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*Defending Florida's Ecosystems  
and Communities*

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March 19, 2010

Charles Lee  
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Dear Charles,

You recently sought our legal opinion concerning a proposed settlement agreement pursuant to the Bert J. Harris Private Property Rights Protection Act between the City of Dunnellon and Conservation Land Group, LLC and Rainbow River Ranch, LLC. The proposed agreement concerns 257 acres known as The Reserve at Blue Run. You expressed concern that the proposed settlement agreement may not comply with the comprehensive plan amendment process set forth under Florida's Growth Management Act" in addition to other procedural issues.

We have reviewed the settlement agreement along with the attachments referenced therein in addition to your correspondence and have determined that the settlement agreement is problematic for two primary reasons. First, the settlement agreement appears to skirt the requirements of the comprehensive plan amendment process set forth under the Growth Management Act by allowing the City to unilaterally amend certain policies in its comprehensive plan through the settlement agreement instead of going through the plan amendment process expressly set forth under the Act. This process requires review and approval by the Florida Department of Community Affairs of any comprehensive plan amendment proposed by the City.

**We are not aware of any waiver or exception in the Bert Harris Act to this requirement. Thus, it is our view that if the landowner believes the existing land use restrictions on the property result in an "inordinate burden," it may either seek an order in Circuit Court invalidating the existing land use restrictions or apply for a comprehensive plan amendment under the Growth Management Act that amends the existing comprehensive plan policies to remove these development restrictions. We do not believe the Bert Harris Act affords a local government the opportunity to unilaterally amend its comprehensive plan through a settlement agreement.**

Further, because it appears to commit the city to approve of a comprehensive plan amendment outside of the state-mandated notice, public hearing and state review procedures, and could allow significantly more development than is necessary to avoid a Harris Act violation, it may constitute “contract zoning,” which is flatly prohibited in Florida. Courts have frequently invalidated agreements that essentially contract away the City’s police powers.

Below is a brief analysis of the issues raised by this agreement in view of the relevant statutes and case law. If you have any further questions, please contact us.

### **Florida’s Growth Management Act (Chapter 163, Florida Statutes)**

Florida’s Growth Management Act (Ch. 163, Part II, Fla. Stat.) requires all local governments to adopt a comprehensive plan determining the allowable uses, densities and intensities and development standards for all lands within their boundaries, and ensure that all development be consistent with the adopted plan.<sup>1</sup>

The Act grants local governments the power and responsibility:

- (a) “to plan for their future development and growth, to adopt and amend comprehensive plans, or elements or portions thereof,
- (b) to guide their future development and growth,
- (c) to implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements, and
- (d) to establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act.”<sup>2</sup>

Plans are required to include goals, objectives and policies that, among other requirements, protect, conserve and appropriately use natural resources and other areas with development constraints.<sup>3</sup> Plans are statutorily mandated legislative actions that control and direct the use and development of a property within a municipality.<sup>4</sup> A Plan is similar to a constitution for all development within the city’s boundaries and once a plan has been adopted pursuant to Chapter 163, “all development undertaken by, and all

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<sup>1</sup> See §§163.3167, 163.3177, 163.184, Fla. Stat.

<sup>2</sup> §163.3167 (1), Fla. Stat.

<sup>3</sup> See §163.3177(6)(d), Fla. Stat.

<sup>4</sup> *Citrus County v. Halls River Dev., Inc.*, 8 So.3d 413, 420 (Fla. 5<sup>th</sup> DCA 2009) (citing *Machado v. Musgrove*, 519 So. 2d 629, 631-32 (Fla. 3d DCA 1987).

actions taken in regard to development orders by, government agencies in regard to land covered by such plan” must be consistent with that plan.<sup>5</sup>

Plan goals, objectives and policies may be amended by a local government but any such amendment is evaluated on several levels of government, including review by the state’s leading planning agency the Department of Community Affairs (DCA), to ensure consistency with the Act and to provide ordered development.<sup>6</sup> The Act provides for a two stage-process for amending a plan. First, the local government determines whether to “transmit” the proposed amendment to the DCA for review. If the local government transmits the amendment, the Department reviews the amendment and provides the local government with its objections, recommendations and comments of any other regional agencies.<sup>7</sup> After the local government receives this “ORC” report the local government may (1) adopt the amendment; (2) adopt the amendment with changes; or (3) not adopt the amendment.<sup>8</sup> If the local government adopts the amendment, DCA reviews the amendment again.<sup>9</sup> If DCA determines the amendment is not in compliance with the Act, the State’s own comprehensive plan, and DCA’s rules, then DCA may initiate an administrative hearing challenging the plan amendment.<sup>10</sup> Similarly, affected persons may file a petition for administrative review of a plan amendment.<sup>11</sup> As the Florida Supreme Court explained in *Martin County v. Yusem*:

This integrated review process ensures that the policies and goals of the Act are followed. The strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its comprehensive plan, it is engaging in a policy decision. This is in contrast to a rezoning proceeding, which is only evaluated on the local level.<sup>12</sup>

### **The Bert Harris Act (Section 70.001, Florida Statutes)**

Section 70.001, Fla. Stat. provides property owners judicial relief “When a specific action of a governmental entity has inordinately burdened<sup>13</sup> an existing use of real property or a vested right to a specific use of real property.”<sup>14</sup>

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<sup>5</sup> *Halls River*, at 420 (citing 163.3194(1)(a), Fla. Stat.; 163.3164(7), Fla. Stat).

<sup>6</sup> *Martin County v. Yusem*, 690 So. 2d 1288, 1294 (Fla. 1997).

<sup>7</sup> §163.3184(4), Fla. Stat

<sup>8</sup> §163.3184(7), Fla. Stat

<sup>9</sup> §163.3184(8), Fla. Stat

<sup>10</sup> §163.3184(10)(a), Fla. Stat.

<sup>11</sup> §163.3184(9)(a), Fla. Stat.

<sup>12</sup> *Yusem*, at 1294.

<sup>13</sup> The term “inordinately burdened” means that’s an action has directly restricted or limited the use of real property such that the property owner is permanently unable to

Before filing a Harris Act claim, written notice of the claim must be given to the local government at least 180 days before filing a lawsuit.<sup>15</sup> After receiving such notice, the local government has 180 days to consider its options, which include retracting or modifying its action, taking no action, or granting relief in a variety of ways and making an offer to settle.<sup>16</sup> If the parties do not enter into a settlement agreement, the local government must issue a written ripeness decision identifying the allowable uses for the property.<sup>17</sup> This ripeness decision is the last prerequisite for judicial review and the matter shall be deemed right or final for judicial review, notwithstanding the availability of other administrative remedies.<sup>18</sup> If the local government maintains its earlier decision, the property owner may file a claim for damages in circuit court.<sup>19</sup>

### ANALYSIS

Under the terms of the settlement agreement, the City asserts that “[s]ince this is a settlement of two Bert Harris Claims and the City has recognized that the Owner has vested rights with regard to residential and commercial uses,” it is amending Objective 1, Policy 1.6 of the Future Land Use Element of the Dunnellon Comprehensive Plan to include up to 100,000 square feet of commercial uses.” It appears this is essentially a unilateral decision by the City to amend its plan, as there is no reference in the settlement agreement to transmitting and adopting a plan amendment in accordance with the review procedures set forth in Chapter 163, Fla. Stat.

We find no authority under either Chapter 163 or the Bert Harris Act to take such action. Chapter 163 is the exclusive process for amending a city’s comprehensive plan and there is nothing in Bert Harris Act, which enables a City to sidestep this requirement through a settlement agreement. **Thus, it is our view that if the landowner believes the existing land use restrictions on the property result in an “inordinate burden,” it may either seek an order in Circuit Court invalidating the existing land use restrictions or apply for a comprehensive plan amendment under the Growth Management Act that amends the existing comprehensive plan policies to remove these development restrictions. We do not believe the Bert Harris Act affords a local government the opportunity to unilaterally amend its comprehensive plan through a settlement agreement.**

The Harris Act provides that if the property owner accepts the settlement offer,

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attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property as a whole. §70.001(3)(e), Fla. Stat.

<sup>14</sup> §70.001(2), Fla. Stat.

<sup>15</sup> §70.001(4)(a), Fla. Stat.

<sup>16</sup> §70.001(4)(c); *See also Halls River*, at 420.

<sup>17</sup> §70.001(4)(a), 5(a), Fla. Stat.

<sup>18</sup> *Halls River*, at 420 (citing §70.001(5)(a), Fla. Stat.).

<sup>19</sup> *Id.* at 420 (citing §70.001(5)(a), Fla. Stat.).

the governmental entity may implement the settlement offer...subject to paragraph (d).

Paragraph (d) provides:

(d) 1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

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

We also do not interpret Paragraph (d) as providing the City with the option of amending its comprehensive plan without complying with the requirements set forth under the Growth Management Act. Even if it did, Paragraph (d) states that if a settlement agreement has the effect of “contravening the application of a statute,” in this case Chapter 163, the settlement agreement must be reviewed in Circuit Court to ensure that the relief granted protects the public interest served by the statute at issue.

As explained earlier, comprehensive plans, and the goals, objectives and policies contained therein are statutorily mandated legislative actions that control and direct the use and development of a property within a municipality. One of the key components of the Growth Management Act is to provide for an integrated review process that ensures that the policies and goals of the Act are followed. Unlike rezoning proceedings, which are only evaluated on the local level, plan amendments are reviewed at the state and regional level.<sup>20</sup> Moreover, the Legislature's intent in enacting the Growth Management Act was so that the public could participate in the comprehensive planning process to the fullest extent possible. This is reflected in the broad standing that is provided for citizens to challenge compliance determinations.<sup>21</sup> Section 163.3215, Fla. Stat. sets forth the standing requirements for parties seeking to enforce a local comprehensive plan. In enacting 163.3215, the Legislature rejected the common law rule and made the stated purpose of 163.3125 “to ensure the standing for any person who ‘will suffer an adverse

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<sup>20</sup> *Yusem*, at 1294.

<sup>21</sup> Section 163.3184(1)(a), Fla. Stat.

effect to an interest protected...by the ... comprehensive plan.”<sup>22</sup> §163.3215, Fla. Stat., is to “be liberally construed to advance the intended remedy,”<sup>23</sup> and “**demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action.**”<sup>24</sup>

Allowing the City to unilaterally amend its comprehensive plan through a settlement agreement does not protect the public’s interest in having an integrated, multi-government review process and allowing the public to participate in the process, let alone enforce their city’s plan. The agreement is not subject to review by DCA and it does not appear that the public has been provided any opportunity to engage in the process, with the exception of less than 24 hours notice that the settlement agreement will be submitted to the City Commission for approval. While the Harris Act does not appear to provide any specific notice requirements, it does not appear that the less than one day’s notice provided by the City allows for meaningful public involvement.

The lack of public participation and involvement, coupled with what appears to be a significant change in allowable land uses provided for in the settlement agreement, also sparks concerns that this agreement constitutes “contract zoning.”

Florida’s contract zoning cases hold invalid agreements and resulting development approvals that do not maintain the existing rights of third parties to object administratively and judicially to development approvals or which violate governing comprehensive plan or land development regulations.<sup>25</sup> As the Third District Court of Appeal in *City of Miami Beach v. Chisholm Properties*, 830 So. 2d 842 (Fla. 3d DCA 2002), remarked, contract zoning is akin to a “sweetheart settlement” and as the Second District explained, the reasoning behind the prohibition against contract zoning is clear:

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<sup>22</sup> *Save the Homosassa River Alliance, Inc. v. Citrus County*, 33 Fla. L. Weekly D 2490 \*15-16 (Fla. 5<sup>th</sup> DCA 2008) (citing *Parker v. Leon County*, 627 So. 2d 476, 479 (Fla. 1993)).

<sup>23</sup> *Edu. Dev. Ctr., Inc. v. Palm Beach County*, 751 So. 2d 621, 623 (Fla. 4<sup>th</sup> DCA 1999).

<sup>24</sup> *Southwest Ranches Homeowners Association, Inc. v. Broward Co., Florida*, 502 So.2d 931, 935 (Fla. 4<sup>th</sup> DCA 1987) (emphasis added). *See also Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So.2d 427, 433 (Fla. 4<sup>th</sup> DCA 2007); *Dunlap v. Orange County, Florida*, 971 So.2d 171, 174 (Fla. 5<sup>th</sup> DCA 2007); *Payne v. City of Miami*, 927 So.2d 904, 907 (Fla. 3d DCA 2005); *Pinecrest Lakes, Inc. v. Karen Shidel*, 795 So.2d 191, 202 (Fla. 4<sup>th</sup> DCA 2001) (“Under section 163.3215 citizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan.”).

<sup>25</sup> *Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996); *See also Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956) ([“t]he adoption of an ordinance is the exercise of municipal legislative power” and a city exercising this power “cannot legislate by contract”); *County of Volusia v. City of Deltona*, 925 So. 2d 340, 345-46 (Fla. 5<sup>th</sup> DCA 2006) (a County cannot delegate its legislative function by investing unbridled discretion in a private property owner or administrative agency); *Morgran Co., Inc. v. Orange County*, 818 So. 2d 640 (Fla. 5<sup>th</sup> DCA 2002).

If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The residential owner would never know when he was protected against commercial encroachment...The adoption of an ordinance is the exercise of municipal legislative power. In the exercise of this governmental function a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body.<sup>26</sup>

While the Bert Harris Act does provide for a settlement option, such settlement agreements could still run afoul of the prohibition against contracting away a city's local police powers. In fact, the development approval struck down in *Chisholm*, was the product of a Harris Act settlement agreement, even though the court did not ultimately rule on the issue of whether the settlement agreement in that case constituted contract zoning. In this case, the fact that the public was all but excluded from the settlement process and given essentially no notice of the City Commission vote on the matter, coupled with the fact that the settlement agreement may allow for significant more development than that which is currently allowed under the comprehensive plan, thus creating the potential for adverse impacts to the public interest, may subject this agreement to greater scrutiny under the laws of contract zoning. Unlike the settlement agreement in *Molina v. Tradewinds Corp. by Kilday*, 526 So. 2d 695 (Fla. 4<sup>th</sup> DCA 1988), which was upheld in part because the City was required to adopt ordinances at duly noticed public hearings, there does not appear to be any such noticed public hearings in this instance. Moreover, while the substance of the settlement agreement may very well include certain conditions or concessions that benefit the public at large, these conditions are ultimately the subject of judicial review and could be insufficient to overcome a contract zoning claim if it is determined that the allowable land uses would adversely affect the public interest. See *Walberg v. Metropolitan Dade County*, 296 So. 2d 509 (Fla. 3d DCA 1974).

## CONCLUSION

It is our opinion that the settlement agreement as written and processed by the City improperly skirts the comprehensive plan amendment process set forth under Chapter 163, Florida Statutes and may constitute unlawful contract zoning. As stated earlier, it appears that the only means of invalidating or nullifying Section 1.6 of the City's Comprehensive Plan is to either **seek an order in Circuit Court under the Bert Harris Act to invalidate the existing land use restrictions or apply for a comprehensive plan amendment under the Growth Management Act that amends the existing comprehensive plan policies. We do not believe the Bert Harris Act affords a local government the opportunity to unilaterally amend its comprehensive plan through a settlement agreement.**

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<sup>26</sup> *Chung*, at 1358 (quoting *Hartnett*).