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Analysis of Property Rights Issues and the Limited Growth System in the Florida Keys
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The potential for private property rights liability is often put forth as a reason that local governments in the Keys should lift the development caps established in the existing Rate of Growth Ordinance (ROGO) or Building Permit Allocation System (BPAS). This concern typically focuses the judicial decisions holding that regulation categorically "takes" private property when it ''denies all economically beneficial or productive use of land…."[1] The stated concern is that, if the current development allocations are not increased in the coming years and the Keys have reached maximum build-out, then the Keys local governments will be required to pay "takings" full market value awards for each undeveloped lot in the Keys.

The law of property rights however is far more protective of the government's ability to strictly regulate property than is commonly understood. The memo analyzes the key aspects of property rights law as they apply to the unique circumstances of the Florida Keys. Overall, it is my opinion that (1) the governmental defenses against any such claims are numerous and strong; and (2) the potential number of privately – owned lots that might have a potentially valid "takings'' claim is not as great as is often assumed.

Initially, the courts have emphasized that a "categorical taking" occurs only when regulation removes "*all* economically beneficial us[e]" of property**.** *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), at 1019). In Court explained in *Lucas*, the deprivation of economic value required for a facial takings claim is limited to ''the **extraordinary circumstance when *no* productive or economically beneficial use of the land is permitted**.'' *Lucas*, 505 U.S. at 1017. (emphasis added). The *Lucas* opinion emphasized that this categorical rule would not apply if the diminution in value were 95% instead of 100%. *Id.* at 1019, n. 8. **Anything less than a ''complete elimination of value,'' or a ''total loss,'' is not be a *per se* taking, and "takes" private property only if application of the *Penn Central* factors (discussed below) result in a judicial ruling that justice and fairness require taxpayer compensation to an dividual landowner.** *Lucas***,** 505 U.S. at 1019–20, n. 8.

[1] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1015, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992) (establishing a categorical rule that a 100 percent reduction in economic value of land is a "per se taking"). See also, *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S. Ct. 2138, 65 L.Ed.2d 106 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

In *Palazzolo v. Rhode Island*[2] (*Palazzolo)*, the Supreme Court explained that, to prove a total regulatory taking, a plaintiff must show that the challenged regulation leaves "the property 'economically idle' " and that the plaintiff retains no more than "a token interest."[3] The plaintiff in *Palazzolo* failed to prove a total taking where an eighteen-acre property appraised for $3,150,000 had been limited as a result of the challenged regulation allowing only one home to a value of $200,000. *Id.* at 616, 631, 121 S. Ct. 2448.

The courts have made clear that government is not liable for a "taking" just because regulations reduce, even substantially, the value of property. The US Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005) reiterated that "we must remain cognizant that "government regulation—by definition—involves the adjustment of rights for the public good" … and that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law….'"

The Florida Keys case of *Beyer v. City of Marathon*, 197 So.3d 563 (Fla. 3rd DCA 2016) and all 'takings' decisions, hold that, absent extreme circumstances, any remaining reasonable economic use of the property will preclude a 'takings' claim. In *Beyer*, the comprehensive plan prohibited all construction on the property; the only allowable use was camping, and the availability of ROGO dedication points, which gave the property a fair market value of $150,000. Since the property retained a reasonable economic value, there was no property rights violation.

In the Keys, even if a parcel cannot receive a permit for major construction, it may still retain value as a result of potential non-permanent or minor construction, a ROGO/BPAS aggregation or dedication point or other use. Some of the non - residential, commercial or industrial uses allowed by Keys local governments include passive recreation, mariculture and aquaculture, beekeeping, working waterfront, conservation land for which there is a local, state or federal land acquisition market. The value these potential uses provide for individual parcels will be a significant factor that militates against a successful takings claim.

Most takings cases are decided on the unique facts of each case – the *Penn Central* factors

Absent a complete prohibition of any valuable use, each potential 'takings' claim is judged on its own individual facts and merit. The property rights clause **"bar[s| Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."** *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005). In *Pennsylvania Coal Co. v. Mahon*[4], the U.S. Supreme Court ruled that regulation will be deemed a taking if it "**goes too far**''[5] a finding that depends on the particular circumstances in each individual case to determine whether, in that situation, "**justness and fairness require the burden to be borne by the public at large…" and not the individual landowner.** *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[2] *Palazzolo v. Rhode Island*, 533 U.S. 606, 630–631, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001).
[3] *Id.* at 631, 121 S. Ct. 2448 (quoting *Lucas, supra* at 1019, 112 S. Ct. 2886).
[4] 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)
[5] 126 U.S. at 415. (emphasis added).

That is the legal standard, applied based on certain factors to be discussed below. There is no hard and fast rule that the prohibition of construction or a substantial reduction in uses and value is a property rights violation. Takings analysis considers the entire set of circumstances, both community-wide and specific to the individual parcel of land. A particularly relevant example for the Keys is the discussion in the *Lingle* decision indicating that stringent regulation that applies broadly, as opposed to "singling out" one or a few landowners may not be a "taking." Among its reasons for reversing a lower court's takings award was that "Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden." 544 U.S. 528, at 544**. In the Keys, the broad application of the development limits, and the comprehensive approach of which they are a part, supports the local governments in a takings challenge.**

Regulatory takings cases involve the "essentially ad hoc factual inquiries" described in *Penn Central.*[6] Under this analysis, there is **no "set formula" or "mathematically precise variables"** for evaluating whether a regulatory taking has occurred, but instead "important guideposts" and "careful examination ... of all the relevant circumstances."[7] The relevant factors include the "economic impact of the regulation" on the plaintiff; the extent to which the regulation "has interfered with" a landowner's "distinct investment-backed expectations"; and the "character of the governmental action."[8] **The more imperative the governmental interest, the farther regulation can go without being labeled a "taking". Regulations designed to prevent a public harm are less likely to be found to be a taking.** For this reason, The U.S. Supreme Court has upheld land use regulations intended to prevent flooding and protect public safety. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

<u>The compelling reason for the strict development limits in the Keys is a strong factor in defense of property rights lawsuits</u>

The "character of the government action"[9] – **the reasons for the strict development limits in the Keys - is a very strong defense to property rights "takings" claims**. The Administration Commission's 1995 Final Order made extensive findings about the Keys' unique and extreme vulnerability to hurricanes - a chain of islands, barely above sea level, connected to the mainland evacuation destination by a single road and multiple bridges (all prone to heavy flooding), and the great peril of being trapped on the road or at home during a dangerous hurricane.[10] The Commission found "[n]**o local government in Florida faces a more unique and serious challenge to protecting its citizens from the impacts of hurricanes**…"[11], and ruled:

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[6] See *Lingle, supra; Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra* at 321–326, 335–336, 122 S. Ct. 1465 (2002).

[7] See *Palazzolo, supra* at 633, 634, 636, 121 S. Ct. 2448 (O'Connor, J., concurring).

[8] *Lingle, supra* at 2081–2082, quoting *Penn Central, supra* at 124. See *Tahoe–Sierra Preservation Council, Inc., supra* at 320, 122 S. Ct. 1465; *Leonard v. Brimfield*, 423 Mass. 152, 154, 666 N.E.2d 1300, cert. denied, 519 U.S. 1028, 117 S. Ct. 582, 136 L.Ed.2d 513 (1996).

[9] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)

[10] *DCA v. Monroe County*, 1995 Fla. ENV LEXIS 129; 95 ER FALR 148 (Admin. Comm., Dec. 12, 1995)

[11] *Id*. at *293 ¶777 (emphasis added).

> **"the minimum evacuation goal necessary to protect lives in the … Keys should be 24 hours."**[12] ***

> "nothing greater than a 24-hour evacuation clearance time is acceptable given the geographic and infrastructure constraints."[13] ***

> **"a hurricane evacuation time of more than 24 hours is not acceptable** if the health, safety and welfare of the citizens and visitors … is the goal."[14]

The Commission ruled that the amount of development allowed by the original 1992 ROGO exceeded the evacuation capability and ecological carrying capacity. It required all Keys local governments to:

> "limit … new residential development … **provided that the hurricane evacuation clearance time does not exceed 24 hours** …." [15] (emphasis added)

Also, since the 1995 Governor and Cabinet Order had also found "the nearshore waters cannot tolerate the impacts from sewage treatment and stormwater from <u>additional</u> development …"[16] and ordered that "additional development, **if any**, will be limited to that amount which may be accommodated while maintaining a hurricane evacuation time of 24 hours and … meet environmental carrying capacity constraints."[17] It ruled:

> "If the infrastructure cannot handle any additional inputs and, either the capacity cannot be increased or the cost of increasing the capacity … is prohibitive, **future development … must be limited or even stopped**."[18]

Section 380.0552(4)(e)2., Fla. Stat. was subsequently amended to limit the amount of permanent residential development to that which can be evacuated in no more than 24 hours, and the comprehensive plans of all local governments in the Keys include that development cap[19]. As the Department of Economic Opportunity explained in a 2017 report to the Governor and Cabinet, all local governments in the Keys:

> "are united by the need to maintain a hurricane evacuation clearance time of 24 hours prior to the onset of hurricane-force winds. The … Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112

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[12] *Id*. at *461 ¶1349.
[13] *Id*. at *43-44.
[14] *Id*. at *321 ¶879.
[15] *Id*. at *74
[16] *DCA, et. al. v. Monroe County,* *204, ¶407.. (emphasis added)
[17] *DCA, et. al. v. Monroe County,* p. 309, ¶930.
[18] *DCA, et. al. v. Monroe County,* p. 138,¶930) (emphasis added).
[19] Section 163.3178, Fla. Stat., which also applies to the comprehensive plans in the Keys, requires that comprehensive plans "protect human life … in areas that are subject to destruction by natural disaster" and "protect[] human life against the effects of natural disaster, including population evacuation…." §163.3178 (1), and (1) d., Fla. Stat.

> miles and spanned by 19 miles of bridges. *** Access to and from the Keys is primarily by U.S. Highway 1. **Evacuation of the … population in advance of a hurricane strike is of paramount importance for public safety.** No hurricane shelters are available … for Category 3-5 hurricane storm events. **A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour evacuation clearance time** …."[20]

In 2012, each local government in the Keys and the DEO entered into a Memorandum of Understanding to determine the hurricane evacuation clearance times for the Keys' population, and "the maximum build-out capacity for the [Keys], consistent with the requirement to maintain a 24-hour evacuation clearance time and [environmental] constraints."[21] That process resulted in a determination that the maximum "buildout" of the Keys which would maintain a 24-hour hurricane evacuation time was 3550 additional residential development units. Each local government amended its comprehensive plan to cap residential development based on its proportional share of the 3550 units**.** All landowners have had notice of that cap since then.[22]

This is the stringent regulatory regime that has applied to all undeveloped lands in the Keys for many years beginning with the Area of Critical State Concern designations in the 1970's, the *Growth Management Act* requirements if the mid -1980's, the ROGO growth caps of the early 1990's and the eventual establishment of a build-out cap in 2012. That theses strict rules are required by state law, applied comprehensively and consistently, and exist to protect lives during and after hurricanes. They are also necessary to protect the unique and extreme environmental fragility of the Keys, and the water quality essential the Keys economy and way of life. These factors weigh heavily in government's favor in any "takings" analysis.

On this point, the Florida case of *Lee County v Morales*[23] is illustrative. *Morales* rejected a claim that a sharp reduction in allowable uses was a taking where the purpose of the rezoning was to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and guard against the threat by hurricanes and flooding to development. The Court emphasized that the downzoning was not arbitrary but was instead based upon an expert study and legitimate environmental, public safety, and concerns related to protection of endangered species, severe erosion, and the constant state of change of the land due to storm damage.[24]

The strict development caps in the Keys are the product of extensive study and science about hurricane forecasting and evacuation, warming and rising seas and rapidly intensifying hurricanes, comprehensive water quality sampling and a $ 6 million ecological carrying capacity study. The public safety imperative (hurricane evacuation and structural damage to adjoining properties and persons), and the ecological carrying capacity bases for the strict development limits in the Keys are strong defenses to 'takings' claims. The reality facing local governments in the Keys: the state of rising seas, more frequent and intense hurricanes, and the resulting financial

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[20] DEO 2017 Annual Report, p. 3. (emphasis added)

[21] July 2012 Memorandum of Understanding.

[22] The state's approval of comprehensive plan amendments adopted to lift that build -out limit is currently on appeal.

[23] *Lee County v Morales*, 557 So.2d 652 (Fla. 2nd DCA 1990).

[24] Id at 653 – 656.

liability for protecting buildings, infrastructure and people and for post-disaster relief are important considerations in any "takings" analysis. Restrictions designed to comply with statutory mandates to protect the loss of life and prevent catastrophic ecological damage are less likely to be seen as "going too far", "unjust", or "unfair." The Florida Supreme Court has ruled:

> "The degree of constitutionally protected property rights "must be determined in the light of social and economic conditions which prevail at any given time."[25]

The Court has also ruled that, in a case from the Florida Keys, that private property rights and the public interest to be balanced.[26] The conditions facing the Florida Keys – increasing evacuation challenges, rising seas, the prohibitive costs of massive infrastructure improvements, ecological loss, will weigh heavily in their favor in a "takings" case. The ROGO/ BPAS growth caps exist to prevent loss of life in face of major storms and hurricanes, the threat of which is exacerbated by global warming – induced stronger and more un-predictable hurricanes, and to protect the water quality and environmental integrity that is the very basis of the Keys economy and way of life. The paramount public purpose for these development limits, and that they are required to prevent a variety of public harms is a strong "takings" defense.

Of particular relevance in support of ROGO is *City of Hollywood v. Hollywood, Inc.*, 432 So.2d 1332 (Fla. 4th DCA 1983), where a city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. Under the cap, the number of permits to be issued was expressly based on traffic capacity because no other existing method would yield a specific number to represent the limitations that existed relative to the other factors. The court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. *Id.* at 1334. Despite this flaw, the Court found that the growth limitation was based upon and justified by multiple valid considerations of the public interest, and not solely upon traffic considerations. *Id.* 1334 -1336.

ROGO / BPAS strongly resembles the ordinance upheld in *City of Hollywood.* Moreover, the critical public safety reason for the 24-hour evacuation limit is a particularly strong governmental defense. It is not an arbitrary number plucked out of the air. It is based on the widespread understanding of the unique low-lying geographical and road infrastructure challenges of evacuating the population prior to a hurricane; the perils of being unable to evacuate; and the clear and consistent statements from the National Hurricane Center that it cannot reliably predict the onset of tropical storm winds beyond 24 hours in advance.[27]

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[25] *Dept. of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101,103 (Fla. 1988).

[26] *Dep't. of Comm. Affairs. v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995) ("Landowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the State.)

[27] As stated in the DEO 2017 Area of Critical State Concern Annual Report, at 3 & 4 of 11, "[t]he … Keys consist of a chain of islands that are connected by a narrow ribbon of U.S. Highway 1, stretching 112 miles and spanned by 19 miles of bridges. The … Keys are isolated from the rest of the state and receive electricity and potable water from … the … mainland. Access to and from the Keys is primarily by U.S. Highway 1. **Evacuation of the … population in advance of a hurricane strike is of paramount importance for public safety**. No hurricane shelters are available in the … Keys for

The BPAS and ROGO growth caps have already been successfully defended in court

In addition to *Beyer v. City of Marathon*, *Dep't. of Community Affairs. v. Moorman*, and *Good v. United States*, discussed below, other judicial decisions have shown the strength of the Keys' growth restrictions to stand up in court. Monroe County's annual growth caps were upheld against a property rights challenge in *Burnham v. Monroe County*, 738 So. 2d 471, 472 (Fla. 3d DCA 1999), where the court held that the rate of growth ordinance was constitutional. The court ruled "the ROGO ordinance was constitutional, as it substantially advances the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection." Id. This was reiterated in a 'takings' case - *Collins v. Monroe County*, 118 So. 3d 872 (Fla. 3d DCA 2013) – in which the County prevailed.

The *Collins* case and other decisions and analyses are explained in the excellent legal analysis provided by Assistant Monroe County Attorney Derek Howard in his December 2017 article in the Environmental and Land Use Law Section Reporter, Derek Howard, *Local Regulatory Taking Claims: Accounting for State and Federal Regulations to Minimize Liability and Damages Exposure*, ELULS Reporter Vol. XXXIV, No. 10 Dec. 2017. This article explains that a property owner must prove a "reasonable investment-backed expectation" of development that has been substantially thwarted by regulation. The principles that defeat a takings claim include "buyer beware" and "cannot sleep on one's rights". He also describes land use cases which were won by Monroe County.

Because, as reported by Mr. Howard, each case is considered on its own facts, and more takings claims fail than succeed, it should not be assumed that government compensation would have to be made for every vacant lot that is unable to receive a residential ROGO/ BPAS allocation, which is highly unlikely given the fact-specific nature of property rights legal analysis and many long-standing legal defenses to compensation claims discussed above.[28]

Landowners who purchased subject to ROGO/ BPAS have diminished ''takings'' claims

Federal takings law[29] and Florida's *Harris Act* protect a landowner's "reasonable, investment-backed expectations and / vested rights to use of the property.[30] Thus, **both the increasing general public awareness of the hurricane evacuation limitations facing the Keys,**

Category 3-5 hurricane storm events. **A system of managed growth was developed in order to ensure the ability to evacuate within the 24-hour evacuation clearance time …."**

[28] The notable exception, *Galleon Bay Corp. v. Bd. of County Commissioners of Monroe County*, 272 So. 3d 396 (Fla. 3d DCA 2018) where the plaintiff succeeded partially in its claim, involved a pre-ROGO approved development which both the Beneficial Use Hearing Officer and, ultimately, the Court, found had been diligently pursued. For more history, see *Galleon Bay Corp. v. Bd. of County Com'rs of Monroe County*, 105 So. 3d 555, 558 (Fla. 3d DCA 2012).

[29] *Avenal v. United States*, 33 Cl. Ct. 778, 785 (1995).

[30] § 70.001(3)(e)(1), Fla. Stat.; *See, also.*, Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. Land Use & Envtl. L. 239, 246 (2011).

the growing impacts of sea level rise[31], and the combination thereof, will tend to support the Keys' growth restrictions in response to "takings" claims.

When determining the reasonableness of a landowner's investment-backed expectations, courts consider, among other things, whether a discounted price indicated prior knowledge of a potential limitation to use or develop; and the overall riskiness of the investment. *Palazzolo v. Rhode Island.*[32] *Palazzolo* ruled that acquiring a property *after* a regulation had taken effect is a particularly relevant consideration.[33] Similarly, in *Abrahim-Youri v. United States,* 36 Fed. Cl. 482, 486 (1996) the Federal Court of Claims wrote that:

> "In assessing the reasonableness of investment-backed expectations, the question … is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind; hence, the call for just compensation on grounds of fairness and justice is considerably diminished".

Landowners who purchased their land after the rate of growth restrictions were enacted will have difficulty winning a property rights suit. The purchase of property with existing zoning restrictions will likely preclude a 'takings' claim when those restrictions prevent development; owners are deemed to acquire their land subject to existing regulations. In *Namon v DER*, 558 So. 2d 504 (Fla. 3d DCA 1990), the Court rejected a 'takings' claim where the owner, when he bought the land, had constructive knowledge of the need to secure a state wetland permit prior to development. Even though no construction or economic use could be made of the property, there was no taking when the owner was validly denied a permit when he had constructive knowledge that he might not qualify for a permit when he chose to buy the land:

> "A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights." *** One who purchases property while it is in a certain known zoning classification, ordinarily will not be heard to claim as a hardship a factor or factors which existed at the time he acquired the property."

Namon is a strong defense to 'takings' claims based on regulatory decisions in effect at the time the property is purchased.

In a Keys case, *Good v. United States,* 39 Fed. Cl. 81, 112-14 (1997), a federal court rejected a 'takings' claim, ruling "[w]hile plaintiff was free to take the investment risks he took in

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[31] Ruppert, Grimm & Candiotti, Sea-Level Rise Adaptation and the Bert J. Harris, Jr., Private Property Rights Protection Act, https://www.flseagrant.org/wp-content/uploads/2012/03/Ruppert_BH-Act_article.pdf

[32] *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

[33] *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken." As explained by Mr. Howard:

> "Based on *Good,* **if regulation of property is pervasive at all levels of government, the local government can argue that it is unreasonable for a developer to purchase the property and continue making an investment in seeking local development approval.**"
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> "In determining if Mr. Good had reasonable investment-backed expectations, the court noted that (a) his initial purchase investment was predated by 'pervasive federal and state regulation' of 'ecologically sensitive areas' such as his property (b) by the time he chose to invest in development, the complained of regulation was already in place. These facts proved fatal to [his] claim. The court explained that '[t]he reasonable investment-backed expectations factor … properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime. In part, the rationale for this rule is that one who invests in property with the knowledge of the restraint assumes the risk of economic loss.' *Good* stated that 'state and local restrictions must be considered in determining the presence or absence of reasonable investment-backed expectations to engage in the proscribed use.' The court further stated that 'in a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset when development is restricted or proscribed.' The court concluded that 'the pervasiveness of the regulatory regime at the time plaintiff purchased Sugarloaf Shores deprives him of a reasonable expectation to effect his development plans.'" (internal citations omitted).

Thus, in the Keys, among the key facts that would distinguish some vacant lot claims from others is whether the property was acquired before or after the enactment of ROGO in 1992. The well-known strict regulatory regime that governs development in the Keys may preclude many owners from succeeding in a 'takings' suit, particularly those who purchased their land after the 1992 adoption of the rate of growth limits.

In an effort to begin to quantify the vacant lot situation in the a Keys, an April 2019 analysis of data provided by the Monroe County Property Appraiser found:

- of the total residential parcels in unincorporated Monroe County (5685), 75.5% of them (4291) were last purchased after ROGO was enacted.

- of the total residential parcels in Key West (188), 70% of them (132) were last purchased after ROGO was enacted.

- of the total residential parcels in Islamorada (736), 81% of them (598) were last purchased after ROGO was enacted.

- of the total residential parcels in Marathon (1,183), 84% of them (988) were last purchased after ROGO was enacted.

- of the total residential parcels in Key Colony Beach (77), 83% of them (64) were last purchased after ROGO was enacted.

- of the total residential parcels in Layton (23), 74% of them (17) were last purchased after ROGO was enacted.

Obviously, the overwhelming number of vacant lots were purchased with actual or constructive knowledge of the ROGO/ BPAS limits.

Pre-ROGO purchasers also are not immune from new regulations

Landowners who bought their parcels prior to ROGO are not necessarily due compensation as a result of strict regulation enacted after their purchase. Courts recognize the ability, indeed the responsibility, of government to respond to new information and science by changing regulations to respond accordingly. Landowners cannot hold vacant land for long periods of time while regulation increases in response to changed conditions and then expect courts to hold them harmless from those regulations. Among the clearest cases on this point is also a case from the Keys.

In 2016, the US Supreme Court declined to review, and thus let stand, *Beyer v. City of Marathon*, 197 So.3d 563 (Fla. 3rd DCA 2016), which ruled in favor of Marathon in a 'takings' case. In *Beyer*, the owner had purchased an undeveloped nine-acre offshore island (Bamboo Key) in 1970, when it was under the jurisdiction of the County and zoned for Gen. Use, which allowed one home per acre. In 1986, a zoning change to Cons. Offshore Island reduced the allowable density to one unit per 10 acres. In 1996, the County Plan was adopted and identified the island as a bird rookery and prohibited any development**.** The Beyers submitted a beneficial use application in 1997 but the County had taken no action by 1999 when Marathon incorporated. After a Beneficial Use hearing, a Special Master **found the only allowable use of the property was camping, and that the assignment of ROGO points constituted reasonable economic use – creating a total value of $150,000.** The Special Master found the owners' inactivity over 35 years, despite increasingly strict land use regulations, precluded any reasonable expectation of greater development value.

The owner sued Marathon for a 'taking' and lost. The Court ruled that the existence or extent of Beyers' investment-backed expectations to develop Bamboo Key was a fact-intensive question, and that there was no evidence that the Beyers "had any specific plan for developing, dating from time of purchase in 1970, up to the present." It ruled that if the owners did not start development prior to the land use regulations, "they acted at their own peril in relying on the absence of zoning ordinances…" and that a "subjective expectation that land can be developed is no more than an expectancy - does not translate into a vested right to develop the property."[34]

[34] The Bert Harris Act (F.S.70.001 Private Property Rights) also requires proof of a reasonable investment backed expectation. "In determining whether reasonable, investment-backed expectations are inordinately

The Derek Howard article also explains that a lack of legally – protected, investment - backed expectations resulted in a successful defense of a 'takings' case by the County in *Collins v. Monroe County*, supra, which emphasized that government is not required to compensate owners for land which remained undeveloped for many years, while regulation increased in response to government responsibilities to protect the public:

> "While the Landowners own properties on distinct areas of the … Keys, there appears to be one underlying commonality among them: with [one] exception … the **Landowners did not take meaningful steps toward the development of their respective properties, or seek building permits, during their sometimes decades-long possession of their properties**. *** 'Monroe County was designated an area of critical state concern in 1979, but the first land use regulations were not enacted until 1986. If the …owners did not start development prior to the enactment of these land regulations, they acted at their own peril in relying on the absence of zoning ordinances.' [***] The … owner in *Galleon Bay* serves as a suitable contrast to the Landowners in the instant case. In *Galleon Bay*, the … owner, over the course of several decades, proceeded with numerous efforts to improve its land including, but not limited to, having its subdivision platted, having the zoning district changed, extensively negotiating with the County, and revising its plat. *** Here, there was a noticeable lack of meaningful efforts by the …owners to explore the possible development options where … they became aware that building permits could be made available to them …." (internal citations omitted)

As put succinctly by the decision in *Monroe County, et.al. v. Ambrose*, 866 So. 2d. 703, 711 (Fla 3rd DCA 2003), where Monroe County, several municipalities and the state successfully defended a broad claim of vested rights:

> "It would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land."

A recent case that rejected a federal constitutional "takings" claim on this basis is *Smyth v. Conservation Commission of Falmouth*, 119 N.E.3d 1188 (Mass. App. Ct. 2019). In *Smyth* the Plaintiff owned an unimproved lot which had been purchased in 1975 for $49,000 with the intent to build a retirement home. The first steps ever taken to develop the lot occurred in 2006, but the development plans for a single - family house did not comply with the current development standards for wetlands and storm water. Without the ability to construct the house, the value of the lot was $60,000 due to the ability to use if for recreational uses. The value the lot would have been ~$700,000 if the home could be built.

Applying the *Penn Central* test to determine liability, the court found no taking because (a) the $60,000 value as regulated exceeded the $49,000 purchase price. (b) the opportunity to

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burdened, consideration may be given to the factual circumstances leading to the time elapsed between enactment of the law or regulation and its first application to the subject property."

developed the property had existing for over 30 years before the plaintiff first sought to build; and (c) the regulations at issue applied generally to all wetland property in the town.

This is a crucially important point in the Keys, where landowners are aware of the very unique ecological sensitivity of virtually every piece of land (the development of even scarified or disturbed lands has secondary impacts on higher quality habitats and nearshore water quality). They have also witnessed a steady increase in environmental and hurricane- related development restrictions starting with the Area of Critical State Concern designations in the 1970, the significantly increased restrictions resulting from the 1985 Growth Management Act, the ROGO/ BPAS development caps in the early 1990s and the establishment of a final "build-out" development allocation in 2012. At the same time, the local governments and the state have expanded and maintained opportunities for owners to realize value from their land in the form of land acquisition programs, ROGO/ BPAS lot aggregation and donation incentives, and transferrable development rights programs. Given these facts, a Keys landowner that took no concrete steps to apply for development approvals or avail themselves of those other options would bear a strong burden to convince a court that justice and fairness require a ruling that government has "taken" their property. This is particularly true given the unique, severe and paramount public safety other reasons for the strict regulatory regime in the Keys.

Single ownership of multiple lots reduces ''takings'' liability

The final key aspect of property rights law that can reduce, perhaps substantially, the "takings" liability of Keys' local governments is the judicial approval of lot aggregation/ combination requirements. A meaningful assessment of potential "takings" liability would require the identification of how many vacant lots in the Keys are in single ownership.

The regulatory approach of aggregating lots to allow only minimal reasonable development on one of several adjoining lots received strong endorsement in 2017 when the US Supreme Court ruled that lot merger requirements did not violate the private property rights of a family that was allowed to build only one house on two adjoining lots. In *Murr v. Wisconsin,* 137 S. Ct. 1933 (US 2017), the Court observed that a central dynamic of property rights law is its flexibility to reconcile the individual's right to private property with government's power to adjust rights for the public good. The decision strongly supports the practice of treating multiple subdivided adjoining lots as one parcel to determine whether the owner has been allowed a reasonable economic use of the "property as a whole." The Court recognized that strict regulation can have positive impacts on the value of heavily regulated property by increasing privacy and recreational space or preserving surrounding natural beauty:

> "[I]f the landowner's other property is adjacent to the [Landowner's] lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part."

The Court also noted that where the ability to build is severely limited, the enforcement of that same restriction against other properties benefits that owner, also militating against finding a property rights violation.

The Court also made clear that lot aggregation requirements are more likely to be upheld when enacted to protect highly sensitive and regulated resources. The factors to be considered are:

> "[T]he physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or is likely to become subject to, environmental or other regulations."

In reasoning clearly applicable to the Keys, the Court upheld the regulation, finding it to be "reasonable … enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land." The Court wrote:

> "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."

Murr enunciates a particularly strong defense available to the state and local governments in the Keys, where lot aggregation and a highly restrictive regulatory regime designed to preserve a unique and fragile coastal ecosystem and way of life are key facts in a 'takings' case.[35]

Any analysis of potential 'taking' liability should include a consideration of the number of adjacent lots in single ownership, and not assume that compensation would need to be given for the value of every individual lot for which a development permit is not issued. Based on the *Murr* analysis, it is also important to know whether a parcel is undevelopable for environmental or other reasons -- for example, the inability to acquire a federal wetland permit-- not attributable to the local ROGO/ BPAS limits[36].

Florida's *Harris Act*

Since its enactment in the 1995, Florida's *Harris Act* has been mentioned frequently by lawyers for landowners and even some local officials as an impediment to strict regulation. That claim relies on the fact that the *Harris Act* "provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution." §70.001(9), Fla. Stat.

But the *Act* only applies to new regulations enacted after its adoption in 1995, establishes a high bar for the granting of compensation, and provides a safety valve mechanism for government in the rare cases where regulations subject to the Act

[35] *Murr* reiterated the rule that knowledge of restrictions in place at the time of purchase weighs strongly against a ''takings'' claim.

[36] Similarly, in situations where a property is "unduly burdened" by the combined effect of multiple restrictions maintained by more than one agency, Florida's *Harris Act* makes government entities liable only for the percentage of responsibility each such governmental entity bears for that burden. §70.001 (6)(a), Fla. Stat

"inordinately burden" an individual property owner. These are significant limitations on the ability of landowners in the Keys to force the taxpayers to compensate them for the inability to build under the ROGO/ BPAS growth caps.

The ROGO/ BPAS restrictions are generally not subject to the *Harris Act*, because they were enacted prior to its adoption.

The *Harris Act* only applies "when a new law, rule, regulation, or ordinance … unfairly affects real property." §70.001(1), Fla. Stat. It does not apply to the application of any law, rule, or ordinance adopted, or formally noticed for adoption, ***on or before May 11, 1995.*** §70.001(12), Fla. Stat. It applies to a subsequent amendment to any such law, rule, regulation, or ordinance only to the extent that the regulatory chance imposes an inordinate burden apart from the pre-existing law, rule or ordinance being amended. §70.001(12), Fla. Stat. **Because the ROGO/ BPAS growth caps were enacted in 1992, they cannot be challenged under the *Harris Act.*** This is a very broad limitation on any liability local governments in the Key might have under the *Act.*

Another important limitation on the applicability of the Act to the Keys is the exclusion from liability for "any actions taken by a county with respect to the adoption of a Federal Emergency Management Agency Flood Insurance Rate Map issued for the purpose of participating in the National Flood Insurance Program. §70.001 (1)(b), Fla. Stat. Properties that are unable to be built upon due to their flood - prone character may be unable to invoke the Act for that reason.

Even if the Harris Act could apply to the ROGO/ BPAS restrictions (for example if a change to the point scoring system adopted after May11, 1995 was the difference between receiving a building permit allocation or being denied such an allocation, that change would itself have to constitute an "inordinate burden". In all cases, that standard is an exacting one.

Under the *Harris Act*, landowners have the burden of proving they have suffered an "inordinate burden" - an exacting standard.

The "takings" standard under the *Act* is a difficult one to prove. The "Harris" Act entitles landowners to compensation only where they can prove that a regulation "has inordinately burdened an existing use of real property or a vested right to a specific use of real property…." §70.001 (2), Fla. Stat.

The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state. §70.001(3) (a), Fla. Stat. The term "existing use" means:

> "1. An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or
> 2. Activity 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 greater than the fair market value of the actual, present use or activity on the real property."
> §70.001 (3) (b), Fla. Stat.

A landowner who can prove the existence of such a vested right or use, must then also prove that government has "inordinately burdened" that use. The terms "inordinate burden" and "inordinately burdened" mean:

> "an action …[which] has directly restricted or limited the use of real property such that the property owner is **permanently unable to 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 **with respect to the real property as a whole**, or that the property owner is **left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large**. "§70.001 (3) (e) (1), Fla. Stat. (emphasis added)

This is very similar to the ultimate standard courts have consistently applied to "takings" claims brought under the Florida or the US Constitution. It does not appreciably lower the threshold for government liability. The same defenses available to a local government defending a constitutional property rights claim are available when defending a *Harris Act* claim.

Moreover, the *Harris Act* requires a landowner to specifically document the evidence of an alleged inordinate burden" with "a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property." §70.001 (4) (a), Fla. Stat.

In addition, landowners must strongly consider the merit of the claim before suing a local government under the Act. If a landowner sues an agency under the *Act* and ultimately fails to prove that the challenged regulation constitutes an inordinate burden, the owner must pay the local government's attorney fees. §70.001 (6) (c) 2, Fla. Stat.

Over 25 years, the Florida appellate courts have only confirmed one *Harris Act* violation but overturned several lower court rulings that the *Act* had been violated.[37] The lone case where an appeals court found a violation involved an unusual set of facts – a set of actions by the local government that clearly trampled on a landowner's vested rights. In *Ocean Concrete, Inc. v. Indian River Cty., Bd. of Cty. Comm'rs*, 241 So. 3d 181, 183 (Fla. 4th DCA 2018). the court affirmed a final judgment under the Act in favor of a landowner who had purchased a parcel of land to build a concrete batch plant only after meeting with county staff to confirm that the plant was permitted by the county code. After the owner filed multiple applications, acquired several permits, installed wells, cleared and graded the property, planted a landscape buffer, and began to install a rail spur and made other substantial expenditures in reliance on the zoning code, the County acceded to public opposition to the project and amended the code to prohibit the plant. Unsurprisingly, the Court found this to be just the type of retroactive, "unfair" preclusion of a "reasonable, investment-backed expectation for the existing use" of land the Act was written to address.

[37] *Town of Ponce Inlet v. Pacetta, LLC, et al*, 120 So. 3d 27 (Fla. 5th DCA 2013). See also, *M&H Profit, Inc. v. Panama City*, 28 So.3d 71(Fla. 1st DCA 2009); *Holmes v. Marion County*, 960 So.2d 828 (Fla. 5th DCA 2007); *Jacksonville v. Coffield*, 18 So.3d. 589 (Fla. 1st DCA 2009).

Even if a local regulation were subject to the Act, and an owner has a valid claim that it inordinately burdens his or her property, the owner is entitled only to some *relief* – not necessarily compensation**.**

Even in those rare situations where a landowner could prove that the ROGO/ BPAS or other land use or environmental restriction in the Keys is an inordinate burden, owner "is entitled to relief, which may include compensation for the actual loss to the fair market value …." §70.001(2), Fla. Stat. The law is intended to provide relief to owners who suffer inordinate burdens – not to require the taxpayers to buy their land are fair market value. The law is set up to give landowners the opportunity to present a valid claim to the government and authorize the agency to grant a variance or other relief from the burdensome restriction. The owner cannot bring suit under the Act unless it has first given the agency formal notice of its claim and the opportunity to either grant a variance or purchase the property.

At least 150 days prior to filing an action, the owner must present the claim, and the supporting evidence, in writing to agency. §70.001 (4)(a), Fla. Stat. During the notice, the governmental entity then makes a written settlement offer of its choosing from any of the following options, which the Act authorizes it to effectuate:

1. An adjustment of development or permit standards.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation. §70.001 (4)(c), Fla. Stat.[38]

While several of these options would not be available if the property is inordinately burdened as a result of ROGO/ BPAS allocation limits, in all cases, the ability exists to grant a waiver or purchase the land (or coordinate with other local, state or federal agencies to do so) to avoid a liability and a compensation judgment under *Harris Act.* §70.001 (4)(d), Fla. Stat.

If the owner rejects the settlement offer, in any suit the owner would bring under the Act, the court will consider the settlement offer and statement of allowable uses when determining whether the agency inordinately burdened the property. §70.001 (6)(a), Fla. Stat.

[38] The agency may also choose to offer no changes to its action, which it would presumably do if it believes the claim to lack merit. §70.001 (4)(c)11, Fla. Stat

The key implication of this procedure is clear. **Local governments need not anticipatorily loosen necessary valid restrictions out of fear of *Harris Act* liability. They can do so only on a case by case basis, where a specific landowner, based on specific circumstances, has proven that they would otherwise suffer the type of unfair burden the Act was enacted to prevent.**

The *Harris Act's* emphasizes requiring proof of, and creates the opportunity to avoid, a *bona fide* claim prior to the filing of a lawsuit. No liability accrues to the agency prior to its staff and lawyers having the full opportunity to assess the actual evidence supporting a claim and advise the agency on how to proceed. Local governments need not loosen their rules across the board based on a generalized theoretical or threatened potential for *Harris Act* claims, but should, as stewards of the public trust, maximize the substantive and procedural defenses available to them under the Act.

Increased Allocations Could, Ironically, Undermine the Legal Support for Comprehensive Development Limits in the Keys

Increasing "ROGO" or "BPAS" allocations could actually to hurt the ability of the local governments in the Keys to defend property rights suits, by undermining the factual bases and legal integrity for the development limits that were enacted more than 25 years ago as a result of litigation and binding legal findings that the ability of the Keys ecological and evacuation carrying capacity to accommodate development had already been exceeded. These findings and rulings remain binding and critical to the survival of the Florida Keys.

Given this context, increasing the amount of residential development that can be built in the Keys would eviscerate all of this meticulous, hard-won but necessary and sustainable planning by the state and local governments. It would violate the key requirements of both the Community Planning Act and the Florida Keys Area of Critical Concern laws that required and resulted in the current County and City comprehensive plans that are based on limited growth as determined by the carrying capacity analysis. The overwhelming amount of planning and study that led to the inescapable conclusion that the current development limits were required to save lives and property and protect the ecology that is the very basis for the Keys way of life and economy cannot now just be disregarded. The law requires rigorous data and analysis to demonstrate that any increases in development in the Keys can be accommodated within these legally - required human safety and environmental constraints.

Any increase in the number of development permits outside of the current framework runs the great risk of completely undermining the legal basis for all of the comprehensive plans in the Keys. The compelling and rigorous evacuation and ecological science-based determinations have supported the annual development caps in the Keys all these years in the face of legal challenges. If the state and local governments simply start increasing those numbers outside of that careful framework, the integrity and comprehensive nature of those plans may lose their defensibility and become arbitrary in the eyes of a court.

On June 6, 2018, Monroe County planning staff wrote a letter to Dept. of Economic Opportunity Executive Director Cissy Proctor, raising this very issue relative to the then-proposed 1300 - unit ROG increase:

> "The issuance of an additional 1300 allocations for rental workforce housing *appears to undermine the whole process under which Monroe County has been regulating growth* since the implementation of the Rate of Growth Ordinance (ROGO). Please explain how this is consistent with our current policy structure." (emphasis added)

The strongest and most successful property rights defense available to the Keys local governments has been that the development allocation limits were necessary to maintain a safe evacuation time and prevent a collapse of the environment upon which the Keys economy and way of life is based. Considering both the fairness to those who have been denied allocations in the past, and the inability to credibly rely on this defense in the future given the unanswered questions raised above, increasing the development allocations now could have devastating long -term implications for the land use framework for the entire Florida Keys.

Conclusion

Local governments enjoy much greater ability and responsibility under bother constitutional and statutory property rights doctrines to protect the public than is commonly understood. The law of property rights, for a variety of reasons, has tended to take on a role in public discussions that exceeds its actual legal impact. It is a nuanced body of law to be applied carefully in individual situations to prevent unfair and overly burdensome applications of regulation to individual landowners – not a broad, categorical yoke of financial liability for all strict regulation. The defenses available to local and state agencies in the Florida Keys are particularly strong. In my view, no community in the country has a stronger set of defenses to ''takings'' claims than those in the Keys, where the development caps are necessary not only to protect the function of a coastal ecosystem that is the very basis of the economy and unique character of the Keys, but also to protect human life itself.

"Takings law" does not diminish the responsibility and ability to enact and maintain the land use regulations necessary to protect the public from the fiscal, social, safety, ecological and other impacts of the development of private property. Nor does it insulate landowners from the application of laws that apply fairly and evenly to similarly situated landowners in a highly regulated, ecologically fragile, infrastructure – limited and hurricane and sea level rise - prone chain of low -lying islands.

This analysis of property rights law counsels strongly against an assumption that the local governments in the Keys will be required to pay "takings" judgments for every vacant lot in the Keys that ultimately cannot be built upon because of the ROGO/BPAS development limitations. Given the strength of the law on the side of the government's interests, the true extent of property rights liability, and the reasonably expected compensation amounts is likely to be far lower than many assume. The number of vacant lots, how many of them are owned by the same entity (or were, prior to the enactment of significant development restrictions like ROGO/ BPAS), when they were purchased (and for what price), the current value as regulated, the natural and

environmental character of the land, and other unique facts about each situation must be known before it can be assumed compensation would be due for the inability to build on the lot. On top of those considerations, there are likely a significant number of vacant lots in the Keys that could not develop as a result of federal or state regulatory restrictions, even if they could be developed under local government comprehensive plans and codes. Local government "takings" liability would be reduced to that extent as well.

What's more, any liability on the "takings" side of the ledger must be considered in the context of the enormous price tag that governments in the Keys face to support development. As has become increasingly clear, the costs of maintain in and elevating roads in face of sea level rise in the Keys is exorbitant. So must the costs of maintaining adequate sewage and stormwater treatment, storm and hurricane damage clean-up and other public services be considered. The reality that each new major structure built in the Keys creates a public fiscal demand must be considered as the contra-consideration to theoretical takings liability.