation is the delegation from the United States Environmental Protection Agency to the Florida Department of Environmental Protection to issue National Pollutant Discharge Elimination System permits under the Clean Water Act on its behalf.

The Act’s formal delegation policy may prove important for local government in the context of laws such as the Endangered Species Act (ESA). Strict application of the “formal delegation” requirement could create a Hobson’s choice for state and local governments when attempting to

---

39 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § 70.001(11)(a)(1) (2010) emphasis added (further, “[t]he fact that the law or regulation could be modified, varied, or altered under any other process or procedure does not preclude the impact of the law or regulation on a property from being clear or unequivocal”)).

46 Id. (amending FLA. STAT. § 70.001(11)(a)(2) (2010)).

47 However this statute of limitation tolls during the pendency of administrative or judicial proceedings under the Act. 2011 Laws of Florida, Chapter 191, Sec 1. (amending FLA. STAT. § 70.001(11)(b) (2010)). This terminology raises an interesting issue. That last part of subsection (11)(a)(1) specifies that a property owner only has one year “from receipt” of the notice to pursue any rights under the Act. However, in the same the paragraph the language merely indicates that notice must be “provided by mail.” This might make it possible for a claimant to assert that they never received the notice regardless of whether it was mailed.

48 FLA. STAT. § 70.001(2) (2012).

49 FLA. STAT. § 70.001(3)(c) (2012) (defining governmental entity as “an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. . . .”).

50 FLA. STAT. § 70.001(3)(c) (2012).

51 Id.


comply with the ESA. If a state or local governmental entity permits an action that would result in a prohibited take of a protected species, it may be liable under Section 9 of the ESA, which prohibits the “take” of endangered species. At the same time, if a state or local governmental entity passes a new law or regulation which does not allow development because of potential “take” of endangered species, the affected property owner might try to sue the state or local government entity under the Bert Harris Act.

As a possible solution to this dilemma, a state or local governmental entity may enter into a Habitat Conservation Plan, as authorized by the ESA. If the state or local governmental entity develops a habitat conservation plan and then works with the Federal Government to establish a memorandum of understanding (MOU) that makes local government implementation of the Habitat Conservation Plan part of the MOU, implementation of the habitat conservation plan measures may possibly constitute an exercise of federal authority in assuring compliance with the federal ESA, thus exempting the state or local government from potential liability under the Bert Harris Act.

In at least one case, a county has responded to a Bert Harris claim by noting that the inordinate burden—if it existed at all—was occasioned by the federal government through development limitations with which the county and state had to comply due to federal issuance of an incidental take permit under the authority if the ESA.

C. Inordinate Burden

The substantive standard of “inordinate burden” in the Act remains difficult to interpret as little reported case law addresses the term. The Act’s definition of inordinate burden includes two distinct parts: (1) a direct restriction on a vested right or existing use such that the owner of real property is permanently unable to attain the reasonable, investment-backed expectations for the property or (2) an imposition of a disproportionate share of the burden imposed for a public benefit. Many phrases in these definitions play a crucial role in analysis of regulatory takings cases under the U.S. Constitution’s private property protections enshrined in the Fifth

---

55 This approach was considered by Collier County. See David C. Weigel, Collier County Attorney, memorandum RE: Red Cockaded Woodpecker Compliance Plan—Board Queries (Dec. 7, 2006) (on file with author). Ultimately Collier County did not test this approach as the county never completed development of the red-cockaded woodpecker protection plan.
57 City of Jacksonville v. Coffield, 18 So. 3d 589, 594-95 (Fla. 1st Dist. Ct. App. 2009). While little case law may define the meaning of “reasonable investment-backed expectations” in the Act, at least one case found that a claimant lacked reasonable investment-backed expectations. Palm Beach Polo, Inc. v. Vill. of Wellington, 918 So. 2d 988, 995 (Fla. 4th Dist. Ct. App. 2006) (finding no reasonable investment-backed expectations based on history of property).
Amendment. Nonetheless, the Florida Legislature expressed its intent that the Act serve as a separate and distinct cause of action from a regulatory takings claim under the U.S. Constitution and might admit of a successful Bert Harris claim in cases not rising to a taking under the U.S. Constitution. Thus, one could presume that the level of burden or regulation necessary to constitute an inordinate burden falls below that required to demonstrate a taking under the U.S. Constitution’s Fifth Amendment. Nonetheless, use of terminology from federal takings law further confuses the substantive issues of the Bert Harris Act. The following portions explore some of the key terminology related to “inordinate burden” in the Act and its intermingling of U.S. Constitutional takings law terminology.

1. Two Types of Inordinate Burden

Reasonable Investment-Backed Expectation

The first type of inordinate burden under the Bert Harris Act is the inability of a claimant to attain the reasonable, investment-backed expectations for the property at issue or a vested right to a use of the property. Use of the phrase “reasonable investment-backed expectations” (RIBE) demonstrates the difficulty of trying to interpret the Bert Harris Act separate from federal takings law.

In federal takings law, RIBE comprises one of the most important determinants of a taking in many cases. While some might argue that RIBE possesses a different meaning in the Bert Harris Act, existing federal case law and extensive scholarly writings on the topic of RIBE in

59 Fla. Stat. § 70.001(1) (2012). See also 31 Op. Fla. Att’y Gen. (2006). (“The legislative intent of the Bert J. Harris, Jr., Private Property Rights Protection Act is evident from the first section of the Act, which clearly provides that the statute was intended to protect private property interests against ‘inordinately burdensome’ governmental regulations that do not necessarily amount to a constitutional taking”).

60 See, e.g., Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that takings law is designed “to bar Government from forcing some people to bear public burdens which, in all fairness and justice should be borne by the public as a whole”). See also Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (discussing the role of reasonable investment-backed expectations in federal takings jurisprudence).


63 Fla. Stat. § 70.001(9) (2012) states:

This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking.
federal takings law make it difficult to ignore previous interpretations of RIBE when analyzing the Bert Harris Act. Before discussing federal interpretations of RIBE, we look to Bert Harris Act cases discussing RIBE.

Case law on the Act in Florida often repeats the Act’s requirement that a regulation interfere with RIBE. However, research revealed only one reported case in Florida that discusses what this really means. In *Holmes v. Marion County*, the court held that the issuance of a time-limited permit precluded any reasonable investment-backed expectation that the specially permitted use would be allowed to continue indefinitely. In *Holmes*, a landfill owner applied for an extension of a special use permit in order to continue its clay and sand mining operation. When neighboring property owners objected to the use and complained about the debris, trucks, and other noises, the county denied the permit renewal. In a suit brought by the landfill owner under the Act, the court ruled that the owner’s expectations were unreasonable because the county was not required to issue a renewed permit. Thus, the *Holmes* case indicates that courts will not find RIBE for extension of conditional use permits.

Beyond the conclusions of *Holmes*, state case law fails to illuminate the concept of RIBE. At the federal level, however, takings law provides significant guidance on RIBE and considers the following factors:

- whether the plaintiff’s expectations were reasonable at the time the property interest was created – e.g., purchased or transferred;
- whether the plaintiff’s economic goal was rationally achievable;
- whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and

---

*Id.*

64 *Abrahim-Youri v. United States*, 36 Fed. Cl. 482, 486 (1996) (“In assessing the reasonableness of investment-backed expectations, the question we ask is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind; hence, the call for just compensation on grounds of fairness and justice is considerably diminished”).

65 For a sampling of some of the issues inherent in RIBE, including U.S. Supreme Court cases discussing RIBE, see Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envtl. L. 239, 246-259 (2011).

66 *Holmes v. Marion County*, 960 So. 2d 828 (Fla. 5th Dist. Ct. App. 2007).

67 *Id.* at 830.

68 *Id.* at 829.

69 *Id.*

70 *Id.* at 830.
• the overall riskiness of the investment.\textsuperscript{71}

Although determined under federal case law, these factors should hold weight under a Bert Harris Act analysis because they are rationally aimed at determining the expectation of an objective person in the plaintiff’s shoes.

The 2011 Amendment leaves RIBE undefined, but provides the following language:

In determining whether reasonable, investment-backed expectations are inordinately burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property.\textsuperscript{72}

In doing so, however, none of the three committees reviewing the 2011 Amendment (the Judiciary Committee, the Economic Affairs Committee & Military Affairs Subcommittee) discusses the intent or the effect of this addition.\textsuperscript{73} Nonetheless, a cogent argument could be made that this addition to the Bert Harris Act reflects another aspect of federal jurisprudence defining RIBE. In Palazzolo v. Rhode Island the court indicated that acquiring a property \textit{after} a regulation already took effect is not an absolute bar to a takings claim but may be considered as part of the overall RIBE analysis.\textsuperscript{74}

Even were a Florida court not to directly adopt all federal case law addressing RIBE, the factor of whether a plaintiff’s expectations were reasonable at the time of purchase or succession should come into play when considering any Bert Harris claims. Thus, RIBE essentially incorporates an element of foreseeability—at least that level of obvious future change that may be ascribed to a reasonable person upon purchase or acquisition of property. For example, in claims that arise related to regulations for adapting to SLR, RIBE may be limited as scientific evidence clearly demonstrates past SLR over geologic time scales as well as more recent and discrete levels of SLR within the past 100 years. In addition, climate change scientists agree that future rates of SLR will be faster than today’s rate, although by just how much is still not very clear.\textsuperscript{75} With this information in hand, a local government defending regulations adapting to SLR should be able to make

\textsuperscript{71} See, generally, Palazzolo v. Rhode Island, 533 U.S. 606 (2001). In addition, the issue of “riskiness of development” was addressed in the case of Good v. United States, 39 Fed. Cl. 81, 112-14 (1997) (concluding that “[w]hile plaintiff was free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken.”).

\textsuperscript{72} 2011 Laws of Florida, Chapter 191, Sec. 1. (amending Fla. Stat. § 70.001(3)(e) (2010)).

\textsuperscript{73} Available at http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=45659&SessionId=66

\textsuperscript{74} Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

cogent arguments that, in light of such recently gained knowledge of SLR, reasonable expectations of development on low-lying coastal land should also change.

**Disproportionate Share**

The second type of inordinate burden under the Bert Harris Act is the imposition on a property owner of a disproportionate share of a burden imposed for a public benefit. Disproportionate share language in the Act enables a property owner to bring a claim when it “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.”

Unfortunately, little case law discusses this issue, but the idea that “in fairness” society should carry the burden of a regulation has its roots in federal takings jurisprudence.

Over half a century ago the U.S. Supreme Court recognized that the “Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” This principle was articulated again by the Court in *First English Evangelical Lutheran Church v. Los Angeles.*

The similarities between the “burden” language of these federal cases and the Bert Harris Act’s language are unmistakable.

One could argue that since no one person causes SLR, it would be unfair for coastal property owners to pay the price for SLR and that the public generally should bear the cost. This argument holds some weight for those that have owned their property for a long time already, including before we began to understand and document SLR as well as predict increased future SLR. However, in light of increased knowledge and understanding of SLR, current purchasers of low-lying and coastal property should understand and assume the risk that SLR and associated adaptation measures may negatively impact their property. Conversely, making the public pay, through takings claims, for regulatory changes necessitated by SLR adaptation on recently acquired property creates a likelihood of moral hazard: purchasers may buy coastal property without worrying about SLR and adaptive regulations for SLR because, if the property’s use is changed to a less valuable use or otherwise limited, the public will have to pay a takings claim, even though it may have been relatively clear that changing conditions due to SLR would impact the property. This means the public effectively insures against the risk of SLR and adaptation undertaken by those who acquire low-lying or coastal property even though we now understand the increasing risks to such property and the need for adapting regulatory schemes to SLR.

2. Restricted or Limited Use

---

76 FLA. STAT. § 70.001(3)(e)(1) (2012).


78 First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304 (1987).
Both types of inordinate burden require that there be a direct restriction or limitation of land use imposed.\textsuperscript{79} An attorney general opinion stated that the Act covers only those properties that regulations directly affect, but beyond that, the Act leaves the determination of a direct effect to the court under the particular facts and circumstances of each case.\textsuperscript{80} However, attenuated and indirect impacts fall outside the scope of the Act. Thus, regulations that indirectly affect use of property—such as financial regulations affecting insurance on buildings along Florida’s coast,\textsuperscript{81} developing special benefit areas for hazardous or erosion-prone coastal areas, or developing mandatory bond requirements for coastal construction—should not themselves be subject to a Bert Harris claim for their secondary impacts on property value, though they may indirectly prevent development by inhibiting financing or making development less profitable.

Developers typically base their investments on benchmarks of returns to determine their investment decisions. If the return from a potential investment fails to meet the benchmark cost of capital, the developer will not invest.\textsuperscript{82} Simplistically, returns function on the difference between the marginal incomes and the marginal costs of an investment. Construction cost typically include factors such as materials, labor, and other direct expenses, but some of the largest costs for developers are soft costs, such as insurance, oversight requirements, mitigation requirements, and fees. Here, nothing prevents local governments or other governmental entities from requiring substantial bonding or insurance requirements for all coastal projects, or enacting other regulations such as additional fees for permits or oversight requirements appropriate for adaptation to SLR or improved coastal resilience. Such costs may cut into the developer’s bottom line. When a project’s return turns unfavorable, developers avoid investing. Similarly, where inland alternatives show higher return because they are not subject to the financial requirements of coastal property, this creates incentive to build on inland parcels. Since these enactments only provide negative incentive and do not directly prevent, restrict, or limit the use of a subject property, they could present an appropriate tool for some aspects of a local government’s efforts to adapt to SLR and improve the resilience of an area without incurring liability under the Act.

3. Existing Use or Vested Right

\textsuperscript{79} There is no case law evidencing a difference between restricted or limited.


\textsuperscript{81} For example, the non-profit advocacy group Florida Coastal and Ocean Coalition recently released a report advocating limitations in coastal areas on the policies of Citizens Property Insurance. Florida Ocean and Coastal Coalition, Florida’s Coastal and Ocean Future: An Updated Blueprint for Economic and Environmental Leadership (2012), available at http://flcoastalandocean.org/.

\textsuperscript{82} Such benchmarks include internal rate of returns or average cost of capital, which are typically used when projects are financed with debt or private equity. Some company in the stead of rates of return will make investment decision based on whether the investment will likely increase or decrease its stock price. However, this decision typically is rendered based on the same ratio of projected cost to projected income.
To result in liability under the Act, a governmental entity must impose an inordinate burden that affects an existing use or a vested right.  

**Existing Uses**

The Act defines two “existing uses:” current and future. Current means the present use or activity, including normally associated inactivity. Future means the reasonably foreseeable, non-speculative land uses, which are suitable for the subject property and compatible with adjacent land uses.

A current use claim typically results from regulation prohibiting a claimant’s contemporary use of its property. For example, a claimant operates a hotel, and a government entity forbids the use of the property as a hotel (perhaps through zoning or law enforcement activities). In such cases, the only defense rests on whether the owner ever possessed the right to conduct the lost use.

Future uses, on the other hand, place the burden on the plaintiff to show the use or activity lost was (1) reasonably foreseeable, (2) non-speculative, (3) suitable for the subject property, (4) compatible with the surrounding land uses, and (5) that the value of the property pre-regulation exceeds that of its post-regulation value.

Courts have long struggled to determine reasonable foreseeability. In regards to the Act, reasonably foreseeable appears to mean objective foreseeability - the use that an ordinary person would find appropriate given the physical possibility of the subject land and the current legal climate – as opposed to subjective foreseeability - the owner’s actual intended use.

---

83 Fl. Stat. § 70.001(2) (2012).
84 Fl. Stat. § 70.001(3)(b)(1) and (2) (2012).
87 See, e.g., Osceola County v. Best Diversified, Inc., 936 So. 2d 55, 59 (citing Keshbro, Inc. v. City of Miami, 801 So. 2d 864, 865 (Fla. 2001)).
88 Id.
89 Id. at 876 (finding that the plaintiff never possessed a property right to use of a hotel as a prostitution and drug house).
92 The understanding of “reasonably foreseeable” as an objective standard can be understood by relating it to the “reasonable” in “reasonable investment-backed expectations.” See, e.g., Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envtl. L. 239, notes 44-46 and accompanying text (2011) (discussing addition of “reasonable” to investment-backed expectations language in federal takings law).
In *Citrus County v. Halls River Development, Inc.*, the plaintiff purchased a property after city officials mistakenly informed him that he could build single-family residences on the property. After it became apparent that the property was not eligible for the development the city had said could be built, the city denied the plaintiff the permit necessary to build the homes. The plaintiff filed a Bert Harris claim against the city. The court denied compensation, holding that the lost use was not reasonably foreseeable in light of the existing land density and costal lake zoning designations which forbid such development. The court reasoned that the determination of reasonable foreseeability disregards the developer’s internal beliefs and instead considers reasonableness in light of the current land use designation. In this case, the property owner’s belief—and subsequent purchase of the land—was based on erroneous information from the city assuring him that the proposed development was acceptable. However, the court determined that foreseeability should be based on the actual current land use designation as written rather than as asserted by the county or believed by the plaintiff.

Speculative uses have been determined by applying a similar standard as that for foreseeability. In *Jacksonville v. Coffield*, the developer plaintiff entered into a contract to purchase a property with the intention to subdivide it into eight single-family homes. Prior to the execution of the contract, the neighboring homeowners filed an application with city to abandon and make private the only road to the subject property. After learning of the application, the plaintiff purchased the property anyway, incorrectly assuming either that the city would deny the permit, or, even if approved, he would retain half of the title to the abandoned roadway. Subsequently, the city closed the road. The plaintiff sued under the theory that awarding the closure inordinately burdened his private property rights, entitling him to compensation under the Act. The court disagreed, holding that the developer’s rights were at best speculative because at the time of the neighbors’ application to close the road, the plaintiff only possessed an option to purchase the property, and after learning of the application, the plaintiff executed the option with full notice that development was at best a mere possibility.

---


94 Id. at 416-18.

95 Id. at 421.

96 Id.

97 City of Jacksonville v. Coffield, 18 So. 3d 589 (Fla. 1st Dist. Ct. App. 2009).

98 Id. at 591-592.

99 Id. at 591.

100 Id. (The court noted that according to the city official, “he could not remember any application to close a public road—of which the city received 45 to 70 per year—that the city denied during his tenure”).

101 Id. (the plaintiff mistakenly believed he maintained an easement by necessity).

102 Id.

103 Id. at 594.

104 Id. at 596.
In addition to the foreseeability prerequisite of future use claims, a plaintiff must show that its lost use must be both “suitable for the subject property and compatible with the adjacent land uses.” However, the Act remains silent as to the definition of either term. Recently, the Florida Legislature added definitions of suitability and compatibility to Florida’s comprehensive planning statutes. One could argue that these definitions could be applied to the Act under the cannon of construction in pari materia, which provides that where ambiguous, a court may derive the meaning of a term in light of statutes with similar subject matter. Both Florida’s statutory planning law and the Act directly revolve around the appropriate use of property. Thus, the similarity of topics and use of terms within the planning statutes and the Act indicates that courts could apply the planning statutes’ definitions of suitable and compatible to the Bert Harris Act. The 2011 changes to Florida’s planning statutes added the following definitions for compatibility and suitability:

"Compatibility" means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

“Suitability” means the degree to which the existing characteristics and limitations of land and water are compatible with a proposed use or development.

Use of these definitions could enable a governmental entity to posit affirmative defenses to liability under the Act. Under the definition of compatibility, government regulations limiting the use of certain properties could be framed as measures to prevent harms to adjacent uses. This argument would support, for example, prohibitions on sea wall construction in many instances as the construction of a sea wall at one location causes increased erosion on neighboring properties. Furthermore, note that compatibility requires that a proposed use must be “stable . . . over time” such that it is not “negatively impacted” by other conditions, such as SLR.

Superficially, suitability may present a greater challenge because the statutory definition specifies “existing characteristics and limitations.” However, the word “existing” as used previously in the Bert Harris Act includes land uses that are “reasonably foreseeable.” This point is strengthened by considering that the definition of “suitability” includes that the “limitations of land and water are compatible with a proposed use.” As noted above, compatibility itself requires consideration of the stability of a use over time. With this in mind, a local government confronted with a challenge to a land use regulation directed at adaptation to

107 Id. (amending Fla. Stat. § 163.3164(9) (2010)) (emphasis added).
109 See supra p. 17
SLR might argue that the land involved is not “suitable” for the use because of “reasonably foreseeable” SLR that would render the land unsuitable for the proposed use.

Thus, the determination of which existing uses (present or reasonably foreseeable) apply to the property at issue, depends on an objective perspective of the financial feasibility, physical possibility, and current legal permissibility, not any subjectively held beliefs of a claimant.\(^{110}\) In addition, a claim cannot be made under the Act unless the burdened use is compatible with adjacent uses and suitable for the subject property. Both of these standards allow for good-faith arguments that legal changes to account for SLR do not infringe on existing rights if the claimed right was not “compatible” or “suitable” in light of known issues with erosion, flooding, or SLR problems.

**Vested Rights Recognized**

“Vested rights,” represents the idea that a governmental entity cannot change its mind and pull the rug out from under a claimant.\(^ {111}\) Through the use of common law principles of equitable estoppel and due process, the Act limits a government entity’s authority when the owner of real property relied in good faith upon some act or omission of the governmental entity and made a substantial change in position or incurred significant obligations or expenses, such that it would be highly inequitable and unjust to destroy the rights acquired.\(^ {112}\)

In *Town of Largo v. Imperial Homes Corp.*, the town rezoned the property at the plaintiff’s request to allow for development of high-rise condominiums.\(^ {113}\) Unlike the plaintiff in *Coffield*, the plaintiff here awaited the rezoning before purchasing the property.\(^ {114}\) Subsequently, the plaintiff purchased the neighboring lot and agreed to limit the use of the second lot in

\(^{110}\) This terminology is derived from the Uniform Standards of Professional Appraisal Practice, 2010-2011 ed. available at http://www.uspap.org/toc.htm, which seem appropriate given that the valuation of any claim would follow these guidelines.

\(^{111}\) City of Jacksonville v. Coffield, 18 So. 3d 589, 597 (Fla. 1st Dist. Ct. App. 2009).

\(^{112}\) Id. at 597 (citing Equity Res. Inc. v. County of Leon, 643 So. 2d 112, 1117 (Fla. 1st Dist. Ct. App. 1994)).

\(^{113}\) Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572 (Fla. 2d Dist. Ct. App. 1975).

\(^{114}\) Id. In the following years, the developer purchased additional tracts of land with assurance from the town that the second tract was suitable for multiple-family development.
consideration of the town rezoning the combined property to allow 39 units per square acre.\textsuperscript{115} However, the town later voted to rezone the property and allow no more than 2.5 units per acre.\textsuperscript{116} The court held that although the mere purchase of land failed to create a vested right to rely on existing zoning, when the town approved a developer’s request to rezone real property knowing that the purchase depended on the approval of the plan, the town led the plaintiff onto the welcome mat and thus could not now pull it out from under its feet by rezoning the land to deny the development.\textsuperscript{117} However, Coffield expressly qualified this holding, by stating it should only apply in rare and exceptional circumstances where the government goes beyond mere negligence.\textsuperscript{118}

Analysis of possible amendments to the Act recognized Coffield’s holding and noted that “the theory of estoppel amounts to nothing more than an application of the rules of fair play.”\textsuperscript{119} The subcommittee reiterated the idea that equitable estoppel applies against a governmental entity “only in rare instances and exceptional circumstances;” the government’s act must “go beyond mere negligence.”\textsuperscript{120}

An example of negligence might be improper issuance of a permit. In Lauderdale-by-the-Sea v. Meretsky,\textsuperscript{121} the town mistakenly issued a building permit which violated the law and thus exceeded the town’s authority.\textsuperscript{122} The court held that it could not estop actions in violation of the town’s ordinance, regardless of how much the plaintiff relied on the permit to his detriment.

\begin{itemize}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 574.
\item \textsuperscript{118} City of Jacksonville v. Coffield, 18 So. 3d 589, 598 (Fla. 1st Dist. Ct. App. 2009). Arguably negligence is part of what distinguishes this case from the Halls River Development case that was held not to be a taking.
\item \textsuperscript{119} Bill Analysis and Fiscal Impact Statement, Bill CS/SB 998, at 4 (April 8, 2011) (citing Equity Resources, 643 So. 2d at 1119-1120).
\item \textsuperscript{120} Id. (internal citations omitted).
\item \textsuperscript{121} Town of Lauderdale-by-the-Sea v. Meretsky, 773 So. 2d 1245 (Fla. 4th Dist. Ct. App. 2000).
\item \textsuperscript{122} Id. at 1249. The court stated:

\begin{quote}
A zoning authority may be equitably estopped to enforce a change in zoning regulations against one who has substantially altered his or her position in reliance on the original regulation and a building permit issued there under; however, when there is no authority to grant the building permit, the governmental entity cannot be estopped from revoking the permit … Town was not equitably estopped from requiring that property owners remove wall that infringed on town's public right-of-way, even though town had originally approved placement of wall; property owners were on constructive notice of contents of ordinance prohibiting construction of wall and were presumed to have constructive knowledge of nature and extent of powers of governmental agents who issue permits.
\end{quote}

\textit{Id.}
because issuance of the permit itself was *ultra vires*—beyond the power of the town. The plaintiff could not estop the town from enforcing its ordinances and revoking the permit.  

An affirmative defense to a vested right, as with an “existing use,” arises for the governmental entity if the plaintiff never possessed the right supposedly lost. For example, in *Palm Beach Polo v. Vill. Of Wellington*, the village attempted to enforce a preservation and restoration plan on an estate purchased at a bankruptcy sale. The previous owner of the property negotiated with the village to flood the land in exchange for further off-site development rights. The court found the plaintiff had purchased the land subject to this bargained-for limitation. Thus, even though flooding rendered the property unusable for development purposes, the court determined that the plaintiff failed to establish its entitlement to build on the property because the flooded property represented precisely the condition that the plaintiff’s predecessors in interest bargained for in exchange for developing another property with higher densities. Thus, the new owner never possessed an “existing use” on which to base a claim.

4. The Time Aspect of an Impact on a Property Right

The Bert Harris Act specifies that a claim will lie where a claimant is “permanently unable to attain the reasonable, investment-backed expectation for the property.” This made it difficult to use the Act to challenge building moratoriums. Prior to 2011, the only case addressing the issue of a landowner “permanently unable to attain the reasonable, investment-backed expectation for the property” tended to indicate a lapse of three years’ time was necessary to satisfy the Act’s permanence requirement. In 2011 an amendment to the act indicated that temporary impacts lasting more than one year may, depending on circumstances, constitute an inordinate burden.

---

123 *Id.* at 1248.  
124 *Id.*  
125 *Palm Beach Polo, Inc. v. Vill. of Wellington*, 918 So. 2d 988, 990 (Fla. 4th Dist. Ct. App. 2006).  
126 *Id.* at 993.  
127 *Id.* at 995.  
128 Nicole S. Sayfie & Ronald L. Weaver, 1999 *Update on the Bert J. Harris, Jr., Private Property Rights Protection*, 73 Fla. B.J. 49 (1999) (referencing Wollard v. Monroe County, BH-97-44-0 (Fla. ____ 1997)).  
129 2011 Laws of Florida, Ch. 191, sec. 1 (amending FLA. STAT. § 70.001 (2010)).
Thus, any enactment that prevents construction for more than one year may support a claim under the Act.

Graphic representation of the major substantive elements of the Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. §70.001) and select associated issues.
IV. Conclusion

The Bert Harris Act continues to evolve and play a role in the decisions of state and local government actors. The Act remains a challenge to courts, attorneys, property owners, and other concerned parties because it purports to create a cause of action independent of federal or state constitutional takings law even as the Act utilizes key terminology from this body of law. Recent changes to the Bert Harris Act clearly resulted from specific cases while the origin of other changes is less clear.

One important case—Halls River Development—as discussed above, opened a significant loophole that could have allowed a very broad defense for a local government when a plaintiff submits a claim under the Act more than one year after enactment of a regulation, rule, or comprehensive plan policy that was clear and unequivocal in its application to the affected property. The Legislature’s 2011 changes eliminated this possibility by stating that enactment only constitutes “first application” to a property when the law is clear and unequivocal in its application and the property owner is provided notice.

The 2011 Amendments also altered “ripeness” language. The Act now refers to a “statement of allowable uses” rather than ripeness. Neither the law nor analysis of the law provided to the Florida Legislature indicates the reason for this change. It may be that the change seeks to separate the Act’s workings from the common law jurisprudence surrounding the “ripeness” requirement for filing a claim. If this is the purpose of the change, it is suspect as the need for ripeness ensures that a claimant has exhausted all reasonably-available remedies and has established an adequate factual basis to assess what the real harm to property is from the offending rule or regulation. To some degree other requirements of the Act may assist in fulfilling these important roles (i.e.—“statement of allowable uses” should indicate the uses permitted, thus allowing better calculation of the value of the property).

The Act’s central terminology of “inordinate burden” remains difficult to assess as the term has not been elucidated by case law. Legislative changes in 2011 modified the definition of “inordinate burden” and “inordinately burdened” to clarify that they mean the same thing. The changes also addressed temporal aspects by stating that temporary impacts of more than one year may rise to the level of an inordinate burden, depending on the circumstances.

Local governments with good information on erosion, flooding, storm surge, and SLR impacts have options for addressing these through tools such as land use planning and regulation. When such laws and regulations are well drafted, the Bert Harris Act should not be considered fatal to such efforts. Careful analysis of “inordinate burden” and related terms from the Act, such as “reasonable investment-backed expectations,” “vested right,” “existing use,” “suitable,” and “compatible” indicate that good arguments exist for not finding a local government liable under the Act if land may be subject to erosion, flooding, surge, or SLR.
V. Appendix of Defenses

Bert Harris Act: Defenses and Limitations for Government Entities
(Footnotes and citations have been omitted from the summaries below. Please refer to the page number referenced after each issue for more information).

Procedural Defenses and Issues

Notice
The Act includes four types of notice; one is notice by the claimant and the other three pertain to notice provided by government entities. Ultimately, governmental entities should carefully comply with the Act’s notice requirements because such efforts may pay dividends by setting-up substantives defenses in the long run while preventing due process and Florida Administrative Procedure Act problems in the short term. (For a full discussion, see supra p. 4).

Ripeness
As amended in 2011, the Act mandates that within 150 days of receiving notice of a claim under the Act (or 90 days for property classified as agricultural), the relevant governmental entity must either settle with the claimant or issue a written “statement of allowable uses” that identifies the uses to which the subject property may be put. Failure of a governmental entity to issue a required “statement of allowable uses” automatically ripens the claim at the culmination of the 90 or 150-day period and allows a claimant to file suit. Therefore, local governments may not rely on a defense based on the ripeness of a claim following this time period. (For a full discussion, see supra p. 5).

Settlements
When examining settlements, it is important to recognize the distinction in judicial review between variances to land use regulations and amendments to comprehensive plans. Legislative actions, such as comprehensive plan enactments and amendments, are typically subject to a low level of judicial review (i.e.—the standard is easier for the government to meet). In contrast, issuance of permits or variances—classified as “quasi-judicial actions” rather than legislative—receive more careful scrutiny under a standard requiring that they be “appropriate and necessary.” This more searching standard means the government action is more easily overturned. (For a full discussion, see supra p. 6).

Other Procedural Issues
Although the Bert Harris Act’s automatic ripening provision does not allow local governments to avoid a lawsuit beyond the 90 or 150-day period on the ground that the claim is not yet ripe, a governmental entity could still rely on procedural mistakes, such as the absence of a bona-fide appraisal, as affirmative defenses against an otherwise valid claim. (For a full discussion, see supra p. 7).

Substantive Defenses
**Governmental Action - Federal Authority Exception**
The Bert Harris Act provides an exemption that excludes from liability actions by the United States, its agencies, or any state, regional, or local government, or its agencies, when “exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.” It may be possible for a state or local governmental entity to take advantage of this formal delegation exemption. (For a full discussion, see supra p. 11).

**Reasonable Investment-Backed Expectation (RIBE)**
While Florida case law confirms the Act’s requirement that a regulation must interfere with RIBE, it sheds little light on how RIBE is defined within the context of the Act as distinguished from federal takings law. On the federal level, courts look to whether the plaintiff’s expectations were reasonable at the time the property interest was created – e.g., purchased or transferred; whether the plaintiff’s economic goal was rationally achievable; whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and the overall riskiness of the investment.

Even were a Florida court not to directly adopt all federal case law addressing RIBE, the factor of whether a plaintiff’s expectations were reasonable at the time of property acquisition should come into play when considering any Bert Harris claims related to regulations for adapting to SLR. Scientific evidence clearly demonstrates appreciable SLR within the past 100 years. In addition, climate change scientists agree that future rates of SLR will be faster than today’s rate, although by just how much is still not very clear. With this information in hand, a local government defending regulations adapting to SLR should be able to make cogent arguments that, in light of such recently gained knowledge of SLR, reasonable expectations of development on low-lying coastal land should also change. (For a full discussion, see supra p. 12).

**Restricted or Limited Use**
The Bert Harris Act applies only to those properties that regulations directly affect. This determination of whether there is a direct effect is made in each individual case in light of the particular facts relating to the property and regulation at issue. However, attenuated and indirect impacts fall outside the scope of the Act. Thus, regulations that indirectly affect use of property—such as financial regulations affecting insurance on buildings along Florida’s coast, developing special benefit areas for hazardous or erosion-prone coastal areas, or developing mandatory bond requirements for coastal construction—should not themselves be subject to a Bert Harris claim for their secondary impacts on property value.

Thus, local governments or other governmental entities may require substantial bonding or insurance requirements for coastal projects, or enact other regulations such as additional fees for permits or oversight requirements appropriate for adaptation to SLR or improved coastal resilience. Since these enactments do not directly prevent, restrict, or limit the use of a subject property, they could present an appropriate tool for some aspects of a local government’s efforts to adapt to SLR and improve the resilience of an area without incurring liability under the Act. (For a full discussion, see supra p. 16).
Existing Uses – Compatibility and Suitability
Under the Act, a valid claim for the loss of an existing or foreseeable future use of the property must demonstrate that the lost use was “suitable for the subject property and compatible with the adjacent land uses.” Although the Act itself does not define “suitable” or “compatible,” their use in Florida’s comprehensive planning statutes may provide insight.

The definitions in the planning statutes could enable a governmental entity to posit affirmative defenses to liability under the Act. (For a full discussion, see supra p. 17).

Vested Right
The mere purchase of land does not create a vested right to rely on existing zoning that would allow a claim under the Act upon rezoning. Courts have held, however, that a governmental entity cannot lead a plaintiff onto the welcome mat only to pull it out from under his feet. For example, in Town of Largo v. Imperial Homes Corp., the court held that when the town approved a developer’s request to rezone real property knowing that the purchase depended on the approval of the plan, the town could not now rezone the land and deny the development.

However, in Lauderdale by the Sea v. Meretsky, the town mistakenly issued a building permit which violated the law and thus exceeded the town’s authority. The court held that it could not estop actions in violation of the town’s ordinance, regardless of how much the plaintiff relied on the permit to his detriment, because issuance of the permit itself was ultra vires—beyond the power of the town. The plaintiff could not estop the town from enforcing its ordinances and revoking the permit. Therefore, an affirmative defense to a vested right, as with an “existing use,” arises for the governmental entity if the plaintiff never possessed the right supposedly lost. (For a full discussion, see supra p. 20).