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Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 1712

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In July 8th, 2004, Governor Bush vetoed S.B. 1712, enacted by the legislature during the 2004 legislative session, which would have ensured agricultural landowners in Florida the right to develop their lands at levels equivalent to surrounding land uses. The bill would have opened Florida's agricultural tracts to development at the same pace and density as their neighboring parcels. The veto message states that the governor is committed to "meaningful and consistent" growth management policies, and that he wished to prevent farmers from being lured to "cash out" their lands for development, preserve environmentally sensitive areas by preventing large scale development on converted lands, and prevent litigation over land use decisions. The governor also stated that it would be inappropriate to tie the hands of local governments as they make land use decisions.[1]

The veto message also raised the property rights of agricultural landowners, stating that "concerns of the supporters of this bill for protection of property rights must be incorporated into future discussions on growth management issues." It further stated that the rights of agricultural landowners are not superior to resource protection and must be "carefully balanced" to achieve the "appropriate" land use. According to the governor, agricultural land use decisions are not "statewide" concerns and decisions concerning the "appropriate" balance must be determined at the local level. This response begs the question: What constitutional and statutory property rights do agricultural property owners have in Florida?

Constitutional Property Rights Defined

The Fifth and 14th Amendments to the U.S. Constitution state: "[N]or shall private property be taken for public use, without just compensation."[2] The Florida Constitution is essentially the same, requiring "full" compensation.[3] Land use or environmental regulations which "go too far" and require a private landowner to bear a burden that should be borne by the public are a taking of private property.[4] There is no bright line for determining "the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."[5] However, courts consistently find that regulations are a taking only if they establish a physical occupation, are arbitrary or capricious, or preclude all or virtually all economically viable uses.[6]

The leading Florida case is *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981), *cert. denied, sub. nom., Taylor v. Graham,* 454 U.S. 1083 (1981), in which the Florida Supreme Court upheld a development order that required half of the owner's property (a large mangrove forest) to remain in its natural state. Because the action served a legitimate governmental purpose and allowed the landowner to enjoy an economically viable use, the court rejected the takings claim, and found that "an owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injuries [sic] the rights of others."

Rights to Nonagricultural Uses

In determining whether a regulation denies a landowner all economically viable use, the focus is on the existence and value of permissible uses.[7] The landowner bears the burden of showing that there is no available beneficial use of the property under the challenged regulation.[8] There is no right to any level of nonagricultural land use, such as residential, commercial, or industrial, as long as the allowed uses are "economically viable."[9] Thus, as long as agricultural use is economically viable, regulations may preclude all development. Under this line of reasoning, unless the denial of a density increase would leave the landowner with only uses that are not

economically viable, it will generally not constitute a "taking." In *Martin County v. Melyvn R. Yusem*, 690 So. 2d 1288 (Fla. 1997), the Florida Supreme Court upheld a county's decision not to "up-zone" agricultural lands, concluding that the county was not required to amend its comprehensive plan at the landowner's request. The court held that landowners do not have a right to density increases, and ruled that decisions to deny requests for comprehensive plan changes are legislative decisions subject to the deferential "fairly debatable" standard of review.

In *Martin County v. Section 28 Partnership Ltd.*, 772 So. 2d 616 (Fla. 4th DCA 2000), the Fourth District rejected a taking claim against Martin County's decision not to amend its comprehensive plan to change agricultural zoning. The court held that such decisions "will not be considered arbitrary and capricious if [they have] a rational relationship with a legitimate general welfare concern."[10] The court found that "the record contains sufficient evidence establishing that the County's comprehensive policies are based on rational and sound planning principles, designed to preserve agricultural lands, protect wetlands and environmental resources, ensure the efficient use of public resources and discourage urban sprawl" and that because of the extent of the impact from the proposed density increase, the refusal to amend the plan bore a substantial relationship to a legitimate governmental interest.

Thus, if agricultural uses are economically viable, local governments will typically be well within their police power and without "takings" liability if they decline to approve rezonings or comprehensive plan amendments on agricultural lands. Senate Bill 1712 would have granted legal entitlements of rural or agricultural landowners to density and use increases that they do not currently enjoy.

Reductions in Allowable Use, Density, or Intensity

Landowners are also not legally protected from reductions in allowable use or intensity under the U.S. or federal constitutions unless they "go too far." In Florida, there is no vested right to the continuation of current zoning, which can be reduced for valid reasons.[11] Thus, even "down-zoning" or increasing restrictions is supported by both federal and Florida law. Because an owner is not guaranteed the most profitable use of his land, but simply some use that can be economically carried out, an action which "down-zones" land or increases legitimate restrictions is not invalid simply because it denies the highest and best use of the property.[12]

Regulatory actions have been upheld against takings claims even where they dramatically diminished the value of the property, including impacts potentially as great as 95 percent.[13] In Florida, so long as the approved zoning allows some economically viable use, a landowner is not entitled to more favorable or economically valuable zoning. In *Lee County v. Morales*, 557 So. 2d 652, 655 (Fla. 2d DCA 1990), *rev. den*., 564 So. 2d 1086 (Fla. 1990), the Second District rejected a takings claim against a "down-zoning" because the resulting densities were economically viable and the reductions were not made arbitrarily, but for valid planning reasons based on a study. The court found that the county acted within its discretion to revise the zoning allowances based upon the new information presently available.

Changes to local government comprehensive plans that reduce allowable densities have specifically been addressed as potential takings. In *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990), *rev. denied*, 570 So.2d 1304 (Fla. 1990), plan amendments that reduced density from one unit per acre to one unit per five acres were not held to be takings since the change was not arbitrary, and the remaining uses were economically viable. The validity of the amendments was strongly supported by the fact that they were adopted pursuant to the authority of Florida's growth management laws.

Thus, local governments' hands are not tied when it comes to changing existing planning and zoning provisions. If existing rules are no longer appropriate, government is not precluded from making changes that reflect current information. Planning and zoning is not a perfect science and is often dependant on predicting the future and contingent on unknown factors. Government has significant flexibility to reduce use or density or increase restrictions, so long as the resulting rules allow some economically viable use and are not arbitrary.

In determining whether regulations are arbitrary, or legitimate subjects of regulations, courts give significant deference to the judgment of the regulating body.[14] The courts repeatedly take the stance that they will not become "super zoning boards"[15] and have given regulating agencies much leeway to use their police powers to "down-zone" at their discretion, as long as that decision addresses a legitimate governmental concern and is supported by competent and substantial evidence.[16] Among the interests and issues that will be deemed legitimate subjects of government regulation are preservation of residential or historical character of a neighborhood,[17] protection of environmentally sensitive areas and pollution control,[18] and issues relevant to compliance with growth management laws.[19]

Permit Conditions and Mitigation Requirements

One potential "takings" scenario occurs when government conditions a development approval on a requirement that some portion of the land be preserved or dedicated for a public use or protection. The constitutionality of permit conditions, exactions, and mitigation requirements arises often in the context of a permit condition that requires certain portions of a parcel of land to be set aside, preserved, or dedicated. Such requirements are a valid tool for agencies when weighing property rights against the need to offset development impacts to natural resources, community resources, or public facilities and services. Such conditions are generally legal and are not an invalid taking if they bear a rational nexus to the project's impact and are "roughly proportional" in extent to the project's impact.[20]

Next, conditions that require some portion of private land to remain in a natural condition, or be dedicated to a public use, are not a per se taking of the subject portion of the parcel. Courts determine whether a taking has occurred by viewing the end result of the regulation on the property "as a whole," and not some distinct segment thereof.[21] Thus, zoning ordinances and environmental permitting rules and orders which preclude the use of certain portions of a parcel in order to mitigate for the development impacts allowed on other portions, or to prevent a public harm, are generally not a taking. The caveat is that such restrictions must be for a legitimate public purpose and proportional to the development impacts.[22]

Moratoria

From time to time, the need arises for local governments to maintain the status quo during the pendency or implementation of a study, perhaps including the development or consideration and adoption of substantial changes to a comprehensive plan or land development code. Temporary moratoria that are in effect for a reasonable time period, and are rationally related to a legitimate governmental purpose, are not a taking.[23] As long as there is a rational nexus between the moratorium and the legitimate purpose to be served by the policies and regulations to be developed during the interim period, a temporary moratorium is not a taking.

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the U.S. Supreme Court rejected a takings claim against a 32-month moratorium on development while a preservation plan for Lake Tahoe was being implemented. In *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County*, 349 So. 2d 667 (Fla. 3d DCA 1977), the county imposed a building moratorium for the purpose of conducting and preparing a comprehensive study directed to the protection of the fresh water supply and the natural ecosystems in that part of the county. The court upheld the moratorium, holding that protection of drinking water supplies and ecological systems are legitimate objectives of zoning resolutions and ordinances.[24] Thus, as at least one commentator has observed: "The typical land use regulation, even where it drastically interferes with use of property for a period of two or three years or revokes an existing use, is unlikely to be held to constitute a regulatory taking."[25]

Florida's Statutory Property Rights: The Harris Act

Florida law provides some additional protections to owners of private land beyond those granted by the "takings" clause of either the U.S. or Florida constitutions. Enacted in 1995, Florida's Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act") is intended to require compensation in more cases than would be required under both the U.S. Constitution and the

Florida Constitution.[26] Although the Harris Act represents a compromise between all of the stakeholders—landowners, government, environmentalists—the real effect of that compromise is undetermined.

The Harris Act finds that the actions of government

may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

The act then creates the following cause of action on behalf of private property owners:

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

This cause of action does not apply to "temporary impacts to real property."[27]

The "inordinate burden" standard leaves much room for interpretation. How much more protection to landowners and restriction on government the Harris Act provides is highly questionable. The act requires compensation where regulation "inordinately burdens" a landowner, while the constitution requires compensation where "all economically viable use" has been precluded. The act does not render government liable for any burden on the use or value of real property. The act defines "inordinate burden" as government action that has "directly restricted or limited the use of real property such that the property owner is permanently unable to attain (1) the reasonable, investment-backed expectation for the existing use of the real property," or (2) "a vested right to a specific use of the real property with respect to the real property as a whole," or (3) "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."[28]

This language is strikingly similar to case law interpreting the takings clause, which requires compensation when regulation prevents an owner from attaining her "reasonable, investment-backed expectation,"[29] limits a vested right,[30] or has such an adverse impact on the landowner that "justness and fairness require the burden to be borne by the public at large."[31] Thus, while the express legislative intent is to "provide more protection," the statutory definitions and decision factors track closely those used by courts under the "takings" clause. For this reason, the Harris Act is likely to be interpreted as granting rights not greatly in excess of those given by the constitution. Because the act uses the same terms of art as federal takings case law to flesh out the meaning of "inordinate burden,"[32] there is no clear basis—other than the general legislative intent that the bar be lower in Harris Act cases—upon which a court can determine when a burden should be deemed "inordinate." Given that some of the constitutional cases have found fair market reductions of 80-90 percent not to be a "taking," one can surmise that lesser reductions would violate the statute. However, it is unlikely that a court would stray far from the constitutional line.

There are no judicial interpretations of the Harris Act to shed light on this issue. Only a limited number of Harris Act cases have reached the courts, and they have been determined on procedural and other matters unrelated to the substantive liability standard. The most common result in such cases has been settlements.

The Judicial Interpretations

Florida appellate courts have decided only three Harris Act claims, with the Middle District of the federal court sitting for an additional one, leaving wide-open the question of what this law means. Only one of these cases, *Royal World Metropolitan v. City of Miami Beach*, 863 So. 2d 320 (Fla. 3d DCA 2003), addresses a substantive issue. In that case, the Third District made no rulings about what constitutes an "inordinate burden," but did rule that the Harris Act does not allow a defense of local government sovereign immunity. The other Florida existing cases address purely procedural issues.[33] In one federal case, a federal court denied a motion for removal of a Harris Act claim to federal court, and instead remanded the matter back to state court.[34]

Harris Act: Final Analysis

The Harris Act is a compromise that preserves the state's legitimate interests in growth management and environmental protection, so long as new regulations do not have so great an adverse impact on an individual landholder that a court would consider it "inordinate." The act does not prohibit appropriate environmental protection and land use legislation. Even the sparse legislative history of the act makes clear that the act was not intended to drastically affect Florida's growth management or environmental laws.[35] The act should be viewed as requiring land use entities to proactively avoid property rights violations, by authorizing administrative waivers and other mechanisms to avoid property rights suits where the strict application of new rules would likely violate property rights, and to act with common sense.[36] While the act does provide some increment of additional protection to landowners beyond that afforded by the constitution, it clearly does not preclude a local government's ability to strengthen land use regulations or even "down-plan" or "down-zone" land for a valid planning reason. Ultimately, government must continue to serve the public good and not fear the threat of Harris Act litigation, except in the rare case when its protections are truly violated.

Conclusion

Neither the U.S. Constitution, the Florida Constitution, nor the Harris Act prevent local or state agencies from strengthening land use or environmental regulations, including the "down planning" or "down-zoning" of land, when such actions are rationally related to legitimate governmental purposes. Neither are owners of agricultural or rural land guaranteed any increases in use or intensity. Florida's Harris Act does provide some substantive rights to use and intensity beyond those granted by the federal or state constitutions, but these increased rights are likely incremental and not significant. In vetoing SB 1712, the governor struck a balance that allows existing and even future land use and environmental laws, rules, and ordinances to meet legitimate and changing public needs while guaranteeing agricultural and rural landowners their existing private property rights.

[1] Governor's Veto Message, Governor Jeb Bush, July 8, 2004, SB 1712.
[2] **U.S. Const.** Amend. V.& XIV.
[3] **Fla. Const**. Art. X, §6.
[4] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
[5] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).
[6] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *American Savings & Loan Ass'n v. Marin County*, 653 F.2d 364, 368 (9th Cir.1981).
[7] *Hodel v. Virginia Surface Mining and Reclamation Act*, 452 U.S. 264 (1981).
[8] *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977 (9th Cir.1987).
[9] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
[10] *Section 28 Partnership Ltd.*, 772 So. 2d at 620 (quoting *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208 (11th Cir. 1995)).
[11] *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d D.C.A. 1980), *aff'd*, 403 So. 2d 407 (Fla. 1981).
[12] *Penn Central*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Graham*, 399 So. 2d at 1380.
[13] Susan Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims*, 78 **Fla. B.J.**61, 61 (2004); *see Hadacheck v. Sebastian*, 239 U.S.

394 (1915) (reducing property value by over 90 percent); *Graham*, 399 So. 2d at 1382. (75-percent reduction of value not a taking); *Penn Central*, 438 U.S. at 124 (in some cases regulations may result in a 95-percent loss without justifying compensation as a taking).
[14] *Town of Hialeah Gardens v. Hebraica Community Center, Inc.*, 309 So. 2d 212 (Fla. 3d D.C.A. 1975).
[15] *City of Naples Airport Authority v. Collier Development Corp.*, 513 So. 2d 247 (Fla. 2d D.C.A. 1987); *Broward County v. Capelleti Bros.*, 375 So. 2d 313 (Fla. 4th D.C.A. 1975).
[16] *Graham*, 399 So. 2d at 1381.
[17] *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County*, 349 So. 2d 667 (Fla. 3d D.C.A. 1977).
[18] *Graham*, 399 So. 2d 1374.
[19] *Glisson,* 558 So. 2d 1030.
[20] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[21] *Penn Central*, 438 U.S. 104; *DEP v. Schindler*, 604 So. 2d 565 (Fla. 2d D.C.A. 1992); *DEP v. MacKay*, 544 So. 2d 1065 (Fla. 3d D.C.A. 1989).
[22] *Morales*, 557 So. 2d 652.
[23] *Penn Central*, 438 U.S. 104.
[24] *Moviematic*, 349 So. 2d at 669.
[25] Trevarthen, *supra* note 13. *See also Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (D.N.M. 1995) (30-month moratorium to protect the status quo in lands within national monument not a taking); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (two-year moratorium on development pending traffic flow study not a taking); *Cappture Realty Corp. v. Bd. of Adjustment of the Borough of Elmwood Park*, 336 A.2d 30 (N.J. Super. App. Div. 1975) (four-year moratorium prohibiting construction of flood prone lands not a taking); *Estate of Scott v. Victoria County*, 778 S.W.2d 585 (Tex. App. 1989) (seven-year interim ordinance not a taking); *Matter of Rubin v. McAlevey*, 288 N.Y.S.2d 519 (1968) (two-year interim development ordinance valid until the enactment of a new comprehensive zoning ordinance).
[26] "Bert J. Harris Private Property Rights Protection Act," **Fla. Stat**. §70.001 (2004).
[27] **Fla. Stat**. §70.001(3)(e) (2004). Thus, the Harris Act does not appear to apply to temporary moratoria.
[28] **Fla. Stat**. §70.001(3)(e).
[29] *Penn Central*, 438 U.S. 104 (1978).
[30] *See Lucas*, 505 U.S. 1003 (1992) (where a regulatory taking deprives the owner of all economic uses, compensation may be denied only where the proscribed use interests were not part of the owner's title to begin with); *also see Monroe County v. Ambrose*, 866 So. 2d 707 (Fla. 3d D.C.A. 2003) (the purchase of land is a subjective expectation and not a vested right to develop property).
[31] *Penn Central*, 438 U.S. at 124; *see also First English*, 482 U.S. at 319; *Dolan*, 512 U.S. 374; *Nollan et ux v. California Coastal Commission*, 483 U.S. 825 (1987).
[32] Trevarthen, *supra* note 13.
[33] *See, e.g., Osceola County v. Best Diversified, Inc.*, 830 So. 2d 139 (Fla. 5th D.C.A. 2002); *Sousa v. City of West Palm Beach*, 762 So. 2d 981 (Fla. 4th D.C.A. 2000).
[34] *Seminole County v. Pinter Enter., Inc.*, 184 F. Supp.2d 1203 (M.D. Fla. 2000).
[35] Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 **Fla. St. U. L. Rev.** 315, 363 (1995). Senator Mackey, sponsor of the bill, states in his closing argument that the act is not intended to have any drastic effects. *Id.* at 363 n.263.
[36] *Id*. at 359.