CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

Vol. XLV, No. 2 THE FLORIDA BAR Winter 2023

Private Property Drowning in Protection: The Conflicting Dynamics of Bert Harris Act and Sea-Level Rise[1]

by Thomas Ruppert, Esq.

The Bert J. Harris, Jr. Private Property Rights Protection Act ("the Act" or "Bert Harris Act") serves as an additional layer of protection in Florida beyond the protections for property rights offered by the U.S. Constitution's Fifth Amendment. The Act allows property owners whose property is "inordinately burdened" by government action to provide notice to the governmental entity that the property owner believes her property has been inordinately burdened. This starts a 90-day clock ticking for the governmental entity to respond with a settlement offer and either settle with the claimant or issue a written "statement of allowable uses" that identifies the uses to which the subject property may be put.[2] Failure of a governmental entity to issue a required "statement of allowable uses" automatically ripens the claim at the culmination of the 90-day period and allows a claimant to file suit.[3] Filing suit requires that a claim include "a written appraisal report as defined in s. 475.611(1)(e) that supports the claim and demonstrates

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Chair's Report

By Janette M. Smith

Happy New Year! This year is set to be very exciting for CCLGL. In this edition of The Agenda, we have two excellent articles submitted by our members. The listserv continues to connect our CCLGL members with hot topics and sound responses. The CCGLG website upgrade continues to provide up-to-date information to our members while also spotlighting many excellent members of our section. Our members make a significant impact in local government and all members are welcome to submit nominations. To view our member and sponsor spotlights, please visit the website and our social media sites.

We have increased our communication and we are also preparing some excellent CLE's. Our signature CLE, Sunshine Law, Public Records and Ethics will be held in Orlando on March 3th. Registration is open.

Additionally, plans are underway for the 46th Annual Conference scheduled to be held at the exclusive Hammock

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CHAIR'S REPORT
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Beach Golf Resort and Spa in Palm Coast, Florida beginning with the Public Finance CLE on April 27, the annual conference on April 28-29, and the members round robin CLE on April 30.

During the conference, our section will celebrate our 50th anniversary We will also celebrate our past section chairs during our Chair's Dinner that is held every five years. Our Chair-Elect has been working diligently to put together an excellent speaker program while also planning for our 2nd annual networking event. By popular demand, we are proud to announce we have secured the Rogue Theory Band for entertainment in addition to the other amazing festivities.

Our sponsorship drive is also underway, and we have an excellent program. This year, we are offering the Diamond Sponsorship for up to six sponsors on a first come first serve basis! We are proud to announce Vernis & Bowling is our first Diamond sponsor. By sponsoring the CCLGL section, our members are directly benefiting our members! Last year, we were able to provide 4 law school students with paid grants in local government law, establish our section's first Academy Leadership sponsorship program, and we are able to elevate networking at the annual conference. We are very grateful for our 2021-2022 sponsors! We look forward to working with all of our sponsors again this year as the contributions by our sponsors provides a direct benefit that remains in our section.

I look forward to seeing each of you at the annual conference this year!

Janette M. Smith

City, County and Local Government Law Section, Chair

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the loss in fair market value to the real property."[4] A government entity receiving a notice of a claim must provide notice to any owners of real property contiguous to the property represented in the claim.

The Act has been amended numerous times since 1995 and has been a lightning rod for both criticism and praise. Critics assert the Act has engendered fear among regulators regarding liability and, as a result, has had a chilling effect on the creation of important land use and natural resource regulations.[5] Supporters agree with the conclusion that the law has curbed the number of regulations affecting real property but see this as evidence that the Act is working as intended.[6] Local governments confirm that the Act costs them money and chills the use of regulatory tools,[7] such as when the Town of Ponce Inlet faced a potential $30 million bill for a suit under the Act; while Ponce Inlet won on appeal without paying $30 million in damages, the effort cost the town about 10 years and $5 million.[8]

Despite such costs, the Act does have a useful role to play in avoiding arbitrary and unfair government actions, such as changing zoning to prevent a project *after* a developer has already consulted with local government and confirmed the eligible land use prior to purchase and investment, as occurred in one Bert Harris case.[9]

The Bert Harris Act, Sea-Level Rise, and 2021 Amendments

When the Florida Legislature passed the Bert Harris Act a quarter century ago, few people realized that seas were rising. Now understanding of rising seas is ubiquitous. In addition, planning, land use, and disaster experts widely acknowledge some key points about disaster losses: 1) Disaster losses have been on the rise for many decades; 2) The single greatest driver of growing disaster losses is increasing population and development in areas at risk of disasters;[10] and 3) Land use planning, zoning, and land use regulation offer some of the most effective ways to prevent creating more of the at-risk development exposed to natural hazards that fuels larger disaster losses.[11]

Nonetheless, in early 2021, the Florida Legislature passed, and the Governor signed, the "Relief From Burdens on Real Property Rights" bill.[12] While the bill may indeed further relieve owners of some property from regulatory burdens, by dissuading local governments from enacting zoning or regulatory policies to decrease or stop the creation of new at-risk development, this *increases* the burden on taxpayers when taxpayer funds are needed to address a disaster made worse the additional at-risk development that contributed to the disaster.

While not an exhaustive list of the 2021 changes to the Bert Harris Act, the following changes disincentivize local governments from taking a proactive stance on using land use planning tools and regulation to avoid construction of more at-risk development in Florida. Each is followed by an abbreviated explanation of how it could increase costs for local governments that might use land use planning and regulations to avoid the creation of new at-risk development:

1. Property owners need not apply for a permit to file suit

The 2021 modifications to the Act allow property owners to file suit against a governmental entity without applying for a permit or providing any evidence that development plans were burdened.[13] This represents one of the most drastic changes ever to the Bert Harris Act. Historically, the Bert Harris Act, like the federal property protections in the U.S. Constitution's Fifth Amendment, was subject to the idea of "ripeness." This required that a claimant have gone through sufficient process to be able to present clear evidence to the court of what development had been planned but then frustrated by the challenged law or regulation; what "property" had been taken from the claimant; and to compare detailed evidence

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on property values before and after the government action and how the claimant's "reasonable investment-backed expectations" were frustrated by the government's actions. Creating this evidence was extremely valuable as it was the only way for the court to have any assurance that the property owner really did plan to engage in a specific development action contrary to law, it allowed ascertaining whether such expectations of such development were "reasonable," and it helped inform the court about what the measure of damages to the property owner is.

After the 2021 changes, property owners without any intention of ever using their property contrary to a challenged regulation or change in land use can sue the governmental entity and potentially win a settlement awarding the property owner public funds for a use that the property owner did not even plan on engaging in. This essentially assigns all current property owners the value of the highest potential property value use for which property could legally be used as of July 1, 2021 and assumes that all such property owners have the desire and the resources to engage in such use. According to the Act, any "infringement" on the theoretical "right" to develop to the most profitable current use for which a property is zoned is to be paid for by the taxpayer. Freezing of property law in this way is antithetical to property law history, centuries of evolution of property law in North America, and to the long-standing understanding that what constitutes "property" constantly evolves in line with changing understandings of our world, social norms, technology, and economics.[14]

A property owner right to sue based on government "adopting or enforcing any ordinance, resolution, regulation, rule, or policy" that affects real property dramatically lowers to entry to the courthouse. This lowering of the bar, combined with significant potential payouts for differentials between high-investment projects that would dramatically increase property values and the property values based on current use, gives property owners a financial incentive to file suit against changes that might otherwise would not have affected the property owner. More lawsuits will cost local governments more taxpayer money to defend, even if the local government prevails.[15] Local governments may be more likely to avoid such potential costs by avoiding "adopting or enforcing any ordinance, resolution, regulation, rule, or policy" affecting real property, meaning that local governments will not fully exercise their ample—and important—police-power authority to prevent the creation of more of the at-risk development that fuels increasing disaster losses.

> 2. A property owner that files a claim retains a right to relief even if the property owner relinquishes title to the property.[16]

This last-minute addition to the law does not itself necessarily directly increase the cost for any particular lawsuit. However, increasing the flexibility for property owners to sell a parcel independent of a Bert Harris claim related to the parcel can make prosecuting a claim easier for a plaintiff; combined with the change noted under #1 (no need to apply for a permit), this change increases financial incentives for land speculation, particularly land that might not be a very safe or suitable location for new development but which is still zoned to allow for such or whose zoning was changed on or after July 1, 2021 to not allow such development.

This change to the Act creates a new question: Does the purchaser of a property, for which the seller retains rights to a Bert Harris claim, take the property subject to the law or regulation being challenged? Current Fifth Amendment "takings" jurisprudence—which is the best analogy we have—would indicate that this is a fact-specific inquiry. If the purchaser does not take the property subject to the new law/regulation, this would raise the surreal possibility that a local government could face multiple lawsuits from different owners for "application" of the same regulation to the same property.

> 3. Governmental entities now have less time to respond to a Bert Harris claim.[17]

While this does not immediately increase direct costs, it does require any governmental entity facing a Bert Harris claim to need to prioritize the claim at the cost of other work. And, as demonstrated in many Bert Harris claims, the burden on local governments to defend these cases can already cost local governments a lot of taxpayer money. This makes this change another disincentive for local governments to make any zoning, land use, or regulatory changes affecting real property. The current 90-day window for government entities to respond to a claim is half of the amount of time originally allotted in the Act in 1995.

> 4. Proposed settlements are now presumed to be "in the public interest."[18]

Again, this might not appear to directly increase the potential "cost" to local governments of a Bert Harris claim. In fact, the problem with this is that it could potentially *save* a local government money: If a local government is more concerned about settling a case to avoid potential liability than the local government is worried about the "public interest," the local government might already be compromising the "public interest" to settle the case. This 2021 change to the Act makes it much less likely in any given litigation there will be a party seeking to force a court to really take on its "weighty responsibility of 'ensur[ing] that the relief granted protects the public interest served by the statute at issue' and that the relief 'is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.'"[19]

> 5. Attorney fee provisions are now much more favorable to private property owners than to government defendants.[20]

Assigning attorney fees to a losing party is often viewed as a sort of extraordinary punishment imposed on a losing party *in addition to the fact that they lost the legal case*. And it can be a major punishment since legal fees can run into the hundreds of thousands or even millions of dollars

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in some cases. The previous Bert Harris Act regime on attorney fees reflected the "attorney-fee-as-punishment" idea. The statute indicated that either plaintiffs or defendant governmental entities that won litigation could receive attorney fees, *but only if* there was a showing that the losing side somehow unreasonably prevented settlement. 2021 changes left this requirement to demonstrate "unreasonableness" on the part of plaintiffs for a defendant governmental entity to recoup attorney fees. But it removed the same requirement of showing "unreasonableness" on the part of defendants, thus making it an automatic right for any prevailing property owner to recover attorney fees. The changes make governmental entities liable for attorney fees simply for losing the case, regardless of whether the governmental entities acted in good faith or not.

Many reasonable and important government actions within their policy power, such as efforts to limit the creation of more at-risk-from-natural hazards development, could potentially be the subject of Bert Harris Act claims. Many of these actions might be debatable as to whether government liability would be found under the Act by a reviewing court. In cases where the government entity acted in good faith, what is the policy reason to punish the governmental entity for acting in good faith under its police power to protect the safety, health, and welfare of its citizens by awarding attorney costs to the plaintiff? This runs counter to the idea of awarding attorney fees to disincentivize misguided, incompetent, or bad-faith actions on the part of governmental entities.

Additionally, 2021 changes to the attorney fee provisions also lengthened the amount of time during which claimants can claim attorney fees. Prior to 2021, claimants awarded attorney fees could calculate such fees from the time of filing an action with the circuit court. Now, however, claimants can claim attorney fees from the moment the claimant presents the claim to the "head of the governmental entity."

The changes to attorney fee provisions, along with #1, represent the clearest indication of a legislative intent to dramatically increase the leverage and potential payback to property owner claimants while assigning additional risk to governmental entities. This, in turn, disincentivizes local government use of land use planning and regulation to avoid the private construction of additional at-risk construction that contributes to the cost of disasters.

Rising Seas & Local Government Action: Potential Defenses to Bert Harris Claims

While several potential procedural and substantive present themselves as candidates for local government defenses depending on the facts of the case,[21] here I want to focus on a single potential substantive defense: only "suitable and compatible" uses are protected land uses.[22] Essentially, this defense would argue that since only "suitable and compatible" land uses are protected, property development proposals that would result in creation of development at high risk of impacts from natural hazards, either today or under SLR scenarios, do not constitute "suitable and compatible" development.

To my knowledge, this defense has never been argued in a Bert Harris case. And it is certainly not a guaranteed defense. The statute does not define either term, and recent case law potentially undermines the argument presented here.[23] Nonetheless, I present the argument here for one reason: few better substantive defenses present themselves to Bert Harris Act claims that might result from land use planning and regulatory activities that seek to account for sea-level rise and climate change when trying to avoid the creation of more risk to disasters in our communities. For more detailed discussion of this possible defense for local government entities that wish to regulate land uses to prevent the creation of additional exposure to risk, see Thomas Ruppert & Chelsea Miller, *Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act*, 50 Stetson L. Rev. 585 (2021)

Who Pays the Costs of Sea-Level Rise?

Billion-dollar disasters have been growing for decades in the United States and in many other places around the world. Just as disasters create human misery and suffering, they also create financial costs. Much of this financial cost ends up being born by taxpayers. This happens at the federal level through the National Flood Insurance Program (which has racked up $40 billion in losses *beyond* its income in the past two decades) and through the Federal Emergency Management Agency's various forms of disaster assistance, including reimbursements to local government for infrastructure damaged in a presidentially declared disaster.

Reimbursing local government infrastructure rebuilding has been one of the keys to helping some local governments be willing accomplices in at-risk development: why should the local government say "no" to proposed development that will increase property tax revenue; avoid any potential land-use dispute, such as a Bert Harris claim; and whose extra costs if hit by disaster are subsidized by federal taxpayers?

Federal taxpayers also pay the costs for past development that should not have been allowed in at-risk places. We pay through "buyout" programs that seek to end the flood-rebuild-flood again cycle by purchasing such properties. The irony is that we *continue to build new at-risk development in floodplain at 10 times the rate we are buying them out!*[24]

The evidence is in and it is clear: Where and how we build is the primary driver of our disaster losses. We have put a lot of attention on *how* we build as we have been increasing building standards. However, for decades, we have been avoiding the issue of *where* we build. This is not surprising in a state like Florida, which has been built on a long history of land development and land speculation. But the price tag for allowing development in high-risk areas continues to grow. And it will only get higher going forward.

We can change the dynamic of

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increasing building new at-risk development. But it will take proactive land use planning and regulation by local governments since our current laws and regulations have created an environment where many different actors (land speculators, developers, builders, local governments, etc.) benefit economically from building in at-risk areas, even though the price tag to us as a society is extremely high. Though the Florida Legislature did create a requirement for "coastal" local governments, in their planning efforts, to address sea-level rise as a cause of flooding,[25] the Legislature has not provided any increased protection to potential Bert Harris Act liability for local governments that do so. On the contrary, the Legislature has asked for planning to address sea-level rise and then, with the 2021 Bert Harris Act amendments, made it more difficult—and expensive—for local governments to do so.

Endnotes

1 This article is a summary and update of the article "Sea-Level Rise Adaptation and the Bert J. Harris, Jr.,

Private Property Rights Protection Act," by Thomas Ruppert & Chelsea Miller, published at 50 Stetson L. Rev. 585 (2021). This publication was supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), Grant No. NA 18OAR4170085. The views expressed are those of the authors and do not necessarily reflect the view of these organizations. Additional copies are available by contacting Florida Sea Grant, University of Florida, PO Box 110409, Gainesville, FL, 32611-0409, (352) 392.2801, www.flseagrant.org.

2 Fla. Stat. § 70.001(5)(a) (2021).

3 Id.

4 Fla. Stat. § 70.001(4)(a) (2021).

5 Nicole S. Sayfie & Ronald L. Weaver, 1999 Update on the Bert J. Harris Private Property Rights Protection, 73 Fla. B.J. 49 (1999) (discussing the chilling effects of the Bert Harris Act on local governments).

6 Robert P. Butts, Private Property Rights in Florida: Is Legislation the Best Alternative?, 12 J. Land Use & Envtl. L. 247, 267–71 (1997) (comparing viewpoints of opponents and proponents of the Bert Harris Act).

7 See, e.g. Cindy Jackson, Fernandina Observer, Recent changes to Bert Harris Act may impact county's new building height restrictions (Aug. 27, 2021), at https://fernandinaobserver.com/county-news/recent-changes-to-bert-harris-act-may-impact-countys-new-building-height-restrictions/.

8 Jacob Schumer, No "Bert Harris" Lawsuit Available for Local Government Refusal to Change Zoning Regulation (Feb. 12, 2021), at https://shepardfirm.com/no-bert-harris-lawsuit-available-for-local-government-refusal-to-change-zoning-regulation/.

9 Ocean Concrete, Inc. v. Indian River County, Board of County Commissioners, 241 So.3d 181 (Fla.App. 4 Dist. 2018).

10 See, e.g. Laurens M. Bouwer, Observed and Projected Impacts from Extreme Weather Events: Implications for Loss and Damage, in Loss and Damage from Climate Change (R. Mechler, L. Bouwer, T. Schinko, S. Surminski, & J. Linnerooth-Bayer, eds.) (Springer, Cham 2019) (noting that "What is clear from the normalisation studies listed here (Table 3.2) is that most do not find an increasing trend in losses, after the records have been normalised for increasing exposure. This implies that the main driver of the observed losses likely has been an increasing number of population and assets, and not a change in the hazard frequency or severity. "). See, also, IPCC, 2012: Summary for Policymakers. In: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, UK, and New York, NY, USA, pp. 1-19.

11 *See, e.g.* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 La. L. Rev. 69, 83 (2012) (focusing analysis "on land-use regulation and other forms of government mandates to adapt to sea-level rise, both because such regulation is indispensible [sic] for reasonable problems, and because it is a precondition for the Takings Clause analysis at its center) and Georgetown Climate Center, Jessica Grannis, Adaptation Tool Kit: Sea-Level Rise and Coastal Land Use (2011) (dedicating twice as many pages to discussion of planning and regulatory tools for adaptation as to all other tools) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjrhc_IzZr0AhUlRzABHfaDA5YQFnoECAkQAQ&url=https%3A%2F%2Fwww.georgetownclimate.org%2Ffiles%2Freport%2FAdaptation_Tool_Kit_SLR.pdf&usg=AOvVaw0GZu9HtrTEEsD69Cvn7bey.

12 2021 Laws of Florida 203, at http://laws.flrules.org/2021/203.

13 2021 Laws of Florida § 1 (modifying Fla. Stat. § 70.001(3)(d)) (expanding "action of a governmental entity" to include mere "adopting or enforcing any ordinance, resolution, regulation, rule, or policy") and (adding Fla. Stat. § 70.00111)(a)1.b) (noting that "The property owner is not required to formally pursue an application for a development order, development permit, or building permit, as such will be deemed a waste of resources and shall not be a prerequisite to bringing a claim.").

14 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) (noting that "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment."). *See, generally* Stuart Banner, American Property: A History Of How, Why, And What We Own (Harv. Univ. Press 2011). *See, also, e.g.* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 La. L. Rev. 69, 72 (2012); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 Stan. L. Rev. 1433, 1447-48 (1993); and Louise A. Halper, *Nuisance, Courts, and Markets in the New York Court of Appeals, 1850-1915*, 54 Alb. L. Rev. 301, 302-0 (1990); Morton J. Horwitz, The Transformation of American Law, 1780-1860 at 31, 37 (1977).

15 A local government may recoup legal costs if it wins the case and "the court determines that the property owner did not accept a bona fide settlement offer, including the statement of allowable uses, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 90-day-notice period." For more on this, see #5 below on the modification of attorney fee provisions.

16 2021 Laws of Florida § 1 (modifying Fla. Stat. § 70.001(2)).

17 2021 Laws of Florida § 1 (modifying Fla. Stat. § 70.001(4)(a)).

18 2021 Laws of Florida § 1 (modifying Fla. Stat. § 70.001(4)(d)1.).

19 Rainbow River Conservation, 189 So. 3d at 314 (citing Fla. Stat. § 70.001(4)(d)2 (2020)).

20 2021 Laws of Florida § 1 (modifying Fla. Stat. § 70.001(6)(c)1.).

21 For a list of these potential defenses, *see* Thomas Ruppert & Chelsea Miller, *Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act*, 50 Stetson L. Rev. 585 (2021).

22 Fla. Stat. § 70.001(3)(b)(2) (2021).

23 *See, e.g.* Ocean Concrete Inc. v. Indian River County, Bd. of Cty. Comm'rs, 241 So. 3d 181, 188 (citing to the holding of Nostimo, Inc. v. City of Clearwater, 594 So. 2d 779, 781 (Fla. 2d Dist. Ct. App. 1992) as indicating "that use of property was compatible with surrounding or adjacent uses because it was a permitted use under the zoning code."). It is also important to note that *Ocean Concrete* should teach local governments a very important lesson: ensure that your zoning reflects what you want to allow in an area both now and into the future because if someone seeks a permit for a development allowed under current zoning for a parcel, it is very likely they will win a Bert Harris claim against you if you then change the zoning to try to stop the project.

24 Presentation "Development Patterns and the Production of Flood Risk in North Carolina," given by Dr. Miyuki Hino at the Association of Collegiate Planning Schools Annual Conference, October 7, 2021.

25 Fla. Stat. §§ 161.551(3)(b)(1), 163.3177(6)(g)(10), 163.3178(2)(f)(1), 259.105(17)(d) (2020).

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The Florida Bar remains steadfast in its commitment to prioritize its members' Mental Health. In that vein, the Mental Health Committee has continued to work tirelessly, since its creation, to destigmatize the seeking of assistance and to provide resources easily and effectively to all members of the Florida Bar.

As part of this effort, the Mental Health Committee has secured a partnership with CorpCare to provide work-life services. CorpCare has generously agreed to provide all members of the Florida Bar with 5 free sessions to their vast array of services which include referrals related to childcare and eldercare, assistance with nutrition and healthcare referrals, help with career services, and even referrals to convenience services such as home cleaning, home repairs, and relocation services. By providing access to such a wide array of services, the Committee seeks to aid in the reduction of everyday stressors which inevitably promotes the mental health of our Florida Bar members.

***Miriam Soler Ramos**, Member of the Florida Bar's Mental Health Committee and Member of the Executive Council of the Florida Bar's City, County, and Local Government Bar Section.*

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In case of Emergency: After the Covid-19 Pandemic, have boundary lines of state emergency management, local response, and private rights mutated?

By Jane Cynthia Graham, B.C.S

Three years ago this March, Governor DeSantis declared a State of Florida public health emergency in response to the Covid-19 outbreak pursuant to Section 381.00315, Florida Statutes.[1] Over the next six months, DeSantis issued executive orders relating to the state's phased reopening and an individual's right to work and operate a business.[2] Cities, counties, and school districts passed local orders and ordinances requiring curfews, masks, and a variety of other restrictions. Section 252.46(1), Florida Statutes authorizes political subdivisions of the state to make, amend, and rescind orders and rules as necessary for emergency management purposes not inconsistent with rules or orders adopted by state agencies or by the Governor. Strip clubs, restaurants and other businesses, individuals, and private property owners responded with a wave of lawsuits aimed at protecting their rights, pitting conflicting state and local laws against each other, and raising a variety of constitutional arguments. Now that the dust has settled, here are some notable cases and guidance for local governments moving forward.

Curfews and Preemption

In July 2020 in response to a spike in Covid-19 transmissions, Miami-Dade County enacted a series of emergency measures including a late-night curfew and a complete shutdown of non-essential businesses. In September 2020, as Covid-19 cases declined, Governor DeSantis issued EO 20-244 which prohibited local governments from enacting Covid-19 emergency measures to prevent an individual from working and operating a business. Partly in response to EO 20-244, Miami-Dade County issued CO 30-20 which allowed retail and commercial establishments to "open, and remain open" but preserved the curfew from 12:00 am to 6:00 am with several exceptions. CO 30-20 preserved the curfew on the grounds that transmissions were more likely in the context of late-night gatherings.

In *Miami-Dade County v. Miami Gardens Square One, Inc.,* 314 So. 3d 389 (Fla. 3d DCA 2020), Tootsie's Cabaret challenged Miami-Dade County's curfew arguing that it was preempted by the Governor's Executive Order 20-244.[3] The Circuit Court granted a temporary injunction preventing Miami-Dade County from enforcing its curfew provisions in the county emergency order and the County appealed. The Third District held that (1) the County's emergency order did not fall within the realm of emergency measures forbidden by the EO and (2) the EO did not preempt the entire field of emergency measures.

The Third District conducted an express preemption analysis by looking to the plain and obvious meaning of the EO text.[4] The Court found the definition of "prevent" was ambiguous because it could either be defined as "to keep from happening" or "to present an obstacle or hinder."[5] Where ambiguity exists, the court looks to the rules of statutory construction. To decipher the intent, the Third District analyzed a "Whereas" clause in the EO about Covid related "closures," and determined that the word "closure" also was ambiguous but was meant for businesses that were altogether closed down. "Had the Governor meant to preempt local governments from imposing curfew, he could have said so."[6] The Third District held that Tootsie's failed to show that the EO clearly and expressly preempted Miami-Dade County's curfew. The Court's analysis highlights why precisely drafted "whereas" clauses in legislation, whether in an EO or local legislation, with a clear description of the intent, are crucial to guard against challenges in the future.

The Third District then conducted an implied preemption analysis. Implied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.[7] The District Court cited Article VIII, section 1(g) of the Florida Constitution that chartered counties have broad authority to enact county ordinances not inconsistent with general law, stating, "Thus, counties and municipalities are ordinarily understood to have policy powers that include the enactment of curfews."[8] The Third District continued:

> [W]e agree that [i]t generally serves no useful public policy to prohibit local government from deciding local issues. This is particularly obvious where no useful public policy is advanced by construing the executive order's narrow language as precluding *all* local government from enacting *any* further emergency measures in discharging its innate responsibility of safeguarding the life and property of its citizens during the sort of natural emergency contemplated by chapter 252.[9]

While not groundbreaking in the area of preemption law, *Square One* reaffirms a charter county's broad authority the implement police powers and that "implied constraints

within these particular areas should be even more carefully scrutinized."[10]

A month later, Judge Raag Singhal of the Southern District of Florida decided a case with similar facts but came to a different conclusion. In *828 Management, LLC v. Broward County,* 508 F. Supp. 3d 1188 (S.D. Fla. 2020), a group of restaurants challenged Broward County's EO 20-28 which imposed a curfew on restaurants and bars prohibiting the sale or consumption of food or alcohol between midnight and 5 am.[11] Unlike in *Square One,* Judge Singhal held that the County's Order was speculative and arbitrary as presented and did not address the economic impact as required by the plain language of EO 20-244.[12] While the local government was "well within its authority to enact restrictions of public health, and such restrictions survive preemption analysis," there was a proof problem.[13]

The County's position that "common knowledge suggests people drink alcohol more freely between midnight and 5:00 am" was unsupported by testimony at the hearing and the affidavits were conclusory.[14] The record was absent of any analysis that quantified the economic impact of each limitation or requirement on the restaurant, or explain why each limitation or requirement is necessary for public health as applied to food service. The Court held the temporal restrictions on food and alcohol service were "rather arbitrary."[15] The Court granted Plaintiff Restaurants a temporary restraining order against the enforcement of Broward's EO.

828 Management demonstrates the importance of supporting legislation with adequate evidence, even if some assertions may seem like common knowledge. Is it really true that people drink more freely between midnight and 5 am? Ever heard of day drinking? Supporting the record with testimony from police officers responding to calls or police logs of calls in the middle of the night from drunk and disorderly conduct could have helped, as well as quantifiable economic statistics and data.

Two months later, in *7020 Entertainment, LLC v. Miami-Dade County*, 519 F. Supp. 3d 1094 (S.D. Fla. 2021), Judge Robert Scola in the Southern District of Florida upheld Miami-Dade's EO for the curfew again.[16] Although *Square One* already upheld Miami-Dade's EO, the *7020 Entertainment* strip club/restaurant/individual exotic dancer plaintiffs urged the Court to decline to follow it because of the recent *828 Mgmt.* decision, arguing, "a nearly identical curfew failed due to a lack of record proof of economic costs of the regulations."[17] Miami-Dade County moved to dismiss based on failure to state a claim.

Here, Judge Scola agreed with Miami-Dade, and pointed out a material difference between Miami-Dade and Broward County's curfew orders. The Miami-Dade County curfew order:

> ….recognizes that the restaurant industry experienced a reduction in sales of 54 percent and that such reduction was caused, individually and collectively, by the County's COVID-related orders, including the County's curfew, and customers' decisions not to patronize restaurants due to concerns about COVID-19.[18]

Judge Scola found that the Miami-Dade curfew order satisfied Executive Order 20-244 by quantifying the economic impact of COVID-related limitations on restaurants and explained why such restrictions are necessary for public health. In contrast, the Broward County order failed to include any quantification of the economic impacts. *Id*.

If Broward had included an identical statement to Miami-Dade relating to economic impact, would it have been enough? The court in *828 Mgmt.* was also disturbed by the arbitrary temporal restrictions, which *7020 Entertainment* did not address. Lessons learned? If you are drafting an order or ordinance for a local government, support it with specific and quantifiable data and testimony. It does not have to be extensive but conclusory comments will likely not suffice. Also, it is best practice for emergency orders and government proclamations to be detailed and include any necessary exemptions so individuals can understand their scope.[19]

Masks and Privacy Rights

Cities and Counties throughout Florida also enacted a variety of mask mandates in response to the Covid-19 pandemic, which have been challenged in Florida courts with mixed results.

In *Machovec v. Palm Beach County,* a group of citizens challenged Palm Beach County's mask mandate, EO-12, as an unconstitutional infringement on their right to privacy based on their constitutional right to refuse medical treatment, arguing that the strict scrutiny standard should be used.[20] The trial court denied their motion for emergency temporary injunction, which the Fourth District upheld. [21]

The Fourth District held that wearing a mask does not subject plaintiffs to "forced medical treatment" and instead, quoted the trial court's order that, "the covering of one's nose and mouth is designed to safeguard *other citizens*."[22] Because EO-12 does not implicate the constitutional right to choose or refuse medical treatment, the trial court correctly applied the rational basis standard of review. The Citizens presented no arguments to support a claim that the County lacked a rational basis for the promulgation of EO-12.[23] The Fourth District summarized,

> A person's "right to be let alone and free from governmental intrusion into the person's private life," guaranteed by Article I, Section 23 of the Florida Constitution, is an important right, but it is not absolute. "Although a person's subjective expectation of privacy is one consideration in deciding whether a constitutional right attaches, the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster." …. To that end, "there are circumstances in which a public emergency, for instance ... the spread of infectious or contagious diseases or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government's police power.[24]

Like *Square One*, *Machovec* recognizes and reaffirms the broad authority of local government police powers in public emergencies.

Six months after *Machovec,* the First District came to an opposite conclusion, holding that Alachua County's mask requirement violated the right to privacy under the Florida Constitution and was therefore subject to a strict scrutiny analysis.[25] In *Green v. Alachua Cty.,* an individual sued Alachua County over a mask mandate violating his right to privacy. The First District held that the mask mandate implicated the plaintiff's right to privacy because within the right to privacy is the right to be left alone and "a fundamental right to the sole control of his or her person."[26] The District Court reasoned:

> [the] guarantee of bodily and personal inviolability—which we are asked to follow—must include the inviolability of something so intimate as one's own face. A persona then reasonably can expect to be free from governmental coercion regarding what he puts on it."[27]

The First District reversed the trial court's denial of the temporary injunction and remanded for a new proceeding that presumed the unconstitutionality of the mask mandate.[28] The First District continued that if the trial court engages in the strict scrutiny inquiry to analyze whether the mandate is the least restrictive means to achieve a compelling governmental interest, a relevant consideration is the statutory scheme established by the Legislature for managing public health emergencies involving an infectious disease, citing Section 381.00315, Florida Statutes.[29] The trial court analysis should address how, if at all, the mandate fits within this state scheme for managing a declared public health emergency, citing Section 252.46, Florida Statutes.[30] The opinion closed, "even in a pandemic, the Constitution cannot be put away and forgotten."[31]

What is a local government supposed to do with this circuit split? While *Machovec* recognized the broad authority of local governments in the Fourth District, *Green* curtailed it in the First District. With this unsettled case law, it would be prudent to draft emergency orders and ordinances which may implicate privacy rights as narrow and specific as possible in case it is challenged, supported by quantifiable data and evidence, and drafted in harmony with state statutes which govern the same topic. The above cases relate to public health emergencies, but local governments will draft orders in the future relating to other emergencies such as hurricane response, flooding, war, or other disasters beyond even our darkest imagination. Make sure to check any state legislation on the topic of the emergency to ensure you are not running afoul of a statutory scheme.

Beach Closures and Private Property Rights

In one of the first cases challenging local government restrictions, a group of private beachfront property owners challenged Walton County's beach closure ordinance enacted to combat the Covid-19 crisis.[32] They alleged that the beaches between their homes and the mean high-water line of the Gulf constitute their private backyards and that they are being denied the full use and enjoyment of their property in violation of the United States and Florida Constitutions and privacy rights. [33] The plaintiffs based their claims for injunctive relief on the Fourth Amendment as a seizure on the "Privacy Right" provision of the Florida Constitution, and that the ordinance is in conflict with Executive Orders of Florida's Governor. [34] On April 6, 2020, the plaintiffs filed an emergency motion for a preliminary injunction.

The Court rejected their argument and held that the plaintiffs failed to satisfy any of the four factors of a preliminary injunction and that it was doubtful they would succeed on the merits. The Court stated,

> We are in the midst of a national health emergency, and it seems highly likely at this stage of the case that the county has the authority to take the measures that it has in order to address that emergency.[35]
>
> As for the second factor, the plaintiffs have not shown that being precluded from accessing a portion of their property during a national pandemic constitutes an irreparable injury. Whatever injury they sustain in not being able to fully access the beach and water behind their homes is temporary and relatively minimal compared to the potential harms that may result if there is increased exposure to this communicable virus.[36]

Conclusion

Almost three years after the onset of the Covid-19 pandemic, what, if any, wisdom have local governments gained from cases challenging Covid-19 emergency regulations? First, legislative drafters should make sure to support any emergency ordinance with clear evidence and statistics instead of conclusory statements, even if a statement seems obvious. Second, review related executive orders and the state statutory scheme to ensure that you comply with any requirements of the EO and aren't running afoul of the implied preemption doctrine. Third, draft orders and ordinances as narrow and specific as possible and include exceptions. Finally, since there are more opinions on balancing private rights with public safety in emergency situations than there are covid strains, be sure to check for recent developments in case law to make sure you are aware of any new precedents. We can hope that we have put the worst of the Covid-19 pandemic behind us, but know there will always be new emergencies to deal with the next day.

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Endnotes

1 *Governor DeSantis* Exec. Order 20-15.

2 *See Governor DeSantis* Exec. Orders. 20-112, 20-123, 20-137, 20-193, 20-214, 20-223, and 20-244

3 *Miami-Dade County v. Miami Gardens Square One, Inc.,* 314 So. 3d 389 (Fla. 3d DCA 2020),

4 *Miami-Dade, 314 So. 3d* at 394.

5 *Id.*

6 *Id.* at 396.

7 *Id.* at 396, *citing GLA & Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003).

8 *Id.* at 396.

9 *Id.* at 397 (internal citations omitted).

10 *Id.*

11 *828 Management, LLC v. Broward County,* 508 F. Supp. 3d 1188, 1192 (S.D. Fla. 2020).

12 *828 Management*, 508 F. Supp. 3d at 1198.

13 *Id.* at 1198.

14 *Id.* at 1196.

15 *Id.*

16 *7020 Entertainment, LLC v. Miami-Dade County*, 519 F. Supp. 3d 1094 (S.D. Fla. 2021).

17 *7020 Entertainment,* 519 F. Supp. 3d at 1101.

18 *Id.*

19 *Id.* at 1102.

20 *Machovec v. Palm Beach County,* 310 So. 3d 941 (Fla. 4th DCA 2021).

21 *Id.* at 942.

22 *Id.* at 946-947.

23 *Id.*

24 *Id.* at 948. (internal citations omitted).

25 *Green v. Alachua Cty.,* 323 So. 3d 246, 250 (Fla. 1st DCA 2021), reh'g denied (July 16, 2021)

26 *Id.* at 253.

27 *Id.*

28 *Id.* at 254

29 *Id.* at 255.

30 *Id.*

31 *Id.* at 255.

32 *Dodero v. Walton Cty.,* 2020 WL 5879130, at *1 (N.D. Fla. 2020).

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at *2.

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