

SEA-LEVEL RISE ADAPTATION AND THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT

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I. INTRODUCTION

When the Florida Legislature passed the Bert J. Harris, Jr. Private Property Rights Protection Act¹ (“the Act” or “Bert Harris Act”) a quarter century ago, very few people realized that seas were rising. With today’s broad awareness of rising sea levels, local governments must also consider when and how responding to a changed future of long-term sea-level rise may lead liability under the Bert Harris Act.

Some changes to the Bert Harris Act over its twenty-five year history have been driven by case law to which the Florida Legislature has responded.² For example, when a lawsuit threatened widespread

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1. FLA. STAT. § 70.001 (2020).

2. In 2011, for example, likely in response to *M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71 (Fla. Dist. Ct. App. 2009), the Florida Legislature amended the Act in part to shorten the notice period required for private property owners and to add a section which addresses how to determine when the claim period accrues. *See* H.R. 701, 22nd Leg., 113th Reg. Sess. (Fla. 2011). In 2015, likely in response to *FINR II, Inc. v. Hardee County*, 164 So. 3d 1260 (Fla. Dist. Ct. App. 2015), the Florida Legislature amended the Act to require that a property owner be directly impacted to bring a claim under the Act. The 2015 amendment also sought to clarify settlement procedures, likely in response to *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312 (Fla. Dist. Ct. App. 2016). Additionally, the 2015 amendment added to the Act an exemption from liability for “actions taken by a county with respect to the adoption of a Flood Insurance Rate Map.” *See* H.R. 383, 24th Leg., 117th Reg. 1st Reg. Sess. (Fla. 2015).

In 2020, proposed bill CS/HB 519 § 1 (Fla. 2020) would have amended the Act attempted to clarify settlement procedures further, likely in response to *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312 (Fla. Dist. Ct. App. 2016). H.R. 519, 26th Leg., 1st Reg.

potential Bert Harris Act liability for participation in the National Flood Insurance Program via utilization of Flood Insurance Rate Maps, the Florida Legislature responded with an exemption.³ As another example, when a conflict among Florida courts of appeals arose in defining direct impact to property, the Legislature responded by codifying its preferred interpretation of the Act.⁴ Though the Florida Legislature did create a requirement for “coastal” local governments, in their planning efforts, to address sea-level rise (SLR) in planning as a cause of flooding,⁵ the Legislature has not provided any increased protection to potential Bert Harris Act liability for local governments addressing SLR generally or as required by Florida Statutes.

Thus, the Act, which intends to protect private property rights by giving relief from “inordinate burdens”⁶ that result from new regulations, requires careful consideration by local governments as they seek to address SLR. This Article examines the Bert Harris Act and includes analysis of case law relating to the Act. The purpose of this review is to analyze the Act’s impacts on local governments’ abilities to utilize their comprehensive plans, future land use maps, land development codes, zoning plans, coastal management plans, ordinances, and other possible tools for adaptation to rising sea levels along Florida’s coasts.

Part I of this Article concludes with a brief introduction to the Act. Part II provides brief summaries of the potential procedural and substantive defenses to a Bert Harris Act claim that receive more detailed treatment in subsequent parts. Part III examines procedural aspects of the Act in greater depth, and Part IV looks more carefully at the substantive aspects of the Act. Part V concludes with some

Sess. (Fla. 2020). This same change to settlement procedures has also been proposed in 2021 legislation. S. 1876, 26th Leg., 1st Reg. Sess. (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021). The 2020 and 2021 bills also seek to clarify the procedures in awarding attorneys’ fees under claims arising from the Act, likely addressing the issues arising from a 2015 appellate court decision. *Id.*; H.R. 519, 26th Leg., 1st Reg. Sess. (Fla. 2020); *Caribbean Condominium v. City of Flagler Beach*, 178 So. 3d 426, 427 (Fla. Dist. Ct. App. 2015). Finally, of notable importance is that the 2020 and 2021 bills would add a section which would codify an appellate court holding that a private property owner does not need to formally apply to develop property in order to bring a claim under the Act. H.R. 519, 26th Leg., 1st Reg. Sess. (Fla. 2020); S. 1876, 26th Leg., 1st Reg. Sess. (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021); *GSK Hollywood Dev. Grp., LLC v. City of Hollywood*, 246 So. 3d 501 (Fla. Dist. Ct. App. 2018).

3. FLA. STAT. § 70.001(10)(b) (added in 2015 Fla. Laws 3).

4. *Id.* § 70.001(3)(g) (added in 2015 Fla. Laws 3). *See also* RONALD L. WEAVER & JONI ARMSTRONG COFFEY, *PRIVATE PROPERTY RIGHTS PROTECTION LEGISLATION: STATUTORY CLAIMS FOR RELIEF FROM GOVERNMENTAL REGULATION*, 30.3-10 (2015).

5. FLA. STAT. §§ 161.551(3)(b)(1), 163.3177(6)(g)(10), 163.3178(2)(f)(1), 259.105(17)(d) (2020).

6. FLA. STAT. § 70.001(1).

overarching lessons for local governments to address potential Bert Harris Act liability when seeking ways to adapt to SLR. Readers are cautioned that consideration of unpublished trial court opinions in this Article is extremely limited.

The Bert Harris Act entered Florida law in 1995 amid a wave of property-rights protections throughout the United States.⁷ 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.⁸ Supporters agree with the conclusion that the law has curbed the number of regulations affecting real property but see this as evidence that the Act is working as intended.⁹

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 twenty-five years after passage of the Act, the reality of sea-level rise (SLR) already affects many communities, and the impacts will only become more severe as the rate of SLR increases.¹⁰

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 examines the Bert Harris Act with the aim of helping local and state government entities understand ways they may seek to protect the safety, health, and welfare of communities from SLR while minimizing the risk of liability under the Bert Harris Act.

7. John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 439, 443 (2009).

8. Nicole S. Sayfie & Ronald L. Weaver, *1999 Update on the Bert J. Harris Private Property Rights Protection*, 73 FLA. B.J. 49 (1999) (discussing the chilling effects of the Bert Harris Act on local governments).

9. Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247, 267–71 (1997) (comparing viewpoints of opponents and proponents of the Bert Harris Act).

10. See generally *Florida's Sea Level is Rising*, SEALEVELRISE.ORG, <https://sealevelrise.org/states/florida/#:~:text=The%20sea%20level%20around%20Florida,thn%20it%20was%20in%201950.&text=This%20increase%20is%20mostly%20due,on%2C%20it's%20causing%20major%20issues.&text=There%20are%20already%20120%2C000%20properties, frequent%20tidal%20flooding%20in%20Florida> (last visited Apr. 5, 2021).

II. SUMMARY OF POTENTIAL DEFENSES TO BERT HARRIS ACT CLAIMS

This Part highlights and summarizes some of the potential defenses to Bert Harris Act claims. Each potential defense includes an internal cite of where detailed discussion appears below in Parts III and IV of the Article.

A. Procedural Defenses and Issues

1. Notice

The Act includes four types of notice. The first is notice by the claimant and the other three pertain to notice provided by government entities.¹¹ Ultimately, governmental entities should carefully comply with the Act's notice requirements because such efforts may pay dividends by allowing for procedural defenses based on time limitations in the Act and preventing due process problems in the short term.¹² For more detailed discussion of notice issues, see *infra* Part III.A.

2. Ripeness

As of 2020, the Act mandates that within 150 days of receiving notice of a claim under the Act (or ninety 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.¹³ 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.¹⁴ Therefore, local governments may not rely on a defense based on lack of ripeness of a claim following this time period.¹⁵ For in-depth treatment of ripeness issues, see *infra* Part III.B

11. FLA. STAT. § 70.001(4)(a)–5(a).

12. For a full discussion, see *infra* notes 22–27 and accompanying text (discussing the importance of complying with notice requirements).

13. FLA. STAT. § 70.001(5)(a).

14. *Id.*

15. Fla. Att'y Gen. Op. AGO 2009-25 (June 10, 2009) ("Should the governmental entity fail to issue a written ripeness decision during the applicable notice period, the prior actions of the governmental entity are deemed to be ripe and such failure is deemed a ripeness decision which has been rejected by the property owner.").

3. Settlements

Settlements may result in significant challenges. A 2014 case established that a settlement offer could not contravene state law unless the settlement was reached during the statutory settlement period provided for in the Act; amendments in 2015, however, changed the statute to alter this.¹⁶ The distinction in judicial review between variances to land use regulations and amendments to comprehensive plans presents a key issue to understand in developing potential settlements to claims under the Act.¹⁷ Notably, likely in response to *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*,¹⁸ a proposed 2020 change to the Act attempted to add a provision which provided that “[s]ettlement offers . . . shall be presumed to protect the public interest.”¹⁹ Bills introduced into Florida’s legislature in 2021 would do the same.²⁰ For a full treatment of the issues related to settlements, see *infra* Part III.C.

4. 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.²¹ For a full discussion, see *infra* Part III.D.

A final procedural note: under current law, both prevailing plaintiffs and government-entity defendants may be able to recoup attorney’s fees under certain circumstances; however, proposed 2021 legislation would provide much more favorable attorney’s fees

16. *Collier County v. Hussey*, 147 So. 3d 35, 40 (Fla. Dist. Ct. App. 2014); 2015 Fla. Laws 3 (amending Fla. Stat. § 70.001 to include: “This paragraph applies to any settlement reached between a property owner and a governmental entity regardless of when the settlement agreement was entered so long as the agreement fully resolves all claims asserted under this section.”).

17. See generally Gary K. Hunter, Jr. & Douglas M. Smith, *ABCs of Local Land Use and Zoning Decisions*, 84 FLA. B.J. 20, 20 (2010) (“Understanding whether a decision is quasi-judicial or quasi-legislative is critical, as procedural due process rights are enhanced in quasi-judicial proceedings and the standards of review differ substantially.”).

18. 189 So. 3d 312 (Fla. Dist. Ct. App. 2016). See also Professional Staff of the Committee on Community Affairs, *Bill Analysis and Fiscal Impact Statement for CS/SB 1876*, FLA. SENATE 8 (Mar. 25, 2021), <https://www.flsenate.gov/Session/Bill/2021/1876/Analyses/2021s01876.ca.PDF>.

19. H.R. 519, 26th Leg., 1st Reg. Sess. II, 97–98 (Fla. 2020).

20. S. 1876, 26th Leg., 1st Reg. Sess. (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021). For a full discussion of issues related to settlement agreements, see *infra* Part III(C).

21. For a full discussion, see *infra* notes 81–91 and accompanying text.

provisions to plaintiffs than to defendants. For a full discussion of attorneys fees and pending 2021 legislative changes and their implications, see *infra* Part III.C., notes 91–96.

B. Substantive Defenses

1. Governmental Action and Federal Authority Exception

The Bert Harris Act, “by its express terms . . . protects against governmental *action* rather than government *inaction*.”²² This Florida Fourth District Court of Appeals statement about the Bert Harris Act distinguishes a Bert Harris Act claim from a property rights claim based on the United States Constitution’s Fifth Amendment. Florida’s Fifth District Court of Appeals held a Fifth Amendment “takings” claim could be based on government inaction,²³ though this does not appear to constitute the interpretation of majority of courts²⁴ and is directly contradicted by the U.S. Court of Appeals for the Federal Circuit.²⁵

The Bert Harris Act also 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.”²⁶ It may be possible for a state or local governmental entity to take advantage of this formal delegation exemption. For more complete analysis of both the government action requirement and federal authority exemptions, see *infra* Part IV.B.

2. Exemption for Operation, Maintenance, or Expansion of Transportation Facilities

The Act provides a blanket exemption to governmental entities for operation, maintenance, or expansion of transportation facilities.²⁷ Thus, plaintiffs may not bring Bert Harris Act claims based on operation, maintenance, or expansion of transportation facilities.²⁸ For a full

22. Boca Ctr. at Military, LLC v. City of Boca Raton, No. 4D19-2736, 2021 WL 359485, at *3 (Fla. Dist. Ct. App. Feb. 3, 2021) (emphasis in original).

23. Jordan v. St. Johns County, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

24. See, e.g., Thomas Ruppert, *Castles—and Roads—in the Sand: Do All Roads Lead to a “Taking”?*, 48 ENVTL. L. REP. 10914, 10920–21 (2018) [hereinafter Ruppert, *Castles—and Roads—in the Sand*].

25. *Id.* at 10930–32.

26. FLA. STAT. § 70.001(3)(c) (2020).

27. *Id.* § 70.001(10)(a) (2020).

28. *Id.*

discussion of this, see *infra* Part IV.B., notes 130–33 and accompanying text.

3. Reasonable Investment-Backed Expectation (RIBE)

While Florida case law confirms the Act’s requirement that a regulation must interfere with RIBE, Florida case law still sheds little light on how RIBE is defined within the context of the Act as distinguished from federal takings law.²⁹ On the federal level,³⁰ 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.³¹

29. *Id.* § 70.001(3)(e); *see also* *Ocean Concrete, Inc. v. Indian River County, Bd. of Cty. Comm’rs*, 241 So. 3d 181, 189–90 (Fla. Dist. Ct. App. 2018).

30. This discussion focuses on as-applied takings challenges at the federal level as opposed to facial challenges at the federal level. Bert Harris Act claims are typically brought as as-applied challenges; the current law’s introduction notes that it requires relief “when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.” FLA. STAT. § 70.001(1). Nonetheless, even under current law, “[a] law or regulation is first applied upon enactment and notice as provided for in this subparagraph if the impact of the law or regulation on the real property is clear and unequivocal in its terms and notice is provided by mail to the affected property owner or registered agent at the address referenced in the jurisdiction’s most current ad valorem tax records.” *Id.* § 70.001(11)(a)(1). Contrast this with Section 70.001(11)(a)(2) which notes that a law or regulation is first applied “when there is a formal denial of a written request for development or variance.” *Id.* § 70.001(11)(a)(2). This blurs the line between an as-applied and facial challenge since an as-applied challenge would ordinarily have required some certainty about what development would have been allowed and an application for development that is actually denied.

A proposed 2021 amendment would seem to further blur the distinction between as-applied and facial challenges by potentially allowing a property owner to bring a Bert Harris claim without an application—or maybe even any intent—to engage in development prohibited by a new law or regulation. S. 1876, 26th Leg., 1st Reg. Sess. § 1, ll. 48–50 (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021) (expanding definition of “action of a governmental entity” to also include “adopting or enforcing any ordinance, resolution, regulation, rule, or policy.”). This proposed legislation appears to go well beyond the historical understanding of an “as-applied” challenge in not requiring any effort or even intent to engage in development. Even so, it is debatable that the proposed 2021 change would allow a property owner to successfully present a claim since the Act still requires “first application” to determine whether an inordinate burden was imposed, FLA. STAT. § 70.001(3)(e), and the applicable filing deadline. *Id.* § 70.001(11). It is questionable whether a claim for mere adoption of a “ordinance, resolution, regulation, rule, or policy” could reasonably proceed successfully without some further action that met the “first application” requirements in FLA. STAT. §§ 70.001(3)(e), (11)(a)1, or (11)(a)2.

31. *See* Tirso M. Carreja, Jr., *Adding a Statutory Stick to the Bundle of Rights: Florida’s Ability to Regulate Wetlands Under Current Takings Jurisprudence and Under the Private Property Rights Protection Act of 1995*, 11 J. LAND USE & ENVTL. L. 423, 441 (1996); *see also* *James v. Zoning Bd. of Appeals of Pembroke*, 60 Mass. App. Ct. 1119, No. 02-P-714, 2004 WL 384801, at *5 (Mass. App. Ct. 2004) (“[R]estrictions lowered the purchase price and limited [landowners’] reasonable investment-backed expectations.”).

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.³² In addition, climate change scientists agree that future rates of SLR will be faster than today's rate, although by just how much and how quickly is still not very clear.³³ 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 knowledge of SLR, reasonable expectations of development on low-lying coastal land should also change. For complete treatment of the issues with RIBE, see *infra* Part IV.D.

4. Direct Impact and Restricted or Limited Use

The Bert Harris Act applies only to those properties that regulations directly affect.³⁴ 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.³⁵ However, attenuated and indirect impacts fall outside the scope of the Act.³⁶

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 may 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 more detail on direct-impact requirements, restricted/limited use, and potential adaptation tools that these requirements might allow, see *infra* Parts IV.C. and IV.D., notes 188–93.

32. *Florida's Sea Level is Rising*, *supra* note 10.

33. *Id.*

34. FLA. STAT. § 70.001(e)–(g).

35. See *Id.* § 70.001(1) (“The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, *as applied*, may inordinately burden, restrict, or limit private property rights. . . .”) (emphasis added).

36. *E.g.*, *City of Jacksonville v. Smith*, 159 So. 3d 888, 893 (Fla. Dist. Ct. App. 2015) (“[A] governmental action which indirectly burdened or inadvertently devalued an owner's land, because of regulatory decisions regarding another owner's property, would be too attenuated for relief under the Harris Act.”).

5. Existing Uses Protected

The Bert Harris Act only protects “existing use[s]” of property.³⁷ “Existing use” in the Act is defined to include both actual, current existing use as well as foreseeable, non-speculative future use of the property if that use is “suitable for the subject real property *and* compatible with the adjacent land uses.”³⁸ Although the Act itself does not define “suitable” or “compatible,” common definitions of these terms and their use in Florida’s comprehensive planning statutes may provide insight.³⁹ Both the common definitions and definitions in the planning statutes could enable a governmental entity to posit affirmative defenses to liability under the Act.⁴⁰ The Act’s definition of “existing uses” receives more complete treatment *infra* Part IV.E.

6. 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.⁴¹ Courts have held, however, that a governmental entity cannot lead a plaintiff onto the welcome mat only to pull it out from under her feet.⁴²

III. 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.⁴³ These procedural requirements remain constant regardless of the claim, the claimant, or the governmental entity receiving the claim. This Part 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.

37. FLA. STAT. § 70.001(2).

38. FLA. STAT. § 70.001(3)(b) (emphasis added).

39. FLA. STAT. § 163.3164(9), (46) (2020) (defining “compatibility” and “suitability”).

40. For a full discussion, *see infra* notes 174–217.

41. *See Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975); *see also* *Bloomingdale Dev., LLC v. Hernando County*, No. 8:07-cv-575-T-30MAP, 2009 WL 347786, at *7–9 (M.D. Fla. Feb. 11, 2009) (quoting *Town of Largo*, 309 So. 2d at 573).

42. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 597 (Fla. Dist. Ct. App. 2009).

43. FLA. STAT. § 70.001(4)(a)–(6)(d) (2020).

A. Notice

The Bert Harris Act includes four types of notice; one is notice provided by the claimant and the other three pertain to notice provided by government entities.⁴⁴

First, the Act requires a claimant give notice a specified number of days prior to filing a claim under the Act.⁴⁵ This notice must be supplied to any governmental entity against whom the claimant intends to file.⁴⁶

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.⁴⁷

Third, the Act requires a government entity to provide notice to all contiguous properties of a claim filed against it under the Act.⁴⁸ 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.⁴⁹

Fourth, after enacting a regulation that clearly and unequivocally affects real property, if the enacting authority gives notice to the owner of affected property that the owner's property rights may be impacted and informs the owner of the Act's one-year statute of limitations,⁵⁰ 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 Part III.A, "Specific Action, First Application, and the Statute of Limitations." Governmental entities should carefully comply with this part of the Act's notice requirements as it may pay dividends by setting up possible procedural defenses down the road.

44. *Id.*

45. *Id.* § 70.001(4)(a).

46. *Id.*

47. *Id.* § 70.001(4)(b).

48. *Id.*

49. *See, e.g.,* Sayfie & Weaver, *supra* note 8 (discussing the claims regarding Miami Beach's floor area ratio requirements, which numbered in the hundreds).

50. FLA. STAT. § 70.001(11); *see* Sayfie & Weaver, *supra* note 8.

B. Ripeness Determination

According to the common law, “ripeness” constitutes the final prerequisite to filing a takings claim.⁵¹ Under the common law, 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.⁵² The Bert Harris Act incorporates the idea of ripeness using different terminology. The Act mandates that within 150 days of receiving notice of a claim under the Act (or ninety days for property classified as agricultural), the relevant governmental entity must either settle with the claimant⁵³ or issue a written “statement of allowable uses” that identifies the uses to which the subject property may be put.⁵⁴ The government’s “statement of allowable uses” is required by Florida courts in determining a claim to be “ripe.”⁵⁵ However, according to the Bert Harris Act,⁵⁶ 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.⁵⁷ Under the Act, therefore, a governmental entity essentially gives a property owner permission to file a lawsuit by refusing to settle the claim and instead issuing a statement of allowable uses or by failing to issue this statement at all within the specified time period.⁵⁸

51. See Wendie L. Kellington, *New Takes on Old Takes: A Takings Law Update*, WASH. U. ST. LOUIS, https://landuselaw.wustl.edu/takings_update.htm#:~:text=Ripeness,of%20the%20privately%20held%20property (last visited Mar. 31, 2021).

52. *Id.* (“Ripeness has three prongs: (1) there must be a final local decision, (2) administrative remedies must be exhausted, including pursuit of variances as well as alternative development options, and (3) as a prerequisite for bringing a federal claim, avenues for achieving state compensation must be explored.”).

53. See *Charlotte Cty. Park of Commerce, LLC v. Charlotte County*, 927 So. 2d 236, 239 (Fla. Dist. Ct. App. 2006) (owner and regulator may settle a claim without resorting to filing a complaint).

54. FLA. STAT. § 70.001(5)(a).

55. See *Jamieson v. Town of Fort Myers Beach*, 292 So. 3d 880, 887 (Fla. Dist. Ct. App. 2020) (citing *Golfrock v. Lee County*, 247 So. 3d 37, 39 (Fla. Dist. Ct. App. 2018) (internal citations omitted)).

56. FLA. STAT. § 70.001(5)(a).

57. *Id.* “Statement of allowable uses” replaced the “ripeness decision.” 2011 Fla. Laws 3 (amending FLA. STAT. § 70.001(5)(a)).

58. “Florida courts have adopted the federal ripeness policy of requiring a ‘final determination from the government as to the permissible uses of the property.’” *Jamieson*, 292 So. at 887. See also, e.g., *M & H Profit, Inc. v. Panama City*, 28 So. 3d 71, 76 (Fla. 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

While Florida has generally adopted the Federal ripeness doctrine, a recent appellate court holding⁵⁹ led to a legislative proposal in 2020 that would have codified the case's holding. In a 2020 bill—and a similar currently proposed bill in the 2021 legislative session⁶⁰—the Legislature proposed to modify the Act's Section 70.001(11)(a)(1)(b) so that a landowner would not have to formally apply to develop property in order to state a claim under the Act.⁶¹ One obvious potential drawback to such a modification is that it would allow property owners to sue governmental entities for property limitations that do not impact any planned use of the property by the owner. In other words, this amendment, if passed, would have allowed property owners that had no intention of ever using their property contrary to the challenged regulation to still sue the governmental entity and potentially win a settlement awarding the property owner public funds for a use that the property owner did not even plan on engaging in. Such an allowance would likely promote innumerable lawsuits on the heels of land use changes affecting property by property owners seeking a windfall simply due to the land use change.

C. Settlements

Settlements have given rise to difficult issues related to the Bert Harris Act. A governmental entity must provide a settlement offer within a specified period of receiving a claim.⁶² In *Collier County v. Hussey*,⁶³ a settlement offer that would contravene state law could only be entered into during the Act's statutory settlement period in between notice of

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.

Id. at 621.

59. See *GSK Hollywood Dev. Grp., LLC v. City of Hollywood*, 246 So. 3d 501 (Fla. Dist. Ct. App. 2018).

60. S. 1876, 26th Leg., 1st Reg. Sess. (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021).

61. H.R. 519, 26th Leg., 1st Reg. Sess. (Fla. 2020).

62. 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. 2011 Fla. Laws 2 (amending FLA. STAT. § 70.001(4)(a) (2010)). The notice period is shorter for agricultural land at only 90 days. FLA. STAT. § 70.001(4)(a). Notably, the 2020 Bill proposed further decreasing the time period for local governments to respond to notice of claims to 90 days for most claims. H.R. 519, 26th Leg., 1st Reg. Sess. (Fla. 2020).

63. 147 So. 3d 35 (Fla. Dist. Ct. App. 2014).

the claim and filing an action in court.⁶⁴ The Florida Legislature changed this outcome with amendments to the Bert Harris Act in 2015, providing that, “[i]f the property owner accepts ~~a the~~ settlement offer, either before or after filing an action, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).”⁶⁵ This amendment clarified that a settlement offer may be entered into by the parties either before or after filing an action.⁶⁶

Even as the Bert Harris Act authorizes settlements that may contravene state statutes, any settlement agreed to by the parties must still protect the public’s interest and represent necessary and appropriate relief.⁶⁷ “Appropriate” means legitimate under the circumstances—not a sweet-heart deal.⁶⁸ “Necessary” means the settlement does not stymie the interests promoted by the burdening regulation.⁶⁹ Courts are required to make a finding that the settlement agreement entered into by the parties protects the public interest and property before approving any settlement agreement under the Act.⁷⁰ Furthermore, if a settlement requires a variance, the government must prove compliance with the standards of “necessary” and “appropriate” for a variance, together with supporting substantial competent evidence on the record.⁷¹ Ultimately, courts reviewing settlements involving land

64. *Id.* at 40–41.

65. 2015 Fla. Laws 2 (amending FLA. STAT. § 70.001(4)(c)).

66. FLA. STAT. § 70.001(4)(c)(11).

67. *Id.* § 70.001(4)(d)(1); *Chisholm Props. South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689b (Fla. Cir. Ct. 2001) [hereinafter *Chisholm I*] *rehearing denied*, *City of Miami Beach v. Chisholm Props. South Beach, Inc.*, 830 So. 2d 842, 843 (Fla. Dist. Ct. App. 2002) [hereinafter *Chisholm II*].

68. *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. *Id.*

69. *Chisholm I*, 8 Fla. L. Weekly Supp. 689b (finding that that granting the variance to build additional stories ran contrary to the intent of the FAR).

70. FLA. STAT. § 70.001(4)(d)(2) (2020); *see also* *Rainbow River Conservation Inc. v. Rainbow River Ranch, LLC*, 189 So. 3d 312, 314 (Fla. Dist. Ct. App. 2016).

71. *Rainbow River Conservation*, 189 So. 3d at 316. *Chisholm I*, one of the Miami FAR cases, the Ritz Carlton of Miami Beach filed suit alleging, amongst other things, that the city’s regulation prevented Ritz from building a desired number of units and thus required compensation under the Bert Harris Act. *Chisholm I*, 8 Fla. L. Weekly Supp. 689b. In response, the city settled by promising to “recommend granting variance application when proposed” to the city’s Zoning Board of Adjustment (“BOA”). *Id.* Although the BOA found that the Ritz could build the desired number of units without a variance, when the Ritz threatened that BOA denial could void the settlement, resulting in revival of a \$3.7 million suit, the BOA conceded. *Id.* That concession precipitated the claim filed by the third party. *Id.* In voiding the settlement, the court found that the BOA’s decision did not flow from substantial evidence, when the desired number of building units could be constructed without a variance. *Id.* As this was the case, nothing in the record supported the hardship finding that is necessary to justify a variance. *Id.*

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.⁷²

The distinction between quasi-judicial and quasi-legislative actions at the local level can also present challenges for settlement agreements. Quasi-legislative actions, such as comprehensive plan enactments and amendments as well as rezonings as part of a settlement, are typically subject to a low level of judicial review (i.e. the standard is easier for the government to meet)⁷³; however, such quasi-legislative actions should consider the standard processes for such actions and the public's statutory rights for participation.⁷⁴ In contrast, issuance of permits or variances—classified as “quasi-judicial actions” rather than legislative—do not include as many protections for public participation, but they also receive more careful examination by reviewing courts.⁷⁵ Most quasi-judicial decisions are appealable to the appellate division of the circuit court via a writ of certiorari.⁷⁶ The standard of review for quasi-judicial decisions under certiorari review is that the decision below must be based on “competent substantial evidence.”⁷⁷ This more searching standard means the government action is more easily overturned.

Bills proposed during the 2020 and 2021 Florida legislative sessions include language that would alter the Act so that “[s]ettlement offers made pursuant to [the Act] shall be presumed to protect the public interest.”⁷⁸ It is unclear whether and how the proposed amendment would have impacted circuit court review of proposed settlement agreements that “would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property.”⁷⁹ Under the proposed legislation's regime, if only the government

72. *Chisholm I*, 8 Fla. L. Weekly Supp. 689b.

73. The standard on review is that a local government's quasi-legislative action must meet a “fairly debatable” standard. *D.R. Horton, Inc. v. Peyton*, 959 So. 2d 390, 398 (Fla. Dist. Ct. App. 2007).

74. Gary K. Hunter, Jr. & Douglas M. Smith, *ABCs of Local Land Use and Zoning Decisions*, 84 FLA. B.J. 20, 21 (Jan. 2010) (“A local government's approval or denial of an issue in its quasi-legislative capacity is typically subject to a fairly debatable standard of review. Fairly debatable means that the government's action must be upheld if reasonable minds could differ as to the propriety of the decision reached.”).

75. *See, e.g., Martin County v. Yusem*, 690 So. 2d 1288, 1293–95 (Fla. 1997) (discussing the quasi-judicial versus quasi-legislative standards of review).

76. *Board of County Commissioners v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993); *Miami-Dade County v. City of Miami*, No. 3D20-1195, 2020 WL 7636006, at *3 (Fla. Dist. Ct. App. 2020). A limited subset of quasi-judicial decisions may seek de novo review of challenges of a development order of consistency with a local government's comprehensive plan. FLA. STAT. § 163.3215 (2021).

77. *Snyder*, 627 So. 2d at 474; *D.R. Horton, Inc.*, 959 So. at 398.

78. H.R. 519, 26th Leg., 1st Reg. Sess. § 1, lines 97–98 (Fla. 2020); S. 1876, 26th Leg., 1st Reg. Sess. § 1, lines 123–24 (Fla. 2021); H.R. 421, 26th Leg., 1st Reg. Sess. (Fla. 2021).

79. *Rainbow River Conservation*, 189 So. 3d at 313 (citing FLA. STAT. § 70.001(4)(d)2 (2020)).

defendant and the plaintiff were involved in the litigation, who would have an incentive and who could have provided any evidence or argumentation that the settlement might *not* be in the public interest? If a local government were to be more concerned about settling the case to avoid potential liability, the local government might already be compromising the “public interest” to settle the case. The politics and economics of development interests, property interests, and the wildly varying interests of any given local government legislative body at any given time are no guarantee that settlements will be “in the public interest.” Not only would an outside individual or group have to find the financial, legal, and other resources to intervene in the case, the intervenors would also have to overcome this new legal presumption that the settlement serves the public interest. This potentially undermines the “the weighty responsibility of ‘ensur[ing] that the relief granted protects the public interest served by the statute at issue’ and that the relief ‘is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.’”⁸⁰

The proposed 2020 and 2021 bill language on settlements would also exacerbate existing issues with the Act’s settlement procedure. As an example, the *Rainbow River Conservation Inc. v. Rainbow River Ranch, LLC* case demonstrates a serious issue with allowing a judge to approve a settlement agreement that violates existing law: What happens when the settlement agreement effectively allows a judge to approve a local government action that would have required notice and public participation had the proposed action in the settlement been done according to statutory law?⁸¹ In *Rainbow River Conservation*, the settlement agreement, initially approved by a circuit court, would have effectively amended the City of Dunnellon’s comprehensive plan, but “without following the notice, public participation and state review requirements in [Section 163.3184, Florida Statutes] for local comprehensive plan amendments.”⁸² Thus, intervenors sued as the circuit court failed to ensure that the settlement agreement protected the public’s interest in robust public participation as part of any comprehensive plan amendment process.⁸³ The district court of appeal reviewing the case noted that the circuit court could have ensured public participation by, for example, requiring the local government to go

80. *Id.* at 314.

81. *Id.*

82. *Id.*

83. *Id.* at 313.

through its ordinary comprehensive plan procedure to make the amendment or “the court could have ordered the City to hold public hearings.”⁸⁴

Even had the court taken action to provide some avenue for public participation to serve the purposes of the statute, the larger policy issue the *Rainbow* case pointed to—judges determining how to serve the public’s interest—would remain. Judges being called upon to explicitly make decisions about what “public interest” a statute is trying to protect, and then to determine the kind of settlement agreement that serves those same public interest(s), sounds as much like either the legislative power of “making and enacting laws”⁸⁵—or the executive power to carry out the laws and “secur[e] their due observance”⁸⁶—as it does the judicial power of interpreting the laws. While the separation of powers doctrine is not mentioned explicitly in the text of the U.S. Constitution, the idea of the separation of powers motivated the drafters of our constitution and helped give the U.S. Constitution its structure.⁸⁷ While the U.S. Supreme Court “has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States,”⁸⁸ Florida’s constitution enshrines the idea of separation of powers,⁸⁹ and courts in Florida recognize this in their decisions.⁹⁰

84. *Id.* at 315.

85. *What is Legislative Power?*, THE LAW DICTIONARY, <https://thelawdictionary.org/legislative-power/> (last visited Apr. 3, 2021).

86. *What is Executive?*, THE LAW DICTIONARY, <https://thelawdictionary.org/executive/> (last visited Apr. 3, 2021).

87. T.J. Halstead, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, CONGRESSIONAL RESEARCH SERVICE 1 (June 23, 1999), <http://congressionalresearch.com/RL30249/document.php>.

88. *Stop the Beach Nourishment, Inc. v. Fla. Dept. of Env'tl. Protec.*, 560 U.S. 702, 719 (2010).

89. FLA. CONST. art. II, § 3 (“The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”).

90. *See, e.g.*, *Chiles v. Phelps*, 714 So. 2d 453, 456–57 (Fla. 1998) (noting that courts are to “refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the constitution”) (citing *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981)); *N. Fla. Women’s Health & Counseling Servs. v. State*, 866 So. 2d 612, 658 (Fla. 2003) (noting that it is not the courts’ “function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute”) (citing *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001)); *Lee County v. Morales*, 557 So. 2d 652, 655 (Fla. Dist. Ct. App. 1990) (noting that “because zoning is basically a legislative function, courts enter the area only where the action of a zoning body is so unreasonable and unjustified as to amount to a confiscation of property” and that “[a]ccordingly, the standard of review in circuit court is not to determine proper zoning, but whether the zoning authorities decision is fairly debatable”) (internal citations omitted). *See also City of Key W. v. Key W. Golf Club Homeowners*, 228 So. 3d 1150, 1157 (Fla. Dist. Ct. App. 2017) (“The Association, Golf Course, and Hospital improperly ask us to usurp a legislative function when they contend we should replace the legislature’s public policy choice that these stormwater services should be funded by utility fees

Proposed amendments to the Act in the 2020⁹¹ and 2021⁹² legislative sessions would dramatically alter the attorney's fees provision in the Act. Rather than allowing claimants to recover attorney fees if the claimant prevails "and the court determines that the settlement offer . . . did not constitute a bona fide offer to the property owner," the amendment would eliminate this latter requirement.⁹³ Thus, any claimant that prevailed would be eligible for attorney fees. This is important from a policy perspective. Forcing the government to pay attorney fees seems most appropriate in cases in which the government action somehow falls short of action reasonably within the government's power and exercised in good faith under the government's police powers. The current language in the Act reflects this: if the governmental entity did not make a good-faith effort to settle the case—as determined by the court upon review of the evidence—then the governmental entity should pay the claimant's attorney fee.⁹⁴

However, many reasonable and important government actions within their police power could potentially be the subject of Bert Harris Act claims. Many of these actions might be debatable as to whether government liability would be found under the Act by a reviewing court. In cases where the government entity acted in good faith, what is the policy reason to punish the governmental entity for acting in good faith under its police power to protect the safety, health, and welfare of its citizens by awarding attorney costs to the plaintiff? The proposed changes would make a governmental entity liable for attorney fees simply for losing the case, regardless of whether it acted in good faith. This runs counter to the idea of awarding attorney fees in order to disincentivize misguided, incompetent, or bad-faith actions on the part of governmental entities. The proposed amendments leave in place the existing requirement that a governmental entity could *only* recover attorney fees from the claimant if the governmental entity both prevailed *and* "the property owner did not accept a bona fide settlement offer."⁹⁵ This demonstrates that the 2020 and 2021 proposed amendments are weighted to cost the public more than property owners, increasing risks to governmental entities (and the public purses they rely on) while decreasing risks and costs for property owners.

with their own suspect public policy choice that these stormwater services should be funded by taxes.").

91. H.R. 519, 26th Leg., 1st Reg. Sess. § 1, lines 193–200 (Fla. 2020).

92. S. 1876, 26th Leg., 1st Reg. Sess. § 1, lines 219–26 (Fla. 2021).

93. *Id.*

94. FLA. STAT. § 70.001(6)(c)(1) (2020).

95. S. 1876, 26th Leg., 1st Reg. Sess. § 1, lines 227–38 (Fla. 2021).

Additionally, the proposed 2020 and 2021 amendments would have also increased the time during which a claimant could claim attorney fees so that a prevailing claimant could potentially recover fees for a longer time than a prevailing governmental entity.⁹⁶ Taken together, these changes would provide far more leverage and potential payback to claimants while assigning additional risk to governmental entities.

D. Procedural Requirements: A Double-Edged Sword

Procedural rules may serve the interests of claimants or governmental entities may use them as affirmative defenses. Both the Bert Harris Act itself and courts have been very clear that if statutory pre-suit requirements are not fulfilled, this procedural error will result in dismissal.⁹⁷ Consequently, a plaintiff's claim is unlikely to move forward in court unless it is properly submitted, not less than 150 days⁹⁸ before filing an action in the court, to the head of the governmental entity⁹⁹ with a valid appraisal¹⁰⁰ that demonstrates that the regulation in question resulted in a reduction in the fair market value of the property.¹⁰¹ In 2012, the case of *Turkali v. City of Safety Harbor* hinged on the need to submit a bona fide appraisal.¹⁰² In *Turkali*, the claimant's case was dismissed with prejudice because the submitted appraisal was not sufficient for the trial court or the reviewing court to determine the

96. *Id.* § 1, lines 212–26; H.R. 519, 26th Leg., 1st Reg. Sess. § 1, lines 253–66 (Fla. 2020).

97. *Sosa v. City of West Palm Beach*, 762 So. 2d 981, 982 (Fla. Dist. Ct. App. 2000) (dismissing claim with prejudice for failure to submit a bona fide appraisal and for failure to meet the statutory requirements for presenting a claim to a governmental entity prior to filing a claim).

98. 150 days for claims related to any property other than agricultural property, which is 90 days. FLA. STAT. § 70.001(4)(a) (2020).

99. If multiple governmental authorities burden the property, the claimant must submit its claim to all involved. *Id.*

100. *Fla. Water Servs. Corp. v. Utils. Comm'n*, 790 So. 2d 501, 503–04 (Fla. 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).

101. *See Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 59–60 n. 5 (Fla. 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).

102. *Turkali v. City of Safety Harbor*, 93 So. 3d 493, 495 (Fla. Dist. Ct. App. 2012).

value of claimant's property.¹⁰³ Local governments have also refused to consider Bert Harris claims due to lack of a bona fide appraisal.¹⁰⁴

Thus, 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.

IV. SUBSTANTIVE ELEMENTS OF THE BERT J. HARRIS ACT

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.¹⁰⁵ The following subsections dissect and analyze the elements of this substantive standard and, when appropriate, provide thoughts on potential arguments for governmental entities defending against Bert Harris Act claims.

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 filed with the governmental entity occur within one year of a regulation's first application to the property at issue.¹⁰⁶ A law is "first applied" according to the Act via two potential avenues. First, 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 provides notice of such impact by mail to the affected property owners.¹⁰⁷ In such a case, a claimant loses the right to file a claim one year after receipt of such notice.¹⁰⁸

Such a mailed notice requirement could present a significant cost to a local government or other governmental entity. The governmental

103. *Id.*; see also Order Granting Defs.' Mot. Summ. J, Sep. 23, 2019, No. 2013 CA 001049 Civil Division (granting summary judgment to defendant county as the appraisals submitted with the appeal were not "bona fide appraisals" as the appraisals were based on the value of both the land *and* on the assumption of valid state and local permits as well as a constructed business operation) (on appeal to Florida's First District Court of Appeal, Case No. 1D19-4387 (2020)).

104. See, e.g., Letter of Roman Gastesi, Jr., Administrator for Monroe County to James S. Mattson, P.A. and Andrew M. Tobin, Esq. dated March 23, 2009. Monroe County Response to Section 70.001, Fla. Stat., Claim (Angelika) (copy on file with author Ruppert).

105. FLA. STAT. § 70.001(2) (2020).

106. *Id.* § 70.001(11).

107. *Id.* § 70.001(11)(a)(1). 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." *Id.*

108. *Id.* § 70.001(11)(a)(1).

entity would have to invest resources to: (1) conduct research to evaluate all properties to which the regulation applies; (2) create a database of all of these properties; (3) cross reference the most current ad valorem tax records to find the mailing address of the property owner or registered agent; and (4) mail a notice to each of the property owners or registered agents. The staff time and expense involved in providing such notice probably means that most regulatory changes will not be noticed in such manner. Thus, most instances of “first applied” will effectively be only via the second alternative: “when there is a formal denial of a written request for development or variance.”¹⁰⁹ Under this scenario government regulations may be “first applied” years, even decades, after they were first passed (regardless of how “clear and unequivocal” the impact on a property is), leading to long-term uncertainty for governmental entities about potential future challenges far, far down the road. Essentially this statutory change removed any time limitation for properties to challenge any “new” regulation, leading to open-ended potential liability for governmental entities that regulate land use.¹¹⁰

It is important to note that the “first applied” element requires landowners to notify the government of their claim under the Act within one year of the statute’s or regulation’s first application to the real property.¹¹¹ Beyond that, there is a four-year statute of limitations to actually file a court action.¹¹² Regarding the statute of limitations, there is also a tolling provision in the Act,¹¹³ which courts have interpreted as meaning that a private property owner has “four years (*plus any tolling time*) to file [a] complaint under the Harris Act.”¹¹⁴

The tolling provision in the Act “has been applied to toll the one-year notice period.”¹¹⁵ For example, in *Wendler v. City of St. Augustine*, the property owners’ application for permits was denied in 2007; but because they appealed the government’s decision, lost, and subsequently filed a petition for certiorari relief, the property owners’ notice to the government under the Act was timely filed in May 2010,

109. *Id.* § 70.001(11)(a)(2) (2020).

110. However, for a potential limitation on such possibly open-ended liability, see the discussion below about the import of time elapsed and its effect on “reasonable investment-backed expectations” *infra* notes 165–66 and accompanying text.

111. *Wendler v. City of St. Augustine*, 108 So. 3d 1141, 1144 (Fla. Dist. Ct. App. 2013).

112. *Id.* at 1146.

113. FLA. STAT. § 70.001(11)(2)(b).

114. *Hussey v. Collier County*, 158 So. 3d 661, 665 (Fla. Dist. Ct. App. 2014) (quoting *Wendler*, 108 So. 3d at 1146).

115. *Id.*

which was one month after the property owners dismissed the certiorari petition.¹¹⁶

B. Governmental Action

To bring a successful claim under the Act, a claimant must show that the specific action originated from a governmental entity.¹¹⁷ A failure of a governmental entity to act does not provide a basis for a claim, even if the government had the ability to act and took actions previously indicating a possibility that the government might act.¹¹⁸ The Act defines governmental entity broadly to include any exercise of state authority.¹¹⁹ However, the Act provides a federal authority exemption.¹²⁰ 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.”¹²¹ Examples of such delegation is the late 2020 delegation from the United States Environmental Protection Agency (EPA) to the Florida Department of Environmental Protection to issue Clean Water Act Section 404 dredge and fill permits¹²² or the EPA’s delegation to Florida to issue permits for most aspects of the National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act on its behalf.¹²³ According to the Bert Harris Act’s formal delegation language, permit decisions made under the aegis of the Clean Water Act’s federal delegation of permitting authority for either Section 404 or the NPDES program should not be subject to Bert Harris Act claims.

Less clear is the import of the Act’s formal delegation policy for local government in the context of laws such as the Endangered Species Act

116. 108 So. 3d at 1146.

117. FLA. STAT. § 70.001(2).

118. *Boca Ctr. at Military, LLC v. City of Boca Raton*, No. 4D19-2736, 2021 WL 359485, at *3 (Fla. Dist. Ct. App. Feb. 3, 2021) (“Specifically, the [Bert Harris] Act provides a mechanism to remedy burdens created by the *enactment of new* regulation, ordinances, etc.—not the refusal to enact new laws where the governmental entity has taken no action. . . .” [emphasis in original]).

119. FLA. STAT. § 70.001(3)(c) (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.”).

120. *Id.*

121. *Id.*

122. *See, e.g., EPA Announces Historic Approval of Florida’s Request to Administer the Clean Water Act Section 404 Program*, EPA (Dec. 17, 2020), <https://www.epa.gov/newsreleases/epa-announces-historic-approval-floridas-request-administer-clean-water-act-section-404>.

123. *See, e.g., NPDES State Program Authority*, EPA, <https://www.epa.gov/npdes/npdes-state-program-authority> (last updated Aug. 31, 2020).

(ESA).¹²⁴ Strict application of the “formal delegation” requirement could create a difficult choice for state and local governments when attempting to 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.¹²⁵ At the same time, if a state or local governmental entity passes a new law or regulation which does *not* allow development because of a potential “take” of endangered species, the affected property owner might try suing 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 works with the federal government to establish a memorandum of understanding (MOU), then that makes local government implementation of the Habitat Conservation Plan part of the MOU.¹²⁶ 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.¹²⁷

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 of the ESA.¹²⁸

The Act also provides an exception for actions by government agencies relating to “operation, maintenance, or expansion of transportation facilities” and provides that “this section does not affect existing law regarding eminent domain relating to transportation.”¹²⁹ Accordingly, this Section provides protections for local governments interested in constructing new roads, maintaining existing roads,

124. See generally 16 U.S.C. §§ 1531–1544 (2020).

125. Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538(a)(1) (2020).

126. This approach was considered by Collier County. See Memorandum from David C. Weigel, Collier County Attorney, to Commissioners, 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.

127. *Id.*

128. Letter of Roman Gastesi, Jr., Administrator for Monroe County to James S. Mattson, P.A. and Andrew M. Tobin, Esq. dated March 23, 2009. Monroe County Response to Galleon Bay Section 70.001, Fla. Stat., Claim, section III (copy on file with author Ruppert).

129. FLA. STAT. § 70.001(10)(a) (2020).

expanding roads, and similar projects.¹³⁰ This exemption for transportation facilities can explain why key road maintenance lawsuits, such as *Jordan v. St. Johns County*,¹³¹ have been filed as claims under the U.S. Constitution's Fifth Amendment protections for property rather than under the Bert Harris Act.¹³²

Similarly, the 2015 amendment of the Act added an exception for

any actions taken by a county with respect to the adoption of a Flood Insurance Rate Map issued by [FEMA] for the purpose of participating in the National Flood Insurance Program, unless such adoption incorrectly applies an aspect of the Flood Insurance Rate Map to the property in such a way as to, but not limited to, incorrectly assess the elevation of the property.¹³³

In a decision out of the Florida Second District Court of Appeal, which struck down a plaintiff's claim under the Act on other grounds, the court noted that any reliance on application of flood insurance maps issued after the effective date of the Act (1995) was misplaced.¹³⁴

C. Direct Impact and Restricted or Limited Use

To bring a successful claim under the Act, a claimant must show that the specific action, which originated from a governmental entity, directly impacted real property owned by the claimant. Indirect impacts do not create a Bert Harris Act claim as the Act specifically states that:

"inordinate burden[s]" can only result from an action of one or more governmental entities [that] has directly restricted or limited use of the real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for

130. Special thanks to St. Augustine City Attorney Isabelle Lopez for highlighting this exemption to the Bert Harris Act. See Isabelle Lopez, *Planning for Community Resiliences* (1000 Friends of Florida Inc. webinar Feb. 20, 2019), <https://1000fof.org/upcoming-webinars/past/> (scroll down then select "View Broadcast"); see also Isabelle Lopez, City Attorney, City of St. Augustine, *Building Resiliency Through Partnerships at the Florida Local Environmental Resource Agencies (FLERA) Annual Conference* (July 31, 2019) (slides at <https://static1.squarespace.com/static/5a0cb6a329f187ffb43b5aa/t/5d5ab6f7ab40fe000116db3d/1566226177649/Jessica+Beach+1.pdf>).

131. See generally *Jordan v. St. Johns County*, 63 So. 3d 835 (Fla. Dist. Ct. App. 2011).

132. Cf. *id.* at 837.

133. FLA. STAT. § 70.001(10)(b) (2020).

134. *Bair v. City of Clearwater*, 196 So. 3d 577, 583 (Fla. Dist. Ct. App. 2016).

the existing use of the real property or a vested right to a specific use of the real property. . . .¹³⁵

The 2015 amendment of the Act amended the definitions of “property owner”¹³⁶ and “real property”¹³⁷ to include “direct[] impact[]” requirements to bring a claim under the Act. These amendments have clarified that claimants must be the legal owners of real property directly burdened by the specific governmental action.

In *City of Jacksonville v. Smith*,¹³⁸ claimants attempted to bring suit under the Bert Harris Act, arguing that the fire station built on an adjacent property “inordinately burdened” claimants’ property.¹³⁹ The court held that, as a matter of first impression, the Bert Harris Act did not apply because claimants’ property “was not itself subject to any governmental regulatory action.”¹⁴⁰ As another example, in *Vale v. Palm Beach County*,¹⁴¹ the court held that the county’s rezoning of a golf course on adjacent property did not directly restrict or limit landowners’ properties such that the Act would apply.¹⁴²

Further, the Act does not apply to property whose value has decreased due to its proximity to property that was impacted by a governmental action directed at another property.¹⁴³ In *Hardee County v. FINR II, Inc.*,¹⁴⁴ claimants brought suit under the Bert Harris Act seeking \$38 million in damages, alleging that claimants’ adjacent property was impacted by the county’s reduction of a mining setback, which claimants argued “inordinately burdened” its property.¹⁴⁵ The trial court granted Hardee County’s Motion to Dismiss for failure to state a cause of action because it held that plaintiff’s property was not the “real property at issue,”¹⁴⁶ and claimants appealed. The Second District Court of Appeal reversed the lower court’s decision, holding that claimants did have a cause of action under the Bert Harris Act for the diminution in

135. FLA. STAT. § 70.001(3)(e)1 (2020).

136. *Id.* § 70.001(3)(f).

137. *Id.* § 70.001(3)(g).

138. 159 So. 3d 888 (Fla. Dist. Ct. App. 2015) (en banc).

139. *Id.*

140. *Id.* at 889, 893.

141. 259 So. 3d 951 (Fla. Dist. Ct. App. 2018).

142. *Id.* at 953.

143. *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1166–67 (Fla. 2017) (holding that “the Act does not apply to property that has ‘suffered a diminution in value or other loss as a result of its proximity to the property that is subject to a government action’”).

144. *Id.*

145. Complaint ¶¶ 1, 16, 19, 23, *FINR II, Inc. v. Hardee County* (Fla. 10th Cir. Ct. Jan. 27, 2014) (No. 252013CA000614).

146. Order Denying Motion to Hold in Abeyance and Granting Defendant’s Motion to Dismiss at 3–4, *FINR II, Inc. v. Hardee County* (Fla. 10th Cir. Ct. Jan. 27, 2014) (No. 252013CA000614).

value of its property due to Hardee County's reduction of mining setback.¹⁴⁷ The Second District Court of Appeal, as part of its ruling, certified a conflict between the case it was deciding and the case of *City of Jacksonville v. Smith*.¹⁴⁸ Between the Second District Court of Appeals' review and the Florida Supreme Court's review of the case, the Bert Harris Act was amended to include "direct[] impact[]" requirements to bring a claim under the Act.¹⁴⁹ This change contributed to the reasoning of the Florida Supreme Court when it stated that claimants, as adjacent property owners who were not directly impacted by the government action, could not state a claim under the Bert Harris Act.¹⁵⁰

The definitions of "inordinate burden" and "inordinately burdened" in that Act mean "action of one or more governmental entities has directly restricted or limited the use of real property. . . ."¹⁵¹ This language, its focus on land-use restrictions and language regarding direct, rather than indirect, impacts to property provides the opportunity for local governments to argue that 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—may not themselves be subject to a Bert Harris claim for their secondary impacts on property value.

This argument is not a guaranteed win, however, since the Act does contemplate actions that "affect[] real property."¹⁵² Nonetheless, this still provides defending local governments two potential arguments: (1) that financial regulations or regulations that do not directly limit land use but rather are only indirect impacts on the value of the land and not "direct impact" as required by the Act; and (2) even if regulations that only affect the financial feasibility or attractiveness of using land and not the legally permitted uses can be considered a "direct impact," such impact does not rise to the level of an "inordinate burden" as long as the reasons for such regulations and financial impacts are well justified and clearly connected to protecting the public from harms and costs that the proposed land use could cause. For example, if a local government knows that extremely low-lying property near the coast will be subject

147. *Hardee County v. FINR II, Inc.*, 164 So. 3d 1260, 1266 (Fla. Dist. Ct. App. 2015).

148. *Id.* at 1266; *City of Jacksonville v. Smith*, 159 So. 3d 888, 894–95 (Fla. Dist. Ct. App. 2015).

149. FLA. STAT. § 70.001(3)(g) (2020) (added in 2015 Fla. Laws 2015-142).

150. *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1167 (Fla. 2017).

151. § 70.001(3)(e)(1).

152. *Id.* § 70.001(3)(d).

to SLR flooding, the local government could pass an ordinance requiring that development or redevelopment of the property include posting a performance bond assuring the financial resources to remediate the property should it be abandoned due to SLR impacts. In such a case, the local government could argue that any “burden” to the property is not inordinate as the burden is only directly tied to avoiding saddling the cost for remediation of private decisions from being shifted onto taxpayers. The local government could argue that the requirement for a performance bond has not “directly restricted or limited the use” of the property.¹⁵³ And finally, as is discussed further below,¹⁵⁴ the government could argue that imposing the cost of a performance bond directly on the property owner, even if it reduces the property’s value, in no way violates the Act’s strictures against leaving a property owner “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.”¹⁵⁵ On the contrary; the local government could argue it would be unfair to burden the public at large with foreseeable remediation costs that should, in all fairness, be borne by the property owner.

D. Inordinate Burden

The substantive standard of “inordinate burden” in the Act remains difficult to interpret as little reported case law addresses the term.¹⁵⁶ An early 2020 unreported case indicated that a local government ordinance limiting vacation rentals to two occupants per bedroom was indeed a burden, but it did not rise to the level of an “inordinate burden.”¹⁵⁷ The

153. *Id.* § 70.001(3)(e)(1).

154. *Infra* pt. IV.D.1.b (addressing “inordinate burden” definition that discusses “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)).

155. § 70.001(3)(e)(1).

156. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 594–95 (Fla. Dist. Ct. App. 2009) (extensively addressing the “reasonable, investment-backed expectation” portion of “inordinate burden”). While little case law may define the meaning of “reasonable, investment-backed expectation[s]” 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. Dist. Ct. App. 2006) (finding no reasonable investment-backed expectations based on history of property).

157. ChrisAnn Allen, *Bert Harris Victory Goes to Holmes Beach, But Plaintiffs Disagree*, THE ISLANDER, <https://www.islander.org/2020/01/bert-harris-victory-goes-to-holmes-beach-but-plaintiffs-disagree/> (last visited Apr. 16, 2021). The trial court’s ruling against the property owners that brought the Bert Harris Act claim against the City of Holmes Beach was appealed to Florida’s Second District Court of Appeal, with the appeal still pending as of April 2021. *Florida Second District Court of Appeal Docket – Case Docket – Case Number: 2D20-653*, FLA. STATE COURTS, <http://onlinedocketsdca.flcourts.org/DCAResults/>

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.¹⁵⁸ Many parts of these phrases have already been analyzed above, and failure to meet any part of the requirements results in a finding of no inordinate burden.

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 Amendment. Nonetheless, the Florida Legislature expressed its intent that the Act serve as a separate and distinct cause of action from a regulatory taking claim under the U.S. Constitution and emphasized that cases not rising to a taking under the U.S. Constitution might be successful claims under the Act.¹⁵⁹ 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.¹⁶⁰ Still, use of terminology from federal takings law further confuses the substantive issues of the Bert Harris Act.¹⁶¹ 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

a. Reasonable Investment-Backed Expectations

The first type of inordinate burden under the Bert Harris Act is the inability of a claimant to attain the reasonable, investment-backed

CaseDocket?Searchtype=Case+Number&Court=2&CaseYear=2020&CaseNumber=653 (last visited Apr. 16, 2021).

158. § 70.001(3)(e)(1).

159. *Id.* § 70.001(9).

160. *Id.* § 70.001(1); *see also* Op. Att'y Gen. Fla. AGO 2006-31 (July 20, 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").

161. *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 alone 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, 617-18 (2001) (discussing the role of reasonable investment-backed expectations in federal takings jurisprudence).

expectations for the property at issue or a vested right to a use of the property.¹⁶² 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.¹⁶³ While some might argue that RIBE possesses a different meaning in the Bert Harris Act,¹⁶⁴ existing federal caselaw¹⁶⁵ and extensive scholarly writings on the topic of RIBE in federal takings law¹⁶⁶ 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.

Caselaw on the Act in Florida often repeats the Act’s requirement that a regulation interfere with RIBE. However, research revealed only two reported cases in Florida that discuss 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 will be allowed to continue indefinitely.”¹⁶⁷ In *Holmes*, a landfill owner applied for an extension of a special use permit in order to continue its clay and sand mining operation.¹⁶⁸ When neighboring property owners objected to the use

162. § 70.001(3)(e)(1).

163. 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, 246 (2011).

164. § 70.001(9) (2020) 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.

Id.

165. *Abraham-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.

Id.

166. For a sampling of some of the issues inherent in RIBE, including U.S. Supreme Court cases discussing RIBE, see Ruppert, *supra* note 163, at 246–59.

167. *Holmes v. Marion County*, 960 So. 2d 828, 830 (Fla. Dist. Ct. App. 2007).

168. *Id.* at 829.

and complained about the debris, trucks, and other noises, the county denied the permit renewal.¹⁶⁹ 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.¹⁷⁰ Thus, *Holmes* indicates that courts might not find RIBE for extension of conditional use permits.

In *Ocean Concrete, Inc. v. Indian River County, Board of County Commissioners*, a property owner purchased property zoned "light industrial" with the intent of developing and operating a concrete batch plant, which was a permitted use under the "light industrial" zoning of the property.¹⁷¹ After the purchase of the property, the county re-zoned the property to "[g]eneral [i]ndustrial" and denied the property owner's application to develop and operate the concrete batch plant.¹⁷² Accordingly, the property owner and his concrete company brought action under the Act against the county.¹⁷³ The court held that the property owner's concrete batch plant was an existing use under the Act, that the planned use was "*per se* compatible" with surrounding land uses, and that the property owner's investment-backed expectations were reasonable.¹⁷⁴ This case teaches that courts will view any land use for which an area was currently zoned when purchased as *per se* reasonable. This means that a dynamic in which a developer proposes a project allowed by the zoning code but then encounters local opposition that changes the zoning code to stop the project will likely result in liability on the part of the local government for violating the RIBE of the applicant.

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

- (1) whether the plaintiff's expectations were reasonable at the time the property interest was created—*e.g.*, purchased or transferred;
- (2) whether the plaintiff's economic goal was rationally achievable;
- (3) whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and

169. *Id.*

170. *Id.* at 830.

171. *Ocean Concrete, Inc. v. Indian River County, Board of County Commissioners*, 241 So. 3d 181, 184 (Fla. Dist. Ct. App. 2018).

172. *Id.* at 185.

173. *Id.*

174. *Id.* at 188–90.

(4) the overall riskiness of the investment.¹⁷⁵

Although determined under federal caselaw, 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. A 2011 amendment left RIBE undefined but did provide 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."¹⁷⁶

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*,¹⁷⁷ the Court indicated that acquiring a property *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.¹⁷⁸

Even if a Florida court were not to directly adopt all federal caselaw 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.¹⁷⁹ In addition, scientists agree that future rates of SLR will be faster than today's rate, although by just how much is still not very

175. See generally *Palazzolo v. Rhode Island*, 533 U.S. 606, 627–38 (2001). In addition, the issue of "riskiness of development" was addressed in the case of *Good v. United States*, 39 Fed. Cl. 81, 114 (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").

176. 2011 Fla. Laws ch. 191, § 1 (amending FLA. STAT. § 70.001(3)(e) (2010)).

177. 533 U.S. 606 (2001).

178. *Id.* at 630.

179. *Florida's Sea Level is Rising*, *supra* note 10. See, e.g., Ctr. for Operational Oceanographic Prods. and Servs., U.S. Dep't of Commerce, *Global and Regional Sea Level Rise Scenarios for the United States: NOAA Technical Report NOS CO-OPS 083*, NOAA fig. 3a & 3b (Jan. 2017), https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf.

clear.¹⁸⁰ 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.¹⁸¹

b. 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.”¹⁸² Unfortunately, little caselaw 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.”¹⁸³ This principle was articulated again by the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*.¹⁸⁴ 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 might hold 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, due to increased knowledge and understanding of SLR, current purchasers of low-lying and coastal

180. *Id.*; See, e.g., Sarah Doherty et al., *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaption in the United States*, U.S. GLOBAL CHANGE RESEARCH PROGRAM 83 (2018) (noting that “[r]elative to the year 2000, sea level is very likely to rise 1 to 4 feet (0.3 to 1.3 m) by the end of the century” but that “for higher scenarios, a rise exceeding 8 feet (2.4 m) by 2100 is physically possible, although the probability of such an extreme outcome cannot currently be assessed”).

181. See Ruppert, *supra* note 163, at 247 nn.44–46.

182. FLA. STAT. § 70.001(3)(e)(1) (2020).

183. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

184. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

property should understand and assume the risk that SLR and associated adaptation measures may negatively impact their property.¹⁸⁵ Conversely, making the public pay, through takings claims, for regulatory changes necessitated by SLR adaptation on recently acquired property creates a likelihood of speculation and 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. Such a regime would essentially make the public the insurer against the risk of SLR impacts on those who choose to purchase low-lying or coastal property despite ever-increasing understanding of the future risks posed by SLR. Such an approach certainly is not part of U.S. constitutional protections of private property,¹⁸⁶ leading one to wonder if this approach would be any better an approach at the state level.

i. Restricted or Limited Use

Both types of inordinate burden require that there be a direct restriction or limitation of land use imposed.¹⁸⁷ Even before caselaw reached the question, 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.¹⁸⁸ Attenuated and indirect impacts fall outside the scope of the Act. The Act does not apply unless the property uses are directly restricted or limited.¹⁸⁹ Thus,

185. *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645–47 (1993) (noting that the business should have anticipated the potential for substantial new regulation since the industry in which it was involved was already highly regulated by a complex regulatory structure); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226–28 (1986) (standing for the same principle as *Concrete Pipe & Prod. of Cal., Inc.*).

186. The U.S. Supreme Court has found no legal duty to protect private property other than possibly maintenance of existing infrastructure. For example: “Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’” *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989). And, “[constitutional protections] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” *Id.*

187. There is no caselaw evidencing a difference between restricted or limited.

188. Fla. Att’y Gen. Op. No. AGO 2006-31 (July 20, 2006).

189. *See Vale v. Palm Beach County*, 259 So. 3d 951, 953 (Fla. Dist. Ct. App. 2018) (holding that property owners in a lot adjacent to a golf course being renovated pursuant to the government’s approval of a development order did not have a claim under the Act because their properties were not restricted or limited by the renovation).

regulations that indirectly affect use of property should not themselves be subject to a Bert Harris claim for their secondary impacts on property value. This should be true even if policies—such as financial regulations affecting insurance on buildings along Florida’s coast,¹⁹⁰ developing special benefit areas for hazardous or erosion-prone coastal areas, or developing mandatory bond requirements for coastal construction—may indirectly prevent development by inhibiting financing or making development less profitable. As noted above,¹⁹¹ preventing the public at large from bearing the foreseeable or likely costs of development decisions by private property owners itself should separate such cases from the Bert Harris Act’s definition of “inordinate burden.”

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.¹⁹² Simplistically, returns function on the difference between the marginal incomes and the marginal costs of an investment. Construction costs 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, the Act does not prevent local governments or other governmental entities from requiring substantial bonding or insurance requirements for all coastal projects or enacting other options 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 becomes 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 appropriate tools in the

190. For example, Florida Coastal and Ocean Coalition, a non-profit advocacy group, issued a report advocating for limitations in coastal areas on the policies of Citizens Property Insurance. *Florida’s Coastal and Ocean Future: An Updated Blueprint for Economic and Environmental Leadership*, FLA. COASTAL AND OCEAN COAL. 19 (Jan. 2012), <http://flcoastalandocean.org/fcoc/wp-content/uploads/2014/07/BlueprintWebVersion.pdf>.

191. See *supra* notes 155–58 and accompanying text.

192. 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.

toolkit of a local government's efforts to adapt to SLR and improve the resilience of an area without incurring liability under the Act.

ii. Existing Use or Vested Right

To result in liability under the Act, a governmental entity must impose an inordinate burden that affects an existing use or a vested right.¹⁹³

E. Existing Uses

The Act defines two “existing use[s]”: current and future.¹⁹⁴ Current “existing use” means the present use or activity, including normally associated inactivity.¹⁹⁵ Future “existing use” means the “reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses.”¹⁹⁶

A current use claim typically results from regulation prohibiting a claimant's contemporary use of its property.¹⁹⁷ 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).¹⁹⁸ In such cases, the only defense rests on whether the owner ever possessed the right to conduct the lost use.¹⁹⁹

On the other hand, future uses 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.²⁰⁰ Note that the conjunction “and” in this list indicates that all five conditions must be met for the future use to qualify as an “existing use” under the Act.

Courts have long struggled to determine reasonable foreseeability.²⁰¹ In regard to the Act, reasonably foreseeable appears to

193. FLA. STAT. § 70.001(2) (2020).

194. *Id.* § 70.001(3)(b)(1)–(2).

195. *Id.* § 70.001(3)(b)(1).

196. *Id.* § 70.001(3)(b)(2).

197. *See, e.g., Osceola County v. Best Diversified, Inc.*, 936 So. 2d 55, 59 (Fla. Dist. Ct. App. 2006) (citing *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871 (Fla. 2001)).

198. *Keshbro*, 801 So. 2d at 867–68.

199. *Id.* at 876 (finding that the plaintiff never possessed a property right to use of a hotel as a prostitution and drug house).

200. § 70.001(3)(b)(2).

201. *See, e.g., Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 355 (1928). For a discussion of the foreseeability of sea-level rise, *see James Wilkins, Is Sea Level Rise “Foreseeable”? Does It Matter?*, 26 J. LAND USE & ENVTL. L. 437 (2011).

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.²⁰² Betting that government will act to change zoning based on activity indicating this possibility does not make such rezoning either “reasonably foreseeable” or “nonspeculative.”²⁰³

In *Citrus County v. Halls River Development, Inc.*,²⁰⁴ the plaintiff purchased a property after county officials mistakenly informed him that he could build single-family residences on the property.²⁰⁵ After it became apparent that the property was not eligible for the development the county had said could be built, the county denied the plaintiff the permit necessary to build the homes.²⁰⁶ The plaintiff filed a Bert Harris claim against the county. The court denied compensation, holding that the lost use was not reasonably foreseeable in light of the existing land density and coastal lake zoning designations, which forbid such development.²⁰⁷ 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.²⁰⁸ In this case, the property owner’s belief—and subsequent purchase of the land—was based on erroneous information from the county 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 for foreseeability. In *Jacksonville v. Coffield*,²⁰⁹ the developer plaintiff entered into a contract to purchase a property with the intention to subdivide it into eight single-family home parcels.²¹⁰ Prior to the execution of the contract, the neighboring homeowners filed an application with the city to abandon and make private the only road to

202. 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., Ruppert, *supra* note 163, 247 nn.44–46 (discussing addition of “reasonable” to investment-backed expectations language in federal takings law); see also RESTATEMENT (SECOND) OF TORTS §§ 291–93 (AM. LAW INST. 1965).

203. *Boca Ctr. at Military, LLC v. City of Boca Raton*, No. 4D19-2736, So. 3d, 2021 WL 359485, at *9 (Fla. Dist. Ct. App. Feb. 3, 2021).

204. 8 So. 3d 413 (Fla. Dist. Ct. App. 2009).

205. *Id.* at 416.

206. *Id.* at 416–18.

207. *Id.* at 421.

208. *Id.*

209. 18 So. 3d 589 (Fla. Dist. Ct. App. 2009).

210. *Id.* at 591–592.

the subject property.²¹¹ After learning of the application, the plaintiff purchased the property anyway, incorrectly assuming either that the city would deny the permit,²¹² or even if approved, he would retain half of the title to the abandoned roadway.²¹³ Subsequently, the city closed the road.²¹⁴ The plaintiff sued under the theory that awarding the closure inordinately burdened his private property rights, entitling him to compensation under the Act.²¹⁵ 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.²¹⁶

Alternatively, in *Ocean Concrete Inc. v. Indian River County, Board of County Commissioners*, a concrete company owner bought a parcel of land zoned for light industrial with the intent of developing and running a concrete batch plant.²¹⁷ Shortly after the purchase, the county changed the zoning of the land from light industrial to general industrial, thus precluding the plaintiff's planned use.²¹⁸ Based on this change, the county subsequently denied the landowner's application to develop the concrete batch plant.²¹⁹ The court held that the concrete plant was an "existing use" under the Act at the time of the county's change of zoning as the court found the use *per se* compatible with the surrounding land uses based on the use being allowed under the zoning in effect at the time of purchase.²²⁰ Accordingly, the court determined that the landowner's investment-backed expectations were reasonable.²²¹ This case provides local governments notice that they are very likely to see liability under the Act if they seek to rezone a property to prohibit the use for which they knew the plaintiff purchased the property. Thus, local governments should carefully review their zoning plans to ensure that the current zoning reflects what the local government will accept for

211. *Id.* at 591.

212. *Id.* (noting 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").

213. *Id.* The plaintiff mistakenly believed he maintained an easement by necessity.

214. *Id.*

215. *Id.* at 594.

216. *Id.* at 596.

217. *Ocean Concrete Inc. v. Indian River County, Bd. of Cty. Comm'rs*, 241 So. 3d 181, 184 (Fla. Dist. Ct. App. 2018).

218. *Id.* at 185.

219. *Id.* at 184-85.

220. *Id.* at 187-88.

221. *Id.* at 190.

development. In addition, this case also makes clear that “non-speculative” *does not* relate to *economic* speculation.²²²

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 real property *and* compatible with the adjacent land uses.”²²³ The Act remains silent as to the definition of either term.

One court called on to interpret compatibility in the Act concluded that any use for which the land was zoned was *per se* “compatible.”²²⁴ As this is the only reported court case interpreting “compatible with adjacent land uses” and is at the District Court of Appeal level, it is binding precedent for all Florida trial courts at this point. However, there remains the possibility that another District Court of Appeal could engage in a more searching review of the idea of “compatible” rather than simply taking at face value the idea of “compatible” from a case that preceded the Act. “In interpreting a statute, we must primarily look to the plain language of the statute at issue. If the statute is clear and unambiguous, we need not resort to rules of statutory interpretation; rather, we give the statute ‘its plain and obvious meaning.’”²²⁵

As the Act has no definition of compatible, another District Court of Appeal might see ambiguity and engage in statutory interpretation if presented with the question of compatibility. One reason to engage in further analysis of what “compatible” means in the Act comes from its placement with the additional requirement that the use be “suitable for the subject real property.”²²⁶ It appears maybe too facile to assume that the ideas of both “compatible with adjacent land uses” and “suitable for the subject real property” are, of necessity, effectively captured by whatever the current zoning regime is.²²⁷ Rather, these sound more like substantive inquiries about the nature of the project, the nature of the property, and the environment surrounding them, both now and in the future. Courts may prefer the simplicity of a *pro forma* inquiry that merely requires looking at the zoning at the time the claim arose. But such limited inquiry belies the reality that much of today’s zoning fails to adequately account for the future impacts of SLR.

222. *Id.* at 187–88.

223. FLA. STAT. § 70.001(3)(b)(2) (2020) (emphasis added).

224. *Ocean Concrete*, 241 So. 3d 188 (citing to the holding of *Nostimo, Inc. v. City of Clearwater*, 594 So. 2d 779, 781 (Fla. Dist. Ct. App. 1992) as indicating “that use of property was compatible with surrounding or adjacent uses because it was a permitted use under the zoning code.”).

225. *Bair v. City of Clearwater*, 196 So. 3d 577, 581 (Fla. Dist. Ct. App. 2016) (internal citations omitted).

226. *See* FLA. STAT. § 70.001(3)(b)(2) (2020).

227. *Id.*

More searching inquiry into “suitable” and “compatible” might begin with statutory interpretation. Statutory interpretation generally has centered around the so-called “plain meaning” of statutory terms.²²⁸ “Some cases state that, absent express legislative definitions of terms or other similar guidance, courts presume that statutory terms carry their ordinary or common meaning or at least that ordinary meanings are not insignificant in statutory interpretation.”²²⁹ “Dictionaries have been used in construing statutory, constitutional, and common law phrases and even used to define the phrase ‘common law.’”²³⁰ The English dictionary entries for compatible and suitable read: Compatible: (of two things) able to exist or occur together without conflict.²³¹ Suitable: [r]ight or appropriate for a particular person, purpose, or situation.²³²

In 2011, the Florida Legislature added definitions of “suitability” and “compatibility” to Florida’s comprehensive planning statutes.²³³ While these definitions in Chapter 163 do not necessarily directly apply to the Bert Harris Act, these definitions also relate to land use and property as does the Bert Harris Act. Thus, it appears worth examining these definitions to see if and how they might shed light on use of the words “suitable” and “compatible” despite some potential challenges in using definitions from Chapter 163, Florida Statutes to interpret part of the Bert Harris Act in Chapter 70.²³⁴ The Florida Legislature’s 2011 definitions added to comprehensive planning statutes:

“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.²³⁵

228. Jon May, *Statutory Construction: Not For the Timid*, 30 THE CHAMPION 28 (Jan/Feb 2006).

229. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFFALO L. REV. 227, Winter 1999, at 15.

230. *Id.* at 2.

231. *Compatible*, LEXICO, <https://www.lexico.com/en/definition/compatible> (last visited Apr. 5, 2021).

232. *Suitable*, LEXICO, <https://www.lexico.com/en/definition/suitable> (last visited Apr. 5, 2021).

233. 2011 Fla. Laws 2011-139.

234. For example, another part of Chapter 70, Section 70.80, notes that “It is the express declaration of the Legislature that ss. 70.001, 70.45, and 70.51 have separate and distinct bases, objectives, applications, and processes. It is therefore the intent of the Legislature that ss. 70.001, 70.45, and 70.51 are not to be construed *in pari materia*.” FLA. STAT. § 70.80 (2020). Nonetheless, while sections 70.001, 70.45, and 70.51 involve “distinct bases, objectives, applications, and processes,” Florida Statute 70.001 and the cited sections defining “compatibility” and “suitability” all address land uses very directly, supplying a good-faith argument that they may, indeed, be interpreted *in pari materia*.

235. 2011 Fla. Laws 2011-139 (emphasis added).

“Suitability” means the degree to which the existing characteristics and limitations of land and water are *compatible* with a proposed use or development.²³⁶

Comparing these statutory definitions with the ones presented by the Oxford English Dictionary, one sees that the meanings provided for compatibility and suitability are appropriate for those terms and they do not appear to miss or undervalue the policy impulses that inspired the legislation.

Use of these definitions may 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 might 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 the statutory definition of compatibility requires that a proposed use must be “stable . . . over time” such that it is not “negatively impacted” by other conditions; SLR should be considered as one of these conditions.²³⁷ In the same vein, the dictionary definition indicates that “compatibility” means “a state in which two things are able to exist or occur together without conflict.”²³⁸

Superficially, suitability appears to present a greater challenge as part of potential defenses by local government against Bert Harris claims. Careful attention to the definitions does provide some hope here, though, for good-faith local government defenses. The English dictionary indicates that “suitable” means, the quality of being “[r]ight or appropriate for a particular person, purpose, or situation.”²³⁹ The challenge here, then, is in focusing on why a proposed activity or project of a Bert Harris claimant is not “right or appropriate” as viewed by the local government. The statutory definition might seem to present greater challenges as it specifies “*existing* characteristics and limitations.”²⁴⁰ However, the word “existing” as used previously in the Bert Harris Act includes land uses that are “reasonably foreseeable,”²⁴¹ meaning that “existing” also includes the future. SLR clearly represents a foreseeable condition for the future as it is already occurring, and the

236. *Id.* (emphasis added).

237. *Id.*

238. *Compatible*, *supra* note 231.

239. *Suitable*, *supra* note 232.

240. 2011 Fla. Laws Ch. 163 § 1 (amending FLA. STAT. § 163.3164 (2010)) (emphasis added).

241. *See supra* pt. IV.E. (discussing the future aspect of “existing use” in the Act).

scientific community is virtually unanimous in its projections that the rate of SLR is increasing now and will continue to accelerate.²⁴²

The point that “suitable” should also look to the future is further strengthened by considering that the definition of “suitability” in Florida Statutes includes that the “limitations of land and water are *compatible* with a proposed use.”²⁴³ As noted above, compatibility itself requires consideration of the stability of a use over time. With these two points in mind, it appears that “suitable” is not just about right now, but also about the future suitability, much like with the definition of “compatibility.” A local government confronted with a challenge to a land use regulation directed at adaptation to 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 physical possibility and current legal permissibility, not any subjectively held beliefs of a claimant.²⁴⁴ In addition, a claim cannot be made under the Act unless the supposedly burdened use is compatible with adjacent uses and suitable for the subject property.²⁴⁵ 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 either currently occurring or expected to occur with erosion, flooding, or other problems exacerbated by SLR. Such a defense could potentially be very powerful for local governments as the defense, if accepted by courts, would mean that there was never a protected property right that was infringed, meaning there could be no local government liability under the Bert Harris Act.

F. Vested Rights Recognized

“Vested rights,” as elucidated in the case *City of Jacksonville v. Coffield*, represents the idea that a governmental entity cannot change

242. Paul Voosen, *Seas are rising faster than ever*, SCIENCE (Nov. 18, 2020), <https://www.sciencemag.org/news/2020/11/seas-are-rising-faster-ever>.

243. 2011 Fla. Laws 2011-139.

244. This terminology is derived from the Uniform Standards of Professional Appraisal Practice, which seem appropriate given that the valuation of any claim would follow these guidelines. APPRAISAL STANDARDS BOARD, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (2010-2011 ed. 2010) (available at <http://chetrogers.com/wp-content/uploads/USPAP-Manual.pdf>).

245. FLA. STAT. § 70.001(3)(b)(2) (2020).

its mind and pull the rug out from under a claimant.²⁴⁶ 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.²⁴⁷

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.²⁴⁸ Unlike the plaintiff in *Coffield*, the plaintiff here awaited the rezoning before purchasing the property.²⁴⁹ Subsequently, the plaintiff purchased the neighboring lot and agreed to limit the use of the second lot in consideration of the town rezoning the combined property to allow thirty-nine units per square acre.²⁵⁰ However, the town later voted to rezone the property and allow no more than 2.5 units per acre.²⁵¹ 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 the plaintiff's feet by rezoning the land to deny the development.²⁵² However, *Coffield* expressly qualified this holding, by stating it should only apply in rare and exceptional circumstances where the government goes beyond mere negligence.²⁵³

Analysis of possible amendments to the Act recognized *Coffield's* holding and noted that "the theory of estoppel amounts to nothing more

246. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 597 (Fla. Dist. Ct. App. 2009).

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, whether they be in the form of words or deeds.

Id. (quoting *Equity Res. Inc. v. County of Leon*, 643 So. 2d 112 (Fla. Dist. Ct. App. 1994)).

247. *Id.* at 597 (citing *Equity Res. Inc. v. County of Leon*, 643 So. 2d 1112, 1117 (Fla. Dist. Ct. App. 1994)).

248. 309 So. 2d 571, 572 (Fla. Dist. Ct. App. 1975).

249. *Id.* In the following years, the developer purchased an additional tract of land with assurance from the town that the second tract was suitable for multiple-family development.

250. *Id.*

251. *Id.*

252. *Id.* at 573-74.

253. *City of Jacksonville v. Coffield*, 18 So. 3d 589, 598 (Fla. 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.

than an application of the rules of fair play.”²⁵⁴ 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.’”²⁵⁵

An example of “mere negligence” is the improper issuance of a permit. In *Lauderdale-by-the-Sea v. Meretsky*,²⁵⁶ the town mistakenly issued a building permit which violated the law and thus exceeded the town’s authority.²⁵⁷ 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.²⁵⁸ The plaintiff could not estop the town from enforcing its ordinances and revoking the permit.²⁵⁹

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. Village of Wellington*,²⁶⁰ 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.²⁶¹ The court found the plaintiff had purchased the land subject to this bargained-for limitation.²⁶² 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

254. Bill Analysis and Fiscal Impact Statement, Bill CS/SB 998, at 4 (Mar. 8, 2011) (citing *Equity Resources*, 643 So. 2d at 1119–20).

255. *Id.* (internal citations omitted); see also *Town of Ponce Inlet v. Pacetta, LLC*, 120 So. 3d 27 (Fla. Dist. Ct. App. 2013) (holding that developers did not have a vested right, by virtue of equitable estoppel, to develop their properties as contemplated while the town considered, but ultimately rejected, a mixed-use development plan).

256. 773 So. 2d 1245 (Fla. Dist. Ct. App. 2000).

257. *Id.* at 1249. The court stated:

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 thereunder. However, when there is no authority to grant the building permit, the governmental entity cannot be estopped from revoking the permit.

Id. (internal citations omitted).

258. *Id.* at 1248.

259. *Id.*

260. *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988, 990 (Fla. Dist. Ct. App. 2006).

261. *Id.* at 993.

262. *Id.*

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.²⁶³ Thus, the new owner never possessed the asserted property right as a basis for a claim.

1. *The Time Aspect of an Impact on a Property Right*

The Bert Harris Act originally specified that a claim will lie where a claimant is “permanently unable to attain the reasonable, investment-backed expectation for the . . . property.”²⁶⁴ 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.²⁶⁵ In 2011 an amendment to the act indicated that temporary impacts lasting more than one year may, depending on the circumstances, constitute an inordinate burden.²⁶⁶ Thus, any enactment that prevents construction for more than one year may support a claim under the Act.

V. CONCLUSION

SLR is happening, and so are the impacts. As bad as the flooding and other impacts may already be for some coastal communities, the future will bring far more severe impacts and challenges. Local governments bear the brunt of these impacts. Based on case law, local governments historically often believed that the best way to avoid legal liability concerns based on property rights claims—whether under constitutional or statutory property protections—was through minimizing regulations to which private properties were subject. In other words, local governments had learned that property rights liability

263. *Id.* at 997.

Whether there is a taking of Big Blue property requires a consideration of what occurred when the PUD was originally developed on the 7400 acres of Wellington in 1972. It was at that time that the owners bargained for development of vast sections at higher densities in return for preservation of Big Blue. This was an agreed restriction, compensated by the transfer of development rights to other property. No taking has occurred.

Id.

264. FLA. STAT. § 70.001(3)(e)(1) (2020).

265. Sayfie & Weaver, *supra* note 8 (referencing *Wollard v. Monroe County*, BH-97-44-0 (Fla. ___ 1997)).

266. 2011 Fla. Laws Ch. 191 § 1 (amending FLA. STAT. § 70.001 (2010)).

came from not allowing property owners to develop as they wished. Now, as SLR begins to overwhelm drainage systems, increase erosion, exacerbate storm surge, and flood streets, a plethora of new potential property rights liabilities have arisen. Future liability for past development decisions can be significant,²⁶⁷ and they will likely grow even greater as more flooding and more impacts to drainage, roads, and other infrastructure serving at-risk properties increases. The unprecedented future we face calls for local governments to take a proactive stance to ensure that today's and tomorrow's development activities that they permit do not add to the mistakes of the past even as local governments seek to address past actions that may fuel future liability. The Bert Harris Act can make it more difficult for local governments to change their ways and prevent additional building and development that will be at risk in the future due to SLR and its impacts.

Still, local governments with good information on erosion, flooding, storm surge, and SLR impacts have options for addressing these impacts 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 the potential that good-faith arguments exist for not finding a local government liable under the Act if land may be subject to erosion, flooding, surge, or SLR.

Local governments may also seek to use tools that may fall outside the domain of "direct impacts" directly limiting the use of property but that do make use or development of the property more expensive and less desirable, thus resulting in secondary impacts to property value. These tools might include financial regulations affecting insurance on buildings along Florida's coast, developing special benefit areas for hazardous or erosion-prone coastal areas or areas requiring inordinately expensive infrastructure for protection or service, or developing mandatory bond requirements for coastal construction in specific areas. While such regulatory efforts offer no guarantee of avoiding liability under the Act, local governments do have strong arguments that they should not lead to liability.²⁶⁸

In addition, local governments should not risk liability under the Bert Harris Act for any actions or decisions involving "operation,

267. Ruppert, *Castles—and Roads—in the Sand*, *supra* note 24.

268. *See supra* text accompanying notes 163–64.

maintenance, or expansion of transportation facilities.”²⁶⁹ Nor should local governments be subject to Bert Harris Act liability for “any actions taken by a county with respect to the adoption of a Flood Insurance Rate Map issued by [FEMA] for the purpose of participating in the National Flood Insurance Program, unless such adoption incorrectly applies an aspect of the Flood Insurance Rate Map to the property in such a way as to, but not limited to, incorrectly assess the elevation of the property.”²⁷⁰

The Act’s central terminology of “inordinate burden” remains difficult to assess as the term lacks clarity in the case law. Case law does clearly indicate that local governments risk liability under Bert Harris when local governments make last-minute zoning changes to avert planned development activities for which property was zoned when purchased or acquired. This also means that local governments should carefully review their zoning plans *now* to ensure that the current zoning reflects what the local government will accept for development.

Courageous and proactive governments seeking to limit their legal and financial liabilities due to rising seas need to carefully develop ordinances to push the envelope in addressing the future of SLR—and climate change—impacts in coastal areas despite the risks presented by the Bert Harris Act. Failure of local governments to boldly look towards the future and take steps now will, in the long run, likely result in even greater losses to local governments and property owners.

269. FLA. STAT. § 70.001(10)(a) (2020). *See also supra* text accompanying notes 139–42.

270. FLA. STAT. § 70.001(10)(b) (2020).