

REDUCING THE DENSITY AND INTENSITY OF FLORIDA’S FUTURE COASTAL DEVELOPMENT AS A SEA-LEVEL RISE ADAPTATION MEASURE: WILL DOWN-ZONING “TAKE” OR OTHERWISE “INORDINATELY BURDEN” PRIVATE PROPERTY?

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I. Introduction

As sea level along Florida’s coast is expected to rise over the next century, coastal municipalities are considering various mitigating measures to incorporate within their comprehensive land-use plans. In response to this threat of sea-level rise, one potential policy is to reduce the density and intensity of development within these plans, which is typically referred to as either “down-zoning”, or “down-planning”.¹ One legal issue that would inevitably arise in this context, however, is whether such a measure would be a violation of the Takings Clauses set forth in the U.S. and Florida constitutions, or would otherwise violate Florida’s Bert J. Harris Jr., Private Property Rights Protection Act. This paper explores whether down-zoning is likely to be considered a taking or an “inordinate burden” under the Harris Act when local governments seek to reduce the density and intensity of future coastal development in order to respond to the consequences of sea-level rise.

II. Sea-level rise on Florida’s coast

Sea-level rise is of particular concern to Florida as 60% of the state’s population lives within 10 miles of the coast.² Specifically, the U.S. Environmental Protection Agency estimates that sea level along Florida’s coast has risen 7 to 9 inches in the last century, and due to rising global temperatures, may rise another 1 to 3 feet within the next century.³ In addition, the 2007

¹ Richard Grosso and Robert Hartsell, *Old MacDonald Still has a Farm: Agricultural Property Rights after the veto of S.B. 1712*, Florida Bar Journal, March 2005, at 41, 44 (Down-planning can also be described as “Down-FLUMing” as both terms refer to the reduction in densities and intensities established by the Future Land Use Map (FLUM) of the local government’s comprehensive plan.).

² Save Florida’s Vanishing Shores (2002), http://www.epa.gov/climatechange/effects/coastal/saving_FL.pdf.

³ *Id.*

International Panel on Climate Change also estimates global sea-level rise to be between 0.6 and 2 feet over the next century.⁴ Rising sea levels erode Florida's beaches, and as coastal land-use is affected by such erosion, local governments are searching for preparatory measures to address the possible consequences.⁵

III. The use of down-zoning within future land-use plan elements in environmentally sensitive areas

A. Protection of environmentally sensitive areas is a legitimate state interest.

First, all land-use regulations must advance legitimate state interests.⁶ Such legitimate state interests include the health, safety, and welfare of the public, and to protect these interests, the state of Florida may validly exercise its police power.⁷ Because it relates to the public welfare, protection of environmentally sensitive areas and the preservation of an area's ecological balance have been deemed valid exercises of the state's police power.⁸

B. Comprehensive plans must include a future land-use plan element.

Next, Florida's coastal municipalities derive authority to plan for future land use through Florida's Local Government Comprehensive Planning and Land Development Regulation Act.⁹ This Act charges local governments to encourage the most appropriate use of land, water, and resources that is in the public interest.¹⁰ The act also gives local governments the responsibility to plan effectively for future problems that may result from the development and use of land within their jurisdictions.¹¹ In fact, comprehensive plans must include a future land-use plan element, which will designate proposed future extent of land use for residential uses and

⁴ Climate Change – Health and Environmental Effects, Coastal Zones and Sea Level Rise, <http://www.epa.gov/climatechange/effects/coastal/>

⁵ *Id.*

⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

⁷ *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981).

⁸ *Glisson v. Alachua County*, 558 So. 2d 1030, 1035 (Fla. 1st DCA 1990); *Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County*, 349 So. 2d 667, 669 (Fla. 3d DCA 1977).

⁹ Local Government Comprehensive Planning and Land Development Regulation Act, Fla. Stat. § 163.3161(1) (1988).

¹⁰ *Id.* § 163.3161(3).

¹¹ *Id.*

conservation.¹² Future land-use categories must be defined in terms of uses included, and must set standards to be followed in the control and distribution of population densities and building and structure intensities.¹³ Viewed as a whole, a comprehensive plan may be described as a constitution for all future development within the municipality's boundary.¹⁴ The plan is then implemented through zoning, which involves the exercise of discretionary powers within limits imposed by the plan.¹⁵

C. Zoning authorities may consider whether an area is environmentally sensitive, proximate to navigable waters, or flood-prone, with respect to prevention of public harm.

Inclusion of ecological considerations has also been deemed a legitimate objective of zoning codes, which should consider the effects of development on an area's ecological balance.¹⁶ Further, local governments may specifically have a legitimate interest in maintaining low densities in environmentally sensitive areas.¹⁷ In addition, in order to determine the environmental impact of proposed development, zoning authorities may rely upon information gathered by experts as to whether further development would cause environmental harm.¹⁸ It is also not unreasonable to place a great deal of weight on this environmental impact as determined by experts.¹⁹ The proximity of the land with respect to navigable waters may also be taken into account in zoning considerations.²⁰ In addition, downzoning to reduce density and intensity in areas subject to flooding has been upheld based on the policy of avoiding public harm.²¹

D. How down-zoning is implemented.

As part of a future land-use plan element, local governments may include down-zoning policies within their comprehensive plans. In the coastal context, down-zoning typically alters the zoning classification of coastal land in order to reduce both the population density and

¹² *Id.* § 163.3177(6)(a).

¹³ *Id.*

¹⁴ *Citrus County v. Halls River Development*, 8 So. 3d 413, 420-421 (Fla. 5th DCA 2009).

¹⁵ *Id.*

¹⁶ *Moviematic Industries Corp.*, 349 So. 2d at 669.

¹⁷ *Martin County v. Section 28 Partnership Ltd.*, 772 So. 2d 616, 621 (Fla. 4th DCA 2000).

¹⁸ *Lee County v. Morales*, 557 So. 2d 652, 655 (Fla. 2d DCA 1990).

¹⁹ *Graham*, 399 So. 2d at 1379.

²⁰ *Id.* at 1382.

²¹ See *M.I. Marshall Ilsley Bank v. Town of Somers*, 414 N.W. 2nd 824 (Wis 1987) (citing the seminal case of *Just v. Marinette County*, 56 Wis.2d 7, 201N.W.2d 761 (1972))

development intensity within these areas.²² Specific down-zoning measures could include, for example, a change in zoning classification from “residential” district to “conservation” district and as a result, reduce allowed residential density from four (4) units per acre to one (1) unit per acre.²³ In addition to using down-zoning as a policy within comprehensive plans, a similar policy is used within Future Land Use Maps (FLUMs), wherein it is referred to as down-FLUMing. It is likely that the use of down-FLUMing within FLUMs would invoke a similar legal analysis to the analysis of down-zoning within comprehensive plans.

E. Comprehensive plans are reviewed under a “fairly debatable” standard.

Last, comprehensive plans, including the zoning classifications within them, are considered to be local in character and a legislative function to which the courts should be deferential.²⁴ In fact, courts assert that they should only enter this area when a zoning authority’s actions are so unreasonable and unjustified as to amount to a confiscation of private property.²⁵ In other words, the courts should not attempt to act as “super zoning boards.”²⁶

More precisely, a zoning authority’s decision is subject to the “fairly debatable” standard of review.²⁷ In order to show that an ordinance is fairly debatable, it is only necessary that there be substantial, competent evidence to support a zoning authority’s actions.²⁸ Stated differently, the zoning authority’s action would only require court approval if reasonable persons could differ as to the propriety of the action, or when the action is open to dispute or controversy on grounds that either make sense or point to a logical deduction that in no way involves constitutional validity.²⁹ Therefore, in sum, if a zoning authority’s actions can be considered “fairly debatable,” the actions should be affirmed, and a different zoning classification may not be directed simply because it would be more desirable in the eyes of the court.³⁰

²² Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19:1 Florida State University Journal of Land Use, 59, 60 (2003).

²³ *Id.*

²⁴ *City of Naples Airport Authority v. Collier Development Corp.*, 513 So. 2d 247, 249 (Fla. 2d DCA 1987); *Martin County*, 772 So. 2d at 619.

²⁵ *Lee County*, 557 So. 2d at 655.

²⁶ *Id.*

²⁷ *Martin County*, 772 So. 2d at 619.

²⁸ *Lee County*, 557 So. 2d at 655.

²⁹ *Martin County*, 772 So. 2d at 619.

³⁰ *City of Naples Airport Authority*, 513 So. 2d at 249; *Town of Hialeah Gardens v. Hebraica Community Center, Inc.*, 309 So. 2d 212, 214 (Fla. 3d DCA 1975).

IV. Whether down-zoning is considered a taking

A. Takings defined.

Takings have been defined in the Takings Clauses of both the U.S. and Florida constitutions. The Takings Clause in the U.S. Constitution is expressed in the 5th Amendment, which provides “[N]or shall private property be taken for public use, without just compensation.”³¹ The 5th Amendment is then made applicable to the states through the 14th Amendment.³² In addition, Florida’s state constitution similarly provides that “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner.”³³

In light of the Takings Clauses, however, it is still well-settled law that land-use regulations may restrict the use of a landowner’s private property, as long as the regulation does not go “too far”.³⁴ Land-use regulations that go “too far” in this restriction, however, will entitle the landowner to government compensation.³⁵ Of course, the difficulty lies in defining “too far” and determining when a regulation limits a landowner’s use of their property to such an extent that a taking occurs.³⁶ To compound this difficulty, a precise formula is not available in order to determine when a regulation may affect a taking of private property. Nevertheless, the U.S. Supreme Court has provided initial guidance to lower courts in the cases of *Lucas v. South Carolina Coastal Council* and *Penn Central Transportation Company v. City of New York*.³⁷

³¹ U.S. Const. Amend. V.

³² *CNL Resort Hotel, L.P. v. City of Doral*, 991 So.2d 417, 420 (Fla. 3d DCA 2008).

³³ Fla. Const. Art. X, §6(a).

³⁴ *Glisson*, 558 So. 2d at 1034.

³⁵ *Lost Tree Village Corporation v. City of Vero Beach*, 838 So. 2d 561, 569 (Fla. 4th DCA 2002).

³⁶ *Id.*

³⁷ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

1. *Lucas* “Categorical” takings

In *Lucas*, two categories of regulatory action were deemed compensable without the need for case-specific inquiry.³⁸ These two categories would be deemed “categorical” takings and are as follows:

- 1) Those regulations compelling the landowner to suffer a physical invasion of their property; or
- 2) Those regulations where the regulation denies all economically beneficial or productive use of the landowner’s property.³⁹

2. *Penn Central* takings

However, if the regulation does not meet either of the categories set forth in *Lucas*, a *Penn Central* analysis would be applied to determine whether a taking has occurred.⁴⁰ As an example, a *Penn Central* analysis would be used in the case that the diminution in property value was 95% rather than 100%.⁴¹ A *Penn Central* analysis, in application, considers the following three factors:

- 1) The economic impact of the regulation on the landowner;
- 2) The extent to which the regulation has interfered with the landowner’s distinct investment-backed expectations; and
- 3) The character of the governmental action”.⁴²

To date, *Penn Central*’s second prong has been clarified to some extent. First, the landowner’s expectations are reviewed relative to the date of purchase, whether that purchase

³⁸ *Lucas*, 505 U.S. at 1015.

³⁹ *Id.*

⁴⁰ *Shands v. City of Marathon*, 999 So. 2d 718, 723 (Fla. 3d DCA 2008).

⁴¹ *Id.*

⁴² *Penn Central Transp. Co.*, 438 U.S. at 124.

was before or after the land-use regulation was enacted.⁴³ Next, this second prong essentially asks how “bound up” the property is with the landowner’s expectations, such as what was sought in the purchase of the property, as well as the landowner’s proposed use.⁴⁴ Additionally considered is how the landowner’s expectations have been shaped by the relevant state’s property law.⁴⁵

B. Survey of Florida’s down-zoning-based takings claims in the coastal context

1. *Shands v. City of Marathon* (2008)

In *Shands*, the land at issue was down-zoned from a one unit per acre development allowance to a one unit per 10 acres allowance. In 1956, Dr. R.E. Shands purchased the 7.9 acre Little Fat Deer Key (now known as Shands Key) before any state land-use policies existed.⁴⁶ From 1956 to 1986, Shands Key, which lies in the Monroe County jurisdiction, was zoned “General Use”, which allowed for development of one unit per acre.⁴⁷ However, in 1986, Shands Key was down-zoned from General Use to “Conservation Offshore Island (OS)”.⁴⁸ In use, the OS zoning classification is applied to properties with a sensitive environmental character and in effect, reduced allowable development to one unit per 10 acres.⁴⁹

The Shands’ takings claim was analyzed under the *Lucas* categorical takings framework, after which it was determined that a valid categorical takings claim did not exist. First, the regulation was deemed to have advanced legitimate state interests as it was directed to environmental protection.⁵⁰ Next, it was determined that the OS designation did not deny the landowner all economically viable use of the property.⁵¹ The reasoning advanced by the court was that the city’s comprehensive plan provided a mechanism by which the landowners could obtain either Rate of Growth Ordinance (ROGO) allocation points or transferrable development

⁴³ *Collins v. Monroe County*, 999 So. 2d 709, 718 (Fla. 3d DCA 2008).

⁴⁴ *Penn Central Transp. Co.*, 438 U.S. at 131; *Taylor v. Village of North Palm Beach*, 659 So. 2d 1167, 1174 (1995).

⁴⁵ *Lucas*, 505 U.S. at 1016.

⁴⁶ *Shands*, 999 So. 2d at 720.

⁴⁷ *Id.* at 721.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 722.

⁵¹ *Id.* at 724.

rights (TDR's).⁵² In addition, as the OS designation still permitted low-intensity residential uses, this undergirded the court's reasoning that all of the property's beneficial use was not eliminated.⁵³

As to an alternative takings analysis, the Shands claim was not expressly analyzed under the 3-pronged *Penn Central*. However, the court discussed the 2nd prong of *Penn* and determined that the appellants did not have distinct investment-backed expectations. Here, the court opined that although R.E. Shands had bought the property over 50 years previous with the expectation to eventually build a family home upon it, the Shands' family expectations were minimal at best.⁵⁴ Further, the Shands' had no specific development plan for the property, nor had they pursued any development of the property since 1956.⁵⁵ In addition, the fact that the plaintiffs had inherited the property indicated they had not shown any substantial personal financial investment.⁵⁶ In the court's words, "[A] subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property ... If the landowners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances."⁵⁷ As to a *Penn-Central* analysis, the court reversed and remanded the case to the trial court for further review.⁵⁸

2. *Collins v. Monroe County* (2008)

In *Collins*, several landowners filed a takings claim predicated on down-zoning, which was analyzed and denied under a categorical takings framework. At issue was whether the landowners were deprived of all or substantial economic use of their property through the enactment of the 2010 Monroe County comprehensive plan.⁵⁹ The court reasoned that the regulation's enactment did not deprive the landowners of all reasonable economic use of their property because they had either received building permits or sold the property.⁶⁰ Because both

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (citing *Monroe County v. Ambrose*, 866 So. 2d 707, 711 (Fla. 3d DCA 2003)).

⁵⁸ *Id.* at 727.

⁵⁹ *Collins v. Monroe County*, 999 So. 2d 709, 713-714 (Fla. 3d DCA 2008).

⁶⁰ *Id.* at 714.

the building permits and property sales provided evidence of development value, the property values were not completely eliminated by the plan.⁶¹ However, the court revised and remanded to the trial court as to consideration of factors necessary to affect a *Penn Central* taking specific to each landowner.⁶² For each of the properties, the trial court was to determine what, if any, reduction in the property's beneficial use had been sustained by application of the regulation. Most recently, a petition for review was filed in the Florida Supreme Court and denied on July 16, 2009.⁶³

3. *Lost Tree Village Corp v. City of Vero Beach* (2002)

In the earlier case of *Lost Tree*, the court also denied a categorical takings claim based on a down-zoning policy within Vero Beach's comprehensive plan. Here, the city's existing zoning regulations permitted Lost Tree to build five units per acre, as of the late 1980's.⁶⁴ However, in December 1989, the city established a new zoning district, R-1AAA, which restricted density to one unit per two acres.⁶⁵ The City then adopted a new comprehensive plan, and as amended in 1992, the new plan restricted density on the islands further to one unit per five acres.⁶⁶ In its holding, the court determined that Lost Tree did not state a cause of action for a categorical takings claim because the mere enactment of the regulations did not preclude all development in all cases.⁶⁷ Rehearing was denied on December 23, 2002.

4. *Taylor v. City of Riviera Beach* (2001)

Taylor also illustrates a Florida appellate court's disposition on takings claims within the down-zoning context. Like the later cases above, at issue in *Taylor* was whether the zoning classification change from limited commercial to conservation/open space resulted in a taking of the landowner's property.⁶⁸ When title was first acquired in 1971, North Palm Beach had no comprehensive land use plan, and the current zoning, designated as C-1A, permitted limited

⁶¹ *Id.*

⁶² *Id.* at 718.

⁶³ *Monroe County v. Collins*, 15 So.3d 581, 2009 WL 2136656 (Fla.).

⁶⁴ *Lost Tree Village Corporation*, 838 So. 2d at 565.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 572.

⁶⁸ *Taylor*, 659 So. 2d at 1170.

commercial uses and high-density, multi-family residential uses.⁶⁹ However, in 1974, the city changed the designation of C-1A, first eliminating the allowance for high density, multi-family residential uses, though retaining the limited commercial use allowance.⁷⁰ Subsequently, in November 1989, the city adopted a new comprehensive plan that changed the island's classification from limited commercial to conservation/open space (C/OS).⁷¹ In 1991, however, the city amended the C/OS zoning classification to add an allowance for low-density single family dwellings.⁷²

According to the court, the categorical takings claim failed because the C/OS classification did not turn the island into a “passive park”.⁷³ First, the court stated that development was not completely banned, nor did the reduction in use constitute a deprivation of all or substantially all of the economic, beneficial or productive use of the affected property.⁷⁴ Second, even if the language of the C/OS designation could be read as a prohibition against all economically viable uses, since the plan included a mechanism for seeking an amendment to the plan with regard to its application to a particular parcel, the plan’s provision could not constitute a categorical taking.⁷⁵ Review was denied by the Florida Supreme Court on June 24, 2002.⁷⁶

5. *Lee County vs. Morales* (1990)

Lee illustrates a down-zonings takings claim pre-*Lucas*, though the case results were similar to an outcome had a *Lucas* analysis been applied. In *Lee*, four undeveloped lots in the La Costa Isles subdivision were purchased in 1978, and at the time, the land was zoned C-2 (commercial), which permitted light industrial use.⁷⁷ Also at the time of purchase, the undeveloped lots were viewed as an investment, upon which the landowners intended to construct both a restaurant and marina.⁷⁸ However, before the development plans were

⁶⁹ *Id.* at 1168.

⁷⁰ *Id.*

⁷¹ *Id.* at 1169.

⁷² *Id.*

⁷³ *Id.* at 1171.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *City of Riviera Beach v. Taylor*, 821 So.2d 293 (Table).

⁷⁷ *Lee County*, 557 So. 2d at 653.

⁷⁸ *Id.*

undertaken, the county placed a moratorium on the development.⁷⁹ Subsequently, the Board of County of Commissioners adopted a rezoning resolution in 1983 that rezoned the property from C-2 to agricultural, and the comprehensive plan later adopted only allowed for development of a single family home on each recorded lot.⁸⁰

Under these facts, the court held that the zoning classification change was not a taking. First, the court reasoned that the zoning authority was appropriately concerned with limiting future commercial development on Cayo Costa in view of legitimate environmental concerns.⁸¹ Next, the court held that the zoning ordinance was not a taking merely because one reasonable use was denied, because in order to be considered a taking, the regulation would need to deprive a landowner of all the property's beneficial and reasonable uses.⁸² Also, the landowners' argument that the property's re-zoning had deprived them of the expected benefit of their investment and from realizing the highest and best use of property, as opposed to all beneficial use of property, was considered by the court to be irrelevant to the proper disposition of the takings issue.⁸³ The Florida Supreme Court subsequently denied review on July 9, 1990.⁸⁴

C. Florida's Bert J. Harris, Jr., Private Property Rights Protection Act

In Florida, the Bert J. Harris, Jr., Private Property Rights Protection Act provides a separate and distinct statutory cause of action for payment of compensation to a landowner when a new regulation unfairly affects their property.⁸⁵ More specifically, the act protects the interests of such landowners from "inordinate burdens" on their property in the event that such burdens do not amount to a taking under the U.S. or Florida Constitutions.⁸⁶ An inordinate burden is defined in the Act as when a governmental action, such as a regulation, directly restricts or limits the use of the property such that the owner is permanently unable to attain the reasonable, investment-backed expectation for either the existing use of the property or a vested right to a specific use of the property.⁸⁷ As can be seen, the act's language is similar to the language in the second prong of *Penn Central*.

⁷⁹ *Id.*

⁸⁰ *Id.* at 654.

⁸¹ *Id.* at 655.

⁸² *Id.* at 656.

⁸³ *Id.*

⁸⁴ *Morales v. Lee County*, 564 So.2d 1086 (Table).

⁸⁵ Bert J. Harris, Jr., Private Property Rights Protection Act, Fla. Stat. § 70.001(1) (1995).

⁸⁶ *Id.*

⁸⁷ *Id.* § 70.001(3).

D. A Harris Act claim situated in the down-zoning context

1. *Citrus County v. Halls River Development* (2009)

Halls River Development illustrates a recent Harris Act claim within the down-zoning context, wherein the court denied the claim's validity. The facts begin in February 2000 when Halls River Development ("Halls") entered into a contract to purchase 11 acres of property in Citrus County.⁸⁸ Shortly after, Halls retained a surveyor and engineer to determine if a multi-family condominium could be built on the property.⁸⁹ At the conclusion of its due diligence, Halls received county approval of the project, as well as the approval of the U.S. Army Corps of Engineers and the Southwest Florida Water Management District.⁹⁰ Halls closed on the property in January 2001.⁹¹

Similar to the takings claims discussed above, the case issue centers around Citrus County's comprehensive plan, and specifically between the plan and its land development code (LDC).⁹² Prior to 1997, the plan and its LDC were consistent, both designating the property as Mixed Use (MXU), which allowed for development of a multi-family condominium.⁹³ However, the plan was subsequently amended in 1997, and the property was down-FLUMed from MXU to Low Intensity Coastal Lakes (CL), wherein the new CL designation allowed for one housing unit per 20 acres of land.⁹⁴ Further, the new CL designation was only reflected in the plan and the Generalized Future Land Use Map (GFLUM), and not reflected in either the county's LDC or LDC zoning maps.⁹⁵ These documents continued to reflect the designation as MXU.⁹⁶ In 2002, the county then adopted an ordinance that conformed the LDC and its zoning maps to the plan, while expressly exempting Halls' property from the operation of the ordinance

⁸⁸ *Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413, 416 (Fla. 5th DCA 2009).

⁸⁹ *Id.*

⁹⁰ *Id.* at 416-417.

⁹¹ *Id.* at 417.

⁹² *Id.* at 415.

⁹³ *Id.* at 416.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

due to the consideration that Halls may have some vested rights.⁹⁷ Then, in one of the several suits simultaneously occurring during this circumstance, Halls' exemption from the ordinance was invalidated by a trial court on the basis that Hall's proposed project was inconsistent with the comprehensive plan.⁹⁸

In this suit, Halls claimed that the impact of the invalidation of its exemption from the ordinance caused its property to be inordinately burdened, a claim which was successful at the trial court level, but unsuccessful at the appellate level.⁹⁹ Defining "inordinate burden", the appellate court indicated that the Harris Act provides that a property owner is inordinately burdened if the owner is left with existing or vested uses that are unreasonable.¹⁰⁰ The court then stated that a vested right is determined by principles of equitable estoppel and substantive due process under statutory or common law.¹⁰¹ In first speaking to the existing use of the property and basing its decision on the comprehensive plan's provisions, the court indicated that the "actual, present use" of the property at the time of Hall's purchase was a single family residence.¹⁰² Conversely basing its argument on the LDC, Halls had argued that its intended use for the multi-family condominium was an "existing use" because such a use of the property was reasonably foreseeable, suitable for the property, and compatible with adjacent land uses.¹⁰³ Nevertheless, the court was not persuaded by this argument and stated that both Halls and the county should have known the plan would control over the LDC.¹⁰⁴ Next, speaking to Hall's vested right, the court indicated that Halls failed to establish a vested right to its intended uses of the property based on a theory of equitable estoppel, despite the county's erroneous advice about the property's permitted uses.¹⁰⁵ The court indicated that the doctrine of equitable estoppel may be invoked against a governmental body when a property owner (1) relies in good faith (2) upon some act or omission of the government and (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired.¹⁰⁶ However, the court stated that

⁹⁷ *Id.* at 417.

⁹⁸ *Id.* at 421.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 421-422.

estoppel should only be invoked against the government in exceptional circumstances and additionally, the doctrine of estoppel does not generally apply to transactions that are forbidden by law or contrary to public policy.¹⁰⁷ Thus, the court determined the plan enjoyed legal primacy regarding allowable land use and accordingly prohibited the property's use as a multi-condominium.¹⁰⁸ Because the amended plan prohibited construction of multi-family dwellings on the property, Halls could not utilize the doctrine of equitable estoppel to compel the county to issue the necessary approvals for the project, despite the county's willingness to do so.¹⁰⁹ The court went on to state that "This case is based entirely on the fact that Halls River's project does not comply with the Plan."¹¹⁰ The court also recognized that the case results would be seen as unduly harsh, but concluded that Halls never had the lawful right to the proposed use for the multi-family dwelling.¹¹¹ Ultimately, the court reversed the trial court's non-final order, which determined that the county inordinately burdened Hall's River's property.¹¹² Rehearing was denied on May 7, 2009, and the Florida Supreme Court denied review on November 17, 2009.¹¹³

V. Conclusion

Upon review of Florida's case law and statutes related to comprehensive land-use planning and land-development regulation, as well as several Florida takings cases, it appears that appropriate reductions in the density and intensity of coastal development through down-zoning would be a legitimate exercise of legislative authority and unlikely to be considered a taking. It also appears that down-zoning may not be considered an "inordinate burden" under the Harris Act either.

As a general matter, Florida's local governments would likely have authority to down-zone in environmentally sensitive areas in response to threats of sea-level rise. Protecting Florida's coast against the consequences of sea-level rise would likely be deemed a legitimate state interest, for both environmental, infrastructural and public safety purposes, especially with strong supporting evidence of sea-level rise that was scaled down to a local level. Since comprehensive plans and land-development regulations are reviewed under the fairly debatable standard that applies to legislative actions generally, if an enacted regulation down-zoned an area along the coast, the courts would likely be deferential to the zoning authority. In the case of

¹⁰⁷ *Id.* at 422.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 423-424.

¹¹² *Id.* at 423.

¹¹³ *Halls River Development v. Citrus County*, 23 So.3d 712 (Table)

down-zoning to protect against the effects of sea-level rise, if local evidence demonstrating sea-level rise was presented to support the zoning authority's actions, the regulation would likely stand.¹¹⁴

As can be seen from the takings cases discussed above, Florida courts have generally denied that down-zoning regulations constitute *Lucas* categorical takings. Down-zoning that leaves any residual economically beneficial use of the property would suffice to defeat a categorical claim, and “savings” provisions which transfer economically beneficial uses to other properties would have the same effect.¹¹⁵ It is also noted, however, that *Penn Central* analyses have not been substantially applied in the case law reviewed. Reference to *Penn Central*'s 1st or 3rd prongs were not made, and only limited references to the 2nd prong were made. Nevertheless, in the above cases, Florida courts reasoned that investment-backed expectations should be proven to be substantial, for example, already having begun development on the property before changes to the zoning classifications were enacted. In other words, the courts appear to dismiss a landowner's expectations for the property's use if they had not taken a particular action to prove these expectations by the time the zoning classifications were altered.

Other than the case above, there appears to be little to no case law construing down-zoning to be an “inordinate burden” under Florida's Bert J. Harris, Jr., Private Property Rights Protection Act. However, since the Act adopts, and courts seem to rely upon, language drawn from constitutional takings law, Harris Act cases asserting that down-zoning disproportionately burdens property may result in similar outcomes to the takings cases above. Still, the lack of legislative and judicial guidance in interpreting the Harris Act makes predicting the outcome of these cases especially hazardous, and has been said to have had a chilling effect on local regulation.¹¹⁶

Still, in the future, landowners near the ocean may also be considered to have constructive notice that their property may be threatened by sea level rise.¹¹⁷ Therefore, what is considered a landowner's reasonable expectation for their coastal land may be considered to change and evolve over time because sea level rise is slow and continuous, and coastal landowners may be deemed to have adequate time to adjust their expectations.¹¹⁸

¹¹⁴ Richardson, Jr., *Downzoning*, *supra*, at 61.

¹¹⁵ *Taylor*, 659 So. 2d. at 1171.

¹¹⁶ See Susan L. Trevarthean, *Advising the Client Regarding Protection of Private Property Rights: Harris Act and Inverse Condemnation*, 78 Fla. B. J. 61 (2004).

¹¹⁷ Michael A. Hiatt, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future*, 18 Duke Environmental Law & Policy Forum, 371, 394 (2008).

¹¹⁸ *Id.* at 393-394.