HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 113 w/CS Private Property Rights
SPONSOR(S): Kottkamp
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Affairs (Sub)	8 Y, 1 N	Grayson	Highsmith-Smith
2) Local Government & Veterans' Affairs	13 Y, 0 N w/CS	Grayson	Highsmith-Smith
3) State Administration			
4) Judiciary			
5) Transportation & Economic Development App. (Sub)			
6) Appropriations			

SUMMARY ANALYSIS

This bill w/ CS amends the Bert J. Harris, Jr., Private Property Rights Act's (*Harris* Act) definition of "action of a governmental entity" to exclude actions to enforce compliance with uniform laws enacted or regulations adopted to protect public safety, such as building codes and fire codes. Additionally, excluded are actions involving the construction, expansion, or maintenance of capital facilities. The bill w/ CS provides that the application of a governmental action affecting real property, not the enactment or adoption of a regulation, serves as the precedent for a Harris Act claim.

The bill w/ CS deletes the term "ripeness" when describing the written decision that governmental entities are required to issue during the 180 day notice period. The bill provides that the failure to issue a written decision during the 180-day period causes the prior governmental action to become its final decision identifying the allowable uses for the subject property.

The bill w/ CS provides a prospective waiver of sovereign immunity for purposes of the Act. The bill w/ CS provides an effective date of January 1, 2004. The bill also requires written claims to be filed with the state land planning agency rather than the Department of Legal Affairs.

The fiscal impact of the bill is indeterminate.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[X]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[X]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[]	N/A[X]
5. Empower families?	Yes[]	No[]	N/A[X]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

This bill w/ CS amends the Bert J. Harris, Jr., Private Property Rights Act's (Harris Act) definition of "action of a governmental entity" to exclude actions to enforce compliance with uniform laws enacted or regulations adopted to protect public safety, such as building codes and fire codes. Additionally, excluded are actions involving the construction, expansion, or maintenance of capital facilities. The bill w/ CS provides that the application of a governmental action affecting real property, not the enactment or adoption of a regulation, serves as the precedent for a Harris Act claim.

The bill w/ CS deletes the term "ripeness" when describing the written decision that governmental entities are required to issue during the 180 day notice period. The bill w/ CS provides that the failure to issue a written decision during the 180-day period causes the prior governmental action to become its final decision identifying the allowable uses for the subject property.

The bill w/ CS provides that the final decision of a governmental entity or entities, whether by issuance of a written decision or by failure to issue a written decision, constitutes the last prerequisite to judicial review, as a matter of law.

The bill w/ CS provides a prospective waiver of sovereign immunity for purposes of the Act. The bill w/ CS provides an effective date of January 1, 2004. The bill also requires written claims to be filed with the state land planning agency rather than the Department of Legal Affairs.

The effects of the proposed changes are to allow parties claiming loss or injury under the Harris Act to seek recovery or redress through the courts impacting ultimately local governments. If the court ruled in favor of the claimant, local governments would be bound to pay claims representing the amounts the court determined the injured party lost.

Background – Bert J. Harris Private Property Rights Act

The Bert J. Harris, Jr., Private Property Rights Protection Act (*Harris* Act), s. 70.001, F.S., was enacted in 1995, ch. 95-181, L.O.F. The Harris Act created a cause of action providing for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state enacted after May 11, 1995, as applied, unfairly affects real property. This cause of action was intended as a separate and distinct cause of action from the laws of taking under the State Constitution and the United States Constitution.

Since the enactment, only two cases have been reported and one Attorney General's Opinion was issued.

In 2000, the Fourth District Court of Appeals found that a property owner failed to comply with the prerequisites for relief by failing to present the city an appraisal supporting his claim and by not timely presenting his claim to the city prior to filing his action[1]. The Fifth District Court of Appeals found that it lacked jurisdiction over an interlocutory appeal[2]. The Attorney General opined that the *Harris* Act does not provide for recovery of damages that are not the subject of governmental action or regulation, but where property may have incidentally suffered a diminution in value or other loss as a result of the regulation of the property.[3]

Background – *Royal World Metropolitan, Inc., v. City of Miami Beach*

According to a representative of the Office of the City Attorney of the City of Miami Beach[4], the facts of this matter are that a property owner of a parcel on Collins Avenue and about 57th Street had a permit to construct a 33 story condominium. Subsequent to obtaining the permit, the economy changed and the property owner received a new permit to construct an apartment building of approximately 27 to 30 floors. Then no construction on the property followed and the permit expired. Some two years later, the City of Miami Beach enacted three city-wide zoning ordinances. These ordinances established new height and density restrictions for development in the area which included the property owner's property.

The property owners, Royal World Metropolitan, Inc. and BCOM, Inc./Royal World, instituted an action for inverse condemnation against the City of Miami Beach. In their complaint, the property owners claimed that the City had violated the *Harris* Act by inordinately burdening their vested rights to construct the site as they had planned.[5]

The Circuit Judge issued an order granting the City's motion for partial summary judgment on July 18, 2002. Additionally, the Judge issued an order denying the property owners' motion for rehearing on October 24, 2002. The essence of those decisions is the Judge's determination on the issue of whether the property owners are entitled to compensation under the *Harris* Act. The Judge found that the ordinances were enacted "pursuant to basic governmental functions performed by the legislative...branch" and were considered inherent acts of governing. As such, the Judge found that as a matter of law, the defense of sovereign immunity acts as a shield against liability for the legislative or quasi-legislative acts of municipalities.[6] The Judge also held in the Order Denying Motion for Rehearing that the exercise of the power by a municipality to grant or refuse a building permit or license is a purely governmental function. That "[t]here has never been, and is presently not tort liability imposed for peculiarly governmental functions such as permitting. Like legislative acts or functions, governmental acts or functions are immune from liability." (citations omitted) Finally, "[a]ll commentary with regard to the *Harris* Act specifically advises that with the passage of the Act, sovereign immunity still remains effective and serves as a viable defense against liability."[7]

C. SECTION DIRECTORY:

Section 1. Amends the Bert J. Harris, Jr., Private Property Rights Act, ss. 70.001(3)(d), (4)(b), (5)(a), (11) and (13), F.S.

Section 2. Provides an effective date of January 1, 2004.

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1 *Sosa v. City of West Palm Beach*, 762 So.2d 981 (4th DCA Fla. 2000).
2 *Osceola County v. Best Diversified, Inc.*, 830 So.2d 139 (5th DCA Fla. 2002).
3 Op.Atty.Gen, 95-78, Dec. 7, 1995.
4 Robert Dixon, Deputy City Attorney, City of Miami Beach, 2/5/03.
5 *Royal World Metropolitan, Inc. v. City of Miami Beach*, 11th Judicial Circuit, Miami-Dade County, Case. No. 99-17243-CA-23.
6 *Id*. Order Granting Motion for Partial Summary Judgment, issued July 18, 2002.
7 *Id*. Order Denying Motion for Rehearing, issued October 24, 2002.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill could expose the state to claims based upon its adoption of any regulation that alters the density, intensity, or use of real property.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The fiscal impacts of this bill are indeterminate since the bill w/ CS is intended only to clarify the applicability of the Bert J. Harris Private Property Rights Protection Act.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a city or county to expend funds or to take any action requiring the expenditure of funds.

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

This bill does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

There do not appear to be any technical drafting issues.

Other Comments

The following Other Comments were received prior to the bill being heard by the Local Affairs Subcommittee. Retention of these Other Comments in this Analysis is for their historical value and to better understand how the bill has evolved thus far during the Legislative process. As a result of substantial amendments to the bill as introduced, these comments may or may not represent the present positions of those commenting.

Proponents

A representative of proponents of the bill[8] provided information regarding the bill as introduced and the amendments proposed to be heard by the Local Affairs Subcommittee.

> The Bert J. Harris, Jr., Private Property Rights Protection Act, s. 70.001, F. S., was enacted in 1995 to protect private property owners from having their property "inordinately burdened" by governmental regulations. The Harris Act creates an expeditious process for resolving land use disputes between government and private property owners. While the Act has effectively moderated regulation of private property, a few remaining issues require legislative clarification:
>
> A. Ripeness [subsection (5)(a)]
>
> Some critics of the Harris Act have attacked the requirement that governments issue a "written ripeness decision" as a legislative encroachment into the judiciary's domain to determine when a party has exhausted its administrative remedies and a case is "ripe" for judicial review. The Legislature has the authority, however, to create causes of action and to determine when the elements have been established for bringing a legal action. Requiring the written decision -- which identifies the allowable uses to which the property may be put -- provides the courts with the same information for which the ripeness doctrine was created, but in a more timely and efficient manner, and assists the courts by providing them with the information needed to adjudicate Harris Act claims. The proposed amendments eliminate the perception that the Legislature is encroaching on the judicial function by eliminating the term "ripeness," but continues to require governmental entities to issue a written decision that will form a basis for the subsequent filing of the Harris Act claim in circuit court.
>
> B. Statute of Limitations [subsection (11)]
>
> The Harris Act is intended to allow challenges to governmental action "as applied" to a property owner's land. There has been confusion as to whether the short, one-year Harris Act statute of limitations is triggered when a regulation is adopted or a law is enacted. The proposed amendments provide much-needed certainty as to when the limitations period begins to run by specifying that adoption of a regulation or enactment of a law do not constitute "applying" the regulation or law for the purposes of triggering the statute of limitations.
>
> C. Sovereign Immunity [subsection (13)]
>
> The original intent of the "sovereign immunity" language was to assure that unintended waivers of sovereign immunity did not result incidentally from the operation of the Harris Act. The original language is vague, however, and has been construed by a circuit court judge to prevent all claims for money damages against local governments, which is one of the core purposes of the Harris Act. *See Royal World Metropolitan, Inc. v. City of Miami Beach*, Miami-Dade Co. Cir. Court No.99-17243-CA23. The bill with the amendments clarifies the Legislature's original intent, PROSPECTIVELY ONLY (not retroactive to the initial adoption of the Harris Act), that

[8] Wade Hopping, Esq., Hopping Green & Sams, 3/21/03.

sovereign immunity is expressly waived by the Harris Act, but only to the extent specified in the Harris Act. This language is modeled on other statutory sovereign immunity waivers.

Opponents (To the Bill as Introduced and the Amendments Proposed to be Heard by the Local Affairs Subcommittee)

Opponent - Florida League of Cities (FLC)[9]

FLC - Ripeness

The proposed ripeness amendment does far more than merely clarify the intent and purpose of the ripeness decision requirement. Elimination of the term "ripeness" weakens the intended effect of advising the court that the process was designed to qualify under the court's ripeness doctrine. While the present language in the Act is not a model of clarity, the proposed changes are far worse.

The new language has the effect of converting a decision to deny a specific application into a "final decision identifying the allowable uses for the subject property." A decision on a specific application does not identify all of the allowable uses for the subject property, it only renders a decision as to the specific use that is proposed.

A better approach is to find some mechanism that would force the local government to issue the ripeness decision rather than have its failure to do so undermine the Act. The existing provisions as well as the bill language both leave the court with no real resolution of the ripeness doctrine and make the "shall be deemed ripe or final for purposes of the judicial review proceeding created by this section" language an unconstitutional invasion of the judicial domain. The League is aware of no cases in which a local government has not been timely in issuance of a ripeness decision.

The League proposes the following change to SB 1164 on page 2 line 13, through page 3 line 3: Strike all of said lines and insert:

5)(a) During the 180-day-notice period, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph 4(a) shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the 180-day-notice period shall ~~be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner~~ serve to ripen an appropriate action to compel a decision on the application. Attorneys' fees shall be due and owing for the prevailing party in such an action. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

FLC - Sovereign Immunity

Unfortunately, the "limited purposes of the Act" are not so limited when you waive sovereign immunity altogether. The doctrine of sovereign immunity provides traditional immunity from liability for governmental acts for which there is not a private counterpart (building permits, decisions on whether to place a traffic light, decisions on whether to close a median, decisions on whether to widen a traffic lane). The bill's elimination of sovereign immunity for "all actions of a governmental entity" opens up all of those areas of traditional immunity to actions under the Harris Act. Such a broad basis of liability was never the intent of the Legislature in adopting the Harris Act. The original intent of the sovereign immunity sentence in the Harris Act was to preserve traditional governmental immunities. The sweeping change proposed by the bill

[9] Rebecca O'Hara, Assistant General Counsel, Florida League of Cities, 3/12/03.

effectively eviscerates sovereign immunity statutes, which implicates single subject concerns, as well as runs afoul of the mandates provisions of the Florida Constitution. In sum, the bill goes too far .

The League proposes the following change to the Act, which would preserve the traditional immunities of government while giving meaning to the rest of the Act.

On page 1 line 27 insert the following language:

> Section 1. Paragraph (d) of subsection (3), of section 70.001, Florida Statutes is amended to read:
>
> (3)(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit. The term does not include inaction or actions to enforce compliance with the law or the authority to protect the public safety, including, but not limited to: building inspections, fire department inspections, health inspections, elevator inspections, hotel inspections or environmental inspections. In addition, the term does not include inaction or actions involving the building, expansion or modernization of capital improvements such as buildings and roads, including but not limited to, traffic control decisions.

FLC – Retroactivity Amendment

On page 3, Lines 17-18, strike the following sentence:

> This subsection applies retroactively to May 11, 1995.

FLC – Density or Intensity Increases

The Harris Act was never intended to create a cause of action for a property owner that applies for an increase in allowable density or intensity of use (e.g., the local government has taken no "action;" it is the property owner who seeks to change the existing regulatory scheme). The amendment adds language to the statute in order to clarify this intent.

On page 3 line 20 insert the following language:

> (14) A cause of action may not be commenced under this section for any denial of an application for an increase in allowable density or intensity of use.

FLC – Statute of Limitations

Subparagraph 11 of the Harris Act provides that a cause of action may not be commenced under the Act if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue. In short, the Act establishes a one year statute of limitations upon Harris Act claims. The bill proposes to amend this subparagraph by adding a second sentence which states: enacting a law or adopting a regulation does not constitute applying the law or regulation to a property. This amendment has the effect of allowing a property owner to wait for an indefinite period after a local government has changed a regulation - 5, 10, 20 years - before bringing a claim. This is fundamentally unfair. There needs to be some kind of timeframe in which a property owner must act in order to preserve a Harris Act claim. A property owner should not be able to sit on his or her rights indefinitely and then claim the benefits of the Harris Act. The League recommends striking the proposed new language. In the alternative, the Act must be amended to specifically state a definite time period in which a property owner must apply for a permit after a regulation is enacted in order to preserve its ability to assert a Harris Act claim (example: 5 years after the regulation is

enacted). A third alternative would be to expressly state in the Act that the defense of laches may bar claims under the Act if a property owner does not act within a specified period of time after a regulation is enacted.

On page 3, Lines 7 through 9, strike the following language:

> Enacting a law or adopting a regulation does not constitute applying the law or regulation to a property.

Opponents – Various Municipalities

The following comments were received from municipalities and provided by the Florida League of Cities.[10]

City of South Daytona and City of Holly Hill[11]

I am the City Attorney for the City of South Daytona and City of Holly Hill and in that capacity I have reviewed the proposed legislative amendment to the Bert J, Harris Act.

The one item I question is the change to the definition of ”action of governmental entity". First, I do not see how this amendment addresses any of the concerns raised in the cover memo. Secondly I have always viewed the Harris Act as being applicable when a governmental entity took action with respect to the specific parcel of property. However this proposed language would make the Act applicable any time a regulation alters the density, intensity or use of real property. Would the Act now be applicable to Comprehensive Land Use Changes, changes in subdivision regulations, stormwater management regulations. changes in parking regulations, changes in minimum lot site requirements, changes in set back/buffering requirements and changes in the maximum impervious surface regulations. These are only some of the issues that I thought of when reviewing the proposed amendment. I am sure that there are more areas of potential impact.

The intent and purpose of this Act is clearly set forth in the beginning of the Chapter. This Act was intended to provide compensation when there was not a taking of the someone's property interest under the Constitution, but the property owner was inordinately burdened by the governmental regulation. In my opinion it was not the intent of the law to provide compensation to property owners every time the governmental entity adopts a regulation that a minimal impact of the property. [*sic*] I believe the property amendment to the definition of “action of a governmental entity" is too broad would encompass many regulations that governmental entities adopt as part of governing that were never intended by the Legislature.

City of Hialeah[12]

I reviewed the proposed changes to the Harris Act. The accompanying text was so offensive that it was difficult to consider these changes. First, the proposed changes only relate to fixing "glitches" that would strengthen the developer or private property owner's claims or rights without even reviewing or clarifying language that would benefit local governments or the process generally. The text is blatantly hostile to, local governments, accusing governments of denying every claim, dilatory tactics, and acting in bad faith.

While I defer to the comments that you may receive from cities, such as Miami Beach, that have extensive experience with the Harris Act, I would object to the waiver of sovereign immunity

[10] Rebecca O’Hara, Assistant General Counsel, Florida League of Cities, 2/19/03.
[11] Scott E. Simpson, Esq., Korey, Sweet, McKinnon, Simpson & Vukelja, letter to Rebecca O’Hara, 2/10/03.
[12] William M. Grodnick, City Attorney, City of Hialeah, letter to Rebecca O’Hara, 2/10/03.

provision and its retroactive application to May 11, 1995. In addition, I object to the proposed change describing actionable government conduct as that which "alters the density, intensity or use of the owner's property" as being overly broad and unfairly exposing local governments to separate Harris Act claims on all zoning decisions. This diminishes appellate review and the competent substantial evidence standard that governments must follow in support of its quasi-judicial zoning decisions.

If the Florida Legislature intends to revisit the Harris Act, then there should be a more even-handed systematic way of addressing all the issues that have been raised during its eight years, not just address "glitches" that impede developers or property owners.

City of South Pasadena[13]

It was not clear from your fax who is proposing the amendments to the Harris Act. In any case, thank you for the draft copy of proposed amendments and for the opportunity to comment. Although the explanation of the proposed changes states that these glitch amendments are necessary in order to carry out the original intent of the act, the amendments seem to expand the Act to include much more speculative claims.

The proposal to amend 70.001(3)(d) to expand the definition of "action of a government entity" to include adopting any regulation that alters the density, intensity or use represents a major change to the intent of the original legislation. In the original Act the Legislature clearly uses the words '"as applied" in Section 1 and throughout the Act. By adding the proposed language the prerequisite of the government having applied a new regulation to an existing use in a manner that causes an inordinate burden would be eliminated. I don't think it was the intent of the Legislature to allow every property owner in the City to use the Bert Harris Act to challenge legislative land use policies adopted by local government. I clearly see the original Act as pertaining to situations in which quasi-judicial decisions of local government have had a specific and defined impact on a property owner and that impact is an inordinate burden. South Pasadena's comprehensive plan contains a policy that requires the City Commission to consider the private property rights of existing uses and vested rights and to take no action that inordinately burdens property unless it is prepared to pay compensation. I believe the City Commission should have a petition before it, either for permission to develop or for a variance from a land use regulation and should be given the opportunity to apply its regulation before being subject to a claim under the Act. In order to determine if property is inordinately burdened the specific facts regarding that parcel should be before the Commission. It is possible that a citywide ordinance reducing density will inadvertently create an inordinate burden on some unique piece of property, but the property owner should have to formally put these facts before the Commission in some type of request for a variance or permit not merely file suit when the ordinance is adopted. I strongly disagree with the statement in the explanation that states. "The proposed amendment will ;prevent local governments from abusing the land use 8Ineniimeat process and forcing landowner~ to inc\!r 1wed1ess costs in submitting development applications for the sole purpose of receiving a denial" There are many cases m which the government does not issue a denial 8.00 there is no need for litigation. By including a comprehensive plan policy that requires the Commission to recognize the Bert Harris Act and consider the vested rights of property owners in making land use decisions South Pasadena has attempted to balance the equities in the application of its land use regulations.

Once you expand the Act to allow a cause of action upon the adoption of a legislative policy change, rather than limiting it to cases in which legislation has actually been applied, you create the need to amend section 5(8) regarding the 180.day notice period. I am not sure that I follow the proposed language. If the government reduces density in all multifamily districts how will that adoption constitute the final decision of the government regarding allowable uses on a

[13] Linda, Hallas, City Attorney, City of South Pasadena, Letter to Rebecca O'Hara, 1/22/03.

particular site? South Pasadena has many uses that require a special exception use permits. Without an application and an examination of the particular facts it is impossible to prepare a list of permitted uses.

Likewise with the proposed amendments to section 11(b), if the potential pool of plaintiffs were not expanded beyond those who have been affected by the application of government regulation section 11(b) would not need to be amended. Allowing the government to start the statute of limitations by giving act1Jal notice of ordinance adoption will ultimately reduce the number of legitima1e clah11S that might otherwise be entitled to relief under the Act. I know I will advise my City Commission to give actual notice of density reduction land use regulations in order to start the statute of limitations and thereby avoid potential future claims. After the one-year runs the City Commission need not consider whether the impact of' the change in regula1ions has resulted in an inordinate burden. This 1 believe would be contrary to the original intent of the Act.

With regard to the proposed changes to (1j) dealing with waiving sovereign immunity 1 am concerned that the option of whether to pay compensation or allow more development needs to remain with the local government once it has ~ determined that an inordinate burden exists.

Pinellas County[14]

I have reviewed the draft legislation and provide the following comments:

I would differ from the commentary in. that:

1. The commentary refers to the Bert J. Harris Jr. Private Property Rights Act {Fla. Stat. Section 70.001; the "Act") a public process for expeditiously resolving land use disputes. It is not such a process. The author is confusing the Act with 18 Florida Land Use and Environmental Dispute Resolution Act. (F1a. Stat. Section 70.051).

The Act created a cause of action, probably in tort, for owners who think their property is "inordinately burdened" by an action of government. It is litigation that should be as aggressively defended. It is aggressively prosecuted. It is especially important in the initial litigation under a new cause of action to leek guidance from the court on the meanings of words in the Act and the scope of its coverage. As would be expected with new and untied legislation, the bulk of the litigation to date has been to refine what is and is not covered by the Act.

2. Many of the actions brought under the Act have been outside the scope of the Act. Local government challenges to such litigation should not be criticized as the use of dilatory litigation tactics. They are more often than not, good faith defenses to the filing of actions that are not covered by the Act. These defenses are designed to prevent the need for two suits as denounced in the drafter's discussion of the statute of limitation. Defenses by local government against efforts to expand or redefine the Act are not bad faith litigation.

A. Ripeness The proposed ripeness amendments do far more than merely clarify the intent and purpose of the ripeness decisions requirement. Elimination of the term "ripeness" weakens the intended effect of advising the court that the process was designed to qualify under the court's ripeness doctrine. The proposed changes are worse than the present language. The changes have the effect of making a decision to deny an application, say for a multi-story apartment building, and converting that decision into a "final decision identifying the allowable uses for the subject property" which, of course, it does not do. The existing language is not much better. The better approach would be to find some mechanism to force the local government to issue the ripeness decision rather than have their failure undermine the Act. The

[14] James L. Bennett, Chief Assistant County Attorney, Pinellas County, memorandum to Rebecca O'Hara, 1/21/03.

existing provisions as well as the proposed resolution both leave the count with no real resolution of the ripeness doctrine and make the "shall be deemed ripe or final for the purposes of the judicial proceeding created by this section" language an unconstitutional invasion of the judicial domain. I am aware of no cases where a local government has not been timely in issuance of a ripeness decision.

[The changes proposed in s. 5(a),] force a decision that will be honored by the courts as being consistent with their ripeness doctrine. See both Taylor v. Village of North Palm Beach, 659 So.2d 1167, 1173 (Fla. App, 4 Dist., 1995) and City of Riviera Beach v. Shillingburg, 659 So.2d 1174, 1182 (Fla. App.4 Dist. 1995), in which the .4th District identified the Harris Act's ripeness provisions as having "altered the ripeness requirement." The 4th District's citation to the Harris Act's identification of the "permissible uses to which the subject property may be put" may signal that court's willingness to accept a more disciplined approach to review of ripeness issues that doesn't invade the court's domain.

B. Statute of Limitations I am at a loss to understand the drafter's complaint. The language in the Act was carefully designed to provide a clear point of entry around a defined case or controversy so as to align with court doctrine. Only this approach will trigger a court's jurisdiction The Royal World case is an example of what the court will require anyway unless a futility argument can be made.

As was recently done by the 2nd DCA in the Best Diversified vs. Osceola County case, the court will reject any attempt by the legislature to preempt its control over jurisdiction. The proposed language invades the court's case or controversy jurisdiction and will probably be rejected as an attempt to evade the court's ripeness/exhaustion of remedies doctrines.

C. Sovereign Immunity Unfortunately, "'the limited purposes of the Act are not so limited when you waive sovereign immunity, i.e. traditional immunity for acts for which there is no private counterpart (building permits, decisions on whether to place a traffic light, decisions on whether to close a median, decisions on whether to widen a traffic lane) become an "action of a governmental entity." The proposed language opens all those areas and much more to actions under the Act. Such a broad basis for liability was never the intent of the legislature and is effectively an evisceration of the sovereign immunity statutes that would violate the single subject rule and certainly open the amendments to the mandates provisions of the constitution. The original purpose of the drafter of the language, this writer, was to preserve those traditional immunities. The more limited interpretation is consistent with the traditional conservative view on interpreting waivers of sovereign immunity while at the same time giving meaning to the rest of the Act. A further interpretation would be that the Bert Harris Act creates a statutory tort and the language was to preserve sovereign immunity caps on liability while still preserving the claims bill route for damages that exceed the caps. Yes the court's decision went too far but the proposed language goes just as far the other way. The proposed solution is far too simplistic.

City of Margate[15]

While I am obviously not particularly enamored with the proposed Harris Act amendments, I believe that Section (5)(b) starting on line 7 of page 3 is particularly damaging to local governments. This provides an unexploded time bomb waiting to go off against the treasury of local government. This clearly encourages lack of attention and procrastination on the part of every property owner. It emasculates F.S. 125.66{4) (b) and its counterpart in F.S. 166.041(3)(c)(2).

[15] Eugene M. Steinfeld, City Attorney, City of Margate, letter to Rebecca O'Hara, 1/21/03.

While, of course, I am in opposition to subparagraph 13. starting on line 3 of page 4, when that paragraph is combined with (5)(b) starting on line 7, it amounts to an unfunded mandate for which local governments simply can not plan.

The above will further discourage innovative land use tools, zoning ordinances, and other regulations to protect and upgrade our residences and bring business into our communities. However, I suspect this is its real purpose.

City of Boca Raton[16]

1. Section 70.001(3)(d)

Although it is unclear under the current statute whether the "adoption of [a] regulation" (new language) is a "specific action" which "affects real property" (existing language). Some cities (and commentators) have taken the position a downzoning does not trigger the Act; only an application for a permit (a "specific" action) (which would be, under such circumstances), inconsistent with the downzoning triggers the Act. If their argument is correct, then this should be opposed, since it would create new exposure for downzoning.

Although this should be opposed, the rationale for the opposition may be problematic because (i) a downzoning would seem to be one of the things the law was intended to address (admittedly, I have not had time to review the legislative record, but I doubt it is persuasive); and (ii) as the supporting analysis mentions, what sense does it make to require the owner to submit a detailed permit application which is inconsistent with the downzoning? (other than to create procedural hurdles for the owner (from the city perspective).

If this language cannot be removed, perhaps it can be clarified as follows: "any regulation the changes the density, intensity, map designation, or actual list of permitted, conditional or prohibited uses..." The "actual list" language comes from Sex. 166.041(3)(c)2.

2. Section 70.001(5)(a)

I would oppose these amendments, which would place the burden of identifying alternative development proposals on the local government, and thus eliminate one of the defenses to a Harris Act claim.

3. Section 70.001(11)(b)

This subsection should be amended to end after "law or regulation." See note 1; the language prior to these two words should be consistent with Note 1 (if the text discussed in Note 1 is removed, this should be removed).

I would oppose the remainder in any case: (1) very few "actual notices" are provided, and (2) a Harris Act claim would be brought in all other cases long after the adoption of the regulation, which the amendments discussed under Note 1 would provide "affect real property."

Also, please note there is no citation for municipal regulation in the text to be deleted (If this text is not deleted, such citation should be added).

4. Section 70.001(11)(c)

See note 1; this is same text as discussed in note 1.

[16] John O. McKirchy, Senior Assistant City Attorney, City of Boca Raton, letter to Rebecca O'Hara, 1/30/03.

5. Section 70.001(13)

This should be opposed. This opposition notwithstanding, however, it is uncertain how the Harris Act can be reconciled with the Miami Beach decision under current language of the state. Naturally, I would prefer the law be repealed. Short of this, however, the law either provides for damages or it doesn't. If it doesn't provide for damages, what was all the hand wringing the last 7 years about? If it does provide for damages, then isn't waiver of sovereign immunity implicated?

Miami-Dade League of Cities, Inc.[17]

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE MIAMI-DADE LEAGUE OF CITIES, INC., FLORIDA EXPRESSING OPPOSITION TO SENATE BILL 1164 AND HOUSE BILL 113 WHICH SET FORTH AMENDMENTS TO THE BERT J. HARRIS, JR. ACT AND ANY AND ALL OTHER PROPOSED AMENDMENTS THAT WOULD SUBJECT LOCAL AND STATE GOVERNMENTS TO FURTHER LIABILITY FOR THE CONSTITUTIONAL EXERCISE OF THEIR LEGISLATIVE AND QUASI-JUDICIAL RESPONSIBILITIES AND POWERS; TRANSMITTING THE RESOLUTION TO THE PRESIDENT OF THE SENATE, SPEAKER OF THE HOUSE AND GOVERNOR; SETTING AN EFFECTIVE DATE.

WHEREAS, the Bert I. Harris, II. Private Property Rights Protection Act (Harris Act'), as codified in Section 70.001 of the Florida Statutes, was enacted in 1995 to provide a limited remedy for property owners when their property has been "inordinately burdened" by the action of a governmental entity, and

WHEREAS, in the eight years since the enactment of the Harris Act, there have been over 258 claims asserted against local governments in Florida; and

WHEREAS, despite its various constitutional infirmities relating to, *inter alia*, its failure to define "inordinate burden" and "reasonable, investment-backed expectations;" the automatic ripeness provisions that appear to violate separation of powers doctrine; and the uncertainties inherent in its attempt to create a statute of limitations period; the Act nonetheless provided in clear language that it does "not affect the sovereign immunity of government"; and

WHEREAS, on July 18, 2002, a case affecting one of the cities of Florida, namely Royal/ World Metropolitan, Inc. v. City of Miami Beach, II Judicial Court Case No.99-17243 {Royal World), resulted in a favorable summary judgment for the City which determined that the doctrine of sovereign immunity protects the City from liability for damages under the Harris Act and said case has been appealed and is pending in the Third District Court of Appeal as of the commencement of the 2003 Session of the Florida Legislature; and

WHEREAS. the legislation proposed via Senate Bill 1164 and House Bill 113. if constitutional, in part seeks to nullify the effect of the Royal World decision and adversely affect the ad valorem. taxpaying public of Florida in as many as 258 other claims pending statewide, by not only amending the Harris Act to provide for a total waiver of sovereign immunity for government. but providing that such waiver is retroactive to May 11, 1995; and

WHEREAS. the economic impact of amending the Harris Act as proposed and making it retroactive for eight (8) years would be devastating for the State and for local governments statewide; and

[17] Resolution 2003-3A, March 6, 2003.

WHEREAS, for example. the potential economic effect of eliminating sovereign immunity in the City of Miami Beach is reflected by the amounts claimed in its pending eight Harris Act cases which total 524,817,75, exclusive of interest, attorney's fees. and court costs; and

WHEREAS, the amendments proposed in Senate Bill 1164 and House Bill 113 seek to interfere with the pending judicial process in the *Royal World* case, as well as in numerous other cases pending before various courts in the State of Florida; and

WHEREAS, that portion of the proposed legislation which seeks to abolish sovereign immunity protection retroactive to May, 1995, if enacted, and determined to be constitutional. would frustrate as much as eight years of litigation throughout the State (5 years in the City o f Miami Beach alone), the expenditures of inordinate amounts of public and private funds for attorneys' and appraisers' fees and court costs, and potentially would set off a brand new round of litigation between the public and private sectors; and

WHEREAS, the gross inequity of such a result is exacerbated when it is realized that the actual value of the properties which arc subject to pending claims have increased, in many cases in exponential proportion in excess of their respective actual values since May, 1995, thereby creating the possibility for unjustly enriching the respective owners far beyond any investment-backed expectations; and

WHEREAS, of greater or equal impact, the proposed amendments if enacted, will seriously impair local governments in their efforts to comply with State-mandated requirements in such areas as growth management, comprehensive planning, concurrency, protection of fragile. environmentally sensitive areas such as wetlands, beachfronts and forestlands, concern with carrying capacity, and many other quality of life concerns; and

WHEREAS, during the century and one half of Florida's existence. a comprehensive body of law has developed through Court interpretation of the State and Federal Constitutions and legislative enactment which has defined "takings" and the power and cost to the public incident to the exercise of eminent domain, all of which have amply protected and amply protect private ownership interests against the necessary as well as the arbitrary and capricious action of state and local governments.

Now Therefore,

Be It Resolved by the Board of Directors of the Miami-Dade County Leagues of Cities, Inc. that

Section 1. The foregoing is true and correct.

Section 2. The Board of Directors of the Miami-Dade League of Cities, Inc. opposes the enactment of Senate Bill 1164 and House Bill 113 which set forth amendments to the Harris Act and further opposes any and all other proposed legislative enactments which would subject State and local governments to further liability for the constitutional exercise of their legislative and quasi-judicial responsibilities and powers.

Section 3. The Secretary of the Miami-Dade League of Cities, Inc. is directed to provide copies of this Resolution to the President of the Senate, Speaker of the House and the Governor.

1000 Friends of Florida[18]

The above bill has been referred to your Committee. The purpose and effect of the proposed legislation is to amend existing language in the Bert Harris Act to the detriment of local

[18] Charles Pattison, AICP, Executive Director, 1000 Friends of Florida,, letter to Honorable Ken Sorensen, 3/17/03.

government land use authority. One of its effects, if enacted, would be to allow claims under the Act to ripen only when acts of government apply to a particular property. Another portion would waive sovereign immunity protection for all governmental agencies against whom claims have been asserted under the Act retroactive to May 1995. We ask that you not support this bill in its current form.

Among the questions raised by this proposal is the economic impact on local governments in Florida of amending the Bert Harris Act as proposed and particularly to make it retroactive for eight years. Since its enactment in 1995 there have been about 250 claims filed against local governments. Some have been disposed of by settlement, some have been abandoned, some have actually gone to trial and some are pending in Court. One of the claims against the City of Miami Beach resulted in a Summary Judgment favorable to the City (Royal World Metropolitan Inc. v. Miami Beach, Case No.99-17243, Circuit Court 11d1 Judicial Circuit, and Dade County). This result was based on the Court's determination that the doctrine of Sovereign Immunity \\'as applicable and immunized the City from liability under the Act. This holding was supported, in part, by clear language in the Act (70.001, F.S.) which reads:

> This Section does not affect the sovereign immunity of government. "

The decision in the Royal World has been appealed to the Third District Court of Appeal and is presently pending consideration. The proposed legislation seeks to interfere with the pending judicial process in Royal World as well as the numerous other cases pending before the various courts in this State. It is clearly inappropriate to change current law while an appeal is pending.

That portion of the proposed legislation which seeks to abolish sovereign immunity protection retroactive to May 1995, if enacted, and if detem1ined to be constitutional, would inject itself into over eight years of litigation statewide on this subject (five years of litigation in Miami Beach alone), the expenditures of inordinate amounts of public (and private) funds for attorneys and appraisers' fees and court costs and potentially set off a brand new round of litigation between the public and private sectors.

The economic impact on the various governmental entities of Florida of retroactively abolishing sovereign immunity is probably incalculable. In Miami Beach alone, the amounts claimed in eight pending cases total $24,817,750. To that sum can be added interest, attorneys' fees and court costs. In addition, and of equal or greater impact, this proposal, if enacted, will seriously impair local governments in their efforts to comply with State mandated requirements, such as growth management, comprehensive planning, concurrency , protection of fragile, environmentally Sensitive areas, such as wetlands, forest lands, beach fronts and concern with carrying capacity and many other quality of life concerns .

Assuming that the proposed retroactive legislation can pass constitutional muster, the economic impact on the general funds of local governments can be devastating. The gross inequity of such a result is exacerbated when you realize that the actual value of the properties which are subject to the pending claims have increased, in many cases in geometric proportions in excess of their respective actual values as of May 1995, thereby unjustly enriching the respective owners, far beyond "investment based expectations".

We are particularly concerned that this bill proposes to extend the statute of limitations indefinitely, thereby allowing a property owner to wait many years before even bringing a claim. This is clearly not fair or equitable for local governments. We also question the ripeness changes which effectively mean the local government's denial of a specific application constitutes a "final decision identifying the allowable uses for the subject property.” Since most applications are for a particular use, it is patently unfair to call the review and approval or rejection of such an application a full assessment of the possible allowable uses on the site. It would be our further recommendation that one clarification be added to the bill so that it is clear

that no cause of action may be filed under this Act where an application for an increase in density or intensity is denied.

We join the many local governments that oppose this legislation, and ask that you support this position in order to protect local governments. That does not mean that reasonable amendments may not be considered, but it is unclear as to whether the proponents are interested in compromise from our understanding of the current situation. At your convenience, I would be happy to review these comments and answer any questions you might have concerning this correspondence.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Local Affairs Subcommittee Meeting on March 27, 2003

The Local Affairs Subcommittee, at its meeting on March 27, 2003, had six amendments before it for consideration. The amendments were as follows:

Amendment No.1 by Representative Kottkamp – Addressed below, except that it was later discovered that a clause was missing from the amendment so that it did not in fact mirror SB 1164.

Amendment No. 1 by Rep. Kottkamp conforms the bill, as filed, to SB 1164.

Amendment No. 1 changes the bill as filed to remove amendment of the definition of "action of a governmental entity" as found in s. 70.001(3)(d), F.S.

The amendment provides that within 15 days of the presentation of a *Harris* Act claim, the governmental entity receiving the claim shall report the claim in writing to the state planning agency rather than to the Department of Legal Affairs.

The amendment changes the bill as filed to reword the amendment to s. 70.001(5)(a), F.S., to provide that the written decision of the governmental entity issued within 180 days following the presentation of a *Harris* Act claim constitutes the governmental entities' final decisions identifying the uses for the property. Further, the amendment provides that the written decision, or failure to issue a written decision, operates as a final decision that has been rejected by the property owner. Finally, the amendment removes references to a "ripeness decision" and provides that the final decision constitutes, as a matter of law, the last prerequisite to judicial review of the merits.

The amendment changes the bill as filed to remove references in s. 70.001(11)(c), F.S., to development approval or variance that alters the density, intensity, or use of the owner's property. Additionally, the amendment adds language that provides that the enactment of a law or regulation does not constitute application of that law or regulation.

The amendment continues to provide a waiver of sovereign immunity and its retroactive application to May 11, 1995.

Amendment No. 2 by Representative Kottkamp – amends Amendment No. 1 to remove the language that provides for the retroactive affect of the sovereign immunity waiver. Additionally, the Amendment amends the title to conform.

Amendment No. 3 by Representative M. Davis – A Strike All Amendment conformed the bill as filed to SB 1164.

Amendment No. 4 by Representative Wishner –- Deleted lines 58 through 62 of the Strike All Amendment (No. 3), thereby removing language concerning the waiver of sovereign immunity.

Amendment No. 5. by Representative Robaina – Removed line 62 of the Strike All Amendment (No. 3), and replaced the line with language that provided for prospective operation of the act and provided that it would only apply to claims arising after the effective date of the act.

Amendment No. 6 by Representative Robaina – Removed line 63 of the Strike All Amendment (No. 3), and replaced the line with language that provided that the act would become effective on January 1, 2004.

At the Local Affairs Subcommittee meeting on March 27, 2003, the Sponsor withdrew Amendment Nos. 1 and 2. The Subcommittee voted to favorably recommend Amendment Nos. 3, 4 and 6. Amendment No. 5 was not favorably recommended. However, after recommending the amendments, and while in the process of taking testimony from members of the public, the bill was temporarily passed.

Local Affairs Subcommittee Meeting on April 10, 2003

The Local Affairs Subcommittee, at its meeting on April 10, 2003, took up the bill that was temporarily passed. After hearing once again from the Sponsor, public testimony was heard and completed. Then, on a Motion for Reconsideration, Amendment No. 4 by Representative Wishner was reconsidered and voted upon unfavorably. The bill with Amendment Nos. 3 and 6 was recommended favorably to the full committee.

Committee on Local Government & Veterans' Affairs April 21, 2003

The Committee on Local Government & Veterans' Affairs, at its meeting on April 21, 2003, adopted five amendments as indicated below:

- Amendment No. 3 by Representative M. Davis – A Strike All amendment that accomplishes the following objectives:
    - Provides that the state land planning agency will be responsible for tracking Harris Act claims rather than the Department of Legal Affairs.
    - Changes the bill as filed to reword the amendment to s. 70.001(5)(a), F.S., to provide that the written decision of the governmental entity issued within 180 days following the presentation of a *Harris* Act claim constitutes the governmental entities' final decisions identifying the uses for the property. Further, the amendment provides that the written decision, or failure to issue a written decision, operates as a final decision that has been rejected by the property owner. Finally, the amendment removes references to a "ripeness decision" and provides that the final decision constitutes, as a matter of law, the last prerequisite to judicial review of the merits.
    - Provides that the application not the enactment or adoption of a regulation serves as the precedent for a Harris Act claim.
    - Clarifies that sovereign immunity is waived for purposes of the Act.
    - Provides an effective date of July 1, 2003.

- Amendment No. 6 by Representative Robiana – Changes the effective date of the bill to January 1, 2004, from July 1, 2003.

- Amendment No. 8 by Representative Sorensen was a Substitute Amendment for Amendment No. 7 by Representative Wishner – Clarifies that the sovereign immunity waiver is to be applied prospectively.

- Amendment No. 9 by Representative Sorensen - Removes the two Whereas clauses from the bill's preamble.

- Amendment No. 10 by Representative Wishner – Provides that the Harris Act does not apply to certain government actions.