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Waiting for the Go: Concurrency, Takings, and the Property Rights Act

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I. INTRODUCTION

Florida faces ongoing growth pressures that burden available infrastructure. In 1972, the Florida Legislature developed comprehensive land use planning laws to address these problems.[1] In 1975, the legislature passed the Local Government Comprehensive Planning Act of 1975,[2] which required comprehensive land use plans. The 1985 legislature substantially amended the 1975 comprehensive planning act and renamed it the Florida Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act").[3] Among other things, the 1985 Growth Management Act requires local comprehensive plans to require adequate infrastructure to accommodate development.[4] This requirement is called "concurrency."

This article addresses the development of infrastructure concurrency requirements. Particularly, this article examines whether delays of, or bars to, property development due to concurrency requirements constitute a compensable taking of private property rights. The Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act"),[5] adopted by the legislature in 1995, might substantially expand local government exposure for those acts which fall short of a taking of all rights in a property. This article concludes by considering the potential impacts of the Harris Act.

II. CONCURRENCY

The Growth Management Act sets general, statewide, regional, and local requirements for land use planning. A key component of the Growth Management Act mandates sufficient, concurrent infrastructure before development is authorized.[6]

The Growth Management Act states in pertinent part that "[i]t is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development."[7] According to the *Florida Administrative Code*, public facilities and

1. Florida State Comprehensive Planning Act of 1972, 1972 Fla. Laws ch. 72-295.
2. 1975 Fla. Laws ch. 75-205 (current version at FLA. STAT. §§ 163.3161-.3211 (1995)).
3. State Comprehensive Plan, 1985 Fla. Laws ch. 85-57 (current version at FLA. STAT. §§ 163.3161-.3243 (1995)).
4. *See* FLA. STAT. §§ 163.3177-.3178, .3180, .3202 (1995).
5. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)).
6. FLA. STAT. § 163.3202(2)(g).
7. *Id.* § 163.3177(10)(h).

services include: roads; sanitary sewer; solid waste; drainage; potable water; parks and recreation; mass transit, if applicable; and public transit.[8]

In addition, any local government may extend the concurrency requirement so that it applies to other public facilities within its jurisdiction, such as schools.[9] Each local government also must adopt a Concurrency Management System ("CMS"),[10] which must include a monitoring system and provide that concurrency be determined for a project by the time a permit for containing a specific plan of development is applied for.

Concurrency timing is set out for each public facility. The most restrictive timing is for sanitary sewer, solid waste, drainage, and potable water facilities. To obtain a permit for these facilities, the local government is required to make the necessary facilities and services available to the new development at the time of issuance of a certificate of occupancy or its equivalent.[11] Another way the local government may obtain a permit is by showing, at the time the permit is issued, that the necessary facilities and services are guaranteed, through an enforceable development agreement, to be in place at the time of the certificate of occupancy.[12] The least restrictive timing requirement is for parks and recreation facilities. These facilities may be unavailable for as long as five years after the issuance of a permit.[13]

The timing requirement for roads is between the first two standards.[14] Many exceptions, however, may apply.[15] Generally, the required timing is: 1) at the time the permit is issued, the roads are in place or under construction; 2) the permit is issued subject to the condition that the roads are scheduled to be in place or under actual construction not more than three

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8. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(a) (1995).
9. *Id.* at r. 9J-5.0055(2)(b).
10. *Id.* at r. 9J-5.0055.
11. *Id.* at r. 9J-5.0055(3)(a)1.
12. *Id.* at r. 9J-5.0055(3)(a)2.
13. FLA. STAT. § 163.3180(2)(b). The *Florida Administrative Code* states:

> A development order or permit is issued subject to the conditions that the necessary facilities and services needed to serve the new development are scheduled to be in place or under actual construction not more than one year after issuance of a certificate of occupancy or its functional equivalent as provided in the adopted local government 5-year schedule of capital improvements.

FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(b)2.a. (1995). This section of the *Florida Administrative Code* is derived from § 163.3180(2)(b) of the *Florida Statutes.*

14. FLA. STAT. § 163.3180(2)(c).
15. *See id.* § 163.3180(5).

years after issuance of a certificate of occupancy, as provided in the five-year schedule of capital improvements;[16] or 3) at the time of issuance of a permit, the roads are the subject of a binding agreement which requires the roads to be in place or under actual construction after no more than three years.[17]

There are numerous exceptions. A major statewide growth management policy promotes compact urban development.[18] Concurrency, as applied to roads, works against this policy. The more the population is spread out, the less congestion exists. Legislation in 1993 created formal roadway concurrency exceptions to try to solve this problem.[19] These exceptions are either area-specific or project-specific[20] and are as follows.

Exception One: Urban Redevelopment Project. A proposed urban redevelopment project located within an "Existing Urban Service Area," as established in the local comprehensive land use plan, is not subject to the concurrency requirements for up to 110% of the roadway impacts generated by prior development.[21] These projects are approved even if the redevelopment reduces the level of service below the adopted standard.[22]

Exception Two: De Minimis Project. A proposed development may be deemed to have de minimis impact and may not be subject to concurrency, so long as the additional impacts do not significantly degrade the existing level of service and the project is not very dense or intense.[23] The cumulative impact of all de minimis development must be monitored and can exceed no more than three percent of the maximum service volume at the adopted level of service if the road is over capacity.[24]

Exception Three: Long-term Transportation CMS. This exception formalizes a ten-year to fifteen-year plan.[25] The Florida Department of Community Affairs ("DCA") approved such a plan for Pasco County, where roads are severely overloaded. To correct existing deficiencies on roads and to set priorities for reducing the backlog on roads, local governments are

16. FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(c)2. (1995).
17. *Id.*
18. FLA. STAT. § 163.3180(8).
19. Local Government Comprehensive Planning and Land Development Regulation Act Amendments, 1993 Fla. Laws ch. 93-206 (codified as amended in scattered sections of FLA. STAT. ch. 163 (1995)).
20. FLA. STAT. § 163.3180(5)(b).
21. *Id.* § 163.3180(8)(b).
22. *Id.* § 163.3180(5)(b).
23. *Id.* § 163.3180(6).
24. *Id.*
25. FLA. STAT. § 163.3180(9).

authorized to adopt a long-term CMS with a planning period of up to ten years.[26] The comprehensive plan must: 1) designate specific areas where significant backlogs presently exist; 2) provide a financially feasible system to ensure that existing deficiencies are corrected within the ten-year period; and 3) demonstrate the roads required to correct existing deficiencies, as well as to accommodate new development.[27] The comprehensive plan also must state that a plan amendment shall be required to eliminate, defer, or delay construction of any road which is needed to maintain the adopted level-of-service standard, and which is listed in the long-term schedule of capital improvements, if established.[28] Local governments with a severe backlog may request DCA approval for a planning period of up to fifteen years for establishing a long-term CMS.[29]

Exception Four: Transportation Concurrency Management Area ("TCMA"). This provision promotes infill development or redevelopment within selected urban areas and it allows the level of service to be averaged within a TCMA.[30] A TCMA is a compact geographic area with existing or proposed multiple, viable alternative travel paths or modes for common trips.[31] A local government must justify the level of service chosen, show how urban infill or redevelopment would be promoted by the TCMA, and demonstrate how mobility will be accomplished.[32]

Exception Five: Transportation Concurrency Exception Areas ("TCEA"). There are three types of TCEAs. The first type is intended to promote urban infill development in built-up areas which already have roads in place.[33] In this type of TCEA, no more than ten percent of the land within an infill TCEA may be developable vacant land.[34] Specific development density and intensity thresholds also must be met.[35] The second type of TCEA promotes urban redevelopment and may be located only in an area which contains no more than forty percent developable vacant land.[36] The third type of TCEA is intended to promote develop-

26. *Id.* § 163.3180(9)(a).
27. *Id.*
28. *Id.* § 163.3180(10).
29. *Id.* § 163.3180(9)(b).
30. FLA. STAT. § 163.3180(7).
31. *Id.*
32. *Id.*
33. *Id.* § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)1. (1995).
34. FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)1.a. (1995).
35. *Id.* at r. 9J-5.0055(6)(a)1.b.
36. FLA. STAT. § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)2. (1995).

ment in central business districts designated for downtown revitalization.[37] There must be data and analysis supporting the creation of these exception areas, where fairly dense and intense development may be allowed.[38] Dade and Broward Counties are trying to designate TCEAs.

Exception Six: Projects that Promote Public Transportation.[39] This is a project-specific exception. To reduce the adverse impact of transportation concurrency, local governments may exempt projects that promote public transportation by establishing policies in the comprehensive plan for granting such exceptions.[40] Examples of such projects are office buildings that incorporate transit terminals or fixed rail stations. To receive the benefit of this exception, local comprehensive plans also must demonstrate supporting data and analysis showing consideration of the project impact on limited access highways and establish how a project will qualify.[41]

Exception Seven: Part-time Projects. Another project-specific exception is for part-time projects.[42] This section excepts developments located within urban infill, urban redevelopment, existing urban service, or downtown revitalization areas which pose only special part-time demands on roads.[43] Examples of these types of developments include stadiums, performing arts centers, racetracks, and fairgrounds.

Exception Eight: Private Contributions. The comprehensive planning statute also entitles a local government to allow a landowner to proceed with development of a specific parcel of land notwithstanding a failure of the development to satisfy transportation concurrency.[44] This provision seeks to limit local government liability for temporary takings due to development delays. The local government must have an adopted comprehensive plan in compliance with DCA standards.[45] The local government also must provide a means by which the landowner will be assessed a fair share of the cost of providing the transportation facilities necessary to serve the proposed development.[46] On the other hand, the landowner must make a binding

37. FLA. STAT. § 163.3180(5)(b); FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(a)3. (1995).
38. FLA. ADMIN. CODE ANN. r. 9J-5.0055(6)(b)2. (1995).
39. FLA. STAT. § 163.3164(28); FLA. ADMIN. CODE ANN. r. 9J-5.0055(7) (1995).
40. FLA. STAT. § 163.3180(5)(b).
41. FLA. ADMIN. CODE ANN. r. 9J-5.0055(7) (1995).
42. FLA. STAT. § 163.3180(5)(c).
43. *Id.*
44. *Id.* § 163.3180(11).
45. *Id.* § 163.3180(11)(a).
46. *Id.* § 163.3180(11)(d).

commitment to the local government to pay the fair share of the cost of providing the transportation facilities to serve the proposed development.[47]

Concurrency standards authorize local governments to condition or bar development. The local government may allow growth only when sufficient infrastructure exists. The following section addresses when a development moratorium, based on a lack of concurrency, may be a compensable taking.

III. THE TAKING BACKGROUND

In the early 1900s, courts began to struggle with the tension between the desire of local governments to regulate the use of land and the constitutional property rights of landowners. Few localities previously adopted zoning regulations. Such regulations tend to reduce the value of at least some property. There was much uncertainty as to whether they were constitutional. In response, the United States Department of Commerce encouraged the adoption of zoning codes through its promulgation in 1921 of the Standard State Zoning Enabling Act, which provided a method for states to adopt statutes empowering local governments to enact zoning regulations.[48]

The Fifth and Fourteenth Amendments to the *United States Constitution* provide the bases for these issues. The Fifth Amendment guarantees that citizens' private property shall not be taken for public use without just compensation.[49] The Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[50]

The *Florida Constitution* also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person will be deprived of property without due process of law.[51] Article X, section six of the *Florida Constitution* is complementary to the Fifth and Fourteenth Amendments to the *United States Constitution.* It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."[52]

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47. FLA. STAT. § 163.3180(11)(e).

48. *See* Kenneth Hart, Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U. L. REV. 766, 768 n.6 (1974).

49. U.S. CONST. amend. V.

50. *Id.* amend. XIV.

51. FLA. CONST. art. I, § 2.

52. *Id.* art. X, § 6.

A review of the key cases in this area is instructive. In *Pennsylvania Coal Co. v. Mahon*,[53] a Pennsylvania statute prohibited coal mining that caused the subsidence of any structure used for human habitation. The statute admittedly destroyed previously existing property and contract rights of the coal mining companies. The court stated that

> The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[54]

The Court held that the statute caused an unconstitutional taking and that the coal mining companies should be compensated.[55]

The next key case in this area addressed a zoning ordinance. The Court in *Village of Euclid v. Ambler Realty Co.*[56] held that zoning regulations which reduced the potential value of property do not constitute an impermissible taking of property.[57] In 1922, Euclid adopted a zoning ordinance.[58] A portion of the plaintiff's property was zoned residential and the plaintiff wanted to develop the entire property for industrial use.[59] The evidence showed that the property was worth $10,000 per acre as industrial, but only $2500 per acre as residential.[60] The Court found that the zoning restrictions were permitted under the police power of the state to protect the health, safety, and welfare of its citizens.[61]

A seminal New York case involved a situation similar to a concurrency moratorium. In *Golden v. Planning Board of Town of Ramapo*,[62] a local ordinance which prohibited development until essential services of public sanitary sewers, drainage facilities, parks and recreation facilities, roads, and firehouses were available, was deemed not to be a taking.[63] The court

53. 260 U.S. 393 (1922).
54. *Id.* at 415-16 (citations omitted).
55. *Id.* at 416.
56. 272 U.S. 365 (1926).
57. *Id.* at 397.
58. *Id.* at 379.
59. *Id.* at 383.
60. *Id.* at 384.
61. *Village of Euclid*, 272 U.S. at 397.
62. 285 N.E.2d 291 (N.Y. 1972).
63. *Id.* at 305.

found that the purpose of the ordinance was not exclusionary, but to provide for orderly growth.[64] Even though the concurrency regulations might have the effect of restricting development of up to eighteen years, the ordinance was not found to have caused a taking because the restriction was temporary and served the public good.[65]

Subsequent United States Supreme Court cases undermine *Ramapo*. The Court in *Penn Central Transportation Co. v. City of New York*,[66] held that an historic preservation ordinance, which prohibited development in a manner requested by the developer, as applied to Penn Station, did not constitute a taking, since all use of the property was not denied because the statute made air rights transferrable.[67] The Court closely examined whether the landowner would receive a reasonable return on its investment, using the phrase "investment backed expectations."[68]

Temporary takings, which are most applicable to cases dealing with concurrency, were considered in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*.[69] In 1957, the church purchased land on which it operated a campground called "Lutherglen" and a retreat for handicapped children.[70] The land is located in a canyon along the banks of a creek which operates as a natural drainage channel.[71] In 1978, a flood destroyed the buildings on the property.[72] As a result of the flood, Los Angeles County adopted an interim ordinance prohibiting the construction of any building in an interim flood protection area, including the church's property.[73] The church immediately filed suit seeking damages.[74] The Court held that landowners were entitled to damages for the temporary taking.[75] The substantive holding of the Court was that when the government's activities deprive a landowner of all use of property, no subsequent action can relieve it of the duty to provide compensation for the period during which the regulation was effective.[76]

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64. *Id.* at 297.
65. *Id.* at 301-02.
66. 438 U.S. 104 (1978).
67. *Id.* at 138.
68. *Id.* at 136.
69. 482 U.S. 304 (1987).
70. *Id.* at 307.
71. *Id.*
72. *Id.*
73. *Id.*
74. *First Evangelical Lutheran Church of Glendale*, 482 U.S. at 308.
75. *Id.* at 322.
76. *Id.* at 321.

Contrast this holding to the holding in *Ramapo*, in which the court held that a "temporary" moratorium of up to eighteen years was not a compensable taking.[77] The *First Evangelical Church of Glendale* Court would have found that ordinance to cause a temporary taking.

Another landmark Supreme Court case is the decision in *Lucas v. South Carolina Coastal Council*.[78] In 1986, developer David Lucas purchased two residential lots on the Isle of Palms, a barrier island near Charleston, South Carolina.[79] Lucas intended to construct single family residences on the lots.[80] Two years later, in reaction to the devastation caused by Hurricane Hugo, the South Carolina Legislature enacted the Beachfront Management Act ("BMA"),[81] which prohibited construction of homes on Lucas' lots.[82]

Lucas' suit claimed that although the BMA was a lawful exercise of South Carolina's police power, the legislation effectively extinguished his property's value, entitling him to compensation irrespective of whether the legislature had acted in furtherance of legitimate police power objectives.[83] The trial court agreed and ordered that Lucas be compensated in the amount of $1,232,287.50.[84] The South Carolina Supreme Court reversed and found "'that the [BMA was] properly and validly designed to preserve . . . South Carolina's beaches,'" a threatened public resource.[85] Since the regulation was designed to prevent serious public harm, the state court reasoned that no compensation was due the landowner under the state's takings clause.[86]

The Supreme Court of the United States granted certiorari in the case. With respect to the merits of the regulatory taking claim, the Court noted that there are at least two categories of regulatory actions which are compensable without any inquiry into the public interest advanced in support of the restraint.[87] The first category of permissible regulatory takings occurs when a property owner suffers a physical invasion of her property.[88]

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77. *Id.*
78. 505 U.S. 1003 (1992).
79. *Id.* at 1006-07.
80. *Id.* at 1007.
81. S.C. CODE ANN. § 48-39-250-360 (Law. Co-op. Supp. 1995).
82. *Lucas*, 505 U.S. at 1007.
83. *Id.* at 1009.
84. *Id.*
85. *Id.* at 1009-10 (alteration in original) (quoting Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992)).
86. *Id.*
87. *Lucas*, 505 U.S. at 1015.
88. *Id.*

The second occurs when a regulation denies all economically beneficial use of land.[89] The Court stated that the only exception to the second category is when the regulatorily-proscribed use would amount to a nuisance at common law.[90] The Court also noted that it was highly unlikely that common law principles would have prevented the erection of any habitable or productive improvements on Lucas' land.[91] Accordingly, the Court reversed and remanded for further proceedings consistent with its decision.[92]

The most recent Supreme Court case in this area is *Dolan v. City of Tigard*.[93] In *Dolan*, an operator of an electric and plumbing supply business wished to raze an existing building and replace it with a larger structure.[94] The city imposed conditions requiring that the landowner dedicate ten percent of the property for flood plain and improvement of storm drainage, and dedicate a fifteen-foot strip for a pedestrian and bike pathway.[95] The Supreme Court held that this action constituted a taking because there must be a "rough proportionality" between dedication requirements and the impact of the development.[96] The Supreme Court refused to hold that rough proportionality did not exist in this case, but rather, that it had not been proven.[97] To prove "rough proportionality," a local government must show some sort of individualized determination that any required dedication is related both in nature and extent to the impact of the proposed development.[98] The burden of persuasion on this issue rests on the government.[99]

Recent Supreme Court of Florida cases on this issue also are instructive. In *Joint Ventures, Inc. v. Department of Transportation*,[100] the court stated that government must pay for property under two circumstances:

> [W]hen it confiscates private property for common use under its power of eminent domain[, and] . . . when it regulates private property under

89. *Id.*
90. *Id.* at 1022.
91. *Id.* at 1024.
92. *Lucas*, 505 U.S. at 1032.
93. 114 S. Ct. 2309 (1994).
94. *Id.* at 2313.
95. *Id.* at 2314.
96. *Id.* at 2319, 2321.
97. *Id.* at 2321.
98. *Dolan*, 114 S. Ct. at 2322.
99. *Id.* at 2319.
100. 563 So. 2d 622 (Fla. 1990).

> its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of the property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner.[101]

The court noted that "[a]lthough regulation under the police power will always interfere to some degree with property use, compensation must be paid . . . when that interference deprives the owner of the substantial economic use of his or her property."[102] "[W]hen compensation is claimed due to governmental regulation of property, the appropriate inquiry is directed to the extent of the interference or deprivation of economic use."[103]

Joint Ventures owned over eight acres of vacant land adjacent to Dale Mabry Highway in Tampa.[104] The owner agreed to sell the property contingent upon the buyer's ability to obtain the necessary development permits.[105] The Florida Department of Transportation ("FDOT") then determined that six-and-a-half acres of this vacant tract was needed for stormwater drainage associated with a planned highway widening.[106] In November 1985, the FDOT recorded a map of reservation, which precluded the issuance of development permits for the property.[107] At an administrative hearing, Joint Ventures contested the FDOT's reservation and the hearing officer found in favor of the FDOT.[108]

On appeal, "Joint Ventures argued that the moratorium imposed by [the applicable *Florida Statute*] amounted to a taking because the statute deprived [Joint Ventures] of substantial beneficial use of its property."[109] In opposition, the FDOT contended that the statute was not a taking, but a mere regulation and valid exercise of its police power.[110] The court made short work of the FDOT's claims, stating:

> If landowners were permitted to build in a transportation corridor during the period of DOT's preacquisition planning, the cost of acquisition

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101. *Id.* at 624.
102. *Id.* at 625.
103. *Id.*; *accord* Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1986).
104. *Joint Ventures*, 563 So. 2d at 623.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 623-24.
109. *Joint Ventures*, 563 So. 2d at 624.
110. *Id.*

> might be increased. Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive protections of chapters 73 and 74.[111]

The court further stated, "[w]e perceive no valid distinction between 'freezing' property in this fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings. Such action has been consistently prohibited."[112]

Joint Ventures generated a plethora of subsequent cases in which the Fifth and First District Courts of Appeal conflicted as to whether maps of reservation create presumptive takings.[113] The Supreme Court of Florida resolved this question in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*[114] In *A.G.W.S.*, the Expressway Authority filed a map of reservation over vacant land while *Joint Ventures* was pending.[115] The property owners claimed that this action amounted to a temporary taking.[116] The circuit court agreed, granting the landowners' motion for summary judgment on liability.[117]

In a sharply divided opinion, the Second District Court of Appeal affirmed the decision of the trial court.[118] The appellate court also certified to the Supreme Court of Florida the question of whether all owners of lands affected by reservation maps are entitled to per se takings judgments.[119] In answering the certified question, the supreme court held that *Joint Ventures* did not create a per se taking standard.[120] It further held that a landowner must show that the map of reservation deprived substantially all economically beneficial or productive use of land before a taking has occurred.[121]

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111. *Id.* at 625.

112. *Id.* at 626.

113. *See* Department of Transp. v. Miccosukee Village Shopping Ctr., 621 So. 2d 516 (Fla. 1st Dist. Ct. App. 1993); Department of Transp. v. Lake Beulah, 617 So. 2d 1089 (Fla. 5th Dist. Ct. App. 1993).

114. 640 So. 2d 54 (Fla. 1994).

115. Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 608 So. 2d 52, 54 (Fla. 2d Dist. Ct. App. 1992), *quashed*, 640 So. 2d 54 (Fla. 1994).

116. *Id.*

117. *Id.*

118. *Id.* at 52.

119. *Id.*

120. *A.G.W.S.*, 640 So. 2d at 58.

121. *Id.*

The Supreme Court of Florida's subsequent decision in *Palm Beach County v. Wright*[122] followed *A.G.W.S.* The trial court and the Fourth District Court of Appeal struck down a bar of land use activities under a comprehensive plan that would impede roadway construction in designated transportation corridors.[123] Both lower courts held that *Joint Ventures* supported a finding of a temporary taking.[124]

The state supreme court, however, reversed, holding that the case was distinguishable from *Joint Ventures* on several points.[125] Principally, the court held that the thoroughfare map conditioned development, but did not completely bar it.[126] Additionally, the reservation map was considered only a flexible guidance tool.[127]

A seminal Eleventh Circuit Court of Appeals decision provides a good checklist for determining whether all economically viable use of property has been taken under Florida Law. *Reahard v. Lee County*[128] suggests that a taking claim requires one to analyze the economic impact on the owner and the extent to which the regulation interferes with the owner's investment backed expectations. Factors to consider are: 1) the history of the property; 2) the history of development; 3) the history of zoning and regulation; 4) whether the development changed when title passed; 5) the present nature and extent of the property; 6) whether the expectations of the landowner are reasonable under state common law; 7) reasonable expectations of neighbors; and 8) the amount of diminution of investment-backed expectations of the landowner.[129]

IV. ANALYSIS OF WHETHER CONCURRENCY'S PROHIBITION ON DEVELOPMENT OF PROPERTY REPRESENTS A TAKING

When property cannot be developed because of concurrency regulations, the following "takings" issues should be considered:

1. Analyze whether the concurrency ordinance provides for at least some development. Some concurrency ordinances allow for minimal development, such as single family homes, even though concurrency levels

122. 641 So. 2d 50 (Fla. 1994).
123. *Id.* at 51.
124. *Id.* at 51-52.
125. *Id.* at 54.
126. *Id.* at 53.
127. *Wright*, 641 So. 2d at 53.
128. 968 F.2d 1131 (11th Cir. 1992).
129. *Id.* at 1136.

of service may be exceeded. If the development allowed is reasonable, it is less likely that a taking has occurred.

2. Analyze the reduction in value of the property and the investment backed expectations of the owner. If the value of the property analyzed is tremendously reduced and the investment backed expectations of the owner are reasonable, it is more likely that a taking has occurred.

3. Determine how long the development will be prohibited by the concurrency regulations. The longer the prohibition, the more likely that a taking has occurred.

4. Consider whether the concurrency problem is related solely to the owner's project or to the government's failure to provide for growth. The greater the impact that the individual owner's project has on the services, the less likely it is that a taking has occurred.

5. Analyze whether the unavailable services are closely related to health, such as availability of water and sewer, or "softer services" such as recreation. The more closely the unavailable services are related to health, the less likely it is that a taking has occurred.

V. THE HARRIS ACT

In 1995, the Florida Legislature passed, and Governor Lawton Chiles signed into law, the Bert J. Harris, Jr., Private Property Rights Protection Act.[130] The Harris Act might benefit landowners when imposition of concurrency regulations creates less than a complete taking of property.[131] The Harris Act creates rights for property owners for those governmental actions which "inordinately burden" property.[132] A cause of action under the Harris Act does not require a taking of all compensable rights in the property.[133]

The Harris Act operates prospectively to those government actions occurring after the end of the 1995 legislative session, or after May 11, 1995.[134] No law, rule, or ordinance that exists, or has been previously noticed for adoption, is covered.[135] Later amendments to existing laws,

130. 1995 Fla. Laws ch. 95-181 (codified at FLA. STAT. § 70.001 (1995)).

131. *Id.*

132. Ch. 95-181, § 1(2), 1995 Fla. Laws. at 1652.

133. *See, e.g., Reahard*, 968 F.2d at 1136 (stating Florida's prior standard that compensation is due only where governmental action "takes" all or substantially all property rights).

134. Ch. 95-181, § 1(12), 1995 Fla. Laws at 1657.

135. *Id.*

rules, and ordinances, however, fall under the Harris Act.[136] The Harris Act also covers actions by all local, state, and regional governments,[137] but it does not affect federal acts or those actions delegated from the federal government.[138] In addition, the Harris Act does not cover actions that abate nuisances, temporary impacts, or impacts caused by Harris Act relief issued to other landowners.

The first two limitations are products of taking jurisprudence. Takings generally are compensable when they effect a public good, but not when they prevent a harm. Conversely, the temporary impact bar differs from the common law entitlement to compensation for temporary takings.[139] This should substantially limit the effect of the Harris Act on moratoria. Transportation-based development bars are lifted once the infrastructure is available.

The Harris Act also exempts maintenance and expansion of transportation facilities.[140] This also should limit the Harris Act's impact on concurrency moratoria. As stated above, property owner claims under traffic corridor expansions constitute a major portion of Florida's taking law. Recent case law regarding development exactions indicates issues that might otherwise arise.

In *Dolan v. City of Tigard*,[141] the United States Supreme Court held that a city could not require a developer to provide a public greenway and bike path. The Court held that the dedications far exceeded the degree of public infrastructure impact shown for the proposed development.[142] The Court also held that the local government must demonstrate both an "essential nexus" and "rough proportionality" between the development and the exaction.[143] Failing that, the government might be liable for a taking.

Florida's Fourth District Court of Appeal, in *Department of Transportation v. Heckman*,[144] reviewed *Dolan* in considering the FDOT's appeal of an inverse condemnation judgment. The trial court held FDOT liable for the City of Oakland Park's requirement that the appellee property owners grant a seven-foot wide right of way across their property in return for a waiver

136. *Id.*
137. *Id.* § 1(3)(c), 1995 Fla. Laws at 1652.
138. *Id.*
139. *See* First Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) (holding temporary taking of all rights can give rise to compensation).
140. Ch. 95-181, § 1(10), 1995 Fla. Laws at 1656.
141. 114 S. Ct. 2309 (1994).
142. *Id.* at 2322.
143. *Id.* at 2319, 2321.
144. 644 So. 2d 527 (Fla. 4th Dist. Ct. App. 1994).

of development and platting requirements. The city then conveyed the parcel to FDOT for the expansion of U.S. Highway 1. The appellate court cited to *Dolan*, but did not find any agency between FDOT and the city.[145] Its reversal was, therefore, wholly unrelated to the merits.

Florida's Second District Court of Appeal considered another inverse condemnation case in *Sarasota County v. Ex.*[146] The Exs claimed that the county had no authority to require a right of way grant in exchange for a permit. The *Ex* court did not reach the merits either. Instead, it held that the action was barred by the statute of limitations.[147]

Roadway expansions are prevalent causes of development exactions. One can reasonably expect concurrency moratoria where already overburdened roadway corridors are subjects of further development requests. Without the exception, limitations based on traffic concurrency would be a ripe area for litigation.

A. *Protected Rights*

The Harris Act protects the "existing use" of property.[148] An "existing use" is "an actual, present use or activity on the real property,"[149] or

> such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property [that is] greater than the fair market value of the actual, present use or activity on the real property.[150]

The first definition is relatively simple to determine. The second definition, however, merges several criteria to create a new standard. There is no direct authority on which to base a determination of when property use is reasonably foreseeable and non-speculative. Former Florida Department of Community Affairs Secretary Tom Pelham suggests that local governments should draft guidelines for determining such uses under the pertinent comprehensive land use plan or zoning code.[151]

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145. *Id.* at 530-31.
146. 645 So. 2d 7 (Fla. 2d Dist. Ct. App. 1994).
147. *Id.* at 10 (citing FLA. STAT. § 95.14 (1995)).
148. Ch. 95-181, § 1(3)(b), 1995 Fla. Laws at 1652.
149. *Id.*
150. *Id.*
151. Thomas Pelham, *Coping with the Private Property Rights Protection Act*, FLA. PLANNING (Fla. Chapter Am. Planning Ass'n), July-Aug. 1995, at 1, 15.

Pelham also notes that the second prong of the "existing use" definition requires appraisers to speculate.[152] The Harris Act fails to answer the question of how one determines whether the reasonably foreseeable, non-speculative land use has a higher fair market value than does a current use.

B. *Vested Rights*

The Harris Act contains three standards to determine a vested right to a specific use.[153] A right may vest under common law equitable estoppel, substantive due process, or a state vested rights statute.[154]

Florida courts have stated that equitable estoppel bars the government from rescinding a vested right held by a property owner who has: "(1) in good faith (2) upon some act or omission of the government (3) . . . made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable . . . to destroy the right . . . ."[155]

The Growth Management Act, most likely to apply to local concurrency issues, contains the following vested rights provision:

> Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.[156]

One article on the Harris Act notes that substantive due process allows courts to develop a standard that goes beyond traditional estoppel.[157] These commentators cite an Eleventh Circuit Court of Appeals decision in support of this proposition.[158]

Thomas Pelham recommends that local governments draft ordinances defining "vested rights."[159] He also suggests that doing so may provide

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152. *Id.* at 15.

153. Ch. 95-181, § 1(3)(a), 1995 Fla. Laws at 1652.

154. *Id.*

155. Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15 (Fla. 1976) (quoting Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963)).

156. FLA. STAT. § 163.3167(8).

157. David L. Powell et al., *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J. 12, 14 (Oct. 1995).

158. *Id.* at 14, 17 n.17 (citing Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1544 (11th Cir. 1994), *vacated*, 42 F.3d 626 (11th Cir. 1994)).

159. Pelham, *supra* note 151, at 15.

a reasonable analysis of the property rights impacts of the new regulation.[160] Local vested rights ordinance standards do not create vested rights under the Harris Act.[161] Most local government codes already contain vested rights provisions. Those which do not, should. The Harris Act requires examination of vested rights.[162] The local definition might better allow a court to analyze whether regulation is compensable. This would be so regardless of the definition's direct applicability.

C. *Inordinate Burdens*

The Harris Act contains two alternative standards to determine inordinate burdens. Under the first standard, the landowner must show: 1) the government action so restricted existing uses or a vested use that the property owner cannot realize its use or vested use of the property; 2) the loss is permanent; and 3) the loss must affect the entire property.[163]

The second test requires a landowner to show that the government action caused the property to bear a disproportionate share of regulatory burden. A governmental action can result in a claim because the landowner bears too great a share of a burden that the government imposed for the good of the general public.[164]

D. *Implementing The Harris Act*

The Harris Act requires the injured property owner to notify the offending governmental entity within one year.[165] The government then has 180 days to issue a good faith settlement offer.[166]

One commentator notes that appropriate settlement offers fall into one of two categories: 1) compensation for the lost value or 2) enactment of an exception to the governmental action that devalued the property.[167]

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160. *Id.*
161. Ch. 95-181, § 1(3)(a), 1995 Fla. Laws at 1652.
162. *Id.*
163. *Id.* § 1(3)(e), 1995 Fla. Laws at 1653.
164. *Id.*
165. *Id.* § 1(11), 1995 Fla. Laws at 1656-57.
166. Ch. 95-181, § 1(4)(c), 1995 Fla. Laws at 1653.
167. Robert C. Downie, *Property Rights: Will Exceptions Become the Rule?*, 69 FLA. B.J. 69, 70 (Nov. 1995) (explaining Ch. 95-181, § 1(4)(c), 1995 Fla. Laws at 1653).

A property owner may sue in circuit court if no settlement is reached.[168] The procedure is parallel to a takings case.[169] The court first determines if an inordinate burden occurred.[170] If so, then a jury determines compensation.[171]

Attorney's fees awards' standards differ from those applicable in takings litigation. Condemnation statutes[172] generally entitle landowners to reasonable legal fees.[173] The government almost never is entitled to recover fees.[174] The Harris Act entitles a landowner to fees if the local government did not issue a good faith offer.[175] The government is entitled to fees if the landowner rejected a good faith offer.[176]

E. *The Attorney General's Opinion*

As of January 1996, no reported court decisions have expressly addressed the Harris Act. Nonetheless, the Florida Attorney General issued an instructive opinion regarding the Act's scope.[177]

St. Johns County asked the Attorney General whether the Harris Act confers rights on owners of property that is indirectly affected by a governmental action or regulation.[178] The answer was that the Act does not.[179] The opinion focused on the Harris Act's definition of "inordinate burden."[180] The term refers to actions that "'*directly* restricted or limited the use of real property . . . .'"[181]

The opinion also contends that courts should narrowly construe the Harris Act.[182] The Harris Act constitutes a waiver of sovereign immuni-

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168. Ch. 95-181, § 1(5)(b), 1995 Fla. Laws at 1654.
169. FLA. STAT. § 73.071 (1995).
170. Ch. 95-181, § 1(6)(a), 1995 Fla. Laws at 1655.
171. *Id.* § 1(6)(b).
172. FLA. STAT. chs. 73, 74 (1995).
173. FLA. STAT. §§ 73.091-.092 (1995).
174. A local government is limited to rights under § 57.105(1) to seek attorney's fees for defending a frivolous claim. *See* FLA. STAT. § 57.105(1) (1995).
175. Ch. 95-181, § 1(6)(c)2., 1995 Fla. Laws at 1655.
176. *Id.* § 1(6)(c)1., 1995 Fla. Laws at 1655.
177. 95-78 Op. Att'y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* (emphasis added) (quoting Ch. 95-181, § 1(3)(e), 1995 Fla. Laws at 1652).
182. 95-78 Op. Att'y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.

ty.[183] The opinion states "like a waiver of sovereign immunity, any ambiguity in the provisions of the act should be construed against an award of damages and such damages should be awarded only when an award appears consistent with the Legislature's intent."[184]

VI. CONCLUSION

The Supreme Court of Florida in *Palm Beach County v. Wright*[185] limited property owners' ability to prove that transportation related development limitations constitute compensable takings.[186] A property owner may demonstrate entitlement to compensation. The owner must meet an exacting factual burden of proof to do so.

The Harris Act, on the other hand, likely will have limited impact on private property rights under concurrency. The Harris Act only applies to applications of statutes, rules, and ordinances enacted after May 11, 1995. Concurrency requirements date from the 1985 growth management legislation. A concurrency moratorium probably would not fall under the Harris Act.

Nonetheless, if one can demonstrate that a concurrency moratorium is of general application, one might argue that the Harris Act applies. In *Board of County Commissioners of Brevard County v. Snyder*,[187] the Supreme Court of Florida held that quasi-legislative rezonings are of a generalized nature—applying to a substantial number of properties.[188] Quasi-judicial rezonings apply only to a small number of parcels or landowners.[189]

The Harris Act does not define the term "application." The state supreme court's use of the word in *Snyder* might help:

> [R]ezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, *and where the decision can be*

183. *Id.*
184. *Id.* (citing Arnold v. Shumpert, 217 So. 2d 116 (Fla. 1968)).
185. 641 So. 2d 50 (Fla. 1994).
186. *Id.* at 54.
187. 627 So. 2d 469 (Fla. 1993).
188. *Id.* at 474.
189. *Id.*

> *functionally viewed as policy application, rather than policy setting*, are in the nature of . . . quasi-judicial action . . . .[190]

Accordingly, one might allege that a general concurrency moratorium is quasi-legislative. It does not "apply" generalized law as might a quasi-judicial action. Therefore, the Harris Act arguably would apply.

The Attorney General's opinion interpreting the Harris Act indicates that this view might not prevail. Attorney General Butterworth noted that the Harris Act is a limited waiver of sovereign immunity.[191] He concluded that any ambiguity must be interpreted in favor of sovereign immunity.[192]

Another exemption that might apply relates to maintenance and expansion of transportation facilities.[193] Concurrency moratoria address the opposite issue. One might claim that the exemption excludes concurrency moratoria because it only expressly addresses growth and maintenance.

The Harris Act might lessen the burden of proof that property owners must meet to obtain compensation for concurrency moratoria. Court interpretations will control the degree of impact. Florida's continued population growth puts increased burdens on extant infrastructure. Thus, the scope of the Harris Act implementation or concurrency might be sweeping.

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190. *Id.* (emphasis added) (quoting Snyder v. Board of County Comm'rs, 595 So. 2d 65, 78 (Fla. 5th Dist. Ct. App. 1991), *quashed*, 627 So. 2d 469 (Fla. 1993)).

191. 95-78 Op. Att'y Gen. (Dec. 7, 1995), *available in* WL, FL-AG Directory, 1995 WL 750474.

192. *Id.*

193. Ch. 95-81, § 1(10), 1995 Fla. Laws at 1656.