Specific law often cited to stop historical preservation

Legal professor: Act should be considered, not feared

EDITOR'S NOTE: *This story is part of an ongoing series of the historical areas and structures of Venice and what, if anything, can be done to save them.*

By **LARRY R. HUMES**
FOR THE GONDOLIER

As the Planning Commission revises the City's Land Development Regulations, it is striving to find a balance between providing for the economic vitality of the community while also protecting its unique historic resources.

Finding that balance can sometimes be challenging. When the discussion comes up regarding potential restrictions on historic properties, for example, the Bert Harris Act and its imposing threat of litigation sometimes gets mentioned.

So what exactly does this Harris Act entail and what effect does it have on preserving Venice's historic resources?

The Bert J. Harris Jr. Private Property Rights Protection Act was passed by the Florida Legislature in 1995 to provide private property owners a cause of action when state or local governments reduce the value of their property.

When governments try to pass laws regarding historical preservation, political leaders often say they're fearful of somebody suing under the Bert J. Harris Jr. act. They are fearful of someone saying that the worth of their property has been devalued because of the new restrictions.

"I think you have to be cautious of (the Act), but that doesn't necessarily mean you

should be in fear of it," said Timothy McLendon, a legal skills professor at the University of Florida's Levin College of Law. "I believe there is still reason to govern in the public interest. And preservation is something that is very much in the public interest.

"It provides great benefit to the landowners in a district. And I don't think there is any reason not to do that."

McLendon is the author of a handbook on Florida historic preservation law and has lectured on the subject for the Florida Trust for Historic Preservation. He also conducts seminars and teaches courses at the university on Florida Constitutional and Historic Preservation Law.

The Bert Harris Act grew out of a movement in Florida, beginning in the 1970s, when private land was being "taken" in an effort to protect the state's fragile environment.

It was intended to provide relief for owners who lost only a partial value of their property.

"Some of the more recent cases at the end of the '80s basically said that for it to be a 'taking,' you had to take away almost all of the value," he said. "That was very disturbing for a lot of people. The idea that if you took a hundred percent of the value of land, that was a taking. But if there was a lesser amount, that was not.

"The thing about Bert Harris is that it is a mixed bag," he added. "There are some legitimate reforms, because some of the abuses it attempted to reform were very real. It is not, for the most part, targeted at preservation. It's sort of an incidental impact."

Another abuse of the system, McLendon said, was the idea of governments imposing "moratoriums" on any development for an extended period of time.

One example he cited occurred around Lake Tahoe in California, where a moratorium for preservation reasons prevented land from being developed for 15 years. In that case, the court determined that even though the stay was temporary, it still amounted to a taking.

> **"The thing about Bert Harris is that it is a mixed bag."**
>
> **Timothy McLendon**
> a legal skills professor at University of Florida's Levin College of Law

McLendon said the Act was effective for about a decade after it was passed because the language was ambiguous and local governments were afraid to do anything.

"It had a chilling effect. They didn't know what it was, and city attorneys would say 'you don't want to be the kickball here, do you?'

"As case law has emerged, however, the Act has been far from the horror people thought it was in 1995. But I think there's a caveat. And one of them has to do with the settlement offers. There hasn't been a lot of case law involving Bert Harris. I mean, no one would hear about these cases unless there was litigation. Who knows what has been settled over the years?"

The Act calls for a claim against a government entity to be made after a law or regulation is made affecting the property at issue. The Legislature has been closing the window to do that.

The original Act called for a claim to be made within 180 days. A revision in 2015 reduced that time period to 150 days, and a third revision last year limited the time to just 90 days. Once a claim is made, the government entity must submit a settlement offer to the property owner within a limited time.

"They have to respond with a settlement offer and that must include everything that is permissible with the property," McLendon said. "There's a list of things that are possible, including no action, but can also include variances or adjusting standards."

If a settlement cannot be reached with a property owner, the case can then proceed to court.

McLendon said one thing he found interesting in the 2021 revision is the presumption after a settlement is made that the offer will be in the public interest.

"There were, for example, cases out of Miami Beach where the settlements were invalidated by the circuit courts because other property owners said, 'Wait a minute. You're giving them some sort of a variance through a settlement that violates the public interest.' The fact that there's a presumption, you can't rebut the presumption."

The Act places an inordinate burden on the existing and vested use of real property, he added.

"There's a great case that came out of West Palm Beach that had to do with the imposition of a height ordinance. You had a bank that applied to build a big building right on the intracoastal. In the immediate aftermath of that, the city began the adoption of a height ordinance. And after that, you had two other owners that applied to build their own buildings above the height limit.

"All three of them brought suit under the Harris Act. Essentially, what the court said was that the only one that had a vested right was the party that started the permitting process prior to the ordinance. It was determined they had a vested right, but nobody else had a vested right."

While the Act talks about reasonably foreseeable uses, it does not cover speculative uses, he said.

"For example, consider that wonderful bed and breakfast (Horse and Chaise) that was lost there in Venice. If an ordinance had been there to protect it, and then a developer had later sought a permit, they would have had to have a vested right to subdivide and develop the property. If you had an ordinance to prevent that sort of thing, unless they are in the pipeline, they cannot vest."

The challenge in proving a case through the Harris Act is in determining that a person's existing historic property has been devalued when the opposite generally occurs. Cost-benefit studies usually show that historic resources increase in value compared to those in non-historic districts.

While the Historic Preservation Act that was passed by the Federal government in 1966 recognizes historic resources as a legitimate public interest, the law does not offer any real protection against what a historic homeowner can do with his property, said McLendon.

"Even being listed on the Federal Register, it only provides you procedural protection against federally-licensed or federally-funded projects. It provides no protection against me doing something to my own property. That can only be achieved through a local ordinance."

Larry Humes writes about local history and can be reached at 1926venice@gmail.com.

GOMulch.com
FAST LANDSCAPE SOLUTIONS
MARCH SPECIALS
WE HAVE ROUNDUP!
$2.25 0.75CF JG Organic Garden Mix WAS $3.99
$5.25 2CF JG Flower & Vegetable WAS $7.39
$12.99 UV Safety Glasses WAS $14.99
$22.49 Round Pt Shovel WOOD HANDLE | WAS $25.00
$33.49 13-2-13 Palm & Tree FERTILIZER 50LBS | WAS $37.99
Order Online - Home Delivery
941.473.1403 | GOMULCH.COM
850 N. Indiana (Hwy 776) | Englewood
M-F: 7:30 AM - 5 PM | SAT: 7:30 AM - 2 PM

First Physicians Group
Welcomes