Florida’s Private Property Rights Law

Florida's Burt Harris Act: Does it Protect Third Parties and the Public Interest?

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Introduction

Florida's "Harris Act" is far too vague to be valuable as legislation. There are no reported cases interpreting or commenting on the substance of the law. Its real impact has been, and will likely continue to be, as a potential "sword" that landowners can hang over the heads of public agencies who are making decisions about new rules or pending permit applications.

It is somewhat clear that the law - often discussed as one law but in reality it is two separate laws and processes - establishes a mechanism that provides the potential for flexibility for government to find a "fix" for cases which really create an unfair burden for a specific landowner. This mechanism exists in both the judicial cause of action for compensation and the Special Master process for "modifications" or "adjustments" to governmental actions.

The compensation part of the law will not be discussed in any detail in this paper, other than to suggest that, the specific terms of the law are likely to yield court judgements on compensation and amounts that are more generous, but not considerably more so, than those currently provided under Constitutional "takings" theories. In this author's opinion, the more frequent and important impact of the Florida law is its impact on proposals for new laws, rules and ordinances and on specific actions on applications for development permits.

The Chilling Effect

As many predicted when the law was initially debated and passed, many decisions to do or not to do something have been made on the basis of a misunderstanding that the legislation has tied government's hands too a far greater extent than it actually has.

The chilling effect springs from two aspects of the Legislation. First, the Act provides for judicially - imposed financial compensation for impacts of a "new law, rule, regulation or ordinance of the state or a political entity in the state...." Sections 70.001 (1) & (2), Fla. Stat. So, proposals for changes that would enact new, more stringent development restrictions or standards, or which would down-zone one or many parcels of land, have consistently been opposed on the strength of claims that such changes would violate this law.

Second, compensation is available for "the actual loss to the fair market value of the real property" caused by "a specific action" of government which has "inordinately burdened an existing use of real property or a vested right to a specific use of real property." 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. Section 70.001(3)(d), Fla. Stat. So, the experience has been that permit and development order applicants can successfully bolster their arguments for the approval of their proposals by claiming that a denial would entitle them to compensation under this law.

This "chilling effect" has been substantial. While, to this author's knowledge, there has been no systematic study of this impact, my own observations and those of colleagues, confirms that many, many permits have been inappropriately issued or issued without proper conditions, because of the perceived threat of financial liability that would result from a denial or the imposition of conditions unfavorable to the applicant. Indeed, the avoidance of financial liability has been the purported justification in several potentially inappropriate settlements of claims under the Act.

Impact On The Rights and Interests of Third Parties

It is important to remember that there are two separate laws and procedures established by this legislation. Their impact on third parties appears to differ significantly, but in both cases the procedural and substantive rights of third parties are unclear.

A. The Judicial Cause of Action For Compensation

The law provides for a 180 - day notice of claim period during which the governmental agency is given an opportunity to provide a remedy without the need to resort to a circuit court action. Section 70.001(4)(a), Fla. Stat. The governmental entity must provide written notice of the claim to "all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property...." Section 70.001(4)(b), Fla. Stat So, if there was no administrative action that gave rise to the claim only owners of contiguous property are given any notice of the claim. However, under Florida statutory and case law, persons who own or reside on land relatively proximate to a subject parcel, or who regularly use a resource or infrastructure that will be impacted by a development are considered aggrieved enough to have standing to challenge permits and development orders. Thus, the Act only provides notice to a small fraction of those who would be impacted by a resolution of a property rights claim.

The Act then provides the governmental entity with the a range of settlement options, which can include an "adjustment of land development or permit standards or other provisions controlling the development or use of land", "increases or modifications in the density, intensity, or use of areas of development", "the transfer of developmental rights", "land swaps or

exchanges", "mitigation, including payments in lieu of onsite mitigation", "location on the least sensitive portion of the property", "conditioning the amount of development or use permitted", "a requirement that issues be addressed on a more comprehensive basis than a single proposed use or development, "issuance of the development order, a variance, special exception, or other extraordinary relief", or "purchase of the real property, or an interest therein, by an appropriate governmental entity." Section 70.001(4)(c), Fla. Stat.

If the property owner accepts the settlement offer, 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. Section 70.001(4)(d), Fla. Stat. Section 70.001(4)(d), Fla. Stat. does seek to provide some protection of the public interest and to third parties by stating that:

> "Whenever a governmental entity enters into a settlement agreement under this section ***which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply*** to the subject real property, ***the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary*** to prevent the governmental regulatory effort from inordinately burdening the real property."

However, the exact nature of this protection is unclear. Who determines whether the relief granted protects the public interest and is the appropriate relief necessary? Does a simple declaration to that effect in the body of a settlement agreement prove compliance with this requirement? If a third party disagrees with that statement, by what mechanism do they bring a challenge? What does it mean to protect the "public interest" and what is "appropriate" relief?

One might tend to conclude that the appropriate mechanism to challenge a settlement agreement is to seek redress in local circuit court, and this is probably accurate, but the matter is clouded by the next subsection of the law, which states that:

> ***"Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute*** as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that ***the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary*** to prevent the governmental regulatory effort from

inordinately burdening the real property." Section 70.001(4)(d)1, Fla. Stat. (emphasis added).

The combined meaning then of these two subsections could be that circuit court approval is required before a state statute can be waived but not for the waiver of a state administrative regulation or a local government requirement. Alternatively, consistent with notions of due process and the need to give meaning to all parts of legislation, these subsections mean that resort must be made by the government and the owner to circuit court whenever a state law would be violated, regardless of the absence of third party objection or concern. However, when a state administrative rule or a local requirement would be violated, local circuit court approval is required only if a third party seeks such review. In either event, the distinction makes little sense given the interconnection of state statutes and administrative rules in permitting actions and the statutory requirement that all local government development orders be consistent with adopted local land use plans.

In either event, the Act is silent on the issue of how a court sanctioned settlement would affect a third party's existing rights to enforce compliance with law. It seemingly gives courts much authority to effectuate a remedy. On the other hand, it clearly does not articulate any exceptions to statutory points of entry or causes of action for third parties. The Act says nothing about what happens if there is a successful challenge by a third party to an approval granted under this section, or for that matter, whether the law would allow for a successful challenge.

This is obviously a major issue that must be dealt with legislatively or by the courts. The author has recently filed notice of intent to challenge a settlement agreement under this law as being a violation of the statutory requirement that all local government development orders be consistent with adopted local comprehensive plans. The concern raised in that action, and the one raised in general by the settlement provisions of this law, is whether an agency can simply "settle" a Harris Act claim by allowing development that would otherwise be prohibited by existing laws without Circuit Court approval and without a demonstration that the Harris Act claim was in fact meritorious - or at least stated a cause of action and was not frivolous.

In a recent ruling of a panel of three Miami-Dade County Circuit Judges, a similar situation was reviewed. In Chisolm, et al. v. City of Miami Beach, et al (Fla. 11th Circuit, Case Nos. 00-91 AP, 00-092 AP, 00-362 AP and 00-365 AP (Aug. 9, 2001) a third party challenged, by way of Petition for Writ of Certiorari, a settlement agreement. The Circuit Court agreed that it had jurisdiction to review the settlement agreement, and issued the Writ, quashing the settlement agreement, which had purported to grant a variance to a building height restriction in that added floors onto an existing hotel.

On the merits, the Court found that liability under the Harris Act did not exist. There was no "inordinate burden" on an "existing use of real property..." because the definition of "existing use" is a "reasonably foreseeable, nonspeculative land use...." Thus, found the Court, since the amount of stories sought and granted for the hotel was not an allowable use in the City, such use was prohibited and not reasonably foreseeable. It was merely speculative in nature.

Next, the court discussed (1) whether there was competent substantial evidence that the granting of the variances protected the public interest served by the zoning restrictions being varied; and (2) whether there was competent substantial evidence that the variances were the appropriate relief necessary to prevent the inordinate burdening of the property. The Respondents argued that the public interest being served was resolving pending litigation and limiting financial exposure to the City. The Court rejected this argument as being a misapplication of the legal standard. If that were the law, it said, every settlement would meet the public interest test by virtue of avoiding claims and litigation. The court found no competent substantial evidence that allowing a building's height to be exceeded would protect the public interest.

In passing on the appropriateness of the relief, the Court looked to the City Code criteria for the issuance of a variance. The Court found that there was no competent substantial evidence that the property was virtually unusable without the variance, and thus the absence of evidence to support a finding that the variance was required to prevent an inordinate burden.

B. The Special Master Dispute Resolution Process

In some ways, this law goes farther to provide notice to third parties than does the section which establishes the new circuit court cause of action. However, the actual right of the third party to enforce legal provisions established to protect their substantial interests is not clear. These persons clearly may be heard in these proceedings but will, presumably, have to rely on other statutes to enforce their rights.

This section adds another item to the standard checklist for persons who seek to protect their third party rights. Such persons will be given notice of the initiation of a proceeding under this section only if they "indicated a desire to receive notice of any subsequent special master proceedings occurring on the development order or enforcement action."

Section 70.51(1), Fla. Stat. establishes the "Florida Land Use and Environmental Dispute Resolution Act." Section 70.51(3), Fla. Stat. provides that any landowner who believes that a development order or an enforcement action of a governmental entity, is "unreasonable or unfairly burdens the use of the owner's real property" may apply within 30 days after receipt of the order or notice of the governmental action for relief under this

section. The request for relief is filed with the elected or appointed head of the governmental entity. Section 70.51 (4), Fla. Stat. The governmental entity with whom a request has been filed must serve a copy of the request for relief to "owners of real property contiguous to the owner's property" and any "substantially affected party who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for any development order at issue or enforcement action at issue." Notice to substantially affected parties is required "only if that party indicated a desire to receive notice of any subsequent special master proceedings occurring on the development order or enforcement action." Each governmental entity must maintain a mailing list of persons who have presented oral or written testimony and who have requested notice. Sections 70.51 (4)(a) and (b), Fla. Stat.

Thus, under the Dispute Resolution process, a broader range of third persons are given notice of the bringing of a claim, although the granting of such notice is heavily and perhaps unrealistically conditioned. For example, many local development orders are issued a the staff level, without any public notice. In such cases, there is of course likely to be no objections of record that meet the requirements of this Act

The filing of a claim triggers a Special Master proceeding. Section 70.51(21), Fla. Stat. states that:

> "Within 21 days after receipt of the request for relief, any owner of land contiguous to the owner's property and any substantially affected person who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for the development order or enforcement action at issue ***may request to participate in the proceeding.*** Those persons may be permitted to participate in the hearing but ***shall not be granted party or intervenor status.*** The participation of such persons is limited to addressing issues raised regarding alternatives, variances, and other types of adjustment to the development order or enforcement action which may impact their substantial interests, including denial of the development order or application of an enforcement action."

As can be seen, the nature of the third party's participation is very unclear, and actual experience has varied significantly. Generally, such persons have not been granted party status, but have been allowed to participate with comments and evidence at all portions of the meetings. In one case, a state agency Special Master (a non-attorney) did not allow the third party to attend the hearing and denied a public records request. However, the agency's Final Order reversed those rulings.

After conducting an informal hearing, the Special Master is to file a written

recommendation. If the recommendation is that the governmental action is unreasonable or unfairly burdens use of the owner's property, the special master may recommend one or more listed alternatives "that protect the public interest served by the development order or enforcement action and regulations at issue but allow for reduced restraints on the use of the owner's real property...." These are the same list of options available under the judicial cause of action part of the law. Section 70.51(19)(b), Fla. Stat.

The Special Master's recommendations are non-binding. Section 70.51(21), Fla. Stat. The agency may accept or modify the recommendation of the special master "***and proceed to implement it by development agreement, when appropriate, or by other method, in the ordinary course and consistent with the rules and procedures of that governmental entity.*** Sections 70.51(21)(a) and (b), Fla. Stat. (emphasis added).

The requirement to implement the recommendation (for example a waiver of rules, etc) through the ordinary procedural course strongly suggests that existing third party challenge rights are preserved, to be exercised upon the completion of those processes. Yet, the agency, in this posture, is now committed to issuance of the permit or development order as it has chosen to implement the recommendation. The question arises then what a Circuit or Administrative Law Judge is to treat an agency action that results from a Special Master Process under this law when such action is challenged as violating some other substantive law or ordinance. Does the Dispute Resolution Act supplant and supersede that substantive law, or does it modify that law? If so, is the question before the reviewing tribunal whether the permit or development order complies with substantive law ***as modified by the Dispute Resolution Act?*** If it does not, then what practical remedy to the landowner is provided by the law. It is silent on this critical point.

There are no reported cases on these issues, and thus, unless statutorily modified, the existing law provides uncertain guidance to agencies, landowners and third parties on basic rights and remedies. To say the least, it is not a model to be copied by other states.

How Might the Law Be Changed

In this author's opinion, this law should be repealed in its entirety as it suffers from too many constitutional, administrative, practical, and substantive flaws. The existing law could be smartly replaced with a provision to be inserted into each relevant statute that establishes a state permit or local development order requirement that would establish a waiver provision in any instance where the strict application of the law is demonstrated to result in a deprivation of constitutionally - protected property or vested rights. In this way, governmental entities would be authorized to provide relief when it is truly warranted without having to formally take an action that constitutes a deprivation and then defend a judicial takings claim. This

waiver provision would become part of the relevant criteria and standard for issuance of the requested permit or development order. The granting of a waiver would require a findings, based on competent, substantial evidence, that (1) the strict application of the law would constitute a deprivation; (2) the "modification", "adjustment" or "waiver" is the minimum necessary to avoid the deprivation; and (3) the public interest which is the purpose of the relevant statute is being protected. Third party rights as they currently exist in each of those statutes would be retained, and granting of the relief would simply be part of the agency action which may be challenged by that third party pursuant to existing procedures and standards.

The approach recommended here would best streamline the process and coordinate it best with the relevant permitting and development order processes, while retaining third party and public interest protections. The existence of the property rights requirement and waiver allowance in the body of the relevant substantive law would work to make the reviewing agencies institutionally sensitive to the property rights of the landowners.

The author does not favor providing for financial compensation of waivers from the law in cases beyond those where a constitutional violation is present. Yet, where a policy choice is made to provide compensation in a greater number of cases, then the standard should be a clear one - say 75% reduction in value - and the law should be clear that all governmental impacts on value - both positive and negative, including any and all public subsidies - must be included in the calculation.